

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUN 15 2023

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

BRIAN KERRY O'KEEFE,

No. 22-16230

Petitioner-Appellant,

D.C. No. 2:12-cv-01388-MMD-CWH
District of Nevada,
Las Vegas

v.

DOUG GILLESPIE, Sheriff; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

ORDER

Respondents-Appellees.

Before: O'SCANNLAIN and BENNETT, Circuit Judges.

This appeal is from the denial of appellant's Federal Rule of Civil Procedure 60(b) and 59(e) motions. The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that jurists of reason would find it debatable whether the district court abused its discretion in denying the motions, and that the underlying petition states a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

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D.C. No. 2:12-cv-01388-MMD-CWH
District of Nevada,
Las Vegas

ORDER

Before: TALLMAN and IKUTA, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 11).

The motion for reconsideration is denied and the motion for reconsideration en banc 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.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRIAN O'KEEFE,

Petitioner,

v.

DOUG GILLESPIE, *et al.*,

Respondents.

Case No. 2:12-cv-01388-MMD-CWH

ORDER

This habeas matter is before the Court on Petitioner Brian O'Keefe's motion for relief from judgment (ECF No. 9), request for electronic service of two docket entries (ECF No. 12), and motion for appointment of counsel (ECF No. 13).

On August 3, 2012, O'Keefe submitted a petition for writ of habeas corpus under 28 U.S.C. § 2241. (ECF No. 1-1.) In lieu of an application to proceed *in forma pauperis*, O'Keefe submitted a motion with an attached order from the Ninth Circuit stating that O'Keefe had been granted leave to proceed *in forma pauperis* in another case on appeal. (ECF No. 1.) On October 11, 2012, the Court instructed O'Keefe that he needed to properly initiate the instant action by moving for leave to proceed *in forma pauperis* or pay the filing fee "[e]ven if he ha[d] been granted pauper status in another case." (ECF No. 3.) The Court ordered O'Keefe to comply within 30 days, warning O'Keefe that failure to comply may result in dismissal of this action. (*Id.*)

The Court's October 11, 2012 order was mailed to O'Keefe and it was returned as undeliverable. (ECF No. 4.) The docket reflects that the order was not remailed because there was no other address available for O'Keefe. On November 13, 2012, the Court dismissed O'Keefe's petition without prejudice based on his failure to keep the Court apprised of his current address. (ECF No. 5.) Judgment was entered. (ECF No. 6.) On

APPENDIX C

1 November 27, 2012, O'Keefe filed a notice of change of address. (ECF No. 8.) The docket
2 reflects that the Clerk's Office mailed a copy of the dismissal order and the judgment to
3 O'Keefe's updated address on November 28, 2012. (ECF Nos. 5, 6.) O'Keefe now moves
4 for relief from the judgment under Fed. R. Civ. P. 60(b). (ECF No. 9.) He argues the
5 Court's procedural ruling was defective because (1) he did not receive the October 11,
6 2012 order, and (2) he filed a notice of change of address. (*Id.* at 1-4.)

7 Under Federal Rules of Civil Procedure 60(b), the Court may relieve a party from
8 a final judgment or order for the following limited reasons:

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

14 Fed. R. Civ. P. 60(b). "A Rule 60(b) motion is proper when it 'attacks' not the substance
15 of the federal court's resolution of a claim on the merits, but some defect in the integrity
16 of the federal habeas proceedings." *Wood v. Ryan*, 759 F.3d 1117, 1120 (9th Cir. 2014)
17 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). Motions for relief pursuant to
18 "Rule 60(b) must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1).

19 Although O'Keefe attacks an alleged defect in the integrity of his habeas
20 proceedings, his motion for relief from judgment was not made within a reasonable time.
21 See Fed. R. Civ. P. 60(c)(1). The Court dismissed O'Keefe's petition and judgment was
22 entered on November 13, 2012. (ECF Nos. 5, 6.) O'Keefe did not move for relief from
23 judgment until June 22, 2022—9 years, 7 months, and 10 days later. Furthermore,
24 O'Keefe gives no explanation for this delay. Indeed, after O'Keefe filed his notice of
25 change of address, the Clerk's Office promptly remailed a copy of the dismissal order,
26 which referenced the October 11, 2012 order, and the judgment to O'Keefe's updated
27 address on November 28, 2012. As such, the grounds for O'Keefe's current motion were
28 known and available to O'Keefe in 2012. The Court therefore finds that O'Keefe's motion

1 for relief from judgment has not been made within a reasonable time. See Fed. R. Civ. P.
2 60(c)(1).

3 Moreover, the Court's procedural ruling was not defective as O'Keefe claims. At
4 the time O'Keefe filed his petition on August 3, 2012, he was located at the Clark County
5 Detention Center. (ECF No. 1-1.) This Court received returned mail from O'Keefe on
6 October 18, 2012, and November 19, 2012. (See ECF Nos. 4, 7.) However, O'Keefe did
7 not file a notice of change of address until November 27, 2012. (ECF No. 8.) As set forth
8 in the Local Rules, LR IA 3-1 states that a "pro se party must immediately file with the
9 court written notification of any change of mailing address," and "[f]ailure to comply with
10 this rule may result in the dismissal of the action." Based on LR IA 3-1, the Court's order
11 dismissing O'Keefe's petition without prejudice for failing to keep the Court apprised of
12 his address was not defective.

13 Because O'Keefe's motion for relief from judgment is denied, his motion for
14 appointment of counsel is also denied as moot. However, the Court finds good cause to
15 grant O'Keefe's request for copies of docket entries.

16 It is therefore ordered that Petitioner Brian O'Keefe's motion for relief from
17 judgment (ECF No. 9) is denied.

18 It is further ordered that O'Keefe's motion for appointment of counsel (ECF No. 13)
19 is denied as moot.

20 The Clerk of Court is directed to send O'Keefe a copy of his motion for leave to
21 proceed *in forma pauperis* (ECF No. 1) and the order instructing O'Keefe to file a new
22 motion (ECF No. 3).

23 It is further ordered that, because reasonable jurists would not find this decision to
24 be debatable or wrong, a certificate of appealability is denied.

25 DATED THIS 11th Day of July 2022.

26 
27 MIRANDA M. DU,
28 CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRIAN KERRY O'KEEFE,

Petitioner,

v.

DOUG GILLESPIE, *et al.*,

Respondents.

Case No. 2:12-cv-01388-MMD-CWH

ORDER

This closed habeas matter is before the Court on *pro se* Petitioner Brian O'Keefe's motion to alter or amend the Court's previous order denying his motion for relief from judgment. (ECF No. 16.)

"[A] Rule 59(e) motion is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Wood v. Ryan*, 759 F.3d 1117, 1121 (9th Cir. 2014) (citation omitted). Absent highly unusual circumstances, reconsideration under Rule 59(e) is "available only when (1) the court committed manifest errors of law or fact, (2) the court is presented with newly discovered or previously unavailable evidence, (3) the decision was manifestly unjust, or (4) there is an intervening change in the controlling law." *Rishor v. Ferguson*, 822 F.3d 482, 491-92 (9th Cir. 2016) (citation omitted).¹

The Court's order denying O'Keefe's motion for relief from judgment was not clearly erroneous or manifestly unjust. In that order, the Court found that O'Keefe's motion was not made within a reasonable time under Fed. R. Civ. P. 60(c)(1). (ECF No. 14 at 3.) Indeed, O'Keefe did not move for relief from his November 13, 2012 judgment until June

¹*Rishor* instructs that a district court presented with a Rule 59(e) motion for reconsideration must first determine whether the motion should be construed as a second or successive petition. 822 F.3d at 492. O'Keefe's motion does not raise new habeas claims, the Court therefore concludes that O'Keefe's motion is not a second or successive petition and proceeds to consider the merits of his motion.

APPENDIX D

1 22, 2022—9 years, 7 months, and 10 days later. (See *id.* at 2.) O'Keefe gave no
2 explanation for this delay, and except for arguing that "the Court Clerk did not remail a
3 copy of the dismissal order," his motion still fails to explain why he took no action for
4 almost 10 years. (ECF No. 16 at 7; see *a/s/o* ECF Nos. 15, 17, 19.)

5 It is therefore ordered that Petitioner Brian O'Keefe's motion to alter or amend
6 (ECF No. 16) is denied.

7 DATED THIS 10th Day of August 2022.

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11 MIRANBA M. DU,
12 CHIEF UNITED STATES DISTRICT JUDGE
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