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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

LINH N. NGUYEN,  <div style="text-align: right; padding-right: 20px;">Petitioner,</div> vs. GEORGE GIURBINO, Warden,  <div style="text-align: right; padding-right: 20px;">Respondent.</div>		CASE NO. 05cv2287 WQH (WMC)  <b>ORDER</b>
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HAYES, Judge:  
 Pending before the Court is the Motion to Vacate Judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, filed by Petitioner Linh N. Nguyen. (Doc. # 34).

**Background**

On January 16, 2007, Petitioner Linh N. Nguyen (“Petitioner”), a state prisoner proceeding *pro se*, filed an Amended Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. section 2254 (“Petition”). (Doc. # 27). On June 7, 2007, United States Magistrate Judge William McCurine, Jr. issued a Report and Recommendation, recommending that the Petition be denied. (Doc. # 30). On July 31, 2007, the Court issued an Order adopting the Report and Recommendation and denying the Petition. (Doc. # 31).

On September 5, 2005, Petitioner filed a Motion to Vacate the Court’s July 31, 2007 Order. (Doc. # 34). Petitioner filed a Declaration in support of the Motion to Vacate, swearing that he has never received a copy of the June 7, 2007 Report and Recommendation, and that he has inquired with the Mailroom Supervisor at the prison who

1 informed Petitioner that in June, 2007, he only received “Legal Mail” from his brother.  
2 Petitioner moves to vacate the Court’s July 31, 2007 Order, and requests the Court to issue  
3 an order that he be served with a copy of the July 7, 2007 Report and Recommendation, be  
4 given an opportunity to submit timely objections, and have the Court render a decision  
5 upon review of any objections submitted by Petitioner.

6 On September 13, 2007, Respondent filed a Response to the Motion to Vacate in  
7 which Respondent agreed that if in fact Petitioner did not receive a copy of the Report and  
8 Recommendation, he would be entitled to relief under Rule 60 of the Federal Rules of Civil  
9 Procedure. (Doc. # 36).

### 10 Discussion

11 Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, a district court  
12 may grant a motion for relief from judgment when there is any reason not previously  
13 considered in Rule 60(b) that justifies granting relief from operation of the judgment. Fed.  
14 R. Civ. P. 60(b). A party merits relief under Rule 60(b)(6) if he demonstrates  
15 “extraordinary circumstances” prevented the party from taking timely action to prevent or  
16 correct an erroneous judgment. *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir.  
17 2002). Relief under Rule 60(b)(6) “normally will not be granted unless the moving party is  
18 able to show both injury and that circumstances beyond its control prevented timely action  
19 to protect its interests.” *Id.*

20 Petitioner contends that on or about August 9, 2007, he received the Court’s July 31,  
21 2007 Order adopting the Report and Recommendation and denying the Petition. Petitioner  
22 contends that he did not become aware of the Report and Recommendation until this date.  
23 Petitioner contends that upon becoming aware of that a Report and Recommendation was  
24 issued, he inquired with the Mailroom Supervisor of the prison who informed him that no  
25 “Legal Mail” had been delivered to him during June 2007, aside from mail from his  
26 brother. Petitioner contends that he did not file objections to the Report and  
27 Recommendation because he never received a copy of the Report and Recommendation.

28 Respondent does not dispute that if Petitioner never received a copy of the Report

1 and Recommendation, and therefore had no opportunity to file objections thereto, he would  
2 be entitled to relief under Rule 60 of the Federal Rules of Civil Procedure.


3 After reviewing the record, the Court finds that Petitioner has demonstrated injury  
4 because he had no opportunity to file objections to the Report and Recommendation, and  
5 that his inability to file objections to the Report and Recommendation resulted from  
6 circumstances beyond his control. The Court concludes that Petitioner has demonstrated  
7 extraordinary circumstances sufficient to warrant relief from judgment because he never  
8 received a copy of the Report and Recommendation and was therefore unable to file  
9 objections.

10 **Conclusion**

11 IT IS HEREBY ORDERED that the Court **GRANTS** the Motion for Vacate  
12 Judgment (Doc. # 34). It is further ordered that the Court **VACATES** the Order adopting  
13 the Report and Recommendation (Doc. # 31) filed on July 31, 2007. Any party may file  
14 objections to the Report and Recommendation no later than Monday, December 17, 2007.  
15 Any party may file a reply to the objections to the Report and Recommendation no later  
16 than Monday, January 7, 2008. The Court directs the Clerk of the Court to serve Petitioner  
17 with a copy of this Order and the Report and Recommendation (Doc. # 30) filed on June 7,  
18 2007 at the following address:

19 Linh Nguyen  
20 T-48024  
21 Calipatria State Prison  
P.O. Box 5002  
Calipatria, CA 92253-5002

22 DATED: November 14, 2007

23   
24 **WILLIAM Q. HAYES**  
25 United States District Judge