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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 DENNIS NAPIER,

12 Petitioner,

13 v.

14 UNITED STATES OF AMERICA,

15 Respondent.  
16

1:10-cv-00040 OWW GSA

MEMORANDUM DECISION GRANTING  
UNITED STATES' MOTION FOR  
RECONSIDERATION (DOC. 72).  
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18 A June 22, 2011 memorandum decision denied Petitioner  
19 Dennis Napier's motion for new trial and amendment of  
20 judgment, and denied the United States' cross-motion to  
21 set a hearing date on its motion for destruction of  
22 property. Doc. 71. In denying the United States' cross-  
23 motion, the district court concluded that an order filed  
24 March 24, 2011 was not a separate document within the  
25 meaning of Federal Rule of Civil Procedure 58, and  
26 therefore, Petitioner's time to appeal had yet to expire.  
27 *Id.* at 7-8. The district court reasoned:  
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1 In a civil case, a notice of appeal must  
2 normally be filed "within 30 days after the  
3 judgment or order appealed from is entered."  
4 Fed. R. App. P. 4(a). The "order" denying  
5 Petitioner's motion for return of property was  
6 entered March 24, 2011. Doc. 64. However,  
7 whether that order was "entered" for purposes of  
8 the Appellate Rules is a different question.  
9 Appellate Rule 4 provides that whenever Federal  
10 Rule of Civil Procedure 58(a) requires the  
11 "judgment or order" to be set forth in a  
12 "separate document," the order is not considered  
13 "entered" until "set forth on a separate  
14 document" or "150 days have run from entry of  
15 the judgment or order in the civil docket."  
16 Rule 58(a) requires a separate document for all  
17 orders disposing of motions, with the exception  
18 of certain types of motions not relevant here.  
19 As a rule of thumb, a "separate document" should  
20 not set forth the court's reasoning or apply law  
21 to the facts. See *Paddack v. Morris*, 783 F.2d  
22 844, 846 (9th Cir. 1986). Here, although the  
23 order is short, it offers an "additional reason  
24 for adopting the Magistrate Judge's findings"  
25 not set forth in any previous document. This  
26 does not constitute a "separate document."  
27 Accordingly, the order was never "entered" for  
28 purposes of Appellate Rule 4. Petitioner has  
180 days (150 plus 30) from March 24, 2011 to  
file his notice of appeal with the Ninth Circuit  
Court of Appeals.

19 *Id.*

20 The United States now moves for reconsideration of  
21 this ruling. Doc. 72. Mr. Napier opposes  
22 reconsideration. Doc. 73. The United States relies on  
23 *In re Schimmels*, 85 F.3d 416 (9th Cir. 1996), to argue  
24 that the March 24, 2011 order did satisfy the separate  
25 judgment rule. *Schimmels* set forth the general standard  
26 as follows:  
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1 The separate judgment rule does not always  
2 require the filing of two separate documents. As  
3 [In re Slimick, 928 F.3d 304 (9th Cir. 1990)]  
4 made clear, when a court enters a short order  
5 that clearly constitutes a final decision, that  
6 short order meets the separate judgment rule.  
7 Similarly, if a court grants a summary judgment  
8 without writing an opinion or memorandum, then  
9 the order granting summary judgment is enough to  
10 meet the separate document requirement.

11 [The separate judgment rule] does require  
12 every judgment to be set forth on a separate  
13 document. Appellant, however interprets this  
14 to mean that two documents are required in  
15 all cases. This is unfounded. [The separate  
16 judgment rule] applies where it is uncertain  
17 whether a final judgment has been entered,  
18 as where a trial judge writes an opinion or  
19 memorandum providing only the basis for the  
20 entry of judgment, but containing apparently  
21 directive or dispositive words such as  
22 "defendant's motion for summary judgment is  
23 granted." In such a situation, a judgment  
24 must be set out on a document separate from  
25 the opinion or memorandum.

26 [citations].

27 *Schimmels*, 84 F.3d at 421.

28 In *Schimmels*, the bankruptcy court entered an order  
entitled "Order Granting Summary Judgment," which read,  
in its entirety:

The matter of Debtor's Motion for Summary  
Judgment on the First Amended Complaint to  
Determine Dischargeability filed by the  
[appellants] having come for hearing on December  
2, 1993, Debtors appearing with their counsel,  
Alan R. Smith, Esq., and the [appellants]  
appearing through their counsel, John R. Martz,  
Esq., and it appearing that the [appellants]  
failed to timely respond to the subject Motion,  
said failure not being attributable to excusable  
neglect, and the Court having considered the

1           tardy motion for extension of time filed by the  
2           [appellants] and denying the same, and the Court  
3           having considered the preliminary response filed  
4           by the [appellants] without supporting  
          affidavits, and the Court having considered the  
          arguments of counsel, it is therefore

5           ORDERED that summary judgment is granted in  
6           favor of the Debtors and against the  
7           [appellants] on each of the nine causes of  
8           action as set forth in the First Amended  
          Complaint to Determine Dischargeability filed by  
          the [appellants].

9       *Id.* This order was not followed by an additional  
10       document entering judgment. In response to a subsequent  
11       motion for reconsideration, the bankruptcy court entered  
12       an order entitled "Order Denying Motion for  
13       Reconsideration of Order Granting Debtor's Motion for  
14       Summary Judgment," which read, in its entirety:  
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16           The Court having considered the [appellants']  
17           Motion for Reconsideration of the Court's Order  
18           dated January 4, 1994 granting Debtor's Motion  
19           for Summary Judgment on the [appellants'] First  
20           Amended Complaint to determine dischargeability,  
          the Debtors' opposition thereto, and the Court  
          having heard the arguments of counsel at a  
          hearing on February 23, 1994,

21           IT IS HEREBY ORDERED that the [appellants']  
22           Motion for Reconsideration of the Order dated  
23           January 4, 1994 granting debtors' motion for  
          summary judgment is DENIED.

24       *Id.* at 421-22. Again the bankruptcy court did not docket  
25       an additional document entering judgment. *Id.* at 422.  
26       Appellants filed their notice of appeal one day late and  
27       subsequently argued the second order did start the time  
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1 for filing a notice of appeal because the bankruptcy  
2 court never entered separate judgments as required under  
3 Bankruptcy Rule 9021. *Id.*

4       The Ninth Circuit held that two separate documents  
5 are not always required. Where the lower court files an  
6 extensive opinion explaining its disposition, a separate  
7 order is required. However, where an order is entered  
8 without the filing of an opinion, such as was the case in  
9 *Schimmels*, no separate document is required. "The mere  
10 fact that the order contains a single sentence detailing  
11 the history of the proceedings does not disqualify it as  
12 a separate order." *Id.* As to the first order in  
13 *Schimmels*, the Ninth Circuit emphasized that it was  
14 "clearly intended as the final disposition of the case,  
15 stating: '[I]t is therefore ORDERED that summary judgment  
16 is granted....'" *Id.* "There was no possibility that  
17 appellants would be misled." *Id.* As to the second order  
18 on the motion to reconsider, the Ninth Circuit emphasized  
19 that the "order contains only a one-sentence recitation  
20 of the procedure, documents, and arguments considered by  
21 the court in denying the motion. There is no explanation  
22 of the reasoning of the court. The order clearly  
23 disposes of the motion for reconsideration. There was no  
24 possibility that the appellants would be misled into  
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1 believing that this was not a final order from which the  
2 time for appeal would run." *Id.*

3 Here, the March 24, 2011 ruling included a single  
4 sentence explaining one additional reason for adopting  
5 the Magistrate Judges findings and recommendations never-  
6 before articulated in writing:  
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8 THE COURT FURTHER finds that as an additional  
9 reason for adopting the Magistrate Judge's  
10 findings is that on March 29, 2010, Fresno  
11 County Superior Court Judge Gary Orozco found  
12 that Mr. Napier remained convicted of two felony  
13 violations of California Penal Code Section  
14 245(a)(1).

15 Doc. 64 at 2.

16 The inclusion of this additional reason formed the  
17 basis of the district court's prior decision that the  
18 March 24, 2011 order did not satisfy the separate order  
19 requirement. See *Paddack v. Morris*, 783 F.2d 844, 846  
20 (9th Cir. 1986) (As a rule of thumb, a "separate  
21 document" should not set forth the court's reasoning or  
22 apply law to the facts). *Schimmels* suggests that a more  
23 nuanced analysis is required. The key is whether it is  
24 "uncertain whether a final judgment has been entered,"  
25 *Schimmels*, 85 F.3d at 421. *Schimmels* offers the example  
26 of "where a trial judge writes an opinion or memorandum  
27 providing only the basis for the entry of judgment, but  
28 containing apparently directive or dispositive words such

1 as 'defendant's motion for summary judgment is granted.'"  
2 *Id.* In such a case, a separate order is required.

3 Here, however, the transcript of the hearing that led  
4 to entry the March 24, 2011 order reveals that the "new"  
5 reason included in the March 24, 2011 order was discussed  
6 and included in the district court's oral statement of  
7 decision adopting the magistrate's findings and  
8 recommendations. See 2/28/11 Hrg. Tr. at 7, 14-17  
9 (discussing Judge Orozco's order). Moreover, in  
10 addition to requesting counsel for the United States to  
11 prepare a written order reflecting the oral ruling, the  
12 district court made it absolutely clear that entry of the  
13 order would start to run the time to file an appeal:  
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16 THE COURT: But if you don't, Mr. Napier, file a  
17 notice of appeal now within 30 days and protect  
18 your rights, you are going to lose your rights.  
19 Do you understand?

20 MR. NAPIER: I thought some cases were 60 days.

21 THE COURT: You are not the government. And so I  
22 can't advise you as to what the law is. You need  
23 to look at the Federal Rules of Appellate  
24 Procedure.

25 And all I'm telling you is if you want to have  
26 my ruling reviewed, you need to appeal it to the  
27 Court of Appeal.

28 Do you understand that?

MR. NAPIER: Yes.

*Id.* at 20. In light of *Schimmels*, the combination of the

1 court's oral ruling and the warning given to Petitioner  
2 regarding the filing of an appeal, the subsequent March  
3 24, 2011 satisfies the separate judgment requirement.  
4 The time for appeal has passed.

5 In his opposition, Mr. Napier indicates that he  
6 "believed he had 60 days to appeal since the United  
7 States was a party." Doc. 73 at 4. As quoted above, Mr.  
8 Napier's mistaken belief that the 60-day appeal period  
9 applied to him was brought up at the February 28, 2011  
10 hearing, at which time the district court drew attention  
11 to Mr. Napier's error by explaining that the extended  
12 appeal period applies only to appeals filed by the United  
13 States. In any event, the 60-day window has long since  
14 passed. It also is notable that Mr. Napier indicates in  
15 his opposition that he has yet to pursue any remedies in  
16 state court because he claims that his appointed Federal  
17 Defender warned "that he was just putting the noose  
18 around his neck by going to the State Court referring to  
19 Judge Orozco's order." Doc. 73 at 5.

22 The United States' motion for reconsideration of the  
23 June 2, 2011 order denying its motion to set a hearing on  
24 its motion for destruction of property is GRANTED.

25 Given the equitable circumstances surrounding Mr.  
26 Napier's acquisition of the firearms in question, the  
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1 United States is ordered to show cause on or before  
2 August 19, 2011, why the firearms cannot be sold at  
3 auction with the proceeds being returned to Mr. Napier.  
4 Mr. Napier shall file any response on or before August  
5 22, 2011. The motion shall be heard on August 29, 2011  
6 at 10:00am.  
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9 SO ORDERED  
10 Dated: August 5, 2011

11 /s/ Oliver W. Wanger  
12 United States District Judge  
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