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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DANIEL ROGER HOOD,
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Petitioner,
v.
DIRECTOR OF THE CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION,
Respondent.

15cv1564-CAB-DHB

**ORDER GRANTING MOTION TO
REOPEN THE TIME TO APPEAL
[Doc. No. 60]**

On February 13, 2017, this Court issued an order denying Petitioner's Petition for Writ of Habeas Corpus, and judgment was entered. [Doc. Nos. 52 and 53.] On February 21, 2017, the order and the judgment were both returned to the Court as undeliverable. [Doc. Nos. 54 and 55.] On February 27, 2017, Petitioner filed a Notice of Possible Move from CCI by Daniel Roger Hood. [Doc. No. 56.]

On March 8, 2017, this Court issued a minute order noting that Petitioner's inmate number listed on the docket was not complete, and ordering the Clerk of the Court to correct the docket and mail another copy of the order and judgment to Petitioner with the amended inmate number. [Doc. No. 57.]

1 On March 23, 2017, Petitioner filed a notice of appeal. [Doc. No. 58.] On April
2 13, 2014, the Ninth Circuit issued an order stating that “[a]lthough the March 23, 2017,
3 notice of appeal was not filed or delivered to prison officials within 30 days from entry of
4 the February 14, 2017, judgment, appellant’s notice of appeal states (and the record
5 reflects) that he did not receive notice of entry of judgment until March 15, 2017. We
6 construe appellant’s pro se notice of appeal as a motion to reopen pursuant to Federal
7 Rule of Appellate Procedure 4(a)(6).” [Doc. No. 60.] The order further states that
8 because the district court has not had the opportunity to rule on this motion , appellant’s
9 appeal is “remanded to the district court for the limited purpose of allowing that court to
10 rule on appellant’s March 23, 2017, motion to reopen the time for appeal.” *Id.*

11 Having reviewed Petitioner’s motion as well as the docket, the Court hereby
12 **GRANTS** Petitioner’s motion to reopen the time to appeal, for the reasons stated below.

13 DISCUSSION

14 Generally, a notice of appeal must be filed 30 days after the judgment is entered.
15 Fed.R.App.P. 4(a)(1)(A). A party who does not timely file a notice of appeal may seek to
16 reopen the time to file an appeal under Rule 4(a)(6), which provides that a district court
17 may reopen the time to file an appeal for a period of 14 days after the date when its order
18 to reopen is entered, but only if three criteria are met:

- 19 (A) the court finds that the moving party did not receive notice under
20 Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order
21 sought to be appealed within 21 days after entry;
22 (B) the motion is filed within 180 days after the judgment or order is entered
23 or within 14 days after the moving party receives notice under Federal Rule
24 of Civil Procedure 77(d) of the entry, whichever is earlier; and
25 (C) the court finds that no party would be prejudiced.

26 Fed.R.App.P. 4(a)(6).¹

27 ¹ Rule 77(d) provides:

28 (1) Service. Immediately after entering an order or judgment, the clerk must serve notice
of the entry, as provided in Rule 5(b), on each party who is not in default for failing to

1 “Rule 4(a)(6) provides ‘a limited opportunity’ for relief under specific
2 circumstances.” *Nunley v. City of Los Angeles*, 52 F.3d 792, 795 (9th Cir.1995). It
3 was adopted to “reduce the risk that the right to appeal will be lost through a
4 failure to receive notice.” *Id.*

5 “While Rule 4(a)(6) puts the burden on the moving party to demonstrate
6 nonreceipt, the rule does not mandate a strong presumption of receipt.” *Nunley*, 52
7 F.3d at 795. A party’s “specific factual denial of receipt” is sufficient to rebut the
8 presumption of receipt under the common law mailbox rule. *Id.* at 796; *see also*
9 *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 964 n. 7
10 (9th Cir.2001) (allowing a rebuttal of the presumption of receipt by a “specific
11 factual denial” is consistent with the general purpose of Rule 4(a)(6), which is to
12 ensure that parties who have not received notice of the entry of judgment are not
13 thereby deprived of the opportunity to appeal). “When a movant specifically denies
14 receipt of notice, a district judge must then weigh the evidence and make a
15 considered factual determination concerning receipt, rather than denying the
16 motion out of hand based upon proof of mailing.” *Id.* at 796.

17 Here, the docket confirms Petitioner’s statement that he did not receive
18 notice of entry of judgment until March 15, 2017, because the original order and
19 judgment were returned to the Court as undeliverable [Doc. Nos. 54 and 55], and
20 copies of the order and judgment were not mailed to Petitioner until March 8, 2017
21 [Doc. No. 57]. This evidence, coupled with Plaintiff’s statement that he did not
22 receive notice, are sufficient to rebut the presumption of receipt which arises from
23 proper and timely mailing under the common law mailbox rule. *See Nunley*, 52

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26 appear. The clerk must record the service on the docket. A party also may serve notice of
the entry as provided in Rule 5(b).

27 (2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not
28 affect the time for appeal or relieve—or authorize the court to relieve—a party for failing
to appeal within the time allowed, except as allowed by Federal Rule of Appellate
Procedure (4)(a).

1 F.3d at 795–796, n. 5 (stating that “[u]nder the so-called ‘bursting bubble’
2 approach to presumptions, a presumption disappears where rebuttal evidence is
3 presented,” and that a “specific factual denial of receipt” by the addressee is
4 sufficient to support a finding that the recipient did not receive notice of entry of
5 judgment from the district court, thereby allowing the district court the discretion
6 to extend the party's time to file an appeal).

7 Having reviewed the record, the Court concludes that the three requirements
8 of Rule 4(a)(6) are satisfied. The evidence in the record shows that Petitioner did
9 not receive notice under Rule 77(d) of the entry of the judgment within 21 days
10 after entry on February 13, 2017. The evidence demonstrates that Petitioner
11 received notice of the entry of judgment on March 15, 2017. It also demonstrates
12 that Petitioner’s motion to reopen the time to appeal was filed on March 23, 2017,
13 which is within 14 days after Petitioner received notice of the entry of judgment.
14 Finally, the Court finds no prejudice as the appeal has only been delayed by a few
15 days.

16 CONCLUSION

17 For the reasons stated above, **IT IS HEREBY ORDERED THAT:**

- 18 1. Petitioner’s motion to reopen the time to appeal is **GRANTED**. As
19 directed by the Ninth Circuit, Petitioner does not need to file a new notice
20 of appeal. [Doc. No. 60 at 2];
21 2. The Clerk shall send a copy of this order to the Ninth Circuit.

22 **IT IS SO ORDERED.**

23 Dated: April 14, 2017

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26 Hon. Cathy Ann Bencivengo
27 United States District Judge
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