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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL RAY HARRIS,
Petitioner,

No. MC 11-80261 WHA

v.

RANDY TEWS,
Respondent.

**ORDER DENYING
MOTION TO ALTER OR
AMEND THE SEPTEMBER 4
ORDER AND JUDGMENT**

Under Federal Rules of Civil Procedure 59(e) and 60(b), counsel for petitioner Michael Ray Harris move to alter or amend an order and judgment filed on September 4, 2014 (Dkt. No. 45). Among other things, the September 4 order denied Harris' Section 2241 habeas petition, holding that Harris did not have a right to update his presentence report from 1990.

A short recap is needed. In 1988, the State of California sentenced Harris to twenty-five years to life for conspiracy to commit murder, as well as a consecutive three-year sentence for bodily injury. Thereafter, the United States District Court for the Central District of California issued a writ of habeas corpus ad prosequendum so that Harris could face prosecution on various federal drug charges. A jury later convicted Harris and five co-defendants on those federal charges, with co-defendants Mario Ernesto Villabona-Alvarado and Brian Bennett convicted on a "continuing criminal enterprise" charge involving Harris and others. Then, in 1990, Judge William J. Rea of the Central District of California sentenced Harris to 235 months in custody consecutive to his state prison sentence.

1 Harris has since filed a habeas petition in the instant action, claiming that he was
2 “entitled to correction of inaccuracies, outdated, and irrelevant information contained in his
3 [p]resentence [r]eport” from 1990 (Habeas ¶ 46). That petition did not explain what exactly is
4 “inaccurate” about the PSR. But in his later, supplemental declaration, Harris asserted how the
5 PSR supposedly became inaccurate in light of our court of appeals’ decision, which occurred
6 five years *after* the PSR was created (Harris Decl. ¶ 10) (emphasis added):

7 In my case, the PSR relies heavily on *my ostensible involvement*
8 *in what was then described as a continuing criminal enterprise*
9 *(CCE)*. The PSR contains numerous inferences to the fact that I
10 was involved in a CCE of five or more persons in which my
11 activities was supervised by Villabona[-Alvarado] and Bennett.
12 Likewise the relevant conduct assessment and putative
13 enhancement was based in large part on the fact that this
14 conspiracy was considered, by virtue of the CCE convictions, to
15 be the type of criminal organization so dangerous to the safety of
16 society as to require the most severe penalty.

17 *Some five years after my PSR was prepared, however, the Ninth*
18 *Circuit reversed the CCE conviction, dramatically altering the*
19 *character of the drug activity at issue in my case. The*
20 *information contained in the PSR concerning the CCE[-]related*
21 *issues, however, was never excised from the PSR. The Ninth*
22 *Circuit’s decision reversing the CCE convictions renders many*
23 *of the PSR’s determinations legally unfair and insupportable*
24 *characterizations of the offense such that the information being*
25 *relied upon by the Case Manager now is erroneous.*

18 To be clear, the reversal of the CCE conviction was for Villabona-Alvarado and Bennett,
19 and not Harris himself. *See United States v. Barona*, 56 F.3d 1087, 1096–99 (9th Cir. 1995)
20 (reversing Villabona-Alvarado and Bennett’s CCE conviction due to legally inadequate jury
21 instructions on “continuing criminal enterprise”). Also, there was nothing inaccurate about
22 Harris’ PSR *at the time of his sentencing*. The PSR only purportedly became inaccurate after
23 *Barona* reversed Villabona-Alvarado and Bennett’s CCE conviction, which occurred five years
24 *after* Harris was sentenced in 1990.

25 The September 4 order then denied Harris’ habeas petition to correct his PSR, among
26 other requests for relief. In particular, the September 4 order recognized that “[w]hile
27 inaccuracies in the PSR may be corrected through habeas review, petitioner cites no authority
28 that a PSR must be updated throughout a term of confinement merely because information

1 contained within the report has become stale” (Dkt. No. 45 at 7). Judgment was then entered
2 against Harris on September 4 (Dkt. No. 46).

3 Now, Harris moves under Rules 59(e) and 60(b) to alter or amend the September 4 order
4 and judgment. In his view, the September 4 order failed to mention his argument that the PSR is
5 now inaccurate in light of *Barona*’s decision on Villabona-Alvarado and Bennett’s CCE
6 conviction. Harris thus asks that the undersigned judge amend the September 4 order and
7 judgment “to permit correction of such inaccuracies” in his PSR and to “prevent manifest
8 injustice . . .” (Br. 3).

9 The present motion is **DENIED**. For Rule 59(e), our court of appeals has instructed:

10 There are four grounds upon which a Rule 59(e) motion may be
11 granted: 1) the motion is “necessary to correct manifest errors of
12 law or fact upon which the judgment is based;” 2) the moving
13 party presents “newly discovered or previously unavailable
evidence;” 3) the motion is necessary to “prevent manifest
injustice;” or 4) there is an “intervening change in controlling
law.”

14 *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (internal citations
15 omitted). But none of those four grounds exists here. In determining whether Harris had a right
16 to update his PSR, the September 4 order did consider Harris’ claim that the PSR was inaccurate
17 and outdated (among other arguments), but nevertheless held that there is “no authority for the
18 proposition that a PSR must be updated throughout a term of confinement merely because
19 information contained within the report has become stale” (Dkt. No. 45 at 7). To date, neither
20 side has provided the Court with any such authority that permits a PSR to be amended in light of
21 information that comes *after* sentencing and judgment. At most, Harris relies on *United States v.*
22 *Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007), which addressed a PSR error that reportedly
23 existed *at the time of the sentencing*.

24 Furthermore, even assuming that a district court has the authority to amend the PSR in
25 the way that Harris now seeks, this order declines to do so based on the circumstances here. The
26 first reason concerns the antiquity of the information at issue. At this point, the undersigned
27 judge has no personnel or records available to shed light on this case. Harris’ underlying set of
28 events occurred over twenty years ago in a different district — *i.e.*, the Central District of

1 California, where his PSR and sentencing actually took place (and where any paper records of
2 his case might exist, if they exist at all). Harris’ counsel have not provided the necessary record
3 to show what purported error needs correction, and indeed, it remains unclear whether Harris’
4 PSR contains a true error. There is no argument that the PSR was somehow incorrect when it
5 was created in 1990. The main contention now is that the PSR became outdated after our court
6 of appeals’ decision for Villabona-Alvarado and Bennett, which happened five years after
7 Harris’ sentencing. That leads to the second reason, laches. This motion, if it was to be made at
8 all, should have been made many years earlier.

9 Rule 60(b) also does not aid Harris’ position. In his present motion, Harris suggests that
10 Rule 60(b)(1) applies because of the purported “mistake” in failing to consider his argument as
11 based on *Barona*. But as discussed above, that suggestion is inaccurate. The September 4 order
12 did consider Harris’ arguments as to supposed inaccuracies with his PSR, and still held that
13 Harris had no right to update the PSR (Dkt. No. 45 at 6). Accordingly, to the extent that Harris
14 seeks to excise CCE-related parts from his PSR, this order finds that a motion under Rules 59(e)
15 and 60(b) is unwarranted.

16 Finally, Harris contends that the conclusion of the September 4 order should omit the
17 following two sentences:

18 A certificate of appealability will not be issued. Reasonable
19 jurists would not find ‘the district court’s assessment of the
20 constitutional claims debatable or wrong.’ *Slack v. McDaniel*,
529 U.S. 473, 484 (2000).

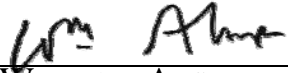
21 Indeed, our court of appeals has held that Section 2253(c)(1) does not require a certificate of
22 appealability before a Section 2241 petition can be heard on appeal. *Forde v. U.S. Parole*
23 *Comm’n*, 114 F.3d 878, 879 (9th Cir. 1997). Nonetheless, in submitting his present motion,
24 Harris has also filed a notice of appeal of the September 4 order, and our court of appeals has
25 since issued a letter indicating that “[a] briefing schedule will not be set *until the court*
26 *determines whether a certificate of appealability should issue*” (Dkt. No. 52) (emphasis added).
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As such, this order declines to alter or amend the conclusion of the September 4 order, and instead reserves for our court of appeals the question of whether a certificate of appealability should issue here. Harris' present motion is therefore **DENIED**.

IT IS SO ORDERED.

Dated: November 10, 2014.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE