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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 KENNETH CHARLES CHAPMAN,  
8 Petitioner,  
9 v.  
10 WARREN L. MONTGOMERY, Warden,  
11 Respondent.

Case No. [13-cv-02301-YGR](#) (PR)

**ORDER DENYING PETITIONER'S  
MOTION FOR RECONSIDERATION;  
AND DENYING HIM LEAVE TO  
PROCEED *IN FORMA PAUPERIS* ON  
APPEAL**

12 **I. INTRODUCTION**

13 This federal habeas corpus action, now closed, was filed pursuant to 28 U.S.C. § 2254 by  
14 Petitioner, a *pro se* state prisoner who challenged his 2009 conviction and sentence rendered in the  
15 Santa Clara County Superior Court. Petitioner was convicted of two counts of second degree  
16 robbery and two counts of assault with a deadly weapon, stemming from a December 17, 2007  
17 incident involving Senorino Organez and Mike Nguyen, who were working as loss prevention  
18 agents at Wal-Mart Stores, Inc. On January 17, 2017, the Court denied the federal habeas petition,  
19 declined to issue a Certificate of Appealability, and entered judgment in favor of Respondent.  
20 Dkts. 37, 38.

21 Before the Court is Petitioner's "Motion to Alter or Amend Judgment," which will be  
22 construed as his motion for reconsideration. Dkt. 39. Specifically, Petitioner moves for  
23 reconsideration of the Court's January 17, 2017 Order, presumably pursuant to either Rule 59(e)  
24 or 60(b) of the Federal Rules of Civil Procedure. Respondent has filed an opposition. Dkt. 45.  
25 Also before the Court is Petitioner request to proceed *in forma pauperis* on appeal. Dkt. 42.

26 For the reasons outlined below, Petitioner's motion for reconsideration and request to  
27 proceed *in forma pauperis* on appeal are DENIED.  
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1 **II. DISCUSSION**

2 **A. Motion for Reconsideration**

3 Where, as here, the Court’s ruling has resulted in a final judgment or order, a motion for  
4 reconsideration may be based either on Rule 59(e) or Rule 60(b) of the Federal Rules of Civil  
5 Procedure. As of 2009, the Federal Appellate Rule 4’s deadline to file a motion for  
6 reconsideration under either Rule 59(e) or Rule 60(b) is twenty-eight days. *See Classic Concepts,*  
7 *Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1285 (9th Cir. 2013). Petitioner’s present motion for  
8 reconsideration was filed within the twenty-eight day period, and it is therefore timely under both  
9 rules.

10 A motion for reconsideration under Rule 59(e) ““should not be granted, absent highly  
11 unusual circumstances, unless the district court is presented with newly discovered evidence,  
12 committed clear error, or if there is an intervening change in the law.”” *McDowell v. Calderon*,  
13 197 F.3d 1253, 1255 (9th Cir. 1999) (citation omitted) (en banc). A district court does not commit  
14 clear error warranting reconsideration when the question before it is a debatable one. *See id.* at  
15 1256 (district court did not abuse its discretion in denying reconsideration where question whether  
16 it could enter protective order in habeas action limiting Attorney General’s use of documents from  
17 trial counsel’s file was debatable).

18 Meanwhile, under Federal Rule of Civil Procedure 60(b), a party may seek relief from a  
19 judgment and to re-open his case in limited circumstances. The Rule provides:

20 **(b) Grounds for Relief from a Final Judgment, Order, or**  
21 **Proceeding.** On motion and just terms, the court may relieve a  
22 party or its legal representative from a final judgment, order, or  
23 proceeding for the following reasons:

- 24 (1) mistake, inadvertence, surprise, or excusable neglect;  
25 (2) newly discovered evidence that, with reasonable diligence, could  
26 not have been discovered in time to move for a new trial under Rule  
27 59(b);  
28 (3) fraud (whether previously called intrinsic or extrinsic),  
misrepresentation, or misconduct by an opposing party;  
(4) the judgment is void;  
(5) the judgment has been satisfied, released or discharged; it is  
based on an earlier judgment that has been reversed or vacated; or  
applying it prospectively is no longer equitable; or

1 (6) any other reason that justifies relief.  
2 Fed. R. Civ. P. 60(b). The decision of whether or not to grant relief under Rule 60(b) is matter of  
3 the district court’s discretion. *See Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996,  
4 1001 (9th Cir. 2007).

5 Rule 60(b)(6) allows courts the discretion “to vacate judgments whenever such action is  
6 appropriate to accomplish justice.” *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009)  
7 (citation omitted). Rule 60(b)(6) is to be “used sparingly as an equitable remedy to prevent  
8 manifest injustice and is to be utilized only where extraordinary circumstances prevented a party  
9 from taking timely action to prevent or correct an erroneous judgment.” *Harvest v. Castro*, 531  
10 F.3d 737, 749 (9th Cir. 2008) (internal quotations omitted).

11 Here, Petitioner does not indicate under what provision of either Rule 59(e) or Rule 60(b)  
12 reconsideration is warranted. In any case, he presents no valid basis for reconsideration under  
13 either Rule 59(e) or Rule 60(b). He alleges no new evidence that could not have been discovered  
14 with due diligence. While he makes certain conclusory arguments to this effect, he fails to show  
15 mistake, inadvertence, surprise, excusable neglect, fraud by the adverse party, or voiding of the  
16 judgment. Finally, as explained below, he does not provide any other reason justifying relief, such  
17 as extraordinary circumstances.

18 Instead, in his motion for reconsideration, Petitioner claims that: (1) he was entitled to a  
19 pretrial hearing and conference in state court to narrow the issues that would be tried; (2) the  
20 prosecutor suppressed evidence that would have shown that Petitioner took merchandise off a  
21 hanger at the Walmart store and not directly from the loss prevention agents; and (3) the failure to  
22 submit evidence in support of his prosecutorial misconduct claims was because this Court denied  
23 his motion for discovery.<sup>1</sup> *See* Dkt. 39 at 2-5.

24 First, Petitioner’s claim that he was entitled to a pretrial hearing and conference in state  
25 court is an entirely new claim, which was *not* raised in either his original petition or amended  
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27 <sup>1</sup> On December 17, 2015, the Court denied Petitioner’s request to conduct discovery  
28 without prejudice as premature. *See* Dkt. 22. While not entirely clear, it appears that Petitioner is  
challenging the Court’s December 17, 2015 Order.

1 petition. Thus, his motion raising such a new claim should be construed as a second or successive  
2 habeas petition. *See Rishor v. Ferguson*, 822 F.3d 482, 492 (9th Cir. 2016) (holding that a Rule  
3 59(e) motion that raises entirely new claims should be construed as a second or successive habeas  
4 petition subject to AEDPA<sup>2</sup>'s restrictions). Second, Petitioner's claim that the prosecutor  
5 suppressed evidence consists of the same claims and arguments from his amended petition that  
6 have already been denied on the merits by this Court. Third, the Court notes that it previously  
7 denied as premature any discovery motions made by Petitioner, *see* Dkt. 22, and that Petitioner  
8 never renewed any of his discovery requests before his habeas petition was denied on the merits.  
9 Moreover, because Petitioner fails to show good cause to conduct discovery, such a request is  
10 meritless in any event. *See Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997) (explaining that good  
11 cause for discovery is shown "where specific allegations before the court show reason to believe  
12 that the petitioner may, if the facts are fully developed, be able to demonstrate that he is  
13 . . . entitled to relief . . .").

14 Accordingly, Petitioner's motion for reconsideration is DENIED. Dkt. 39.

15 **B. Motion for Leave to Proceed *In Forma Pauperis* on Appeal**

16 Petitioner has requested to proceed *in forma pauperis* on appeal. Dkt. 42. In its January  
17 17, 2017 Order, the Court declined to issue a certificate of appealability and determined there were  
18 no valid grounds for an appeal. Dkt. 37 at 25. Consequently, Petitioner fails to show good cause  
19 to proceed *in forma pauperis* on appeal.

20 Accordingly, the motion to proceed *in forma pauperis* on appeal is hereby DENIED. Dkt.  
21 42.

22 The Clerk shall send a copy of this Order to Petitioner and to the Ninth Circuit Court of  
23 Appeals, wherein Petitioner may renew his motion. *See* Fed. R. App. P. 24(a).

24 **III. CONCLUSION**

25 For the reasons outlined above, the Court orders as follows:

- 26 1. Petitioner's motion for reconsideration is DENIED. Dkt. 39.
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<sup>2</sup> Antiterrorism and Effective Death Penalty Act of 1996.

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2. Petitioner’s motion to proceed in forma pauperis on appeal is DENIED. Dkt. 42.
3. The Clerk of the Court shall serve a copy of this Order on the Ninth Circuit Court of Appeals.
4. This Order terminates Docket No. 39 and 42.

IT IS SO ORDERED.

Dated: June 2, 2017

  
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YVONNE GONZALEZ ROGERS  
United States District Judge