

1 proceed in forma pauperis should be applied. (ECF No. 8 at 1.) However, no documents were
2 appended to petitioner's one page filing, and nothing within petitioner's filing reflects that he was
3 granted leave to proceed in forma pauperis.

4 The undersigned construes plaintiff's motion as a motion for relief from judgment
5 pursuant to Rule 60(b) of the Federal Rules of Civil Procedure:

6 (b) Grounds for Relief from a Final Judgment, Order, or
7 Proceeding. On motion and just terms, the court may relieve a party
8 or its legal representative from a final judgment, order, or
9 proceeding for the following reasons:

10 (1) mistake, inadvertence, surprise, or excusable neglect;

11 (2) newly discovered evidence that, with reasonable diligence,
12 could not have been discovered in time to move for a new trial
13 under Rule 59(b);

14 (3) fraud (whether previously called intrinsic or extrinsic),
15 misrepresentation, or misconduct by an opposing party;

16 (4) the judgment is void;

17 (5) the judgment has been satisfied, released or discharged; it is
18 based on an earlier judgment that has been reversed or vacated; or
19 applying it prospectively is no longer equitable; or

20 (6) any other reason that justifies relief.

21 Fed. R. Civ. P. 60(b).

22 Petitioner has failed to demonstrate that he is entitled to relief from judgment under Rule
23 60(b). Moreover, review of the petition reflects that re-opening this case would be futile. First,
24 writs of coram vobis have been abolished in federal civil practice. Fed. R. Civ. P. 60(e).

25 Second, judicial findings in Grecco, Case No. 2:15-cv-0669 (E.D. Cal.), confirm that
26 petitioner had not exhausted his state court remedies at the time he filed the instant petition in
27 2014. In the November 6, 2014 petition for writ of error coram vobis, petitioner challenges his
28 2010 conviction in the Sacramento County Superior Court, Case No. 09F01642. (ECF No. 1.)
Petitioner claims that District Attorney Sherri Greco² colluded with defense attorney Clark Head
to plant blood evidence, falsify court documents, manipulate photographs, and suppress or

² Although petitioner named District Attorney Sherri "Grecco" as a defendant in No. 2:15-cv-0669 WBS GGH, he referred to her as "Greco" in both petitions and subsequent filings.

1 conceal crime scene investigation reports. Petitioner appears to seek DNA testing of blood
2 allegedly found on his shoe. (ECF No. 1 at 3.)

3 However, petitioner subsequently filed a petition for writ of mandate, also challenging the
4 2010 conviction, which another court construed as a petition for writ of habeas corpus. Grecco,
5 No. 2:15-cv-0669 WBS GGH (E.D. Cal.). In Grecco, petitioner also claimed that Greco colluded
6 with Head to conceal C.S.I. reports, plant blood, manipulate photographs, falsify documents, etc.
7 Id. (ECF No. 13 at 1.) The other court reviewed petitioner’s state court records and determined
8 that “petitioner did not raise any claim concerning misconduct by the prosecutor or defense
9 counsel,” or raise an issue concerning DNA in his appeal filed in the Court of Appeal. Id. (ECF
10 No. 13 at 1.) Although petitioner appended a motion for DNA testing pursuant to Cal. Penal
11 Code § 1405 in superior court case number 09F01642, signed by petitioner on January 29, 2012,
12 the court in Grecco found that there was no indication the motion was actually filed in the
13 superior court, or that petitioner pursued the DNA claim through the California Supreme Court.
14 Grecco, No. 2:15-cv-0669 WBS GGH (ECF No. 13 at 6.) The court in Grecco determined that
15 petitioner had failed to exhaust his state court remedies, and ordered petitioner to show cause why
16 the petition should not be dismissed without prejudice. Id. (ECF No. 13 at 6.) On July 2, 2015,
17 the court noted that despite petitioner filing five separate responses to the order to show cause,
18 petitioner failed to state facts showing he had exhausted his state court remedies, and
19 recommended that the petition be dismissed without prejudice. Id. (ECF No. 20.)

20 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
21 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement
22 by providing the highest state court with a full and fair opportunity to consider all claims before
23 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
24 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

25 Here, because the writ of error coram vobis has been abolished, petitioner must challenge
26 his state court conviction through a petition for writ of habeas corpus. See 28 U.S.C. § 2254.
27 However, petitioner may not file a habeas petition in federal court until he exhausts his state


28 ///

1 judicial remedies. Because it appears petitioner had not exhausted his state court remedies prior
2 to filing the instant action, reopening this case would be futile.

3 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s motion to reopen this
4 case (ECF No. 8), construed as a motion for relief from judgment, be denied.

5 These findings and recommendations are submitted to the United States District Judge
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
7 after being served with these findings and recommendations, petitioner may file written
8 objections with the court and serve a copy on all parties. Such a document should be captioned
9 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
10 he shall also address whether a certificate of appealability should issue and, if so, why and as to
11 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
12 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
13 § 2253(c)(3). Petitioner is advised that failure to file objections within the specified time may
14 waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
15 1991).

16 Dated: July 21, 2015

17 
18 _____
19 KENDALL J. NEWMAN
20 UNITED STATES MAGISTRATE JUDGE

21 /lynn2601.60b