IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12731-C

LAVAUGHN WEATHERLY,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

LaVaughn Weatherly is a Florida prisoner serving a total 45-year sentence after pleading no contest to 2 counts of attempted sexual battery upon a child less than 12 years of age, sexual battery upon a child between the ages of 12 and 18 by a person in a position of familial or custodial authority, 2 counts of lewd or lascivious molestation of a child less than 12 years of age, and lewd or lascivious molestation of a child between the ages of 12 and 16. He seeks a

certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in his appeal of rulings on post-judgment motions in his habeas corpus proceeding under 28 U.S.C. § 2254.[1]

A COA is required for Weatherly to appeal the denial of his motion for relief from judgment under Fed. R. Civ. P. 60(b)(1). *See Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2006). He argued in the motion that the district court could not have reviewed his case thoroughly before ruling on the third amended § 2254 petition because the court received his objections to a magistrate judge's report and recommendation on December 15, 2017, and denied the petition on December 19. He provided no support for his presumption that the district court had insufficient time to review the case thoroughly. He has not made a substantial showing of the denial of a constitutional right and, thus, is not entitled to a COA on the denial of his Rule 60(b)(1) motion. *See* 28 U.S.C. § 2253(c)(2).

No COA is required for Weatherly to appeal the denial of his motion "to respond/rule," the rejection of his objections to the denial of his motion "to respond/rule," and the denial of his motion "for clarification" and "to expedite ruling," as those rulings were not final orders that disposed of the merits of his § 2254 proceeding. *See id.* § 2253(c)(1)(A); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). However, those rulings are subject to frivolity review because Weatherly seeks leave to proceed IFP. *See* 28 U.S.C. § 1915(e)(2).

In the motions and objections, Weatherly sought a ruling on his motion to alter or amend judgment under Fed. R. Civ. P. 52(b) and 59(e). As he acknowledged, however, the motion

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[1] This is a timely appeal of: (1) the order denying Weatherly's motion "to respond/rule" on his motions under Fed. R. Civ. P. 52(b), 59(e), and 60(b)(1); (2) the order rejecting his objections to the denial of his motion "to respond/rule" and denying his motion for relief from judgment under Fed. R. Civ. P. 60(b)(1); and (3) the order denying his motion "for clarification" and "to expedite ruling." The notice of appeal was not timely to appeal the denial of his third amended § 2254 petition or to appeal the rulings on other post-judgment motions. *See Wright v. Preferred Research, Inc.*, 891 F.2d 886, 889-90 (11th Cir. 1990); *Ellis v. Richardson*, 471 F.2d 720, 721 (5th Cir. 1973).

under Fed. R. Civ. P. 52(b) and 59(e) was untimely. *See* Fed. R. Civ. P. 52(b), 59(e) (requiring a motion to amend or make additional findings and a motion to alter or amend judgment to be filed within 28 days of entry of the judgment). The district court declined to extend the deadline to file a motion under Fed. R. Civ. P. 52(b) and 59(e) and, in fact, could not grant such an extension. *See* Fed. R. Civ. P. 6(b)(2). The district court did not err by denying Weatherly's requests for a ruling on his motion under Fed. R. Civ. P. 52(b) and 59(e).

In his motion "to respond/rule" and his objections to the denial of his motion "to respond/rule," Weatherly also sought a ruling on his Rule 60(b)(1) motion. Although the district court denied the motion "to respond/rule," the court later did rule on the Rule 60(b)(1) motion after Weatherly pointed out that he had one year after the entry of judgment to file such a motion. The district court reaffirmed the original judgment. There is no issue of arguable merit for appeal related to the district court's delayed ruling on the Rule 60(b)(1) motion.

This appeal is frivolous because there are no issues of arguable merit in law or fact. *See Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002). Weatherly is not entitled to leave to proceed IFP. *See* 28 U.S.C. § 1915(e)(2).

Accordingly, Weatherly's motion for a COA to appeal the denial of his Rule 60(b)(1) motion is DENIED. No COA is required to appeal the denial of his motion "to respond/rule," the rejection of his objections to the denial of his motion "to respond/rule," and the denial of his motion "for clarification" and "to expedite ruling." His motion for leave to proceed IFP in his appeal of the rulings on those motions and objections is DENIED.

UNITED STATES CIRCUIT JUDGE

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Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

LaVaughn Weatherly has moved for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated August 16, 2018, denying him a certificate of appealability and leave to proceed *in forma pauperis* in his appeal from the denial of his motion for relief from judgment under Fed. R. Civ. P. 60(b)(1), the denials of his motion "to respond/rule" and his motion "for clarification" and "to expedite ruling," and the rejection of his objections to the denial of his motion "to respond/rule." Upon review, the motion for reconsideration is DENIED because Weatherly has offered no new evidence or arguments of merit to warrant relief.