

1 Show Cause why the petition should not be dismissed as untimely, and afforded counsel thirty days
2 within which to file a response. (Doc. 6). Mr. Mitts filed no response.

3 On October 20, 2011, the Magistrate Judge issued Findings and Recommendations to dismiss
4 the petition and gave counsel twenty days within which to file objections. (Doc. 8). Mr. Mitts did not
5 file objections. On November 22, 2011, this Court adopted the Findings and Recommendations,
6 entered judgment, and closed the file. (Docs. 9 & 10).

7 On June 13, 2012, Petitioner, without assistance of his counsel, filed a series of documents,
8 including the instant motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). (Doc. 12). In
9 his motion for relief from judgment, Petitioner made a number of allegations charging Mr. Mitts with
10 egregious negligence and ineffective assistance of counsel in failing to file a timely federal petition.
11 Petitioner alleged, inter alia, that his family retained Mr. Mitts in March 2010 to represent him in
12 Petitioner's habeas corpus proceedings and other related legal matters; that Mr. Mitts did not keep
13 Petitioner and his family apprised of various rulings in state court despite Petitioner's monthly
14 communications with Mr. Mitts; that Petitioner sent Mr. Mitts Petitioner's entire file on or about
15 August 6, 2011 [sic]; that Mr. Mitts filed the original petition in this case on August 9, 2011; that Mr.
16 Mitts did not communicate with Petitioner and Petitioner only learned of this Court's dismissal of the
17 petition when Petitioner's wife discovered that fact on the internet on November 25, 2011. (Doc. 12,
18 pp. 5-6). Petitioner contended that counsel's actions were negligent and entitle Petitioner to equitable
19 tolling under federal law that would make his petition timely despite being filed beyond the one-year
20 limitation period.

21 On October 5, 2012, the Court denied Petitioner's motion for relief. (Doc. 31). Of particular
22 note, the Court rejected Petitioner's claim of actual innocence as well as his claim that Mr. Mitts
23 committed gross attorney negligence in his handling of Petitioner's case, as distinct from ordinary
24 attorney negligence. Petitioner filed a notice of appeal in the United States Court of Appeals, Ninth
25 Circuit, on October 22, 2012. (Doc. 32). On October 28, 2012, the Ninth Circuit granted a certificate
26 of appealability as to certain issues and permitted the appeal to go forward. (Doc. 42).

27 Subsequently, on March 28, 2016, the Ninth Circuit issued an opinion which affirmed in part
28 and reversed in part the decision of this Court. (Doc. 43). The Ninth Circuit affirmed that portion of

1 the judgment regarding actual innocence. Brooks v. Yates, 818 F.3d 532, 533-534 (9th Cir. 2016).
2 However, the appellate court reversed the judgment as to whether Petitioner’s counsel had abandoned
3 him, concluding that Mitts was “grossly negligent in his representation of [Petitioner] *at the time the*
4 *district court ordered [Petitioner] to show cause why his petition should not be dismissed as*
5 *untimely.*” Brooks, 818 F.3d at 534 (Emphasis supplied).

6 The Ninth Circuit pointed out that this Court had focused its inquiry on Mitt’s performance
7 leading up to the habeas petition’s late filing, and determined that, because Mitt’s miscalculation of
8 the filing deadline was only simple attorney negligence, Petitioner was not entitled to equitable tolling.
9 The Court went on to state that

10 “[t]his was not the proper inquiry.

11 …

12 Instead, the proper inquiry is whether ‘extraordinary circumstances prevented [Petitioner] from
13 taking timely action to prevent or correct an erroneous judgment,’ [i.e.], *the relevant judgment*
14 *being the district court’s ultimate dismissal of the petition.*”

15 Brooks, 818 F.3d at 534 (Emphasis supplied).

16 Noting that, “[e]ven where a petitioner is abandoned by counsel, the petitioner must also show
17 that he diligently pursued his rights before relief can be granted,” and because the Court had not made
18 express findings as to Petitioner’s diligence, the Ninth Circuit remanded the case to this Court for the
19 specific purpose of making such findings regarding Petitioner’s diligence or lack thereof. Id. at 535.

20 On April 20, 2016, mandate issued from the Ninth Circuit. On May 9, 2016, counsel for
21 Petitioner entered her appearance. (Doc. 46). On May 16, 2016, the Court ordered the parties to file
22 briefs addressing the issue on remand, i.e., Petitioner’s diligence. (Doc. 48). On July 7, 2016,
23 Respondent filed his brief. (Doc. 50). On July 15, 2016, Petitioner filed his brief with attachments.
(Doc. 51).

24 DISCUSSION

25 A. Requirements For Granting A Rule 60(b) Motion.

26 Federal Rule of Civil Procedure 60(b) governs the reconsideration of final orders of the district
27 court. Rule 60(b) permits a district court to relieve a party from a final order or judgment on grounds
28 of: “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3)

1 fraud . . . of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . or (6)
2 any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b). A
3 motion under Rule 60(b) must be made within a reasonable time, in any event “not more than one year
4 after the judgment, order, or proceeding was entered or taken.” Id.

5 Moreover, when filing a motion for reconsideration, Local Rule 230(j) requires a party to show
6 the “new or different facts or circumstances claimed to exist which did not exist or were not shown
7 upon such prior motion, or what other grounds exist for the motion.” Motions to reconsider are
8 committed to the discretion of the trial court. Combs v. Nick Garin Trucking, 825 F.2d 437, 441
9 (D.C.Cir. 1987); Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (en banc). To succeed, a party
10 must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior
11 decision. See, e.g., Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal.
12 1986), *aff’d in part and rev’d in part on other grounds*, 828 F.2d 514 (9th Cir. 1987).

13 As the Ninth Circuit observed in its opinion, “[G]ross negligence by counsel amounting to
14 ‘virtual abandonment’ can be an ‘extraordinary circumstance’ that justifies [relief under] Rule
15 60(b)(6).” Brooks, 818 F.3d at 534, citing Mackey v. Hoffman, 682 F.3d 1247, 1251 (9th Cir. 2012).

16 B. Analysis.

17 The issue of whether some extraordinary circumstance stood in Petitioner’s way has been
18 answered by the Ninth Circuit’s decision, which concluded that Mr. Mitts had engaged in gross
19 attorney negligence amounting to “virtual abandonment” of his client. The Ninth Circuit remanded
20 the case to this Court for the sole purpose of determining whether Petitioner met the diligence
21 requirement for Rule 60(b) relief.

22 In his brief filed following remand, Respondent states that he “finds no basis to challenge
23 diligence....” (Doc. 50, p. 2). Further, Respondent states that he

24 ...will not task Petitioner to go through the motions to say what is obvious. That is,
25 Respondent will not quarrel with a finding that six and one-half months was a reasonable time
26 for him to accumulate and present the matters that he did present for Rule 60(b)(6) relief, as
part of his effort to make a case that to re-open would not be futile.”

27 (Doc. 50, p. 3).

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2. The October 5, 2012 order denying Petitioner’s motion for relief from judgment (Doc. 31), is VACATED;
3. Petitioner’s motion for relief from judgment dated June 13, 2012 (Doc. 12), is GRANTED; and,
4. The matter is referred back to the U.S. Magistrate Judge assigned to this case for further proceedings.

IT IS SO ORDERED.

Dated: August 9, 2016

/s/ Lawrence J. O’Neill
UNITED STATES CHIEF DISTRICT JUDGE