APPENDIX

A. Antiretroviral Therapy for the Prevention of HIV-1 Transmission
N.Engl.J.Med., Vol. 375;9, September 1, 2016

B. Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner is Using Suppressive Antiretroviral Therapy
JAMA, Vol. 316;2, July 12, 2016

C. Results of the Opposties Attract Final Analysis - Fact Sheet
www.oppositesattract.net.au, July 25, 2017

D. Zero Transmissions mean Zero Risk - PARTNER 2 Study Results
NAM*AIDSMAP, Cairns, Gus, July 24, 2018

E. HIV Viral Load and Transmissibility of HIV Infection
JAMA, Vol. 321;5, January 10, 2019 (Fauci, Anthony S)

F. The Science is Clear: With HIV, Undetectable Equals Untransmittable
www.nih.gov/news-events/news-releases/, January 10, 2019

G. Medical Affidavit
Steven M. Pounders, MD

H. Medical Affidavit
David M. Lee, MD

I. Medical Affidavit
Robert W. Henderson, MD (Retired)

J. General Affidavit
Cody Jay Riley

K. General Affidavit
Margaret Williams

L. Laboratory Reports

M. HIV and STD Criminalization
Center for Disease Control and Prevention

N. President's Remarks on HIV Criminalization
December 1, 2021

Ø. Opinion
Fifth Circuit Court of Appeals, August 8, 2022

P. Opinion on Rehearing
Fifth Circuit Court of Appeals, September 15, 2022

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 14, 2022
Lyle W. Cayce
Clerk

No. 21-11062

CODY JAY RILEY,

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 Northern District of Texas
USDC No. 3:18-CV-2439

Before STEWART, DENNIS, and WILLETT, *Circuit Judges*.

PER CURIAM:

Cody Jay Riley, Texas prisoner #1750077, seeks a certificate of appealability (COA) to appeal the district court's dismissal as untimely of his 28 U.S.C. § 2254 application challenging his 2010 convictions for aggravated sexual assault of a child while using or exhibiting a deadly weapon. Riley argues that his § 2254 application was timely filed under 28 U.S.C. § 2244(d)(1)(D), and alternatively that a "gateway exception" under *Schlup v. Delo*, 513 U.S. 298 (1995), applies to the one-year time bar because he has submitted new, reliable scientific evidence of actual innocence with his

§ 2254 application. With respect to his substantive claims, Riley asserts that his right to due process was violated because the State failed to provide proof to support each element of the charged offenses and the indictment included the overbroad term "bodily fluids." He further asserts that counsel rendered ineffective assistance by failing to object to the use of "bodily fluids" in the indictment, jury charge, and judgment. Finally, Riley alleges that no reasonable juror would have voted to convict him if presented with the scientific evidence that is now available and argues that the district court erred by not holding an evidentiary hearing.

To obtain a COA, Riley must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court dismissed his § 2254 application as time barred without reaching the merits of his constitutional claims, Riley must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In order to obtain a COA to appeal the denial of his Rule 60(b) motion challenging the district court's determination that his § 2254 application was untimely, Riley must show that reasonable jurists could debate whether the district court's denial of relief was an abuse of discretion. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Riley fails to make the requisite showing. Accordingly, his motion for a COA is DENIED. As Riley fails to make the required showing for a COA on his constitutional claims, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 122 (2021). Riley's motion for leave to proceed in forma pauperis is DENIED AS UNNECESSARY.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CODY JAY RILEY, TDCJ No. 1750077, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:18-cv-2439-S-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The Court entered judgment dismissing Petitioner Cody Jay Riley's application for a writ of habeas corpus under 28 U.S.C. § 2254 with prejudice as time barred on September 24, 2021. See Dkt. Nos. 46, 68, 69. Riley noticed an appeal. See Dkt. No. 71. He then filed (more than 28 days after the Court entered judgment) a motion for relief under Federal Rule of Civil Procedure 60(b)(6). See Dkt. No. 72.

The Rule 60(b) motion remains referred to the undersigned United States magistrate judge under 28 U.S.C. § 636(b) and a standing order of reference from United States District Judge Karen Gren Scholer. And the undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should deny the motion.

While Rule 60(b) provides for relief from a final judgment or order, "a Rule 60(b) motion for relief from a final judgment denying habeas relief counts as a second or successive habeas application ... so long as the motion 'attacks the federal court's previous resolution of a claim on the merits.'" Banister v. Davis, 140 S. Ct. 1698, 1709

(2020) (cleaned up; quoting Gonzalez v. Crosby, 545 U.S. 524, 532 (2005)).

But "there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination" by, for example, arguing that a district court's ruling as to exhaustion, procedural default, or limitations was in error. Gilkers v. Vannoy, 904 F.3d 336, 344 (5th Cir. 2018) (quoting Gonzalez, 545 U.S. at 532).

Riley's motion attacks the Court's limitations analysis and may therefore be properly considered under Rule 60(b). And, although Riley noticed an appeal prior to filing the Rule 60(b) motion, if the Court agrees with the undersigned's recommendation that the motion should be denied, the Court possesses jurisdiction to consider it despite the pending appeal. See FED. R. CIV. P. 62.1(a)(2); see also Travelers Ins. Co. v. Liljeberg Enters., 38 F.3d 1404, 1407 n.3 (5th Cir. 1994) ("[T]he district court [retains the power] to consider on the merits and deny a 60(b) motion filed after a notice of appeal, because the district court's action is in furtherance of the appeal. When the district court is inclined to grant the 60(b) motion, however, then it is necessary to obtain the leave of the court of appeals. Without obtaining leave, the district court is without jurisdiction, and cannot grant the motion." (citation omitted)).

As Rule 60(b)'s purpose "is to balance the principle of finality of a judgment with the interest of the court in seeing that justice is done in light of all the facts,"

Hesling v. CSX Transp., Inc., 396 F.3d 632, 638 (5th Cir. 2005) (citing Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. Jan. 1981)), "[t]he extraordinary relief [it] afford[s] ... requires that the moving party make a showing of unusual or unique circumstances justifying such relief." Wallace v. Magnolia Family Servs., L.L.C., Civ. A. No. 13-4703, 2015 WL 1321604, at *2 (E.D. La. Mar. 24, 2015) (citing Pryor v. U.S. Postal Servs., 769 F.2d 281, 286 (5th Cir. 1985)); see also Carter v. Fenner, 136 F.3d 1000, 1005 (5th Cir. 1998) ("[R]elief under Rule 60(b) is considered an extraordinary remedy," such "that the desire for a judicial process that is predictable mandates caution in reopening judgments" (cleaned up)).

And "it goes without saying that a Rule 60 motion is not a substitute for an appeal from the underlying judgment." Travelers, 38 F.3d at 1408.

While "Rule 60(b) vests wide discretion in courts, ... relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" Buck v. Davis, 137 S. Ct. 759, 777 (2017) (quoting Gonzalez, 545 U.S. at 535); see also Priester v. JP Morgan Chase Bank, N.A., 927 F.3d 912, 913 (5th Cir. 2019) ("Relief under Rule 60(b)(6) – the catch-all provision of 60(b) ... – is appropriate only in 'extraordinary circumstances.'" (citing U.S. ex rel. Garibaldi v. Orleans Parish Sch. Bd., 397 F.3d 334, 337 (5th Cir. 2005) ("Rule 60(b)(6) authorizes a court to relieve a party from a final judgment for 'any ... reason justifying relief' other than a ground covered by clauses (b)(1) through (b)(5) of the rule. Relief under this section, however, is appropriate only in an 'extraordinary situation' or 'if extraordinary circumstances are present.'" (footnotes omitted)))).

In Seven Elves, the United States Court of Appeals for the Fifth Circuit

> set forth the following factors to consider when evaluating a motion under Rule 60(b)(6): (1) that final judgments should not lightly be disturbed; (2) that a Rule 60(b) motion should not be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether, if the case was not decided on its merits due to a default or dismissal, the interest in deciding the case on its merits outweighs the interest in the finality of the judgment and there is merit in the claim or defense; (6) whether, if the judgment was rendered on the merits, the movant had a fair opportunity to present his claims; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Williams v. Sake Hibachi Sushi & Bar, Inc., No. 3:18-cv-517-D, 2020 WL 1862559at *3 (N.D. Tex. Apr. 14, 2020) (citing Seven Elves, 635 F.2d at 402; footnotes omitted); see also Haynes v. Davis, 733 F. App'x 766, 769 (5th Cir. 2018) ("Though we have never explicitly held that the 'Seven Elves factors' bear on the extraordinary circumstances analysis under Rule 60(b)(6) specifically, we have used them as a guide in evaluating the strength of a motion brought pursuant to Rule 60(b)(6)." (citations omitted)).

And, "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting." Haynes, 733 F. App'x at 769 (quoting Diaz v. Stephens, 731 F.3d 370, 376 n.1 (5th Cir. 2013)).

Considering the Seven Elves factors in the context of habeas, Riley's motion fails to make a strong showing that, given all the facts, his is an extraordinary situation justifying relief under Rule 60(b)(6). A judgment, particularly in the context of habeas relief, should not lightly be disturbed, Riley's motion is not a substitute for his pending appeal, and no intervening equities make it inequitable to grant relief.

And, while the Court did not consider the merits of Riley's claims – because

they are untimely – the motion solely concerns the Court's "ruling" as to the untimeliness of the petition, which Riley argues was "erroneous." Dkt. No. 72 at 2. But the Court carefully considered the limitations issue. After extensive briefing, the undersigned entered thorough findings of fact and conclusions of law. Judge Scholer then carefully considered Riley's objections, ordering a response to those objections and entering a written decision addressing the undersigned's findings and conclusions in light of the objections.

In sum, the Rule 60(b) motion may document Riley's disagreement with the Court's judgment – re-urging arguments already considered and rejected by the Court – but it presents no extraordinary circumstances justifying reopening the judgment.

Recommendation

The Court should deny Petitioner Cody Jay Riley's motion for relief under Federal Rule of Civil Procedure 60(b)(6) [Dkt. No. 72] but should, solely for statistical purposes, reopen and then close this case based on any order accepting or adopting these findings, conclusions, and recommendation.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation

where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: December 2, 2021

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CODY JAY RILEY, TDCJ No. 1750077	§ §	
v.	§ §	CIVIL ACTION NO. 3:18-CV-2439-S-BN
DIRECTOR, TDCJ-CID	§ §	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. *See* ECF No. 74. An objection was filed by Petitioner. *See* ECF No. 75. The District Court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court **ACCEPTS** the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. The Court therefore **DENIES** Petitioner's Motion for Relief under Rule 60(b) [ECF No. 72].

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability as to its denial of the Rule 60(b) motion. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of

a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[1]

But if Petitioner does elect to file a notice of appeal as to the denial of his Rule 60(b)(6) motion, he must also either pay the appellate filing fee ($505.00) or move for leave to proceed in forma pauperis. *See Williams v. Charter*, 87 F.3d 703, 705 (5th Cir. 1996) ("[W]here a Rule 60(b) motion is filed after the notice of appeal from the underlying judgment, a separate notice of appeal is required in order to preserve the denial of the Rule 60(b) motion for appellate review. Absent such a separate notice of appeal, [the court of appeals is] without jurisdiction to review the trial court's disposition of a Rule 60(b) motion." (citations and footnote omitted)).

Further, the Court **DIRECTS** the Clerk to **REOPEN** this case to enter this order, and then **CLOSE** this case for statistical purposes.

SO ORDERED.

DATED December 28, 2021

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

[1] Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

> (a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CODY JAY RILEY, TDCJ No. 1750077	§ §	
v.	§	CIVIL ACTION NO. 3:18-CV-2439-S-BN
DIRECTOR, TDCJ-CID	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, it is **ORDERED** that Petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254 is **DISMISSED** with prejudice.

SO ORDERED.

DATED September 24, 2021

KAREN GRENC SCHOLER
UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

No. 21-11062

CODY JAY RILEY,

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 Northern District of Texas
USDC No. 3:18-CV-2439

Before STEWART, DENNIS, and WILLETT, *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 Appellant's motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS FURTHER ORDERED that the motion is DENIED.

Additional material from this filing is available in the Clerk's Office.