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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO VERA,  
Petitioner,  
v.  
CONNIE GIPSON,  
Respondent.

Case No. 1:13-cv-00814-AWI-SKO-HC  
FINDINGS AND RECOMMENDATIONS TO  
DENY PETITIONER'S MOTION TO VACATE  
JUDGMENT (DOC. 44) AND TO DECLINE  
TO ISSUE A CERTIFICATE OF  
APPEALABILITY  
**OBJECTIONS DEADLINE:**  
**THIRTY (30) DAYS**

Petitioner is a state prisoner who proceeded pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. The petition was dismissed upon the Respondent's motion because of failure to state facts entitling Petitioner to federal habeas relief. On September 12, 2014, judgment of dismissal was entered and was served on Petitioner at the address listed on the docket.

Pending before the Court is a motion to vacate the judgment that was filed by Petitioner on January 8, 2015.

I. Background

The docket reflects no activity after the entry of judgment

1 other than the instant motion to vacate the judgment. The motion is  
2 unsupported by documentation or a declaration. Petitioner states  
3 that on August 26, 2014, he delivered to a named correctional  
4 officer a motion for an extension of time to file objections to the  
5 Magistrate Judge's findings and recommendations to grant the  
6 Respondent's motion to dismiss the petition. The findings and  
7 recommendations had been filed on August 1, 2014. Petitioner  
8 purports to quote the extension application, indicating that the  
9 basis of the request was an application made in one or two other  
10 cases that had been pending before this Court. Petitioner does not  
11 set forth any objections to the findings and recommendations or  
12 otherwise set forth any substantive grounds for vacating the  
13 judgment.

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15 II. Motion to Vacate the Judgment

16 A motion for reconsideration is treated as a motion to alter or  
17 amend judgment under Fed. R. Civ. P. 59(e) if it is filed within the  
18 time limit set by Rule 59(e). United States v. Nutri-cology, Inc.,  
19 982 F.2d 394, 397 (9th Cir. 1992). Otherwise, it is treated as a  
20 motion pursuant to Fed. R. Civ. P. 60(b) for relief from a judgment  
21 or order. American Ironworks & Erectors, Inc. v. North American  
22 Const. Corp., 248 F.3d 892, 989-99 (9th Cir. 2001). A motion to  
23 alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) "must be  
24 filed no later than 28 days after the entry of the judgment." Fed.  
25 R. Civ. P. 59(e).

26 Here, because Petitioner's motion was filed several months  
27 after the entry of judgment, it will be considered pursuant to Rule  
28 60.

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

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

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1 634 F.Supp. 656, 665 (E.D.Cal. 1986), aff'd in part and rev'd in  
2 part on other grounds, 828 F.2d 514 (9th Cir. 1987).

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

15 Here, Petitioner has not shown any law or facts that reflect  
16 any excusable neglect, abuse of discretion, clear error, or manifest  
17 injustice. Petitioner has not shown any grounds that would justify  
18 relief from the judgment. Accordingly, it will be recommended that  
19 the Court deny Petitioner's motion to vacate the judgment.

### 20 III. Certificate of Appealability

21 Unless a circuit justice or judge issues a certificate of  
22 appealability, an appeal may not be taken to the Court of Appeals  
23 from the final order in a habeas proceeding in which the detention  
24 complained of arises out of process issued by a state court. 28  
25 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336  
26 (2003). A district court must issue or deny a certificate of  
27 appealability when it enters a final order adverse to the applicant.  
28 Rule 11(a) of the Rules Governing Section 2254 Cases.

1 A certificate of appealability may issue only if the applicant  
2 makes a substantial showing of the denial of a constitutional right.  
3 § 2253(c) (2). Under this standard, a petitioner must show that  
4 reasonable jurists could debate whether the petition should have  
5 been resolved in a different manner or that the issues presented  
6 were adequate to deserve encouragement to proceed further. Miller-  
7 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.  
8 473, 484 (2000)). A certificate should issue if the Petitioner  
9 shows that jurists of reason would find it debatable whether: (1)  
10 the petition states a valid claim of the denial of a constitutional  
11 right, and (2) the district court was correct in any procedural  
12 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

13 In determining this issue, a court conducts an overview of the  
14 claims in the habeas petition, generally assesses their merits, and  
15 determines whether the resolution was debatable among jurists of  
16 reason or wrong. Id. An applicant must show more than an absence  
17 of frivolity or the existence of mere good faith; however, the  
18 applicant need not show that the appeal will succeed. Miller-El v.  
19 Cockrell, 537 U.S. at 338.

20 Here, it does not appear that reasonable jurists could debate  
21 whether the motion should have been resolved in a different manner.  
22 Petitioner has not made a substantial showing of the denial of a  
23 constitutional right. Accordingly, it will be recommended that the  
24 Court decline to issue a certificate of appealability.

25 IV. Recommendations

26 Based on the foregoing, it is RECOMMENDED that:

- 27 1) Petitioner's motion to vacate the judgment be DENIED; and  
28 2) The Court DECLINE to issue a certificate appealability.

1           These findings and recommendations are submitted to the United  
2 States District Court Judge assigned to the case, pursuant to the  
3 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local  
4 Rules of Practice for the United States District Court, Eastern  
5 District of California. Within thirty (30) days after being served  
6 with a copy, any party may file written objections with the Court  
7 and serve a copy on all parties. Such a document should be  
8 captioned "Objections to Magistrate Judge's Findings and  
9 Recommendations." Replies to the objections shall be served and  
10 filed within fourteen (14) days (plus three (3) days if served by  
11 mail) after service of the objections. The Court will then review  
12 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
13 The parties are advised that failure to file objections within the  
14 specified time may result in the waiver of rights on appeal.  
15 Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing  
16 Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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19 IT IS SO ORDERED.

20 Dated: February 19, 2015

/s/ Sheila K. Oberto  
21 UNITED STATES MAGISTRATE JUDGE  
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