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28UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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STEVEN BRAUNSTEIN,

Plaintiff,

v.

BRIAN WILLIAMS, et al.,

Defendants.

Case No. 2:16-cv-2556-APG-NJK

ORDER

This is a habeas corpus proceeding under 28 U.S.C. § 2254. Pending before the court are petitioner's motion for reconsideration (ECF No. 5) and a motion the petitioner has styled as a "motion for leave to refile 28 USC 2241 on order of Ninth Circuit remand" (ECF No. 9).

Because the effective date of petitioner's appeal of this court's judgment pre-dates the filing of his motion for reconsideration, this court has lost jurisdiction to rule upon a motion seeking relief from that judgment. See *Williams v. Woodford*, 384 F.3d 567, 586 (9<sup>th</sup> Cir. 2004) (concluding that district court lacked jurisdiction over petitioner's Rule 60(b) motion filed subsequent to notice of appeal). Even so, a party may "ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the district court gives such an indication, then the party should make a motion in the Court of Appeals for a limited remand to allow the district court to rule on the motion." *Sierra Pacific Industries v. Lyng*, 866 F.2d 1099, 1113 n. 21 (9<sup>th</sup> Cir. 1989); see also, *Gould v. Mutual Life Insurance Co.*, 790 F.2d 769, 772 (9<sup>th</sup> Cir. 1986).

This practice has been adopted by the Federal Rules of Civil Procedure. Rule 62.1(a) states, "If a timely motion is made for relief that the court lacks authority to grant because of an

1 appeal that has been docketed and is pending, the court may: (1) defer considering the motion;  
2 (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals  
3 remands for that purpose or that the motion raises a substantial issue.” The third option is often  
4 referred to as an “indicative ruling.” See Fed. Ct. App. Manual § 15:12.5 (5th ed.).

5 Under Rule 60(b), the court may relieve the moving party from a final judgment on  
6 several grounds, including the catch-all category “any other reason justifying relief from the  
7 operation of the judgment.” Fed. R. Civ. P. 60(b)(6). Petitioner has not made a convincing case  
8 that he is entitled to relief under any of the grounds listed under (b)(1) through (b)(5).

9 Relief under subsection (b)(6) requires a showing of “extraordinary circumstances.”  
10 *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). “Such circumstances will rarely occur in the  
11 habeas context.” *Id.* Here, petitioner does not identify any circumstances that would qualify as  
12 extraordinary. Simply put, even if this court had jurisdiction to rule upon petitioner’s Rule 60(b)  
13 motion, it would deny it. The court also concludes that petitioner’s motion does not raise a  
14 substantial issue for the purposes of Rule 62.1(a)(3).

15 Likewise, this court must also deny petitioner’s other motion (ECF No. 9), with which he  
16 asks this court to allow him to file an amended habeas petition. Petitioner appears to be laboring  
17 under the perception that this proceeding has been remanded to this court by the Ninth Circuit,  
18 which is not the case. See ECF Nos. 6/8. He also appears to be contending that limitations on  
19 second or successive petitions under 28 U.S.C. § 2254 do not apply to his proposed amended  
20 petition because he is bringing it under 28 U.S.C. § 2241. However, it is well established that a  
21 state habeas petitioner may not avoid the limitations imposed on successive petitions by styling  
22 his petition as one pursuant to § 2241 rather than § 2254. See *Greenawalt v. Stewart*, 105 F.3d  
23 1287, 1287-88 (9th Cir.1997); see also *White v. Lambert*, 370 F.3d 1002, 1007 (9<sup>th</sup> Cir. 2004)  
24 (confirming that § 2254 is the exclusive avenue for a state court prisoner to challenge the  
25 constitutionality of his detention).

26 IT IS THEREFORE ORDERED that petitioner’s motion for reconsideration (ECF No. 5)  
27 and “motion for leave to refile 28 USC 2241 on order of Ninth Circuit remand” (ECF No. 9) are  
28 both DENIED.

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IT IS FURTHER ORDERED that petitioner is denied a certificate of appealability with respect to this order.

DATED THIS 20<sup>th</sup> day of April, 2017.



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UNITED STATES DISTRICT JUDGE