

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1669

Oji Konata Markham

Petitioner - Appellant

v.

Vicki Janssen

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:19-cv-03110-WMW)

JUDGMENT

Before GRUENDER, BENTON, and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motion to supplement the record is denied.

October 22, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Oji Konata Markham,

Case No. 19-cv-3110 (WMW/BRT)

Petitioner,

**ORDER ADOPTING REPORTS AND
RECOMMENDATIONS**

v.

Vicki Janssen,

Respondent.

This matter is before the Court on the October 28, 2020 Report and Recommendation and December 11, 2020 Report and Recommendation (collectively, R&Rs) of United States Magistrate Judge Becky R. Thorson. (Dkts. 28, 34.) The R&Rs recommend that this Court (1) deny Petitioner Oji Konata Markham's petition for writ of habeas corpus, (2) deny Markham's motion for an evidentiary hearing, (3) deny Markham's motion to expedite and compel judgment and for release pending this Court's decision, (4) deny Markham's "COVID-19 Motion for Release," and (5) not issue a certificate of appealability.

A district court reviews *de novo* those portions of an R&R to which an objection is made and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *accord* Fed. R. Civ. P. 72(b)(3); LR 72.2(b)(3). When a party fails to file specific objections to an R&R, *de novo* review is not required. *See Montgomery v. Compass Airlines, LLC*, 98 F. Supp. 3d 1012, 1017 (D. Minn. 2015) (observing that objections to an R&R that "are not

specific but merely repeat arguments presented to and considered by a magistrate judge are not entitled to *de novo* review, but rather are reviewed for clear error"). A district court reviews for clear error any aspect of an R&R to which no specific objection is made. *See Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam); *see also* Fed. R. Civ. P. 72(b) advisory committee's note to 1983 amendment ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). Because Markham is *pro se*, his objections are entitled to liberal construction. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Here, timely objections were not filed. Nonetheless, the Court has reviewed Markham's untimely objections to the October 28, 2020 R&R. Markham's objections do not identify any error of law or fact that warrant rejecting the recommendations in the R&Rs. Moreover, having carefully reviewed the R&Rs, the Court finds that they are neither clearly erroneous nor contrary to law.

Based on the R&Rs, the foregoing analysis, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED:**

1. The October 28, 2020 R&R, (Dkt. 28), is **ADOPTED**.
2. The December 11, 2020 R&R, (Dkt. 34), is **ADOPTED**.

3. Petitioner Oji Konata Markham's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, (Dkt. 1), is **DENIED**.¹

¹ Because Markham's petition is denied, the Court need not rule on Markham's pending objection, (Dkt. 20), to the magistrate judge's order denying Markham's motion to expand the record. *See* Rule 7(a), Rules Governing Section 2254 Cases in the United States District Courts.

4. Petitioner Oji Konata Markham's request for an evidentiary hearing, (Dkt. 24), is **DENIED**.

5. Petitioner Oji Konata Markham's motion to expedite, to compel judgment pursuant to Rule 12(c), Fed. R. Civ. P., and for release pending the Court's decision (Dkt. 26), is **DENIED**.

6. Petitioner Oji Konata Markham's "COVID-19 Motion for Release," (Dkt. 27), is **DENIED**.

7. A certificate of appealability **SHALL NOT ISSUE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 18, 2021

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Oji Konata Markham,

Case No. 19-cv-3110 (WMW/BRT)

Petitioner,

ORDER

v.

Vicki Janssen,

Respondent.

This matter is before the Court on Petitioner Oji Konata Markham's motion for relief from judgment, (Dkt. 44), motion to designate a record on appeal, (Dkt. 48), and motion for issuance of a certificate of appealability, (Dkt. 55). For the reasons addressed below, Markham's motions are denied.

On December 18, 2019, Markham commenced this action against Respondent Vicki Janssen. On February 18, 2021, this Court denied Markham's petition for writ of habeas corpus, denied Markham's motion for an evidentiary hearing, denied Markham's motion to expedite and compel judgment and for release pending this Court's decision, denied Markham's "COVID-19 Motion for Release," and did not issue a certificate of appealability. Markham subsequently filed the pending motions, which the Court addresses in turn.

I. Motion for Relief from Judgment

Markham argues that he is entitled to relief from judgment pursuant to Rule 60(b)(6), appearing to contend that this Court misapplied the standard for granting a

certificate of appealability and that this Court erroneously rejected Markham's constitutional claims. It appears that Markham challenges the Court's February 18, 2021 Order and seeks to have the Court's conclusions reconsidered.

As an initial matter, Janssen suggests in her response that this Court lacks jurisdiction to decide Markham's Rule 60(b)(6) motion because Markham has filed a notice of appeal. Typically, after a party files a notice of appeal, the district court no longer has jurisdiction over the case because jurisdiction rests with the court of appeals. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). "As a general rule, a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously" *Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004) (internal quotation marks omitted). But a district court may "consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in [the appellate] court, and a separate appeal may thereafter be taken to challenge the denial." *Id.* Because Markham's Rule 60(b) motion is denied for the reasons addressed below, the Court will consider the motion on the merits.

"Rule 60(b) was not intended as a substitute for a direct appeal from an erroneous judgment." *Spinar v. S.D. Bd. of Regents*, 796 F.2d 1060, 1062 (8th Cir. 1986) (internal quotation marks omitted). Rule 60(b)(6) permits relief from a final judgment, order, or proceeding for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Relief pursuant to Rule 60(b)(6) is "an extraordinary remedy for exceptional circumstances." *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1155

record made before the district court. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). Although the record may be enlarged by the court of appeals when the interests of justice demand it, this Court lacks the authority to supplement the record on appeal. *Id.* (observing that the *appellate court* has authority under Fed. R. App. P. 10(e) to supplement a record on appeal).

Therefore, Markham's motion for an order designating the record on appeal is denied.

III. Motion for Issuance of a Certificate of Appealability

Markham also moves for this Court to issue a certificate of appealability. On March 19, 2021, Markham filed a notice of appeal that disputes, among other issues, this Court's application of the standard for granting a certificate of appealability. "The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. For this reason, when Markham filed a notice of appeal, this Court was divested of jurisdiction to consider whether it properly applied the standard for granting a certificate of appealability. Therefore, this Court cannot grant Markham the relief he seeks.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein,

IT IS HEREBY ORDERED that:

1. Petitioner Oji Konata Markham's motion for relief from judgment, (Dkt. 44), is **DENIED**.
2. Markham's motion for an order designating the record on appeal, (Dkt. 48), is **DENIED**.
3. Markham's motion for issuance of a certificate of appealability, (Dkt. 55), is **DENIED**.

Dated: June 30, 2021

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

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

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Oji Konata Markham,

Civ. No. 19-3110 (WMW/BRT)

Petitioner,

v.

Vicki Janssen,

**REPORT AND
RECOMMENDATION**

Respondent.

Oji Konata Markham, OID# 211943, MCF Rush City, 7600 525th St., Rush City, MN 55069, *pro se* Petitioner.

Heather Dawn Pipenhagen, Esq., Dakota County Attorney's Office, and Matthew Frank, Esq., Minnesota Attorney General's Office, counsel for Respondent.

BECKY R. THORSON, United States Magistrate Judge.

This matter is before the Court on Petitioner Oji Konata Markham's "COVID-19 Motion for Release." (Doc. No. 27.) Petitioner, who is currently incarcerated at MCF-Rush City, seeks compassionate release due to the COVID-19 pandemic. Respondent has not filed a response to this motion. For the reasons that follow, this Court recommends Petitioner's motion be denied.

Petitioner filed a Petition for Writ of Habeas Corpus on December 18, 2019. (Doc. No. 1.) On October 7, 2020—with that Petition still pending—Petitioner filed the instant motion. (Doc. No. 27.) Therein, Petitioner argues that the spread of COVID-19 at MCF-Rush City poses a "substantial risk of serious harm" to Petitioner. (Doc. No. 27 at 1.) Petitioner asserts that compassionate release, temporary release, or stay of execution of

his sentence is merited in his case due to his “advanced age,” “deteriorating health,” “elevated risk of dire health consequences,” and “service of 80% of his original sentence.”¹ (Doc. No. 27 at 2.)

Construing Petitioner’s request as a motion for compassionate relief pursuant to 18 U.S.C. § 3582(c)(1)(A), release under these facts is not warranted. Petitioner asserts that his age and nonspecific medical conditions place him at high risk of serious illness due to COVID-19, but there is no evidence in the record to support that claim. *See* CDC, Coronavirus Disease 2019: People at Increased Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed December 9, 2020). Moreover, this Court agrees with other courts that a possibility of contracting the virus is insufficient to justify release under § 3582(c)(1)(A). *United States v. Fry*, No. 11-cr-141 (PAM/KMM), 2020 WL 1923218, at *1 (D. Minn. Apr. 21, 2020) (citation omitted); *see also United States v. Raia*, 954 F.3d 594, 597 (stating “the mere existence of COVID-19 in society and the possibility that it may spread to a particular a particular prison alone cannot independently justify compassionate release”). Instead, federal courts have required that an inmate demonstrate both “a particularized susceptibility to the disease” and “a particularized risk of

¹ Petitioner also appends material to this motion that is duplicative of that which appears in his filing at Doc. No. 26. (*See* Doc. No. 27 at 7–18.) Because this Court has already addressed those arguments in a prior Report and Recommendation, (*see* Doc. No. 28), it declines to revisit them here.

contracting the disease at his prison facility.” *United States v. Feiling*, 453 F. Supp. 3d 832, 838 (E.D. Va. 2020) (collecting cases).

Here, Petitioner has attached an MCF-Rush City internal memorandum indicating the existence of positive COVID-19 cases at that facility. (*See* Doc. No. 27 at 6.) As of December 9, 2020, MCF-Rush City reports no current COVID-19 cases among its inmate population.² While that could change in the future, Petitioner has failed to demonstrate either that he has a particular susceptibility to the disease or that he is at a particularized risk of contracting it. (*See* Doc. No. 27 at 6.) Accordingly, this Court recommends his “COVID-19 Motion for Release” be denied.

Petitioner also implies that prison authorities’ failure to release him due to the spread of COVID-19 may constitute “deliberate indifference” to his medical needs under the Eighth Amendment. (Doc. No. 27 at 2.) To the extent Petitioner seeks to bring an Eighth Amendment claim in the instant motion, that claim fails. If Petitioner wishes to challenge the conditions of his confinement under the Eighth Amendment, such a claim must be raised in a civil rights action under 42 U.S.C. § 1983, not in a habeas proceeding. *See Spencer v. Haynes*, 773 F.3d 467, 469–70 (8th Cir. 2014) (explaining that a habeas petition may only be used to challenge the fact or length of confinement, not to challenge the conditions of that confinement).

² *See* MCF-Rush City COVID-19 Response, <https://mn.gov/doc/about/covid-19-updates/mcf-rush-city-covid-19-response/> (last accessed December 9, 2020); COVID-19 Updates, <https://mn.gov/doc/about/covid-19-updates/> (last accessed December 9, 2020).

RECOMMENDATION

Based on the foregoing, and on all of the files, records, and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Petitioner's "COVID-19 Motion for Release" (Doc. No. 27) be **DENIED**.

Date: December 11, 2020

s/ Becky R. Thorson
BECKY R. THORSON
United States Magistrate Judge

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals. Under Local Rule 72.2(b)(1), "a party may file and serve specific written objections to a magistrate judge's proposed finding and recommendations within 14 days after being served a copy" of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

**Additional material
from this filing is
available in the
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