

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RODNEY CARSON,

Petitioner,

CASE NO. 2:07-cv-00375
JUDGE SARGUS
MAGISTRATE JUDGE ABEL

v.

STUART HUDSON, Warden,

Respondent.

OPINION AND ORDER

On January 5, 2009, the Magistrate Judge issued a *Report and Recommendation* recommending dismissal of the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The Court granted petitioner's request for an extension of time until February 15, 2009, to file his objections. No objections were filed. On February 25, 2009, final judgment was entered dismissing the instant habeas corpus petition. Petitioner now has filed, on March 23, 2009, a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) requesting the Court to vacate final judgment dismissing his habeas corpus petition without consideration of his objections. Doc. No. 52. For the reasons that follow, petitioner's motion for relief from judgment, Doc. No. 52, is **DENIED**.

Petitioner alleges that he placed his objections with prison officials for mailing on February 13, 2009, and that, through no fault of his own, his objections were never filed. In support of this allegation, petitioner has attached what purports to be a copy of a withdrawal slip for postage from his prison account indicating that 51 cents was withdrawn from his account on February 18, 2009, for legal mail. He has also attached a

certification of legal mail sent by him from the prison, which indicates only that he placed objections with prison officials for mailing on March 13, 2009. Those objections were mailed by prison staff on March 18, 2009. *See Exhibits to Motion.*

Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Because petitioner does not attempt to raise any additional claims in his motion for reconsideration, but alleges that due to circumstances beyond his control, his timely mailed objections to the Magistrate Judge's *Report and Recommendation* were not considered, this Court therefore concludes that petitioner's motion does not constitute a successive petition. *See Gonzalez v. Crosby*, 545 U.S. 524 (2005).

Petitioner's failure to file timely objections appears to have been the result of his carelessness or neglect. *See Williams v. Meyer*, 346 F.3d 607, 613 (6th Cir. 2003).

In deciding whether relief is warranted, three factors are

relevant: (1) whether the party seeking relief is culpable; (2) whether the party opposing relief will be prejudiced; and (3) whether the party seeking relief has a meritorious claim or defense. *Id.* at 845. Culpability is “framed” by the specific language of the rule; *i.e.*, a party demonstrates a lack of culpability by demonstrating “mistake, inadvertence, surprise, or excusable neglect.” *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir.1992).

Id., at 613. Petitioner states that he placed his objections with prison officials for mailing on February 13, 2009; however, this allegation is without support. The affidavit submitted by petitioner from Mary Miner indicates that she works at the prison where petitioner is incarcerated and receives and logs all outgoing and incoming mail relating to legal filings by inmates; however, Miner indicates she received petitioner’s objections on March 13, 2009 – not February 13, 2009 – and mailed them on March 18, 2009, long after his objections were due. *See Exhibits to Motion*. Notably, the certification of prison mail by Miner does not indicate that petitioner placed any legal mail with prison officials during the month of February, although apparently he withdrew postage for mailing on February 18, 2009. *See id.* Further, to date the Court has not received the objections which petitioner purportedly placed with prison officials for mailing some time in February.

A party's conduct is culpable if it “display[s] either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings.” *Amernational Indus. v. Action-Tunggram, Inc.*, 925 F.2d 970, 978 (6th Cir.1991) (quoting *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391 (6th Cir.1987)).

Id.; *see also Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir.1980); *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir.2002), citing *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490

(6th Cir. 2000).


The courts have defined "neglect" to include " 'late filings caused by mistake, inadvertence, or carelessness, as well as intervening circumstances beyond the party's control.' " [*Jinks v. Allied Signal, Inc.*, 250 F.3d 381, 386 (6t Cir.2001)] (quoting *Pioneer Invest. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Although Rule 60(b)(1) does not define the term "excusable neglect," the courts have determined the existence of excusable neglect by making an equitable determination based upon the following factors: "(1) the danger of prejudice to the other party, (2) the length of delay, (3) its potential impact on judicial proceedings, (4) the reason for the delay, and (5) whether the movant acted in good faith." *Id.* (citing *Pioneer*, 507 U.S. at 395).

Burley v. Bosch Americas Corporation, 75 Fed. Appx. 329, 333, unpublished, 2003 WL 22025030 (6th Cir. August 27, 2003).

The record indicates that, approximately one month after his objections were due, petitioner placed his objections with prison officials for mailing. His explanation for this delay is without record support and this Court therefore is unable to conclude that petitioner's delay is in good faith. Further, none of petitioner's objections appear to be meritorious. See *Williams v. Meyers, supra*, at 346 F.3d at 614.

In view of the foregoing, petitioner's motion for reconsideration of final judgment and request for consideration of his objections to the *Report and Recommendation*, Doc. No. 52, is DENIED.

IT IS SO ORDERED.

 3-28-2009
EDMUND A. SARGUS, JR.
United States District Judge