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

DAVID LEE TERRY,

Petitioner,

2:06-cv-0244-GEB-KJM-P

vs.

MULE CREEK STATE PRISON, et al.,

Respondents.

ORDER

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Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus. On September 28, 2007, the court granted respondent’s motion, dismissed this habeas petition because it was not timely filed, and entered judgment. Thereafter, on December 4, 2007, the court denied a certificate of appealability. The Court of Appeal also denied petitioner’s request for a certificate of appealability on July 31, 2008.

On December 15, 2008, petitioner filed a document he has entitled a “motion for relief from default.” In the body of the motion, he argues that “the lower court finding on which the subject habeas denial was based is an inadvertent decision” and cites to the “catch-all” provision of Rule 60(b) of the Federal Rules of Civil Procedure. He argues that his petition was in fact timely and so the “default” of dismissal should therefore be cured.

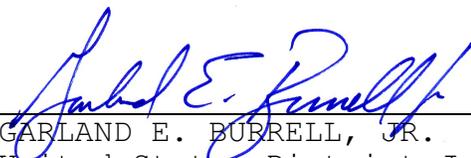
1 Under Rule 60(b) of the Federal Rules of Civil Procedure, a court may relieve a  
2 party from a final judgment for five reasons listed in the rule or for “any other reason that  
3 justifies relief.” A motion based on mistake, inadvertence, newly discovered evidence, or fraud  
4 must be made no more than one year after the entry of judgment; a motion based on any other  
5 reason must be made within a reasonable time. Fed. R. Civ. P. 60(c)(1). To the extent that  
6 petitioner bases his motion on inadvertence, it is not timely.

7 Petitioner also relies on what he terms the “catch-all” provision of the rule,  
8 presumably subdivision (b)(6). The Ninth Circuit has held that Rule 60(b) may be used to seek  
9 reconsideration of legal issues, but the request may not be based on evidence and legal arguments  
10 that could have been presented at the time of the challenged decision. See Liberty Mut. Ins. Co.  
11 v. E.E.O.C., 691 F.2d 438, 441 (9th Cir.1982) (holding that the “law in this circuit is that errors  
12 of law are cognizable under Rule 60(b)”); Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d  
13 877, 890 (9th Cir. 2000) (construing Rule 59(e)). The disposition of a motion for reconsideration  
14 is within the discretion of the district court. Lolli v. County of Orange, 351 F.3d 410, 411 (9th  
15 Cir. 2003).

16 In support of this motion, petitioner presents arguments he has already made or  
17 could have made in opposition to respondent’s motion to dismiss. This is an insufficient basis  
18 upon which to grant the motion.

19 Accordingly, IT IS THEREFORE ORDERED that petitioner’s motion for  
20 reconsideration (docket no. 37) is denied.

21 Dated: February 17, 2009

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24 GARLAND E. BURRELL, JR.  
United States District Judge