UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6026

JOWARSKI RUSSELL NEDD,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director, Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. John A. Gibney, Jr., Senior District Judge. (3:16-cv-00948-JAG-RCY)

Submitted: March 30, 2022 Decided: April 21, 2022

Before KING and HARRIS, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Jowarski Russell Nedd, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jowarski Russell Nedd seeks to appeal the district court's order denying his second Fed. R. Civ. P. 60(b) motion for relief from the district court's prior order denying relief on Nedd's 28 U.S.C. § 2254 petition.* The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A); *see generally United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Nedd has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are

* This case returns to us following a limited remand for the district court to conduct the fact finding necessary to determine whether Nedd's notice of appeal was timely filed under Fed. R. App. P. 4(c)(1).

adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: August 16, 2022

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(3:16-cv-00948-JAG-RCY)

JOWARSKI RUSSELL NEDD

Petitioner - Appellant

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HAROLD W. CLARKE, Director, Virginia Department of Corrections

Respondent - Appellee

ORDER

The court denies the petitions for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petitions for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Harris, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOWARSKI RUSSELL NEDD,

Petitioner,

v. Civil Action No. **3:16CV948**

HAROLD W. CLARKE, DIRECTOR,

Respondent.

MEMORANDUM ORDER

Jowarksi Russell Nedd, a Virginia state prisoner proceeding *pro se* and *in forma pauperis*, filed a petition pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition") challenging his convictions in the Circuit Court of the County of Accomack, Virginia ("Circuit Court") for capital murder, robbery, and use of a firearm in commission of a felony and resulting life sentence. By Memorandum Opinion and Order entered on May 25, 2017, the Court denied Nedd's § 2254 Petition because it was barred by the applicable one-year statute of limitations. *Nedd v. Clarke*, No. 3:16CV948, 2017 WL 2297023, at *1–7 (E.D. Va. May 25, 2017). The Court subsequently denied a motion pursuant to Federal Rule of Civil Procedure 60(b). ("Rule 60(b) Motion," ECF Nos. 47, 48.) The matter is before the Court on a remand from the United States Court of Appeals for the Fourth Circuit to ascertain whether Nedd filed a timely notice of appeal of his Rule 60(b) Motion. (ECF No. 52.) Nedd has a history of untimely filings and the Court has been through this exercise before in this case.[1]

[1] After the dismissal of his § 2254 Petition, the Court notified Nedd that a notice of appeal must be filed within thirty (30) days of the date of entry thereof. (ECF No. 17, at 1.) As explained previously:

Nedd failed to file a notice of appeal within that thirty-day window. Instead, well beyond the appeal period, on September 5, 2017, the Court received a letter from Nedd. By Memorandum Order entered on April 26, 2018, the Court explained the following to Nedd:

> On September 7, 2017, the Court received a letter from Petitioner wherein he alleged that he never received any response from the Court about the disposition of his petition. (ECF No. 18.) Petitioner also stated that he submitted a Reply to the Motion to Dismiss that he hoped the Court considered. That same day the Clerk mailed Petitioner a copy of the docket sheet that indicated exactly when his § 2254 petition was dismissed and also indicated that the Court had received his Reply to the Motion to Dismiss and considered that Reply in its dismissal of the petition. Many months later, on April 16, 2018, the Court received another letter from Petitioner repeating the contents of his September 7, 2017 letter and stating that he plans to file an untimely appeal. (ECF No. 21.) The Court believes that Petitioner is well aware of the disposition of his § 2254 petition but simply does not like the result. Nevertheless, the Clerk is DIRECTED to send Petitioner a copy of the May 25, 2017 Memorandum Opinion and Order and a copy of the docket sheet and note the same on the docket.

(ECF No. 22, at 1.) Even after the Court mailed Nedd a second copy of the docket sheet indicating that his § 2254 Petition had been dismissed, Nedd waited nearly two months, or until June 22, 2018,[] to file his Notice of Appeal and Rule 60(b) Motion. (ECF No. 23.) The Court found the Rule 60(b) Motion untimely. (ECF Nos. 26, 27.)

On November 13, 2018, the United States Court of Appeals issued a per curiam opinion "remand[ing] the case for the limited purpose of allowing the district court to determine when Nedd received notice of the district court's entry of its final order and whether he is entitled to a reopening of the appeal period pursuant to Rule 4(a)(6)." (ECF No. 30, at 2.) The Fourth Circuit explained:

> Nedd's notice of appeal was not filed within 30 days after the district court's entry of judgment. However, Nedd sent the district court a letter dated August 14, 2017,[] stating that he had not received a response about his case and requesting an updated status of the case. We construe this letter as a motion to reopen the appeal period. *See* Fed. R. App. 4(a)(6). (*Id.*)

(ECF No. 34, at 1–2.) Accordingly, by Memorandum Order entered on January 10, 2019, the Court ordered that the record be expanded. (ECF No. 31, at 3.) On February 5, 2019, the Court received a response from Nedd that was not sworn to under penalty of perjury and provided none of the information that the Court ordered him to provide. (ECF No. 32.) Nevertheless, because Respondent noted that they had no valid basis to object to Nedd's Motion to Reopen the Appeal Period, and because the record before the Court seemingly indicated that Nedd failed to receive

I. PROCEDURAL HISTORY FOR CURRENT REMAND

On October 26, 2020, the Court denied Nedd's Rule 60(b) Motion. The Court informed Nedd that "a written notice of appeal must be filed with the Clerk of the Court within thirty (30) days of the date of entry hereof. Failure to file a notice of appeal may result in the loss of the ability to appeal." (ECF No. 48, at 1.) On January 4, 2021, well beyond the thirty-day period in which to file an appeal, Nedd wrote a letter to the Court, dated December 24, 2020, that stated as follows:

> This is a letter of inquiry regarding my Notice of Appeal to the Fourth Circuit Court of Appeals from the Order denying my Rule 60(b) Motion for Relief from Judgment entered herein on October 26, 2020. The Notice of Appeal was mailed on November 10, 2020. To date, I have not received a blank copy of an informal brief from the Court of Appeals.

(ECF No. 49, at 1.)[2] The Court construed this letter as a Notice of Appeal and transmitted the Notice of Appeal to the Fourth Circuit. (ECF No. 50.) On May 28, 2021, the Fourth Circuit issued a per curiam opinion "remand[ing] the case for the limited purpose of allowing the district court to conduct the fact finding necessary to determine whether this appeal was timely filed under Fed. R. App. P. 4(c)(1). (ECF No. 52, at 2.) The Fourth Circuit explained:

> Nedd noted his appeal on December 24, 2020,[3] after the 30-day period to note an appeal expired. However, Nedd's letter, which the district court construed as a notice of appeal, stated that he was inquiring about the status of a notice of appeal that he had mailed on November 10, 2020. That alleged notice of appeal does not appear on the district court's docket sheet.

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the Court's denial of the § 2254 Petition until April 30, 2018, the Court granted the Motion to Reopen the Appeal Period. (ECF No. 34.)

[2] The Court corrects the capitalization in the quotations from Nedd's submissions.

[3] For the purposes of this appeal, we assumed that the date appearing on the letter is the earliest date Nedd could have delivered it to prison officials for mailing to the court. Fed. R. App. P. 4(c)(1); *Houston v. Lack*, 487 U.S. 266, 276 (1988).

(*Id.*) Accordingly, by Memorandum Order entered on June 23, 2021, the Court directed that the record be expanded as follows:

> 1. Nedd is DIRECTED to file a response, sworn under penalty of perjury, indicating the time, date, and place he gave his Notice of Appeal to prison authorities for mailing to the court, within twenty (20) days of the date of entry hereof. Nedd must provide some evidence that establishes that this is the date that he delivered the Notice of Appeal to authorities. The Court will not accept any submission from Nedd that has not been sworn under penalty of perjury.
> 2. Respondent must file a response to Nedd's sworn statement and provide any record evidence available that bears on Nedd's statement, within twenty (20) days after Nedd files such statement with the Court.

(ECF No. 53, at 1–2.)

II. RESPONSES TO ORDER

In his sworn Declaration in Response to Court Order ("Response," ECF No. 54), Nedd avers:

> On November 9, 2020, I placed the Notice of Appeal at issue in an envelope addressed to the Clerk of the Court specified above, and delivered the said envelope to Correctional Sergeant C. Burnette, along with a RNCC form: "Inmate Trust System-Withdrawal Request," to cover the cost of first-class postage.
>
> Later, on November 9, 2020, the said envelope and form were received by the Watch Office at RNCC.
>
> On November 10, 2020, the said envelope and form were received by the Business Office at RNCC, which paid for first-class postage.
>
> Later, on November 10, 2020, the said envelope, containing the Notice of Appeal at issue, was received by the mail room at RNCC, which mailed the said envelope using the United States Postal Service, as legal mail, with first-class postage affixed.

(*Id.* at 3, 5 (paragraph numbers omitted).) Nedd attaches documents that reflect that the institution did, indeed, mail an envelope to this Court on November 10, 2020. (ECF No. 54-1, at 2–3.) Respondent indicates that he "has investigated petitioner's statements, including verifying with Ms. Greer that her letter is authentic and an accurate representation of Nedd's outgoing mail during

the relevant period." (ECF No. 56, at 2.)[4] Respondent correctly notes that, although the record does not reflect "any indication of the *contents* of the legal mail sent to the Court on November 10, 2020, the [Respondent] is unaware of any other case Nedd had pending with this Court at that time, nor does the record reveal any other mail received by Nedd during the relevant time." (*Id.*) Thus, Respondent concedes that, "from the available record that it appears Nedd placed his Notice of Appeal in the institutional mail on November 10, 2020." (*Id.*)

Based on the record before the Court, it appears that Nedd timely filed his Notice of Appeal under Fed. R. App. P. 4(c)(1). Therefore, in accordance with the Fourth Circuit's directive, the record in this case shall be returned to the Fourth Circuit for further consideration.

The Clerk is DIRECTED to send a copy of the Memorandum Order to Nedd, counsel of record, and the United States Court of Appeals for the Fourth Circuit.

It is so ORDERED.

Date: 2 September ~~August~~ 2021
Richmond, Virginia

/s/
John A. Gibney, Jr.
United States District Judge

[4] Inexplicably, two different attorneys for Respondent filed responses. (ECF Nos. 56, 57.) As they both concede the record shows Nedd timely filed his Notice of Appeal, the Court only cites to the earliest filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

JOWARSKI RUSSELL NEDD,

Petitioner,

v. Civil Action No. **3:16CV948**

HAROLD W. CLARKE, DIRECTOR,

Respondent.

MEMORANDUM OPINION

Jowarksi Russell Nedd, a Virginia state prisoner proceeding *pro se* and *in forma pauperis*, filed a petition pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition") challenging his convictions in the Circuit Court of the County of Accomack, Virginia ("Circuit Court") for capital murder, robbery, and use of a firearm in commission of a felony, and his resulting life sentence. By Memorandum Opinion and Order entered on May 25, 2017, the Court denied Nedd's § 2254 Petition because it was barred by the applicable one-year statute of limitations. *Nedd v. Clarke*, No. 3:16CV948, 2017 WL 2297023, at *1–7 (E.D. Va. May 25, 2017). On October 2, 2018, the Court denied a motion seeking relief under Federal Rule of Civil Procedure 60(b)(6). (ECF Nos. 26, 27.) After a limited remand to determine whether Nedd was entitled to a reopening of the appeal period, on June 20, 2019, the United States Court of Appeals for the Fourth Circuit dismissed his appeal. (ECF No. 37.)

On August 5, 2020, the Court received from Nedd yet another "MOTION FOR RELIEF FROM JUDGMENT," seeking relief under Federal Rule of Civil Procedure 60(b)(6) ("Second Rule 60(b) Motion," ECF No. 44). In his Second Rule 60(b) Motion, Nedd once again requests that the Court vacate the dismissal of his § 2254 Petition because the Court erred in its conclusion that his § 2254 Petition was untimely. (*See id.* at 1–2.)

A party seeking relief under Federal Rule of Civil Procedure 60(b) must make the threshold showings of "timeliness, a meritorious defense, a lack of unfair prejudice to the opposing party, and exceptional circumstances." *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (quoting *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984)). After a party satisfies these threshold showings, "he [or she] then must satisfy one of the six specific sections of Rule 60(b)." *Id.* (citing *Werner*, 731 F.2d at 207).

Under Federal Rule of Civil Procedure 60(c)(1), Nedd was required to file his motion within a reasonable time after the entry of the May 25, 2017 Memorandum Opinion and Order. Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). Nedd's Second Rule 60(b) Motion, filed more than three years after the entry of the challenged judgment, was not filed in a reasonable time. *See McLawhorn v. John W. Daniel & Co., Inc.*, 924 F.2d 535, 538 (4th Cir. 1991) ("We have held on several occasions that a Rule 60(b) motion is not timely brought when it is made three to four months after the original judgment and no valid reason is given for the delay." (citing *Cent. Operating Co. v. Utility Workers of Am.*, 491 F.2d 245 (4th Cir. 1974), and *Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249 (4th Cir. 1967))). Moreover, "[a] motion under [Rule] 60(b)(6) may not be granted absent 'extraordinary circumstances.'" *MLC Auto., LLC v. Town of Southern Pines*, 532 F.3d 269, 277 n.5 (4th Cir. 2008) (quoting *Reid v. Angelone*, 369 F.3d 363, 370 (4th Cir. 2004)).

Nedd fails to offer any persuasive argument why this Court should find that his Second Rule 60(b) Motion was filed within a reasonable time. *Cf. Fortune v. Clarke*, 712 F. App'x 296, 297 (4th Cir. 2018) (explaining that determination of timeliness of a Rule 60(b) motion is discretionary, not jurisdictional).

Even if Nedd's Second Rule 60(b) Motion was considered timely, he fails to offer any persuasive reason that would warrant vacating the prior dismissal of his § 2254 Petition. The Court found that Nedd's § 2254 Petition was barred by the statute of limitations. The Fourth Circuit determined that there was nothing "debatable" in that conclusion. (ECF No. 37, at 3–4.) Once again, Nedd continues to disagree with the Court's conclusion that his § 2254 Petition was untimely. However, Nedd offers nothing in his Second Rule 60(b) Motion that would require this Court to vacate the dismissal of his § 2254 Petition and he fails to demonstrate extraordinary circumstances. Instead, Nedd simply rehashes his arguments why his § 2254 Petition was timely and advances a frivolous argument that this Court lacks jurisdiction to find his § 2254 Petition untimely.[1] Nedd fails to demonstrate any entitlement to relief under Rule 60(b). Accordingly, Nedd's Second Rule 60(b) Motion (ECF No. 44) will be DENIED. A certificate of appealability will be DENIED.

An appropriate Order shall issue.

/s/
John A. Gibney, Jr.
United States District Judge

Date: 26 October 2020
Richmond, Virginia

[1] Nedd contends that this Court lacked jurisdiction because Respondent did not file his response pursuant to Federal Rule of Civil Procedure 12(b)(6). Pursuant to the federal habeas rules, Respondent's Motion to Dismiss and Rule 5 Answer and Rule 5 Response were the appropriate filings. *See* Rules Governing Section 2254 Cases in the United States District Courts Rule 5.