

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

3                    ADRIAN T. MOSQUEDA,                                    No. C 10-0595 CW (PR)  
4                                    Petitioner,                                    ORDER GRANTING MOTION FOR  
5                                    v.                                    30, 2010 DISMISSAL; REOPENING  
6                                    FRANCISCO JAQUEZ, Warden, et al.,                                    CASE; DENYING LEAVE TO FILE  
7                                    Respondents.                                    AMENDED DUE PROCESS CLAIM; AND  
8                                                                       GRANTING EXTENSION TO FILE CLAIMS  
9                                                                       IN CIVIL RIGHTS COMPLAINT AND TO  
10                                                                       COMPLETE NEW IFP APPLICATION

11 \_\_\_\_\_/ (Docket no. 7)

12                    This case was commenced when Petitioner filed a document  
13 captioned "Petition For A Writ of Habeas Corpus," challenging his  
14 indeterminate placement in the Pelican Bay State Prison Security  
15 Housing Unit based on his validation as a gang member.

16                    On June 25, 2010, the Court issued an order of dismissal with  
17 leave to amend and gave Petitioner thirty days from the date of the  
18 Order to amend to allege a § 1983 action because his claims were  
19 not cognizable in federal habeas corpus. The Court stated that the  
20 failure to timely file a civil rights complaint would result in  
21 dismissal for failure to prosecute.

22                    In an Order dated July 30, 2010, the Court issued an Order of  
23 Dismissal stating: "The time for Petitioner to file his complaint  
24 has passed, and no complaint has been filed." (July 30, 2010 Order  
25 at 1.) Therefore, the Court dismissed this action for failure to  
26 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

27                    Before the Court is Petitioner's motion for reconsideration  
28 under Rule 60(b) of the Federal Rules of Civil Procedure (docket  
no. 7). Also before the Court is his "Request [for] Leave to Amend  
Petitioner for Writ of Habeas Corpus to Include Additional Claim

1 Affecting Prison Sentence Duration" (docket no. 6) as well as his  
2 amended pleading (docket no. 6-1).

3 For the reasons outlined below, the Court GRANTS Petitioner's  
4 motion for reconsideration, vacates its July 30, 2010 Order of  
5 Dismissal, and directs the Clerk of the Court to reopen this  
6 action. Petitioner's request for leave to amend his petition to  
7 add a due process claim is DENIED.

8 DISCUSSION

9 I. Motion for Reconsideration

10 Rule 60(b) provides for reconsideration only upon a showing  
11 of: (1) mistake, inadvertence, surprise or excusable neglect;  
12 (2) newly discovered evidence which by due diligence could not have  
13 been discovered before the court's decision; (3) fraud by the  
14 adverse party; (4) the judgment is void; (5) the judgment has been  
15 satisfied; or (6) any other reason justifying relief. See Fed. R.  
16 Civ. P. 60(b).

17 Here, Petitioner alleges that he submitted his amended  
18 pleading and his "Request [for] leave to amend Petition for Writ of  
19 Habeas Corpus to include additional claim affecting Prison sentence  
20 duration" before the July 25, 2010 deadline. He claims he  
21 submitted these documents "for photocopying and mailing on July 18,  
22 2010 . . . ." (Pet'r Mot. for Recons. at 2.) To substantiate  
23 this, Petitioner has submitted a copy of his "Request for Legal  
24 Photocopying Service," which shows that he submitted his  
25 photocopying request on July 18, 2010. Petitioner argues that  
26 "under the 'Mailbox Rule,' an inmate's legal documents are deemed  
27 filed once these are turned over to prison officials for mailing."  
28 (Id.) These facts present adequate grounds for reconsideration.

1 The Court finds that Petitioner's amended pleading and motion to  
2 amend are deemed filed on July 18, 2010, the date it was signed and  
3 delivered to prison authorities for mailing. See Saffold v.  
4 Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated and remanded  
5 on other grounds, Carey v. Saffold, 536 U.S. 214 (2002) (holding  
6 that a federal or state habeas petition is deemed filed on the date  
7 the prisoner submits it to prison authorities for filing, rather  
8 than the date it is received by the courts). Accordingly,  
9 Petitioner's motion for reconsideration (docket no. 7) is GRANTED,  
10 the Court's July 30, 2010 Order of Dismissal is vacated, and the  
11 Clerk shall reopen this action.

12 II. Motion for Leave to Amend Petition

13 Petitioner filed a motion to amend his petition to add a new  
14 claim, specifically "a due process violation which directly affects  
15 the duration of [his] prison sentence." (Mot. for Leave to Am. at  
16 2.) In the alternative, if the Court denies his motion, Petitioner  
17 requests an extension of time to file his remaining claims in a  
18 civil rights complaint and to complete a new in forma pauperis  
19 (IFP) application.

20 Habeas petitions may be amended or supplemented as provided in  
21 the Federal Rules of Civil Procedure. See 28 U.S.C. § 2242;  
22 Anthony v. Cambra, 236 F.3d 568, 576 (9th Cir. 2000). Although  
23 Federal Rule of Civil Procedure 15(a) requires that leave to amend  
24 "shall be freely given when justice so requires," the court may  
25 consider whether there is any evidence of undue delay, bad faith or  
26 dilatory motives with respect to the filing of an amendment when  
27 determining whether leave to amend should be granted. See id. at  
28 577-78.

1           Petitioner submitted his new claim in a document entitled,  
2 "Amendment to Petition for Writ of Habeas Corpus to Include  
3 Additional Claim Affecting Prison Sentence Duration." Petitioner  
4 alleges that he is challenging as a violation of his constitutional  
5 rights the February 3, 2010 decision to deny him parole by the  
6 California Board of Parole Hearings (Board). Petitioner was  
7 provided an opportunity to be heard and a statement of reasons for  
8 the denial pursuant to California Penal Code § 3041.5(a)(2).  
9 (Attach. to Amendment, Ex. E-5.) Specifically, he states, "Being  
10 that the board's decision denying Petitioner parole is predicated  
11 on [his] faulty gang validation and S.H.U confinement, the Board  
12 did not rely on 'some evidence' in denying Petitioner parole."  
13 (Amendment at 3.) However, no such due process claim is cognizable  
14 under federal habeas review because the record shows that  
15 Petitioner received adequate process at his 2010 parole suitability  
16 hearing. See Swarthout v. Cooke, \_\_\_ U.S. \_\_\_, 131 S. Ct. 859, 862  
17 (2011) (a prisoner subject to California's parole statute receives  
18 adequate process when he is allowed an opportunity to be heard and  
19 is provided with a statement of the reasons why parole was denied).  
20 Because Petitioner received adequate process at his 2010 parole  
21 suitability hearing, then his alleged due process claim stemming  
22 from the Board's 2010 denial is not cognizable on federal habeas  
23 review. See Swarthout, 131 S. Ct. at 862.

24           Accordingly, for the above reasons, the due process claim  
25 raised in the amendment petition is not cognizable on federal  
26 habeas corpus review. Therefore, the Court DENIES Petitioner's  
27 motion for leave to amend his petition to add that due process  
28 claim. His request for an extension of time to file his remaining

1 claims on a civil rights complaint form and to complete a new IFP  
2 application is GRANTED, as directed below.

3 CONCLUSION

4 For the foregoing reasons, the Court GRANTS Petitioner's  
5 motion for reconsideration (docket no. 7). The Clerk is directed  
6 to vacate the Court's July 30, 2010 Order of Dismissal and to  
7 REOPEN this action.

8 The Court DENIES Petitioner's motion for leave to amend to add  
9 a new claim (docket no. 6) because his due process claim relating  
10 to the Board's 2010 parole denial is not appropriate for federal  
11 habeas corpus review. However, the Court GRANTS Petitioner's  
12 request for an extension of time to file his remaining claims in a  
13 civil rights complaint and to complete a new IFP application.

14 Petitioner must file his complaint no later than thirty (30)  
15 days from the date of this Order. Petitioner must write the case  
16 number for this action -- Case No. C 10-00595 CW (PR) -- on the  
17 form and complete all sections of the form. Petitioner is  
18 particularly directed to name as defendants each person who caused  
19 a violation of his constitutional rights and explain what each  
20 person did to cause the violation. Liability under § 1983 arises  
21 only upon a showing of personal participation by the defendant.  
22 See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). There is  
23 no respondeat superior liability under § 1983, i.e. no liability  
24 under the theory that a supervisor is responsible for the actions  
25 or omissions of his or her subordinate. See Leer v. Murphy, 844  
26 F.2d 628, 634 (9th Cir. 1988) (liability may be imposed on  
27 individual defendant under § 1983 only if plaintiff can show that  
28 defendant proximately caused deprivation of federally protected

1 right).

2       Because Petitioner originally filed this case as a habeas  
3 corpus action, his previously-filed IFP application was denied  
4 without prejudice to filing a new application or paying the full  
5 filing fee. (June 25, 2010 Order at 4.) As mentioned in the  
6 Court's June 25, 2010 Order, the filing fee for a civil rights  
7 action is \$350.00. Petitioner must pay the \$350.00 filing fee, or  
8 file an application for leave to proceed IFP, before this action  
9 can proceed. If Petitioner alleges that he is unable to pay the  
10 full filing fee at the time of filing, he must submit: (1) an  
11 affidavit that includes a statement of all assets he possesses, and  
12 (2) a certified copy of his trust fund account statement for the  
13 six-month period immediately preceding the filing of the action,  
14 obtained from the appropriate official of each prison at which the  
15 prisoner is or was confined. See 28 U.S.C. § 1915(a)(1), (2). If  
16 the district court determines that the prisoner is unable to pay  
17 the full filing fee at the time of filing, the prisoner will be  
18 granted leave to proceed IFP. This means that the filing fee must  
19 be paid by way of an installment plan, according to which the Court  
20 first will assess and collect a partial filing fee from the  
21 prisoner, and then the prisoner will be required to make monthly  
22 payments of twenty percent of the preceding month's income credited  
23 to the prisoner's account until the full \$350.00 filing fee is  
24 paid. Id. § 1915(b)(1). The agency having custody of the prisoner  
25 is responsible for forwarding to the Court payments from the  
26 prisoner's account each time the amount in the account exceeds ten  
27 dollars. See id. Accordingly, Petitioner is hereby ORDERED to  
28 pay the requisite \$350.00 filing fee in this action no later than

1 thirty (30) days from the date of this Order. He shall include  
2 with his payment a clear indication that it is for the above-  
3 referenced case number, Case No. C 10-00595 CW (PR). In the event  
4 that Petitioner is unable to pay the filing fee, he shall submit an  
5 IFP application, trust account statement and certificate of funds  
6 no later than thirty (30) days from the date of this Order.

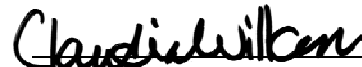
7 Failure to file a completed civil rights form and to pay the  
8 filing fee or file the requisite documents within the thirty-day  
9 deadline shall result in dismissal of this action without  
10 prejudice.

11 The Clerk of the Court shall send Petitioner a blank civil  
12 rights form and the Court's prisoner IFP application form along  
13 with his copy of this Order.

14 This Order terminates Docket nos. 6 and 7.

15 IT IS SO ORDERED.

16 Dated: 3/29/2011



17 CLAUDIA WILKEN  
18 UNITED STATES DISTRICT JUDGE  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 ADRIAN T. MOSQUEDA,

5 Plaintiff,

6 v.

7 FRANCISCO JAQUEZ et al,

8 Defendant.

Case Number: CV10-00595 CW

**CERTIFICATE OF SERVICE**

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

11 That on March 29, 2011, I SERVED a true and correct copy(ies) of the attached and a **blank civil**  
12 **rights form and the Court's prisoner IFP application form**, by placing said copy(ies) in a postage  
13 paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S.  
14 Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

15 Adrian Tamayo Mosqueda E-08547  
16 D7-109  
17 Pelican Bay State Prison  
18 P.O. Box 7500  
19 Crescent City, CA 95531

20 Dated: March 29, 2011

21 Richard W. Wieking, Clerk  
22 By: Nikki Riley, Deputy Clerk  
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