IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11693-A

FRANK JOSEPH SCHWINDLER,

Petitioner-Appellant,

versus

WARDEN,
WARDEN, PHILLIPS STATE PRISON,

Respondents-Appellees.

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

Before: MARTIN, ROSENBAUM and BRANCH, Circuit Judges.

BY THE COURT:

Appellant Frank Schwindler's motion for reconsideration of our August 28, 2019, order dismissing this appeal for lack of jurisdiction is DENIED.

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Before: MARTIN, ROSENBAUM and BRANCH, Circuit Judges.

BY THE COURT:

The Appellee's motion to dismiss the appeal for lack of jurisdiction, which we construe from the response to the jurisdiction question, is GRANTED. Appellant Frank Schwindler filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Northern District of Georgia. After several transfers of the case, the district court in the Southern District of Georgia stayed the case on May 4, 2018, pending the outcome of Schwindler's appeal in the state supreme court from his state postconviction proceedings. On May 24, 2018, Schwindler filed a self-styled motion pursuant to Federal Rule of Civil Procedure 60, seeking reconsideration of the district court's stay order. On April 1, 2019, the district court denied Schwindler's motion for

reconsideration. Schwindler then filed the instant notice of appeal from the district court's April 1, 2019, order.

As an initial matter, we construe Schwindler's notice of appeal to appeal both the May 4, 2018, stay order and the April 1, 2019, order denying reconsideration because Schwindler expressed an intent to challenge both rulings and his notice of appeal is timely as to both. *See* Fed. R. App. P. 3(c)(1), (4); *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984); *see also* Fed. R. App. P. 4(a)(1)(A), (4)(A). However, we lack jurisdiction to review either order because we conclude that they are not final or immediately appealable. *See* 28 U.S.C. §§ 1291, 1292; *CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1327 (11th Cir. 2000) (stating that, to be appealable, an order must be final or fall into a specific class of interlocutory orders that are made appealable by statute or jurisprudential exception). The district court's orders did not end litigation on the merits and, instead, contemplated further habeas proceedings after the conclusion of Schwindler's appeal in state court. *See World Fuel Corp. v. Geithner*, 568 F.3d 1345, 1348 (11th Cir. 2009); *Broussard v. Lippman*, 643 F.2d 1131, 1133 (5th Cir. Unit A Apr. 1981) (stating that an order that contemplates further substantive proceedings in a case is not final and appealable).

The district court's stay order also does not qualify for immediate review under the "effectively out of court" doctrine because the stay was not immoderate and did not involve an indefinite period of delay. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1194 (11th Cir. 2009); *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1165-66 (11th Cir. 2007). Although we recognize that there had been considerable delay in Schwindler's federal and state proceedings, the district court's stay order was premised on the fact that progress had been made on the merits of Schwindler's state postconviction claims, and because

both parties have acknowledged that Schwindler's state appellate proceedings have concluded, the stay is presumably due to be lifted upon dismissal of this appeal. Therefore, Schwindler has not been placed "effectively out of court." *See King*, 505 F.3d at 1166-70.

Accordingly, this appeal is DISMISSED for lack of jurisdiction. Any pending motions are DENIED as moot.