

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
)	
v.)	Crim. No. 91-83-B
)	
MICHAEL E. MITTENBERG,)	
)	
Defendant)	

***RECOMMENDED DECISION TO DENY DEFENDANT’S MOTION
FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255***

Michael E. Mittenberg moves this Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1994 & Supp. 1997). Mittenberg pleaded guilty to conspiracy to possess marijuana with the intent to distribute it in violation of 21 U.S.C. § 846 (Pamph. 1997), and was sentenced to 235 months’ imprisonment. He contends that his prosecution in the District of Maine was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and that he received ineffective assistance of counsel at various stages of the criminal proceeding in violation of the Sixth Amendment to the United States Constitution.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (citation and internal quotations omitted). Because it finds that Mittenberg’s allegations either are contradicted by the record or are insufficient to justify relief even if

accepted as true, the Court concludes that a hearing is unnecessary and recommends that the motion be dismissed.

I. Background

Mittenberg pleaded guilty on July 7, 1992, to the criminal charge of conspiring to possess marijuana with intent to distribute. The facts giving rise to the plea stemmed from Mittenberg's involvement in a 1989 drug-smuggling operation involving two other principals, Harold Leasure and Fred Trombley, for which Mittenberg was to be paid \$30,000. Mittenberg traveled to Colombia to meet with drug suppliers and to inspect and to arrange for the shipment of some 5,000 pounds of marijuana to Maine. He also met with others in New York City to plan the offense, traveled to the Caribbean to meet the sailing crew for the enterprise, and visited Maine to secure a location at Pretty Marsh on Mount Desert Island for importing the drug and to assist in the distribution of the drug. In essence, Mittenberg supervised the smuggling operation. He subsequently was sentenced by the Court to 235 months' imprisonment on February 8, 1993. A judgment was entered on February 11, 1993, from which there was no direct appeal.

II. Discussion

A. Double jeopardy claim

Mittenberg contends that his prosecution in the District of Maine was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution because he previously was prosecuted in the District of New Jersey for the same offense. He claims that "[t]he Maine offense behavior and the New Jersey [o]ffense behavior involve[d] the same criminal agreement to distribute, and possess with intent to distribute marijuana."

On June 19, 1992, Mittenberg was found guilty by a jury in the United States District Court for the District of New Jersey of conspiring to possess cocaine and marijuana with the intent to distribute it. He was sentenced by the court to 220 months' imprisonment. That conviction resulted from Mittenberg's involvement in a separate smuggling operation of illegal drugs from Colombia into Florida. It is noteworthy that in determining the appropriate sentence for Mittenberg in this District, the Court specifically found that "the offense for which the defendant was convicted in New Jersey is a separate crime from that which is now before the court."

First, it appears that Mittenberg's guilty plea waived his double jeopardy claim. As the United States Supreme Court has stated:

[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

United States v. Broce, 488 U.S. 563, 569 (1989). A careful review of the transcript from the Rule 11 hearing on Mittenberg's motion for a change of plea discloses that his guilty plea was counseled and voluntary, and the defendant does not challenge such a conclusion in his current motion. Moreover, none of the exceptions to the above general rule appear to apply to this case. There is no claim by Mittenberg and there is nothing in the record, for instance, to suggest that the Court did not have the authority to enter the conviction and to impose the sentence. *Id.*

Second, it is clear from the record that the conspiracies at issue were separate. In this Circuit, the relevant standard for examining this claim is as follows:

In determining whether two charged conspiracies that allege violations of the same substantive statute are actually the same offense for double jeopardy purposes, we consider five factors: (a) the time during which the activities occurred; (b) the persons involved; (c) the places involved; (d) whether the same evidence was used to prove the two conspiracies; and (e) whether the same statutory provision was involved in both conspiracies.

United States v. Gomez-Pabon, 911 F.2d 847, 860 (1st Cir. 1990) (citations omitted), *cert. denied*, 498 U.S. 1074 (1991).

Applying these factors to the instant case, it is clear that no viable claim for double jeopardy purposes exists in Mittenberg's motion. The offense for which Mittenberg was convicted in New Jersey concerned activities taking place between April and May of 1991, nearly two years after the Maine conspiracy that is the subject of this motion, which occurred during the spring and summer of 1989. The two cases also involved different conspirators and different locations. Also, a review of the trial record discloses that the government did not make use of the same exact evidence in proving the conspiracies. Indeed, the transcript of the Maine proceedings is noteworthy for the absence of any reference to illegal activities occurring in New Jersey. Finally, although the same statutory provision, 21 U.S.C. § 846, governed the charges in both conspiracies, that fact is not dispositive of the issue. Merely because the two cases involved Mittenberg and the same criminal statute does not, in and of itself, necessarily implicate the prohibition double jeopardy. Rather, the two criminal conspiracies clearly were "sequential and separate," *see United States v. Hart*, 933 F.2d 80, 85 (1st Cir. 1991), and, thus, do not make out a viable claim based on the constitutional prohibition against double jeopardy. Accordingly, the Court recommends that this claim be dismissed without an evidentiary hearing.

B. Ineffective assistance of counsel claim

Mittenberg also contends that he received ineffective assistance of counsel at certain stages of the proceeding in violation of the Sixth Amendment to the United States Constitution. Specifically, Mittenberg alleges that his attorney at the plea and sentencing stages rendered ineffective assistance by: (1) failing to file a motion to dismiss the indictment on the theory that the Double Jeopardy Clause barred Mittenberg's prosecution in Maine due to the prosecution in New Jersey; (2) failing to object to the use of multiple separate sentences in computing the sentencing guideline range; and (3) failing to request a competency examination and a possible downward departure from the sentencing guidelines due to Mittenberg's "diminished capacity" based on his claim that he suffered from post-traumatic stress disorder as a result of his prior military service.

An ineffective assistance of counsel claim is reviewed under the two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that his counsel's performance was deficient. *Id.* at 687. The petitioner also must show that, but for his counsel's deficient performance, the outcome of the trial or proceeding would have been different. *Id.* A failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* Furthermore, a presumption of truthfulness attaches to the statements made by a defendant at a Rule 11 hearing on a guilty plea. *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984) (defendant must present at time of section 2255 motion credible, valid reasons why departure from his earlier contradictory statements is now justified) (citations omitted).

The Court concludes that any claim by the defendant of ineffective assistance of counsel fails in this case because he has not demonstrated that he was incompetent to enter the guilty plea or that he would not have done so but for his counsel's errors. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (where defendant pleads guilty, showing of prejudice requires that defendant would not have entered guilty plea but for the errors of his counsel). Despite his contentions to the contrary, Mittenberg has failed to demonstrate any deficiency of performance on the part of his attorney. His contentions that his attorney should have filed a motion to dismiss the indictment "on the grounds that the criminal agreement prosecuted and punished in New Jersey was the same illegal agreement prosecuted and punished in Maine," or that his counsel "should have objected to [the] use of the guidelines for multiple separate offenses," are unavailing. As discussed above, the Court finds that the two conspiracies were separate and distinct; consequently, Mittenberg's attorney was not required to argue such untenable positions based on the Double Jeopardy Clause. *Barrett v. United States*, 965 F.2d 1184, 1193 & n.18 (1st Cir. 1992) (counsel under no obligation to make arguments that are not "plausible options"). Finally, although Mittenberg now claims that his attorney should have sought a competency examination for him prior to his rendering a guilty plea, the record is void of any evidence that he was, at the time, incompetent to plead guilty or to understand the nature or ramifications of the sentencing proceeding. To the contrary, a review of the transcript from the Rule 11 hearing discloses that Mittenberg clearly understood the nature of the proceedings and the consequences of his plea. Moreover, the evidence available to the Court at the time in the form of the pre-sentence investigative report revealed a finding that the defendant, a high school graduate of average intelligence, appreciated the circumstances of his situation.

There is, then, nothing in the record to suggest that Mittenberg did not knowingly and voluntarily plead guilty to the charge or that he was anything other than competent to do so. Because his claim to ineffective assistance of counsel fails to demonstrate any deficiency in his counsel's performance, the Court need not consider whether any prejudice occurred (although Mittenberg's motion is striking in its lack of any claim to prejudice). The claim may be dismissed without an evidentiary hearing.

III. Conclusion

For the foregoing reasons, the Court recommends that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated this 12th day of August, 1997.