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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO ORTIZ,

Petitioner,

v.

D. G. ADAMS, warden,

Respondent.

No. C 08-4834 SI (pr)

**ORDER DENYING RELIEF FROM
JUDGMENT**

On June 24, 2010, the court denied the petition for writ of habeas corpus and entered judgment in this action. More than fourteen months later, on September 6, 2011, petitioner filed a "declaration in support of his request for relief under mistake, inadvertence and/or excusable neglect. (Fed. Rules Civ. P., Rule 60(b).)" (Docket # 20.) At the same time, he filed an 80-page traverse. (Docket # 21.) The declaration is construed to be a Rule 60(b) motion and is DENIED.¹

The court may relieve a party "from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). "A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Here, relief is not available under Rule 60(b)(1) because petitioner's Rule 60(b) motion was filed more than a year after judgment was entered. The only possibility of relief is under Rule 60(b)(6).

¹When the document was filed, it was identified as a declaration, and therefore was not flagged as being a motion in need of a decision. The court noticed that it needed a decision only recently, when attempting to determine why petitioner filed a notice of change of address in this long-closed case.

1 Rule 60(b)(6) "has been used sparingly as an equitable remedy to prevent manifest
2 injustice and is to be utilized only where extraordinary circumstances prevented a party from
3 taking timely action to prevent or correct an erroneous judgment." *United States v. Washington*,
4 394 F.3d 1152, 1157 (9th Cir. 2005) (internal quotations and citation omitted). Thus, to reopen
5 a case under Rule 60(b)(6), a party must establish "both injury and circumstances beyond his
6 control that prevented him from proceeding . . . in a proper fashion." *Id.* (internal quotations
7 omitted).

8 Petitioner's extreme delay in presenting his Rule 60(b) motion, as well as the reasons he
9 offered for his delay convince the court that the motion should be denied both because it was not
10 filed within a "reasonable time," Fed. R. Civ. P. 60(c)(1), and because he failed to show
11 extraordinary circumstances justifying relief from the judgment. The Rule 60 motion did not
12 identify any error in the order of dismissal, but simply was an attempt to file an extremely tardy
13 traverse. The legal argument section of the traverse appears largely to have been cut-and-pasted
14 from earlier state appellate court briefs. It was not reasonable to take 25+ months to prepare the
15 traverse.²

16 Petitioner offered several reasons for his delay, but they do not individually or
17 collectively support relief from the judgment. First, petitioner declared that he "speaks and
18 understands very little English," Docket # 20, p. 2; however, his several handwritten letters to
19 the court (Docket # 4, # 15, and # 17) show he has some command of the English language. His
20 language difficulties do not justify relief from the judgment. Second, he declared that he was
21 housed in the very restrictive environment of an ad-seg unit from May 2008 through January
22 2009, Docket # 20, p. 2, but that time period was before the court even set the briefing schedule
23 in the March 2, 2009 order to show cause. Third, petitioner suggested that the attorney he found
24 to help him prepare a traverse waited many months until April 3, 2010 to tell him that she had
25 a conflict and could not assist him, Docket # 20, p. 2, but petitioner's date was off by six months:
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28 ²Respondent filed his answer on July 2, 2009; the court denied the petition on June 24, 2010,
after waiting more than eleven months for a traverse; petitioner filed his traverse more than fourteen
months later, on September 6, 2011.

1 that attorney informed him in *October 2009* that she had a conflict, *see* Docket # 14, and he
2 thereafter requested and received an extension of time to file the traverse due to her departure
3 from the case. Petitioner knew since early October 2009 that he had to prepare the traverse
4 himself, and did not do so before the petition was denied more than eight months later in June
5 2010. Fourth, petitioner declared that he was transferred to a new prison on March 10, 2010, and
6 had to once again look for an inmate to help him with his traverse, Docket # 20, p. 3; however,
7 by that time, he had already had many months to prepare his traverse and had already missed the
8 final traverse deadline of December 18, 2009. Relief is not warranted under Rule 60(b)(6) for
9 the inexcusably late traverse and motion for relief from judgment. The motion for relief from
10 judgment is DENIED. (Docket # 20.)

11 A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case
12 in which "reasonable jurists would find the district court's assessment of the constitutional
13 claims debatable or wrong" in the order denying the petition, or one in which "jurists of reason
14 would find it debatable whether the district court was correct in its procedural [rulings]" in this
15 order. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The denial of the certificate of
16 appealability is without prejudice to petitioner seeking a certificate from the United States Court
17 of Appeals for the Ninth Circuit.

18 IT IS SO ORDERED.

19 DATED: April 15, 2013



SUSAN ILLSTON
United States District Judge

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