



1           Petitioner appends two documents to his motion. First, in a January 24, 2017 letter  
2 addressed to petitioner from Cohen, counsel provided petitioner with “copies of all of the  
3 documents in [counsel’s] possession that [petitioner] [has] submitted to the court and they have  
4 marked ‘Received’ and then forwarded to [counsel’s] office.” (ECF No. 8 at 3.) Counsel noted  
5 that the last two, dated 9/29/16 and 10/24/16 were not marked received; because counsel received  
6 these documents from the court, counsel could not explain why the documents were not stamped.

7 (Id.) Counsel then stated:

8           It occurred to me that it may be unclear to the Placer clerks’ office  
9 whether they should file the documents because they are outside the  
10 appeal and Placer is technically only handling the appeal. It may  
11 help if I file a motion for clarification with the Placer County  
12 Appellate Division and ask for a court order that states that the  
13 Placer County Clerk should file all documents that you submit, in  
14 light of the El Dorado County Bench being recused.

15           I left a message with the El Dorado County Appellate Clerk asking  
16 if there was a second Notice of Appeal filed that addressed the final  
17 judgment.

18 (ECF No. 8 at 3.) This letter references El Dorado County Superior Court Case No. S16CRM  
19 0096. (Id.)

20           Second, petitioner provided a copy of a motion styled, “motion to augment the record on  
21 appeal; motion to extend briefing schedule; request for bail/release on appeal.” (ECF No. 8 at 4.)  
22 This motion is dated December 30, 2016, signed by Cohen, and bears the Placer County Superior  
23 Court caption, but references Case No. S16CRM 0096, the case initially filed in El Dorado  
24 County Superior Court. The motion does not bear any court’s file-stamp. (ECF No. 8 at 4.) In  
25 the motion, counsel requested that the court augment the record with particular exhibits, to extend  
26 the briefing schedule so that counsel could review the exhibits, to stay execution of the sentence  
27 and release petitioner on his own recognizance.

28           As set forth below, the motion for reconsideration, is granted, and upon reconsideration,  
the motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure is  
denied, and, to the extent petitioner asks the court to order any state court to expedite his appeal,  
such request is dismissed for lack of habeas jurisdiction.

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1 II. Background

2 Petitioner was convicted in July of 2016, for driving when privilege suspended or revoked  
3 for driving under the influence of alcohol or drugs; driving with knowledge of such suspension,  
4 revocation or restriction; and displaying registration or identification card not issued for vehicle  
5 with intent to avoid compliance with registration requirements. (ECF No. 1 at 1.) He was  
6 sentenced on July 11, 2016 to a jail term of one and a half years. (Id.) Petitioner confirms he  
7 filed an appeal. (ECF No. at 1.)

8 Petitioner claims that he has filed a petition for writ of habeas corpus in the California  
9 Supreme Court, but that the petition remained pending as of December 5, 2016. (ECF No. 1 at 4.)  
10 The California Supreme Court website reflects that the petition was denied on January 11, 2017.  
11 Robben (Todd) on Habeas Corpus, Case No. S238441 (Cal. S. Ct.).<sup>1</sup>

12 Petitioner raises multiple claims for relief in the instant petition.

13 On March 1, 2017, petitioner filed a notice of change of address, reflecting his release  
14 from jail on March 6, 2017. (ECF No. 9.) However, in other cases filed by petitioner, he filed a  
15 notice of change of address reflecting he was retained in jail, and ultimately transferred to the  
16 Sacramento County Jail, where he remains housed at this time. See, e.g., Robben v. D'Agostini,  
17 No. 2:16-cv-2742 CMK (E.D. Cal.) (ECF No. 14.)

18 III. Motion for Reconsideration

19 “[A] motion for reconsideration should not be granted, absent  
20 highly unusual circumstances, unless the district court is presented  
21 with newly discovered evidence, committed clear error, or if there  
22 is an intervening change in the controlling law.” 389 Orange St.  
Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). A motion  
23 for reconsideration “may not be used to raise arguments or present  
evidence for the first time when they could reasonably have been  
raised earlier in the litigation.” Kona Enters., Inc. v. Estate of  
Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

24 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).

25 “A party seeking reconsideration must show more than a disagreement with the Court’s decision,  
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27 <sup>1</sup> The court takes judicial notice of petitioner's records in the state appellate courts, available at  
28 <http://appellatecases.courtinfo.ca.gov>. See Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002)  
(courts may take judicial notice of relevant state court records in federal habeas proceedings).

1 and recapitulation” of that which was already considered by the Court in rendering its decision.  
2 United States. v. Westlands Water Dist., 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001). Courts  
3 construing Federal Rule of Civil Procedure 59(e), providing for the alteration or amendment of a  
4 judgment, have noted that a motion to reconsider is not a vehicle permitting the unsuccessful  
5 party to “rehash” arguments previously presented, or to present “contentions which might have  
6 been raised prior to the challenged judgment.” Costello v. United States, 765 F.Supp. 1003, 1009  
7 (C.D. Cal. 1991); see also F.D.I.C. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986); Keyes v.  
8 National R.R. Passenger Corp., 766 F. Supp. 277, 280 (E.D. Pa. 1991). These holdings  
9 “reflect[] district courts’ concerns for preserving dwindling resources and promoting judicial  
10 efficiency.” Costello, 765 F.Supp. at 1009. Additionally, pursuant to this Court’s Local Rules,  
11 when filing a motion for reconsideration, a party must show what “new or different facts or  
12 circumstances claimed to exist which did not exist or were not shown upon such prior motion, or  
13 what other grounds exist for the motion.” Local Rule 230(j).

#### 14 IV. Rule 60(b)

15 Rule 60(b) provides as follows:

16 **Grounds for Relief from a Final Judgment, Order, or**  
17 **Proceeding.** On motion and just terms, the court may relieve a  
18 party or its legal representative from a final judgment, order, or  
19 proceeding for the following reasons:

- 20 (1) mistake, inadvertence, surprise, or excusable neglect;
- 21 (2) newly discovered evidence that, with reasonable diligence,  
22 could not have been discovered in time to move for a new trial  
23 under Rule 59(b);
- 24 (3) fraud (whether previously called intrinsic or extrinsic),  
25 misrepresentation, or misconduct by an opposing party;
- 26 (4) the judgment is void;
- 27 (5) the judgment has been satisfied, released or discharged; it is  
28 based on an earlier judgment that has been reversed or vacated; or  
applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

27 Fed. R. Civ. P. 60(b). Rule 60(b)(6) “is to be used sparingly as an equitable remedy to prevent  
28 manifest injustice and is to be utilized only where extraordinary circumstances. . .” exist. Harvest

1 v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted). The  
2 moving party “must demonstrate both injury and circumstances beyond his control. . . .” Id.  
3 (internal quotation marks and citation omitted).

4 V. Discussion

5 In his motion, petitioner now claims that his appeal “will be further delayed or even  
6 dismissed.” (ECF No. 8 at 1.)

7 A. Appeal Delay

8 In his first claim, petitioner contends his appeal has been delayed by the state in violation  
9 of his due process rights. (ECF No. 1 at 5.) Reading this claim in conjunction with his motion  
10 for reconsideration, it appears that petitioner asks this court to compel a California court to  
11 expedite his appeal.

12 In Blair v. Martel, 645 F.3d 1151 (9th Cir. 2011), the Ninth Circuit found that habeas  
13 jurisdiction is absent in this context:

14 In two recent cases, Wilkinson v. Dotson, 544 U.S. 74, 125 S. Ct.  
15 1242, 161 L.Ed.2d 253 (2005), and Skinner v. Switzer, —U.S. —  
16 —, 131 S. Ct. 1289, 179 L.Ed.2d 233 (2011), the Court has made  
17 clear that an action brought under 42 U.S.C. § 1983 is the proper  
18 course for a constitutional claim such as the one that Petitioner  
19 originally filed here. Those decisions distinguish between claims  
20 that necessarily imply the invalidity of a conviction, which must be  
21 brought in the context of a habeas petition, and claims for  
22 constitutional violations that do not necessarily spell speedier  
23 release and thus do not lie at the core of habeas corpus, which may  
24 be brought, if at all, under § 1983. Skinner, 131 S. Ct. at 1298-99  
& n. 13.11

21 Under Skinner in particular, a prisoner, like Petitioner, who wants  
22 to compel the processing of an appeal to which state law entitles  
23 him, may not file a habeas petition to obtain that result. A due  
24 process claim of that sort does not “necessarily imply the invalidity  
25 of [a] conviction.” Id. at 1298 (emphasis added). In fact, it says  
26 nothing about the validity of the conviction because it raises an  
27 issue of process, not substance. Neither does the claim “necessarily  
28 spell speedier release,” id. at 1299 n. 13 (emphasis added), because,  
as happened here, the state court might affirm the prisoner’s  
conviction and sentence, leaving him in custody. We therefore  
conclude that a request for an order directing a state court to hasten  
its consideration of an appeal belongs in a § 1983 complaint, not a  
habeas petition.[FN 3]

Because we lack jurisdiction over Petitioner’s first claim, we  
dismiss it.

1 Blair, 645 F.3d at 1157-58.<sup>2</sup>

2 Here, to the extent petitioner seeks a court order expediting his appeal in state court, such  
3 request must be dismissed because this court lacks habeas jurisdiction over such claim.

4 Petitioner acknowledges that he filed a civil rights complaint against the El Dorado County  
5 Superior Court in connection therewith (ECF No. 8 at 1).

6 B. Younger Abstention

7 Despite petitioner's concern as to the status of his pending appeal in state court, both his  
8 filings, as well as the documents signed by his new counsel Cohen, confirm that his direct appeal  
9 remains pending. Petitioner has failed to show new or extraordinary circumstances that warrant  
10 intervention by this court. Thus, for the reasons set forth in the January 19, 2017 order, this court  
11 must abstain from addressing the instant petition. Younger v. Harris, 401 U.S. 37, 43-54 (1971).  
12 When an appeal of a state criminal conviction is pending, petitioner must await the outcome of  
13 his direct appeal before his state remedies are exhausted, even where the issue to be challenged in  
14 the federal writ of habeas corpus has been finally resolved in the state courts. Sherwood v.  
15 Tomkins, 716 F.2d 632, 634 (9th Cir. 1983); see also Schnepf v. State of Or., 333 F.2d 288 (9th  
16 Cir. 1964) (per curiam).

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. Petitioner's motion for reconsideration (ECF No. 8) is granted;
- 19 2. Upon reconsideration, the January 19, 2017 order (ECF No. 6) is affirmed;
- 20 3. Petitioner's request that the court order any state court to expedite his appeal is  
21 dismissed for lack of habeas corpus jurisdiction; and

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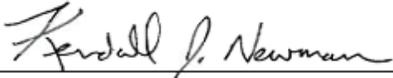
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26 <sup>2</sup> It also appears that an argument that delay in resolving an appeal from a state court conviction  
27 violates due process is precluded by binding circuit precedent. Hayes v. Ayers, 632 F.3d 500,  
28 523 (9th Cir. 2011).

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4. The Clerk of the Court is directed to change petitioner's mailing address to: Todd Robben, #5073288, Sacramento County Main Jail, 651 I Street, Sacramento, CA 95814.

Dated: June 12, 2017

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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