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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL MARKS,
Petitioner,
v.
SCOTT FRAUENHEIM,
Respondent.

No. 2:15-cv-0665 JAM DB P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. On August 11, 2017, this court issued findings and recommendations in which the undersigned recommended denial of petitioner’s petition for writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 31.) 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 20, 2017, petitioner filed objections to the findings and recommendations. (ECF No. 32.) On December 19, 2017, the district judge rejected petitioner’s objections, adopted the findings and recommendations, denied the petition for a writ of habeas corpus, and declined to issue a certificate of appealability. (ECF No. 33.)

Petitioner subsequently filed a request for a certificate of appealability. (ECF No. 36.) For the reasons set forth below, the court construes petitioner’s motion as a Rule 59(e) motion to amend the judgment and recommends denial of that motion.

1 **II. Analysis**

2 Petitioner argues a knife allegedly used during the crime was not DNA tested and he did
3 not have a fair chance to show the jury that the victim lied. (ECF No. 36.) He claims the
4 cumulative effect of all the mistakes made resulted in a wrongful conviction. Petitioner’s motion
5 primarily reargues the merits of his claim. Petitioner does not cite to newly discovered evidence
6 or a change in the law. Nor does petitioner meet the remaining two bases for relief under Rule
7 59(d).

8 To demonstrate “manifest error,” petitioner must show the judgment rests on an incorrect
9 factual assumption or clear error of law. However, new legal arguments that should have been
10 raised previously are not appropriate in a Rule 59(e) motion. Divane v. Krull Elec. Co., Inc., 194
11 F.3d 845, 850 (7th Cir. 1999). Nor is a Rule 59(e) motion an appropriate vehicle to ask the court
12 to revisit issues already addressed. Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir.
13 2000). Petitioner shows neither an incorrect factual assumption or a clear error of law. He
14 primarily does nothing more than reiterate the arguments he made in his petition (ECF No. 8) and
15 his objections to the undersigned’s findings and recommendations (ECF No. 32.).

16 Petitioner also does not show that a “manifest injustice” will result from this court’s denial
17 of a certificate of appealability. This district court considered, and rejected, issuance of a
18 certificate of appealability previously. (See ECF No. at 33.) Petitioner’s disagreement with the
19 court’s decision and restatement of allegations and arguments previously considered and rejected
20 by the court do not warrant reconsideration of the judgment upon order adopting findings and
21 recommendations in this proceeding.

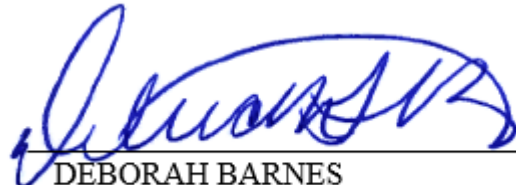
22 **III. Conclusion**

23 Accordingly, IT IS HEREBY RECOMMENDED that petitioner’s motion for a certificate
24 of appealability (ECF No. 36) be construed as a Rule 59(e) motion and be denied.

25 These findings and recommendations will be submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
27 after being served with these findings and recommendations, any party may file written
28 objections with the court and serve a copy on all parties. The document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
2 objections shall be filed and served within seven days after service of the objections. The parties
3 are advised that failure to file objections within the specified time may result in waiver of the
4 right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 Dated: July 30, 2018

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9 DEBORAH BARNES
10 UNITED STATES MAGISTRATE JUDGE

11 DLB:12
12 DLB:1/Orders/Prisoner.Habeas/mark0665.recon
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