

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAY 8 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DONALD ROBIN BARREN,

Plaintiff-Appellant,

v.

HOWARD SKOLNIK; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 19-15952

D.C. No.
2:09-cv-01202-RFB-VCF
District of Nevada,
Las Vegas

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise from the denial of petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b).

See Lynch v. Blodgett, 999 F.2d 401, 403 (9th Cir. 1993) (certificate of probable cause to appeal necessary to appeal denial of post-judgment motion for relief under Rule 60(b)). Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C.

§ 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the Clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

The Clerk shall send a copy of this order to the district court judge.

1 demonstrating that the issues are debatable among jurists of reason; that a court could
2 resolve the issues differently; or that the questions are adequate to deserve
3 encouragement to proceed further. *Id.* When the petitioner's claim is denied on
4 procedural grounds, a certificate of appealability should issue if the petitioner shows: (1)
5 "that jurists of reasons would find it debatable whether the petition states a valid claim of
6 the denial of a constitutional right"; and (2) "that jurists of reason would find it debatable
7 whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529
8 U.S. 473, 484-85 (2000).

9 Reasonable jurists would not find the Court's denial of petitioner's motions for relief
10 under Rule 60(b) motion and to "exercise supplemental jurisdiction" to be debatable or
11 wrong. Petitioner did not file his Rule 60(b) motion within a reasonable time, especially
12 where the bases asserted for relief from judgment were available to him as early as 2012.
13 Further, petitioner's motion seeking the Court's intervention in ongoing state proceedings
14 was an improper attempt to reopen this closed action. Accordingly, the Court concludes
15 that petitioner has not satisfied the standard for issuance of a certificate of appealability,
16 and the petitioner's motion for certificate of appealability (ECF No. 99) is hereby DENIED.

17 IT IS SO ORDERED.

18 DATED this 28th day of May, 2019.



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20 RICHARD F. BOULWARE, II
21 UNITED STATES DISTRICT JUDGE
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Las Vegas

ORDER

Before: CANBY and CHRISTEN, Circuit Judges.

This appeal is from the denial of appellant's Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section [2254 petition] states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 * * *
9 DONALD ROBIN BARREN,
10 Petitioner,
11 v.
12 HOWARD SKOLNIK, et al.,
13 Respondents.

Case No. 2:09-cv-01202-RFB-VCF

ORDER

14 This closed pro se habeas petition pursuant to 28 U.S.C. § 2254 comes before the
15 Court on petitioner's motion for relief from judgment pursuant to Federal Rule of Civil
16 Procedure 60(b)(6). (ECF No. 91). Respondents have opposed (ECF No. 93), and
17 petitioner has replied. (ECF No. 94). In addition, petitioner has filed a "motion to exercise
18 supplemental jurisdiction." (ECF No. 95).

19 Petitioner initiated this habeas action in June 2009, and it was denied on the merits
20 on August 15, 2012. (ECF No. 71). On or after September 24, 2012, petitioner filed a
21 motion for certificate of appealability and a notice of appeal with the Ninth Circuit Court of
22 Appeals. (ECF Nos. 73 & 77). The Court denied petitioner's motion for certificate of
23 appealability. (ECF No. 75). Around the same time, petitioner filed a motion for extension
24 of time with the Ninth Circuit Court of Appeals, which the Ninth Circuit construed as a
25 motion for extension of time to file a notice of appeal and remanded for consideration by
26 this Court. (ECF No. 77). In his motion and reply, petitioner asserted that he was unable
27 to timely file his notice of appeal because his requests for law library access had been
28 denied. (See ECF No. 79). This Court denied the motion for extension of time, holding

1 that petitioner had failed to show either good cause or excusable neglect. FRAP 4(a)(5).
2 (ECF No. 80). The Ninth Circuit agreed, and accordingly dismissed petitioner's appeal
3 for lack of jurisdiction. (ECF No. 83). Nearly six years later, petitioner filed the instant
4 motion for relief pursuant to Federal Rule of Civil Procedure 60(b)(6).

5 A petitioner may seek relief from a final judgment pursuant to Federal Rule of Civil
6 Procedure 60(b) under a limited set of circumstances. See Gonzalez v. Crosby, 545 U.S.
7 524, 528 (2005)). However, “[h]abeas corpus petitions cannot utilize a Rule 60(b) motion
8 to make and end-run around the requirements of the AEDPA or to otherwise circumvent
9 that statute’s restrictions on second or successive habeas corpus petitions.” *Jones v.*
10 *Ryan*, 773 F.3d 825, 833 (9th Cir. 2013). A motion is a legitimate Rule 60(b) motion if it
11 attacks “some defect in the integrity of the federal habeas proceedings.” *Gonzalez*, 545
12 U.S. at 532. If a motion asserts a new claim, including a challenge to the court’s
13 determination on the merits, the motion is not properly considered a Rule 60(b) motion
14 and instead should be treated as a second or successive petition. *Id.* at 529-32.

15 Under Rule 60(b), “the court may relieve a party or its legal representative from a
16 final judgment, order, or proceeding for the following reasons:

- 17 (1) mistake, inadvertence, surprise, or excusable neglect;
- 18 (2) newly discovered evidence that, with reasonable diligence, could not
19 have been discovered in time to move for a new trial under Rule 59(b);
- 20 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation,
21 or misconduct by an opposing party;
- 22 (4) the judgment is void;
- 23 (5) the judgment has been satisfied, released or discharged; it is based on
24 an earlier judgment that has been reversed or vacated; or applying it
prospectively is no longer equitable; or
- 25 (6) any other reason that justifies relief.

26 A Rule 60(b) motion must be made “within a reasonable time.” Fed. R. Civ. P.
27 60(c)(1).

1 Petitioner asserts relief pursuant to Rule 60(b)(6), arguing that he is entitled to
 2 such due to “extraordinary circumstances.” The extraordinary circumstances he points
 3 to are those he alleged in a 2013 civil rights complaint, in Case No. 2:13-cv-01492-RCJ-
 4 GWF. In that complaint, petitioner asserted that he was denied law library access, which
 5 prevented him from timely filing his notice of appeal in this habeas action. The allegations
 6 petitioner asserts ones that he could have raised, or in fact did raise, when originally
 7 seeking an extension of time to appeal in 2012. Petitioner appears to argue that he did
 8 not raise these claims earlier in this action due to his ongoing litigation. But nothing about
 9 petitioner’s pending civil rights complaint justifies waiting until January 2019 to file a
 10 motion for Rule 60(b) relief in this case, particularly where the civil rights proceedings
 11 were not resolved in petitioner’s favor and were dismissed for failure to prosecute more
 12 than a year before petitioner filed his Rule 60(b) motion. The Court concludes that
 13 petitioner did not file his Rule 60(b) motion within a “reasonable time,” and the motion will
 14 therefore be denied on those grounds.

15 Turning to petitioner’s motion for this court to exercise “supplemental jurisdiction,”
 16 petitioner asks the Court to adjudicate a habeas petition he has pending in state court,
 17 which asserts that his good time credits have been improperly calculated.
 18 Notwithstanding the fact that federal courts typically abstain from intervention in ongoing
 19 state proceedings pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) and do not typically
 20 consider unexhausted claims, such as those petitioner now asserts, the motion is an
 21 improper attempt to reopen these closed proceedings and will therefore be denied on that
 22 basis. Should petitioner wish to pursue the habeas claims asserted in his motion, he may
 23 attempt to do so in a new action only.

24 In accordance with the foregoing, IT IS THEREFORE ORDERED that petitioner’s
 25 motion for relief from judgment (ECF No. 91) is DENIED.

26 IT IS FURTHER ORDERED that petitioner’s motion to exercise supplemental
 27 jurisdiction (ECF No. 95) is DENIED.

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1 The Clerk of Court shall send petitioner a copy of this court's form and instructions
2 for a habeas petition pursuant to 28 U.S.C. § 2254.

3 IT IS SO ORDERED.

4 DATED this 22nd day of April, 2019.


RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

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APR 17 2020

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Las Vegas

ORDER

Before: OWENS and BENNETT, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 8) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11. No further filings will be entertained in this closed case.