

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20071



A True Copy
Certified order issued Nov 01, 2019

Joseph W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

JOSEPH W. HILL,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Joseph W. Hill, Texas prisoner # 1801977, moves for a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(b) motion. The Rule 60(b) motion sought relief from the judgment dismissing the 28 U.S.C. § 2254 application Hill filed in June 2015 challenging his conviction and sentence for aggravated robbery. The district court dismissed the § 2254 application as time barred.

To obtain a COA, Hill must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Hill seeks a COA to appeal the denial of his Rule 60(b) motion, he must show that a reasonable jurist could conclude that the district court's denial of his Rule 60(b) motion

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Need to Read

was an abuse of discretion. See *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Hill presents four arguments in support of a COA. He first contends that the district court's judgment denying his § 2254 application is void as a matter of law because the district court's time-bar determination contradicted established law concerning the right to appeal and the right to effective assistance of counsel during plea bargaining. His argument mostly consists of repeated bare assertions that the district court violated his due process rights by committing legal error in denying his § 2254 application. This vague, conclusory argument does not show that a reasonable jurist could conclude that the denial of his Rule 60(b) motion was an abuse of discretion. See *Hernandez*, 630 F.3d at 428.

In his second argument, Hill contends that the district court erred in concluding that his Rule 60(b) motion was a second or successive § 2254 application. The district court did not decide that the Rule 60(b) motion was a second or successive § 2254 application, and therefore Hill's second argument is based on a factually incorrect premise and does not satisfy the standards for a COA. See *Hernandez*, 630 F.3d at 428.

Hill next contends that the district court's denial of his § 2254 application has been substantially undermined by the Supreme Court's decision in *Buck*, 137 S. Ct. 759. There, the Supreme Court held that the § 2254 applicant, Buck, demonstrated IAC and entitlement to relief under Rule 60(b) and that this court exceeded the scope of the COA analysis by denying a COA after essentially deciding the case on the merits. *Buck*, 137 S. Ct. at 773-80. Buck would not have been entitled to Rule 60(b) relief but for the change in law brought by *Martinez*, 566 U.S. at 14, and *Trevino v. Thaler*, 569 U.S. 413, 429 (2013). *Buck*, 137 S. Ct. at 767, 780. *Martinez* and *Trevino* do not present a

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change in the law in Hill's case, which was decided by the district court in 2016 after the issuance of *Martinez* in 2012 and *Trevino* in 2013. Hill's contention regarding *Buck*, therefore, does not show that a reasonable jurist could conclude that the district court's denial of his Rule 60(b) motion was an abuse of discretion. See *Hernandez*, 630 F.3d at 428.

Lastly, Hill argues that IAC by his trial and appellate attorneys presented extraordinary circumstances warranting Rule 60(b) relief, in light of *Martinez*, 566 U.S. at 14, and *Trevino*, 569 U.S. at 429. *Martinez* and *Trevino* are inapplicable to Hill because they concerned an equitable rule allowing federal courts in § 2254 proceedings to find cause to overcome a procedural default of an IAC claim that was not properly presented in state court, while Hill's issue in state court was an untimely notice of appeal rather than any procedurally defaulted IAC claim. See *Martinez*, 566 U.S. at 14; *Trevino*, 569 U.S. at 429.

Accordingly, Hill's motion for a COA is DENIED. His motion for leave to proceed IFP is also DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

(2) options

OR Do

Both 2) Go to Supreme Ct

2) Ask Fed Ct for
permission to file
subsequent 2254 writ