Appendece A.
United States Court of Appeals
for the Fifth Circuit ... Denying C.O.A.
Denying Motion for Reconsideration

Time runs from ↑

United States Court of Appeals for the Fifth Circuit

No. 20-50034

JUAN GUZMAN ZUNIGA, JR.,

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 Western District of Texas
USDC No. 5:19-CV-1417

Before CLEMENT, ELROD, and HAYNES, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file out of time the motion for reconsideration is GRANTED.

A member of this panel previously DENIED the motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration.

IT IS FURTHER ORDERED that the motion is DENIED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 24, 2021
Lyle W. Cayce
Clerk

No. 20-50034

JUAN GUZMAN ZUNIGA, JR.,

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 Western District of Texas
USDC No. 5:19-CV-1417

ORDER:

Juan Guzman Zuniga, Jr. was convicted of sexual assault and sentenced to thirty years confinement. *Zuniga v. State*, No. 04-07-729-CR, 2008 WL 4163224, at *1 (Tex. App.—San Antonio Sept. 10, 2008, pet. ref'd) (mem. op., not designated for publication). In 2011, Zuniga filed a federal habeas petition under 28 U.S.C. § 2254, which a federal district court denied and dismissed on the basis that his claims were barred by the statute of limitations. We denied Zuniga's request for a certificate of appealability ("COA").

In 2019, Zuniga filed a new § 2254 petition. The district court dismissed this petition on the basis that it was a "second or successive" petition under 28 U.S.C. § 2244(b)(3), meaning that the district court lacked jurisdiction to consider it without prior authorization from the appropriate court of appeals. Zuniga now moves for a COA to appeal the district court's dismissal of the 2019 § 2254 petition.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Where, as here, the district court has denied a request for habeas relief on procedural grounds, the movant must show that "jurists of reason could find it debatable" both whether "the petition states a valid claim of the denial of a constitutional right" and whether "the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Zuniga has not met this standard.

Accordingly, IT IS ORDERED that the motion for a COA is DENIED.

/s/ Catharina Haynes
CATHARINA HAYNES
United States Circuit Judge

Amended

Appendice A-2

United States Court of Appeals 5th Circuit

Denial of STATE Court

Records

Transcripts

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 23, 2020

#1465196
Mr. Juan Guzman Zuniga Jr.
CID Smith Prison
1313 County Road 19
Lamesa, TX 79331-1898

No. 20-50034 Juan Zuniga, Jr. v. Lorie Davis, Director
USDC No. 5:19-CV-1417

Dear Mr. Zuniga,

We are taking no action your motion to obtain trial transcripts state court record. The motion is unnecessary as there are no transcripts on file. You may request the record directly from the district court.

A motion for certificate of appealability with brief in support is due on, or, before March 2, 2020. See Court's notice issued January 22, 2020.

Sincerely,

LYLE W. CAYCE, Clerk
Claudia N. Farrington

By: _____
Claudia N. Farrington, Deputy Clerk
504-310-7706

cc: Mr. Edward Larry Marshall

Appendice B.

UNITED STATES District Court
WESTERN District of TEXAS
SAN Antonio Division.

ORDER: Dismissal of Habeas Corpus
pg 1 of 3.

A. 8.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GUZMAN ZUNIGA, JR., **TDCJ No. 01465196,**	§	
Petitioner,	§	
v.	§	**CIVIL NO. SA-19-CA-01417-XR**
LORIE DAVIS, Director, **Texas Department of Criminal Justice,** **Correctional Institutions Division,**	§	
Respondent.	§	

DISMISSAL ORDER

Before the Court are Petitioner Juan Guzman Zuniga, Jr.'s petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (ECF No. 1) and supplemental memorandum in support (ECF No. 2). In these pleadings, Petitioner seeks to challenge the constitutionality of his September 2007 state court conviction and thirty-year sentence for sexual assault. *State v. Zuniga, Jr.*, No. 2006-CR-5239 (186th Dist. Ct., Bexar Cnty., Tex. Sept. 24, 2007). However, Petitioner previously filed an application for writ of habeas corpus challenging this same conviction which this Court dismissed with prejudice as untimely on June 28, 2012. *See Zuniga, Jr. v. Thaler*, No. 5:11-cv-0241-XR (W.D. Tex.).

Before a second or successive application for writ of habeas corpus may be filed in the district court, 28 U.S.C. § 2244(b)(3) provides an applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. Pursuant to § 2244(b), the Court finds this successive application for writ of habeas corpus should be dismissed because Petitioner has not obtained prior approval to file a successive habeas corpus application. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (holding the district court lacked jurisdiction to

127 S.Ct 793

consider a successive § 2254 petition since petitioner did not obtain authorization from the court of appeals); *In re Campbell*, 750 F.3d 523, 529 (5th Cir. 2014) (petitioner must receive authorization before filing successive habeas petition).

Accordingly, **IT IS HEREBY ORDERED** that:

1. Petitioner Juan Guzman Zuniga, Jr.'s petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction;

2. Petitioner failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing that this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, this Court **DENIES** Petitioner a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; and

3. All remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this 10th day of December, 2019.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GUZMAN ZUNIGA, JR.,	§	
TDCJ No. 01465196,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-19-CA-01417-XR**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

The Court has considered the Judgment to be entered in the above-styled and numbered cause.

Pursuant to this Court's Dismissal Order of even date herewith, **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) filed by Petitioner Juan Guzman Zuniga, Jr. is **DISMISSED WITHOUT PREJUDICE**. No Certificate of Appealability shall issue in this case. This case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this 10th day of December, 2019.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

Appendix C

ORDER: Dismissal of Motion to Alter or Amend the Judgment Rule 59.(e)

pp. 1 of 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GUZMAN ZUNIGA, JR.,	§	
TDCJ No. 01465196,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-19-CA-01417-XR**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is *pro se* Petitioner Juan Guzman Zuniga, Jr.'s Motion to Alter or Amend the Judgment (ECF No. 6). Citing Rule 59(e) of the Federal Rule of Civil Procedure, Petitioner seeks reconsideration of this Court's dismissal of his 28 U.S.C. § 2254 Habeas Corpus Petition (ECF No. 1).

In the Dismissal Order signed December 10, 2019, this Court dismissed Petitioner's § 2254 petition without prejudice because the Court lacks jurisdiction to entertain successive habeas corpus applications without prior approval from the Fifth Circuit Court of Appeals. (ECF No. 4). For the same reasons, the Court now lacks jurisdiction over Petitioner's Rule 59 motion. Furthermore, Petitioner fails to demonstrate the existence of: (1) an intervening change of controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error or to prevent manifest injustice. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (holding the purpose of a Rule 59(e) motion is "to correct manifest errors of law or to present newly discovered evidence.").

It is therefore **ORDERED** that Petitioner's Motion to Alter or Amend the Judgment, filed January 6, 2020 (ECF No. 6), is **DISMISSED**.

It is further **ORDERED** that a certificate of appealability is **DENIED** for the instant motion, as reasonable jurists could not debate the denial of Petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

It is so **ORDERED**.

SIGNED this 7th day of January, 2020.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

Appendice D

ORDER: Denying MOTION FOR LEAVE TO SUPPLEMENT OR AMEND WITH ADDITIONAL BRIEFING. FOR RULE 59(e).

Filed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GUZMAN ZUNIGA, JR.,	§	
TDCJ No. 01465196,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-19-CA-01417-XR**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is *pro se* Petitioner Juan Guzman Zuniga, Jr.'s Motion for Leave to Supplement or Amend (ECF No. 9). Petitioner previously filed a motion to alter or amend judgment under Rule 59(e) of the Federal Rule of Civil Procedure (ECF No. 6), and now seeks to supplement this motion with additional briefing. However, this Court already dismissed Petitioner's Rule 59(e) motion in an Order dated January 7, 2020 (ECF No. 7).

It is therefore **ORDERED** that Petitioner's new motion, filed January 17, 2020 (ECF No. 9), is **DISMISSED** for the reasons stated in this Court's previous Order (ECF No. 7).

It is further **ORDERED** that a certificate of appealability is **DENIED** for the instant motion, as reasonable jurists could not debate the denial of Petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

SIGNED this 23rd day of January, 2020.

XAVIER RODRIGUEZ
United States District Judge

Appendix E

Denial of Motion To Obtain State Court Records and Transcripts.

Filed

E

D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GUZMAN ZUNIGA, JR.,	§	
TDCJ No. 01465196,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-19-CA-01417-XR**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division.	§	
	§	
Respondent.	§	

ORDER

Before the Court is Petitioner's Motion to Obtain Trial Court Record (ECF No. 12). Petitioner requests a copy of his state trial court records and transcripts so that he may prepare an appeal of this Court's dismissal of his 28 U.S.C. § 2254 Habeas Corpus Petition as successive. After careful consideration, the motion will be denied.

As stated in previous orders (ECF Nos. 4, 7, 11), this Court lacks jurisdiction over this case because Petitioner's § 2254 petition is successi . Petitioner has cited no authority stating he is entitled to the record to appeal such a determination, nor does this Court have the resources to provide free copies of the record to every petitioner who submits such a request. Moreover, the Court is no longer in possession of Petitioner's state court record, as his original application for writ of habeas corpus was dismissed as untimely on June 28, 2012. *See Zuniga, Jr. v. Thaler*, No. 5:11-cv-0241-XR (W.D. Tex.).

It is therefore **ORDERED** that the Petitioner's Motion to Obtain Trial Court Record, filed February 3, 2020 (ECF No. 12), is **DENIED**.

SIGNED this 4th day of February, 2020.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JUAN GUZMAN ZUNIGA, JR.,	§	
TDCJ No. 1465196,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-11-CA-241-XR**
	§	
WILLIAM STEPHENS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER DISMISSING AND DENYING RULE 60(b) MOTION

The matter before the Court is Petitioner's motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, filed August 25, 2014 (ECF no. 40). For the reasons set forth below, Petitioner's motion will be denied.

I. Background

Petitioner filed this federal habeas corpus action pursuant to 28 U.S.C. Section 2254 challenging his September, 2007 Bexar County conviction for sexual assault. In a Dismissal Order issued June 28, 2012 (ECF no. 19), this Court dismissed Petitioner's federal habeas corpus petition as untimely under the AEDPA's one-year statute of limitations found in Title 28 U.S.C.Section 2244(d)(1)(A). As explained in this Court's Dismissal Order, Petitioner filed this Section 2254 federal habeas corpus action challenging his conviction for sexual assault not earlier than March 21, 2011. This Court determined (1) Petitioner's conviction became final for purposes of the AEDPA's one-year statute of limitations not later than July 3, 2009, (2) the deadline for filing Petitioner's *federal* habeas corpus petition was July 3, 2010, (3) Petitioner's

> On motion and upon such terms as are just, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Such a motion must be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. *Gonzalez v. Crosby*, 545 U.S. 524, 528 n.2, 125 S. Ct. 2641, 2645 n.2, 162 L. Ed. 2d 480 (2005); FED.R.CIV.P. 60(c)(1), FED.R.CIV.P.

A Rule 60(b) motion which attacks not the federal district court's ruling on the merits of a federal habeas claim but, rather, challenges only the federal district court's refusal to address the merits of a claim, due to findings of procedural default, the expiration of the AEDPA's limitations period, or some other procedural impediment to merits disposition, may proceed without pre-certification under 28 U.S.C. Section 2244(b)(3). *See Gonzalez v. Crosby*, 545 U.S. at 533-38, 125 S. Ct. at 2648-51 (holding that, if neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, the motion may proceed to resolution); *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir.) ("A Rule 60(b) directed to a procedural ruling that barred consideration of the merits, such as a procedural default, is not considered a 'successive' petition and is properly brought as a Rule 60(b) motion."), *stay of execution and cert.* denied, ___ U.S. ___, 134 S. Ct. 1022 (Jan. 22, 2014); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir.) (holding a motion

challenging only the federal district court's conclusion that petitioner had procedurally defaulted on a claim was properly before the district court pursuant to Rule 60(b)), *stay of execution denied*, ___ U.S. ___, 132 S. Ct. 1995, ___ L. Ed. 2d ___ (2012); *Hernandez v. Thaler*, 630 F.3d 420, 427-28 (5th Cir. 2011) (holding the same). Because Petitioner's Rule 60(b) motion in this cause attacks this Court's summary dismissal of Petitioner's federal habeas corpus petition as untimely, Petitioner may proceed without pre-certification under 28 U.S.C. Section 2244(b)(3).

A Rule 60(b)(6) movant is required to show "extraordinary circumstances" justifying the reopening of a final judgment. *Gonzalez v. Crosby*, 545 U.S. at 535, 125 S. Ct. at 2649; *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir.), *cert.* denied, ___ U.S. ___, 134 S. Ct. 48, 186 L. Ed. 2d 960 (2013); *Adams v. Thaler*, 679 F.3d at 319; *Hernandez v. Thaler*, 630 F.3d at 429. "Such circumstances will rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. at 535, 125 S. Ct. at 2649; *Diaz v. Stephens*, 731 F.3d at 374; *Adams v. Thaler*, 679 F.3d at 319. A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment under Rule 60(b)(6). *Diaz v. Stephens*, 731 F.3d at 375-76; *Adams v. Thaler*, 679 F.3d at 319; *Hernandez v. Thaler*, 630 F.3d at 430.

Insofar as Petitioner argues in conclusory fashion that this Court's dismissal of Petitioner's federal habeas corpus action herein was the product of mistake, inadvertence, surprise, or excusable neglect (as provided by Rule 60(b)(1), FED.R.CIV.P.), any such contention is untimely. This Court dismissed Petitioner's federal habeas corpus action on June 28, 2012 (ECF no. 19). Petitioner filed his Rule 60(b) motion not earlier than August 20, 2014, i.e., the date petitioner signed his motion. Thus, Petitioner's Rule 60(b) motion was not filed within the one-year period mandated by Rule 60(c)(1),.FED.R.CIV.P.

Moreover, Petitioner alleges no specific facts which show this Court's dismissal of Petitioner's federal habeas corpus action herein as untimely was in any manner erroneous, inadvertent, mistaken, the product of surprise or excusable neglect, or inconsistent with any legal authority. Therefore, this Court will liberally construe Petitioner's pro se Rule 60(b) motion as seeking relief pursuant to Rule 60(b)(6).

B. Petitioner's Rule 60(b) Motion Untimely

Petitioner's Rule 60(b) motion was not filed within a year from this Court's judgment as required for such motions filed pursuant to Rule 60(b) subdivisions (1) through (3). Rule 60(c)(1), FED.R.CIV.P. Nor was Petitioner's Rule 60(b) motion filed with a reasonable time, as required for motions under Rule 60(b)(6) by the same Rule 60(c)(1). This Court dismissed Petitioner's original federal habeas corpus action on June 28, 2012. Petitioner's Rule 60(b) motion seeks to litigate the substance of his federal habeas corpus claims which this Court dismissed as untimely.

Petitioner waited to file his Rule 60(b) motion until August, 2014, more than two years after this Court dismissed Petitioner's federal habeas corpus petition and more than fifteen months after the Fifth Circuit effectively affirmed this Court's dismissal of Petitioner's claims as untimely by denying Petitioner a CoA. All of the arguments raised in Petitioner's Rule 60(b) motion were available to Petitioner at the time this Court dismissed Petitioner's federal habeas corpus petition as untimely. Petitioner does not identify any new legal opinions or legal authorities unavailable at the time this Court dismissed his federal habeas corpus petition which furnish a new legal basis for rejecting this court's analysis of the timeliness of Petitioner's federal habeas corpus petition. The more than two-year delay between the date of this Court's

judgment and the filing of Petitioner's Rule 60(b) motion is not justified by any rational explanation currently before the Court.

Under such circumstances, petitioner's Rule 60(b) motion was not brought within a reasonable time. *See Tamayo v. Stephens*, 740 F.3d at 991 (holding a Rule 60(b) motion filed eight months after the Supreme Court's decision in *McQuiggin v. Perkins*, ___ U.S. ___, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013), in which the movant sought retroactive application of the Supreme Court's holding in *McQuiggin* was untimely under Rule 60(c)(1)). Here, there is no factual allegation showing Petitioner, despite the exercise of due diligence, was unable to present the same arguments raised in his Rule 60(b) motion at the time this Court issued its ruling dismissing Petitioner's federal habeas corpus petition as untimely. Petitioner's Rule 60(b) motion must be dismissed as untimely.

C. Petitioner's Arguments in his Rule 60(b) Motion Lack Merit

Petitioner complains that he was denied a ruling by this Court on his amended petition for federal habeas corpus relief. Petitioner is in error. This Court's Dismissal Order made clear Petitioner's federal habeas corpus attack upon his 2007 Bexar County conviction for sexual assault was barred by the AEDPA's one-year statute of limitations (ECF no. 19). This Court's holding on this point applied with equal force to Petitioner's original federal habeas corpus petition (filed March 25, 2011 - ECF no. 1) and Petitioner's amended petition (filed September 8, 2011 - ECF no. 9). Petitioner's Amended Petition does not include a certificate of service indicating Petitioner ever served a copy of same on Respondent's counsel of record. Petitioner's Amended Petition does not include any discussion relevant to this Court's conclusion that Petitioner's federal habeas corpus action was untimely under Section 2244(d)(1). Respondent filed his motion to dismiss on October 10, 2011 (ECF no. 14) requesting dismissal of this entire

action, more than a month after Petitioner filed his amended petition (i.e., on September 8, 2011). Even if it were possible to construe this Court's Dismissal Order as addressing only Petitioner's original federal habeas corpus petition (a legal principle for which Petitioner cites no authority and for which this Court has been unable to locate any legal authority), the untimeliness of Petitioner's original federal habeas corpus petition was not cured by the filing of Petitioner's amended petition approximately six months later. On June 28, 2012, this Court dismissed all of Petitioner's claims herein as untimely: "this case is **DISMISSED** as barred by the statute of limitations."[1] The untimeliness of Petitioner's original federal habeas corpus petition pursuant to Section 2244(d)(1) was not rectified or cured by the filing of Petitioner's Amended Petition in September, 2011. Petitioner's Amended Petition did nothing more than add another conclusory assertion of Due Process violation to the litany of complaints Petitioner raised in his original federal habeas corpus petition collaterally attacking his 2007 state criminal conviction.[2]

Petitioner presents no arguments suggesting this Court's ruling on the untimeliness of this federal habeas corpus action was in any manner erroneous or inconsistent with any legal authority. Any contention Petitioner wishes to raise at this juncture suggesting this Court erred in dismissing Petitioner's federal habeas corpus action as untimely was more than adequately addressed in this Court's Dismissal Order (which this Court expressly incorporates by reference) and was implicitly rejected by the Fifth Circuit when it denied Petitioner a CoA. None of the arguments contained in Petitioner's latest motion warrant relief under Rule 60(b).

---

[1] Dismissal Order, ECF no. 19, at p. 7.

[2] Liberally construed, Petitioner's Amended Petition asserted a new claim that the intermediate state appellate court erroneously applied the insufficient evidence standard of *Jackson v. Virginia* in affirming Petitioner's conviction on direct appeal.

D. Petitioner Has Failed to Show "Extraordinary Circumstances"

Petitioner has not identified any "extraordinary circumstances" which warrant reconsideration under Rule 60(b)(6) of this Court's conclusion that Petitioner's federal habeas corpus petition was untimely. The Supreme Court's opinion in *McQuiggin v. Perkins*, ___ U.S. ___, ___, 133 S. Ct. 1924, 1931-32, 185 L. Ed. 2d 1019 (2013) (holding "a credible showing of actual innocence" may permit a petitioner to overcome a procedural bar to relief such as the AEDPA's limitations period), is of little solace to Petitioner. Petitioner has failed to allege any specific facts establishing "a credible showing" he is actually innocent of the crime for which he was convicted. Even when construed liberally, Petitioner's conclusory assertions in his Rule 60(b) motion do not satisfy the showing necessary under *McQuiggin*. Petitioner identifies no evidence showing he is actually innocent of the offense for which he was convicted and sentenced in September, 2007. Petitioner has failed to allege any facts showing the existence of exceptional circumstances warranting relief under Rule 60(b)(6).

IV. Certificate of Appealability

Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under Section 2254, the petitioner must obtain a CoA. *Miller-El v. Johnson*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003); 28 U.S.C. §2253(c)(2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Jones v. Cain*, 227 F.3d 228, 230 n.2 (5th Cir. 2000) (holding the same); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or

denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted alone. *Crutcher v. Cockrell*, 301 F.3d at 658 n.10; *Lackey v. Johnson*, 116 F.3d at 151; *Murphy v. Johnson*, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. §2253(c)(3).

A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 2569, 159 L. Ed. 2d 384 (2004); *Miller-El v. Johnson*, 537 U.S. at 336, 123 S. Ct. at 1039; *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603, 146 L. Ed. 2d 542 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 3394, 77 L. Ed. 2d 1090 (1983).

To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U.S. at 282, 124 S. Ct. at 2569; *Miller-El v. Johnson*, 537 U.S. at 336, 123 S. Ct. at 1039; *Slack v. McDaniel*, 529 U.S. at 484, 120 S. Ct. at 1604; *Barefoot v. Estelle*, 463 U.S. at 893 n.4, 103 S. Ct. at 3394 n.4. This Court is required to issue or deny a CoA when it enters a final Order such as this one adverse to a federal habeas petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts*. This Court denied Petitioner a CoA the first time Petitioner presented this Court with his complaints about the validity of his guilty pleas. The Fifth Circuit likewise found Petitioner was not entitled to a CoA.

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. If this Court rejects a prisoner's constitutional claim on the merits, the petitioner must demonstrate reasonable jurists could find the court's assessment of the constitutional claim to be debatable or wrong. "[W]here a district

demonstrate "exceptional circumstances" exist which warrant relief from the Judgment in this cause under Rule 60(b)(6). Petitioner is not entitled to a CoA from this Court's denial of Petitioner's Rule 60(b) motion.

V. ORDER

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's Rule 60(b) motion for relief from judgment, filed August 25, 2014 (ECF no. 40) is **DISMISSED as untimely and, alternatively, in all respects DENIED**.

2. Petitioner is **DENIED** a Certificate of Appealability with regard to both the dismissal and denial of his Rule 60(b) motion.

It is so ORDERED.

SIGNED this 29th day of August, 2014.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

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10/2/2019
ZUNIGA, JUAN GUZMAN Tr. Ct. No. 2006CR5239-W2 **WR-75,319-02**
This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

Deana Williamson, Clerk

JUAN GUZMAN ZUNIGA JR.
STEVENSON UNIT - TDC # 1465196
1525 FM 766
CUERO, TX 77954

MIWNAB 77954

Appendix F.
Texas. Court of Criminal Appeals
denial of writ. with conclusions.

Appendice G

WRIT Courts. Response.

. opinion & . Recommendation.

[redacted]

NO. 2006CR5239-W2

EX PARTE	§	IN THE DISTRICT COURT
	§	186TH JUDICIAL DISTRICT
JUAN GUZMAN ZUNIGA JR.	§	BEXAR COUNTY, TEXAS

ORDER DESIGNATING ISSUES

The Court having concluded that controverted, previously unresolved facts which are material to the legality of Applicant's confinement exist and need to be resolved, there is a necessity for the suspension of the time limitations enunciated in Article 11.07 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(d).

Applicant has alleged the following issue which the court finds requires resolution:

a. Prosecutorial misconduct;
b. Abuse of discretion;
c. Ineffective assistance of trial and appellate counsel; and
d. Actual innocence.

Findings will be forwarded to the Court of Criminal Appeals for its disposition of the matter.

SIGNED and ENTERED on 8/14/2019.

JEFFERSON MOORE
Judge, 186th Judicial District Court
Bexar County, Texas

cc:
The Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

NO. 2006-CR-5239-W2

EX PARTE	§	IN THE DISTRICT COURT
	§	**186TH** JUDICIAL DISTRICT
JUAN GUZMAN ZUNIGA JR.	§	BEXAR COUNTY, TEXAS

ORDER

Applicant, **Juan Guzman Zuniga, Jr.** has filed a *pro se* application for a post-conviction writ of habeas corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure, collaterally attacking his conviction in cause number **2006CR5239.**

ALLEGATIONS OF APPLICANT

1. In Ground One, Applicant alleges prosecutorial misconduct. He claims that the prosecutor withheld exculpatory evidence. In his memorandum accompanying his writ application, it appears that the evidence Applicant believes was withheld was exculpatory DNA evidence and a report generated by the SANE nurse. Applicant claims that evidence existed that should have been tested for DNA.
2. In Ground Two, Applicant alleges ineffective assistance of trial and appellate counsel. He claims that, through various acts and omissions, his trial counsel and appellate counsel provided ineffective assistance. In his accompanying memorandum, Applicant specifies that his trial counsel:
    - Allowed the exclusion of evidence obtained by the SANE nurse;
    - Refused to give Applicant a copy of the trial record and transcripts;
    - Failed to investigate the existence of impeaching evidence;
    - Failed to locate an interview of the SANE nurse;
    - Failed to discover the genetic material existing on the complainant's clothing;

- Failed to investigate, develop, and present evidence to rebut the state's case.

Applicant claims that appellate counsel:

- Failed to conduct an adequate investigation to support DNA testing;
- Knew of the existence of DNA evidence but did not challenge the trial counsel's ineffectiveness for not obtaining and testing the evidence;
- Denied Applicant a copy of the trial court records
- Failed to obtain all of the SANE nurse evidence;
- Failed to investigate Applicant's DNA claim;
- Failed to challenge the denial of DNA testing;
- Mixed two different proceedings under two different laws;
- Failed to challenge the state's failure to disclose DNA evidence;
- Failed to challenge the rape kit evidence.

3. In Ground Three, Applicant alleges judicial misconduct constituting an abuse of discretion. He asserts that the trial judge abused his discretion for denying appointment of counsel and denying DNA testing.

4. In Ground Four, Applicant claims that he is actually innocent, and that the SANE nurse report and DNA evidence would prove his innocence.

HISTORY OF THE CASE

On or about August 31, 2007, Applicant pled not guilty to the second degree felony offense of sexual assault. A jury found Applicant guilty and the trial court sentenced him to thirty (30) years confinement in TDCJ.

Applicant's conviction was affirmed by the Fourth Court of Appeals. *Zuniga v. State*, No. 04-07-00729-CR (Tex. App. – San Antonio September 10, 2008), pet. stricken) (not

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Appendix H.

B

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-17-00370-CR

Juan Guzman **ZUNIGA** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2006CR5239
Honorable Jefferson Moore, Judge Presiding

BEFORE CHIEF JUSTICE MARION, JUSTICE BARNARD, AND JUSTICE RIOS

In accordance with this court's opinion of this date, the judgment of the trial court is AFFIRMED.

SIGNED January 3, 2018.

Irene Rios, Justice

FILE COPY

f

MANDATE

THE STATE OF TEXAS

TO THE 186TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, GREETINGS:

Before our Court of Appeals for the Fourth District of Texas on January 3, 2018, the cause upon appeal to revise or reverse your judgment between

Juan Guzman Zuniga Jr., Appellant(s)

V.

The State of Texas, Appellee(s)

No. 04-17-00370-CR and Tr. Ct. No. 2006CR5239

was determined, and therein our Court of Appeals made its order in these words:

In accordance with this court's opinion of this date, the judgment of the trial court is AFFIRMED.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Appeals for the Fourth District of Texas, in this behalf and in all things have the order duly recognized, obeyed, and executed.

Witness the Hon. Sandee Bryan Marion, Chief Justice of the Court of Appeals for the Fourth District of Texas, with the seal of the Court affixed and the City of San Antonio on July 26, 2018.

COURT OF APPEALS ★ STATE OF TEXAS ★

KEITH E. HOTTLE, CLERK

Cynthia A. Martinez

Cynthia A. Martinez
Deputy Clerk, Ext. 53853

Appendix I

Fourth Court of Appeals
San Antonio, Texas

October 31, 2018

No. 04-17-00635-CR

Juan Guzman **ZUNIGA** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2006CR5239
Honorable Jefferson Moore, Judge Presiding

ORDER

In accordance with the court's opinion of this date, this appeal is DISMISSED FOR LACK OF JURISDICTION.

It is so **ORDERED** on October 31, 2018.

Luz Elena D. Chapa, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 31st day of October, 2018.

COURT OF APPEALS STATE OF TEXAS

Keith E. Hottle, Clerk of Court

A

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00635-CR

Juan Guzman **ZUNIGA** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2006CR5239
Honorable Jefferson Moore, Judge Presiding

PER CURIAM

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: October 31, 2018

DISMISSED FOR LACK OF JURISDICTION

This is an attempted appeal from the trial court's failure to rule on an untimely-filed motion for new trial.

Appellant Juan Guzman Zuniga Jr. was convicted of sexual assault in September 2007, and this court affirmed his conviction on direct appeal. *See Zuniga v. State*, No. 04-07-00729-CR, 2008 WL 4163224 (Tex. App.—San Antonio Sept. 10, 2008, pet. stricken) (not designated for publication). In September 2016, Zuniga filed a motion for forensic DNA testing and a motion to appoint counsel. The trial court denied the request for counsel on March 14, 2017, and denied the

motion for post-conviction DNA testing on April 17, 2017. Zuniga timely appealed, and this court subsequently affirmed the trial court. *See Zuniga v. State*, No. 04-17-00370-CR, 2018 WL 280521 (Tex. App.—Jan. 3, 2018, pet. ref'd) (mem. op., not designated for publication). On June 2, 2017, while the appeal was pending, Zuniga filed an untimely motion for new trial in the trial court, asking the court to reconsider its rulings on his request for counsel and DNA testing. The trial court did not rule on the motion, and Zuniga filed the instant notice of appeal in September 2017, complaining of the court's failure to rule.

A defendant in a criminal action has a right to appeal a final judgment of conviction and orders made appealable by statute. *See Abbott v. State*, 271 S.W.3d 694, 696-97 (Tex. Crim. App. 2008). The appealable order in Zuniga's post-conviction DNA proceeding was the order denying the motion for post-conviction DNA testing, which was the subject of Appeal No. 04-17-00370-CR. There is no further final judgment or appealable order in that proceeding that Zuniga may appeal, and he has therefore failed to properly invoke the jurisdiction of this court.

We therefore dismiss this appeal for lack of jurisdiction.

PER CURIAM

DO NOT PUBLISH

Appendix J

FILE COPY

Fourth Court of Appeals
San Antonio, Texas

February 15, 2018

No. 04-17-00370-CR

Juan Guzman **ZUNIGA JR.**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2006CR5239
Honorable Jefferson Moore, Judge Presiding

O R D E R

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

The court has considered the appellant's motion for en banc reconsideration, and the motion is DENIED.

Irene Rios

Irene Rios, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 15th day of February, 2018.

Appendix (K)

FILE COPY

Fourth Court of Appeals
San Antonio, Texas

February 15, 2018

No. 04-17-00370-CR

Juan Guzman **ZUNIGA JR.**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2006CR5239
Honorable Jefferson Moore, Judge Presiding

ORDER

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Irene Rios, Justice

The panel has considered the appellant's motion for rehearing, and the motion is DENIED.

Irene Rios
Irene Rios, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 15th day of February, 2018.

Keith E. Hottle
Clerk of Court

Appendix L.

FILE COPY

I.

Fourth Court of Appeals
San Antonio, Texas

March 19, 2018

No. 04-17-00635-CR

Juan Guzman **ZUNIGA** Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2006CR5239
Honorable Jefferson Moore, Judge Presiding

O R D E R

Appellant, proceeding pro se, filed a notice of appeal stating his intent to appeal the trial court's order signed on April 17, 2017 denying his post-conviction motion for forensic DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. §§ 64.01-.05 (West Supp. 2017). Appellant's court-appointed attorney filed a brief pursuant to *Anders v. California*, 368 U.S. 738 (1967), asserting there are no meritorious issues to raise on appeal, and has informed the appellant of the right to file his own *pro se* brief. *Nichols v. State*, 954 S.W.2d 83, 85 (Tex. App.—San Antonio 1997, no pet.); *Bruns v. State*, 924 S.W.2d 176, 177 n.1 (Tex. App. —San Antonio 1996, no pet.). The State filed a letter waiving its right to file an appellee's brief unless appellant files a *pro se* brief. Appellant has expressed his intent to file a *pro se* brief and has been provided with a copy of the appellate record. *See Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014).

Appellant has now requested a copy of, or access to, the reporter's record from his 2007 trial, particularly volume two of the seven volume reporter's record. An appeal from an order denying a post-conviction motion for DNA testing is limited to the matters directly relevant to the motion for DNA testing. *See* TEX. CODE CRIM. PROC. ANN. §§ 64.01-.05. Appellant is therefore only entitled to a copy of the record filed in this appeal from the denial of his DNA motion, which has been previously furnished, not a copy of the entire appellate record from his 2007 trial.

Accordingly, it is ORDERED that appellant's request for access to volume(s) of the reporter's record from his 2007 trial is DENIED. It is further ORDERED that appellant's

motion for an extension of time to file his *pro se* brief is GRANTED. Appellant's *pro se* brief is due **within thirty (30) days** from the date of this order.

If the appellant files a *pro se* brief, the State may file a responsive brief no later than thirty (30) days after the date the appellant's *pro se* brief is filed in this court.

Rebeca C. Martinez, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 19th day of March, 2018.

COURT OF APPEALS
STATE OF TEXAS

KEITH E. HOTTLE,
Clerk of Court