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**\*E-FILED - 10/15/08\***

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

SHEDRICK HENRY,	)	No. C 98-21093-RMW (PR)
	)	
Petitioner,	)	ORDER DENYING
	)	PETITIONER'S MOTION FOR
vs.	)	RECONSIDERATION
	)	
GARY LINDSEY, Warden,	)	
	)	(Docket No. 10)
Respondent.	)	
	)	

Petitioner, a California prisoner, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 2, 1998, the court sua sponte dismissed the case without prejudice for failure to exhaust and instructed petitioner that he could resubmit his petition after exhausting state remedies (docket no. 4). Subsequently, petitioner began exhausting his state remedies eight months later and filed a state habeas petition in California Superior Court on August 31, 1999. Mot. at 2. He continued exhausting his state remedies through the California courts until ultimately, California Supreme Court denied his petition on April 25, 2001. Mot. at 3. Thereafter, he filed another section 2254 petition in district court on December 5, 2001, which was subsequently dismissed as untimely on March 31, 2004. Mot. at 3. The Ninth Circuit affirmed the dismissal on August 4, 2005. See Henry v. Lamarque, No. 04-16028 (9th Cir. Aug. 1, 2005) (unpublished disposition).

1 On April 14, 2008, petitioner filed this motion for reconsideration asking the court for  
2 relief from its 1998 judgment because the court failed to advise him that he had the option of  
3 striking his unexhausted claims and proceeding on his petition before dismissal. Petitioner also  
4 claims that for that reason, he is entitled to equitable tolling and the court should allow him to  
5 file a new petition that relates back to his original petition. For the reasons set forth below, the  
6 court denies petitioner's motion for reconsideration.

## 7 DISCUSSION

8 Where the court's ruling has resulted in a final judgment or order, Rule 60(b) provides  
9 for reconsideration where one or more of the following is shown: (1) mistake, inadvertence,  
10 surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not  
11 have been discovered before the court's decision; (3) fraud by the adverse party; (4) the  
12 judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief. Fed.  
13 R. Civ. P. 60(b); School Dist. 1J v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Here,  
14 petitioner files his motion based on Rule 60(b)(6), the catch-all provision.

15 A party is entitled to relief under Rule 60(b)(6) where "extraordinary circumstances  
16 prevented [him] from taking timely action to prevent or correct an erroneous judgment."  
17 Greenawalt v. Stewart, 105 F.3d 1268, 1273 (9th Cir. 1997) (citations and quotation marks  
18 omitted). Rule 60(b)(6) is to be used "sparingly [and] as an equitable remedy to prevent  
19 manifest injustice." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th  
20 Cir. 1993). Further, Rule 60(b) expressly limits the time within which a motion for relief from  
21 judgment may be made. Motions based on "any other reason justifying relief from the operation  
22 of the judgment," Fed. R. Civ. P. 60(b)(6), must be made "within a reasonable time." Fed. R.  
23 Civ. P. 60(b). "What constitutes 'reasonable time' depends upon the facts of each case, taking  
24 into consideration the interest in finality, the reason for the delay, the practical ability of the  
25 litigant to learn earlier of the grounds relied upon, and prejudice to other parties." Ashford v.  
26 Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

27 Here, petitioner's petition was filed on October 30, 1998. The order dismissing the  
28 petition was entered on December 2, 1998. Petitioner elected not to file a notice of appeal.

1 After exhausting his state remedies, he waited over seven months to re-file his habeas petition in  
2 2001. On appeal from the 2004 dismissal of petitioner's section 2254 petition as untimely, the  
3 Ninth Circuit considered and rejected the same issue petitioner raises in the instant motion, but  
4 in the context of an equitable tolling argument. After the Ninth Circuit's affirmance, petitioner  
5 waited an additional two and half years before filing the instant reconsideration motion.  
6 Petitioner gives no reason for the significant delays, and it is clear that he had learned of the  
7 claim raised in this motion as early as 2001. Id. Accordingly, the court denies petitioner's  
8 motion as untimely because petitioner failed to move for reconsideration within a reasonable  
9 time.

10 Further, a movant seeking relief under Rule 60(b)(6) is required to show "extraordinary  
11 circumstances" justifying the reopening of a final judgment. Gonzalez v. Crosby, 545 U.S. 524,  
12 125 S.Ct. 2641, 2649 (2005). "Such [extraordinary] circumstances will rarely occur in the  
13 habeas context." Id. Petitioner has not demonstrated that "extraordinary circumstances  
14 prevented [him] from taking timely action to prevent or correct" the judgment. Hamilton v.  
15 Newland, 374 F.3d 822, 825 (9th Cir. 2004) (quoting Greenawalt v. Stewart, 105 F.3d 1268,  
16 1273 (9th Cir. 1997)). Petitioner alleges no "change of circumstances between the time when  
17 [he] filed his habeas petition and the time when he filed his 60(b) motion" that justifies relief.  
18 Id. His delay in raising his current motion "may be attributable to inattention or inexperience but  
19 neither deficiency constitutes an 'extraordinary circumstance' that justifies Rule 60(b) relief."  
20 Greenawalt, 105 F.3d at 1273. Circumstances have not changed apart from petitioner's belated  
21 attempt to argue a legal theory he raised or should have raised earlier. Accordingly, the court  
22 concludes that petitioner cannot demonstrate extraordinary circumstances sufficient to grant  
23 reconsideration.

#### 24 CONCLUSION

25 The motion for reconsideration is DENIED. This order terminates docket no. 10.

26 IT IS SO ORDERED.

27 DATED: 10/10/08

  
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RONALD M. WHYTE  
United States District Judge