

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

3 JAVIER FLORES,) No. C 05-3932 CW (PR)
 4)
 Petitioner,) ORDER GRANTING IN FORMA PAUPERIS
 5) STATUS ON APPEAL, DENYING MOTION
 v.) FOR RECONSIDERATION AND GRANTING
 6 A.P. KANE, Warden,) CERTIFICATE OF APPEALABILITY
)
 Respondent.) (Docket nos. 22, 23)
 7)
 8 _____)

9 Petitioner, proceeding pro se, filed a petition for a writ of
 10 habeas corpus pursuant to title 28 U.S.C. § 2254. On March 14,
 11 2008, the Court granted Respondent's motion to dismiss the petition
 12 as untimely. On March 24, 2008, Petitioner filed a notice of
 13 appeal. On April 14, 2008, he filed an application to proceed in
 14 forma pauperis (IFP) on appeal. On May 30, 2008, he filed a motion
 15 for reconsideration. Respondent filed an opposition to
 16 Petitioner's motion for reconsideration on June 25, 2008. On
 17 November 10, 2008, Petitioner filed an "addendum" to his motion for
 18 reconsideration.

19 I. Motion for Reconsideration

20 Federal Rule of Appellate Procedure 4(a)(4)(A)(vi) provides
 21 that a district court may retain jurisdiction after a notice of
 22 appeal is filed if a petitioner files a motion "for relief under
 23 Rule 60 [and] if the motion is filed no later than 10 days
 24 (computed using Federal Rule of Civil Procedure 6(a)) after the
 25 judgment is entered." Fed. R. App. P. 4(a)(4)(A)(vi).

26 In the present case, Respondent argues that Petitioner's
 27 motion for reconsideration of the March 14, 2008 Order Granting
 28 Respondent's Motion to Dismiss is untimely because it was not filed

1 within ten days of the judgment being entered. Instead, Petitioner
2 filed it over two months after entry of judgment. Petitioner also
3 filed his motion for reconsideration after filing his notice of
4 appeal. Thus, Respondent also argues that "the Notice of Appeal
5 divested this Court of jurisdiction to substantively address the
6 Motion." (Opp'n to Mot. for Recons. at 2.)

7 Because the notice of appeal was filed before the motion for
8 reconsideration, this Court lacks jurisdiction to rule upon
9 Petitioner's motion. See Scott v. Younger, 739 F.2d 1464, 1466
10 (9th Cir. 1984). To seek Rule 60(b) relief during the pendency of
11 an appeal, the proper procedure is to ask the district court
12 whether it wishes to entertain the motion, or to grant it, and then
13 move the court of appeals, if appropriate, for remand of the case.
14 Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004). A
15 district court lacks jurisdiction to rule on a Rule 60(b) motion
16 filed after a notice of appeal unless this procedure "to revest the
17 district court with jurisdiction to consider [the] Rule 60(b)
18 motion" is followed. Id.

19 In any event, however, Petitioner's motion has no merit.

20 Motions to reconsider a decision of the court are
21 appropriately brought under Rule 59(e) or Rule 60(b) of the Federal
22 Rules of Civil Procedure. Fuller v. M. G. Jewelry, 950 F.2d 1437,
23 1422 (9th Cir. 1991). Pursuant to Rule 59(e), reconsideration may
24 be appropriate where the movant demonstrates that there is (1) an
25 intervening change in the controlling law, (2) new evidence not
26 previously available, or (3) a need to correct a clear error of law
27 or to prevent manifest injustice. School Dist. No. 1J, Multnomah
28 County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993),

1 cert. denied, 512 U.S. 1236 (1994). Rule 60(b) provides for
2 reconsideration only upon a showing of: (1) mistake, inadvertence,
3 surprise or excusable neglect; (2) newly discovered evidence which
4 by due diligence could not have been discovered before the court's
5 decision; (3) fraud by the adverse party; (4) the judgment is void;
6 (5) the judgment has been satisfied; or (6) any other reason
7 justifying relief. See Fed. R. Civ. P. 60(b); School Dist. No. 1J,
8 5 F.3d at 1263. Subparagraph (6) requires a showing that the
9 grounds justifying relief are extraordinary; mere dissatisfaction
10 with the court's order or belief that the court is wrong in its
11 decision are not adequate grounds for relief. See Twentieth
12 Century - Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir.
13 1981).

14 Here, as grounds for reconsideration, Petitioner claims that
15 he "discovered a clear error that entitles him to relief." (Mot.
16 for Recons. at 2.) He argues that his petition is "timely under
17 the 'mailbox rule.'" (Addendum at 2.) He alleges that he signed
18 his federal petition on August 14, 2005 and gave it to prison
19 officials to be processed on that date. However, his petition was
20 not file-stamped by the Clerk of Court until September 28, 2005.

21 Under the "mailbox rule," a pro se federal habeas petition is
22 deemed filed on the date it is delivered to prison authorities for
23 mailing. See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir.
24 2001), vacated and remanded on other grounds, Carey v. Saffold, 536
25 U.S. 214 (2002) (holding that a federal or state habeas petition is
26 deemed filed on the date the prisoner submits it to prison
27 authorities for filing, rather than the date it is received by the
28 courts).

1 In its March 14, 2008 Order, the Court found that Petitioner
2 failed "to make a claim or showing that the date he signed the
3 petition was the date of delivery to prison officials for mail."
4 (Mar. 14, 2008 Order at 2.) The Court further stated, "Such a
5 claim is especially important here because forty-five days elapsed
6 between the date the petition was signed and the date it was
7 filed." (Id.) The Court deemed the petition filed as of September
8 23, 2005, three court days before the date of filing, because it
9 assumed "that Petitioner did not give his petition to prison
10 officials for mailing on August 14, 2005 in light of his equitable
11 tolling argument requesting the Court to toll the statute of
12 limitations for the thirty-six days the prison law library was
13 closed during August and September, 2005." (Id. (citing Opp'n at
14 4-5).)

15 Petitioner states that in his opposition to the motion to
16 dismiss, he "focused on the wrong point," and "sought to establish
17 timeliness through equitable tolling rather than just focusing on
18 when he delivered his legal documents to his Counselor." (Addendum
19 at 2.) He states, "To the best of [his] recollection, on or about
20 August 14, 2005, [he] gave [his] writ to Counselor Heinly for
21 processing." (Pet'r Decl. ¶ 2.) He adds, "It appears there is no
22 log to record receipt of the legal mail. The only record is for
23 outgoing legal mail. The mail room indicates they forwarded [his]
24 writ to the court on September 27, 2005." (Id. ¶ 4.) Petitioner
25 alleges that Counselor Heinly "took the writ to the Trust Account
26 Office for them to cut the \$5.00 filing fee and to sign the in
27 forma pauperis form." (Mot. for Recons. at 2.) Petitioner states,
28 "Apparently the Trust Office set [sic] on the writ for a couple of

1 weeks before fulfilling their duties and mailing the writ to the
2 court." (Id.) In support of this statement, Petitioner cites
3 Counselor Heinly's declaration. However, no such declaration is
4 attached to the motion. Petitioner alleges that Counselor Heinly
5 initially "agreed to wrote a declaration indicating that he had
6 taken possession of the writ on August 14, 2005." (Addendum at 2.)
7 However, Counselor Heinly "retracted his offer to write a
8 declaration and informed Petitioner that he should ask the Trust
9 Office for a copy of the original trust withdrawal form with the
10 signatures and dates on it." (Id.) Petitioner claims he tried to
11 obtain the trust withdrawal form; however, the trust office
12 "indicated that their records had been 'purged' and therefore they
13 were unable to provide a copy of the trust withdrawal form." (Id.)
14 The record contains a document entitled, "Check Status Update,"
15 which indicates that \$5.00 was taken from Petitioner's account on
16 September 23, 2005 and sent to the Court. (Addendum, Attach.
17 "Check Status Update" dated Oct. 14, 2007.) Also in the record is
18 the receipt for the \$5.00 filing fee from the Clerk of the Court
19 dated September 28, 2005. (Addendum, Attach. "Receipt for Payment"
20 dated Sept. 28, 2005.)

21 Upon considering the alleged "clear error" presented in
22 Petitioner's motion for reconsideration, the Court finds that
23 Petitioner has failed to show that reconsideration of the Court's
24 March 14, 2008 Order is appropriate. The Court found the petition
25 to be untimely by seventeen days, and Petitioner has filed this
26 motion for reconsideration to account for forty-five days that he
27 claims should have been tolled pursuant to the mailbox rule.
28 However, the record does not support Petitioner's allegations.

1 Instead, the record supports the Court's conclusion that the
2 petition should be deemed filed as of September 23, 2005 because
3 that was the date the trust office sent his \$5.00 filing fee to the
4 Court. (Addendum, Attach. "Check Status Update" dated Oct. 14,
5 2007.) Given the failure of Petitioner's argument that his
6 petition is timely, the motion to reconsider would not be granted
7 if this Court had jurisdiction to consider it.

8 In view of the above considerations, the motion to reconsider
9 is DENIED on the merits as well as for lack of jurisdiction. A
10 remand for ruling is not necessary.

11 II. Motion for a Certificate of Appealability (COA)

12 Petitioner did not seek a COA, however, the Court will
13 construe his notice of appeal as a request for COA on all of the
14 claims raised in his habeas petition. See United States v. Asrar,
15 116 F.3d 1268, 1270 (9th Cir. 1997) ("If no express request is made
16 for a certificate of appealability, the notice of appeal shall be
17 deemed to constitute a request for a certificate.")

18 A petitioner may not appeal a final order in a federal habeas
19 corpus proceeding without first obtaining a COA. See 28 U.S.C.
20 § 2253(c); Fed. R. App. P. 22(b). Section 2253(c)(1) applies to an
21 appeal of a final order entered on a procedural question antecedent
22 to the merits, for instance a dismissal on statute of limitations
23 grounds. See Slack v. McDaniel, 529 U.S. 473, 483 (2000).

24 "Determining whether a COA should issue where the petition was
25 dismissed on procedural grounds has two components, one directed at
26 the underlying constitutional claims and one directed at the
27 district court's procedural holding." Id. at 484-85. "When the
28 district court denies a habeas petition on procedural grounds

1 without reaching the prisoner's underlying constitutional claim, a
2 COA should issue when the prisoner shows, at least, that jurists of
3 reason would find it debatable whether the petition states a valid
4 claim of the denial of a constitutional right and that jurists of
5 reason would find it debatable whether the district court was
6 correct in its procedural ruling." Id. at 484. As each of these
7 components is a "threshold inquiry," the federal court "may find
8 that it can dispose of the application in a fair and prompt manner
9 if it proceeds first to resolve the issue whose answer is more
10 apparent from the record and arguments." Id. at 485. Supreme
11 Court jurisprudence allows and encourages federal courts to resolve
12 the procedural issue first, as the Court does here.

13 The Court has reviewed its Order Granting Respondent's Motion
14 to Dismiss. The petition was dismissed because the statute of
15 limitations deadline was July 22, 2004, this petition was not filed
16 until September 23, 2005, and Petitioner's arguments against
17 dismissal -- that circumstances warrant statutory¹ and equitable
18 tolling to save the petition from being untimely -- were

20 ¹ The Court found that statutory tolling did not alone overcome
21 the time bar to Petitioner's federal petition, stating:

22 The one-year limitations period which began running
23 against Petitioner on July 22, 2003 was tolled by the
24 filing of his state habeas petition in the California
25 Supreme Court on June 2, 2004, which is a period of 317
26 days. The statute resumed running on July 20, 2005, the
27 date of the California Supreme Court denial, and ran until
28 September 23, 2005, the date Petitioner's federal habeas
petition was deemed filed, which is sixty-five additional
days. Therefore, a total of 382 days (317 days plus 65
days) had elapsed before Petitioner filed the present
petition in federal court on September 23, 2005.
Therefore, his petition is untimely because it was filed
seventeen days (382 days minus 365 days) after the
limitations period expired.

(Mar. 14, 2008 Order at 5-6 (footnote omitted).)

1 unavailing. As mentioned above, the Court also found that nothing
2 in the record supports Petitioner's allegation that he delivered
3 his petition to prison officials for mailing on August 14, 2005;
4 thus, he does not benefit from forty-five additional days under the
5 "mailbox rule." Based on the record evidence, a court could
6 resolve the issue involving the "mailbox rule" in a different
7 manner than this Court and find the petition to be timely. Because
8 jurists of reason would find debatable or wrong the Court's
9 conclusion that the petition is untimely, the request for a COA is
10 GRANTED.

11 CONCLUSION

12 For the foregoing reasons,

13 1. Leave to proceed IFP on appeal (docket no. 22) is
14 GRANTED.

15 2. Petitioner's motion for reconsideration (docket no. 23)
16 is DENIED.

17 3. Petitioner's motion for a COA is GRANTED.

18 4. The Clerk of the Court shall process the notice of
19 appeal.

20 5. This Order terminates Docket nos. 22 and 23.

21 IT IS SO ORDERED.

22 DATED: 3/10/09

23 
24 _____
25 CLAUDIA WILKEN
26 United States District Judge
27
28

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 FLORES,

5 Plaintiff,

6 v.

7 et al,

8 Defendant.
_____ /

Case Number: CV05-03932 CW

CERTIFICATE OF SERVICE

9
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on March 10, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Javier Flores C44235
16 Correctional Training Facility
17 P.O. Box 689
18 Soledad, CA 93960-0689

19 Dated: March 10, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk

United States District Court
For the Northern District of California