

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN RHODES, individually and :
on behalf of himself and all :
others similarly situated, :
: Civil Action No.
Plaintiffs, : 1:91-CV-2908-ODE
:
v. :
:
JOHN SEAY, individually and :
in his official capacity as :
Sheriff of Cherokee County, :
Georgia and Cherokee County, :
:
Defendants. :

RESPONSE

Wright, Miller, and Kane, Federal Practice and
Procedure §2866 point out that F.R.C.P. 60 (b) has its own
time limits. At the very least, all motions must be made
within a reasonable time.¹

This is clearly a case under 60 (b) (5) or (b) (6):

it is no longer equitable that the judgment have
post-petition applications

F.R.C.P. 60 (b) (5):

or any other reason justifying relief from the
operation of the judgment.

¹ Unless the judgment is void, which this judgment is not.
Morales Feliciano v. Rullan, 378 F.3d 42(1st Cir. 2004).

R.R.C.P. 60 (b) (6):

The problem is that the motion in this case is completely untimely. See cases cited at footnote 9 of § 2866 in the bound volume and pocket part. See generally R.C. by Alabama Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 701 (M.D. Ala. 1997)

18 U.S.C. § 3626 did not amend F.C.R.P. 60 (b) and can be read consistently with it. See Komyatti v. Bayh, 96 F.3d 955, 962 and fn. 8 (7th Cir. 1996); Hadix v. Caruso, 2006 W.L. 1361415 (W.D. Mich. 2006). cf. United States v. Michigan, 989 F. Supp. 853, 858-859 (W.D. Mich. 1996). See also, Williams v. Edwards, 87 F.3d 126 fn. 21 (5th Cir 1996).

On its face 18 U.S.C. §3626 (b) provides time limits for when a termination of relief might be filed. In this case, it would be 2 years after the Act was enacted in 1996. Consistent with 3626(b), the time to file a F.R.C.P. 60 (b) (5) or (6) motion could not be untimely until after 1998.

In other words, these defendants have had nine years to bring an action to terminate relief or vacate the judgment. Mr. Garrison has been Sheriff since before the passage of 18 U.S.C. § 3626 (b) and Cherokee County has been in existence before them.

There is not one sentence in the P.L.R.A. that allows a defendant to wait nine years after he could have filed a motion under F.R.C.P. 60 (b) (5) or 60 (b) (6). Defendants themselves suggest no reason for the wait.

The motion is untimely and should be dismissed.²

Respectfully Submitted,

_____/s/
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² Plaintiffs request an evidentiary hearing on the merits should the court deny this motion. See Cason v. Seckinger 231 F.3d 777 (11th Cir. 2000). Moreover, given the thirty days before the stay kicks in, the 30 day stay provision of 18 U.S.C. §3626 surely violates due process. Compare Miller v. French, 530 U.S. 327, 350 (2000). (Question left open).

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CERTIFICATE OF SERVICE

This is to certify that I have electronically filed the foregoing **RESPONSE** electronically with the clerk of the court and by the U.S. Postal Service, with appropriate first-class postage affixed, and have served the said document via the U.S. Postal Service, with proper postage affixed, to the following:

Michelle J. Hirsch
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This 5th day of March, 2007.

_____/s/
Ralph Goldberg
Georgia Bar No. 299475