



1 group of soccer players on their way home from an evening of drinking and dancing. After  
2 Petitioner and his co-defendants peppered the soccer players with a variety of verbal insults, the  
3 interaction escalated into a verbal argument. Ultimately, Petitioner and the co-defendants got into  
4 Castenada's car, backed slowly toward the group of soccer players, and fired into the group. Kevin  
5 Argueta sustained a fatal head wound and died at the scene.

6 In Stanislaus County Superior Court in February 2010, a jury found Petitioner (1) guilty of  
7 second-degree murder, two counts of assault with a firearm, and negligent discharge of a firearm; (2)  
8 not guilty of two attempted murder counts, one count of intentionally shooting at an occupied  
9 vehicle, a gang enhancement appended to the murder charges, and gang participation. The jury  
10 deadlocked on other gang enhancements and seven attempted murder counts. On September 17,  
11 2010, the trial court sentenced Petitioner to a term of 40 years to life in prison.  
12

13 Petitioner appealed the convictions to the California Court of Appeal, Fifth Appellate  
14 District, which affirmed the convictions in all regards on May 31, 2012. The California Supreme  
15 Court summarily denied the appeal on September 12, 2012.  
16

17 On April 15, 2013, Petitioner filed a petition for writ of habeas corpus in this Court. On  
18 September 8, 2016, the Magistrate Judge entered findings and recommended that the Court deny the  
19 petition for writ of habeas corpus and decline to issue a certificate of appealability. The findings and  
20 recommendations provided that either party could file objections within thirty days. Although the  
21 Court twice granted Petitioner's motions for enlargements of time, granting him a total of ninety  
22 days in which to object, its November 16, 2016, order provided that no further extensions would be  
23 granted. Nonetheless, on December 16, 2016, Petitioner again moved for an extension of time. The  
24 Court denied the motion. Neither Petitioner nor Respondent filed objections to the findings and  
25 recommendations. On January 17, 2017, the Court adopted the findings and recommendations and  
26 entered judgment denying the petition. On May 5, 2017, Petitioner moved for relief from judgment  
27 under F.R.Civ. P. 60(b).  
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1 **II. Rule 60(b) Motions Are Limited in Habeas Actions**

2 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to all  
3 petitions for writ of habeas corpus filed on or after April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320,  
4 322-23 (1997). Under the statutory terms, the petition in this case is governed by AEDPA's  
5 provisions because Petitioner filed it after April 24, 1996.

6 Among other purposes, AEDPA was intended to ensure greater finality of state and federal  
7 court judgments in criminal cases. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). To  
8 accomplish its purpose, AEDPA imposes significant restrictions on second or successive petitions.  
9 28 U.S.C. § 2244(b). With limited exceptions, a petitioner may not pursue relief in a second or  
10 successive habeas petition. *Id.* Even in those cases in which the statute permits a prisoner to file a  
11 second or successive petition, the prisoner must first move in the appropriate circuit court of appeals  
12 for authorization to file the second or successive petition. 28 U.S.C. § 2244(b)(3)(A). Failure to  
13 secure authorization is a jurisdictional bar that requires a district court to dismiss the petition. *Rishor*  
14 *v. Ferguson*, 822 F.3d 482, 490 (2016) (petition for *cert. pending*).

15 AEDPA's restrictions on second or successive habeas applications severely limit the  
16 application of F.R.Civ.P. 60(b) in federal habeas actions. *See Barrett v. Yearwood*, 83 Fed. Appx.  
17 160, 161 n. 1 (9<sup>th</sup> Cir. 2003). The Federal Rules of Civil Procedure may be applied, when  
18 appropriate, in § 2254 proceedings, but only to the extent that they are not inconsistent with other  
19 statutory provisions or the Rules Governing Section 2254 Cases in the United States District Courts.  
20 Rule 12, Rules Governing Section 2254 Cases in the United States District Courts. As a result, a  
21 petitioner may not rely on the provisions of R. 60(b) if a reconsideration motion under R. 60(b) is  
22 tantamount to a second or successive petition.

23 A Rule 60(b) motion is subject to AEDPA's restrictions on second or successive petitions  
24 when the motion seeks to present newly discovered evidence, add a new claim for relief, attack the  
25 resolution of a claim on its merits, or vacate a judgment based on a subsequent change in the law.  
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1 *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). The restrictions do not apply, however, if the motion  
2 seeks only to address a defect in the integrity of the federal habeas proceedings. *Id.* at 532. “Put  
3 another way, a motion that does not attack ‘the integrity of the proceedings, but in effect asks for a  
4 second chance to have the merits determined favorably’ raises a claim that takes it outside the  
5 bounds of Rule 60(b) and within the scope of AEDPA’s limitations on second or successive habeas  
6 corpus petitions.” *Jones v. Ryan*, 733 F.3d 825, 834 (9<sup>th</sup> Cir. 2013).

7  
8 In this case, Petitioner seeks relief from judgment based solely on the denial of his third  
9 motion for extension of time to file objections. To the extent that Petitioner does not seek to vacate  
10 the judgment based on its substantive provisions, the R. 60(b) motion is not limited by AEDPA’s  
11 restrictions on second or successive petitions. Reaching this conclusion requires drawing a very fine  
12 dividing line, however, since setting aside the judgment to permit Petitioner to file objections is  
13 ultimately intended to permit advocacy for substantive change. The undersigned has been unable to  
14 identify any prior case addressing similar facts. The Court need not reach this issue, however, if it  
15 agrees with the undersigned that Petitioner did not allege a basis sufficient to set aside the judgment.

16  
17 **III. Standards for Reviewing Rule 60(b)(1) Motions**

18 “[A] court may relieve a party or its legal representative from a final judgment, order, or  
19 proceeding for . . . mistake, inadvertence, surprise, or excusable neglect.” F.R.Civ. 60(b)(1). As  
20 stated above, Petitioner contends that his failure to file objections within the time period provided by  
21 the findings and recommendations resulted from his excusable neglect.

22 “[F]or purposes of Rule 60(b), ‘excusable neglect’ is understood to encompass situations in  
23 which the failure to comply with a filing deadline is attributable to negligence.” *Pioneer Inv. Serv.*  
24 *Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 394 (1993). In *Pioneer*, the Supreme Court  
25 described a continuum of failure to comply with a filing deadline, including at one end, an act of  
26 God or unforeseen human intervention, and at the other end, the party’s decision simply to ignore the  
27 deadline. *Id.* at 387-88. In the middle are instances in which the filer chooses to miss the deadline  
28

1 for reasons of varying value, such as stopping to render first aid to an accident victim, inadvertence,  
2 or miscalculation. *Id.* at 388. The Court found that the rule itself granted a reprieve to “out-of-time  
3 filings that were delayed by ‘neglect,’” the plain meaning of which includes both faultless omissions  
4 to act and omissions resulting from carelessness. *Id.* By empowering the courts to accept late filings  
5 in cases of excusable neglect, “Congress plainly contemplated that the courts would be permitted,  
6 where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as  
7 by intervening circumstances beyond the party’s control.” *Id.*

8  
9 “[T]he determination is at bottom an equitable one, taking account of all relevant  
10 circumstances surrounding the party’s omission.” *Id.* at 395. The relevant circumstances include  
11 (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact  
12 on judicial proceedings; (3) the reason for the delay, including whether it was within the movant’s  
13 reasonable control; and (4) whether the movant acted in good faith. *Id.*; *Bateman v. United States*  
14 *Postal Serv.*, 231 F.3d 1220, 1223-24 (9<sup>th</sup> Cir. 2000).

15  
16 In this regard, Petitioner’s reliance on *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691  
17 (9<sup>th</sup> Cir. 2001), overruled on other grounds by *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141  
18 (2001), is misplaced. In *TCI*, a widow’s motion to set aside a default judgment against her in a  
19 dispute with her mother-in-law concerning the proceeds of her late husband’s life insurance policy  
20 was evaluated in the context of the differing principles related to default judgments. 244 F.3d at  
21 693. In addition, nothing in *TCI* supports Petitioner’s contention that “‘excusable neglect’ . . .  
22 implies some degree of sloth, carelessness or lack of diligence can be tolerated so long as it was not  
23 intentional and did not operate to an unreasonable degree to prejudice the opposing party.” Doc. 44  
24 at 8-9.

25  
26 **A. Prejudice Against the Opposing Party**

27 Petitioner assumes that the State of California cannot be prejudiced by the Court’s granting  
28 Petitioner’s Rule 60(b) motion. Petitioner’s assumption misunderstands the nature of federal habeas

1 corpus relief and the interest in the finality of judgments of the citizens on whose behalf the state  
2 acts.

3 In light of “the profound societal costs that attend the exercise of habeas jurisdiction,” the  
4 statutory scheme significantly limits federal courts’ jurisdiction to grant habeas relief. *Calderon v.*  
5 *Thompson*, 523 U.S. 538, 554-55 (1998) (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986)). The  
6 limits reflect the states’ interest in the finality of convictions that have survived the state courts’  
7 direct review. *Calderon*, 523 U.S. at 555 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635  
8 (1993)). Addressing a circuit court’s determination to recall its mandate in a capital case, the  
9 Supreme Court explained:  
10

11 Finality is essential to both the retributive and the deterrent functions of criminal  
12 law. “Neither innocence nor just punishment can be vindicated until the final  
13 judgment is known.” [*McClesky v. Zant*, 499 U.S. 467, 491 (1991).] “Without  
14 finality, the criminal law is deprived of much of its deterrent effect.” [*Teague v.*  
15 *Lane*, 489 U.S. 288, 309 (1989).]

16 Finality also enhances the quality of judging. There is perhaps “nothing more  
17 subversive of a judge’s sense of responsibility, of the inner subjective  
18 conscientiousness which is so essential a part of the difficult and subtle art of  
19 judging well, than an indiscriminate acceptance of the notion that all shots will  
20 always be called by someone else.” Bator, *Finality in Criminal Law and Federal*  
21 *Habeas Corpus for State Prisoners*, 76 Harv. L.Rev. 441, 451 (1963).

22 Finality serves as well to preserve the federal balance. Federal habeas review of  
23 state convictions frustrated “both the States’ sovereign power to punish offenders  
24 and their good-faith attempts to honor constitutional rights.” [*Murray v. Carrier*,  
25 477 U.S. 478, 487 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)) .]  
26 “Our federal system recognizes the independent power of a State to articulate  
27 societal norms through criminal law; but the power of a State to pass laws means  
28 little if the State cannot enforce them.” *McClesky*, 499 U.S. at 491[.]

*Calderon*, 523 U.S. at 555-56.

Granting Petitioner’s Rule 60(b)(1) motion in this case would result in prejudice to the State  
of California, which had a reasonable expectation in the finality of the judgment.

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1           **B. Circumstances of Petitioner’s Delay**

2           All motions under Rule 60(b) must be filed within a reasonable time. F.R.Civ.P. 60(c)(1).  
3           “What constitutes reasonable time depends on the facts of each case.” *United States v. Holtzman*,  
4           762 F.2d 720, 725 (9<sup>th</sup> Cir. 1985). The court must analyze the facts to determine whether the movant  
5           had a good reason for failing to act sooner and whether the opposing party was prejudiced by the  
6           delay. *Id.* Performing the analysis necessarily implicates the reason for the delay and the presence  
7           or lack of good faith.

8           According to procedural rules, a party may object to findings and recommendations entered  
9           by a magistrate judge within fourteen days after being served with a copy or within such time period  
10          provided by the findings and recommendations. F.R.Civ.P. 72(b)(2). In this case, the findings and  
11          recommendations provided that any party could file objections within 30 days. Procedural rules  
12          permit, but do not require, the court to extend for good cause the specified time for performing an  
13          act. F.R.Civ.P. 6(b).

14          In this case, on October 18, 2016, Petitioner moved for a thirty-day enlargement of time in  
15          which to file objections, declaring that because of his participation in a vocational trade program, he  
16          was only able to secure time in the law library on Saturdays. The Magistrate Judge granted the  
17          requested extension. On November 14, 2016, Petitioner again requested a second thirty-day  
18          extension of time, stating that his law library access was limited by his participation in a vocational  
19          program, a prior prison lock down, and a then-existing partial lock down. The Magistrate Judge  
20          again granted the requested extension, which enlarged Petitioner’s time to respond to a total of  
21          ninety days, but warned Petitioner: “**No further extensions of time will be granted.**” Doc. 38.  
22          Nonetheless, on December 16, 2016, Petitioner again moved for a 30-day extension of time, stating  
23          that his law library time had been limited by lock downs and his vocational program schedule. The  
24          Magistrate Judge denied the requested extension.

25          After allowing more than thirty days for Petitioner to take further action, the District Court  
26          adopted the findings and recommendations and entered judgment on January 17, 2017. Petitioner  
27          took no action until he mailed his Rule 60(b) motion on April 28, 2017, more than 130 days after the  
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1 Magistrate Judge denied the motion to enlarge time and more than 90 days after entry of the  
2 judgment.

3 Petitioner concedes that he filed nothing in response to the denial of his December 2016  
4 motion for enlargement of time but alleges that the delay was attributable to his placement in the  
5 Administrative Segregation Unit at the California Correctional Center-Susanville (“Ad-Seg”) on  
6 December 20, 2016.<sup>2</sup> Petitioner concedes: “Those in Ad-Seg are allowed to request transportation to  
7 the law library, and if they are facing legal deadlines, they are give priority status, which may allow  
8 them as much as 5 or 6 hours of access per week.” Doc. 44 at 7. Nonetheless, assuming that his  
9 only course of action was to file objections, Petitioner alleges that he took no action to respond to the  
10 denial of the December motion to enlarge time because his property, including his legal property,  
11 had been placed in storage for the duration of his disciplinary term.<sup>3</sup> Without his prior work product,  
12 Petitioner contends that he could not reasonably proceed. This argument ignores the fact that  
13 because the Court had denied Petitioner’s third motion for enlargement of time, Petitioner was  
14 already precluded from filing objections.

15 Petitioner admits that he received both the December order denying enlargement of time and  
16 the January judgment while he was confined in Ad-Seg. Thus, despite his lack of access to his legal  
17 property, Petitioner knew of the adverse developments concerning his petition but took no action to  
18 advise Respondent or the Court of his perceived inability to respond to either order. Petitioner  
19 provides no reason for his failure to disclose his lack of access to necessary legal materials and to  
20 advise the Court and Respondent of his intent to object to the denial of enlargement of time and the  
21 entry of judgment following the return of his legal property.

22 Petitioner takes no responsibility for his lack of diligence, in either his failure to make even a  
23 minimal attempt to advise the Court and his adversary of his intent further to pursue his habeas  
24 claims upon return of his legal property, or his earlier failure to prepare and file objections within the  
25 ninety days following filing of the findings and recommendations. Instead, Petitioner blames prison

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27 <sup>2</sup> Although Petitioner actually states that he was subject to Administrative Segregation beginning December 20, 2017, the undersigned assumes that date reflects a clerical error.

28 <sup>3</sup> Petitioner characterizes his term in Ad-Seg as a *force majeure*, that is “an event that can neither be anticipated nor controlled.” Black’s Law Dictionary at 673-74 (8<sup>th</sup> ed. 2004). The undersigned does not agree that disciplinary segregation falls within the category of *force majeure*.

1 staff for failing to respond to his oral and written requests for his legal property and the Magistrate  
2 Judge for abusing her discretion in denying his third request for enlargement of time. In blaming  
3 prison staff, Petitioner disregards his own failure to advise the Court and Respondent of the change  
4 of circumstances following his confinement in Ad-Seg and loss of access to his legal property and  
5 Petitioner's intent to challenge the denial of his motion for enlargement of time. In blaming the  
6 Magistrate Judge, Petitioner disregards the warning in the November 2016 order that no further  
7 extensions would be granted and presupposes that Petitioner was entitled to indefinite extensions of  
8 time to file until he had completed his objections.

9       The undersigned is not persuaded by Petitioner's abdication of responsibility for his own  
10 decisions and actions. A party representing himself without an attorney is bound by the Federal  
11 Rules of Civil Procedure, the Local Rules, and all other applicable laws in the same way as counsel.  
12 Local R. 183(a). Whatever Petitioner's level of education or experience, and in spite of his  
13 temporary lack of his legal property, Petitioner could easily have filed a statement of his situation  
14 and requested an opportunity to challenge the denial of his December motion for a third extension of  
15 time. Instead, Petitioner did nothing.

16       Nor is the argument that the Magistrate Judge abused her discretion in denying Petitioner's  
17 third motion for an extension of time persuasive. By December, Petitioner had been provided with a  
18 significant period time in which to file objections and had been advised that the Court would not  
19 grant any further extensions.

20       Petitioner contends that the Magistrate Judge "lacks personal experience of the plight of  
21 prisoners with respect to prison conditions and how they can impinge upon their right of access to  
22 court and to due process, not to mention equal protection." Doc. 44 at 9. Petitioner suggests that an  
23 evidentiary hearing is necessary to establish prison conditions during the period in which Petitioner  
24 sought to extend the time period in which to submit objections to the findings and recommendations.  
25 The undersigned disagrees.

26       The undersigned daily addresses cases in which prisoners proceeding *pro se* represent  
27 themselves competently, in good faith, and in compliance with applicable time restraints and other  
28 procedural rules, and is not persuaded by Petitioner's attempts to evade responsibility for his own

1 inaction by representing himself as an uneducated and inexperienced inmate. Although Petitioner  
2 asserts that a court would abuse its discretion if it refused to provide an additional extension of time,  
3 despite an earlier order indicating that no further extensions would be granted, in the event of an  
4 unforeseen event such as the inmate’s falling into a coma, Petitioner does not allege an unforeseen  
5 event. The only reasons offered for the December extension motion were those previously alleged—  
6 limited law library time and periodic prison lock downs. Both of these occurrences were reasonably  
7 foreseeable. Nor is the undersigned favorably impressed by Petitioner’s attempts to shift  
8 responsibility to “unresponsive” correctional staff who neglected their “duty” to provide him his  
9 legal property following his transfer to Ad-Seg.

10 For the first time in this motion, Petitioner alleges that the findings and recommendations  
11 were so lengthy and so complex that he could not reasonably prepare objections in the time  
12 available. This argument is not persuasive. There can be little question that Petitioner was familiar  
13 with the grounds that he alleged for habeas relief, his own arguments in support of those grounds,  
14 Respondent’s arguments in opposition, and the state courts’ disposition of those grounds.

15 Returning to the *Pioneer* continuum of reasons for failing to comply with the filing deadline,  
16 the undersigned finds that Petitioner’s reasons are very close to the extreme position of ignoring the  
17 December deadline for submission of objections. Despite clear warning in the November court  
18 order, Petitioner simply assumed that the Court would keep extending the filing date until he was  
19 ready to file objections.

20 **C. Relief Is Not Available Under Rule 60(b)(6)**

21 Petitioner also seeks relief under R. 60(b)(6), which permits relief from judgment for “any  
22 other reason that justifies relief.” “Rule 60(b)(6) is not a substitute for [R.] 60(b)(1).” *United States*  
23 *v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9<sup>th</sup> Cir. 1993). “Rule 60(b)(6) has been used  
24 sparingly as an equitable remedy to prevent manifest injustice.” *Id.* “To justify relief under [Rule  
25 60(b)(6)], a party must show ‘extraordinary circumstances’ suggesting that the party is faultless in  
26 the delay.” *Pioneer*, 507 U.S. at 393. “Such circumstances will rarely occur in the habeas context.”  
27 *Gonzalez*, 545 U.S. at 535.

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1 **IV. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district  
3 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El*, 537 U.S. at  
4 335-36. The controlling statute in determining whether to issue a certificate of appealability is 28  
5 U.S.C. § 2253, which provides:

6  
7 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
8 district judge, the final order shall be subject to review, on appeal, by the court of  
9 appeals for the circuit in which the proceeding is held.

10 (b) There shall be no right of appeal from a final order in a proceeding to test the  
11 validity of a warrant to remove to another district or place for commitment or  
12 trial a person charged with a criminal offense against the United States, or to test  
13 the validity of such person's detention pending removal proceedings.

14 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an  
15 appeal may not be taken to the court of appeals from—

16 (A) the final order in a habeas corpus proceeding in which the detention  
17 complained of arises out of process issued by a State court; or

18 (B) the final order in a proceeding under section 2255.

19 (2) A certificate of appealability may issue under paragraph (1) only if the  
20 applicant has made a substantial showing of the denial of a constitutional right.

21 (3) The certificate of appealability under paragraph (1) shall indicate which  
22 specific issues or issues satisfy the showing required by paragraph (2).

23 If a court denies a habeas petition, the court may only issue a certificate of appealability "if  
24 jurists of reason could disagree with the district court's resolution of his constitutional claims or that  
25 jurists could conclude the issues presented are adequate to deserve encouragement to proceed  
26 further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the  
27 petitioner is not required to prove the merits of his case, he must demonstrate "something more than  
28 the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at  
338.

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