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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT RAMESES,

Petitioner,

No. CIV S-04-1173 GEB GGH P

vs.

SCOTT KERNAN,

Respondents.

ORDER &

FINDINGS AND RECOMMENDATIONS

_____ /

This is the third of petitioner’s motions, made purportedly pursuant to Fed. R. Civ. P. 60(b), in this matter. The initial Rule 60(b) motion was dismissed and the second was stricken as duplicative. See docket # 89 and docket # 93. As was noted with the first such motion, in the Findings and Recommendations, filed on October 8, 2010, and adopted by Order, filed on December 13, 2010, this petition for writ of habeas corpus was denied on March 31, 2008, and judgment entered accordingly, after which petitioner appealed to the Ninth Circuit. On April 27, 2010, the mandate of the Ninth Circuit was filed in the district court’s case docket, directing that the Ninth Circuit’s February 18, 2010, judgment affirming the judgment of the

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1 district court take effect.¹ See docket # 82 and # 83. Notwithstanding, petitioner, for a third
2 time, purports to proceed in this court, pursuant to Fed. R. Civ. P. 60(b), on a motion for relief
3 from final judgment. This time petitioner contends that he was never served with either the
4 October 8, 2010, Findings and Recommendations (docket # 87), or the Order, filed on December
5 13, 2010, adopting the findings and recommendations and dismissing the initial 60(b) motion.
6 This court's review of the docket shows that petitioner's original counsel was withdrawn on
7 February 25, 2008.² Docket # 67. Thereafter, petitioner proceeded pro se and any filings were
8 served upon petitioner pro se by mail until new counsel for petitioner was appointed on March
9 18, 2009. PACER records show that the Ninth Circuit evidently subsequently granted, on May
10 10, 2010, petitioner's request to terminate his new counsel's services; however, no notice was
11 sent to this court so any subsequent district court filings were served on petitioner's counsel of
12 record as indicated in this court's docket, rather than on petitioner pro se. Petitioner filed a
13 second motion, pursuant to Rule 60(b), which was stricken as entirely duplicative of the
14 previously dismissed 60(b) motion, as noted earlier. Docket # 93. Because it appears that that
15 Order, filed on April 25, 2011, was also served on petitioner's counsel, rather than on petitioner
16 pro se, the court will not simply strike the instant third motion as an abuse of process. However,
17 petitioner's filings in this case that has been closed since March 31, 2008, has become unduly
18 burdensome upon this court.

19 The initial Rule 60(b) motion and the second and the third wholly inapposite
20 motions are all predicated on alleged defects in the proceedings within the district court.

21 ¹ According to PACER, the petition for rehearing and for rehearing en banc was denied
22 on April 16, 2010, and the mandate issued on April 26, 2010. This court's docket, as noted
23 above, shows the mandate as filed in this court on April 27, 2010. Thereafter, on August 23,
24 2010, the Ninth Circuit ruled that petitioner had not demonstrated that this case warranted
25 intervention by the extraordinary remedy of mandamus, denied the motion to proceed in forma
26 pauperis as moot, and ordered that no further motions would be filed or entertained in the closed
docket. See docket # 84.

² The petition was denied in its entirety on March 31, 2008, and judgment thereon
entered.

1 As was previously set forth:

2 Under Rule 60(b), a party may seek relief from judgment and to
3 re-open his case in limited circumstances, “including fraud,
4 mistake, and newly discovered evidence.” Gonzalez v. Crosby, 545
5 U.S. 524, 528, 125 S.Ct. 2641, 2645-46, 162 L.Ed.2d 480 (2005).
6 Under Rule 60(b) (6), the catchall avenue by which petitioner
7 presumably also seeks to proceed to reopen his case, one must
8 demonstrate “any ... reason justifying relief from the operation of
9 the judgment” in situations that are not addressed by the specific
10 circumstances delineated in Rule 60(b)(1)-(5). Gonzalez v. Crosby,
11 545 U.S. 524, 528-529, 125 S.Ct. 2641, 2646, 162 L.Ed.2d 480
12 (2005). A purported Rule 60(b) motion seeking to reopen the
13 judgment of an initial habeas petition brought pursuant to 28
14 U.S.C. § § 2254, 2255 is in essence a successive petition, under 28
15 U.S.C. § 2244(b) where it “seeks to add a new ground for relief,”
16 or “if it attacks the federal court's previous resolution of a claim on
17 the merits ...” Gonzalez, at 532, 125 S.Ct. at 2648 [emphasis
18 added]. “[A] ‘claim’ as used in § 2244(b) is an asserted federal
19 basis for relief from a state court's judgment of conviction.” Id., at
20 530, 125 S.Ct. at 2647.

21 Petitioner protests that he is not herein attacking the district court’s
22 previous decision on the merits but on “procedural” grounds. He
23 accuses the district court of being part of some type of scheme to
24 not reach the merits of the arguments petitioner desired the court to
25 reach. The undersigned is not persuaded. This is nothing but a
26 transparent attempt to attack the final decision of the district court
along with its interlocutory rulings which indeed did address every
cognizable claim raised by petitioner on the merits.³

Thus, at most, petitioner’s motion is construed as a successive
petition. Under Ninth Circuit Rule 22-3, “[i]f a second or
successive petition or motion, or an application for leave to file
such an application or motion, is mistakenly submitted to the
district court, the district court shall refer it to the court of
appeals.” The district court has discretion to either transfer that
petition to the court of appeals or to dismiss the petition. United
States v. Winestock, 340 F.3d 200 (4th Cir. 2003)(§ 2255 case);
Robinson v. Johnson, 313 F.3d 128, 139-140 (3rd Cir. 2002). In
this case, the undersigned will recommend dismissal of the motion,
rather than a transfer of the motion to the Ninth Circuit. This court
does not have jurisdiction to consider the successive petition
without prior authorization by the Ninth Circuit.

³ To the extent that the court would view petitioner’s attack on the rubric of a Rule 60(b) motion, the conclusions of district court complicity with whomever to deny petitioner a ruling on the merits are baseless and frivolous. As indicated in the Findings and Recommendations adopted by the district court, the undersigned took pains to independently review the merits of what the undersigned viewed as complex claims. The claims were decided with a lengthy explanation and analysis.

1 Findings and Recommendations, filed on October 8, 2010, pp. 2-3 (docket # 87), as noted,
2 adopted by Order, filed on December 13, 2010 (docket # 89).

3 Accordingly, IT IS ORDERED that the Clerk of the Court is to substitute
4 petitioner pro se for appointed counsel in the case docket and to serve petitioner pro se by mail
5 with this Order and Findings and Recommendations, as follows:

6 Robert Ramses P-99863
7 Mule Creek State Prison
8 P.O. Box 409040 B-8-106
9 Ione, CA 95640

10 IT IS RECOMMENDED that:

11 1. Petitioner's third motion for relief from judgment, pursuant to Rule 60(b), filed
12 on September 2, 2011 (docket # 94) be dismissed; and

13 2. Any further filings from petitioner in this closed case be disregarded.

14 These findings and recommendations are submitted to the United States District
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
16 days after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
19 shall be served and filed within fourteen days after service of the objections. The parties are
20 advised that failure to file objections within the specified time may waive the right to appeal the
21 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22 DATED: October 3, 2011

23 /s/ Gregory G. Hollows
24 UNITED STATES MAGISTRATE JUDGE

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