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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANTHONY LEE CORLEY,)	1:09-cv-01607-SKO-HC
)	
Petitioner,	)	ORDER DIRECTING THE SUBSTITUTION
	)	OF RESPONDENT MATTHEW CATE IN
v.	)	PLACE OF FORMER RESPONDENT C.
	)	DICKINSON PURSUANT TO FED. R.
	)	CIV. P. 25(d)
MATTHEW CATE, Secretary of the)	
California Department of	)	ORDER DIRECTING RESPONDENT TO
Corrections and	)	LODGE ADDITIONAL RECORDS AND TO
Rehabilitation,	)	FILE A SUPPLEMENTAL BRIEF
	)	REGARDING THE MOTION TO DISMISS
Respondent.	)	(Doc. 15) NO LATER THAN THIRTY
	)	DAYS AFTER THE DATE OF SERVICE OF
	)	THIS ORDER

ORDER PERMITTING PETITIONER TO
FILE A SUPPLEMENTAL RESPONSE NO
LATER THAN THIRTY DAYS AFTER
RESPONDENT'S SERVICE OF THE
SUPPLEMENTAL BRIEF ON PETITIONER

ORDER DENYING PETITIONER'S MOTION
FOR RECONSIDERATION OF HIS MOTION
FOR THE APPOINTMENT OF COUNSEL
(DOCS. 8, 6, 2)

Plaintiff is a state prisoner proceeding pro se and in forma
pauperis with a petition for writ of habeas corpus pursuant to
28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties
have consented to the jurisdiction of the United States

1 Magistrate Judge to conduct all further proceedings in the case,
2 including the entry of final judgment, by manifesting their
3 consent in writings signed by the parties or their
4 representatives and filed by Petitioner on September 21, 2009,
5 and on behalf of Respondent on February 10, 2010.

6 I. Substitution of Respondent Matthew Cate

7 In connection with a motion to dismiss the action for
8 untimeliness filed on March 9, 2010 (doc. 15 at 1, n. 1),
9 Respondent requested that the Court substitute Matthew Cate,
10 Secretary of the California Department of Corrections and
11 Rehabilitation (CDCR), as Respondent in this action. The request
12 is unopposed.

13 Respondent represented that Petitioner is currently
14 incarcerated out of state and that thus, the Secretary of the
15 CDCR would be the appropriate respondent in this action. (Id.)
16 Respondent requested that the substitution occur pursuant to Fed.
17 R. Civ. P. 25(d), which provides that a court may at any time
18 order substitution of a public officer who is a party in an
19 official capacity whose predecessor dies, resigns, or otherwise
20 ceases to hold office.

21 Title 28 U.S.C. § 2242 provides that a petition for writ of
22 habeas corpus shall allege the name of the person who has custody
23 over the applicant. Rule 2(a) of the Rules Governing Section
24 2254 Cases in the District Courts (Habeas Rules) provides that if
25 the petitioner is currently in custody under a state-court
26 judgment, the petition must name as respondent the state officer
27 who has custody. A failure to name the proper respondent
28 destroys personal jurisdiction. Stanley v. California Supreme

1 Court, 21 F.3d 359, 360 (9th Cir. 1994).

2 Although petitions brought by federal prisoners must be
3 filed in the district of confinement, petitions brought by
4 prisoners in custody under a judgment and sentence of a state
5 court of a state which, as California, contains two or more
6 federal judicial districts, are subject to the terms of 28 U.S.C.
7 § 2241(d), which expressly 1) permits a state prisoner to file a
8 petition in either the district where the person is in custody or
9 in the district in which the state court was held which convicted
10 and sentenced the prisoner, and 2) vests concurrent jurisdiction
11 in both courts. Braden v. 30th Judicial Circuit Court of
12 Kentucky, 410 U.S. 484 (1973) (state prisoner may bring petition
13 in the federal district where he is confined or in the federal
14 district where the sentencing court is located); see, Ortiz-
15 Sandoval v. Gomez, 81 F.3d 891, 894-95 (9th Cir. 1996).

16 Here, the petition, in which Petitioner challenges
17 convictions suffered in Stanislaus County, was transferred to
18 this district, in which the state court was located that
19 convicted and sentenced Petitioner. Thus, the Court obtained
20 personal jurisdiction over the Respondent.

21 The proper respondent to a habeas petition is the person who
22 has custody over the petitioner. 28 U.S.C. §§ 2242, 2243. The
23 statutes contemplate a proceeding against a person who has the
24 immediate custody of the prisoner and the power to produce the
25 body of the prisoner. Rumsfeld v. Padilla, 542 U.S. 426, 434-35
26 (2004). The Habeas Rules do not expressly specify the warden of
27 the petitioner's custodial institution as the proper respondent;
28 however, the Advisory Committee Note to Habeas Rule 2 indicates

1 that the warden and the chief officer in charge of the state
2 penal institutions are appropriately considered as the state
3 officer having custody. It has been held that naming the
4 California Director of Corrections in place of the warden of the
5 institution where a petitioner is housed does not deprive the
6 court of personal jurisdiction over the respondent where the
7 petitioner is a state prisoner bringing a challenge to a
8 conviction sustained within the jurisdiction of the California
9 CDC. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894-95 (9th Cir.
10 1996). Whether a state official has custody of a prisoner and
11 has the power to produce a prisoner depends in part upon the
12 state law governing the penal system of the state in question.
13 Id. at 895. In Ortiz-Sandoval v. Gomez, the court found
14 significant the fact that both the warden of a California prison
15 and California's Director of Corrections had the power to produce
16 the prisoner, both might receive service of process, and the laws
17 of the state put the custody of the prisoner in the director.
18 The court concluded that under those circumstances, in cases
19 where a prisoner has been transferred or where his immediate
20 custodian has otherwise been put in doubt, the Director of
21 Corrections serves as an effective respondent and eliminates
22 procedural roadblocks to resolution on the merits. Id. at 896.

23 As of July 1, 2005, Cal. Pen. Code § 5050 abolished the
24 office of the Director of Corrections and provided that any
25 reference to the Director of Corrections in any code refers to
26 the Secretary of the CDCR.

27 The Court therefore concludes that Matthew Cate, Secretary
28 of the CDCR, is an appropriate respondent in this action, and

1 that pursuant to Fed. R. Civ. P. 25(d), he should be substituted
2 in place of C. Dickinson.

3 II. Supplemental Input regarding the Pending Motion
4 to Dismiss

5 On May 9, 2010, Respondent filed a motion to dismiss this
6 action for untimeliness. The Court has reviewed the papers
7 submitted in support of the motion and notes that lodged document
8 number 8, an order of the Stanislaus County Superior Court dated
9 January 3, 2007, refers to the Stanislaus court's having denied a
10 previous writ on November 15, 2006, and expressly refers to the
11 previous decision of that date. The Court has reviewed the
12 remaining papers lodged in support of the motion and cannot
13 locate the previous petition for writ or any decision of the
14 Stanislaus County Superior Court with respect to that petition.

15 It appears that in order for the Court fully to consider the
16 issues pertinent to the motion to dismiss, the earlier petition
17 and the ruling on the petition must be lodged with this Court.

18 Further, both Respondent and Petitioner will be given an
19 opportunity to file additional briefing concerning the
20 significance of the missing proceedings and the precise effect,
21 if any, on the computation of the running of the statute of
22 limitations.

23 III. Petitioner's Motion to Reconsider His Motion
24 to Appoint Counsel

25 On July 9, 2009, Petitioner filed a motion for the
26 appointment of counsel (doc. 2) on the grounds that he was unable
27 to afford to employ counsel, he was unschooled in the law and
28 unable to comply with unspecified processes and rules of the
Court, and he wanted to avoid dismissal of his petition for

1 technical defects. On September 15, 2009, the Court denied
2 Petitioner's motion on the grounds that the interests of justice
3 did not merit appointment based on Petitioner's lack of legal
4 training (doc. 6).

5 On September 28, 2009, Petitioner filed a motion for
6 reconsideration of his motion for counsel (doc. 8). He argued
7 that he should be given counsel because he had raised multiple
8 issues in the petition concerning the alleged ineffectiveness of
9 his trial counsel in connection with not only the proceedings
10 leading up to Petitioner's guilty pleas but also the sentence
11 imposed. (Doc. 8 at 1, 4, 7.)

12 A. Standards for Appointment of Counsel

13 There currently exists no absolute right to appointment of
14 counsel in habeas proceedings. See e.g., Anderson v. Heinze, 258
15 F.2d 479, 481 (9th Cir.), cert. denied, 358 U.S. 889 (1958);
16 Mitchell v. Wyrick, 727 F.2d 773 (8th Cir.), cert. denied, 469
17 U.S. 823 (1984).

18 A Magistrate Judge may appoint counsel at any stage of a
19 habeas corpus proceeding if the interests of justice require it.
20 18 U.S.C. § 3006A; Rule 8(c) of the Rules Governing Section 2254
21 Cases. A district court evaluates the likelihood of a
22 petitioner's success on the merits and the ability of a
23 petitioner to articulate his claims pro se in light of the
24 complexity of the legal issues involved. Weygandt v. Look, 718
25 F.2d 952, 954 (9th Cir. 1983).

26 B. Relief pursuant to Fed. R. Civ. P. 59(e)

27 Motions for reconsideration may be considered pursuant to
28 the standards of Fed. R. Civ. P. 59(e) or 60(b). United States

1 v. Westlands Water Dist., 134 F.Supp.2d 1111, 1130 (E.D. Cal.
2 2001).

3 Petitioner does not appear to state grounds sufficient to
4 warrant relief pursuant to Fed. R. Civ. P. 59(e), which is
5 appropriate when there are highly unusual circumstances, the
6 district court is presented with newly discovered evidence, the
7 district court committed clear error, or a change in controlling
8 law intervenes. School Dist. No. 1J, Multnomah County, Oregon v.
9 Acands, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). To avoid being
10 frivolous, such a motion must provide a valid ground for
11 reconsideration. See, MCIC Indemnity Corp. v. Weisman, 803 F.2d
12 500, 505 (9th Cir. 1986). A motion to alter or amend a judgment
13 pursuant to Rule 59(e) must be filed no later than twenty-eight
14 (28) days after the entry of the judgment. Fed. R. Civ. P.
15 59(e).

16 Here, there has been no demonstration of unusual
17 circumstances, newly discovered evidence, or intervening change
18 in controlling law. The denial of Petitioner's motion was not
19 clearly erroneous; Petitioner's alleged denial of a right to
20 counsel at a point in criminal proceedings when he had a
21 constitutional right to counsel does not bear upon the likelihood
22 of his success in this proceeding, in which it has not yet been
23 determined whether an evidentiary hearing will take place. There
24 is no showing that the interests of justice require the
25 appointment of counsel.

26 B. Relief pursuant to Fed. R. Civ. P. 60

27 Federal Rule of Civil Procedure 60(b) governs the
28 reconsideration of final orders of the district court. The rule

1 permits a district court to relieve a party from a final order or
2 judgment on grounds including but not limited to 1) mistake,
3 inadvertence, surprise, or excusable neglect; 2) newly discovered
4 evidence; 3) fraud, misrepresentation, or misconduct by an
5 opposing party; or 4) any other reason justifying relief from the
6 operation of the judgment. Fed. R. Civ. P. 60(b). The motion for
7 reconsideration must be made within a reasonable time, and in
8 some instances, within one year after entry of the order. Fed.
9 R. Civ. P. 60(c).

10 Rule 60(b) generally applies to habeas corpus proceedings.
11 See, Gonzalez v. Crosby, 545 U.S. 524, 530-36 (2005). Although
12 the Court has discretion to reconsider and vacate a prior order,
13 Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994), motions for
14 reconsideration are disfavored. A party seeking reconsideration
15 must show more than a disagreement with the Court's decision and
16 offer more than a restatement of the cases and arguments
17 considered by the Court before rendering the original decision.
18 United States v. Westlands Water Dist., 134 F.Supp.2d 1111, 1131
19 (E.D. Cal. 2001). Motions to reconsider pursuant to Rule
20 60(b)(1) are committed to the discretion of the trial court,
21 Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983), which can
22 reconsider interlocutory orders and redetermine applications
23 because of an intervening change in controlling law, the
24 availability of new evidence or an expanded factual record, or
25 the need to correct a clear error or prevent manifest injustice.
26 Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656,
27 665 (E.D.Cal. 1986), aff'd in part and rev'd in part on other
28 grounds, 828 F.2d 514 (9th Cir. 1987).

1 Local Rule 230(j) provides that whenever any motion has been
2 granted or denied in whole or in part, and a subsequent motion
3 for reconsideration is made upon the same or any alleged
4 different set of facts, counsel shall present to the Judge or
5 Magistrate Judge to whom such subsequent motion is made an
6 affidavit or brief, as appropriate, setting forth the material
7 facts and circumstances surrounding each motion for which
8 reconsideration is sought, including information concerning the
9 previous judge and decision, what new or different facts or
10 circumstances are claimed to exist which did not exist or were
11 not shown upon such prior motion, what other grounds exist for
12 the motion, and why the facts or circumstances were not shown at
13 the time of the prior motion.

14 Here, Petitioner has not shown any facts or law that reflect
15 any abuse of discretion, clear error, or manifest injustice.

16 The Court therefore will deny Petitioner's motion for
17 reconsideration.

18 IV. Disposition

19 Accordingly, it is ORDERED that:

20 1) The request of Respondent C. Dickinson to substitute
21 Matthew Cate, Secretary of the California Department of
22 Corrections and Rehabilitation, is GRANTED, and Matthew Cate,
23 Secretary of the California Department of Corrections and
24 Rehabilitation, is SUBSTITUTED as Respondent in this action;

25 2) Respondent is DIRECTED to lodge no later than thirty (30)
26 days after the date of service of this order the decision of the
27 Stanislaus County Superior Court dated November 15, 2006, on
28 Petitioner's petition for writ previously filed in that court,

1 and the petition addressed by the decision of November 15, 2006;

2 3) Respondent is DIRECTED to file no later than thirty (30)
3 days after the date of service of this order a supplemental brief
4 concerning the legal effect of the proceedings relating to the
5 Stanislaus County Superior Court's decision of November 15, 2006,
6 on the issues raised in the motion to dismiss, including but not
7 limited to the computation of the running of the statute of
8 limitations;

9 4) Petitioner may FILE a supplemental response no later than
10 thirty (30) days after the date of Respondent's service of the
11 supplemental filings on Petitioner; and

12 5) Petitioner's motion for reconsideration of Petitioner's
13 motion for the appointment of counsel is DENIED.

14
15 IT IS SO ORDERED.

16 **Dated: May 11, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE