DECISION FROM;

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX - A (1pg.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 14 2023

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

CLIFFORD D. JACKSON, Petitioner-Appellant, v. NEIL MCDOWELL, Warden, Respondent-Appellee.	No. 22-55607 D.C. No. 2:16-cv-03422-VBF-GJS Central District of California, Los Angeles ORDER

Before: GRABER and WARDLAW, 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.

DECISION FROM;

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVIISION

APPENDIX - B (3pg.)

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:noreply@ao.uscourts.gov Message-Id:<34029061@cacd.uscourts.gov>Subject:Activity in Case 2:16-cv-03422-VBF-GJS Clifford Jackson v. Neil McDowell Order on Motion for Relief Content-Type: text/html

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
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Case Name: Clifford Jackson v. Neil McDowell

Case Number: 2:16-cv-03422-VBF-GJS

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WARNING: CASE CLOSED on 01/23/2018

Document Number: 75

Docket Text:
ORDER DISMISSING DOCUMENT #67 (PETITIONER'S SECOND MOTION FOR RELIEF FROM JUDGMENT) AS UNTIMELY AND SUCCESSIVE) by Judge Valerie Baker Fairbank: For the reasons stated in the opposition brief (Doc 69), petitioners Second Fed.R. Civ. P. 60(b) motion is DISMISSED with prejudice as untimely and successive.The Court DECLINES to issue a certificate of appealability. Petitioner may still ask the United States Court of Appeals for the Ninth Circuit to issue a certificate of appealability. IT IS SO ORDERED. (shb)

2:16-cv-03422-VBF-GJS Notice has been electronically mailed to:
Jonathan J Kline docketinglaawt@doj.ca.gov, lici.garcia@doj.ca.gov, maria.navarro@doj.ca.gov, jason.tran@doj.ca.gov, silvia.feigin@doj.ca.gov, jonathan.kline@doj.ca.gov, marianne.siacunco@doj.ca.gov, alex.huezo@doj.ca.gov
2:16-cv-03422-VBF-GJS Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :
Clifford D. Jackson
CDC AS-7108
D2 - 6
Folsom State Prison
PO Box 950
Folsom CA 95671

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CLIFFORD D. JACKSON,
Petitioner,
v.
Neil McDowell (Warden),
Respondent.

No. LA CV 16-03422-VBF-GJSx

ORDER

Dismissing Document #67 (Petitioner's Second Motion for Relief from Judgment) as Untimely and Successive

Denying a Certificate of Appealability

On January 23, 2018, this Court issued an Order dismissing Jackson's habeas corpus petition without prejudice for failure to exhaust state-court remedies, *see* CM/ECF Document ("Doc") 32, entered judgment (Doc 33), and denied a certificate of appealability ("COA") (Doc 34). Petitioner filed a notice of appeal on April 6, 2018 (Doc 42), but the Ninth Circuit denied a COA on May 31, 2018 (Doc 49).

On November 26, 2018, about ten months after the entry of judgment, petitioner filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) (Doc 51). After full briefing, this Court issued an Order on September 25, 2019 (Doc 60) dismissing that motion with prejudice as untimely. On October 25, 2019, petitioner filed a notice of appeal (Doc 61) with the Ninth Circuit, which assigned

appeal number 19-56259. After extensions of time, on February 9, 2021 the Ninth Circuit issued an Order (Doc 65) denying his application for a COA to appeal the denial of his first motion for relief from judgment. The Ninth Circuit denied petitioner's ensuing reconsideration motion by Order issued March 5, 2021 (Doc 66).

Petitioner has filed a second Fed. R. Civ. P. 60(b) motion for relief from judgment (Doc 67). As ordered (Doc 68), the respondent filed an opposition brief (Doc 69), and petitioner filed a reply (Doc 70).

ORDER

For the reasons stated in the opposition brief (Doc 69), petitioner's Second Fed. R. Civ. P. 60(b) motion is **DISMISSED with prejudice as untimely and successive.**

The Court **DECLINES** to issue a certificate of appealability.

Petitioner may still ask the United States Court of Appeals for the Ninth Circuit to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: June 3, 2022

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
Senior United States District Judge

RESPONDENTS OPPOSITION TO MOTION

UNITED STATES DISTRICT COURTS OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

APPENDIX - C (9pg.)

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Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD D. JACKSON,

Petitioner,

v.

NEIL McDOWELL, Warden,

Respondent.

Case No. CV 16-03422 VBF (GJS)

OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

The Honorable Valerie Baker Fairbank
Senior United States District Judge

Pursuant to this Court's May 17, 2021, Order, Respondent Raybon Johnson, Warden of California State Prison, Los Angeles County, in Lancaster, California,[1] respectfully opposes Petitioner's "Verified Motion for Relief from Judgment under Rule 60(b), Based on Change of Law, Subdivision (b)(6)" ("Motion"). As set forth below, the Motion should be denied because it is successive and does not satisfy any of the requirements for obtaining relief under Federal Rule of Civil Procedure 60(b)(6) ("Rule 60(b)(6)"). This Opposition is based on the attached Memorandum of Points and Authorities, this Court's file, and the documents Respondent lodged on June 5, 2017, and February 4, 2019.

#16 Doc

Dated: June 17, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
JASON TRAN
Supervising Deputy Attorney General

/s/ Jonathan J. Kline
JONATHAN J. KLINE
Deputy Attorney General
Attorneys for Respondent

[1] Raybon Johnson is Petitioner's current custodian. Substitution of the proper custodian's name is authorized by Federal Rule of Civil Procedure 25(d).

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY

Petitioner filed his federal Petition for Writ of Habeas Corpus on May 18, 2016, in which he raised four grounds for relief. (Docket No. 1.) On February 1, 2017, the magistrate judge issued a Report and Recommendation recommending that Grounds Three and Four be summarily dismissed. (Docket No. 7 at 12.) On April 19, 2017, this Court adopted the Report and Recommendation and summarily dismissed Grounds Three and Four. (Docket No. 11.)

On June 5, 2017, Respondent moved to dismiss the Petition on the basis that Grounds One and Two were unexhausted. (Docket No. 14.) On July 3, 2017, Petitioner filed an opposition in which he disputed that Grounds One and Two were unexhausted and, alternatively, requested a stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). He asserted that good cause for the stay existed because "the Respondent and Magistrate[] are using their interpretation of what the state courts reviewed." (Docket No. 18 at 3.)

On August 31, 2017, the magistrate judge issued a Report and Recommendation recommending that the motion to dismiss be granted and Petitioner's request for a *Rhines* stay be denied. (Docket No. 24 at 2.) With respect to the denial of the stay request, the magistrate judge found Petitioner's good cause argument to be "frivolous" and "specious." Even putting that aside, the magistrate judge found that there was no good cause because Petitioner had raised the claims forming the basis for Grounds One and Two in his trial court habeas petition but did not include these "known claims" in his subsequent state habeas petitions. (Docket No. 24 at 10-11.)

On November 28, 2017, Petitioner objected to the Report and Recommendation. Although not entirely clear, he appeared to object to the denial of the stay request on the ground that a subsequent federal habeas petition would not be second or successive. (*See* Docket No. 31 at 6-7.) On January 23, 2018, this

Court adopted the Report and Recommendation and dismissed the Petition without prejudice. (Docket Nos. 32 & 33.) On March 8, 2018, Petitioner filed a notice of appeal. (Docket No. 35.) On May 31, 2018, after receiving briefing from both parties, the Ninth Circuit Court of Appeals denied the request for a certificate of appealability because the notice of appeal was not timely filed. (Docket No. 49.)

On November 26, 2018, Petitioner filed his first motion to set aside the judgment pursuant to Rule 60(b)(6). (Docket No. 51.) Although Petitioner made several references to *Rhines* (Docket No. 51 at 3-5), he did not appear to challenge this Court's determination that no good cause existed for *Rhines* stay. After Respondent filed an opposition (Docket No. 55), Petitioner, on March 27, 2019, filed a reply in which he cited for the first time *Dixon v. Baker*, 847 F.3d 714 (9th Cir. 2017), and argued that good cause for a *Rhines* stay was established by the fact that he was not represented during his state postconviction proceedings (Docket No. 59). On September 25, 2019, this Court dismissed the Rule 60(b) motion as untimely. (Docket No. 60.)

On October 25, 2019, Petitioner filed a notice of appeal. (Docket No. 61.) This Court denied a certificate of appealability on December 4, 2019 (Docket No. 64) and the Ninth Circuit followed suit on February 9, 2021 (Docket No. 65). The Ninth Circuit denied Petitioner's motion for reconsideration on March 5, 2021. (Docket No. 66.)

Petitioner filed the instant Rule 60(b) Motion on May 14, 2021. (Docket No. 67.)

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ARGUMENT

THE MOTION SHOULD BE DENIED BECAUSE IT IS SUCCESSIVE AND DOES NOT SATISFY ANY OF THE REQUIREMENTS FOR OBTAINING RELIEF UNDER RULE 60(B)(6)

Petitioner requests relief from this Court's January 23, 2018, judgment based on the "change in law established by *Dixon v. Baker*, 847 F.3d 714," specifically that *Rhines*'s good cause requirement is satisfied when a petitioner was not represented by counsel in his state postconviction proceedings. (Mot. at 1.) Respondent disagrees. The Motion should be denied because it is successive and does not satisfy any of the requirements for obtaining relief under Rule 60(b)(6).

A. The Motion Should Be Denied Because It Is Successive

"[T]here is nothing in the Federal Rules of Civil Procedure . . . that provides for multiple motions for reconsideration of an order." *United States v. Strain*, 2019 U.S. Dist. LEXIS 232321, at *2 (D. Alaska Oct. 22, 2019). Here, Petitioner did not cite to *Dixon v. Baker*, 847 F.3d 714, when he initially sought a *Rhines* stay in his opposition to Respondent's motion to dismiss filed in July 2017.[2] (Docket No. 18 at 3.) Then, in his reply to Respondent's opposition to Petitioner's prior Rule 60(b) motion filed in March 2019, Petitioner argued for the first time that *Dixon* supplied good cause for a *Rhines* stay. (Docket No. 59.) That is essentially the same argument that Petitioner makes in the instant Rule 60(b) Motion. Because "a successive motion for reconsideration that seeks to relitigate issues twice considered by a court wastes valuable judicial resources and belies finality," *United States v. Strain*, 2019 U.S. Dist. LEXIS 232321, at *2-3 n.6 (citing *De Adams v. Hedgpeth*, 2016 U.S. Dist. LEXIS 101781, at *8 (C.D. Cal. June 8, 2016) (noting that post-judgment motions that continue to re-evaluate judgments can divert the court's time and resources from other matters)), the instant Motion should be denied.

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[2] *Dixon* was decided on February 2, 2017.

B. The Motion Should Be Denied Because It Does Not Satisfy Any of the Requirements for Obtaining Relief under Rule 60(b)(6)

Even if the Motion were not successive, it still should be denied because it does not satisfy the requirements for obtaining relief under Rule 60(b)(6). In support of his argument that he is entitled to relief under Rule 60(b)(6), Petitioner primarily relies on *Bynoe v. Baca*, 966 F.3d 972 (9th Cir. 2020). (Opp. at 1-8.) In *Bynoe*, the district court denied Bynoe's stay motion under *Rhines* because his federal habeas petition contained only unexhausted claims. *Bynoe v. Baca*, 966 F.3d at 979. Several years later, the Ninth Circuit decided *Mena v. Long*, 813 F.3d 907 (9th Cir. 2016), in which it held that district courts may grant a *Rhines* stay of a petition containing only unexhausted claims. *Id.* About seven months after *Mena* was decided, Bynoe filed a Rule 60(b)(6) motion, seeking to reopen his federal habeas proceeding so he could renew his request for a stay under *Rhines* and *Mena*. *Id.* The Ninth Circuit found that Bynoe's motion satisfied all three of the requirements for obtaining relief under Rule 60(b)(6) in that it: (1) was not premised on another ground delineated in Rule 60(b); (2) was filed within a reasonable time; and (3) demonstrated extraordinary circumstances justifying reopening the judgment. *Id.* As explained below, Petitioner's Rule 60(b)(6) motion satisfies none of these requirements.

1. Petitioner's claim is premised on another ground delineated in Rule 60(b)

Rule 60(b) provides that a motion for relief from a final judgment may be based on the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment is satisfied; or (6) "any other reason that justifies relief." As mentioned above, a party seeking relief under the catch-all provision of Rule 60(b)(6) cannot premise his motion on another ground delineated in Rule 60(b). *Bynoe v. Baca*, 966 F.3d at 979. The Ninth Circuit ruled

that Bynoe satisfied this requirement because his Rule 60(b) motion was based on *Mena*'s change in the complete-exhaustion rule and not on any of Rule 60(b)'s other grounds for relief, including "a mistake by the court." *Id.* at 980.

The same conclusion is not warranted here. Although Petitioner purports to base the Motion on Rule 60(b)(6), in reality it is based on Rule 60(b)(1)—that this Court erred in failing to use *Dixon v. Baker*, 847 F.3d 714, to find good cause for a *Rhines* stay. (*See* Mot. at 1-2.) To the extent that Petitioner attempts to characterize *Dixon* as a "change of law" similar to the change of law effectuated by *Mena* that entitled Bynoe to Rule 60(b)(6) relief (Mot. at 2), the timing of the cases makes the two situations clearly distinguishable. *Mena* was decided several years *after* Bynoe's stay motion was denied, but *Dixon* was decided more than five months *before* Petitioner ever requested a *Rhines* stay. Thus, Petitioner is not claiming that he, like Bynoe, is entitled to the benefit of a change in law that occurred after judgment; he is contending that this Court erred in failing to apply the *Dixon* holding to Petitioner's claim that he established good cause under *Rhines*. (*See* Docket No. 61 at 2 (claiming this Court's failure to consider *Dixon* in its determination that Petitioner had not established good cause for a *Rhines* stay "was 'a clear error of law'"); 9th Cir. Docket No. 5 at 4 (claiming this Court's denial of stay motion in the face of *Dixon* "is debatable, if not plainly and clearly wrong"); 9th Cir. Docket No. 7 at 2 (arguing "it is more than debatable that [this Court] made a clear error of law in refusing to apply Dixon's 'good cause' standard"). Because this ground qualifies for consideration under Rule 60(b)(1), it does not satisfy the first requirement set forth in *Bynoe*. *See Bynoe v. Baca*, 966 F.3d at 979-80; *see also* Docket No. 60 at 2-3 n.1 (this Court stating, "Where a party seeks relief on a ground that qualifies for consideration under Rule 60(b)(1) through (5), Rule 60(b)(6) does not apply.").

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2. The Motion is untimely[3]

Rule 60(c) provides that a motion for relief from judgment must be made within a "reasonable time" and, if based on the reasons set forth in Rule 60(b)(1), (2), or (3), "no more than a year after the entry of judgment." Under Rule 60(c), "[w]hat constitutes [a] reasonable time depends on the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." *Lemoge v. United States*, 587 F.3d 1188, 1196-97 (9th Cir. 2009).

As explained above, the Motion is based on this Court's alleged mistake in failing to find good cause for a *Rhines* stay based on *Dixon*. Because "mistake" is a reason set forth in Rule 60(b)(1), the Motion is subject to the one-year time limit set forth in Rule 60(c). The Motion, however, was filed on May 14, 2021, more than three years after judgment was entered on January 23, 2018. As a result, it is untimely.

Moreover, this Court previously determined that Petitioner's prior Rule 60(b) motion (filed November 26, 2018, ten months after the judgment was issued) was untimely. (Docket No. 60.) This Court's prior well-reasoned analysis, of course, applies with even greater force to the instant Motion, which was filed more than three years after the judgment was issued.[4] *De Adams v. Hedgpeth*, 2016 U.S. Dist. LEXIS 101781, at *9 ("If those earlier Rule 60(b) motions for relief from the May 10, 2011 Order were untimely—and petitioner does not claim that his current arguments for relief from that Order arose more recently due to the issuance of new

[3] In its Order scheduling a mandatory response to the Motion, this Court directed Respondent to address both the timeliness and merits of the Motion. (Docket No. 68 at 2.) As timeliness is one of the requirements set forth in *Bynoe*, Respondent addresses it here.

[4] Respondent incorporates by reference the analysis in this Court's Order dismissing Petitioner's prior Rule 60(b) motion as untimely (Docket No. 60) and the analysis in Respondent's Opposition to Motion to Set Aside Judgment (Docket No. 55).

binding case law or due to his discovery of material new evidence—then *a fortiori* this motion is untimely as well.")

Furthermore, even if the Motion could be construed as one made under Rule 60(b)(6), it is distinguishable from the timely Rule 60(b)(6) motion in *Bynoe*. Bynoe filed his Rule 60(b)(6) motion only seven months after the Ninth Circuit changed the complete-exhaustion rule by issuing its decision in *Mena*. Here, however, Petitioner filed the instant Motion more than four years after the Ninth Circuit decided *Dixon*, and more than three years after this Court issued the judgment. Such a delay is not reasonable. *See Magana-Torres v. Harrington*, 2019 U.S. Dist. LEXIS 34284, at *2 (E.D. Cal. Mar. 1, 2019) (because petitioner was aware, or should have been aware, of change-in-law argument four years before he filed his Rule 60(b)(6) motion, the motion was not filed within a "reasonable time"); *De Adams v. Hedgpeth*, 2016 U.S. Dist. LEXIS 101781, at *9-12 (Rule 60(b)(6) motion filed more than four years after judgment was untimely).

3. Petitioner has not demonstrated extraordinary circumstances justifying reopening the judgment

"To receive relief under Rule 60(b)(6), a party must demonstrate extraordinary circumstances which prevented or rendered him unable to prosecute his case." *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (quotations omitted). A party "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the action in a proper fashion." *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006). The "extraordinary circumstances" that justify relief under Rule 60(b)(6) "rarely occur in the habeas context." *Wood v. Ryan*, 759 F.3d 1117, 1120 (9th Cir. 2014).

Here, Petitioner appears to claim that the "intervening" change in law occasioned by the Ninth Circuit's decision in *Dixon* constituted an extraordinary circumstance entitling him to Rule 60(b)(6) relief. In so doing, he likens the effect of *Dixon* in this case to the effect of *Mena* in *Bynoe*. (*See* Mot. at 5-8.) However,

the analysis in *Bynoe* with respect to whether a change in law constitutes an extraordinary circumstance is premised on the existence of an actual post-judgment change of law. *See Bynoe v. Baca*, 966 F.3d at 983. That premise is absent here. *Dixon* was decided more than five months before Petitioner ever requested a *Rhines* stay in this case, and nearly a year before this Court entered its judgment. Because there was no post-judgment change in law in this case, *Bynoe* and the cases upon which it relies are inapposite. In sum, given that *Dixon* was decided long before the judgment in this case, Petitioner has not shown the existence of any extraordinary circumstances that "prevented him from proceeding with the action in a proper fashion." *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d at 1103.

Further detracting from the extraordinary nature of the circumstances in this case is the fact that Petitioner has already raised this claim in this Court as well as the Ninth Circuit. (*See* Docket No. 59 at 2-3; 9th Cir. Docket No. 5 at 4; 9th Cir. Docket No. 7 at 2.) It appears that Petitioner is attempting to relitigate that claim in this Motion. However, "[t]he 'extraordinary circumstances' standard for assessing a Rule 60(b)(6) motion is intended to avoid a mere 'second bite at the apple.'" *Anderson v. Arnold*, 2017 U.S. Dist. LEXIS 36465, at *4 (E.D. Cal. Mar. 13, 2017) (quoting *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 250 (9th Cir. 1989)). Accordingly, Petitioner has failed to show the existence of extraordinary circumstances justifying Rule 60(b)(6) relief.

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CONCLUSION

For these reasons, Respondent respectfully requests that Petitioner's Rule 60(b) Motion be denied.

Dated: June 17, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
JASON TRAN
Supervising Deputy Attorney General

/s/ Jonathan J. Kline
JONATHAN J. KLINE
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF SERVICE

Case Name: *Clifford D. Jackson v. Neil McDowell, Warden* No. **CV 16-03422 VBF (GJS)**

I hereby certify that on June 17, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On June 17, 2021, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Clifford D. Jackson
CDCR # AS-7108
California State Prison - Los Angeles County
A4 – 136 up
P.O. Box 4430
Lancaster, CA 93539-4430

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on June 17, 2021, at Los Angeles, California.

Marianne A. Siacunco
Declarant

/s/ Marianne A. Siacunco
Signature

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PETITIONERS REPLY TO RESPONDENTS OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT

APPENDIX- D (9pg.)

Clifford D. Jackson, CDCR# AS-7108
CSP-Los Angeles County
A-1-233
P.O. Box 4430
Lancaster, California 93539

Petitioner,
In Propria Persona

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Clifford D. Jackson, Petitioner, v. Neil McDowell, Warden, Respondent.	Case No. 2:16-cv-03422-VBF-(GJS) PETITIONER'S VERIFIED REPLY TO RESPONDENT'S OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT Honorable Valerie Baker Fairbank, Senior United States District Judge

Pursuant to this Court's May 17, 2021 order (Doc.# 68), Petitioner files his reply to Respondent's opposition to the motion for relief from judgment. Petitioner asserts that Respondent has failed to show that this is not a **"TRUE"** Rule 60(b)(6) motion for relief, and that it is untimely, as evidenced from Respondent's attempt to have this Court construe it as a Rule 60(b)(1), when it is not. As the actual Rule 60(b)(6) motion, and in this Reply, this Court, to avert a manifest injustice, should grant the motion, and vacate its previous judgment, thus, reopening the habeas case, so the claims are resolved on their merits, and not some procedural bar.

REPLY

(a) Procedural History

Respondent outlined the procedural history in their opposition, and interestingly noted that on November 26, 2018 (Doc.# 51), Petitioner did file his first motion to set aside the judgment pursuant to Rule 60(b)(6). (Resp. Opp. at p. 2, Doc.# 69).

But Respondent omits that the Court construed Petitioner's Rule 60(b)(6), to be a Rule 60(b)(1), and in treating it as such, deemed it untimely. (Doc.# 60.) Respondent is arguing that the Court should construe this Rule 60(b)(6) motion for relief from judgment, also under Rule 60(b)(1), and also deem it untimely. However, construing this Rule 60(b)(6) against the expressed language and argument, would violate Ninth Circuit precedent, as shown below.

Petitioner, respectfully request this Court to treat the motion, as a "TRUE" Rule 60(b)(6), and as such, grant it, vacate the previous judgment, and direct Respondent to file an ANSWER addressing the habeas claims within 30 days of this Court's order.

(b) Procedural History of Dixon v. Baker with this Specific Court

Dixon v. Baker, 847 F.3d 714 (9th CIr. 2017), was published by the Ninth Circuit on February 2, 2017.

A review of the LEXIS/NEXIS data base from the prison's law library, reveals that this specific Court (VBF), first cited Dixon in Klein v. Borders (C.D. Cal. Sept 11, 2017)2017 U.S. Dist. LEXIS 167497, not because of a stay and abeyance issue, but to illustrate that failure to object may constitute ineffective assistance of counsel.

Then, in Cage v. Montgomery(C.D. Cal. Dec. 21, 2017)2017 U.S. Dist. 223499, ruled that Dixon v. Baker did not provide relief, because Cage had

not filed any state habeas corpus in any state court. (Id.) Unlike Cage, Petitioner Jackson did file in the California Supreme Court, and was waiting on a ruling.[1]

After Cage, this Court also denied a stay under the same reasoning, that the petitioner had not filed anything in any state court, in Gonzalez v. Montgomery(C.D. Cal. April 5, 2018)2018 U.S. Dist. LEXIS 239680.

Similarly in Barboa v. Espinoza(C.D. Cal. June 19, 2018)2018 U.S. Dist. LEXIS 227254, this Court denied a motion for a stay and abeyance, because nothing was filed in the State courts.

So, it appears that the legal implications brought by Dixon v. Baker, on motions to stay and abeyance by Pro Se prisoners without counsel, was not apparent to this Court until at least December 21, 2017, in Cage's case. That's 10 months after Dixon was published.

Despite this reality that Courts endure, in dealing with hundreds of habeas cases, this Court could not have reasonably relied upon Dixon at the time it found, on August 31, 2017, that Petiitoner failed to show "good cause" for a Rhines stay, in the report and recommendation. (Doc.# 24.)

Yet, Respondent unfairly imputes knowledge of Dixon on Petitioner, as early as July 2017 (Doc.# 69, at p. 3: lines 13-16), claiming that Petitioner did not even cite Dixon in his request for a stay. [B]ecause of this unfairness, Petitioner reiterate that importance of the new decision in Bynoe v. Baca, 966 F.3d 972 (9th Cir. 2020) ("Bynoe").

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1. The Ninth Circuit subsequently reversed the denial of Cage's motion for a stay and abeyance, concluding that the lack of filing in state courts is immaterial under Dixon. (Cage v. Montgomery(9th Cir. July 21, 2020, no.# 18-55724)2020 U.S. App. LEXIS 22698.) Because Petitioner Jackson had just filed a state habeas, after July 2017, it is certainly possible, that this Court would have also denied his motion for a stay under similar reasons.

(c) Respondent's Contentions Conflict with Ninth Circuit Precedents; And therefore, should not be accepted by this Court

(1) Recharacterize a Pro Per Pleading

In his Rule 60(b)(6) motion, Petitioner Jackson cited two cases, one from the Ninth Circuit (Ross v. Williams, 896 F.3d 958, 969-970 fn.13 (9th Cir. 2017)) and one from the U.S. Supreme Court (Castro v. United States, 540 U.S. 375, 377 (2003)), for the rule that, "the Court must exercise its power of recharacterization in a manner that favors the Pro-Per petitioner. Not the other way around, favoring Respondent.

In Castro, an illiterate prisoner filed a §2255 motion, but without notice, recharacterized it as a second or successive petition, and denied the motion on that ground, effectively closing the federal doors to his claims. The Supreme Court vacated the denial, and remanded, clarifying the rule mentioned above. The Ninth Circuit, in Ross, noted the cases where it had recharacterized the nature of the petitioner's filing in a manner that favored the petitioner.

Here, Respondent is silent on this subject. But argues sub-silentio, that this Court should recharacterize this Rule 60(b)(6), to be the same as a Rule 60(b)(1) that this Court recharacterized earlier.

Respondent does so, since he is silent on whether the Rule 60(b)(6) meets Bynoe v. Baca's three-prong test.

Overall, Petitioner requests that this Court adjudicate this motion, as a "TRUE" Rule 60(b)(6), as expressly stated so. In doing so, it will find that, in the interest of fairness, and justice, the habeas claims should be adjudicated on their merit. (See Bynoe, 966 F.3d at 980 [Stating the purpose of the equitable powers under Rule 60(b)(6), to vacate judgments

whenever such action is appropriate to accomplish justice.].)

(2) Rule 60(b)(6), as Interpreted by Bynoe v. Baca, Permits Adjudication of Petitioner's Rule 60(b)(6) Motion for Relief

Without any clarity, Respondent make two broad arguments. Both are specious.

First, Respondent claims that the motion should be denied because it is successive, and wastes valuable judicial resources and belies finality. (Doc.# 69, at p. 3, citing several district court decisions, mainly U.S. v. Strain, 2019 U.S. Dist. LEXIS 232321 (D. Alaska Oct. 22, 2019).) However, citation to United States v. Strain, supports Petitioner's position.

The district court in Strain, ruled that the new decision from U.S. v. Chea, was from another district court; and therefore not a binding decision. The Strain district court added that, "Strain failed to identify an intervening change in controlling authority that would make reconsideration appropriate.

Unlike Strain, Petitioner has identified the controlling authority that is binding on the district courts in the Ninth Circuit, i.e., Dixon v. Baker.

Therefore, the Rule 60(b)(6) motion here is appropriate.

Then, Respondent argues that the motion should be denied because it does not satisfy any of the requirements for obtaining relief under Rule 60(b)(6). (Doc.# 69, at p. 4.) And outlined each of the three-prongs from Bynoe v. Baca. (Doc.# 69, at pp. 4-8 [listing the 3-prongs].)

(a) Petitioner's claim is NOT premised on any other ground, but Rule 60(b)(6)

Respondent asserts that, while Petitioner's motion purports to be

base on Rule 60(b)(6), in reality it is based on Rule 60(b)(1) -- that this Court erred in failing to use Dixon v. Baker, to find good cause. (Doc.# 69, at pp. 4-5.) But again, this is Respondent attempt to get this Court to recharacterize his Rule 60(b)(6) in a manner that disfavors petitioner.

The Bynoe Circuit Court defined "extraordinary circumstances," as being the key in granting Rule 60(b)(6) relief. (966 F.3d at pp. 979-982, citing Klapprott v. United States, 335 U.S. 601 (1949). It occurs where there are "other compelling reasons" for reopening the judgment. The Supreme Court held that relief udner Rule 60(b)(6) was appropriate because the events leading to the default judgment far exceeded the "excusable neglect" standard in Rule 60(b)(1); his "extraordinary situation" could not "fairly or logically be classified as mere neglect on his part," (966 F.3d at 982.)

Here, and as stated above, even if this specific court had applied Dixon v. Baker to Petitioner's case, there is a reasonable and plausible reason to believe it would have ruled like in the other cases cited, and find that Dixon did not apply to cases where the petitioner's had not filed any court pleadings in the state courts.

It wasn't until the Ninth Circuit clarified this point in Cage v. Montgomery, 2020 U.S. App. LEXIS 22698 (9th Cir. 2020), in July 21, 2020, that the lack of state filing is immaterial under Dixon v. Baker. So, it can be said that an actual change in the law, once the Ninth Circuit clarified Dixon in July 2020 to this Court. So this extraordinary situation could not be fairly or logically be classified as mere neglect on Petitioner's part.

Moreover, Respondent attempts to make the timing of the change in the law that Dixon made, as something that changes the way this Court should treat it. But under Bynoe, that test is simple: "To evaluate whether a

party's delay in filing a Rule 60(b)(6) motion was reasonable, [the Courts] consider the party's ability to learn easlier of the grounds relied upon, the reason for the delay, the parties' interest in the finality of the judgment, and any prejudice caused to the parties by the delay. (966 F.3d at p. 980.)

In the opposition, Respondent, not once claimed any prejudice from any plausible delay. As the Court knows, the merits of the actual claims were not adjudicated. Instead, the petition was dismissed without prejudice for lack of good cause for a Rhines stay. Even Respondent does not contest that it wasn't until March 2019 where Petitioner first cites Dixon v. baker in his Reply. (Doc.# 69, at p. 3.) Even in March 2019, the Ninth Circuit had not clarified the materiality of having a state filing in a state court for Dixon's decision to apply.

Therefore, this is a "TRUE" Rule 60(b)(6) motion, thus satisfying the first prong of Bynoe v. Baca.

(b) The Motion was filed without any unreasonable Delay, under the Extraordinary Situation Faced by Petitioner, as a Prose Prisoner

As stated above, it wasn't until the Ninth Circuit clarified the materiality of a state habeas being filed, for Dixon to apply, did not reach this Court until July 2020, with Cage v. Montgomery.

It would not have made any difference, if Petitioner would have relied on Dixon earlier, since he was in the same situation of not having any habeas petition in the State courts. Ergo, Petitioner would have reasonably gotten the same ruling, as Cage did in teh beginning.

Moreover, Respondent continued attempt to place this Rule 60(b)(6)

under the lens of Rule 60(b)(1) , so that the 1 year deadline applies, is an unfair attempt to curtail justice.

Therefore, in treating this Rule 60(b)(6) motion for what it is, this Court should find that this factor weighs in favor of reopening the judgment.

(c) Extraordinary Circumstances Exists

Respondent's argument that Petitioner has not shown "extraordinary circumstance," is based on the unsupported and illogical premise that Dixon v. Baker, unlike the Mena v. Long decision in Bynoe v. Baca, was decided before the judgment was entered by this Court, and Mena was decided after.

This difference is immaterial. The point of establishing "extraordinary circumstances" under Ninth Circuit precedent, is NOT when the change ocurred, but whether the change in the law affected an unsettle area of law. (See Bynoe, 966 F.3d at pp. 983-984.)

Dixon v. Baker did affect an unsettle area of law, that resolved an unanswered question of law, and it explicitly acknowledged that, in Pro Se cases, without counsel, is "good cause" for a Rhines stay. Hence, this factor weighs also in favor of Petitioner.

Respondent last contention is that Petitioner already raised this claim, and is attempting to relitigate it again. (Doc.# 69 at p. 8.) However, this Court adjudicated the first Rule 60(b) motion under the lens of subsection (1) [legal error], recharacterizing said motion and finding it untimely filed. This Court did not answer the question of Dixon's applicability. That question is before this Court, under the lens of Rule 60(b)(6), now.

(d) Because Respondent's Agument are without Merit this Court should adjudicate this Rule 60(b)(6)

Because Respondent's contention conflict with Bynoe rationale, and are only attempts to get the Court to "recharacterize" the motion as another Rule 60(b)(1), when the plain and clear language is to the contrary, AND because Respondent does not claim to be prejudice, or that the Rule 60(b) (60 motion is untimely (as oppose to its argument that, if a Rule 60(b)(1), it is certainly untimely), nor Respondent claims that the state will be in a worst position if the judgment is reopen. This Court should find that the factors weighing in favor for Petitioner, are enough to reopen the judgment, and order Respondent to file an ANSWER to the habeas claims on their merits.

CONCLUSION

Based on the foregoing reasons, case law cited, and the record in this Court, Petitioner respectfully request this Court to grant the Rule 60(b)(6) motion, reopen the judgment, and direct Respondent to address the merits of the habeas claims within 30 days of this Court's order.

Dated: July 13, 2021

Respectfully Submitted,

Clifford D. Jackson
Petitioner,
In Propria Persona

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF IMPERIAL

(C.C.P. SEC.446 & 201.5; 28 U.S.C. SEC. 1746)

I, Clifford D. Jackson DECLARE UNDER PENALTY OF PERJURY THAT: I AM THE Petitioner IN THE ABOVE ENTITLED ACTION; I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS _____ DAY OF: _____ 20 AT CSP-LAC, LANCASTER, CALIFORNIA 93539.

(SIGNATURE) _____
(DECLARANTIPRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC.1013 (a) & 2015.5; 28 U.S.C. SEC.1746)

I, Clifford D. Jackson AM A RESIDENT OF CSP-LAC PRISON, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA. I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM / NOT A PARTY OF THE ABOVE-ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 4430 LANCASTER, CALIFORNIA 93539:

ON _____ 20 I SERVED THE FOREGOING: PETITIONER'S VERIFIED

(SET FORTH EXACT TITLE OF DOCUMENTS SERVED)

ON THE PARTY (S) HEREIN BY PLACING A TRUE COPY (S) THEREOF, ENCLOSED IN A SEALED ENVELOPE (S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT CSP-Los Angeles County, Lancaster, California 93539:

Attorney General of California
Matthew Rodriguez (A)
300 S. Spring Street, Suite 1702
Los Angeles, California 90013

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: _____, 20

X _____
(DECLARANTIPRISONER)
CLIFFORD D. JACKSON

PETITIONERS VERIFIED MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b) BASED ON CHANGE OF LAW, SUBDIVISION (b) (6)

APPENDIX- E (8pg.)

Clifford D. Jackson, CDCR# AS-7108
CSP-Los Angeles County
A-1-103
P.O. Box 4430
Lancaster, California 93539

Petitioner,
In Propria Persona

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Clifford D. Jackson, Petitioner, v. Neil McDowell, Warden, Respondent.	Case No. 2:16-cv-03433-VBF-(GJS) **PETITIONER'S VERIFIED MOTION FOR RELIEF FROM JUDGMENT UNDER RULE 60(b), BASED ON CHANGE OF LAW, SUBDIVISION (b)(6)** Honorable Valerie Baker Fairbank, Senior U.S. District Judge

Petitioner, Clifford D. Jackson, by and through his record, respectfully moves this court, to issue an order reopening the judgment entered January 23, 2018 (Doc.# 33), that dismissed without prejudice, Petitioner's Federal habeas corpus, for lack of exhaustion and failure to established "good cause," for a stay and abeyance, as required by Rhines v. Weber, 544 U.S. 269 (2005), based on change in the law established by Dixon v. Baker, 847 F.3d 714, 719-721 (9th Cir. 2017) ("good cause" is shown by a pro per prisoner proceeding in state habeas corpus proceedings without counsel representation). During State habeas corpus proceedings, Petitioner Jackson was without counsel at all relevant times and should be deemed to be able to show "good cause," under Dixon v. Baker.

The Ninth Circuit Court of Appeals in Bynoe v. Baca, 966 F.3d 972 (9th Cir.

2020) ("Bynoe"), has recently showed that changes in which to stay and abeyance Federal habeas corpus petitions, warranted the grant of Bynoe's Rule 60(b)(6) motion for Relief from Judgment, that had originally dismissed his petition for having all unexhausted claims. The Ninth Circuit held in a new case, Mena v. Long, 813 F.3d 907 (9th Cir. 2016), that district court have discretion to stay and abeyance petitions that have entirely unexhausted claims. **(Id., 966 F.3d at pp. 976-977.)**

As shown below, Petitioner meets the requirements outlined in **Bynoe**, based on the change of law established by Dixon v. Baker, supra. Thus, the district court should grant this motion for relief from judgment, and issue an order to reopen the Federal habeas case. Nonetheless, granting this motion will also avert the great manifest injustice that has happened in the way this case was adjudicated, thus meeting the "extraordinary circumstances" standard.

(I) **Bynoe v. Baca Rule 60(b)(6) Standard of Review**

In **Bynoe**, the Ninth Circuit stated that, under Rule 60(b)(6), a petitioner must meet three requirements: (1) the motion can not be premised on another ground delineated in the rule (meaning, it's a strict Rule 60(b)"(6)" motion), (2) it must be filed "within a reasonable time," and (3) it must demonstrate "extraordianry circumstances" justifying reopening the judgment. **(Id., 966 F.3d at pp. 979-980.)**

(1) **Petitioner's Motion is a True Rule 60(b)(6)**

As the front cover of this motin shows, Petitioner has only cited to Rule 60(b)(6), as the avenue for relief from the January 2018 judgment entered in his case. This requirement is plainly satisfied under **Bynoe**.

It is also worth noting, that while district judges have the power to

construed Pro-Per prisoner's pleadings liberally, in the best light in their favor; giving the benefit of any doubt (e.g., Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)), district judges have equal power to "recharacterize" Pro-Per pleadings, in order to place it within a different legal category. This power, must be exercised by recharacterizing said pleading in a manner that favors the Pro-Per petitioner. (E.g., Ross v. Williams, 896 F.3d 958, 969-970 fn. 13 (9th Cir. 2017) (Noting the cases where the Ninth Circuit has used the "recharacterization" power).) This "judge-made rule," as stated by our Supreme Court Justices in Castro v. United States, 540 U.S. 375, 377 (2003), must be used to assist Pro Per litigants/petitioners. It is not to be used, to recharacterize a Pro-Per's motion as a second-successive petition, and "write-him or her 'out-of-court'." (Castro, 540 U.S. 375, 377 (reversing the treatment of Castro's motion as a §2255 petition, as a second or successive, and then, denied him access to the court).) A district judge must first give notice to the Pro-Per petitioner, that it will "recharacterize" his or her pleading. Without such notice, recharacterization is violative of the Castro rule.

Petitioner Jackson has met the first prong of Bynoe.

(2) Petitioner's Rule 60(b)(6) is being filed 'within a reasonable time,' under the circumstances of this case

The Bynoe Circuit Court acknowledged that there is little guidance, in which to test timeliness, when it comes to "change of the law" basis for the Rule 60(b)(6) motion. (Id., 966 F.3d at p. 980.) The Bynoe Circuit Court did, however, state that, "courts should measure timeliness as of the point in time when the moving party has grounds to make a Rule 60(b)(6) motion, regardless of the time that has elapsed since the entry of judgment." (Id.)

[T]o evaluate whether a party's delay in filing a Rule 60(b)(6) motion was reasonable, the Courts generally consider the party's ability to learn earlier of the grounds relied upon, the reason for the delay, the parties' intersts in the finality of the judgment, and any prejudice caused to parties by the delay. (Id.)

It is worth noting that, this case is currently subject to the United States Supreme Court's jurisdiction (i.e. open-case), because the Ninth Circuit Court recently denied relief on March 5, 2021, in case number 19-56259. Petitioner, in his Pro Se status, unlearned in the law, has been attempting to get the judgment open again, because as a Pro-Per during state habeas corpus proceedings, is "good cause" under Rhines v. Weber, as recently interpreted by the Ninth Circuit in Dixon v. Baker, supra. And like cases that were denied for procedural reasons, and which claims have never been adjudicated on their merits, Petitioner Jackson's case should be reopen, and this motion deemed filed "within a reasonable time."

There is no evidence in the record of any dilatory actions by Petitioner. In fact, ever since the district judge dismissed the Federal habeas corpus petition and motion to stay and abeyance for the lack of "good cause," Petitioner has filed several peladings seeking to have his habeas claims adjudicated on their merits. Petitioner is working on his Petition for Writ of Certiorari to the U.S. Supreme Court, but came accross **Bynoe v. Baca**, which outlined the proper procedure in which to seek Rule 60(b)(6) relief. Especially here, where Dixon v. Baker changed the law on what constitutes "good cause" under Rhines v. Weber.

(3) **Extraordinary Circumstances Exist that is Necessary to grant Rule 60(b)(6) relief**

The **Bynoe** Circuit Court, citing Klapprott v. United States, stated that, "the Supreme Court considered whether the district court erred in denying a Rule 60(b)(6) motion seeking to set aside a default judgment depriving the petitioner of his citizenship. [Citation Omitted]. The default judgment had been entered against the petitioner because he had been "in jail ..., weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges." [Citation Omitted]. Although four years had passed since the judgment had been entered, the [Supreme] Court held that relief under amended Rule 60(b)(6) was appropriate because the events leading to the default judgment far exceeded the "excusable neglect" standard in Rule 60(b)(1); his "extraordinary situation" could not fairly or logically be classified as mere 'neglect' on his part. **(Id., 966 F.3d at p. 982-983.)**

The **Bynoe** Circuit Court added that, [a] "clear and authoritive" change in the law governing the judgment in a petitioner's case may present extraordinary circumstances. **(Id., at p. 983.)** It outlined six-factors that must be considered. Petitioner Jackson certainly meets most, thus, compelling the conclusion that Rule 60(b)(6) relief from the January 23, 2018 judgment may be granted.

(a) Factor One:

This factor, considers the "nature of the intervening law." First, the district court had originally dismissed the federal habeas case, as a mixed-petition; and that no-good cause was shown to stay the proceedings.

Secondly, like the effect of the new decision of Mena v. Long, 813 F.3d 907 (9th Cir. 2016) had in **Bynoe**, clarifying that "district courts can indeed stay and abey entirely unexhausted habeas petitions," **(Id., 966 F.3d at 977)**, the Dixon v. Baker, 847 F.3d 714, 720-722 (9th Cir. 2017), indeed clarified for the district courts that, "if a Pro Se petitioner is without an attorney

during state habeas corpus proceedings," he or she has established "good cause" for a Rhines v. Weber stay and abeyance.

[B]efore Dixon v. Baker, being a Pro Se petitioner, by itself, was not sufficient "good cause," for a stay and abeyance, under certain circumstances. But that was largely based on Supreme Court precedent, Martinez v. Ryan(2012)_ U.S._, 132 S.Ct. 1309, 1319-1321, recognizing the difficulties Pro Se petitioners suffered by the lack of legal representation. Hence, Dixon v. Baker, changed the law that affected an unsettled are of law. Again, prior to Dixon v. Baker, it was neither prohibited or required to grant a stay for "good cause" shown by a Pro Se petitioner trying to investigate his state habeas petition. It is now clear, that being a Pro Se petitioner, without counsel during state habeas corpus proceedings is "good cause."

This factor weighs in Petitioner's favor.

(b) Factor Two:

This second factor, considers whether Petitioner Jackson has exhibited sufficient diligence in advancing his claim. (Id., 966 F.3d at 984.) It is evident from the Federal court records in both here and at the Ninth Circuit, Petitioner has not stopped seeking to advance his claims to be adjudicated on their merits. This factor weighs in Petitioner's favor.

(c) Factor Three:

Third factor, the reviewing court evaluates whether granting the motion somehow "undo the past, executed effects of the judgment." (Id., 966 F.3d at 985.) While the State has an abstract finality interest, litigation of the denial of his motion to stay and abeyance is still open, and the State still defending their position. Based on the totally of the circumstances, this factor weighs

in Petitioner's favor. (Id.)

(d) **Factor Four:**

This Fourth factor considers the delay between the final judgment and his Rule 60(b) motion. (Id., 966 F.3d at 986.) [A] long delay can be offset by a petitioner's diligence. In this respect, this factor is similar, although not identical, to the second factor, which emphasizes the petitioner's diligence in challenging on appeal the judgment he now seeks to overturn. (Id.)

Petitioner has been diligently pursuing to reopen the judgment, based on his Pro Se understanding of the law, and capabilities, while incarcerated. He is currently in the process of finishing and filing a Petition for Writ of Certiorari to the U.S. Supreme Court, from the Ninth Circuit denial on March 5, 2021, in case no.# 19-56259. This factor weighs in Petitioner's favor.

(e) **Factor Five:**

The fifth factor asks whether the challenged judgment has a close relationship to the change in law underlying the Rule 60(b)(6) motion. (Id.) The Bynoe Circuit Court stated that, "[w]here a court rested its judgment on a basis only marginally altered by later changes in relevant law, reopening a judgment is disfavored. [Citation Omitted]. Many legal rulings cast some doubt on the reasoning in previous cases; only those that may have affected the outcome of the judgment the petitioner seeks to review should weigh toward a finding of extraordinary circumstances." (Id., at p. 986.)

As applied to Petitioner's case, Dixon v. Baker is one such ruling. Dixon v. Baker rejected the legal core of the district court's denial of his request for a Rhines stay. The district court denied the stay because Petitioner failed to show "good cause." Dixon v. Baker directly repudiated this conclusion by the district court and held that "good cause" is shown by a Pro Se petitioner that

was without an attorney during state habeas corpus proceedings. (Dixon v. Baker, 847 F.3d at pp. 720-722.) Hence, Dixon v. Baker undermined the central premise of the district court's denial of a rhines stay. This factor also weighs in favor of Petitioner.

(f) Comity

The Bynoe Circuit Court finally asks whether principles of comity weigh against reopening habeas proceeding.

In this case, like in Bynoe, reopening the decision does not risk disturbing a court's reasoned, merit-based conclusion, because there never was one. Hence, this factor weighs in Petitioner's favor.

(II) Conclusion

Based on the foregoing reasons and law, Petitioner Jackson requests that this district court grant this motion, and reopen habeas proceeding, so that his claims may be adjudicated on their merits.

Dated:_____, 2021

Respectfully Submitted,

_____
Clifford D. Jackson
Petitioner,
In Propria Persona