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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

CARDELL NEWTON,

Plaintiff,

vs.

OFFICER CURZEN and SAN QUENTIN  
STATE PRISON,

Defendants.

Case No: C 11-00309 SBA

**ORDER DISMISSING ACTION  
WITHOUT PREJUDICE**

On January 21, 2011, Plaintiff Cardell Newton, acting pro se, filed the instant action in this Court against Defendants Officer Curzen and San Quentin State Prison. Plaintiff, who is not incarcerated and has paid the requisite filing fee of \$350, alleges that Defendants failed to timely send his legal mail to Judge Jeremy Fogel (formerly of this Court), which, in turn, “denied [him] the right to contest a conviction.” Dkt. 1 at 5.<sup>1</sup> This action was originally assigned to Magistrate Judge Laporte, but was subsequently reassigned to the undersigned. Dkt. 11.

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<sup>1</sup> Although Plaintiff does not identify the federal action, the Court’s docket indicates that Plaintiff previously filed a habeas petition that was assigned first to Judge Fogel and later to Judge Richard Seeborg. See *Newton v. People of the State of Cal.*, No. C 08-3301 RS. On February 22, 2010, Judge Fogel dismissed the petition with leave to amend. The Order, however, was returned as undeliverable. Judge Seeborg subsequently dismissed the action on April 12, 2010. There is no indication in the docket that Plaintiff sought relief from the dismissal based on Defendants’ alleged failure to timely send his legal mail, as alleged in the instant Complaint.

1 On April 25, 2012, the Court issued an order to show cause why the instant action  
2 should not be dismissed for failure to comply with Federal Rule of Civil Procedure 4(m).  
3 Dkt. 23. Generally, under Rule 4(m), the failure to serve a defendant within 120 days after  
4 the complaint is filed requires that a court dismiss the action without prejudice against the  
5 unserved defendant or require service to be accomplished within a specified time. Fed. R.  
6 Civ. P. 4(m). However, courts have discretion under Rule 4(m) to extend the time for  
7 service upon a showing of good cause. In re Sheehan, 253 F.3d 507, 513 (9th Cir. 2001).

8 In his response to the order to show cause, Plaintiff claims that he is innocent of the  
9 crime for which he was convicted in state court, and that Defendants' actions caused him to  
10 lose his federal challenge to that conviction. Dkt. 24 at 1. Plaintiff further states that he  
11 should be allowed additional time to effect service on Defendants so that he can hire a  
12 registered process server. Id. These contentions are unpersuasive. The merits of Plaintiff's  
13 case have no bearing on why he has yet to serve Defendants. Moreover, Plaintiff offers no  
14 explanation why did not retain the services of a registered process server earlier in the  
15 action. Moreover, in her May 6, 2011 Order, Magistrate Judge Laporte specifically warned  
16 Plaintiff that he had not complied with Rule 4(m).<sup>2</sup> Despite such warning, Plaintiff has  
17 made no effort to properly serve Defendants since that time. Thus, given the record  
18 presented, the Court finds that Plaintiff has failed to demonstrate good cause under Rule  
19 4(m) for an extension of time to effect service. Accordingly,

20 IT IS HEREBY ORDERED THAT the instant action is DISMISSED WITHOUT  
21 PREJUDICE under Federal Rule of Civil Procedure 4(m). The Clerk shall close the file  
22 and terminate all pending matters.<sup>3</sup>

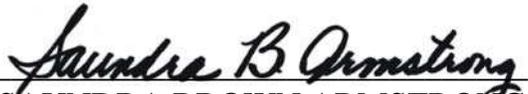
23  
24 <sup>2</sup> Judge Laporte issued an order to show cause why the action should not be  
25 dismissed based on Plaintiff's failures to appear at the initial Case Management  
26 Conference, to file a Case Management Statement, and to serve Defendants within the time  
specified by Rule 4(m). Dkt. 6. The action was reassigned to the undersigned before Judge  
Laporte was able to rule on her order to show cause.

27 <sup>3</sup> Prior to the issuance of the order to show cause by this Court, Plaintiff filed a  
28 motion for default judgment. Dkt. 22. However, the Clerk declined to enter defaults  
against Defendants. Therefore, Plaintiff's motion for default judgment is denied.

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IT IS SO ORDERED.

Dated: January 30, 2013

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

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

4 NEWTON et al,

5 Plaintiff,

6 v.

7 CURZEN et al,

8 Defendant.

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Case Number: CV11-00309 SBA

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**CERTIFICATE OF SERVICE**

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

16

17 That on January 31, 2013, I SERVED a true and correct copy(ies) of the attached, by placing said  
18 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
19 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
20 located in the Clerk's office.

18

19

20 Cardell Newton  
21 718 33<sup>rd</sup> Street  
22 Oakland, CA 94609

23 Dated: January 31, 2013

Richard W. Wieking, Clerk

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By: Lisa Clark, Deputy Clerk

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