

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ENRIQUE BARRERA,
Petitioner,
v.
W.L. MUNIZ,
Respondent.

No. 2:14-cv-2260 JAM DB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se and in forma pauperis. On June 27, 2017, this court issued findings and recommendation in which the undersigned recommended denial of petitioner’s petition for writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 45.) Petitioner was advised that if he wished to file an appeal, he should seek a certificate of appealability in his objections to the findings and recommendations. On August 16, 2017, petitioner filed objections to the findings and recommendations. (ECF No. 48.) On October 12, 2017, the district judge rejected petitioner’s objections, adopted the findings and recommendations, declined to issue a certificate of appealability, and denied the petition for a writ of habeas corpus.

On November 9, 2017, petitioner filed both a motion for a certificate of appealability in this court and a notice of appeal. (ECF Nos. 51, 53.) The district judge referred the motion to the undersigned magistrate judge. (ECF No. 54.) For the reasons set forth below, the court

///

1 construes petitioner’s motion as a Rule 59(e) motion to amend the judgment and recommends
2 denial of that motion.

3 Generally, once an appeal is filed, a district court no longer has jurisdiction to consider
4 motions affecting the judgment. Davis v. Yageo Corp., 481 F.3d 661, 685 (9th Cir. 2007) (citing
5 Gould v. Mut. Life Ins. Co. of N.Y., 790 F.2d 769, 772 (9th Cir.1986)). However, under Rule 4
6 of the Federal Rules of Appellate Procedure, if a party files a notice of appeal after the entry of
7 judgment but before disposition of certain motions, including a motion to alter or amend the
8 judgment under Federal Rule of Civil Procedure 59(e) or a motion for relief from judgment under
9 Rule 60(b), then the district court retains jurisdiction to consider and decide that motion and the
10 notice of appeal becomes effective when that motion is resolved. Because petitioner filed his
11 motion within 28 days after the entry of judgment, his motion is treated as one under Rule 59(e).¹
12 See Lee-Thomas v. Prince George’s County Public Schools, 666 F.3d 244, 247 n.4 (4th Cir.
13 2012).

14 A Rule 59(e) motion to alter or amend the judgment is an “extraordinary remedy which
15 should be used sparingly.” Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). In
16 general, there are four grounds upon which a Rule 59(e) motion may be granted:

- 17 (1) if such motion is necessary to correct manifest errors of law or
18 fact upon which the judgment rests; (2) if such motion is necessary
19 to present newly discovered or previously unavailable evidence; (3)
20 if such motion is necessary to prevent manifest injustice; or (4) if
the amendment is justified by an intervening change in controlling
law.

21 Id. (citing McDowell v. Calderon, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (en banc) (per
22 curiam)). Petitioner does not cite to newly discovered evidence or a change in the law. Nor does
23 petitioner meet the remaining two bases for relief under Rule 59(d).

24 ///

25 ¹ Judgment was entered on October 12, 2017. (ECF No. 50.) Petitioner’s proof of service shows
26 that he placed his motion in the prison mail to be sent to this court on November 7, 2017. (ECF
27 No. 53 at 10.) Prisoner filings are deemed “filed” on the date they are provided to prison officials
28 for mailing. Houston v. Lack, 487 U.S. 266, 270 (1988). Petitioner provided his motion to
officials for filing 26 days after entry of judgment. Accordingly, his motion falls within the time
provisions of Rule 59(e).

1 Petitioner argues that the court erred in summarily denying his claims without an evidentiary
2 hearing, which, he contends, justifies a certificate of appealability. (ECF No. 53 at 4.) He also
3 appears to argue, for the first time, that his trial attorney was ineffective for failing to conduct a
4 pre-trial investigation. (Id. at 5.) He makes a second new argument that the California Court of
5 Appeals determination that the evidence was sufficient to support the verdict for attempted
6 murder is an unreasonable application of the law set forth in Mullaney v. Wilbur, 421 U.S. 684,
7 704 (1974). (Id. at 8.) Primarily, however, petitioner reargues the merits of his claims. (Id. at 5-
8 8.)

9 To demonstrate “manifest error,” petitioner must show the judgment rests on an incorrect
10 factual assumption or clear error of law. However, new legal arguments that should have been
11 raised previously are not appropriate in a Rule 59(e) motion. Divane v. Krull Elec. Co., Inc., 194
12 F.3d 845, 850 (7th Cir. 1999). Nor is a Rule 59(e) motion an appropriate vehicle to ask the court
13 to revisit issues already addressed. Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir.
14 2000). Petitioner shows neither an incorrect factual assumption or a clear error of law. He
15 primarily does nothing more than reiterate the arguments he made in his objections to the
16 undersigned’s findings and recommendations. Petitioner does not explain his new argument that
17 the decision in Mullaney v. Wilbur, 421 U.S. 684 (1974) is controlling. He appears to be relying
18 simply on the Court’s statement therein that a federal court is bound by a state court’s
19 construction of its state laws except where that construction is “an obvious subterfuge to evade
20 consideration of a federal issue.” 421 U.S. at 691. For the reasons set out in the June 27, 2017
21 findings and recommendations, this court does not find any such “subterfuge” on the part of the
22 state court in this case. Further, petitioner could have, and should have, raised any argument
23 based on Mullaney previously.


24 Nor does petitioner show that a “manifest injustice” will result from this court’s denial of a
25 certificate of appealability. This district court considered, and rejected, issuance of a certificate
26 of appealability previously. (See ECF No. 49 at 2.) Petitioner presents nothing new here to
27 change that determination.

28 ///
29

1 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s motion for a certificate of
2 appealability (ECF No. 53) be construed as a Rule 59(e) motion and be denied.

3 These findings and recommendations will be submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. The document should be captioned
7 “Objections to Magistrate Judge's Findings and Recommendations.” Any response to the
8 objections shall be filed and served within seven days after service of the objections. The parties
9 are advised that failure to file objections within the specified time may result in waiver of the
10 right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 Dated: December 3, 2017

12
13 
14 _____
15 DEBORAH BARNES
16 UNITED STATES MAGISTRATE JUDGE
17
18

19 DLB:9
20 DLB1/prisoner-habeas/barr2260.59e
21
22
23
24
25
26
27
28