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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD CHARLES BUCHANAN,)	Civil No. 10cv423 BTM (NLS)
)	
Petitioner,	)	ORDER DENYING MOTION TO AMEND
v.	)	FINDINGS [Docket No. 79]; GRANTING
	)	LEAVE TO FILE ADDENDUM TO FIRST
MATTHEW CATE, Secretary; and	)	AMENDED PETITION [Docket No. 80];
EDMUND G. BROWN, JR., the Attorney	)	GRANTING MOTION FOR LEAVE TO
General of the State of California,	)	CORRECT TYPOGRAPHICAL ERRORS
	)	[Docket No. 81]; and GRANTING
Respondents.	)	REQUEST FOR SERVICE OF MARDSEN
	)	HEARING TRANSCRIPTS. [Docket No.
_____	)	83.]

I. INTRODUCTION

On February 22, 2010, Petitioner Richard Charles Buchanan ("Petitioner"), a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. [Docket No. 1.] Petitioner is a California prisoner serving a term of forty-five years to life plus ten years who is challenging his convictions for kidnapping for extortion, assault with a semi-automatic firearm, making a criminal threat, being a felon in possession of a firearm, transportation of a controlled substance, possession of a controlled substance for sale, and possession of a controlled substance. (Lodgment 7 at 1-2.)

On December 9, 2010, Petitioner filed the First Amended Petition ("FAP"), the active pleading in this case. [Docket No. 40.] On the same day, Petitioner moved to have exhibits from his original Petition attached to the FAP and that motion was granted on December 14, 2010. [Docket No. 43.] On March 9, 2011, Respondent filed an Answer to the FAP. [Docket No. 51.]

1 On March 24, 2011, Petitioner filed a Motion for Discovery [Docket No. 53.] On or about April
2 28, 2011, Petitioner filed a motion for Judicial Notice [Docket No. 60], a Motion for Sanctions [Docket
3 No. 61], and a Motion to Compel Respondent to Comply with Order [Docket No. 63 hereinafter
4 "Motion to Compel".] On May 9, 2011, Petitioner filed a Second Motion for Judicial Notice. [Docket
5 No. 64.] On May 25, 2011, the Court issued an Order Denying the Motion for Discovery; Granting in
6 Part and Denying in Part Motion for Judicial Notice; Denying Motion for Sanctions; Denying Motion to
7 Compel Respondent to Comply with Order; and Granting Motion for Judicial Notice; and Requiring
8 Supplemental Lodgments. [Docket No. 68, hereinafter "The Order."]

9 On June 17, 2011, Petitioner filed a Motion to Amend Findings. [Docket No. 79.] On June 24,
10 Petitioner filed: 1) a Motion for Advance Leave to File Second Amended Petition [Docket No. 80]; 2)
11 a Motion to Correct Two Typos/Errors [Docket No. 81]; and 3) an Ex Parte Motion re: 6/8/11 Order
12 Requiring Clerk's Office to Serve Petitioner Copy of Marsden Transcripts Be Completed and Missing
13 Pages Provided [Docket No. 83.] The Court will address each motion in turn.

14 **II. MOTION TO AMEND FINDINGS**

15 **A. Appropriate Rules Governing Request**

16 Petitioner filed a "Motion to Amend Findings Pursuant to Fed. R. Civ.P. 52(b), 60(a)(b)(6) in 28
17 U.S.C. § 2253 Habeas Corpus Case." Although not entirely clear, Petitioner appears to ask the court to
18 reconsider the parts of the Order denying the request for an order requiring a supplemental answer and
19 denying request for discovery. Rule 52(b) states: "On a party's motion filed no later than 28 days after
20 the entry of judgment, the court may amend its findings--or make additional findings--and may amend
21 the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59." Fed. R.
22 Civ. P. 52(b). Rule 52 is applicable only after judgment has been entered. *Hensley v. U.S. Dist. Court*
23 *Eastern Dist. of Ca.*, 2008 WL 686816 (E. D. Cal. March 10, 2008); *McNeil v. U.S.* 2006 WL 581081
24 (W.D. Wash. March 08, 2006). As no judgment has been entered in this case, Rule 52 does not apply.

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1 Rule 60(a) provides:

2 The court may correct a clerical mistake or a mistake arising from oversight or omission
3 whenever one is found in a judgment, order, or other part of the record. The court may do
4 so on motion or on its own, with or without notice. But after an appeal has been docketed
in the appellate court and while it is pending, such a mistake may be corrected only with
the appellate court's leave.

5 Fed. R. Civ. P. 60(a). Because Petitioner is not seeking to correct a clerical mistake by the court, Rule
6 60(a) does not apply. Rule 60(b) provides;

7 On motion and just terms, the court may relieve a party or its legal representative from a
8 final judgment, order, or proceeding for the following reasons:

9 (1) mistake, inadvertence, surprise, or excusable neglect;

10 (2) newly discovered evidence that, with reasonable diligence, could not have been
discovered in time to move for a new trial under Rule 59(b);

11 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
12 misconduct by an opposing party;

13 (4) the judgment is void;

14 (5) the judgment has been satisfied, released or discharged; it is based on an earlier
15 judgment that has been reversed or vacated; or applying it prospectively is no longer
equitable; or

16 (6) any other reason that justifies relief.

17 Fed. R. Civ. P. 60(b). Rule 60, by its terms, applies only to "final orders" and does not apply to
18 interlocutory orders. Fed. R. Civ. P. 60(b). The advisory committee's notes make this clear: "The
19 addition of the qualifying word 'final' emphasizes the character of the judgments, orders or proceedings
20 from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the
21 restrictions of the rule, but rather they are left subject to the complete power of the court rendering them
22 to afford such relief from them as justice requires."; *see also Abada v. Charles Schwab & Co., Inc.*, 127
23 F.Supp.2d 1101 (S.D. Cal. 2000). An order is final if it terminates the litigation subject only to the right
24 of appeal. *Corn v. Guam Coral Co.*, 318 F.2s 622, 628-29 (9th Cir. 1963); *see also Corcoran v. Small*,
25 2009 WL 2095986 (C.D. Cal July 14, 2009)(Order denying motion to stay habeas petition not final
26 order under Rule 60); *Sonderfan v. Washoe County*, 2009 WL 901933 (D. Nev. March 25, 2009)(Order
27 dismissing some, but not all, claims in habeas petition not final order). The Order did not resolve all the
28 issues in this case and is not a final order. Accordingly, Rule 60(b) does not apply.

1 The Court maintains an inherent authority to reconsider all interlocutory orders. *Amarel v.*
2 *Connell*, 102 F.3d 1494, 1515 (9th Cir.1996); *Abada v. Charles Schwab & Co., Inc.*, 127 F.Supp.2d
3 1101, 1102 (S.D.Cal. 2000). Accordingly, the Court construes Petitioner's Motion as one for
4 reconsideration.¹ Reconsideration is appropriate when the court "(1) is presented with newly
5 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if
6 there is an intervening change in controlling law." *Campion v. Old Republic Home Protection Co., Inc.*
7 2011 WL 1935967 (S. D. Cal. May 20, 2011), quoting *School Dist. No. 1J, Multnomah County, Or. v.*
8 *AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) (applying standards for post judgment motion for
9 reconsideration under Fed. R. Civ. P. 59(e)). In this case, Petitioner appears to argue that the court
10 committed clear error or that the decision was manifestly unjust.

11 **B. Denial of Request to Compel a Further Answer**

12 Petitioner seeks reconsideration of the Court's denial of the part of the Motion to Compel
13 seeking to require Respondent to address Exhibits attached to the FAP. In particular, Petitioner asserts
14 the following finding was in error: "Accordingly, Petitioner has pointed to no examples where
15 Respondent has failed to address relevant exhibits and the Court declines to Order the Respondent to
16 respond to unidentified exhibits in the FAP." (Order at 7-8.) Petitioner argues he identified Exhibits
17 Four and Five as exhibits which Respondents failed to address in the Answer. [Docket No. 79 at 3-4].
18 In the Motion to Compel, Petitioner stated generally that "Exhibits Three, Four and Five (Reporter's
19 Transcripts (RT) Excerpts, specifically cited, and material to merits of claims) that Respondent appears
20 to have completely ignored referring [sic] to while preparing 'Respondents [sic] Answer to the FAP',
21 Dated March 02, 2011." Petitioner then added: "For example, at Page 9, fn 3, the Respondent claims
22 'Exhibit Six' is not included in FAP." (Motion to Compel at 3-4). The Order found that Respondent had
23 addressed Exhibit Six and that no other exhibits were alleged to have been ignored by Respondent.

24 Petitioner now argues that he specified a failure to respond to Exhibits Four and Five and the
25 Court did not address his concerns. Petitioner is mistaken. As explained in the Order, Petitioner had

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27 ¹Because the Court is construing this motion as a request for reconsideration, and in order to
28 preserve all of his rights to review, Petitioner may file Objections to the Order to the District Court
Judge pursuant to Federal Rule of Civil Procedure 72(a) within 14 days after being served with this
Order.

1 received "piecemeal" a copy of the Reporter's Transcript of his trial from severed co-defendant Rodney
2 Brooks (the "Piecemeal RT"). The pagination and content of Petitioner's Piecemeal RT does not match
3 the Reporter's Transcript lodged by Respondent. Petitioner argued in the Motion to Compel that
4 Respondent improperly relied upon the Reporter's Transcript contained in the Lodgments and asked the
5 Court to require Respondent to acquire a copy of the Piecemeal RT, lodge it with the Court and use only
6 it in relation to this action. Specifically, Petitioner argued on page 4 of the original motion "Respondent
7 should have referred to Exhibits attached and incorporated to the FAP, Itself, not some set of altered RT
8 not incorporated to FAP or connected to it at all." (Motion to Compel at 4.) Petitioner then moves on to
9 Item 3, the request that the Court require everyone to use the Piecemeal RT. The Order rejected this
10 request: "The Court declines to order everyone to use the wrong transcript. Respondent has lodged the
11 correct Reporter's Transcript with this court and served the correct Reporter's Transcript on Petitioner.
12 Petitioner is entitled to no more." [Order at 8.]

13 The Order's finding that Petitioner had pointed to no failure to address relevant exhibits must be
14 read in conjunction with the ruling that Respondent could not be forced to refer to and use the wrong
15 transcript. The Court perceives neither clear error nor manifest injustice from requiring all parties to use
16 the correct Reporters Transcript, as lodged by Respondent. Moreover, Respondent filed an Answer
17 consisting of 21 pages and an additional 18 pages of analysis in the Memorandum of Points and
18 Authorities in Support of the Answer. This Answer satisfies Respondent's duty to Answer the Petition.
19 Finally, there can be no manifest injustice in the Order's denial of a request for a more extensive Answer
20 as the Court will respond to all the claims in the FAP regardless of whether Respondent has availed
21 itself of the opportunity to address each and every exhibit attached to the FAP. Accordingly, the Motion
22 to Reconsider the Order Denying the Request for a Supplemental Answer is DENIED.

23 **C. Request for Reconsideration of Motion for Discovery**

24 As described in the Order, Petitioner is seeking: "discovery related to Mr. Torres, the victim in
25 the kidnaping charge for which Petitioner was convicted: 1) information about the existence of a
26 wiretap on Ernesto Torres; 2) a copy of an up to date "Parolee Detail Record" for Mr. Torres; and 3) a
27 copy of the records of the Parole Agent assigned to Mr. Torres. (Mtn at 1-3.)" [Order at 11.] Discovery
28 is generally not allowed in habeas proceedings. *Bittaker v. Woodford*, 331 F.3d 715., 728 (9th Cir. 2003)

1 "Petitioner must present specific factual allegations that demonstrate that there is good reason to believe
2 that the Petitioner may, through discovery, be able to gather sufficient evidence to entitle him to relief."
3 *Bracy v. Bramley*, 520 U.S. 899, 904, 908-09 (1997).

4 Petitioner argues that the evidence he sought to compel in the Request for Discovery is relevant
5 to various grounds in the FAP. As noted in the Order, Petitioner failed to indicate in his motion for
6 discovery the claims of the FAP to which the sought discovery was relevant. In fact, the only argument
7 in the original motion was that Mr. Torres was a witness for the prosecution and the state should have
8 obtained (and turned over) more information about Mr. Torres. [Motion at 9.] Petitioner also mentions
9 in a footnote that Office McIver's testimony about the vehicle stop that led to the arrest and conviction
10 conflicts with a police dispatch tape. [Mtn at fn, p10.]

11 In the Order, the Court examined Claim 2, the Fourth Amendment claim, and found the
12 discovery sought was not likely to lead to evidence entitling Petitioner to relief because: 1) the Fourth
13 Amendment Claim is not cognizable in federal habeas because Petitioner had a full and fair opportunity
14 to litigate the claim in state court [Order at 12, *citing Ortiz-Sandoval v. Gomez* 81 F.3d 891 (9th Cir.
15 1996)]; 2) The Fourth Amendment Claim is barred by a failure to raise it on direct appeal [Order at 12,
16 *citing In re Dixon* 41 Cal.2d 756 (1953)]; and 3) The traffic stop was supported by the independent
17 evidence from the wiretaps, rendering evidence that the asserted justification was false irrelevant.
18 [Order at 12, *citing Lodgement 27* at 128-132.]

19 The Court also looked at Claim 4, the *Brady* claim. The Court found that this Claim was barred
20 by *Dixon* and there could be no good cause for discovery of a barred claim. Moreover, even if the claim
21 is not barred, Petitioner has shown no reason to believe that the discovery sought would lead to
22 impeachment evidence, no less a likelihood of gathering sufficient evidence to entitle him to relief.

23 Petitioner now asserts for the first time that the discovery sought is relevant to claims 1, 2, 4, 7
24 and 9. A motion for reconsideration, however, is not a second bite at the apple and not a method to raise
25 arguments that could have been raised earlier. *Kona Enters., Inc. v. Estate of Bishop*, 239 F.3d 877, 890
26 (9th Cir. 2000). Nonetheless, in the interests of completeness, the Court will examine the arguments
27 made by Petitioner.

28 Petitioner now claims that the evidence sought about Mr. Torres is relevant to Claim 9, the

1 ineffective assistance of counsel claim.² Petitioner asserts that his counsel's failure to investigate the
2 police's knowledge of the location of Mr. Torres prior to the traffic stop will prove ineffective assistance
3 of counsel. Petitioner further asserts that the evidence would have shown that the police used a pretext
4 for the traffic stop resulting in his arrest and conviction. As described in the Order, the trial court found
5 that the traffic stop was supported by the probable cause from the evidence collected pursuant to the
6 wiretaps. [Order at 3, *citing* Lodgement 27.] Accordingly, evidence that the police used a pretext (the
7 search for a parolee at large) to stop the vehicle instead of revealing the existence of the wiretaps is
8 irrelevant. It is as irrelevant to the ineffective assistance of counsel claim as it was to the Fourth
9 Amendment Claim. Accordingly, there is no reason to believe that discovery of the pretext issue is
10 likely to lead to evidence that would entitle Petitioner to relief.

11 Similarly, the discovery sought is also irrelevant to the Ground 1, the use of perjured testimony,
12 because it was not improper for the police to give a false pretext when stopping the vehicle and not
13 improper for their testimony to fail to match the pretext given. The Court perceives neither clear error
14 nor manifest injustice from the conclusion that the discovery sought is not likely to lead to evidence that
15 would entitle Petitioner to relief. Accordingly, the Motion to Reconsider the Order Denying Discovery
16 in this habeas action is DENIED.

17 **III. MOTION FOR ADVANCE LEAVE TO FILE SECOND AMENDED PETITION**

18 Petitioner seeks leave to file a Second Amended Petition solely for the purpose of correcting the
19 citations to the Piecemeal RT to citations to the RT lodged. [Docket No. 80.] Because Petitioner is not
20 asserting any desire to add either new claims or new support to existing claims, the Court construes this
21 Motion as Leave to file an Addendum to the FAP. Petitioner asserts that his use of the Piecemeal RT
22 was not an intentional affront to the Court. The Court accepts as true Petitioner's assertion that his use
23 of the Piecemeal Transcript was innocent of any wrongdoing and applauds Petitioner's intent to provide
24 accurate citations to the court. Accordingly, the Motion is Granted and Petitioner may file an
25 Addendum to the FAP, for the sole purpose of providing correct citations to the Official RT for any

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27 ² Petitioner argues on page 5 of his motion that the wire tape evidence sought "is mentioned" in
28 Claim 7, the Prosecutorial Misconduct claim. This is not an argument as to the existence of good cause
to believe that the discovery sought will enable Petitioner to gather sufficient evidence to entitle him to relief.

1 citations to the Piecemeal RT in the FAP. Petitioner is specifically instructed not to attempt to add any
2 additional claims or any additional support for existing claims. Petitioner may file the Addendum no
3 later than August 15, 2011.

4 **IV. MOTION TO CORRECT ERRORS**

5 In this motion [Docket No. 81] Petitioner asks the Court to correct two errors in his
6 Memorandum of Points and Authorities in support of his Traverse [Docket No. 77], relating to incorrect
7 numbers written on pages 3 and 8. The Court has no reason to doubt that Petitioner inadvertently wrote
8 the wrong numbers on his Traverse. Accordingly, Petitioner is granted leave to file corrected page
9 numbers 3 and 8 and the Clerk of Court is directed to substitute the corrected pages when filed.

10 **V. REQUEST FOR SERVICE OF COMPLETE MARSDEN TRANSCRIPTS**

11 On June 8, 2011, the Court issued an Order Requiring the Clerk's Office to Serve Petitioner with
12 a Copy of two Marsden Transcripts Lodged by Respondent. [Docket No. 75.] In this Motion [Docket
13 No. 83], Petitioner claims that he did not receive pages 319 and 328-332 of the Reporter's Transcript
14 Volume 5-A, containing the Marsden hearing transcripts. In order to give Petitioner full access to the
15 transcripts, the Motion is Granted and the Clerk's Office is directed to reserve the pages which Petitioner
16 claims he never received.

17 **VI. CONCLUSION**

18 For the foregoing reasons, It Is Hereby Ordered that:

- 19 1. The Motion to Amend Findings is DENIED;
- 20 2. The Motion for Leave to File a Second Amended Petition is construed as a
21 Motion for Leave to File an Addendum; the motion is GRANTED and Petitioner
22 may, no later than **August 15, 2011**, file an Addendum to the First Amended
23 Petition for the sole purpose of correcting citations to the Piecemeal RT to
24 citations to the Official RT;
- 25 3. The Motion to Correct Errors is GRANTED and Petitioner may file corrected
26 pages no later than **August 15, 2011** and the Clerk's Office is Directed to Replace
27 the original pages with the corrected pages when they are filed; and
- 28 4. The Request for Complete Service of the Marsden Transcripts is GRANTED and

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the Clerk's Office is Directed to Serve Petitioner with pages 319 and 328-332 of
the Reporter's Transcript Volume 5-A.

IT IS SO ORDERED.

DATED: July 20, 2011



Hon. Nita L. Stormes
U.S. Magistrate Judge
United States District Court