

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

STEPHEN R. FEGAN, 1:08-cv-01140-DLB (HC)

Petitioner, ORDER DISREGARDING PETITIONER'S MOTION FOR DISCOVERY AND DENYING MOTION FOR RECONSIDERATION

Warden, California [Dues: 7, 8]

### Respondent.

On August 25, 2008, the instant petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 was dismissed, without prejudice, as successive.<sup>1</sup> (Court Doc. 5.)

On August 29, 2008, Petitioner filed a motion for discovery and motion for reconsideration. (Court Docs. 7, 8.) On September 5, 2008, Petitioner filed “Objections to Magistrates Ruling and Dismissal.” (Court Doc. 9.)

In his motion for reconsideration, Petitioner argues that his motion to subpoena records from a pretrial hearing is an issue never raised before this Court and will demonstrate that his constitutional rights were violated at his criminal trial.

In his objections, Petitioner continues to argue that the current claims have never been presented or considered by this Court and it is therefore not a successive petition. The Court construes Petitioner’s motions for reconsideration as filed under Rule 60(b) of the Federal Rules

<sup>1</sup> Pursuant to 28 U.S.C. § 636(c)(1), Petitioner consented to the jurisdiction of the United States Magistrate Judge. (Court Doc. 4.)

of Civil Procedure, which governs the reconsideration of final orders of the district court.

The rule permits a district court to relieve a party from a final order or judgment on the grounds of: “(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 . . . of an adverse party; (4) the judgement is void; (5) the judgment has been satisfied . . . ; or (6) any other reason justifying relief from the operation of the judgment.” Fed.R.Civ.P. 60(b). The motion for reconsideration must be made within a reasonable time, in any event, “not more than one year after the judgment, order, or proceeding was entered or taken.” Id.

Upon review of Petitioner’s motion for discovery, it is clear that he has failed to meet the requisite showing under 28 U.S.C. § 2244 (b)(2)(B) (a recognized exception to the bar against new claims being raised in a second or successive petition is made for the discovery of a factual predicate that could not have been previously discovered by due diligence and the facts underlying the claim, if proven in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder could have found the prisoner guilty of the underlying offense).

Petitioner merely requests that the Court issue a subpoena the transcripts and/or affidavits of a pretrial hearing that took place sometime between October 23, 1995 and November 7, 1995, before his trial began on November 14, 1995. (Motion Discovery, at 1.) Petitioner simply fails to make any showing that the factual predicate for his claim could not have been discovered previously through the exercise of due diligence or that but for the alleged constitutional error no reasonable factfinder would have found him guilty. Accordingly, Petitioner presents no basis for the Court to reconsider its August 25, 2008, order dismissing the instant petition without prejudice as successive, and his motion is DENIED.

IT IS SO ORDERED.

**Dated: February 9, 2009**

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE