

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

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|---|----------------------------------|---|---|
| 3 | BILLY RAY O'NEAL,                | ) | No. C 08-4669 SBA (PR)                    |
| 4 | Plaintiff,                       | ) |   |
| 5 | v.                               | ) | <b><u>ORDER DENYING PLAINTIFF'S</u></b>   |
| 6 | COUNTY OF SAN FRANCISCO, et al., | ) | <b><u>MOTION FOR RECONSIDERATION;</u></b> |
| 7 | Defendants.                      | ) | <b><u>AND CERTIFICATION THAT</u></b>      |
|   |                                  | ) | <b><u>APPEAL IS FRIVOLOUS</u></b>         |
|   |                                  | ) | (Docket no. 42)                           |

This is a civil rights case brought pro se by Plaintiff, who alleged excessive force claims against Defendants San Francisco County Jail (SFCJ) Deputies R. Reymundo and Camarra stemming from an April 21, 2007 incident.

In an Order dated March 30, 2012, the Court granted Defendants Reymundos and Camarra's motion to dismiss Plaintiff's claims for failure to exhaust administrative remedies. As that Order clearly indicated, Plaintiff's claims were dismissed without prejudice to refile in a new action upon exhaustion of his claims. The Court also directed the Clerk of the Court to send Plaintiff a blank civil rights complaint form and a blank in forma pauperis (IFP) application.

On April 13, 2012, Plaintiff filed a Notice of Appeal as well as a motion for reconsideration of the Court's March 30, 2012 Order.

Thereafter, the Ninth Circuit Court of Appeals issued a Referral Notice and directed the Court to inform the Ninth Circuit if Plaintiff's appeal is frivolous or not taken in good faith.

The motion for reconsideration was filed before the notice of appeal, and is timely. See Fed. R. Civ. P. 59(e). The notice of appeal thus does not become effective until the motion for reconsideration is ruled upon. See Fed. R. App. P. 4(B)(i).

Motions to reconsider a decision of the Court are appropriately brought under Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. Fuller v. M.G. Jewelry, 950 F.2d 1437, 1422 (9th Cir. 1991).

Pursuant to Rule 59(e), reconsideration may be appropriate where the movant demonstrates

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1 that there is (1) an intervening change in the controlling law, (2) new evidence not previously  
2 available, or (3) a need to correct a clear error of law or to prevent manifest injustice. McDowell v.  
3 Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). To whatever extent Plaintiff's motion can be  
4 construed as a motion for leave to file a motion for reconsideration under Rule 59, it is DENIED as  
5 more than ten days had passed from the date final judgment was entered to the date he filed the  
6 motion. See Fed. R. Civ. P. 59(b).

7 Rule 60(b) provides for reconsideration only upon a showing of: (1) mistake, inadvertence,  
8 surprise or excusable neglect, (2) newly discovered evidence which by due diligence could not have  
9 been discovered before the court's decision, (3) fraud by the adverse party, (4) a void judgment, (5) a  
10 satisfied or discharged judgment, or (6) any other reason justifying relief. See Fed. R. Civ. P. 60(b);  
11 School Dist. 1J v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Subparagraph (6) requires a  
12 showing that the grounds justifying relief are extraordinary; mere dissatisfaction with the court's  
13 order or belief that the court is wrong in its decision are not adequate grounds for relief. Twentieth  
14 Century - Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir. 1981).

15 In his motion for reconsideration, Plaintiff asks the Court to reconsider its March 30, 2012  
16 Order dismissing his excessive force claims as unexhausted. Plaintiff states that he does not "see the  
17 rationality of filing a grievance against the Sherrif [sic] Department while [he was] accused of  
18 assault and battery [and] resisting arrest . . . [and] [t]he judge dismissed the criminal case after  
19 [re]viewing it." (Mot. for Recons. at 2.) Instead, Plaintiff repeats his argument that he exhausted his  
20 administrative remedies by filing a "Citizens Complaint." (Id.) However, the Court has previously  
21 determined that such a filing is insufficient to satisfy the exhaustion requirement, stating:  
22

23 While Plaintiff claims he filed a citizen's complaint on some unspecified  
24 date, such a filing is insufficient to exhaust his administrative remedies because  
25 Plaintiff was required to comply with the appeals process described in the San  
26 Francisco Sheriff's Department's Policy and Procedures. See Woodford, 548 U.S.  
27 at 90-91<sup>1</sup> ("Proper exhaustion demands compliance with an agency's deadlines and  
28 other critical procedural rules."). Furthermore, Plaintiff's allegation of filing a  
citizen's complaint is made without any proof or support, and he does not indicate  
that he received notice of the disposition of his citizen's complaint. Therefore,

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<sup>1</sup> Woodford v. Ngo, 548 U.S. 81, 90-91 (2006).

1 Plaintiff's filing of a citizen's complaint does not satisfy the exhaustion requirement  
2 because he did not comply with the jail grievance procedures as required by the  
PLRA. See id.

3 (Mar. 30, 2012 Order at 7 (footnote added).)

4 Plaintiff concedes that he did not file a grievance at SFCJ relating to the claims in this action;  
5 however, he explains that he "went to state prison for two months and had no access to any  
6 grievances . . . [b]ut started working on the civil suit." (Mot. for Recons. at 2.) The alleged incident  
7 of excessive force occurred on April 21, 2007. Plaintiff claims he was "charged with assault and  
8 battery on a peace officer and stayed in solitary confinement for 5 months for the conspired false  
9 criminal charges that held [him]." (Id.) The Court presumes that Plaintiff was being held in SFCJ  
10 for those five months; therefore, Plaintiff had at least five months at SFCJ to file a grievance. By  
11 failing to raise his grievance at SFCJ and waiting until he was transferred to another prison to file his  
12 suit, Plaintiff deprived SFCJ officials the time and "an opportunity to address complaints internally  
13 before allowing the initiation of a federal case," which is the purpose of the PLRA exhaustion  
14 requirement. Porter v. Nussle, 534 U.S. 516, 525 (2002). Thus, the Court finds that Plaintiff's  
15 action was properly dismissed without prejudice for failure to exhaust because he "conce[ded] to  
16 nonexhaustion" and "no exception to exhaustion applie[d]." Wyatt v. Terhune, 315 F.3d 1108, 1119  
17 (9th Cir. 2003). Moreover, Plaintiff claims that he has since filed a "grievance" using the "San  
18 Francisco County Jail facility prison Grieva[nce] Form" relating to the excessive force claims  
19 alleged in this action. (Mot. for Recons. at 8.) Plaintiff has not indicated when this grievance was  
20 filed, or whether he has received a response. As mentioned above, this action was dismissed without  
21 prejudice; therefore, the dismissal does not bar a new action raising the same claims once Plaintiff  
22 has exhausted his administrative remedies.

24 Furthermore, the Court notes that Plaintiff does not make a showing of mistake,  
25 inadvertence, surprise or excusable neglect. He does not set forth any newly-discovered evidence,  
26 fraud, or any grounds for finding that the judgment is void or has been satisfied. Plaintiff merely  
27 argues that he feels prejudiced by the Court's dismissal of his claims. (Mot. for Recons. at 9.) He  
28 adds that he believes that the dismissal is "a childish attempt to keep [his] civil rights violated." (Id.)

1 at 1.) The Court construes such an argument as Plaintiff's mere dissatisfaction with the Court's  
2 March 30, 2012 Order, which is not an adequate ground for relief. See Twentieth Century - Fox  
3 Film Corp., 637 F.2d at 1341. Accordingly, the Court finds that Plaintiff's motion for  
4 reconsideration is without merit; therefore, it is DENIED.

5 With the denial of the motion for reconsideration the notice of appeal becomes effective. See  
6 Fed. R. App. P. 4(B)(i). Rule 24(a)(3) of the Federal Rules of Appellate Procedure provides that a  
7 party granted leave to proceed IFP in district court, as Plaintiff was here, may continue in that status  
8 on appeal unless the district court certifies that the appeal is not taken in good faith, which in this  
9 context means that it is frivolous. See Ellis v. United States, 356 U.S. 674, 674-75 (1958). 28  
10 U.S.C. § 1915(a)(3) similarly provides that an appeal may not be taken IFP if the trial court certifies  
11 it is not taken in good faith. If the district court finds that the appeal is frivolous and not taken in  
12 good faith and revokes IFP status, the Ninth Circuit will conduct an independent review of the  
13 record to determine whether the appeal is frivolous. The Ninth Circuit will decide whether to grant  
14 the prisoner IFP status. If IFP status is denied by the Ninth Circuit, the prisoner will nonetheless be  
15 directed to pay the entire filing fee and to show cause why the appeal should not be dismissed as  
16 frivolous. See 28 U.S.C. § 1915(e)(2). Here, because the Court's March 30, 2012 Order properly  
17 dismissed Plaintiff's claims as unexhausted and his motion for reconsideration is without merit, the  
18 appeal will be certified as frivolous and, therefore, not taken in good faith.

#### 19 CONCLUSION

20  
21 For the foregoing reasons, Plaintiff's motion for reconsideration (docket no. 42) is DENIED  
22 for the reasons discussed above.

23 The appeal is CERTIFIED as not taken in good faith. The Clerk shall forthwith notify  
24 Plaintiff and the Ninth Circuit of this Order. See Fed. R. App. P. 24(a)(4). Plaintiff may file a  
25 motion for leave to proceed IFP on appeal in the Ninth Circuit within **twenty-eight (28) days** after  
26 service of notice of this action. See Fed. R. App. P. 24(a)(5). Any such motion "must include a  
27 copy of the affidavit filed in the district court and the district court's statement of reasons for its  
28 action." Id.

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Because Plaintiff claims that he did not receive a blank civil rights complaint form and a blank IFP application pursuant to the Court's March 30, 2012 Order, the Clerk shall send copies of the aforementioned forms along with his copy of this Order.

This Order terminates Docket no. 42.

IT IS SO ORDERED.

DATED: \_\_7/9/12

  
\_\_\_\_\_  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

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

4 BILLY RAY O'NEAL,  
5 Plaintiff,

Case Number: CV08-04669 SBA

**CERTIFICATE OF SERVICE**

6 v.

7 COUNTY OF SAN FRANCISCO et al,  
8 Defendant.

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 July 10, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)  
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in  
13 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's  
14 office.

15 Billy Ray O'Neal 288973  
16 San Francisco County Jail  
17 850 Bryant Street  
San Francisco, CA 94103

18 Dated: July 10, 2012

19 Richard W. Wieking, Clerk  
20 By: Lisa Clark, Deputy Clerk

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