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

April 01, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 21-10301 Gaines v. Lumpkin
USDC No. 4:08-CV-147

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Mr. Barton Ray Gaines
Mr. Edward Larry Marshall

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 1, 2022
Lyle W. Cayce
Clerk

No. 21-10301
Summary Calendar

BARTON RAY GAINES,

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. 4:08-CV-147

Before STEWART, HAYNES and HO, *Circuit Judges*.

PER CURIAM:*

Barton Ray Gaines, former Texas prisoner # 1139507, has moved for a certificate of appealability (COA) to appeal the district court's disposition of his Federal Rule of Civil Procedure 60(b)(6) motion. He sought relief from

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

the judgment dismissing as time barred his 28 U.S.C. § 2254 application in which he challenged his convictions for aggravated robbery with a deadly weapon. The district court found that the motion should be dismissed in part as an unauthorized successive § 2254 application and concluded that the motion otherwise was untimely and did not allege exceptional circumstances. Also, the district court denied Gaines's motion to recuse the district court judge.

Gaines argues that the district court erred in dismissing his Rule 60(b) motion in part as a successive § 2254 application. He asserts that his motion alleged an apparent defect in the integrity of the federal habeas proceedings, specifically, a conflict of interest involving his habeas counsel, and contended that the conflict affected whether his § 2254 application was timely filed. Also, he contends that his Rule 60(b)(6) motion, which was filed more than 12 years after the judgment dismissing his § 2254 application, was filed in a reasonable time after he discovered the conflict and presented exceptional circumstances. He further asserts that the district court erred in denying his motion to recuse.

A prisoner is entitled to a COA if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Gaines must show that reasonable jurists could debate the correctness of the disposition of the Rule 60(b) motion. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Gaines has not made the required showing. Accordingly, his motion for a COA is DENIED. His motion to proceed in forma pauperis on appeal also is DENIED.

A COA is not required to appeal the denial of a motion to recuse. *Trevino v. Johnson*, 168 F.3d 173, 176-78 (5th Cir. 1999). Gaines fails to show that the district court judge was biased against him, and he provides nothing

to suggest that the judge's impartiality might reasonably be questioned. *See* 28 U.S.C. § 455(a), (b)(1); *United States v. Scroggins*, 485 F.3d 824, 830 (5th Cir. 2007). The denial of the motion to recuse is AFFIRMED.