

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-50058
USDC No. 5:96-CV-742

DEREK MITCHELL BAILEY,

rec 11/8/17 KMS

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 Western District of Texas

O R D E R:

Derek Mitchell Bailey, Texas prisoner # 689542, was convicted of murder and was sentenced to life in prison. Bailey subsequently filed a 28 U.S.C. § 2254 application challenging his conviction, which the district court denied. In November 1999, we affirmed the district court's judgment. Almost 17 years later in October 2016, Bailey filed a Federal Rule of Civil Procedure 60(b) motion for relief from judgment, arguing that there was a defect in the integrity of his § 2254 proceedings. The district court denied the motion as untimely.

Bailey now moves for a certificate of appealability (COA) to appeal the district court's denial of his Rule 60(b) motion. Without providing any reason

APPENDIX "A"

for the nearly 17-year delay, he contends that there is no time limitation on Rule 60(b)(6) motions and that the district court should have considered the merits of his motion. He alleges that the magistrate judge, the district judge, and the Texas Attorney General involved in his § 2254 proceedings had the appearance of partiality and that the magistrate judge and district judge should have recused themselves.

Despite Bailey's argument to the contrary, he must obtain a COA to appeal the district court's order. See 28 U.S.C. § 2253(c)(1); *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007). To obtain a COA to appeal the denial of his Rule 60(b) motion, Bailey must show that "a jurist of reason could conclude that the district court's denial of [his] motion was an abuse of discretion." *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011); see *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Bailey has not met this standard.

Accordingly, Bailey's motion for a COA is DENIED.



Certified as a true copy and issued
as the mandate on Oct 25, 2017

Attest:

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

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

FILED

NOV 29 2017

United States Court of AppealsFIFTH CIRCUIT
OFFICE OF THE CLERKLYLE W. CAYCE
CLERKCLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY 
TEL. 504-310-7700 DEPUTY
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 29, 2017

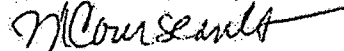
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-50058 Derek Bailey v. Lorie Davis, Director
USDC No. 5:96-CV-742-OLQV

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701Ms. Jeannette Clack
Ms. Casey Leigh Jackson Solomon

NOV 29 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature] DEPUTY

No. 17-50058

rec 12/12/17 *RLM*

DEREK MITCHELL BAILEY,

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 Western District of Texas

5:96-cv-742-DLG

Before JONES, HIGGINBOTHAM, and COSTA, Circuit Judges.

PER CURIAM:

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 ORDERED that the motion is Denied.

APPENDIX "B"

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

December 18, 2017

#689542
Mr. Derek Mitchell Bailey
CID Stringfellow Prison
1200 FM 655
Rosharon, TX 77583-0000

rec 1/4/18 RLB
filed note of S.Ct. Ruling of
Harbison v. Bell, 556 US 180 (2009) on 12/22/17
This is mailed to addresses other than shown on motion

No. 17-50058 Derek Bailey v. Lorie Davis, Director
USDC No. 5:96-CV-742

Dear Mr. Bailey,

We received your petition for en banc rehearing. In light of the Court's order denying COA on October 25, 2017 and the Court's order of November 29, 2017 denying reconsideration, we take no action on the en banc rehearing. The appeal is closed.

Sincerely,

LYLE W. CAYCE, Clerk

Claudia N. Farrington

By:

Claudia N. Farrington, Deputy Clerk
504-310-7706

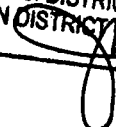
cc:

Ms. Casey Leigh Jackson Solomon

APPENDIX "C"

FILED

JAN - 6 2017

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY  DEPUTYUNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISIONDEREK MITCHELL BAILEY,
TDCJ No. 689542,
Petitioner,

v.

LORIE DAVIS,¹ Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.§
§
§
§
§
§
§
§
§
§

CIVIL NO. SA-96-CV-742-OLG

*Rec General mail
1/13/17 dmj***ORDER**

On June 30, 1997, the Magistrate Court issued a Report and Recommendation, recommending Petitioner's habeas application be denied. On August 14, 1997, the Court approved and accepted the report and recommendation over Petitioner's objections. The Court's order and judgment were entered the following day. Petitioner filed a timely appeal, and was granted a certificate of appealability (COA) as to a single issue raised in his federal petition. On December 28, 1998, the Fifth Circuit Court of Appeals denied Petitioner's request for additional COA, and on November 12, 1999, affirmed this Court's judgment denying federal habeas relief.

On October 14, 2016, this Court received Petitioner's "Motion for Relief from Operation of Judgment." Petitioner argues that the political motivations of the Court and the Texas Attorney General's Office caused a defect in the integrity of his federal habeas proceedings.

Rule 60(c)(1) requires any motion under Rule 60(b) "be made within a reasonable time ...".

Petitioner's motion was filed almost seventeen years after the Fifth Circuit affirmed this Court's

¹After becoming the Director of the Texas Department of Criminal Justice, Correctional Institutions Division, on May 1, 2016, Lorie Davis was automatically substituted as a party pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

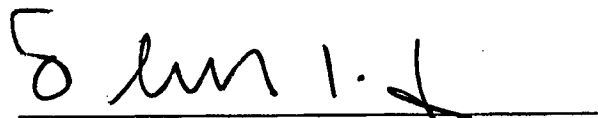
APPENDIX "D"

judgment denying relief. He cites no newly discovered evidence or intervening changes in law in this time. The Court thus finds Petitioner has not filed his motion "within a reasonable time," and does not show good cause for the delay. *See, e.g., In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004) (motions under Rule 60(b) must be made within a reasonable time, unless good cause can be shown for the delay). Petitioner's untimely motion is denied.

It is therefore **ORDERED** that the Motion for Relief from Judgment, filed by Petitioner on October 14, 2016, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**, as reasonable jurists could not debate the denial of the petitioner's Rule 60(b) 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 the 6 day of January 2017.



ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

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