

1 Rule 60(b) permits filing of a motion for relief based upon mistake, inadvertence,
2 surprise, or excusable neglect. Such a motion must be filed within “a reasonable time,” and in
3 cases of mistake, newly discovered evidence, or fraud, within “no more than a year after entry of
4 judgment.” Fed. R. Civ. Proc.60(b).

5 In Holden’s motion for reconsideration, he states that in my order on the motion to
6 dismiss, I concluded that ground 17B related back to an earlier, timely-filed claim and therefore
7 was timely. ECF No. 73. Ground 17B was the claim that his trial counsel was ineffective for
8 failing to challenge prosecutors’ use of a certain inmate-informant. ECF No. 39, pp. 41-45.
9 Holden says the court subsequently, in the merits disposition, stated that ground 17B does not
10 relate back and was procedurally barred. *Id.*

11 However, Holden misrepresents or confuses my merits order. He had not presented
12 federal ground 17B to the highest state court, thus it was unexhausted. See ECF No. 62, pp. 28-
13 32. He acknowledged that if he attempted to exhaust the claim in state court those courts would
14 find his petition untimely and successive under Nevada Revised Statutes §§ 34.726 and 34.810.
15 *Id.* Thus, he urged me to deem the claim “technically exhausted” but argued that he could
16 demonstrate good cause and actual prejudice to excuse the procedural default that would have
17 occurred had he returned to state court with the claim. He argued that his claim could be heard
18 in federal court under the narrow exception created in *Martinez v. Ryan*.¹ I analyzed the claim
19 under *Martinez* but determined that *Martinez* did not apply because though the claim had not
20 been presented to the highest state court, it had been raised during the initial collateral review

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23 ¹ 566 U.S. 1 (2012). In *Martinez*, the Court held that a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

1 proceedings.² Holden failed to demonstrate cause and prejudice so I dismissed ground 17B as
2 procedurally barred. Holden's rationale for reconsideration is based on him misstating the
3 conclusions in my two orders. The motion, accordingly, is denied.

4 **III. Motion to Vacate and Set Aside Sentence**

5 Holden also filed what he styled as a motion to vacate and set aside his sentence. ECF
6 No. 77. I agree with the respondents that this motion sets forth substantive habeas claims. Thus,
7 it is a second and successive federal petition. Holden must get authorization from the federal
8 appeals court to file such a petition in federal district court. *See* 28 U.S.C. § 2244(b). Thus, I
9 deny the motion.

10 **IV. Conclusion**

11 I THEREFORE ORDER that the motion for reconsideration and motion to vacate and set
12 aside sentence **(ECF Nos. 73 and 77) are both DENIED.**

13 I FURTHER ORDER that a certificate of appealability is denied.

14 I FURTHER ORDER that Holden's counsel's motion to withdraw as attorney **(ECF No. 80)**
15 **is GRANTED.** Theresa A. Ristenpart **is released as counsel.**

16 I FURTHER ORDER that the respondents' motion to relieve them from responding to future
17 pro se pleadings **(ECF No. 79) is GRANTED.** The respondents need not respond to any future
18 pleadings filed by Holden in this case unless ordered to do so.

19 Dated: October 22, 2021



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21 U.S. District Judge Andrew P. Gordon

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² *Id.* at 10-11.