

United States Court of Appeals  
for the Fifth Circuit

\_\_\_\_\_  
No. 20-20238  
\_\_\_\_\_



A True Copy  
Certified order issued Mar 30, 2021

*Styl W. Cuyca*  
Clerk, U.S. Court of Appeals, Fifth Circuit

HERBERT GARFIELD GARDNER,

*Petitioner—Appellant,*

*versus*

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent—Appellee.*

\_\_\_\_\_  
Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:19-CV-2185  
\_\_\_\_\_

ORDER:

IT IS ORDERED that the motion for a certificate of appealability  
Is DENIED.

IT IS FURTHER ORDERED that the motion for appointment of  
counsel is DENIED.

IT IS FURTHER ORDERED that the motion for leave to file  
supplemental brief in support of the motion for a certificate of appealability  
is DENIED.

**ENTERED**

April 09, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

HERBERT GARFIELD GARDNER,  
TDCJ #01948640,

Petitioner,

vs.

LORIE DAVIS, Director,  
Texas Department of Criminal Justice -  
Correctional Institutions Division,

Respondent.

CIVIL ACTION NO. H-19-2185

**ORDER**

State inmate Herbert Garfield Gardner (TDCJ #01948640) filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 [Doc. # 1], seeking relief from a 2014 conviction entered against him in Harris County. On March 27, 2020, the Court granted the respondent's motion for summary judgment after finding that the petition was untimely and dismissed this action as barred by the governing one-year statute of limitations. Gardner has now filed a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure [Doc. # 22].

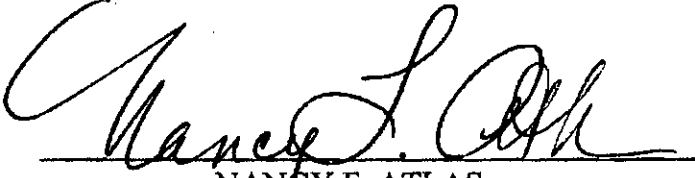
Relief from a judgment is available under Rule 59(e) in very limited circumstances, such as (1) an intervening change in controlling law; (2) newly discovered evidence that was previously unavailable; or (3) manifest error of law

or fact. *See Trevino v. City of Fort Worth*, 944 F.3d 567, 570 (5th Cir. 2019) (citations omitted). Gardner does not attempt to make this showing. Instead, he presents arguments that were raised and rejected previously, which are not appropriate in a motion filed under Rule 59(e). In that regard, it is well established that a Rule 59(e) motion is not the “proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.” *Id.* (citations omitted). Gardner does not otherwise show that his case was dismissed in error or that he is entitled to relief under Rule 59(e).

Accordingly, it is **ORDERED** that Gardner’s motion to alter or amend the judgment [Doc. # 22] is **DENIED**. No certificate of appealability will issue from this decision.

**The Clerk’s Office shall provide a copy of this order to the parties.**

SIGNED at Houston, Texas on April 9, 2020.

  
NANCY F. ATLAS  
SENIOR UNITED STATES DISTRICT JUDGE

**ENTERED**

March 27, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

HERBERT GARFIELD GARDNER,  
TDCJ #1948640,

Petitioner,

VS.

LORIE DAVIS, Director, Texas  
Department of Criminal Justice,  
Correctional Institutions Division,

Respondent.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. 4:19-2185

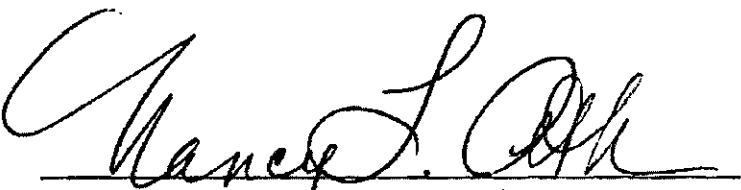
**FINAL JUDGMENT**

For the reasons set forth in the Court's Memorandum and Order of even date,  
this case is **DISMISSED** with prejudice.

This is a **FINAL JUDGMENT**.

The Clerk's Office will provide a copy of this order to the parties.

SIGNED at Houston, Texas on March 27, 2020.

  
\_\_\_\_\_  
NANCY F. ATLAS  
SENIOR UNITED STATES DISTRICT JUDGE

**ENTERED**

March 27, 2020

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

HERBERT GARFIELD GARDNER,  
TDCJ #1948640,

Petitioner,

VS.

LORIE DAVIS, Director, Texas  
Department of Criminal Justice,  
Correctional Institutions Division,

Respondent.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO. 4:19-2185

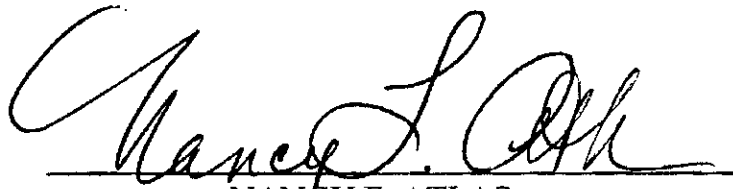
**MEMORANDUM AND ORDER**

State inmate Herbert Garfield Gardner (TDCJ #1948640), has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 [Doc. # 1] that includes a supporting memorandum [Doc. # 1-1], seeking relief from a 2014 conviction for capital murder that resulted in a sentence of life without parole. The respondent has answered with a motion for summary judgment, arguing that this action must be dismissed because the petition is barred by the governing one-year statute of limitations [Doc. # 8]. Gardner has filed a response [Doc. # 15], a “Motion to Dismiss” the respondent’s arguments [Doc. # 14], and a motion for a certificate of appealability [Doc. # 18]. After considering all of the pleadings, the state court records, and the applicable law, the Court will grant the respondent’s motion and dismiss the petition for the reasons explained below.

2. The petition for a writ of habeas corpus filed by Herbert Garfield Gardner under 28 U.S.C. § 2254 is **DENIED** and this case is **DISMISSED with prejudice**.
3. Gardner's motion to dismiss [Doc. # 15] is **DENIED**.
4. Gardner's motion for a certificate of appealability [Doc. # 18] is **DENIED**.

The Clerk will provide a copy of this order to the parties.

SIGNED at Houston, Texas on March 27, 2020.

  
\_\_\_\_\_  
NANCY F. ATLAS  
SENIOR UNITED STATES DISTRICT JUDGE



**CHRIS DANIEL**  
**HARRIS COUNTY DISTRICT CLERK**

January 5, 2017

HERBERT GARFIELD GARDNER  
#1948640 POLUNSKY UNIT  
3872 FM 350 SOUTH  
LIVINGSTON, TEXAS 77351

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 1372136-A in the 180th District Court.

- ☐ State's Original Answer Filed ,
- ☐ Affidavit ,
- ☐ Court Order Dated ,
- ☐ Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.
- ☐ Respondent's Proposed Findings of Fact and Order ,
- ☒ Other

Sincerely,

  
Leslie Hernandez, Deputy  
Criminal Post Trial

Enclosure(s) – STATE'S PROPOSED ORDER DESIGNATING ISSUES

11 A

APPENDIX-D

EX PARTE

§

180TH DISTRICT COURT

§

OF

HERBERT GARFIELD GARDNER

§

HARRIS COUNTY, TX

STATE'S PROPOSED ORDER DESIGNATING ISSUES

Having considered the application for Writ of Habeas Corpus in the above - captioned cause: The court finds that the following issues need to be resolved:

1. Whether the Applicant was denied effective assistance of counsel at trial.
2. Whether Applicant's plea was denied effective assistance of counsel on appeal.

Therefore, pursuant to Article 11.07 § 3(d), this court will resolve the above cited issues and then enter findings of fact.

The clerk of the court is ordered to send a copy of this order to the applicant HERBERT GARDNER, and to counsel for the state, Catina Haynes, 1201 Franklin, Suite # 600, Houston, TX 77002.

The clerk of the court is ordered to transmit the court's instant order designating issues to The Court of Criminal Appeals.

The clerk of the court is ordered not to transmit any additional documents to The Court of Criminal Appeals until further ordered by this court.

ORDER ISSUED JANUARY 5, 2017





P.2

THE STATE OF TEXAS

v.

GARDNER, HERBERT GARFIELD

STATE ID No.:TX08234563

§  
§  
§  
§  
§  
§

IN THE 180TH DISTRICT

COURT

HARRIS COUNTY, TEXAS

## JUDGMENT OF CONVICTION BY JURY—NON-DEATH CAPITAL

Judge Presiding: HON. TERRY FLENNIKEN

Date Judgment Entered: 8/15/2014

Attorney for State: MARY MCFADEN

Attorney for Defendant: KING, VIVIAN RADINE

Offense for which Defendant Convicted:

**CAPITAL MURDER**

Charging Instrument:  
**INDICTMENT**

Statute for Offense:  
N/A

Date of Offense:  
**12/23/2012**

Degree of Offense:  
**CAPITAL FELONY**

Plea to Offense:  
**NOT GUILTY**

Verdict of Jury:  
**GUILTY**

Findings on Deadly Weapon:  
**YES, A FIREARM**

Plea to 1<sup>st</sup> Enhancement Paragraph: N/A

Plea to 2<sup>nd</sup> Enhancement/Habitual Paragraph: N/A

Findings on 1<sup>st</sup> Enhancement Paragraph: N/A

Findings on 2<sup>nd</sup> Enhancement/Habitual Paragraph: N/A

Punished Assessed by:  
**COURT**

Date Sentence Imposed:  
**8/15/2014**

Date Sentence to Commence:  
**8/15/2014**

Punishment and Place of Confinement: **LIFE WITHOUT PAROLE, INSTITUTIONAL DIVISION, TDCJ**

**THIS SENTENCE SHALL RUN CONCURRENTLY.**

Fine: \$ N/A Court Costs: \$ 609.00 Restitution: \$ N/A Restitution Payable to: ☐ VICTIM (see below) ☐ AGENCY/AGENT (see below)

Sex Offender Registration Requirements do not apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was N/A

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:

From 12/23/2012 to 8/15/2014	From to
From to	From to
From to	From to

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A DAYS NOTES: N/A

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Harris County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

373

The Court FINDS Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court FINDS the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the Director, Institutional Division, TDCJ. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

The Court **ORDERS** Defendant's sentence **EXECUTED**.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

**Furthermore, the following special findings or orders apply:**

**Deadly Weapon.**

The Court FINDS Defendant used or exhibited a deadly weapon, namely, A FIREARM, during the commission of a felony offense or during immediate flight therefrom or was a party to the offense and knew that a deadly weapon would be used or exhibited. TEX. CODE CRIM. PROC. art. 42.12 §3g.

Signed and entered on August 15, 2014

X

**TERRY FLENNIKEN**  
JUDGE PRESIDING

Ntc Appeal Filed: 8-15-2014 Mandate Rec'd: \_\_\_\_\_

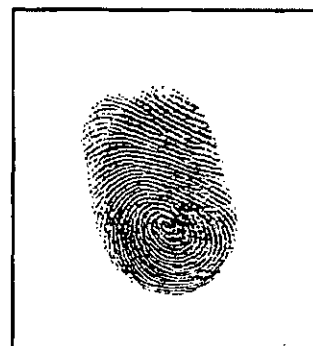
After Mandate Received, Sentence to Begin Date is: \_\_\_\_\_

Def. Received on \_\_\_\_\_ at \_\_\_\_\_ AM / PM

By: \_\_\_\_\_, Deputy Sheriff of Harris County

Clerk: J. WYCOFF

999 13/989 DMW ✓ 999  
life w/out parole



Right Thumbprint