IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEROME LEE CROSS, Petitioner, **v.** **DAVE ROBINSON,** Respondent.	Case No. 1:14-cv-00863 MJS (HC) **ORDER DENYING MOTION FOR RECONSIDERATION** **[Doc. 14]**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Both parties have consented to Magistrate Judge jurisdiction under 28 U.S.C. § 636(c). (ECF Nos. 6-7.)

On September 2, 2014, the undersigned dismissed the petition as untimely under 28 U.S.C. § 2244(d). On September 12, 2014, Petitioner filed a motion for reconsideration pursuant to Federal Rules of Civil Procedure § 59(e) and 60(b).

I. LEGAL STANDARDS

A motion for reconsideration is treated as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e) if it is filed within the time limit set by Rule 59(e). United

States v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992). Otherwise, it is treated as a motion pursuant to Fed. R. Civ. P. 60(b) for relief from a judgment or order. American Ironworks & Erectors, Inc. v. North American Const. Corp., 248 F.3d 892, 898-99 (9th Cir. 2001). A motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).

A. Relief Pursuant to Fed. R. Civ. P. 59(e)

Relief pursuant to Fed. R. Civ. P. 59(e) is appropriate when the district court is presented with newly discovered evidence, the district court committed clear error, or a change in controlling law intervenes. Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). To avoid being frivolous, such a motion must provide a valid ground for reconsideration. See, MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986).

B. Relief Pursuant to Fed. R. Civ. P. 60

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

Rule 60(b) generally applies to habeas corpus proceedings. See, Gonzalez v. Crosby, 545 U.S. 524, 530-36, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Although the Court has discretion to reconsider and vacate a prior order, Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994), motions for reconsideration are disfavored. A party seeking reconsideration must show more than a disagreement with the Court's decision and offer more than a restatement of the cases and arguments considered by the Court before

rendering the original decision. United States v. Westlands Water Dist., 134 F.Supp.2d 1111, 1131 (E.D.Cal. 2001).

When a motion has been granted or denied in whole or in part, and a motion for reconsideration is made based on the same or any alleged different set of facts, counsel must set forth the material facts and circumstances surrounding each motion for which reconsideration is sought, including information concerning the previous judge and decision, the new or different facts or circumstances that are claimed to exist which were not present when the prior motion was filed, any other grounds for the motion, and why the facts or circumstances were not shown at the time of the prior motion. See Local Rule 230(j).

II. DISCUSSION

In his motion for reconsideration, Petitioner presents several arguments. He asserts that his petition is timely in light of recent retroactive Supreme Court decisions. (Mot. at 2.) Further, Petitioner argues that he was unaware of the factual predicate of his ineffective assistance of counsel claim until he received a recent newspaper article explaining that other cases were being re-opened in light of his counsel's deficient performance due to substance abuse. (Id.) Finally, Petitioner argues that he was not legally trained and not aware of his rights to appeal his conviction. (Id. at 3.) These claims shall be addressed in turn.

A. Later Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(C)

Petitioner contends that he is entitled to a later commencement date based on recent retroactive Supreme Court decisions regarding the shackling of defendants. Under 28 U.S.C. § 2244(d)(1)(C), the commencement of the limitations period can be extended to the date on which a constitutional right is recognized, and made retroactively applicable by the Supreme Court to cases on collateral review. However, Petitioner does not provide the names or citations of any such new cases. As Respondent notes, the last Supreme Court to discuss shackling defendants was decided

in 2005, and allowed shackling in certain circumstances. See Deck v. Missouri, 544 U.S. 622, 633 (2005). As the Court is unaware of any new Supreme Court precedent, Petitioner is not entitled to a later date for the running of the statute of limitations under 28 U.S.C. § 2244(d)(1)(C).

B. Later Commencement of Limitations Period Under 28 U.S.C. § 2244(d)(1)(D)

28 U.S.C. § 2244(d)(1)(D) states that the limitations period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." The objective standard in determining when time begins to run under Section 2244(d)(1)(D) is "when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." Hasan v. Galaza, 254 F.3d 1150 (9th Cir. 2001), (quoting Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000)). "Section 2244(d)(1)(D) does not demand the maximum diligence possible, but only 'due' or 'reasonable' diligence." Souliotes v. Evans, 622 F.3d 1173, 1178 (9th Cir. 2010) (reversed on other grounds); see also Holland v. Florida, 130 S. Ct. 2549, 2565, 177 L. Ed. 2d 130 (2010).

Petitioner asserts in his motion for reconsideration that he is entitled to tolling based on newly discovered evidence. Specifically, he contends that he filed his claim for ineffective assistance of counsel based on recent reports in the newspaper of his trial counsel's substance abuse issues. (Mot. at 2-3.) Respondent contends that the newspaper article only provided additional evidence of the claim. Respondent does not state when he believes he could have discovered the factual predicate of the claim through the exercise of due diligence.

It is possible that Petitioner, through outward manifestations of counsel's conduct, would have been aware that his counsel was impaired at the time of trial. However, that is not necessarily the case. If not, then the Court must determine when it would have been reasonable for Petitioner to discover the factual basis of the claim through reasonable diligence. Neither Petitioner nor Respondent have provided any information

to the Court regarding when news or other public reporting of counsel's conduct was first made, and if Petitioner, who was incarcerated during this entire period, could have obtained the information with reasonable diligence. Petitioner has provided no factual information regarding his efforts to discover this claim. Without more Petitioner has not met his burden for showing that the statute of limitations should commence at a later date under 28 U.S.C. § 2244(d)(1)(D).

In abundance of caution, the Court provides Petitioner the opportunity to provide additional information regarding when he discovered the claim and the efforts he undertook to discover the facts underlying the claim. Petitioner's additional briefing is due within thirty (30) days of service of this order.

C. Ignorance of the Law

In his final ground for reconsideration, Petitioner claims he should be entitled to equitable tolling because he is uneducated and does not have knowledge of the law. This claim for equitable tolling must fail. Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (lack of legal sophistication is not an extraordinary circumstance warranting equitable tolling); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (inmate's lack of legal training, a poor education, or illiteracy does not give a court reason to toll the limitations period); Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004); Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000). Petitioner's circumstances are no different than the majority of incarcerated prisoners attempting to file petitions for writ of habeas corpus. Accordingly, his ignorance of the law is not an extraordinary circumstance entitling Petitioner to equitable tolling.

III. CONCLUSION

Petitioner's motion for reconsideration is DENIED with respect to his first and third claims based on Supreme Court caselaw and ignorance of the law. Petitioner shall be provided an opportunity to provide additional briefing with regard to the date that the statute of limitations for Petitioner's ineffective assistance of counsel claim should commence under 28 U.S.C. § 2244(d)(1)(D). Petitioner is ordered to file any additional

briefing within thirty (30) days of service of this order. Respondent may file an opposition to the additional briefing within fourteen (14) days of service of Petitioner's filing.

IT IS SO ORDERED.

Dated: October 30, 2014

/s/ *Michael J. Seng*
UNITED STATES MAGISTRATE JUDGE