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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALLEN C. THOMPSON,

 Petitioner,

 v.

RICK HILL, Warden,

 Respondent.

Case No. 1:13-cv-02094-LJO-SKO-HC

ORDER DISREGARDING OBJECTIONS
(DOC. 17)

FINDINGS AND RECOMMENDATIONS TO
DENY PETITIONER'S MOTION FOR
RECONSIDERATION (DOC. 17) AND
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 that was dismissed with prejudice by this Court as untimely upon the Respondent's motion. The Court adopted the Magistrate Judge's findings and recommendations and declined to issue a certificate of appealability; judgment for Respondent was entered on August 27, 2014. (Docs. 15 & 16.) On the same date, the order and judgment were served by mail on Petitioner at the address listed on the docket. No notice of appeal was filed.

1 I. Order Disregarding Petitioner's Objections

2 On February 24, 2015, Petitioner filed objections to the
3 findings and recommendations of the Magistrate Judge in which he
4 argues that the untimeliness of his petition should not bar his
5 petition because he is challenging an unauthorized sentence.
6 Because the time for filing objections passed, and judgment was
7 subsequently entered, the case has been closed.

8 Thus, to the extent that Petitioner's filing is understood to
9 be objections to the findings and recommendations, the objections
10 are DISREGARDED.

11 II. Motion for Reconsideration

12 It is possible that in filing "objections," Petitioner intended
13 to seek reconsideration of the dismissal of his petition. In an
14 abundance of caution, the Court will consider the objections as a
15 motion for reconsideration.

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

26 Here, reference to Petitioner's "objections" shows that
27 Petitioner signed a declaration under penalty of perjury that he
28 deposited the document in a mailbox for United States mail that was

1 provided by the prison for that purpose; the date on the declaration
2 is February 21, 2015. (Doc. 17 at 3.) The Court will thus consider
3 Petitioner's motion to have been constructively filed on that date
4 pursuant to the mailbox rule.¹ Thus, the motion was served more than
5 twenty-eight days after the entry of judgment on August 27, 2014.
6 Therefore, the Court will not consider the motion pursuant to Rule
7 59(e).

8 To the extent Petitioner's motion is considered as a motion for
9 reconsideration, Federal Rule of Civil Procedure 60(b) governs the
10 reconsideration of final orders of the district court. The rule
11 permits a district court to relieve a party from a final order or
12 judgment on grounds including but not limited to 1) mistake,
13 inadvertence, surprise, or excusable neglect; 2) newly discovered
14 evidence; 3) fraud, misrepresentation, or misconduct by an opposing
15 party; or 4) any other reason justifying relief from the operation

17 ¹ Dates of filing are calculated pursuant to the "mailbox rule." Habeas Rule 3(d)
18 provides that a paper filed by a prisoner is timely if deposited in the
19 institution's internal mailing system on or before the last day for filing. The
20 rule requires the inmate to use the custodial institution's system designed for
21 legal mail; further, timely filing may be shown by a declaration in compliance
22 with 28 U.S.C. § 1746 or by a notarized statement setting forth the date of
23 deposit and verifying prepayment of first-class postage. *Id.* Habeas Rule 3(d)
24 reflects the "mailbox rule," initially developed in case law, pursuant to which a
25 prisoner's pro se habeas petition is "deemed filed when he hands it over to prison
26 authorities for mailing to the relevant court." *Houston v. Lack*, 487 U.S. 266,
27 276 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox
28 rule applies to federal and state petitions alike. *Campbell v. Henry*, 614 F.3d
1056, 1058-59 (9th Cir. 2010) (citing *Stillman v. LaMarque*, 319 F.3d 1199, 1201
(9th Cir. 2003), and *Smith v. Ratelle*, 323 F.3d 813, 816 n.2 (9th Cir. 2003)).
The mailbox rule, liberally applied, in effect assumes that absent evidence to the
contrary, a legal document is filed on the date it was delivered to prison
authorities, and a petition was delivered on the day it was signed. *Houston v.*
Lack, 487 U.S. at 275-76; *Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir.
2010); *Campbell v. Henry*, 614 F.3d at 1058-59; *Lewis v. Mitchell*, 173 F.Supp.2d
1057, 1058 n.1 (C.D.Cal. 2001). The date a petition is signed may be inferred to
be the earliest possible date an inmate could submit his petition to prison
authorities for filing under the mailbox rule. *Jenkins v. Johnson*, 330 F.3d 1146,
1149 n.2 (9th Cir. 2003), overruled on other grounds, *Pace v. DiGuglielmo*, 544
U.S. 408 (2005).

1 of the judgment. Fed. R. Civ. P. 60(b). The motion for
2 reconsideration must be made within a reasonable time, and in some
3 instances, within one year after entry of the order. Fed. R. Civ.
4 P. 60(c).

5 Rule 60(b) generally applies to habeas corpus proceedings.
6 See, Gonzalez v. Crosby, 545 U.S. 524, 530-36 (2005). Although the
7 Court has discretion to reconsider and vacate a prior order, Barber
8 v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994), motions for
9 reconsideration are disfavored. A party seeking reconsideration
10 must show more than a disagreement with the Court's decision and
11 offer more than a restatement of the cases and arguments considered
12 by the Court before rendering the original decision. United States
13 v. Westlands Water Dist., 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001).
14 Motions to reconsider pursuant to Rule 60(b)(1) are committed to the
15 discretion of the trial court, Rodgers v. Watt, 722 F.2d 456, 460
16 (9th Cir. 1983), which can reconsider interlocutory orders and re-
17 determine applications because of an intervening change in
18 controlling law, the availability of new evidence or an expanded
19 factual record, or the need to correct a clear error or prevent
20 manifest injustice, Kern-Tulare Water Dist. v. City of Bakersfield,
21 634 F.Supp. 656, 665 (E.D.Cal. 1986), aff'd in part and rev'd in
22 part on other grounds, 828 F.2d 514 (9th Cir. 1987).

23 A motion for reconsideration under Rule 60(b)(6) will not be
24 granted unless the movant shows extraordinary circumstances
25 justifying relief. Gonzalez v. Crosby, 545 U.S. at 536.

26 Local Rule 230(j) provides that whenever any motion has been
27 granted or denied in whole or in part, and a subsequent motion for
28 reconsideration is made upon the same or any allegedly different set

1 of facts, counsel shall file an affidavit or brief, as appropriate,
2 setting forth the material facts and circumstances surrounding each
3 motion for which reconsideration is sought, including information
4 concerning the previous judge and decision, what new or different
5 facts or circumstances are claimed to exist which did not exist or
6 were not shown in the prior motion, what other grounds exist for the
7 motion, and why the facts or circumstances were not shown at the
8 time of the prior motion.

9 Here, because Petitioner challenges a determination of the
10 timeliness of his petition, and not a disposition on the merits of
11 the claims set forth in the petition, the Court will assume that the
12 motion for reconsideration is not a prohibited successive petition.
13 See 28 U.S.C. § 2244(b); Gonzalez v. Crosby, 545 U.S. at 529-36
14 (holding that § 2244(b)'s limitation on successive petitions did not
15 bar a Rule 60(b) motion challenging a ruling that a § 2254 petition
16 was untimely).

17 Considering Petitioner's motion pursuant to Rule 60(b), the
18 Court concludes that Petitioner has not shown any mistake,
19 inadvertence, surprise, excusable neglect, newly discovered
20 evidence, fraud, misrepresentation, misconduct by an opposing party,
21 or any other reason justifying relief from the operation of the
22 judgment. There is no showing of any intervening change in the
23 controlling law or any extraordinary circumstances warranting
24 relief.

25 Accordingly, it will be recommended that Petitioner's motion
26 for reconsideration be denied.

27 III. Certificate of Appealability

28 Unless a circuit justice or judge issues a certificate of

1 appealability, an appeal may not be taken to the Court of Appeals
2 from the final order in a habeas proceeding in which the detention
3 complained of arises out of process issued by a state court. 28
4 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336
5 (2003). A district court must issue or deny a certificate of
6 appealability when it enters a final order adverse to the applicant.
7 Habeas Rule 11(a).

8 A certificate of appealability may issue only if the applicant
9 makes a substantial showing of the denial of a constitutional right.
10 § 2253(c)(2). Under this standard, a petitioner must show that
11 reasonable jurists could debate whether the petition should have
12 been resolved in a different manner or that the issues presented
13 were adequate to deserve encouragement to proceed further. Miller-
14 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.
15 473, 484 (2000)). A certificate should issue if the Petitioner
16 shows that jurists of reason would find it debatable whether: (1)
17 the petition states a valid claim of the denial of a constitutional
18 right, and (2) the district court was correct in any procedural
19 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

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

27 Here, it does not appear that reasonable jurists could debate
28 whether the motion should have been resolved in a different manner.

1 Petitioner has not made a substantial showing of the denial of a
2 constitutional right. Therefore, it will be recommended that the
3 Court decline to issue a certificate of appealability.

4 IV. Recommendations

5 In accordance with the foregoing, it is RECOMMENDED that:

- 6 1) Petitioner's motion for reconsideration be DENIED; and
7 2) The Court DECLINE to issue a certificate of appealability.

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

24
25 IT IS SO ORDERED.

26 Dated: March 16, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE