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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SHAUN REGINALD SHAW,
12 Petitioner,
13 v.
14 STU SHERMAN, Warden, et al,
15 Respondents.

Case No.: 20-CV-1875-GPC-DEB

**ORDER DENYING PETITIONER'S
MOTION TO VACATE JUDGMENT**

[Dkt. No. 20]

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17 Petitioner Shaun Reginald Shaw ("Petitioner") filed a motion to vacate judgment on
18 February 16, 2023. (Dkt. No. 20.) On April 18, 2023, Respondent filed an opposition.
19 (Dkt. No. 26.) On June 5, 2023, Petitioner filed a reply. (Dkt. No. 31.) For the reasons
20 discussed below, the Court DENIES Petitioner's motion to vacate judgment.

21 **Procedural Background**

22 In 2017, Petitioner was convicted by a jury and sentenced to twenty-one years in
23 custody. (Dkt. No. 8-1.) Petitioner timely appealed his conviction, and ultimately was
24 resentenced to eighteen years in prison in 2019. (Dkt. No. 8-17 at 1¹). On December 16,
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27 ¹ Page numbers are based on the CM/ECF pagination.

1 2019, Petitioner filed a petition for writ of habeas corpus in the California Supreme
2 Court. (Dkt. No. 8-18.) The California Supreme Court denied the petition. (Dkt. No. 8-
3 19.)

4 On September 21, 2020, Petitioner filed a petition for writ of habeas corpus
5 (“Petition”) with this Court. (Dkt. No. 1.) In the Petition, Petitioner raised four claims:
6 (1) ineffective assistance of trial counsel in violation of his Sixth Amendment right; 2)
7 ineffective assistance of appellate counsel in violation of his Sixth Amendment right; 3) a
8 *Brady*² claim asserting that both his trial counsel and the prosecution failed to obtain the
9 Home Depot surveillance video which Petitioner claim would have corroborated his alibi;
10 and 4) an actual innocence claim. (Dkt No. 16 at 3.)

11 On August 2, 2021, the Magistrate Judge issued a Report and Recommendation
12 (“R&R”) denying the petition for writ of habeas corpus. (Dkt. No. 15.) In the R&R, the
13 Magistrate Judge ordered that objections shall be filed on or before August 23, 2021.
14 (Dkt. No. 15 at 14.) Petitioner did not file an objection.

15 During the pendency of his habeas petition in this Court on December 29, 2021,
16 Petitioner sent a request addressed to the clerk’s office at the Superior Court of San
17 Diego inquiring as to whether a subpoena was issued to Home Depot during Petitioner’s
18 trial proceedings in 2017. (Dkt. No. 20, Ex. A. at 7.) On June 23, 2022, the Superior
19 Court’s SDT Desk, Criminal Division replied that it did not find any subpoena duces
20 tecum requested for Petitioner’s case from 2017 through 2021. (*Id.* at 6.) Petitioner
21 concedes that he did not submit this correspondence to this Court while his habeas
22 petition was pending. (*Id.* at 2-3.)

23 On October 13, 2022, this Court issued an Order adopting the Magistrate Judge’s
24 R&R and denying and dismissing Petitioner’s petition for writ of habeas corpus. (Dkt.
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27 ² *Brady v. Maryland*, 373 U.S. 83 (1963)

1 No. 16.) In the Order, the Court denied Petitioner’s ineffective assistance of counsel
2 claims because Petitioner failed to “provide any independent and corroborating evidence”
3 that the Home Depot video alibi actually existed and because evidence placed Petitioner
4 at the crime scene. (*Id.* at 11.) The Court denied Petitioner’s ineffective assistance of
5 appellate counsel claim for not raising the ineffective assistance of counsel claim on
6 direct appeal because Petitioner “failed to show that there was no tactical purpose for his
7 trial counsel’s actions.” (*Id.* at 13.) The Court denied Petitioner’s *Brady* claim because
8 he had failed to demonstrate that the prosecution was in possession of the Home Depot
9 video. (*Id.* at 14.) Finally, the Court denied Petitioner’s free standing claim of actual
10 innocence for lack of a federal basis to provide relief. (*Id.* at 16.)

11 On February 16, 2023, Petitioner filed this instant motion to vacate this Court’s
12 October 2022 Order and Judgment denying his habeas petition based on newly
13 discovered evidence to which the Respondent opposed. (Dkt. Nos. 20, 26.) In his reply,
14 Petitioner clarifies that he seeks to vacate the Order and Judgment pursuant to Federal
15 Rules of Civil Procedure 59(e) and 60(b)(1), (b)(2), (b)(3), and (b)(6). (Dkt. No. 31 at
16 23, 26.)

17 Discussion

18 A. Federal Rule of Civil Procedure 59(e)

19 Under Federal Rule of Civil Procedure (“Rule”) 59(e), “[a] motion to alter or
20 amend a judgment must be filed no later than 28 days after the entry of the judgment.”
21 Fed. R. Civ. P. 59(e). Amending a judgment is an “an extraordinary remedy which
22 should be used sparingly.” *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir.
23 2011) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999)).

24 A district court “[has] no power to extend the time for filing a Rule 59(e) motion.”
25 *Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993); *Scott v. Younger*, 739 F.2d 1464,
26 1467 (9th Cir. 1984) (“That time period [specified in Rule 59(e)] is jurisdictional and
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1 cannot be extended by the court.”); *Carter v. United States*, 973 F.2d 1479, 1488 (9th Cir.
2 1992) (“the district court has no discretion to consider a late rule 59(e) motion”);
3 *Amerson v. Kindredcare, Inc.*, 606 Fed. Appx. 371, 372 (9th Cir. 2015) (“The time period
4 for filing a Rule 59(e) motion is jurisdictional and cannot be extended by the court.”).

5 The judgment that Petitioner seeks to vacate was entered on October 13, 2022.
6 (Dkt. No. 16.) Petitioner filed the instant motion on February 16, 2023, more than four
7 months after the entry of judgment. (Dkt. No. 20.) Accordingly, the Court agrees with
8 Respondent that the late filing date forecloses consideration of the motion under Rule
9 59(e).

10 **B. Successive Habeas Petition**

11 While neither party has raised the issue of whether Petitioner’s Rule 60(b) motion
12 should be treated as a successive petition, the Court raises it here *sua sponte*. See *Bratton*
13 *v. Hernandez*, 08cv1932–WQH–RBB, 2009 WL 2366469, at *6 (S.D. Cal. 2009) (raising
14 successive habeas petition issue *sua sponte* reasoning that “[f]ederal courts are obligated
15 to raise questions concerning their subject matter jurisdiction *sua sponte in all cases.*”),
16 *Winburn v. Jackson*, Civil No. 5:07-15440, 2008 WL 108888 (E.D. Mich. 2008) (raising
17 successive habeas petition issue *sua sponte*).

18 “[A] Rule 60(b) motion that seeks to revisit the federal court’s denial *on the merits*
19 of a claim for relief should be treated as a successive habeas petition.” *Gonzalez v.*
20 *Crosby*, 545 U.S. 524, 534 (2005) (emphasis in original). Following the Supreme Court’s
21 ruling in *Gonzalez*, the Ninth Circuit recognized that a district court addressing a Rule 60
22 motion in the habeas context must distinguish between a true Rule 60 motion and a Rule
23 60 motion disguised as a second or successive habeas petition. *Hall v. Haws*, 861 F.3d
24 977, 985 (9th Cir. 2017); *United States v. Washington*, 653 F.3d 1057, 1062 (9th Cir.
25 2011). If the alleged Rule 60(b) motion challenges “some defect in the integrity of the
26 federal habeas proceedings,” the court must treat it as a true Rule 60(b) motion to vacate.
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1 *Hall*, 861 F.3d at 985. “On the other hand, if the motion presents a ‘claim,’ i.e., ‘an
2 asserted federal basis for relief from a . . . judgment of conviction,’ then it is, in
3 substance, a new request for relief on the merits and should be treated as a disguised
4 [petition].” *Washington*, 653 F.3d at 1063 (quoting *Gonzalez*, 545 U.S. at 530).

5 If the Rule 60(b) is a disguised attack on a court’s order addressing the underlying
6 constitutionality of the state court conviction, under AEDPA, a petitioner must first seek
7 permission to file a second or successive petition with the U.S. Circuit Court of Appeal.³
8 *See* 28 U.S.C. § 2244(b)(3); *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018) (“the
9 district court lacks jurisdiction and must dismiss” a second or successive habeas petition
10 disguised as a Rule 60(b) motion “unless and until the court of appeals grants an
11 application to file it.”); *see also Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001)
12 (“When the AEDPA is in play, the district court may not, in the absence of proper
13 authorization from the court of appeals, consider a second or successive habeas
14 application.”).

15 Further, the Supreme Court has concluded that a Rule 60(b)(2) motion seeking to
16 present newly discovered evidence in support of a claim already litigated “is in substance
17 a successive habeas petition and should be treated accordingly.” *Gonzalez*, 545 U.S. at
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20 ³ In order to file a second or successive 2254 petition, Petitioner must obtain a certificate from the U.S.
21 Circuit Court of Appeal where

22 (A) the applicant shows that the claim relies on a new rule of constitutional law, made
23 retroactive to cases on collateral review by the Supreme Court, that was previously
24 unavailable; or

25 (B)(i) the factual predicate for the claim could not have been discovered previously
26 through the exercise of due diligence; and (ii) the facts underlying the claim, if proven
27 and viewed in light of the evidence as a whole, would be sufficient to establish by clear
28 and convincing evidence that, but for constitutional error, no reasonable factfinder would
have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A) & (B).

1 531-32; *Washington*, 653 F.3d at 1063 (“a motion to present “newly discovered
2 evidence” in support of a claim previously denied . . . is in substance a successive habeas
3 petition and should be treated accordingly.”), *Neely v. Dir., Cal. Dep’t of Corr.*, No. 2:08-
4 cv-1416 WBS CKD P, 2022 WL 17076967, at 1 (E.D. Cal. 2022), *report and*
5 *recommendation adopted by* 2022 WL 17812581 (Dec. 19, 2022) (“the Ninth Circuit has
6 held that a Rule 60(b)(2) motion amounts to a second or successive habeas petition where
7 the petitioner . . . seeks to present new evidence in support of a claim already litigated or
8 a new claim.”).

9 Here, Petitioner seeks to submit newly discovered evidence, his correspondence
10 with the San Diego Superior Court on December 29, 2021 and June 23, 2022, regarding
11 whether his trial counsel requested a subpoena duces tecum during Petitioner’s state court
12 case. (Dkt. No. 20, Ex. A at 6–7.) Relying on this newly discovered evidence, Petitioner
13 argues that (1) relief is justified under Rule 60(b)(2) because this evidence proved that his
14 trial counsel was indeed ineffective, (Dkt. No. 31 at 22); (2) relief is justified under Rule
15 60(b)(3) because this evidence proved that his trial counsel’s statement that a subpoena
16 was issued at trial was a misrepresentation justifying relief, (*id.* at 19–23); and (3) relief
17 is justified under Rule 60(b)(6) because this evidence proves that his trial counsel and the
18 prosecution engaged in official misconduct by failing to obtain the Home Depot video,
19 making his circumstances extraordinary, (*id.* at 27–29).

20 In essence, Petitioner seeks to reopen his previous habeas claims of the Sixth
21 Amendment ineffective assistance of counsel claim, (Dkt. No. 31 at 20, 24), the *Brady*
22 claim, (*Id.* at 27–29) and the actual innocence claim, (*Id.* at 29–31) with the newly
23 discovered evidence under Rule 60(b)(2), and asks the Court to review the merits of his
24 claims again. However, because these claims were already adjudicated in the October
25 2022 Order, the Court concludes that Petitioner’s motion to vacate under Rule 60(b)(2),
26 (3), and (6) must be construed as a second or successive motions pursuant to § 2254 and
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1 governed by 28 U.S.C. § 2244(b). *See Thompson v. Calderon*, 151 F.3d 918, 921 (9th
2 Cir. 1998) (“In most cases when the factual predicate for a Rule 60(b) motion also states
3 a claim for a successive petition under 28 U.S.C. § 2244(b), as it does in this case, the
4 Rule 60(b) motion should be treated as a successive habeas petition.”). Consequently,
5 absent authorization from the Ninth Circuit, this Court lacks jurisdiction to consider the
6 merits of his Rule 60(b)(2), (b)(3) and (b)(6) motions. *See United States v. Allen*, 157
7 F.3d 661, 664 (9th Cir. 1998) (district court lacked jurisdiction to consider the merits of
8 the petitioner’s claim because he did not seek a certification from the Ninth Circuit).

9 **C. Rule 60(b)(1)**

10 Petitioner also brings a Rule 60(b)(1) motion arguing that his late submission of
11 the newly discovered evidence constitutes excusable neglect justifying relief. (Dkt. No.
12 31 at 19-20.) The Court concludes Petitioner challenges “the integrity of the federal
13 habeas process” and treats Petitioner’s Rule 60(b)(1) motion as a true Rule 60 motion.
14 *See Gonzalez*, 545 U.S. at 533 (“When no ‘claim’ is presented, there is no basis for
15 contending that the Rule 60(b) motion should be treated like a habeas corpus
16 application.”).

17 Under a limited set of circumstances, Rule 60(b) allows a party to seek relief from
18 a final judgment. *Gonzalez* 545 U.S. at 528; *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir.
19 2013). “In the habeas context, Rule 60(b) applies to the extent that it is not inconsistent
20 with the Anti-Terrorism and Effective Death Penalty Act (AEDPA).” *Hall*, 861 F.3d at
21 984.

22 Rule 60(b)(1) provides that relief from judgment may be granted for “excusable
23 neglect.” Fed. R. Civ. P. 60(b)(1). “[F]or purposes of Rule 60(b), ‘excusable neglect’ is
24 understood to encompass situations in which the failure to comply with a filing deadline
25 is attributable to negligence.” *Pioneer Inv. Serv. ’s Co. v. Brunswick Assoc. ’s Ltd. P’ship*,
26 507 U.S. 380, 394 (1993) “[T]he determination of whether neglect is excusable is an
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1 equitable one that depends on at least four factors: (1) the danger of prejudice to the
2 opposing party; (2) the length of the delay and its potential impact on the proceedings; (3)
3 the reason for the delay; and (4) whether the movant acted in good faith.” *Bateman v.*
4 *United States Postal Serv.*, 231 F.3d 1220, 1223–24 (9th Cir. 2000); *accord Washington*
5 *v. Ryan*, 833 F.3d 1087, 1098 (9th Cir. 2016) (“Motions for relief from judgment under
6 Rule 60(b)(1) must . . . must satisfy the four-factor test the Supreme Court established in
7 *Pioneer.*”).

8 Petitioner argues that his late submission of the newly discovered evidence to the
9 Court is excusable because he lacked access to a law library during the process of being
10 transferred to Jamestown S.C.C. from December 12, 2022, to the last week of January
11 2023. (Dkt. No. 31 at 21–22.) The Court finds this explanation unpersuasive to justify
12 relief under Rule 60(b)(1).

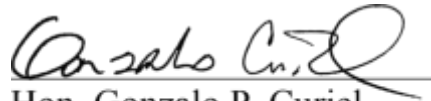
13 Here, Petitioner mailed his request to the San Diego Superior Court around
14 December 29, 2021 after the deadline to Object to the R&R but before the Court’s
15 October 13, 2022 Order. The San Diego Superior Court replied to Petitioner around June
16 2022, about four months before the entry of judgment and six months before Petitioner’s
17 transfer to Jamestown. Petitioner filed the instant motion on February 16, 2023, eight
18 months after the Court’s Order and Judgment in October 2022. Petitioner has failed to
19 explain why he did not submit this new evidence between late June 2022, when he
20 received the state court correspondence, and December 2022 when he was transferred
21 out. Moreover, Petitioner does not explain why he did not submit the new evidence prior
22 to the Court’s Order and Judgment in October 2022. Thus, the Court DENIES
23 Petitioner’s Rule 60(b)(1) motion based on excusable neglect. *See e.g., Casey v.*
24 *Albertson’s Inc*, 362 F.3d 1254, 1260 (9th Cir. 2004) (affirming district court’s order that
25 a party’s “failure to look for and find a key witness until after the lawsuit was over was
26 not excusable neglect under Rule 60(b)(1).”).

1 **Conclusion**

2 Based on the reasoning above, the Court DENIES Petitioner’s motion to vacate
3 judgment. As to the newly discovered evidence, Petitioner must seek permission with the
4 Ninth Circuit to file a second or successive petition with this Court. *See* 28 U.S.C. §
5 2244(b).

6 IT IS SO ORDERED.

7 Dated: July 18, 2023

8 
9 Hon. Gonzalo P. Curiel
United States District Judge