IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10308-B

ROGER KING,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ORDER:

Roger King seeks a certificate of appealability ("COA"), in order to appeal the denials of motions seeking relief from the denial of his underlying 28 U.S.C. § 2254 federal habeas petition. To merit a COA, King must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). King has not made such a showing, and his motion for COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

The issue

1 Appendix A.

IN THE UNITED STATES COURT OF APPEALS

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Appeal from the United States District Court
for the Middle District of Georgia

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Roger King has filed a motion for reconsideration, 11th Cir. R. 27-2, of this Court's March 29, 2018, order denying his motion for a certificate of appealability ("COA"). In its order denying him a COA, this Court correctly identified that King sought to appeal the denial of two Fed. R. Civ. P. 60(b) motions that were seeking relief from a previous judgment, in his underlying 28 U.S.C. § 2254 proceeding. Upon review, King's motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

APPENDIX A1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

ROGER KING

Petitioner,

v.

STANLEY WILLIAMS

Respondent.

CASE NO.: 1:14-CV-20 (WLS)

ORDER

Petitioner Roger King filed the instant petition for writ of habeas corpus on February 6, 2014. (Doc. 1.) On April 17, 2015, United States Magistrate Judge Thomas Q. Langstaff recommended dismissing the recommendation as untimely. (Doc. 32.) The Court adopted Judge Langstaff's recommendation and dismissed the petition on September 11, 2015. (Doc. 41.) King soon after filed a motion for reconsideration (Doc. 43) and requested a certificate of appealability (Doc. 46). The Court denied both. (Docs. 48; 49.) The United States Court of Appeals for the Eleventh Circuit affirmed the Court on January 17, 2017. (Doc. 52.)

On February 23, 2017, King filed two motions seeking relief from judgment under Federal Rule of Civil Procedure "60(b)(1)(3)," which the Court interprets to mean both under Rule 60(b)(1) and 60(b)(3). Judge Langstaff denied the motions on June 1, 2017, explaining that they were untimely under Rule 60(c)(1) because they were made "more than a year after the entry of the judgment or order or the date of the proceeding." (Doc. 57.) King objected to the order pursuant to Rule 72(a). (Doc. 58.) Under the rule, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law."

King argues that Judge Langstaff miscalculated the start date for the one-year time limit under Rule 60(c)(1). He asserts it began to run when the Eleventh Circuit affirmed the Court's dismissal order on January 17, 2017 rather than on September 11, 2015 when the

APPENDIX B

Court issued the dismissal order. The Court disagrees with King. An appeal "does not toll the time for making a 60(b) motion. This is because such motion can be made even though an appeal has been taken and is pending." *Transit Cas. Co. v. Sec. Trust Co.*, 441 F.2d 788, 791 (5th Cir. 1971).[1] Accordingly, the one-year limit began to run with the Court's September 11, 2015 judgment. Judge Langstaff's ruling that King's motions were untimely is therefore not clearly erroneous or contrary to law. The Court declines to set aside or modify the order.

King next argues that Judge Langstaff erred in failing to inform him that he had fourteen days to appeal his "proposed finding and recommendations . . . ." (Doc. 58 at 2.) King is referring to case law requiring a magistrate judge to inform a pro se litigant he has fourteen days to object to a proposed dispositive order. *See Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. Unit B 1982). That notice requirement, however, does not apply to nondispositive orders issued by a magistrate judge. *United States v. Schultz*, 565 F.3d 1353, 1362 (11th Cir. 2009). Judge Langstaff therefore did not err in failing to give King notice of his right to object.

Finally, King requests the appointment of counsel. (Doc. 58 at 3.) Judge Langstaff previously denied a motion to appoint counsel. (Doc. 18.) King did not challenge that order. (*See* Doc. 26.) King has not presented any reasons why the Court should now reconsider that order. Accordingly, King's request is **DENIED.**

For the reasons discussed herein, Judge Langstaff's June 1, 2017 order was not clearly erroneous or contrary to law. Accordingly, the objections are **OVERRULED** and the order **STANDS.**

On June 15, 2017, King requested a certificate of appealability as to Judge Langstaff's June 1, 2017 order. (Doc. 60.) A certificate of appealability is required to appeal the denial of a Rule 60 motion. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1263 (11th Cir. 2004), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). Such a certificate should be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires "showing that reasonable jurists could debate whether (or, for that matter, agree that) the

[1] The Eleventh Circuit has adopted as binding precedent all decisions issued by the former Fifth Circuit prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983). The Court finds that the issues raised by King are settled by clear case law. No reasonable jurist could debate whether they should be resolved in a different manner. Accordingly, the request for a certificate of appealability is **DENIED**.

On August 7, 2017, King filed a "Supplemental Amendment to Objection to Magistrate Finding of June 1, 2017." (Doc. 63.) These objections were filed outside of the fourteen-day window to make such objections established by Rule 72(a). King does not explain why his supplemental objections were filed over a month late and did not request leave from the Court to make new objections. Accordingly, the supplemental objections are untimely and therefore waived. *See* Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.")

On October 10, 2017, King filed a "Writ of Mandamus to Compel Ruling on Rule 60(b) Motion." (Doc. 65.) The document was filed using a form complaint for State of Georgia Superior Courts, but King listed this case as the civil action number. To the extent King is making a motion to compel the Court to issue the instant order, the motion is **DENIED AS MOOT** given that the Court has now ruled on King's objections.

SO ORDERED, this 16th day of January, 2018.

/s/ W. Louis Sands
W. LOUIS SANDS, SR. JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

ROGER KING,

Petitioner,

VS. **1 : 14-CV-20 (WLS)**

STANLEY WILLIAMS, Warden,

Respondent.

ORDER

Presently pending herein are two motions filed by Petitioner seeking to have this case reopened. (Docs. 53, 54). Petitioner's federal habeas petition was dismissed as untimely by Order dated September 11, 2015, and judgment was entered that same day. (Docs. 41, 42). The Court denied Petitioner's subsequently filed Motion for Certificate of Appealability and Motion for Reconsideration. (Docs. 48, 49). Following the granting of a limited certificate of appealability, the Eleventh Circuit Court of Appeals upheld the district court's dismissal of Petitioner's § 2254 as untimely. (Docs. 50, 51).

Petitioner now seeks to have this case reopened pursuant to Rule 60(b)(1)(3) of the Federal Rules of Civil Procedure, which provides for relief from judgment based on fraud. Petitioner maintains that the district court erred in dismissing Petitioner's § 2254 petition, having been misled by the Respondent regarding Petitioner's filings in state court and the statutory procedures governing his state filings. (Docs. 53, 54).

Rule 60(c)(1) provides that a motion filed under Rule 60(b)(1)(3) must be filed "no more

APPENDIX B1

than a year after the entry of the judgment or order or the date of the proceeding". The judgment which Petitioner seeks to reopen was entered on September 11, 2015. As Petitioner's motions seeking the opening of this judgment were not filed until February 23, 2017, any relief which Petitioner seeks under Rule 60(b)(1)(3) is precluded as untimely.

Accordingly, Petitioner's motions to reopen this care are **DENIED**.

SO ORDERED, this 1st day of June, 2017.

s/ ***THOMAS Q. LANGSTAFF***
UNITED STATES MAGISTRATE JUDGE

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