

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TERRELL WEST,)	
)	CASE NO. 1:14CV316
Petitioner,)	
)	
v.)	JUDGE BENITA Y. PEARSON
)	
CHRISTOPHER LAROSE,)	
)	<u>MEMORANDUM OF OPINION AND</u>
Respondent.)	<u>ORDER</u> [Resolving ECF Nos. 33, 34]

Pending before the Court are Petitioner's Application for a Certificate of Appealability ([ECF No. 33](#)) and Motion to Appeal *in forma pauperis* ([ECF No. 34](#)). For the following reasons, the Court denies the Application for a Certificate of Appealability, and denies the Motion to Appeal *in forma pauperis* without prejudice to refile in the pending Sixth Circuit case.

I. Application for a Certificate of Appealability ([ECF No. 33](#))

Pro se Petitioner filed a Petition for a Writ of Habeas Corpus pursuant to [28 U.S.C. § 2254](#). [ECF No. 1](#). Respondent filed a Motion to Dismiss. [ECF No. 6](#). The case was referred to Magistrate Judge James R. Knepp, II, who issued a Report recommending that the Court grant Respondent's Motion to Dismiss, as the Petition was time-barred. [ECF No. 20](#). The Court adopted the Report and overruled Petitioner's objections. [ECF No. 24](#). At that time, the Court certified that an appeal from this decision could not be taken in good faith, and there was no basis upon which to issue a certificate of appealability. *Id.* at PageID #: 426.

(1:14CV316)

Petitioner appealed the Court's decision. [ECF No. 26](#). The Sixth Circuit denied his application for a certificate of appealability. [ECF No. 28](#).

Petitioner then filed a Motion for Relief from Judgment Pursuant to [Fed. R. Civ. P. 60\(b\)](#). [ECF No. 29](#). The Court denied the Motion, finding that Petitioner had not demonstrated a basis for relief under [Rule 60\(b\)](#). Petitioner now appeals the Court's decision to deny his [Rule 60\(b\)](#) Motion, arguing that he was denied due process. [ECF No. 33](#).

As the Supreme Court held in [Miller-El v. Cockrell, 537 U.S. 322 \(2003\)](#):

[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a [certificate of appealability]. . . . [U]ntil a [certificate of appealability] has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.

[Id. at 335–36](#). A certificate of appealability is also a prerequisite for a habeas petitioner's appeal of the denial of a [Rule 60\(b\)](#) motion. [United States v. Hardin, 481 F.3d 924, 926 \(6th Cir. 2007\)](#).

A certificate of appealability shall issue “if the applicant has made a substantial showing of the denial of a constitutional right.” [28 U.S.C. § 2253\(c\)\(2\)](#). If the district court denied the habeas petition on the merits, then the applicant must show that “reasonable jurists could debate whether” it “should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#) (internal quotation marks omitted). If the district court denied the petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a certificate of appealability should issue when the applicant shows that jurists of reason would find debatable

(1:14CV316)

(1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the district court was correct in its procedural ruling. *Id.*

In this case, the Court denied Petitioner's claims on both substantive and procedural grounds. The Court determined that Petitioner was time-barred from bringing a claim under [Rule 60\(b\)\(1\)](#), [60\(b\)\(2\)](#), and [60\(b\)\(3\)](#), and that he had not established grounds for relief under [Rule 60\(b\)\(4\)](#), [60\(b\)\(5\)](#), or [60\(b\)\(6\)](#). [ECF No. 31](#).

Petitioner's application for a certificate of appealability largely reiterates arguments made in his previous filings, and he has not "made a substantial showing of the denial of a constitutional right" or demonstrated that reasonable jurists could debate whether his claim should have been resolved differently. There is no debate that his [Rule 60\(b\)\(4\)](#), [\(5\)](#), and [\(6\)](#) claims were properly denied. There is no evidence that the Court's judgment was void, warranting relief under [Rule 60\(b\)\(4\)](#), that the judgment has been satisfied, released or discharged to justify relief under [Rule 60\(b\)\(5\)](#), or some other basis for relief under [Rule 60\(b\)\(6\)](#). Nor has Petitioner demonstrated reasonable debate over the resolution of his [Rule 60\(b\)\(1\)](#), [\(2\)](#), or [\(3\)](#) claims. Even if Petitioner could show a valid claim of the denial of a constitutional right, there is no dispute that Petitioner's claims for relief under [Rules 60\(b\)\(1\)](#), [\(2\)](#), or [\(3\)](#) were time-barred.

For these reasons, the Court denies Petitioner's application for a certificate of appealability.

(1:14CV316)

II. Motion to Appeal *in forma pauperis* ([ECF No. 34](#))

Petitioner's Motion to Appeal Motion to Appeal *in forma pauperis* ([ECR No. 34](#)) is denied without prejudice to refile in Case No. 17-3312 pending in the Sixth Circuit.

III. Conclusion

For the foregoing reasons, the Court denies the Application for a Certificate of Appealability and denies the Motion to Appeal *in forma pauperis* without prejudice to refile in the pending Sixth Circuit case.

IT IS SO ORDERED.

May 19, 2017
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge