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

|                        |   |                        |
|------------------------|---|------------------------|
| AHMED AMARIR,          | ) |                        |
|                        | ) |                        |
| Plaintiff,             | ) | No. C 04-5290 CRB (PR) |
|                        | ) |                        |
| vs.                    | ) | ORDER DENYING MOTION   |
|                        | ) | TO VACATE JUDGMENT     |
| JAMES C. HILL, et al., | ) |                        |
|                        | ) | (Doc # 61)             |
| Defendants.            | ) |                        |
| _____                  | ) |                        |

Plaintiff moves for an order vacating summary judgment in favor of defendants and reopening his civil rights action pursuant to Federal Rule of Civil Procedure 60(b). For the reasons set forth below, the motion will be denied.

**BACKGROUND**

Plaintiff, a prisoner at the Correctional Training Facility ("CTF") in Soledad, California, filed a pro se action under 42 U.S.C. § 1983 and 28 U.S.C. § 1367 alleging denial of adequate dental treatment.

Per order filed March 21, 2005, the court found that plaintiff's allegations, liberally construed, stated a cognizable claim for relief for deliberate indifference under § 1983 and for medical malpractice under California law against CTF dentist James C. Hill and CTF chief medical officer Michael L. Friedman. The court dismissed the other named defendants under the authority of 28 U.S.C. § 1915A(b).



1 surprise or excusable neglect was unexpected and unavoidable rather than  
2 careless. *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987).  
3 Reconsideration is not allowed pursuant to Rule 60(b)(1) based on an attorney's  
4 innocent, careless, or negligent mistakes, or even based on an attorney's  
5 intentional misconduct. *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097,  
6 1101 (9th Cir. 2006). As a general rule, parties are bound by the actions of their  
7 lawyers; even attorney malpractice does not usually provide a basis to set aside a  
8 judgment pursuant to Rule 60(b)(1). *Casey v. Alberston's, Inc.*, 362 F.3d 1254,  
9 1260 (9th Cir. 2004).

10 Rule 60(b)(2) permits relief from judgment based on "newly discovered  
11 evidence that, with reasonable diligence, could not have been discovered in time  
12 to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). "[T]he  
13 movant must show that the evidence (1) existed at the time of the trial, (2) could  
14 not have been discovered through due diligence, and (3) was 'of such magnitude  
15 that production of it earlier would have been likely to change the disposition of  
16 the case.'" *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (quoting  
17 *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir.  
18 1987)).

19 Rule 60(b)(6) is a "catchall provision" that applies only when the reason  
20 for granting relief is not covered by any of the other reasons set forth in Rule 60.  
21 *United States v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005). "It has been  
22 used sparingly as an equitable remedy to prevent manifest injustice and is to be  
23 utilized only where extraordinary circumstances prevented a party from taking  
24 timely action to prevent or correct an erroneous judgment." *Id.* (internal  
25 quotations omitted). A party "must demonstrate both injury and circumstances  
26 beyond his control that prevented him from proceeding with the prosecution or  
27

1 defense of the action in a proper fashion." *Id.* (internal quotations omitted).

2 **I. Timing**

3 Defendants argue that plaintiff's Rule 60(b) claims are untimely. Rule  
4 60(c) states that "a motion under Rule 60(b) must be made within a reasonable  
5 time – and for reasons (1), (2), and (3) no more than a year after the entry of the  
6 judgment or order or the date of the proceeding." Judgment was entered in this  
7 matter on June 2, 2006, more than two years before plaintiff filed his Rule 60(b)  
8 motion; plaintiff's claims under Rule 60(b)(1) and (2) are clearly untimely.  
9 Additionally, two years is beyond a reasonable time for plaintiff to bring a  
10 "catch-all" claim under Rule 60(b)(6).

11 In any event, the claims are without merit.

12 **II. Attorney Misconduct**

13 Plaintiff argues that he is entitled to relief from judgment under Rule 60(b)  
14 because he was prejudiced by his court-appointed appellate attorney's failure to  
15 file a motion for an extension of time to file a petition for rehearing in the Ninth  
16 Circuit.

17 The relevant sequence of events is as follows. On June 2, 2006, the court  
18 granted defendants' motion for summary judgment. On October 31, 2007, the  
19 Ninth Circuit affirmed the judgment. On November 11, 2007, plaintiff requested  
20 an extension of time to file a petition for rehearing. Mot. Ex. B. The Ninth  
21 Circuit responded in a letter dated November 16, 2007 that because plaintiff was  
22 represented by counsel, all motions for relief had to be filed by counsel. *Id.* On  
23 November 20, 2007, plaintiff's court-appointed counsel informed plaintiff that  
24 she had determined not to seek a rehearing and would withdraw as counsel in  
25 order to allow plaintiff to proceed pro se. *Id.* Counsel also informed plaintiff  
26 that she would request the Ninth Circuit to grant him an extension of time to file  
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1 a petition for rehearing. *Id.* On January 29, 2008, counsel filed a joint motion for  
2 withdrawal as counsel and for an extension of time to file a petition for rehearing.  
3 Mot. Ex. D. On February 1, 2008, the Ninth Circuit granted the motion for  
4 withdrawal of counsel but denied the motion for extension of time as moot. *See*  
5 Mot. Ex. C.

6 On April 23, 2008, plaintiff filed a petition for a writ of certiorari with the  
7 United States Supreme Court. *See id.* In a letter dated April 29, 2008, the Court  
8 rejected the petition on the ground that it was "out-of-time." *Id.* The letter  
9 explained: "The date of the lower court judgment or order denying a timely  
10 petition for rehearing was October 31, 2007. Therefore, the petition was due on  
11 or before January 29, 2008. Rules 13.1, 29.2 and 30.1." *Id.* Plaintiff points to  
12 the fact that counsel filed the motion for an extension of time with the Ninth  
13 Circuit on the same day that his petition for certiorari to the Supreme Court was  
14 due and claims that this "untimely" filing entitles him to relief from judgment  
15 under Rule 60(b).

16 Plaintiff's claim is without merit. Plaintiff essentially asks the court to  
17 vacate summary judgment because his appellate attorney improperly handled the  
18 request for rehearing of the Ninth Circuit's affirmance of this court's judgment.  
19 Rule 60(b) does not give this court that authority. If plaintiff wishes to reopen  
20 appellate review, a motion for reconsideration in the Ninth Circuit is the proper  
21 means to do so, not a motion to vacate judgment here.

22 Even if Rule 60(b) did give the court authority to reopen appellate review,  
23 attorney negligence is not a valid basis on which to set aside judgment under  
24 Rule 60(b)(1). *See Latshaw*, 452 F.3d at 1101. Counsel's delay in filing a motion  
25 for an extension of time to file a petition for rehearing cannot justify the court's  
26 vacating its grant of summary judgment.



