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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NERSES TASHCHYAN,

 Petitioner,

 v.

J. LIZARRAGA,

 Respondent.

No. 1:18-cv-01242-DAD-JLT (HC)

ORDER CONSTRUING PETITIONER'S
MOTION TO SET ASIDE JUDGMENT AS A
MOTION FOR RECONSIDERATION AND
DENYING PETITIONER'S MOTION

(Doc. No. 23)

This matter is before the court on petitioner's motion to set aside judgment, which the court will construe as a motion for reconsideration of the court's November 7, 2019 order denying his petition for writ of habeas corpus. (Doc. No. 23.) For the reasons discussed below, petitioner's motion will be denied.

BACKGROUND

Petitioner Nerses Tashchyan is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On June 20, 2019, the assigned magistrate judge issued findings and recommendations recommending that the petition be denied with prejudice due to petitioner's failure to exhaust his claims by first presenting them to the state's highest court and due to petitioner's failure to state a

1 cognizable claim for federal habeas relief. (Doc. No. 20.) On November 7, 2019, the
2 undersigned adopted those findings and recommendations in full, dismissed the petition for writ
3 of habeas corpus with prejudice, and directed the Clerk of the Court to close this case. (Doc. No.
4 21.) Judgment was entered in accordance with that order. (Doc. No. 22.)

5 On December 6, 2019, petitioner filed a motion to set aside judgment, citing Rule 60 of
6 the Federal Rules of Civil Procedure, in which petitioner appears to be requesting reconsideration
7 of the court's order dismissing his petition. (Doc. No. 23.) Accordingly, the court will construe
8 petitioner's motion as a motion for reconsideration.

9 LEGAL STANDARD

10 Federal Rule of Civil Procedure 60(b) governs the reconsideration of final orders of the
11 district court. Rule 60(b) permits a district court to relieve a party from a final order or judgment
12 on grounds of: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
13 evidence . . .; (3) fraud . . . of an adverse party; (4) the judgment is void; (5) the judgment has
14 been satisfied . . . or (6) any other reason justifying relief from the operation of the judgment."
15 Fed. R. Civ. P. 60(b). A motion under Rule 60(b) must be made within a reasonable time, in any
16 event "not more than one year after the judgment, order, or proceeding was entered or taken." *Id.*

17 Reconsideration of a prior order is an extraordinary remedy "to be used sparingly in the
18 interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of*
19 *Bishop*, 229 F. 3d 877, 890 (9th Cir. 2000) (citation omitted); *see also Harvest v. Castro*, 531
20 F.3d 737, 749 (9th Cir. 2008) (addressing reconsideration under Rule 60(b)). In seeking
21 reconsideration under Rule 60, the moving party "must demonstrate both injury and
22 circumstances beyond his control." *Harvest*, 531 F.3d at 749 (internal quotation marks and
23 citation omitted).

24 "A motion for reconsideration should not be granted, absent highly unusual
25 circumstances, unless the district court is presented with newly discovered evidence, committed
26 clear error, or if there is an intervening change in the controlling law," and it "may *not* be used to
27 raise arguments or present evidence for the first time when they could reasonably have been
28 raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571

1 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted) (emphasis in
2 original). Further, Local Rule 230(j) requires, in relevant part, that a movant show “what new or
3 different facts or circumstances are claimed to exist which did not exist or were not shown”
4 previously, “what other grounds exist for the motion,” and “why the facts or circumstances were
5 not shown” at the time the substance of the order which is objected to was considered.

6 DISCUSSION

7 Petitioner moves for reconsideration of the court’s November 7, 2019 order (Doc. No. 21)
8 dismissing his petition for a writ of federal habeas corpus with prejudice. (Doc. No. 23.)

9 First, petitioner contends that the court was mistaken when it determined that he had failed
10 to exhaust his claims by first presenting them to the state’s highest court, and he asserts that this is
11 the kind of oversight that Rule 60 is designed to correct. (Doc. No. 23 at 1.) Petitioner has
12 attached a copy of the “filed” stamped copy of his habeas application to the California Supreme
13 Court bearing case number S251968, which was filed with the Clerk of the California Supreme
14 Court on October 15, 2018. (Doc. No. 23 at 1.)

15 Contrary to petitioner’s assertion, the court’s determination that petitioner had failed to
16 exhaust his claims by first presenting them to the state’s highest court was not based on a mistake or
17 oversight by the court in not considering the fact that he filed a state habeas petition with the
18 California Supreme Court. In fact, the findings and recommendations, which the court adopted in full
19 in its November 7, 2019 order, referenced petitioner’s state habeas application. (*See* Doc. No. 20
20 at 2) (“[Petitioner] filed another habeas petition in the California Supreme Court on October 15,
21 2018, and that petition was denied on March 13, 2019.”). However, despite filing his habeas
22 applications in the California Court of Appeal and the California Supreme Court, petitioner did not
23 properly present his claims because, as the California Court of Appeal explained in its order denying
24 petitioner’s application without prejudice, “[he] failed to show that he exhausted his remedy of filing
25 a petition for writ of habeas corpus in the *superior court*.” (*See* Doc. No. 20 at 2 (emphasis added).)
26 Thus, the court finds that there was no error or mistake in the its order dismissing petitioner’s habeas
27 petition on the grounds that he failed to exhaust his claims by first properly presenting them to the
28 state’s highest court.

