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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH BRIM,)	Case No. CV 12-08107 DDP ✓
)	[TERM GAVEL ON DOCKET NO. 11]
Plaintiff,)	
)	Appeal No. 14-55792 and
v.)	Appeal No. 13-56477
)	
UNITED STATES OF AMERICA,)	ORDER RE CERTIFICATE OF
)	APPEALABILITY AND "REQUEST TO
Defendant.)	WITHDRAW"
)	
)	[CV 99-02201 DDP]
)	[SA CR 93-00098 LHM]
)	[Dkt. Nos. 484, 495, 496]
)	

In 1996, Plaintiff was convicted of conspiracy to manufacture phencyclidine ("PCP"), in violation of 21 U.S.C. § 846, 841(a)(1), possession of piperidinocyclohexanecarbonitrile (PCC) and piperidine with intent to manufacture PCP, in violation of 21 U.S.C. § 841(a)(1), and attempt to manufacture PCP, in violation of 21 U.S.C. § 841(a)(1). (Cr. Dkt. Nos. 17, 223.) All three convictions were based on possession of certain precursor chemicals used in the manufacture of PCP; no actual PCP was found. (Dkt. No. 428, Magistrate's Report & Recommendation ("R&R") at 6-7.) He was

cc: 9th Circuit Court of Appeal

1 sentenced to two life sentences and another sentence of 20 years,
2 all to run concurrently. (Cr. Dkt. No. 245.) Plaintiff appealed his
3 conviction and sentence to the Ninth Circuit, which vacated the
4 conviction as to the latter two charges but left the life sentence
5 for the first charge intact. United States v. Brim, No. 96-50530,
6 *1, *3 (9th Cir. Oct. 29, 1997).

7 Various petitions for relief have followed over the
8 intervening years. Relevant to this order, on November 24, 2003,
9 the Court denied Plaintiff's Motion to Vacate, Set Aside or Correct
10 Sentence pursuant to 28 U.S.C. § 2255. On September 14, 2012, the
11 Court denied Plaintiff's motion to re-consider that original denial
12 under § 2255, as well as denying a motion under Fed. R. Crim. P. 36
13 to re-open the judgment to correct an alleged "clerical error."
14 (Cr. Dkt. No. 462. See also Cr. Dkt. No. 461 & Civ. Dkt. No. 39
15 (underlying motions).) Plaintiff has since appealed that decision
16 to the United States Court of Appeal, Ninth Circuit, creating
17 Appeal No. 13-56477. (Cr. Dkt. No. 484.)

18 On July 19, 2013, the Court also denied another motion for
19 relief under § 2255, as well as motions for appointment of counsel
20 and corrective judgment. (Cr. Dkt. No. 483.) Plaintiff has
21 appealed that decision to the Ninth Circuit as well, creating
22 Appeal No. 14-55792. (Cr. Dkt. No. 491.)

23 On May 21, 2014, the circuit court issued an order remanding
24 the case to this Court for the limited purpose of granting or
25 denying a Certificate of Appealability ("COA") in each of the above
26 appeals.

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1 **I. Dkt. No. 484/Appeal No. 13-56477**

2 "A certificate of appealability may issue . . . only if the
3 applicant has made a substantial showing of the denial of a
4 constitutional right." 28 U.S.C. § 2253. The order at issue here
5 was in response to two motions. In the first motion, the grounds
6 for relief were, generally, (1) "newly discovered evidence" that
7 showed Plaintiff's innocence as to conspiracy, and (2) both "newly
8 discovered evidence" and clarifications regarding expert reports
9 discussing how much PCP could have been made from the quantities of
10 precursor found in Plaintiff's possession. (Civ. Dkt. No. 39.)
11 The second motion alleged, similarly, that the magistrate had made
12 a "clerical error" in construing the expert reports. (Cr. Dkt. No.
13 461 at 5-7.)

14 To meet the "substantial showing" requirement of § 2253, a
15 petitioner must show that "reasonable jurists could debate whether
16 . . . the petition should have been resolved in a different manner
17 or that the issues presented were adequate to deserve encouragement
18 to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000).
19 The Court denied the motions for both procedural and substantive
20 reasons.

21 Procedurally, the Court treated the motions as motions for
22 relief under 28 U.S.C. § 2255, although they were framed by
23 Plaintiff as motions under Fed. R. Civ. P. 60(b) and Fed. R. Crim.
24 P. 36. This is because both motions were ultimately attempts to
25 revisit a § 2255 petition. The Court therefore held that the
26 motions were untimely and successive. (Civ. Dkt. No. 43 at 2.)
27 However, because reasonable jurists might disagree that Plaintiff
28 was, in fact, attempting to lodge a § 2255 petition under a

1 different name in his latter motions, the Court also briefly
2 addressed the merits of his motions and found them groundless.
3 (Id. at 2-3.) Therefore, the Court also finds it appropriate to
4 address the merits of the motions in assessing the request for a
5 COA.

6 **A. Evidence Showing Actual Innocence of Conspiracy**

7 As to the "new" evidence regarding the conspiracy, it
8 consisted primarily of a supposed inconsistency between police
9 testimony before the grand jury that the co-defendants had "come
10 together" and trial testimony that they had not been found
11 together. But, first, this is not "new" evidence, as it was
12 already on the record, and second, the evidence Plaintiff claims
13 would have been helpful to him was put before the jury.
14 Plaintiff's own motion showed that the supposedly exculpatory
15 testimony was in the trial transcript. (Civ. Dkt. No. 39 at 5-6.)
16 No reasonable jurist could find a constitutional violation on this
17 issue.

18 **B. Expert Opinions, Letters, and Reports**

19 Plaintiff was sentenced according to federal sentencing
20 guidelines, which set a "base offense level" in drug cases
21 according to the amount of the drug a defendant possessed or
22 manufactured. USSG § 2D1.1(c) (1995), available at
23 [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1995/
24 1995_Guidelines_Manual_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1995/1995_Guidelines_Manual_Full.pdf). Where the charge is conspiracy to
25 manufacture the drug in question, but no drugs are actually seized,
26 the base offense level is calculated from the amount of the drug
27 the defendant *could* have manufactured. "Where there is no drug
28 seizure . . . *the court shall approximate the quantity of the*

1 *controlled substance.*" U.S.S.G. 2D1.1, Commentary n.5 (1995)
2 (emphasis added).¹

3 Plaintiff was convicted based on the seizure of precursor
4 chemicals used in the manufacture of PCP, rather than actual drugs.
5 Thus, the amount of PCP Plaintiff could have manufactured largely
6 determined his sentence, because it determined his base offense
7 level. Because Plaintiff's criminal history placed him in criminal
8 history category VI, (R&R at 11:11), at any base offense level of
9 37 or higher Plaintiff's maximum sentence would have been life.
10 USSG § 5, Sentencing Table (1995).

11 "Approximations of drug quantity must meet three criteria."
12 Kilby, 443 F.3d at 1141. First, the government bears the burden of
13 proving the approximated quantity by a preponderance of the
14 evidence; second, the evidence supporting the approximation "must
15 possess sufficient indicia of reliability to support its probable
16 accuracy"; and third, the court "must err on the side of caution."
17 Id. Plaintiff argues that these criteria were not met as to his
18 sentencing. (Civ. Dkt. No. 39 at 32-39; id. at 33-34 ("The
19 district court's and Ninth Circuit's approximation of drug quantity
20 lacked 'sufficient indicia [of] reliability.'").)

21 Although the complete trial record is not before the Court,
22 Plaintiff's exhibits show that the trial court took its duties in
23 approximating the quantity of drug product that could have been
24 manufactured seriously. (See Dkt. No. 39, Ex. 5 (trial transcript
25

26 ¹See United States v. Kilby, 443 F.3d 1135, 1141 (9th Cir.
27 2006) ("Where none of the drugs has been seized, the district court
28 may approximate the weight of the drugs."); United States v.
Macklin, 927 F.2d 1272, 1281 (2d Cir. 1991) (same); United States
v. Hyde, 977 F.2d 1436, 1440 (11th Cir. 1992) (same).

1 showing court's reasoning as to drug quantity in sentencing
2 Plaintiff's co-defendant and holding that government had not met
3 its burden as to definition of "PCP" or "phencylidine".)
4 Plaintiff does not and apparently cannot allege any constitutional
5 error as to, for example, lack of due process. Moreover, as to the
6 determination of his exact level of his base offense, the Ninth
7 Circuit has already noted that even if his base offense level were
8 reduced somewhat (from 38 to 36) to take into account the lack of
9 purity of the precursors, he would still have been subject to a
10 possible life sentence.² United States v. Brim, 148 F. App'x 619,
11 621 (9th Cir. 2005).

12 To the degree that Plaintiff is arguing that the base offense
13 level could not have been approximated at all without knowing the
14 purity of the precursor, that argument must be considered waived,
15 as he previously argued only for a reduction to a base offense
16 level of 36. Id. In any event, the argument is not compelling.
17 The trial court was required to *approximate* the amount of drug
18 product that could be manufactured. Any approximation requires
19 making some assumptions. In this case, the trial court appears to
20 have made an assumption, based on expert opinion, that the
21 precursor was not so impure as to significantly decrease the
22 quantities of pure PCP that could be manufactured. Nor has
23 Plaintiff presented any evidence that that assumption was wrong.
24 Any amount over a single kilogram of pure PCP would have resulted

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26 ²This is because Plaintiff also qualified for certain
27 enhancements and reductions which resulted in a net 1-point
28 increase to his base offense level. (See R&R at 11.) Thus, if his
initial base offense level had been 36, his final offense level
after adjustments would have been 37.

1 in a base offense level of at least 36, USSG § 2D1.1(c) (1995), and
2 Plaintiff's own expert has put the likely yield at somewhere
3 between 21.7 and 32.5 kg if the precursor were 100% pure. (Civ.
4 Dkt. No. 39, Ex. 8.) Plaintiff has presented no evidence at all
5 that the precursor was, or should have been considered, so impure
6 as to reduce the reasonable approximation of yield to something
7 below a kilogram - that is, to something below one-twentieth of the
8 low-end estimate of Plaintiff's own expert. In short, Plaintiff's
9 new evidence does not seriously call into question the trial
10 court's approximation of the yield *for sentencing purposes*, even if
11 it is admitted that the calculation was not terribly precise.³

12 Nonetheless, in the "Rule 60(b)" motion, Plaintiff argued that
13 he had suffered at least two cognizable constitutional harms.
14 First, he argues that his counsel in the original § 2255 petition
15 was ineffective because counsel did not clarify for the Court that
16 the expert reports showed that the amount of PCP could be produced
17 depended on the purity of the precursor chemical, and purity was
18 never proved at trial. (Civ. Dkt. No. 39 at 36-39.) Plaintiff
19 argues that he gave his attorney a letter from the expert, Dr.

21 ³Indeed, the act of estimating how much of a chemical *would*
22 have been produced - i.e., attempting to speculate about a
23 counterfactual - is inherently fraught with the possibility of
24 significant error. Moreover, clandestine labs run by amateurs will
25 by their nature be inconsistent in their chemistry - sometimes to
26 the point of explosion, as is well-known, but much more often
27 resulting in products of varying quality. It is questionable
28 whether estimating the production capacity of a hypothetical lab
makes sense, as opposed to simply sentencing based on possession of
a given amount of precursor. Nonetheless, when defendants are
charged with possession of the final drug, but no such drug exists,
Congress has commanded the courts to estimate a hypothetical
amount, and this command is not quite so unmoored from due process
as to be unconstitutional - even if it is likely to yield somewhat
inconsistent sentencing from case to case and judge to judge.

1 Williams, clarifying that point, but that the attorney did not
2 present that letter to Court. (Id.) Instead, the magistrate and
3 this Court both relied on the quantities given in Plaintiff's
4 expert's official report. Plaintiff argues that this was in error
5 - either a general error warranting vacating of his sentence, or a
6 "clerical error," in the sense that the Court misconstrued the
7 report's figures. (See generally Cr. Dkt. No. 461.)

8 As a second means of approaching more-or-less the same issue,
9 Plaintiff claims that there was, in essence, a Brady violation in
10 the § 2255 process, because the government did not turn over to him
11 an affidavit from a different expert in his co-defendant's case
12 that would also have clarified the need to assess precursor purity.
13 (Civ. Dkt. No. 39 at 29-30.)

14 Assuming *arguendo* that Plaintiff's motion really was a proper
15 Rule 60(b) motion, the Court had broad equitable discretion to
16 provide relief from its own order, provided Plaintiff showed
17 "extraordinary circumstances" justifying the relief. United States
18 v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982). In this case,
19 however, the Court found that the "new" information Plaintiff has
20 presented would not have changed the outcome of the original
21 petition and did not justify relief.

22 **1. Ineffective Assistance of Counsel**

23 Plaintiff's claim of ineffective assistance of counsel fails
24 for three reasons. First, there is no constitutional right to
25 counsel at a § 2255 proceeding, and therefore there can be no
26 ineffective assistance of counsel claim. Sanchez v. United States,
27 50 F.3d 1448, 1456 (1995). Second, the letter that Plaintiff
28 contends was not presented to the Court was written in 2004, while

1 the Court adopted the magistrate's report and recommendation in
2 2003. (Dkt. No. 31.) Thus, Plaintiff's post-conviction counsel
3 had no opportunity to present the letter while the original § 2255
4 motion was being considered, and thus could not have been
5 ineffective in not doing so. Third, even if the letter had been
6 presented to the magistrate, it would have been at best redundant,
7 because other evidence before the magistrate already made clear
8 that the final yield calculation would be lower if the precursors
9 were not pure. The R&R specifically notes that Dr. Williams'
10 original report "cautioned that because no quantitative analysis
11 had been performed, ingredients that were less than one hundred
12 percent pure would cause the yield to be lower than he calculated."
13 (R&R at 12.) The 2004 "clarifying" letter, which Plaintiff alleges
14 his lawyer should have presented to the magistrate, says much the
15 same thing as the original report:

16 A quantitative analysis was not done on the piperidine or the
17 PCC In my report, I assumed that each was 100% pure.
18 Most precursors in clandestine [drug manufacture] are not pure
19 and thus the expected actual yield would be less than that
20 which I gave in my letter to you.

21 (Civ. Dkt. No. 39, Ex. 8.) While the 2004 letter might have
22 reiterated the point, it would not have meaningfully changed the
23 analysis conducted by the magistrate, who had already taken the
24 purity problem into account.

25 **2. Brady Violation**

26 Rule 60(b)(3) also provides room for relief from a judgment if
27 there was misconduct by an opposing party. Here, however, there
28 has not been misconduct by the government. Plaintiff asserts that

1 the government committed a Brady violation when it did not turn
2 over to him the affidavits and other statements made by Plaintiff's
3 co-defendant's expert witness, Dr. Booker. However, this claim is
4 fatally flawed.

5 A Brady violation occurs when the government *suppresses*
6 exculpatory information. Brady v. Maryland, 373 U.S. 83, 87
7 (1963). This strongly implies that the government in some way
8 controls the information and can hide it from the defendant's view.
9 The government is not obliged to point out the existence of every
10 piece of exculpatory information that exists somewhere in the world
11 - let alone the existence of an expert opinion with which other
12 experts could disagree and did disagree. Thus, the government does
13 not have a duty to inform a defendant that a co-defendant has put
14 on or will put on expert testimony contradicting the government's
15 expert testimony - especially when the defendant has had a fair
16 opportunity to call his own experts, and most especially when the
17 thrust of the co-defendant's expert's opinion has been *placed in*
18 *the public record*. (Dkt. No. 39, Ex. 5 (trial court transcript
19 discussing Dr. Booker's opinion).)

20 **C. Conclusion**

21 Plaintiff's "newly discovered" evidence as to the estimated
22 drug quantity provided no new substantive information, did not show
23 a Brady violation, and did not call into question the Court's or
24 the Ninth Circuit's conclusions on previous rounds of review. No
25 reasonable jurist could disagree with these conclusions.

26 However, Rule 60(b)(6) allows relief for "any . . . reason
27 that justifies" it. During the course of reviewing Plaintiff's
28 case while ruling on these motions, the Court's attention has been

1 drawn to the original sentencing documents. In particular, the
2 Court notes that the Judgment and Commitment Order reads as
3 follows:

4 [I]t is the judgment of the Court that the defendant is hereby
5 committed to the custody of the Bureau of Prisons to be
6 imprisoned for a term of: Life. This term consists of *life*
7 *imprisonment on each of Counts 1 and 4*, and 240 months on
8 Count 3 of the Indictment, all terms to be served
9 concurrently. *If released from imprisonment*, the defendant
10 shall be placed on supervised release for a term of 10 years .
11 . . .

12 (Emphases added.) This statement of the sentence imposed is
13 potentially ambiguous. On the one hand, it seems to impose two
14 life sentences. On the other hand, it contemplates release, which
15 is not possible under a life sentence.⁴

16 Nor does the order simply set conditions of supervised release
17 in the alternative, in case the life sentences are vacated or
18 overturned but the 240-month sentence remains, as can be seen in
19 the next sentence:

20 This term [of supervised release] consists of *10 years on each*
21 *of Counts 1 and 4*, and 3 years on Count 3, all such terms to
22 run concurrently.

23 (Emphasis added.) Counts 1 and 4 are the counts on which Plaintiff
24 received life sentences. Thus, the order clearly contemplates
25 supervised release *as to the supposed life sentences*. This creates
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27 ⁴Parole in the federal system was abolished in 1984. See
28 Pub.L. No. 98-473, Title II, Sec. 218(a)(5), 98 Stat. 2027 (Oct.
12, 1984).

1 an ambiguity on the face of the sentence. Although the judgment
2 and sentences were vacated as to Counts 3 and 4, United States v.
3 Brim, No. 96-50530, *1, *3 (9th Cir. Oct. 29, 1997), the remaining
4 life sentence still suffers this ambiguity. Because the sentence
5 at issue is a life sentence, a reasonable jurist could see the
6 ambiguity on the face of Plaintiff's sentence as requiring relief
7 under Rule 60(b)(6).

8 It is therefore possible that the Court was incorrect in
9 denying Plaintiff's motion, and a COA is warranted.

10 **II. Dkt. No. 483/ Appeal No. 14-55792**

11 Plaintiff has asked to "withdraw" his "pending motion for
12 request of COA." (Cr. Dkt. No. 496.) Plaintiff seems to be under
13 the impression that such a "withdrawal" will expedite his appeal.
14 In fact, the Court is under an order from the Ninth Circuit to
15 consider the COA question, and Plaintiff's appeal will not proceed
16 until the Court renders an answer on that point. (Cr. Dkt. No.
17 495.) Therefore the Court considers the merits of the appeal and
18 hereby denies the COA, because Plaintiff cannot make a substantial
19 showing of a constitutional violation.

20 The order at issue here denied relief requested on three
21 grounds. First, it denied relief under a motion based on two new
22 Supreme Court cases. Relief was denied without prejudice for
23 procedural reasons - a second or successive motion must also be
24 "certified . . . by a panel of the appropriate court of appeals,"
25 28 U.S.C. § 2255(h), and Plaintiff had failed to secure such
26 certification. (Cr. Dkt. No. 483 at 2-3.) Requiring a petitioner
27 to meet minimal procedural requirements is not a constitutional
28 violation. Second, the order denied a "request for corrective

1 judgment." This was, in essence, a motion to reconsider the
2 precursor purity issue discussed above. (Id. at 3.) For the
3 reasons discussed in Part I, no new evidence compels the Court to
4 reconsider the issue. Third, the order denied a request for the
5 appointment of counsel. (Id. at 3-4.) As explained in the order,
6 there is no constitutional right to counsel in habeas corpus
7 proceedings. Therefore, denial of appointment of counsel was not a
8 constitutional violation.

9 The Court finds that no reasonable jurist could disagree with
10 its denial of relief and that a COA is not justified.

11 **III. Conclusion**


12 For the foregoing reasons, the Court DENIES Plaintiff a COA as
13 to Appeal No. 14-55792, but grants it as to Appeal No. 13-56477.

14 IT IS SO ORDERED.

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17 Dated: April 14, 2015


DEAN D. PREGERSON
United States District Judge

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