

APPENDIX A

COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUL 17 2017

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARRYL BURTON,

Defendant-Appellant.

No. 16-17156

D.C. No. 1:85-cr-00205-LJO-1
Eastern District of California,
Fresno

ORDER

Before: KOZINSKI and HAWKINS, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 5 & 12) 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 2255 motion states a valid claim of the denial of a constitutional right.”

United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

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v.

DARRYL BURTON,

Defendant-Appellant.

No. 16-17156

D.C. No. 1:85-cr-00205-LJO-1
Eastern District of California,
Fresno

ORDER

Before: LEAVY and TALLMAN, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 15).

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.

Appellant's motion to take judicial notice (Docket Entry No. 14) is denied.

No further filings will be entertained in this closed case.

1
2
3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

5 **UNITED STATES OF AMERICA,**

6 **Plaintiff,**

7 **v.**

8 **DARRYL BURTON,**

9 **Defendant.**

1:85-cr-00205 LJO

**ORDER CONSTRUING REQUEST AS
ONE TO RE-OPEN TIME FOR
APPEAL AND TO FILE A MOTION
FOR RECONSIDERATION; DENYING
REQUEST; AND DIRECTING CLERK
OF COURT TO PROVIDE COPY OF
UNDERLYING ORDER DENYING
PETITION PURSUANT TO 28 U.S.C. §
2255 (Docs. 160, 145 & 140)**

11
12 In a letter dated September 27 2016 (Doc. 160, filed Oct. 6, 2016), Defendant Darryl Burton, a
13 federal prisoner proceeding *pro se*, inquires about the status of certain filings in this case related to a
14 petition he filed on September 29, 2000 pursuant to 28 U.S.C. § 2255 ("Section 2255 Petition"). *See*
15 Doc. 140. Defendant acknowledges that his Section 2255 Petition was denied in January 2001. Doc.
16 145. Defendant claims that "[i]n February 2001, he filed a timely motion of objection and
17 reconsideration of the denial along with a notice of appeal." Doc. 160. Defendant indicates that he
18 recently "discovered that there was never a reply received for either motion" and, after a further review
19 of the docket, discovered that the docket reveals no entries pertaining to any these motions. *Id.*
20 Defendant asks the Court to review the available case files for his motions and asserts that he has "valid
21 copies" of these motions he could provide the Court. *Id.*

22 Assuming, for the sake of this discussion only, that Defendant does have copies of these motions
23 and that those copies would demonstrate Defendant sent the motions to the Court, the Court's own
24 review of the docket confirms that they were never docketed. Therefore, again for the sake of argument
25 only, the Court will assume Defendant's motions were either lost in the mail or by the Court.

1 With regard to the purported notice of appeal, the time for raising any missing or lost notice of
 2 appeal has long since passed. Federal Rule of Appellate Procedure 4 squarely governs this situation.
 3 Pursuant to the version of that rule in place in 2001 and the present rules, Defendant had 60 days from
 4 entry of judgment to file his notice of appeal. Fed. R. App. P. 4(a)(1)(B) (2000); Fed. R. App. P.
 5 4(a)(1)(B)(i).¹ A Court may extend the time for the filling of a notice of appeal by no more than 30 days
 6 after the prescribed deadline or 14 days after the extension request is granted, but only “if a party so
 7 moves no later than 30 days after the time prescribed by Rule 4(a) expires.” Fed. R. App. P. 4(a)(5)
 8 (2000); Fed. R. App. P. 4(a)(5). Even if Defendant could demonstrate that he did not receive notice of
 9 the Order Denying his Section 2255 Petition, docketed January 26, 2001, it would still be too late to re-
 10 open the time to file a notice of appeal. Fed. R. App. P. 4(a)(6) (2000)(permitting a district court to re-
 11 open the time to file an appeal for a period of 14 days if the court finds that the moving party did not
 12 receive notice of the order sought to be appealed, but only if a request to re-open is filed within 180 days
 13 of the entry of judgment); Fed. R. App. P. 4(a)(6)(same).

14 To the extent Defendant claims he also attempted to file with this Court a request for
 15 reconsideration of the Order Denying his Section 2255 Petition, it is likewise far too late for this Court
 16 to consider any such motion. Federal Rule of Civil Procedure 60(b) governs motions for reconsideration
 17 of this kind. A Rule 60(b) motion “must be made within a reasonable time ... [and] no more than a year
 18 after the entry of the judgment,” for reasons under Rule 60(b)(1), (2) or (3). Fed. R. Civ. P. 60(c). “What
 19 constitutes reasonable time depends upon the facts of each case, taking into consideration the interest in
 20 finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied
 21 upon, and prejudice to the other parties.” *Lemoge v. United States*, 587 F.3d 1188, 1196-97 (9th Cir.
 22 2009) (internal quotations and citations omitted). Courts have routinely held that delays of less than
 23 three years in seeking Rule 60(b)(6) relief are not reasonable. *See, e.g., Morse–Starrett Products Co. v.*

24
 25 ¹ The Rules of Appellate procedure applicable to civil cases govern appeals from decisions on petitions for habeas corpus
 filed pursuant to 28 U.S.C. § 2255. *See United States v. Hardy*, 953 F.2d 1388 (9th Cir. 1992) (table) (applying civil
 deadlines); *Laborin v. Clark*, No. 2:08-CV-1998-TJB, 2011 WL 6102114, at *1 (E.D. Cal. Dec. 8, 2011) (same).

1 *Steccone*, 205 F.2d 244, 249 (9th Cir. 1953) (22 months unreasonable); *Hogan v. Robinson*, 2009 WL
 2 1085478, at *4 (E.D. Cal. April 22, 2009) (Rule 60(b)(6) motion “filed over 18 months after judgment
 3 was entered, and over two years after Plaintiffs were put on notice of the facts and circumstances upon
 4 which they rely[]” was untimely); *Henry v. Lindsey*, 2008 WL 4594948, at *2 (N.D. Cal. Oct.15, 2008)
 5 (Rule 60(b)(6) motion untimely where the petitioner waited “an additional two and a half years” after
 6 the Ninth Circuit's affirmance before filing); *Swait v. Evans*, 2008 WL 4330291, at *5-*6 (C.D. Cal.
 7 Sept.22, 2008) (Rule 60(b) motions untimely where petitioner “failed to proffer any legally valid
 8 explanation for his two-year delay” in filing). Here, Defendant claims to have filed the missing motions
 9 in 2001, almost fifteen years ago. Since then, in September 2013, he filed pro se a motion for correction
 10 of sentence, Doc. 146, and an appeal from the order denying that motion in November 2013. Doc. 148.
 11 He offers no valid explanation for why he did not discover that his purported earlier motions were
 12 neither docketed nor ruled upon. Accordingly, even if Defendants motion for reconsideration was lost,
 13 either in the mail or by the Court, this Court has little difficulty finding that he did not file his Rule
 14 60(b)(6) motion within a reasonable time.

15 For the reasons set forth above, Defendant's request, construed as (1) a request to re-open the
 16 time to file a notice of appeal regarding the Order Denying his Section 2255 Petition and/or (2) a request
 17 to reconsider the Order Denying his Section 2255 Petition, is DENIED as untimely. As a courtesy, the
 18 Court grants Defendant's other request, for copies of Docket Entries 140 (a minute order) and 145 (the
 19 Order Denying his Section 2255 Petition). The Clerk of Court is directed to serve copies of those
 20 documents on Defendant along when serving him with a copy of this Order.

21
 22 IT IS SO ORDERED.

23 Dated: November 2, 2016

/s/ Lawrence J. O'Neill
 UNITED STATES CHIEF DISTRICT JUDGE

APPENDIX B

DISTRICT COURT FOR THE EASTERN DISTRICT
DECEMBER 5, 2016

UNITED STATES OF AMERICA, Plaintiff, v. DARRYL BURTON, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
2016 U.S. Dist. LEXIS 167908
1:85-cr-00205 LJO
December 5, 2016, Decided
December 5, 2016, Filed

Editorial Information: Prior History

Burton v. United States, 2013 U.S. Dist. LEXIS 157099 (E.D. Cal., Oct. 29, 2013)

Counsel

Darryl Burton, Defendant, Pro se, ADELANTO, CA.

For USA, Plaintiff: Carl M. Faller, LEAD ATTORNEY, Carl M. Faller, Attorney At Law, Fresno, CA.

Judges: Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE.

Opinion

Opinion by: Lawrence J. O'Neill

Opinion

ORDER DENYING REQUEST FOR RECONSIDERATION; CLARIFYING PRIOR ORDER RE REQUEST FOR COPIES; DENYING RENEWED REQUEST FOR COPIES; AND DENYING FREEDOM OF INFORMATION ACT REQUEST (Docs. 163, 166 & 165)

In a letter dated September 27, 2016 (Doc. 160, filed Oct. 6, 2016), Defendant Darryl Burton, a federal prisoner proceeding *pro se*, inquired about the status of certain filings in this case related to a petition he filed on September 29, 2000 pursuant to 28 U.S.C. § 2255 ("Section 2255 Petition"). See Doc. 140. Defendant acknowledges that his Section 2255 Petition was denied in January 2001 ("January 2001 Order"). Doc. 145. Defendant claimed that "[i]n February 2001, he filed a timely motion of objection and reconsideration of the denial along with a notice of appeal." Doc. 160. Defendant indicated that he recently "discovered that there was never a reply received for either motion" and, after a further review of the docket, discovered that the docket revealed no entries pertaining to either his objection/reconsideration request or his notice of appeal. *Id.* Defendant asked the Court to review the available case files for his motions and asserts that he has "valid copies" of these motions he could provide the Court. *Id.*

In a November 3, 2016 Order ("November 2016 Order"), the Court explained that its own review of the docket confirmed that Defendant's motions were never docketed. Doc. 161 at 1. The Court assumed, for the sake of discussion, that Defendant's motions were either lost in the mail or by the Court. See *id.* The Court then concluded that because of the amount of time that had passed since Defendant's attempt at filing these motions-almost fifteen years-it was far too late for the Court to extend the time for filing a notice of appeal or for the Court to consider any motion to reconsider the January 2001 Order denying his Section 2255 Petition. *Id.* at 2-3.

Despite the November 2016 Order, Defendant nevertheless filed a Request for Reconsideration of the January 2001 Order denying his 2255 Petition. Doc. 165. For the reasons set forth in the

November 2016 Order, the Court cannot consider this late-filed Request for Reconsideration of an Order issued more than fifteen years ago. The Request is therefore DISMISSED.

In his September 27, 2016 letter, Defendant also specifically requested copies of Docket Entries 140 and 145 from this case file. Docket entry 145 is the January 2001 Order denying Defendant's Section 2255 Petition. A copy of that document was provided to Defendant as a courtesy along with the November 2016 Order. Docket Entry 140 reflects the filing on September 29, 2000 of Defendant's 2255 Petition. Also as a courtesy, the Court directed the Clerk of Court to provide Defendant with a copy of that Docket Entry¹. The actual underlying 2255 Petition is presently not at this courthouse, as the entire case file has been sent to the Federal Court's archive center outside this District, so a copy of the underlying filing is not readily obtainable. Without any information suggesting why the document is important to a non-frivolous claim before the Court, the Court declines to order the case file returned from the archive center at taxpayer expense. *Chapman v. United States*, 55 F.3d 390, 390-91 (8th Cir. 1995) ("[A]ccess to materials such as a transcript is not constitutionally required until after judicial certification that access is required to decide issues presented in a pending, non-frivolous case."), Among other things, Defendant's possession of a copy of his 2255 Petition would not change the Court's conclusion that the Court cannot consider a Request for Reconsideration of its January 2001 Order denying that Petition. The request for a copy of the document underlying Docket Entry 140 is DENIED WITHOUT PREJUDICE.

Finally, Petitioner has filed a request for copies of certain documents from his case file pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Doc. 166. FOIA requires "[e]ach agency [to] make available to the public [certain] information." *Id.* § 552(a). However, FOIA defines the term "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include . . . the courts of the United States." *Id.* § 551(1)(B). Accordingly, FOIA does not apply to the U.S. Courts and therefore has no bearing on this Court's decision regarding Defendant's request for documents.

CERTIFICATE OF APPEALABILITY

When a district court denies a habeas petition (or a request for reconsideration of a habeas petition) on procedural grounds without reaching the underlying constitutional claims, the petitioner must show, in order to obtain a certificate of appealability: (1) that jurists of reason would find it debatable whether the petition stated a valid claim of a denial of a constitutional right; and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). While both showings must be made to obtain a certificate of appealability, "a court may find that it can dispose of the application 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 Court finds that jurists of reason would not find it debatable that Defendant's Request for Reconsideration was properly dismissed on procedural grounds. Accordingly, the Court hereby DECLINES TO ISSUE for certificate of appealability.

CONCLUSION

For the reasons set forth above:

- (1) Defendant's Request for Reconsideration is DISMISSED;
- (2) Defendant's request for a copy of the document underlying Docket Entry 140 is DENIED WITHOUT PREJUDICE.
- (3) Defendant's FOIA request is DENIED; and

explain why he did not discover that his purported earlier motions were neither docketed nor ruled upon, the Court finds there would be no debate among jurists of reason as to its recent rulings in this case, which all amount to a denial of Defendant's untimely request to re-open the time for appeal and/or for reconsideration of the 2001 denial of his Section 2255 Petition filed in 2000. This Court finds that given the jurisprudence surrounding Rule 60(b), no Court could resolve these issues in a different manner, nor do the issues deserve encouragement to proceed further.

Accordingly, a certificate of appealability is DENIED.

IT IS SO ORDERED.

Dated: May 25, 2017

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

Footnotes

1

The Court later learned that at least one of the requested documents were no longer in the Courthouse, having been sent to the Federal Court's archive center outside this District, and modified its order to decline to send complete documents absent any showing they were important to a non-frivolous claim over which this Court has jurisdiction. Doc. 169 at 2.



UNITED STATES OF AMERICA, Plaintiff, v. DARRYL BURTON, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
2017 U.S. Dist. LEXIS 80634
1:85-cr-00205 LJO
May 25, 2017, Decided
May 25, 2017, Filed

Editorial Information: Prior History

United States v. Burton, 2017 U.S. Dist. LEXIS 53881 (E.D. Cal., Apr. 6, 2017)

Counsel Darryl Burton, Defendant, Pro se, ADELANTO, CA.
For USA, Plaintiff: Ross Pearson, GOVT, LEAD ATTORNEY,
United States Attorney's Office, Fresno, CA.
Judges: Lawrence J. O'Neill, UNITED STATES CHIEF DISTRICT JUDGE.

Opinion

Opinion by: Lawrence J. O'Neill

Opinion

ORDER DENYING CERTIFICATE OF APPEALABILITY (Docs. 178, 179, 184)

This matter comes before the Court to resolve the issue of whether a certificate of appealability should issue in connection with Defendant Darryl Burton's pending appeal. Doc. 184.

BACKGROUND

Defendant Darryl Burton is a federal prisoner proceeding *pro se*. On September 29, 2000, he filed a petition pursuant to 28 U.S.C. § 2255 ("Section 2255 Petition"). See Doc. 140. Defendant acknowledges that his Section 2255 Petition was denied in January 2001. Doc. 145.

In a letter dated September 27, 2016 (Doc. 160, filed Oct. 6, 2016), Defendant, inquired about the status of certain filings in this case related to his Section 2255 Petition. Defendant claimed that "[i]n February 2001, he filed a timely motion of objection and reconsideration of the denial along with a notice of appeal." Doc. 160. Defendant indicated that he recently "discovered that there was never a reply received for either motion" and, after a further review of the docket, discovered that the docket reveals no entries pertaining to any these motions. *Id.* Defendant asked the Court to review the available case files for his motions and asserts that he has "valid copies" of these motions he could provide the Court. *Id.*

On November 3, 2016, the Court issued an Order construing the September 27, 2016 Order as a request to re-open the time for appeal and denying any such request, finding "the time for raising any missing or lost notice of appeal has long since passed." Doc. 161 at 2. To the extent Defendant was claiming that he attempted to file with this Court a request for reconsideration of the Order denying his Section 2255 Petition, the November 3, 2016 Order likewise found it "far too late for this Court to consider any such motion." *Id.* In addition, as a courtesy, the Court ordered the Clerk of Court to provide Defendant copies of certain documents requested by Defendant. *Id.* at 3.1 According to the

Court's docket, the November 3, 2016 Order was served on Defendant at his address of record. Defendant timely filed a notice of appeal from that Order. Doc. 162.

On November 21, 2016, Defendant filed a "Pleading[] Pursuant to Federal Rules of Civil Procedure, Rule 59(e), Local Rule 230(j), [or] In the Alternative Rule 60(b)," seeking reconsideration of the Order denying is Section 2255 Petition. Doc 165 (filed Nov. 21, 2016; dated November 15, 2016). The Court addressed this filing in a December 5, 2016 Order as follows: "For the reasons set forth in the November 2016 Order, the Court cannot consider this late-filed Request for Reconsideration of an Order issued more than fifteen years ago. The Request is therefore DISMISSED." Doc. 169 at 2. According to the Court's docket, the December 5, 2016 Order also was served on Defendant at his address of record. Thereafter, Defendant filed a notice of appeal from the "December 5, 2016" Order. Doc. 170.

On December 27, 2016, Defendant filed letter dated December 22, 2017, addressed to the Clerk of Court stating: "Be advised that in November of 2016, I filed a timely Pleading (60(b)) back before this Court. The pleading was sent registered mail with a return receipt requested, this portion I have received back. To date there has not been any informal acknowledgement from the clerk's office. Please send me a copy of the active docket sheet for the above styled matter." Doc. 172. On January 5, 2017, the Court responded to this letter by explaining that, as mentioned, the Court received, reviewed, and dismissed this this "Pleading" in its December 5, 2016 Order. See Doc. 173.

Thereafter, Defendant filed numerous other documents, all of which reflected a misunderstanding of his proceedings and a refusal to acknowledge the Court's denial, Doc. 169, of his Rule 60(b) motion. On January 17, 2016, Defendant filed a document entitled "Notice of Judicial Error in its Pronounced Order of January 6, 2017 Order," in which Defendant claimed he never received the Court's December 5, 2016 Order, and explains that if he had, he would have filed objections "preserving full appellate review." Doc. 174. Defendant "put[] this court on notice for the violation and the lack of notification" and states his intent to exercise his rights to file objections to the denial of "the 60(b)." *Id.* at 3. This document, however, made no specific requests pursuant to any rule of procedure. Accordingly the Court took no action upon it. See Doc. 178 at 3.

On January 23, 2017, the Court received another filing entitled "Correction of the Inaccurately Stated Record," in which Defendant, among other things, again complained that he was not notified of the Court's prior orders, takes issue with various background facts mentioned by the Court in its prior orders, and discusses his interpretation of the scope of his own notices of appeal. Doc. 175. Again, this document makes no specific requests pursuant to any rule of procedure, so the Court took no action upon it. See Doc. 178 at 3.

On February 9, 2017, in a document entitled "Claimant's Pleading to Expedite a Factual Determination and Fact Finding," Defendant claimed that he has made numerous requests regarding his "Rule 60(b)" pleading that have "fallen on deaf ears." Doc. 176 at 2-3. Finally, on February 27, 2017, Defendant filed a document entitled "Claimant's Pleading for Show Cause Order to the Government," in which he continued to assert that his Rule 60 motion was still pending and requested that the Court require that the opposing party be given the opportunity to properly respond. Doc. 177.

The Court responded to the February 2017 filings with the following order, issued April 7, 2017:

Given that Defendant appears to be confused as to the state of his Rule 60(b) motion filed November 21, 2016, Doc. 165, that motion is DISMISSED. It is far too late for this Court to consider any such motion. Federal Rule of Civil Procedure 60(b) governs motions for reconsideration of this kind. A Rule 60(b) motion "must be made within a reasonable time ...

[and] no more than a year after the entry of the judgment," for reasons under Rule 60(b)(1), (2) or (3): Fed. R. Civ. P. 60(c). "What constitutes reasonable time depends upon 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) (internal quotations and citations omitted). Courts have routinely held that delays of less than three years in seeking Rule 60(b)(6) relief are not reasonable. See, e.g., *Morse-Starrett Products Co. v. Steccone*, 205 F.2d 244, 249 (9th Cir. 1953) (22 months unreasonable); *Hogan v. Robinson*, 2009 U.S. Dist. LEXIS 33989, 2009 WL 1085478, at *4 (E.D. Cal. April 22, 2009) (Rule 60(b)(6) motion "filed over 18 months after judgment was entered, and over two years after Plaintiffs were put on notice of the facts and circumstances upon which they rely[]" was untimely); *Henry v. Lindsey*, 2008 U.S. Dist. LEXIS 111175, 2008 WL 4594948, at *2 (N.D. Cal. Oct. 15, 2008) (Rule 60(b)(6) motion untimely where the petitioner waited "an additional two and a half years" after the Ninth Circuit's affirmance before filing); *Swait v. Evans*, 2008 U.S. Dist. LEXIS 110407, 2008 WL 4330291, at *5-6 (C.D. Cal. Sept. 22, 2008) (Rule 60(b) motions untimely where petitioner "failed to proffer any legally valid explanation for his two-year delay" in filing). Here, Defendant claims to have filed the missing motions in 2001, almost fifteen years ago. Since then, in September 2013, he filed pro se a motion for correction of sentence, Doc. 146, and an appeal from the order denying that motion in November 2013, Doc. 148. He offers no valid explanation for why he did not discover that his purported earlier motions were neither docketed nor ruled upon. Accordingly, the Court finds that he did not file his Rule 60(b)(6) motion within a reasonable time.

... Defendant's Rule 60 motion was previously DISMISSED. To the extent there was any confusion about that fact in previous orders, the instant order DISMISSES IT AGAIN on grounds of untimeliness (see paragraph above). There is no procedural rule that requires the Court to order the United States to respond to a frivolous petition. In this case, Defendant's Rule 60 motion is frivolous because of its extreme untimeliness. Accordingly, Claimant's request for a Show Cause Order is DENIED.

So there is no mystery, Defendant has sought to bring a motion to reconsider the 2001 denial of his 2255 Petition. The Court has now ruled several times that Defendant may not do so. **No further pleadings on any matter related to that issue will be entertained nor will it be responded to if filed.** See Doc. 178 at 3-5.

Defendant appealed from the April 7, 2017 Order. Doc. 179. On May 24, 2017, the Court of Appeals remanded the matter to this Court to address the question of whether a certificate of appealability should issue. Doc. 184. As discussed below, the Court declines to issue a certificate of appealability.

ORDER DENYING CERTIFICATE OF APPEALABILITY

A certificate of appealability may be issued from a final order in a proceeding under Section 2255 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a certificate of appealability, Petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (internal quotation marks and citations omitted); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015) (applying same standard to appeal from denial of Rule 60(b) motion in a Section 2255 proceeding). The Court is also mindful of the "relatively low" threshold for granting a certificate of appealability. *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002). Here, in light of the length of the delay and Defendant's failure to

(4) The Court DECLINES TO ISSUE a certificate of appealability. IT IS SO ORDERED.

Dated: December 5, 2016

/s/ Lawrence J. O'Neill

UNITED STATES CHIEF DISTRICT JUDGE

Footnotes

1

The Court inadvertently referred to the Docket Entry as a "Minute Order." In fact, it is simply an entry on the docket reflecting the receipt on September 29, 2000 of Defendant's own 2255 Petition.



**Additional material
from this filing is
available in the
Clerk's Office.**