APP. A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANDREW JACE, Petitioner, v. RON DAVIS, Warden, Respondent.	Case No. 2:19-cv-03020-ODW-KES REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation ("R&R") is submitted to the Honorable Otis D. Wright, II, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On April 11, 2019, Petitioner Michael Andrew Jace ("Petitioner") constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition"). (Dkt. 1.) A jury convicted Petitioner of the second degree murder of his wife, April Jace, after hearing evidence that Petitioner waited with a loaded gun for her to come home and then

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V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

"[C]learly established Federal law" refers to the Supreme Court holdings in existence at the time of the state court decision in issue. Cullen v. Pinholster, 563 U.S. 170 (2011). Supreme Court precedent is not clearly established law under § 2254(d)(1) unless it squarely addresses the issue in the case before the state court or establishes a legal principle that clearly extends to the case before the state court. See Harrington v. Richter, 562 U.S. 86, 101 (2011) (noting that it "is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court (citation omitted)).

For purposes of Section 2254(d)(1), a state court decision is "contrary to" clearly established federal law only if there is "a direct and irreconcilable conflict with Supreme Court precedent." Murray v. Schriro, 745 F.3d 984, 997 (9th Cir. 2014). A state court decision is an "unreasonable application" of clearly established federal law under Section 2254(d)(1) if the state court's application of clearly established Supreme Court precedent was "objectively unreasonable, not merely wrong." White v. Woodall, 572 U.S. 415, 419 (2014) (citation omitted). Specifically, a petitioner must establish that there is no possibility "for fairminded disagreement" that the clearly established rule at issue applies to the facts of the case. Id. at 420 (citation omitted).

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A state court's decision is based on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) when the federal court is "'convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record' before the state court." Hurles v. Ryan, 752 F.3d 768, 778 (9th Cir.) (citation omitted omitted), cert. denied, 574 U.S. 1041 (2014). So long as "[r]easonable minds reviewing the record might disagree," however, the state court's determination of the facts is not unreasonable. Brumfield v. Cain, 576 U.S. 305, 314 (2015) (citation omitted). The petitioner carries the burden of proof. See Pinholster, 563 U.S. at 181. AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." White v. Wheeler, 136 S. Ct. 456, 460 (2015) (per curiam) (citation omitted). Even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102.

Petitioner exhausted his claims by presenting them to the California Supreme Court, which issued a summary denial. (LD 9, 10.) Petitioner had previously asserted most if not all of these claims in two habeas petitions filed in the California Court of Appeal. That court denied the first as an improper attempt to evade the prohibition against appellants raising arguments on appeal pro se (LD 2, LD 3). It denied the second for the same reason and as an improper successive petition (LD 4, LD 5). Generally, when the last state court denies a claim without explanation where a lower court explained its denial of the same claim, federal courts "look through" the summary denial to the reasoned one. Wilson v. Sellers, 138 S. Ct. 1188, 1193 (2018). This presumption is rebuttable, however. See id. at 1196. Here, the look-through presumption is rebutted, because the California Court of Appeal's reasons could not have been those of the California Supreme Court in denying the petition. Petitioner's appeal was concluded by the time he sought habeas relief in the California Supreme Court, and that petition was not successive.

APP. A

Thus, the Court assumes that the California Supreme Court's denial was an "adjudication on the merits" for purposes of AEDPA and reviews Petitioner's claims under AEDPA's deferential standard. See Johnson v. Williams, 568 U.S. 289, 298 (2013) (citing Richter, 562 U.S. at 99-100). Based on assumption it was adjudicated on merits

Because the state supreme court provided no reasoning explaining its denial, this Court will conduct an "independent review" of Petitioner's claims under AEDPA's deferential standard. See Ayala v. Chappell, 829 F.3d 1081, 1095 (9th Cir. 2016) (where California Supreme Court summarily denied petitioner's claims, and there is no other reasoned state court decision, federal habeas court conducts "independent review" of record) (citing Richter, 562 U.S. at 102). When conducting such an independent review of a silent state-court denial, the reviewing federal habeas court "must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. Richter, 562 U.S. at 101-02 (citing 28 U.S.C. § 2254(d)).

VI.

CLEARLY ESTABLISHED FEDERAL LAW

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The initial court considering the claim must then

APP. B

Michael Jace
BA3055
Corcoran State Prison
Corcoran, CA 93212
In Pro se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Michael Jace
Petitioner

vs

Ron Davis, Warden
Respondent

Case No. 2:19-cv-03020-ODW-KES

OBJECTION TO REPORT AND RECOMMENDATION TO DENY PETITION FOR WRIT OF HABEAS CORPUS: MEMORANDUM OF POINTS AND AUTHORITIES

The Honorable Karen E. Scott
United States Magistrate Judge

APP. B

OBJECTIONS TO REPORT AND RECOMMENDATION

Petitioner objects to the Report And Recommendation filed on 08/05/20, to deny Petition For Writ Of Habeas Corpus for the Following reasons:

1. RICHTER PRESUMPTION HAS BEEN REBUTTED. There is clear evidence that the California Court of Appeal rejected petitioner's federal claims within his habeas petition submitted to court out of "sheer inadvertence" therefore the deferential standard of AEDPA is not applicable to petitioner's case. Petitioner's claims of ineffective assistance of counsel have not been adjudicated on the merits in state court as required and clearly stated in the language of 28 U.S.C. §2254(d). "If a federal claim is rejected as a result of sheer inadvertence it has not been evaluated based on the intrinsic right and wrong of the matter." Johnson v. Williams, 568 U.S. 289, 303 The denial was procedural. And all of the issues petitioner raised in his state habeas petition were outside of the record. There were no overlapping issues between petitioner's habeas petition and that submitted by the state appointed appellate attorney. Structural constitutional errors exist within petitioner's habeas petition that are ignored by the state. (SEE Exhibit #1: actual denial reads slightly different 3 Cal. 4th 41, 173 than the R&R p 7 line 26-28)

2. MARTINEZ v. RYAN, 566 U.S. 1 EXPANDED UNDER Trevino v. Thaler, 569 U.S. 413 was applicable to petitioner's case. The stay request was contingent upon the court ruling. Though a ruling was request-ed, the Magistrate Judge issued a stay without ruling. (Objection

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to R&R to Dismiss is enclosed. The date which petitioner mailed his Petition For Rehearing is also at issue.)

3. THE MAGISTRATE JUDGE'S RULING IS BIASED. The judge makes arguments for the state/respondent that they never presented [illegible] requiring petitioner to "squarely address the issue in the case before the state court." R&R p 11 line 13-18. Though the state cited Richter in numerous instances they never cited what the Magistrate Judge argues on their behalf. Petitioner is not a lawyer and has limited experience reading legal documents, but from the cases he's read to date, he can't remember any other court including in their Standard of Review what this judge has interjected. The judge arbitrarily added an additional hurdle for petitioner to overcome, that does not appear to be universially applied by District Courts. This was done as Federal law was ignored. "It is well settled that pro se litigants generally are entitled to a liberal construction of their pleading, which should raise the strongest arguments they suggest." Green v. United States, 260 F. 3d 78, 83 (2nd Cir. 2001) The Magistrate Judge arguing on behalf of the state is of issue and the argument the judge interjects is contrary to clearly established Federal law. Also see Brown v Roe, 279 F. 3d 742, 745-46 (9th Cir. 2002) "Pro se habeas petitioners occupy a unique position in the law... are to be afforded the benefit of any doubt." The Magistrate Judge does not afford the petitioner benefit of any doubt. And there are additional instances of bias which petitioner will cite in specific Ground this occurs.

//////

AEDPA is not applicable to petitioner's case and it should be reviewed de novo. The three objections listed are applicable to all of petitioner's Grounds in part or in whole. There are additional objections specific to facts within numerous Grounds as follows:

GROUND TWO

"The Supreme Court had HELD in several cases that the habeas court's commission is not to invent stragetic reasons or accept any strategy counsel could have followed without regard to what actually happened;" Marcrum v Luebbers, 509 F. 3d 489, 502(8th Cir) Counsel announcing, "We accept responsibility. This case is about why it was done," does not reveal a strategy. R&R p 19 line 25, 26 Counsel never presented petitioner's provocation to a jury. Counsel presented a hypothetical of their choosing based upon evidence the prosecution presented. What exactly is petitioner "accept[ing]" responsibility for when he had no idea what counsel was doing? What petitioner "accept[ed]" responsibility for, but counsel never presented was articulated by Mr. Hicks on Nov. 6, 2015. It promises an affirmative defense to produce evidence.

> "Moreover the evidence about the extra-marital affair would not confuse the issues... Therefore, the jurors need to hear this evidence as it substantiates Mr. Jace's state of mind and directly affects his culpability (intent) when the jury determines guilt upon the different degrees of murder. To not allow said evidence would deny Mr. Jace the right to present his defense by showing mitigating factors regarding his intent during the commission of the act." CT p 104 line 4, 8-10 Exhibit #2

~~21-55945~~ APP. B 13

08/27/2020 Librarian Hebert

Jacc BA3055

1. Dept. Atty General
300 South Spring St.
Suite #1702
Los Angeles, CA 90013

2. Southern Division
411 West Fourth St.
Rm #1053
Santa Ana, CA 92701

APP. C.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL JACE

CASE: 1:22-CV-00419-AWI-CDB

vs.

MARGARET LIRONES, ET AL.

ORDER OF REASSIGNMENT

/

The court, having considered the appointment of Magistrate Judge Christopher D. Baker finds the necessity for reassignment of the above captioned case, and for notice to be given to the affected parties.

IT IS THEREFORE ORDERED that:

The above captioned case shall be and is hereby **REASSIGNED** from Bakersfield Magistrate Judge (BAK) to Magistrate Judge Christopher D. Baker for all further proceedings. The new case number for this action, which must be used on all documents filed with the court, is: **1:22-CV-00419-AWI-CDB**

All dates currently set in this reassigned action shall remain effective subject to further order of the court.

DATED: October 6, 2022

CHIEF UNITED STATES DISTRICT JUDGE

DKT. # 16

Due to the actions of Senoir Librarian Margaret Lirones plaintiff's fundamental right to access the Court has been obstructed, violating plaintiff's Constitutional right guaranteed him by the First and Fourteenth Amendments. This would include but is not limited to defendant's repeated violations of Title 15 3122(b)(4).

At all times mentioned in this complaint defendant Lirones held said position and was assigned to Corcoran Prison.

Defendant Lirones is sued individually and in her official capacity. At all times mentioned in this complaint defendant Lirones acted under the color of state law.

On February 18, 2021, plaintiff submitted a Preferred Legal User request (also known as a PLU) that was denied. With a PLU designation plaintiff would have been granted access to the law library while Corcoran Prison operated under a modified program due to COVID-19. While operating under this modified program access to the law library was only granted to PLUs.

This modified program was in effect from February 11, 2021, the date that plaintiff received the final judgment for case number 2:19-cv-03020-DAD-KES, through March 16, 2021. (The final judgment was entered on February 05, 2021). Therefore from February 11 through March 16, 2021, plaintiff was denied access to law library.

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APP. D.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANDREW JACE,

Petitioner,

v.

RON DAVIS, et al.,

Respondents.

Case No. 2:19-CV-03020-ODW (KES)

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60

On April 11, 2019, Petitioner Michael Andrew Jace ("Petitioner") constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition"). (Dkt. 1.) On February 5, 2021, having received no objections to the Magistrate Judge's Report and Recommendation (Dkt. 51), the Court denied the Petition with prejudice, concluding that all of Petitioner's ineffective assistance of counsel claims failed. (Dkt. 52-54.)

On March 25, 2021, the Court received from Petitioner a filing dated March 17, 2021. (Dkt. 55.) Petitioner states that he did in fact mail in August 2020 objections to the Magistrate Judge's Report and Recommendation and encloses

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DKT. 56 / APP. D

APP. D

those objections as an attachment. (See Dkt. 55-1 through Dkt. 55-3.)

The Court interprets Petitioner's filing as a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60,[1] which permits the Court to relieve a party from a final judgment for "any . . . reason that justifies relief." The Court has reviewed Petitioner's objections, which pertain to six of his nine claims. To the extent he repeats arguments the Court has already rejected, the Court will not repeat them here. To the extent he challenges the Report and Recommendation specifically, the Court responds as follows:[2]

Ground Two (IAC because trial counsel conceded three "meritorious issues" in the opening statement without Petitioner's permission): Petitioner faults the magistrate judge for describing counsel's strategy as "partially successful." (Dkt. 55-1 at 9-10.) The Court continues to conclude that counsel's strategy was not unreasonable and was also effective. Counsel persuaded the jury not to convict Petitioner of first degree murder, despite Petitioner's own statements that he was waiting with a loaded gun for his wife to return home and other evidence of planning. The factual "concessions" counsel made were part of this strategy.

Ground Three (IAC because trial counsel conceded a fourth "meritorious issue" in closing argument): Petitioner criticizes the magistrate judge's conclusion that "learning after the shooting that his wife was indeed unfaithful could not have informed Petitioner's state of mind when he shot her." (Id. at 10.) Petitioner insists that he knew about the affair before he shot his wife. (Id.) Text messages from the day of the murder showed that Petitioner did not know whether his wife was having

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[1] Motions under Rule 59 to alter or amend a judgment must be made no later than 28 days after entry of judgment.

[2] Petitioner states that the assigned magistrate judge is "biased," appearing to mean that the magistrate judge improperly applied to a pro se litigant the AEDPA standard of review. (Dkt. 55-1 at 6-7.) The AEDPA standard of review applies to represented and self-represented litigants alike.

APP. D

an affair. (1 CT 78; 3 RT 192.) Further, a different strategy would have involved attacking the victim's sexual history and risked alienating jurors. A different strategy would have also required Petitioner to testify, further risking juror alienation if Petitioner persisted in calling the shooting "accidental" or gave an account that was contradicted by the forensic evidence. In any event, testimony that he suspected his wife was having an affair or, as he writes in the instant motion, "made it clear to him" without words that "she was no longer his" (Dkt. 55-1 at 10-11) would not have supported a defense of provocation.

Ground Four (IAC because "defense counsel conceded second degree murder against the Petitioner's expressed will"): Petitioner argues that the magistrate judge improperly drew distinctions between this case and McCoy v. Louisiana, 138 S. Ct. 1500 (2018). (Dkt. 55-1 at 14-15.) Petitioner does not put forward any cogent arguments to support this statement. Per the record, counsel argued for acquittal and voluntary manslaughter, not second degree murder. (See, e.g., 4 RT at 370-93, 392.)

Ground Five (IAC because "defense counsel did not call a single witness and did not object to, or cross-examine, any meaningful witnesses"): Petitioner argues that the magistrate judge presented "dishonest" opinions without reading "the relevant transcripts." (Dkt. 55-1 at 17.) The Court reassures Petitioner that it reviewed all the relevant transcripts. It appears that Petitioner does not understand why the Court considers "hypothetical strategic decisions." (Id. at 22.) Under Supreme Court precedent, where (as here) the highest state court has not explained its reasoning in denying a petitioner's claims on the merits, the reviewing federal habeas court "must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. Harrington v. Richter, 562 U.S. 86, 101-02 (2011). Further, in addressing claims of ineffective

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assistance under Strickland v. Washington, 466 U.S. 668 (1984), the Court must determine if acts or omissions were outside the wide range of professionally competent assistance.

Ground Six (IAC because trial counsel failed to investigate and prepare for Petitioner's case adequately): Petitioner repeats arguments the Court has already addressed. (See Dkt. 55-1 at 23.)

Ground Seven (IAC because trial counsel advised Petitioner not to testify): Petitioner repeats arguments the Court has already addressed. (See id. at 23-24.)

Because Petitioner has not presented any reason that justifies relief from judgment, the Court DENIES Petitioner's motion.

DATED: April 22, 2021

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

Presented by:

Karen E. Scott

KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE

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APP. E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANDREW JACE,

Petitioner,

v.

KEN CLARK, Warden,[1]

Respondent.

Case No. 2:19-CV-03020-ODW (KES)

ORDER DENYING PETITIONER'S REQUEST FOR LEAVE TO FILE A LATE APPEAL (DKT. 57)

On February 5, 2021, the Court dismissed Petitioner's habeas petition with prejudice, denied a certificate of appealability, and entered judgment. (Dkt. 52, 53, 54.) On March 17, 2021, Petitioner constructively filed a Rule 60 motion for relief from judgment, which the Court denied on April 22, 2021. (Dkt. 55, 56.) On June 22, 2021, Petitioner filed a "Request to Leave to File a Late Appeal," which the Court docketed on August 4, 2021. (Dkt. 57 ["Request"].)[2] Petitioner argues that

[1] Ken Clark, Warden at California State Prison—Corcoran, where Petitioner is currently incarcerated, is substituted for his predecessor. Fed. R. Civ. P. 25(d).

[2] Petitioner mistakenly filed the Request in the Ninth Circuit Court of Appeals. "If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date

APP. E

because of inadequate law library access, he has "good cause" for requesting an additional six weeks to submit an appellate brief. (Id. at 1–5.) As discussed herein, the Request is denied.

A notice of appeal in a civil case must be filed with the district clerk within 30 days after entry of judgment. Fed. R. App. P. 4(a)(1)(A). Thus, Petitioner had until March 8, 2021, to file a notice of appeal. A Rule 60 motion for reconsideration can extend the time to file a notice of appeal, but *only* if the motion for Rule 60 relief "is filed no later than 28 days after the judgment is entered." Fed. R. App. P. 4(a)(4(A)(vi). Thus, to extend the time to file a notice of appeal, Petitioner's Rule 60 motion for reconsideration would have had to have been filed no later than March 5, 2021. Even giving Petitioner the benefit of the mailbox rule, he constructively filed his motion for reconsideration on March 17, 2021, or 40 days after entry of judgment. Thus, his motion for reconsideration did not extend the deadline for filing a notice of appeal.

If a party demonstrates good cause or excusable neglect, the district court has the discretion to extend the time to file a notice of appeal, but *only* if the motion for extension of time is filed within 60 days after entry of judgment. Fed. R. App. P. 4(a)(5)(A)(i). Thus, even if inadequate law library access constituted good cause for seeking an extension of time to file a notice of appeal, Petitioner would have needed to file his Request no later than April 6, 2021—60 days after entry of judgment. He did not, waiting until June 22, 2021, *see supra* n.2, to file his request for additional time.

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when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted." Fed. R. App. P. 4(d).

If the Court orders one, a reply to an answer

APP. E.

In sum, the Court lacks any discretion to grant Petitioner's untimely request to extend time to file a notice of appeal. The Request for Leave To File a Late Appeal (Dkt. 57) is DENIED.

DATED: _August 5, 2021

OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE

Presented by:

KAREN E. SCOTT
United States Magistrate Judge

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APP. F.

FILED

SEP 15 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANDREW JACE, Petitioner-Appellant, v. RONALD DAVIS, Warden, Respondent-Appellee.	No. 21-55915 D.C. No. 2:19-cv-03020-ODW-KES Central District of California, Los Angeles ORDER

Before: WARDLAW and BADE, Circuit Judges.

Appellant's motion for leave to file a late appeal (Docket Entry No. 5) is denied because this court has no authority to extend time for appeal. *See* Fed. R. App. P. 26(b)(1).

To the extent that appellant appeals from the district court's February 5, 2021 judgment or its April 22, 2021 post-judgment order, the request for a certificate of appealability is denied because the notice of appeal was not timely filed. *See* 28 U.S.C. §§ 2107, 2253(c)(2).

To the extent that appellant appeals from the district court's August 6, 2021 order denying his motion to extend time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5), a review of the record suggests that this appeal may be appropriate for summary disposition under Ninth Circuit Rule 3-6(b). *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982); *see also Vahan v.*

APP. F

Shalala, 30 F.3d 102, 103 (9th Cir. 1994) (holding that a district court lacks authority to grant a motion to extend time for appeal if the motion was filed outside the time limits set by Fed. R. App. P. 4(a)(5)). Within 21 days after the filing date of this order, appellant must show cause why summary affirmance of the district court's August 6, 2021 order is not appropriate. A response may be filed within 10 days after service of the memorandum.

Appellant's motion for leave to proceed in forma pauperis (Docket Entry No. 4) is granted. The Clerk will update the docket.

Appellant's motion for appointment of counsel (Docket Entry No. 3) is denied.

If appellant does not comply with this order, this appeal will be automatically dismissed by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

Briefing is stayed pending further order of the court.

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APP G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 14 2021

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

MICHAEL ANDREW JACE, Petitioner-Appellant, v. RONALD DAVIS, Warden, Respondent-Appellee.	No. 21-55915 D.C. No. 2:19-cv-03020-ODW-KES Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN, CLIFTON, and BYBEE, Circuit Judges.

A review of the record and appellant's responses (Docket Entry Nos. 9 & 10) to this court's September 15, 2021, order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994) (holding that a district court lacks authority to grant a motion to extend time for appeal if the motion was filed outside the time limits set by Fed. R. App. P. 4(a)(5)).

Accordingly, we summarily affirm the district court's August 6, 2021, order.

Any pending motions are denied as moot.

10/10/22

AFFIRMED.

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~~" In a nonemergency situation, however, a motion to affirm a final judgment should only be filed only where " it is manifest that the question on which the decision of the cause depends are so unsubstantial as not to need further argument." S Ct. R 16(1)(c)~~

App. G

APP APP H E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 05 2022

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

MICHAEL ANDREW JACE,

Petitioner - Appellant,

v.

RONALD DAVIS, Warden,

Respondent - Appellee.

No. 21-55915

D.C. No. 2:19-cv-03020-ODW-KES
U.S. District Court for Central California, Los Angeles

MANDATE

UNITED STAT
CENTRAL DIST
MICHAEL ANDREW JACE
Petitioner,

v.

RON DAVIS, et al.,

Respondents.

Case No. 2:19-CV-03020-ODW (KES)

ORDER DENYING MOTION FOR

The judgment of this Court, entered December 14, 2021, takes effect this 64) date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7

[illegible] ("Petitioner") recently filed a motion for reconsideration under Federal Rule of Civ[illegible] Magistrate Judge alleged "notus[a]l to file [his] timely objection" to her August 2020 Report and Recommendation ("R&R"). (Dkt. 64.) P[illegible] DENIED.

A. Procedural History.

On August 5, 2020, the Magistrate Judge issued an R&R recommending denial of Petitioner's petition for writ of habeas [illegible] objections were due by August 28, 2020. (Dkt. 50.) After none were received, on February [illegible], 2021, the District Judge entered an order adopting the R&R and noting that no objections had been filed. (Dkt. 52.) The District Judge entered judgment against

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APP I

Petitioner. (Dkt. 53.)

In March 2021, Petitioner filed a "motion for reconsideration." (Dkt. 55.) He claimed that "a grave error ha[d] occurred," because he timely mailed objections to the R&R to the Court on August 27, 2020. (Dkt. 55 at 1; Dkt. 55-3 [proof of service declaration].) He attached another copy of the objections dated August 27, 2020 (Dkt. 55-1) and asked the Court to consider them.

The District Judge interpreted Petitioner's filing as a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60. (Dkt. 56 at 2.) Despite receiving the objections late, the Court considered whether any justified granting relief from judgment and concluded that they did not. (Id. at 2-4.)

In June 2021, Petitioner requested leave to file a late appeal, alleging inadequate law library access and tampering with legal mail. (Dkt. 57.) He wrote, "The legal mail dated 8/27/20 never reached the District Court allowing the Magistrate Judge's R&R to be adopted in error." (Id. at 4-5.)

On August 6, 2021, the District Judge denied relief, determining that it lacked discretion to authorize a late appeal because Petitioner's request was made so long after entry of judgment. (Dkt. 58.) When Petitioner appealed, the Ninth Circuit affirmed this determination (Dkt. 62) and denied the late appeal. (Dkt. 61.)

B. The Instant Motion.

Petitioner now brings a second motion under Federal Rule of Civil Procedure 60, which permits the Court to relieve a party from a final judgment for "any … reason that justifies relief." Petitioner contends that on an unstated date, he received a response to his March 2021 grievance alleging that due to "gross carelessness," California State Prison Corcoran ("CSP-Corcoran") had failed to mail his objections to the R&R. (Dkt. 64 at 4.) CSP-Corcoran denied the grievance, producing a mail log entry showing that his request to mail a 32-page document to the Court was approved on August 27, 2020. (Id. at 5.) From these facts, Petitioner concludes that the assigned Magistrate Judge engaged in intentional

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"malfeasance," in that she received but refused to file his timely objections to the R&R. (Id. at 1-2.) She did this because he had "accused [her] of being biased" and because his objections "challenged [her] reasoning ...." (Id. at 2.) He contends that this intentional wrongdoing exceeded the Magistrate Judge's authority, violated his right to due process, and justifies vacating the judgment. (Id. at 2-3.) He could not have asked for relief earlier, because he "could not have known of the [Magistrate Judge's] refusal to file his timely objection to her R&R until after [CSP-Corcoran] completed their investigation regarding their tampering with legal mail." (Id. at 2.)

C. Discussion.

Petitioner fails to show wrongdoing by the Magistrate Judge. Sometimes mail sent is lost and never received. Mail received at the courthouse is not opened by judges; it is opened by diligent members of the Clerk's Office who would have docketed Petitioner's objections had they received them. In any event, Petitioner sent his August 2020 objections to the Court (Dkt. 51-1); the Court determined that they lacked merit. (Dkt. 52.) Petitioner has not demonstrated entitlement to relief from judgment.

DATED: February 15, 2022

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

Presented by:

Karen E. Scott

KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE

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APP. J

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 11 2022

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

MICHAEL ANDREW JACE,

Petitioner-Appellant,

v.

RONALD DAVIS, Warden,

Respondent-Appellee.

No. 22-55241

D.C. No.
2:19-cv-03020-ODW-KES
Central District of California,
Los Angeles

ORDER

Before: Lisa B. Fitzgerald, Appellate Commissioner.

This case appears to arise from the denial of appellant's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) in habeas corpus proceedings under 28 U.S.C. § 2254. *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)). 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 chooses to issue a certificate of appealability, the court should specify the issues that meet the required showing; if the district court declines to issue a certificate, the court is requested to state its reasons. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANDREW JACE,

Petitioner,

v.

RON DAVIS, Warden,

Respondent.

Case No. 2:19-cv-03020-ODW-KES

ORDER DENYING CERTIFICATE OF APPEALABILITY

I.

BACKGROUND

In 2019, Michael Andrew Jace ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition" at Dkt. 1) challenging his state court conviction for the second degree murder of his wife. Petitioner raised multiple claims of ineffective assistance of counsel. The gist of each was that he should not have been convicted of any crime more serious than manslaughter, because he did not intend to kill his wife when he shot her.

On August 5, 2020, the Magistrate Judge issued an R&R recommending

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denial of Petitioner's petition for writ of habeas corpus. (Dkt. 51.) Any objections were due by August 28, 2020. (Dkt. 50.) After none were received, on February 5, 2021, the District Judge entered an order adopting the R&R and noting that no objections had been filed. (Dkt. 52.) The District Judge entered judgment against Petitioner (Dkt. 53) and declined to issue a certificate of appealability ("COA") (Dkt. 54).

In March 2021, Petitioner filed a "motion for reconsideration." (Dkt. 55.) He claimed that "a grave error ha[d] occurred," because he timely mailed objections to the R&R to the Court on August 27, 2020. (Dkt. 55 at 1.) He attached another copy of the objections dated August 27, 2020 (Dkt. 55-1) and asked the Court to consider them. The District Judge interpreted Petitioner's filing as a motion for relief from judgment under Federal Rule of Civil Procedure 60. (Dkt. 56 at 2.) Despite receiving the objections late, the Court considered whether any justified granting relief from judgment and concluded that they did not. (Id. at 2-4.)

In June 2021, Petitioner requested leave to file a late appeal, alleging inadequate law library access and tampering with legal mail. (Dkt. 57.) He wrote, "The legal mail dated 8/27/20 never reached the District Court allowing the Magistrate Judge's R&R to be adopted in error." (Id. at 4-5.) On August 6, 2021, the District Judge denied relief, determining that it lacked discretion to authorize a late appeal because Petitioner's request was made so long after entry of judgment. (Dkt. 58.) When Petitioner appealed, the Ninth Circuit affirmed this determination (Dkt. 62) and denied the late appeal (Dkt. 61).

In February 2022, Petitioner filed a second motion for relief from judgment under Federal Rule of Civil Procedure 60. (Dkt. 64.) Petitioner attached documents showing that he filed a grievance accusing prison staff of failing to mail his objections to the R&R. (Id. at 4.) The prison denied the grievance, producing a mail log entry showing that his request to mail a 32-page document to the Court was approved on August 27, 2020. (Id. at 5.) From these facts, Petitioner

abused discretion of used wrong standard in citing Rule 59 in footnote 4 & then using 28 days as time frame in Dkt. 58 pg. 2 line 8

issued 04/22/21

2 months.

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concluded that the assigned Magistrate Judge engaged in intentional "malfeasance," in that she received but refused to file his timely objections to the R&R. (Id. at 1-2.) She did this, Petitioner claimed, because he had "accused [her] of being biased" and because his objections "challenged [her] reasoning ...." (Id. at 2.) The District Judge denied the motion, finding:

> Petitioner fails to show wrongdoing by the Magistrate Judge. Sometimes mail sent is lost and never received. Mail received at the courthouse is not opened by judges; it is opened by diligent members of the Clerk's Office who would have docketed Petitioner's objections had they received them. In any event, Petitioner sent his August 2020 objections to the Court (Dkt. 51-1); the Court determined that they lacked merit. (Dkt. 52.) Petitioner has not demonstrated entitlement to relief from judgment.

(Dkt. 65 at 3.)

On March 2, 2022, Petitioner filed a notice of appeal to the Ninth Circuit. (Dkt. 66.) On May 11, 2022, the Ninth Circuit remanded the case "for the limited purpose of granting or denying a [COA] at the court's earliest convenience." (Dkt. 68 at 1.) The Ninth Circuit instructed, "If the district court chooses to issue a certificate of appealability, the court should specify the issues that meet the required showing; if the district court declines to issue a certificate, the court is requested to state its reasons." (Id.)

II.

LEGAL STANDARD

"Unless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals from ... the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]" 28 U.S.C. § 2253(c)(1)(A). "[A] state prisoner who is proceeding under § 2241 must obtain a COA...." Wilson v. Belleque, 554 F.3d 816, 825 (9th Cir. 2009).

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Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides in relevant part:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.
>
> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Rule 11, Rules Governing 28 U.S.C. § 2254 Cases.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473 (2000), the United States Supreme Court held that, to obtain a COA under § 2253(c), a habeas petitioner must show that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Id. at 483-84 (citation omitted). "The COA inquiry ... is not coextensive with a merits analysis." Buck v. Davis, 137 S. Ct. 759, 773 (2017). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322,

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338 (2003); see also Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) ("The standard for granting a certificate of appealability is low.").

"Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Slack, 529 U.S. at 485. Because both are required, "a court may find that it can dispose of the application [for a COA] in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. at 485. The general rule that courts should not pass upon a constitutional question if another dispositive ground is present "allows and encourages the court to first resolve procedural issues." Id. (citing Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

III.

ANALYSIS

In the present case, the Court finds that Petitioner has not made the foregoing showing with respect to any of the grounds for relief alleged in the motion for relief from judgment. As explained in the Court's order denying the motion, Petitioner failed to demonstrate that judgment should be vacated on the basis of the lost objections. No matter why the objections were not timely submitted, when the Court did belatedly receive them, it considered them and concluded that they lacked merit. (Dkt. 56.)

DATED: May 13, 2022

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

Presented by:

Karen E. Scott

KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE

standard is abuse of discretion

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UNITED STATES COURT OF APPEALS

FILED

JUN 24 2022

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

FOR THE NINTH CIRCUIT

MICHAEL ANDREW JACE, Petitioner-Appellant, v. RONALD DAVIS, Warden, Respondent-Appellee.	No. 22-55241 D.C. No. 2:19-cv-03020-ODW-KES Central District of California, Los Angeles ORDER

Before: BENNETT and FORREST, 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 (Docket Entry No. 5) 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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2253(c)(2) - A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.