

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 FOR THE EASTERN DISTRICT OF CALIFORNIA  
6

7 DENNIS NAPIER,

8 Petitioner,

9 v.

10 UNITED STATES OF AMERICA,

11 Respondent.  
12

1:10-cv-00040 OWW GSA

MEMORANDUM DECISION DENYING  
PETITIONER'S MOTION FOR NEW  
TRIAL AND MOTION TO VACATE  
JUDGMENT (DOC. 65).  
13

14 I. INTRODUCTION/BACKGROUND

15 Before the court for decision is Petitioner Dennis  
16 Napier's motion for new trial, or, in the alternative,  
17 motion to vacate the judgment. Doc. 65.

18 On January 30, 2009, special agents with the Bureau  
19 of Alcohol, Tobacco, Firearms and Explosives ("ATF"),  
20 with the assistance of officers from the Clovis Police  
21 Department, executed a federal search warrant at  
22 petitioner's residence in Clovis, California. During the  
23 search, agents located and seized ten (10) firearms.<sup>1</sup>  
24

25 <sup>1</sup> The following firearms were seized: (1) Rohm, Model 57, .44  
26 caliber, revolver, bearing serial number: LG5891; (2) Sturm, Ruger  
27 &Co., Inc., Model P85, 9mm, pistol, bearing serial number: 300-  
28 51055; (3) Mossberg, Model 500, 12 gauge, shotgun, bearing serial  
number: K500339; (4) Winchester, Model 94, 30-30 caliber, rifle,  
bearing serial number L203728; (5) New England Firearms Co., Pardner  
Model, 12 gauge, shotgun, bearing serial number: ND259016; (6)  
Marlin, Model 60, .22 caliber rifle, bearing serial number:16394321;

1 The seized firearms were accepted into the ATF system on  
2 February 2, 2009 and a notice was sent to movant on  
3 February 23, 2009.

4 Petitioner filed a claim, which was received by ATF  
5 on March 25, 2009. Doc. 1, Ex. A. On June 26, 2009,  
6 petitioner filed a motion for return of property pursuant  
7 to Federal Rule of Civil Procedure Rule 41(g). Doc. 1.  
8 On January 8, 2010, the Magistrate Judge filed Findings  
9 and Recommendations recommending denial of Petitioner's  
10 motion for return of property. Doc. 13. Petitioner  
11 filed objections on January 12, 2010, January 14, 2010,  
12 January 19, 2010 and February 22, 2010. Docs. 15, 20,  
13 19 & 25.

14  
15  
16 On July 30, 2010, the United States filed a brief in  
17 support of its request that the District Court adopt the  
18 Findings and Recommendations. Doc. 41. Petitioner filed  
19 an opposition on August 30, 2010. Doc. 43. On March 24,  
20 2011, after a number of continuances and a hearing on  
21 February 28, 2011, the district court denied the  
22 petitioner's motion for return of property by adopting  
23 the Magistrate Judge's Findings and Recommendations, but  
24

25  
26  
27  
28  

---

(7) Russian Model 191/30, 7.62 x54R, rifle, bearing serial number 9130102189; (8) Savage, Model Stevens, .410 gauge, shotgun, bearing no serial number; (9) Browning Arms, Model Buckmark, .22 caliber, pistol, bearing serial number: 655NZ16161; and (10) Hi-Point, Model C9, 9mm, pistol, bearing serial number: P1426321.

1 stayed destruction of the property pending final  
2 determination by the appellate court. Doc. 64.

3 On May 23, 2011, Petitioner filed a "Motion for New  
4 Trial[/] Motion to Vacate the Judgment." Doc. 65. The  
5 United States filed an opposition. Doc. 68, filed June  
6 7, 2011. Petitioner filed a reply. Doc. 69, filed June  
7 14, 2011.  
8

## 9 II. DISCUSSION

### 10 A. Rule 59 Motion Untimely.

11 A motion for new trial is governed by Federal Rule of  
12 Civil Procedure 59, which provides that "[a] motion for  
13 new trial must be filed no later than 28 days after entry  
14 of judgment." Fed. R. Civ. P. 59(b). A motion to alter  
15 or amend a judgment brought under Rule 59(e) must  
16 likewise be "filed no later than 28 days after the entry  
17 of judgment." Here, the Order adopting the Magistrate  
18 Judges' Findings and Recommendations was entered March  
19 24, 2011. Doc. 64. Plaintiffs' motion for new trial,  
20 filed May 23, 2011, even if construed as a motion to  
21 alter or amend judgment under Rule 59(e), is DENIED as  
22 untimely.  
23  
24

### 25 B. Rule 60.

26 Plaintiffs' reply specifically invokes Rule 60, which  
27 provides, in pertinent part:  
28

1 (a) Corrections Based on Clerical Mistakes;  
2 Oversights and Omissions.

3 The court may correct a clerical mistake or a  
4 mistake arising from oversight or omission  
5 whenever one is found in a judgment, order, or  
6 other part of the record. The court may do so on  
7 motion or on its own, with or without notice.  
8 But after an appeal has been docketed in the  
9 appellate court and while it is pending, such a  
10 mistake may be corrected only with the appellate  
11 court's leave.

12 (b) Grounds for Relief from a Final Judgment,  
13 Order, or Proceeding.

14 On motion and just terms, the court may relieve  
15 a party or its legal representative from a final  
16 judgment, order, or proceeding for the following  
17 reasons:

18 (1) mistake, inadvertence, surprise, or  
19 excusable neglect;

20 (2) newly discovered evidence that, with  
21 reasonable diligence, could not have been  
22 discovered in time to move for a new trial  
23 under Rule 59(b);

24 (3) fraud (whether previously called  
25 intrinsic or extrinsic), misrepresentation,  
26 or misconduct by an opposing party;

27 (4) the judgment is void;

28 (5) the judgment has been satisfied,  
released, or discharged; it is based on an  
earlier judgment that has been reversed or  
vacated; or applying it prospectively is no  
longer equitable; or

(6) any other reason that justifies relief.

Rule 60(a), which provides for corrections of  
clerical mistakes, is inapplicable here, as Petitioner  
claims substantive errors in the final judgment.

Rule 60(b) provides for reconsideration: "only upon a  
showing of (1) mistake, surprise, or excusable neglect;

1 (2) newly discovered evidence; (3) fraud; (4) a void  
2 judgment; (5) a satisfied or discharged judgment; or (6)  
3 'extraordinary circumstances' which would justify  
4 relief." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442  
5 (9th Cir. 1991).

6  
7 Petitioner's motion could not plausibly be construed  
8 to argue that the judgment is void or has been satisfied  
9 or discharged. He does not claim "mistake," or  
10 "surprise." He does suggest that he was hindered in  
11 making objections at the February 28, 2011 because the  
12 court was extremely busy, his hearing was delayed, he had  
13 not eaten for 20 hours, and he was suffering from stage  
14 fright. This is arguably an invocation of the "excusable  
15 neglect" basis for relief. Even if, *arguendo*, this  
16 satisfied the excusable neglect standard, Plaintiff fails  
17 to identify arguments he would have raised at the hearing  
18 in the absence of the above-alleged inconveniences.

19  
20 Petitioner also argues that branding him a "felon"  
21 amounted to perpetration of "fraud." As was explained in  
22 both the Findings and Recommendations and the oral  
23 statement of decision adopting the Findings and  
24 Recommendations, even though Petitioner's 1993 felony  
25 assault conviction was set aside and declared a  
26 misdemeanor by the Fresno County Superior Court in 2003,  
27  
28

1 this was erroneous as the offense was a felony based on  
2 the original sentence, and could not be reduced to a  
3 misdemeanor. See Doc. 13 at 3-4; Doc. 61, 2/28/11 Hg.  
4 Tr., at 11-12. It was not improper or "fraud" to  
5 consider Petitioner subject to a firearms restriction.  
6

7 The Federal Court implores Petitioner to seek review  
8 of the state court orders fixing his prior conviction as  
9 a felony. Despite numerous continuances for that  
10 purpose, Plaintiff has not done so. The District Court  
11 has no jurisdiction to obtain or amend the state court  
12 judgment.

13 Petitioner does not claim any additional  
14 extraordinary circumstances that would justify relief  
15 from the judgment. The vast majority of Plaintiffs'  
16 arguments rehash issues already raised, considered, and  
17 ruled upon.  
18

19 Petitioner's motion for relief under Rule 60(b) is  
20 DENIED.  
21

22 C. Request to Set Hearing Re Cross-Motion for  
23 Destruction of Property.

24 The district court stayed the United States' cross-  
25 motion for destruction of property pending the final  
26 determination by an appellate court of petitioner's  
27 motion for return of property. Doc. 64 at 2. The United  
28 States now argues that the time for appeal has passed and

1 requests a hearing on their cross-motion.

2 In a civil case, a notice of appeal must normally be  
3 filed "within 30 days after the judgment or order  
4 appealed from is entered." Fed. R. App. P. 4(a). The  
5 "order" denying Petitioner's motion for return of  
6 property was entered March 24, 2011. Doc. 64. However,  
7 whether that order was "entered" for purposes of the  
8 Appellate Rules is a different question. Appellate Rule  
9 4 provides that whenever Federal Rule of Civil Procedure  
10 58(a) requires the "judgment or order" to be set forth in  
11 a "separate document," the order is not considered  
12 "entered" until "set forth on a separate document" or  
13 "150 days have run from entry of the judgment or order in  
14 the civil docket." Rule 58(a) requires a separate  
15 document for all orders disposing of motions, with the  
16 exception of certain types of motions not relevant here.  
17 As a rule of thumb, a "separate document" should not set  
18 forth the court's reasoning or apply law to the facts.  
19 See *Paddack v. Morris*, 783 F.2d 844, 846 (9th Cir. 1986).  
20 Here, although the order is short, it offers an  
21 "additional reason for adopting the Magistrate Judge's  
22 findings" not set forth in any previous document. This  
23 does not constitute a "separate document." Accordingly,  
24 the order was never "entered" for purposes of Appellate  
25  
26  
27  
28

1 Rule 4. Petitioner has 180 days (150 plus 30) from March  
2 24, 2011 to file his notice of appeal with the Ninth  
3 Circuit Court of Appeals.  
4

5 **III. CONCLUSION**

6 For the reasons set forth above:

7 (1) Petitioner's motion for new trial is DENIED  
8 as untimely.

9 (2) Petitioner's motion to vacate judgment under  
10 Rule 60 is DENIED.

11 (3) The United States' request to set a hearing  
12 on their cross-motion for destruction of  
13 property is DENIED. The stay remains in place  
14 as to that motion.  
15

16 The United States shall submit a proposed form of  
17 order consistent with this memorandum decision within  
18 five (5) days of electronic service.  
19

20 SO ORDERED

21 Dated: June 22, 2011

22 /s/ Oliver W. Wanger  
23 United States District Judge  
24  
25  
26  
27  
28