

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO: 05-23260-CIV-GOLD/WHITE

ELADIO ALBERTO MUNOZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER ADOPTING IN PART REPORT OF MAGISTRATE JUDGE [DE 80];
DENYING MOTION FOR RESUBMITTING MOTION [DE 78]; CLOSING CASE

THIS CAUSE is before the Court on Magistrate Judge Patrick A. White's Report [DE 80] on Plaintiff's Motion for Relief from Final Judgment. On May 27, 2008, I denied Petitioner's habeas petition [DE 63]. Petitioner appealed [DE 65] on August 1, 2008, and on August 4, 2008, Petitioner filed a Motion for Reconsideration [DE 64], which I denied for lack of jurisdiction [DE 68]. On September 11, 2008, Petitioner again filed a Motion for Reconsideration [DE 72], which I denied for lack of jurisdiction [DE 74]. On December 8, 2008, Plaintiff filed a Motion for Resubmitting Motion for Relief from Final Judgment and Motion for Evidentiary Hearing Motion for Declaratory Judgment [DE 78] ("Motion"), seeking relief pursuant to Rule 60(b) and claiming the Eleventh Circuit had relinquished jurisdiction back to this Court. Magistrate Judge White recommends denying the Motion for lack of jurisdiction, and, in the alternative, on the merits.

A review of the Eleventh Circuit docket indicates that the Eleventh Circuit has not relinquished jurisdiction over Petitioner's appeal, but in fact denied Petitioner's Motion for Limited Remand [see DE 78] and is proceeding with the appeal. In fact, the appeal is presently in the briefing stage. As I have instructed Petitioner in the past, "[t]he filing of a notice of appeal generally 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.” *Educ. Credit Mgmt. Corp. V. Mosley*, 494 F.3d 1320, 1328 (11th Cir. 2007) (citing and quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)). This rule applies to motions pursuant to Fed. R. Civ. P. 60(b). See *Wisecup v. James*, 790 F.2d 841 (11th Cir. 2986) (holding that notice of appeal divested district court of jurisdiction and district court could not act on subsequent motion construed as Rule 60(b) motion). Since the Eleventh Circuit has acknowledged receipt of Petitioner’s appeal, is proceeding with the appeal, and contrary to Petitioner’s assertion, has not remanded the case, I do not have jurisdiction to consider the instant Motion. I therefore adopt Magistrate Judge White’s Report in part, and do not reach the merits of Petitioner’s Motion. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Magistrate Judge Patrick A. White’s Report [DE 80] is AFFIRMED AND ADOPTED in PART.
2. Petitioner’s Motion for Resubmitting Motion for Relief from Final Judgment and Motion for Evidentiary Hearing Motion for Declaratory Judgment [DE 78] is DENIED for lack of subject matter jurisdiction.
3. This case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida this 8 day of June, 2009.



THE HONORABLE ALAN S. GOLD
U.S. DISTRICT COURT JUDGE

cc:
U.S. Magistrate Judge Patrick A. White
Counsel of record