



1           On August 2, 2019, this court issued an order adopting the findings and recommendations  
2 and dismissing this action. (Doc. No. 9.) At the time the findings and recommendations were  
3 adopted, plaintiff had not filed objections thereto, and the period to file objections had passed.  
4 (*Id.* at 2.)

5           On August 14, 2019, plaintiff filed a motion to vacate the court’s dismissal order on  
6 grounds of lack of notice, stating that he did not receive any of the court’s orders and  
7 independently learned of the dismissal of this action on or about August 10, 2019. (Doc. No. 11  
8 at 1.) Plaintiff contends that the lack of notice was “a result of factors beyond Petitioner’s  
9 control” including the U.S. Post Office and/or Valley State Prison’s failure to forward notices  
10 from the court to plaintiff at the address he provided. (*Id.*) Plaintiff also states in his motion that  
11 he was unable to communicate with the court because his legal property was confiscated by  
12 prison officials due to safety concerns. (*Id.* at 2.) Plaintiff’s present motion to vacate dismissal is  
13 based on Rule 60(b)(6) of the Federal Rules of Civil Procedure. (*Id.* at 1.) As such, the court  
14 construes plaintiff’s notice as a motion for reconsideration and a request to file objections to the  
15 findings and recommendations.

16           Rule 60(b) provides that “[o]n motion and upon such terms as are just, the court may  
17 relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1)  
18 mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief  
19 from the operation of judgment.” Relief under Rule 60 “is to be used sparingly as an equitable  
20 remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances  
21 . . .” exist. *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotation marks and  
22 citation omitted) (addressing reconsideration under Rules 60(b)(1)-(6)). The moving party “must  
23 demonstrate both injury and circumstances beyond his control . . .” *Id.* (internal quotation marks  
24 and citation omitted). Further, Local Rule 230(j) requires, in relevant part, that plaintiff show  
25 “what new or different facts or circumstances are claimed to exist which did not exist or were not  
26 shown” previously, “what other grounds exist for the motion,” and “why the facts or  
27 circumstances were not shown” at the time the substance of the order which is objected to was  
28 considered.

1           “A motion for reconsideration should not be granted, absent highly unusual  
2 circumstances, unless the district court is presented with newly discovered evidence, committed  
3 clear error, or if there is an intervening change in the controlling law,” and it “may *not* be used to  
4 raise arguments or present evidence for the first time when they could reasonably have been  
5 raised earlier in the litigation.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571  
6 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted) (emphasis in  
7 original).

8           Based on plaintiff’s representation that he did not receive any of the court’s orders and out  
9 of an abundance of caution and in the interest of justice, the court will vacate the judgment and  
10 grant plaintiff an opportunity to file objections to the findings and recommendations issued on  
11 May 24, 2019.<sup>1</sup> *See Luna v. Vasquez*, No. CV F 05-1228 LJO DLB HC, 2008 WL 345868, at \*1  
12 (E.D. Cal. Feb. 6, 2008) (vacating judgment, because petitioner informed the court that he never  
13 received a copy of the findings and recommendations, and permitting petitioner an opportunity to  
14 object); *Kentz v. Ellis*, No. CV F 06-0166 AWI SMS HC, 2008 WL 2421632, at \*1 (E.D. Cal.  
15 June 13, 2008) (same); *Nguyen v. Giurbino*, No. 05CV2287 WQH (WMC), 2007 WL 3407364, at  
16 \*2 (S.D. Cal. Nov. 14, 2007) (granting Rule 60(b) motion, because petitioner contended that he  
17 never received a copy of the report and recommendation and therefore had no opportunity to file  
18 objections, and permitting petitioner an opportunity to object).

19           Accordingly,

- 20           1.       The court’s order, adopting findings and recommendations and dismissing the  
21                   action, issued on August 2, 2019 (Doc. No. 9) is vacated;

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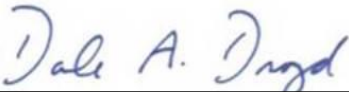
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24 <sup>1</sup> The findings and recommendations were served by mail at plaintiff’s address of record on May  
25 24, 2019 and were not returned to the court as undeliverable. However, the docket reflects that  
26 the order to show cause, served by mail on April 29, 2019, was returned as undeliverable because  
27 plaintiff was “[o]ut to Court 5/15-16, 5/20-22.” Because the findings and recommendations were  
28 issued and served two days after plaintiff was “out to court,” it is likely that plaintiff did not  
receive a copy of the court’s order due to circumstances out of his control and therefore did not  
have an opportunity to file objections. However, plaintiff is also cautioned that if he were to be  
transferred during the course of this litigation, it is his obligation to keep the court apprised of his  
current address of record. *See* Local Rule 183(b).

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- 2. Within twenty-one (14) days from the date of service of this order, plaintiff may file objections<sup>2</sup> to the findings and recommendations (Doc. No. 8); and,
- 3. Failure to file timely objections will result in a final order adopting the findings and recommendations and dismissing this action.

IT IS SO ORDERED.

Dated: October 3, 2019

  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> In his objections, plaintiff is directed to address if he has exhausted his administrative remedies regarding his action pursuant to the Eighth Amendment, which stems from the alleged removal of his cane, request for medical shoes, and suspension of his pain management medication. (See Doc. Nos. 1, 7.)