

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 93-29-B</b>
	)	
<b>FREDERICK ALAN PIERCE,</b>	)	
	)	
<b>Defendant</b>	)	

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

Frederick Alan Pierce moves this Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A jury convicted Pierce for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and for using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1). The Court sentenced Pierce to 210 months in prison on the conspiracy charge and 60 months in prison on the firearms charge. Pierce claims that (1) he was denied effective assistance of counsel at various stages before, during, and after the trial; (2) the Court’s instruction on the firearms charge was in error; (3) the prosecution failed to disclose evidence favorable to Pierce’s defense; (4) the Court lacked jurisdiction; and (5) he was not mentally competent to stand trial. For reasons delineated below, the Court recommends that Pierce’s section 2255 motion be denied.

**I. Background**

Pierce and a friend, David Maddox, drove to Lawrence, Massachusetts from Maine on June 28, 1993 to purchase four ounces of cocaine. After dropping Maddox off at a fastfood restaurant in Lawrence, Pierce met with Paul Abraham, who served as Pierce’s connection to the

supplier. In fact, Abraham had earlier informed drug enforcement agents of the deal and when the dealer did not arrive at the meeting point the deal fell through. Pierce dropped Abraham off, picked Maddox up and headed back to Maine. Police arrested Pierce and Maddox on Interstate 95 in New Hampshire. The arresting officers discovered and seized \$3,333.50 from Pierce. The officers also discovered drug paraphernalia and a loaded gun in the car.

A grand jury indicted Pierce on one count of conspiracy to possess cocaine and on a second count for carrying a firearm during and in relation to a drug trafficking crime. On December 10, 1993 a jury convicted Pierce on both counts. The Court later imposed a 210-month sentence on the conspiracy count and a 60-month sentence on the firearms count. Pierce challenged his convictions on several grounds. *See United States v. Pierce*, 60 F.3d 886 (1<sup>st</sup> Cir. 1995). The Supreme Court denied certiorari on July 1, 1996. *See United States v. Pierce*, 116 S.Ct. 2580 (1996).

Pierce filed a section 2255 handwritten motion with the Court on December 19, 1994. On December 21, 1994, the Court dismissed the motion pursuant to Rule 2 of the Rules Governing Section 2255 Motions because Pierce failed to “set forth in legible fashion the factual basis upon which he seeks relief. . . .” (Court Order at 1). On April 25, 1997, Pierce once again filed a section 2255 motion and the Court again dismissed the motion pursuant to Rule 2 on July 14, 1997. The Court stated that Pierce “has not set forth a ground for relief sufficiently clear to require the Government to answer the Motion to Vacate, Set Aside or Correct Sentence.” (Court Order at 1.) Before the Court is Pierce’s section 2255 motion filed on January 26, 1998, and the Government’s Response to the motion.

### *A. Statute of limitations*

The Government argues that under the Antiterrorism and Effective Death Penalty Act (AEDPA) Pierce is statutorily barred from filing his section 2255 motion. Under the AEDPA, Congress amended section 2255 to read:

A 1-year limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such government action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Pierce's conviction became final on July 1, 1996, the day the Supreme Court denied certiorari in this case. Although Pierce filed the present motion on January 26, 1998, clearly outside the July 1, 1997 deadline, he earlier filed a previous section 2255 motion before the Court on April 25, 1997, within one year of July 1, 1996. The Court dismissed the April 25<sup>th</sup> motion, without addressing its merits, because it could not understand the claims Pierce attempted to assert in the motion.

Although the doctrine of equitable tolling is rarely used, the Court recommends its application in this case. A statute of limitations should be tolled in the “rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.” *United*

*States v. Midgley*, 1998 WL 191778 (3<sup>rd</sup> Cir. April 23, 1998) (quoting *Alvarez-Machain v. United States*, 96 F.3d 1246, 1251 (9<sup>th</sup> Cir. 1996)) The only reason the Government can argue that Pierce's motion is untimely is because this Court returned Pierce's previous timely motion so that Pierce could clarify his claims. Sound legal principals do not rest on inviting a Petitioner to rewrite his motion and then when he does so, refusing to address the merits of the motion. In the interests of justice the Court recommends that the statute of limitations be considered tolled from the time Pierce filed his April 25<sup>th</sup> motion thereby making his present motion timely filed.

***B. Second or Successive Petition and Abuse of the Writ***

The Government argues that the Court should dismiss Pierce's motion under the abuse of the writ doctrine. Before the AEDPA, Courts often reviewed section 2255 motions to determine if the claims could have been addressed in an earlier 2255 motion. Under the AEDPA, Congress "elaborated" on the abuse of the writ doctrine by amending section 2255. See *Denton v. Norris*, 104 F.3d 166, 167 (8<sup>th</sup> Cir. 1997). Section 2255 now reads:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain —

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously available.

The First Circuit has followed the lead of other circuits and applied the rule that if the original petition did not produce adjudication on the merits, the later petition will not be considered a "second or successive" petition. *Pratt v. United States*, 129 F.3d 54, 59 (1<sup>st</sup> Cir. 1997); See also, *In re Gasery*, 116 F.3d 1051, 1052 (5<sup>th</sup> Cir. 1997); *Cameron v. Irvin*, 98 F. 3d

44, 46 (2<sup>nd</sup> Cir. 1996). The Court dismissed Pierce's previous section 2255 motions without addressing the merits of his claims. Accordingly, the Court finds that Pierce's present motion is not a "successive" motion requiring certification from the court of appeals.

***C. District Court's instruction***

Pierce claims that the Court's instruction to the jury on the firearms charge regarding the phrase "using or carrying" under Section 924(c)(1) was erroneous. The Court instructed the jury that, "the phrase used or carried means having a firearm or firearms available to assist or aid in the conspiring to possess cocaine with an intent to distribute. . . The Government need not show that the defendant actually displayed the weapon." (T. 437-438). The Supreme Court later held that in order for a defendant to be convicted under the "use" prong of the statute, the prosecution must show that the defendant "actively employed the firearm during and in relation to the predicate crime." *Bailey v. United States*, 516 U.S. 137, 143 (1995).

The Government concedes that the Court's instruction, in light of *Bailey*, was erroneous, but argues that the Court should review the instruction under the "plain error" standard. The Court agrees. In this Circuit, when the defendant did not object to the instruction at trial, the Court must not only determine whether there was plain error, but also whether "affirmance of the error would result in a 'miscarriage of justice' that would jeopardize public confidence in the integrity of the justice system." *United States v. Ramirez-Ferrer*, 82 F.3d 1149, 1151 (1<sup>st</sup> Cir. 1997). This standard requires that the conviction be overturned only if the Court has substantial doubt about the certainty of the defendant's guilt. *Id.*

After reviewing the evidence presented at trial, the Court is satisfied that Pierce "actively employed" the gun as required under *Bailey*. Pierce picked up Abraham in his car and drove off

to meet the supplier. Abraham testified that Pierce said that he “was not going to let anything go wrong with the deal.” (T. 228) Pierce then asked Abraham to open up the glove compartment, where Abraham saw a gun. Pierce instructed Abraham to hand him the gun and Pierce kept it next to him while they waited for the cocaine supplier to arrive. By placing the gun next to him while waiting for the supplier to arrive Pierce “actively employed” the gun during and in relation to the crime. Based on the facts above, the Court finds that a jury would have found that Pierce “used” the gun under the *Bailey* decision. Accordingly, the Court is satisfied that upholding Pierce’s conviction on the firearms charge would not be a “miscarriage of justice”.

#### ***D. Ineffective Assistance of Counsel***

Pierce claims that his trial counsel provided him ineffective assistance of counsel because he failed: to conduct a pretrial investigation; to raise an entrapment defense during trial; to interview two impeachment witnesses; and to prepare for trial. Pierce also asserts that his sentencing and appellate counsel provided him ineffective assistance of counsel because he failed to argue that Pierce’s career offender predicate crimes were more than ten years old during sentencing proceedings and because he failed to challenge Pierce’s indictment on appeal.

##### ***a. The Standard***

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Pierce must show the Court that counsel’s performance was deficient. *Id.* at 687. Pierce must also show that, but for counsel’s deficient performance, the outcome of the trial would have been different. *Id.* The Court need not analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel’s

performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

### ***1. Pre-trial investigation***

Pierce alleges that, prior to trial, counsel failed to interview two witnesses that would have impeached government witnesses and exculpated Pierce from any wrong doing. However, as the government properly points out, Pierce does not identify the witnesses or describe the information those witnesses would offer. Pierce's general allegation that counsel failed to conduct pre-trial investigation similarly lacks substance. Pierce does not allege, other than interviewing two unidentified witnesses, how counsel's lack of preparation for trial affected the outcome of the trial. Accordingly the Court is satisfied that counsel's conduct before the trial did not prejudice the outcome of the trial.

### ***2. Counsel's alleged failure to call certain witnesses at trial***

Pierce claims that counsel failed to call "certain crucial witnesses" at trial. The only witnesses Pierce identifies are his daughter and his brother. Pierce alleges that both witnesses would have supported his assertion that he went to Massachusetts to purchase clothing material, not cocaine. Even assuming that counsel should have called both witnesses, the Court is satisfied that their testimony would not have changed the outcome of the trial. As Pierce concedes, the witnesses would not have offered new evidence that the jury did not hear. Instead the witnesses would have reiterated evidence already in the trial record. Accordingly, the Court is satisfied that

the absence of those witnesses's testimony did not affect the outcome of the case.

### ***3. Entrapment Defense and Counsel's Advice to Enter a Guilty Plea***

Pierce claims that counsel was ineffective by failing to raise an entrapment defense at trial. For counsel to raise the entrapment defense would mean conceding that Pierce went to Massachusetts to purchase drugs. Counsel reasonably could have concluded that to raise an entrapment defense would have undermined Pierce's repeated assertions that he was in Massachusetts purchasing spandex material, not drugs. When examining trial counsel's conduct the Court will not evaluate such conduct using hindsight and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 487. The Court is satisfied that counsel's choice not to raise the entrapment defense was entirely appropriate conduct that fell within the range of reasonable professional assistance.

Pierce also argues that counsel gave him bad advice by telling Pierce to accept a guilty plea. Even assuming that counsel's advice was wrong, Pierce has not alleged any facts that demonstrate how counsel's advice prejudiced the outcome of his trial. Accordingly, the Court is satisfied that Pierce's claim must fail for failing to meet the prejudice prong of the *Strickland* test.

### ***4. Motions to Withdraw***

Pierce next asserts that counsel's motions to withdraw as his counsel were untimely and ultimately prejudiced the trial. On the day before jury selection counsel filed a motion to withdraw as counsel in which Pierce joined. The next day the Court held a hearing in which counsel explained that he filed the motion because he and Pierce had a personality conflict. The

Court denied counsel's motion stating that "the conflict that exists between the defendant and his counsel is not so great that it results in a total lack of communication preventing an adequate defense as set forth in *United States v. Allen*, the First Circuit case that deals with this issue."

(H1.19-20)

On December 6, 1993, two days before the trial, counsel again filed a motion to withdraw and again Pierce joined in the motion. The next day the Court held a hearing. At the hearing counsel stated that Pierce ignored his advice about the case and that Pierce believed that counsel was working with the Government by providing them information about the case. Again the court denied the motion.

Even assuming that the motions filed by counsel were untimely, trial counsel's actions did not prejudice Pierce. Nothing in the record indicates that counsel was unprepared to defend Pierce. In fact, the record indicates that counsel provided Pierce with the best defense possible. Having failed to demonstrate that counsel's motions to withdraw prejudiced him during the trial, the Court recommends that Pierce's claim be denied.

### ***5. Sentencing Proceeding***

Pierce argues that his sentencing and appellate counsel failed to argue that his career offender predicate crimes were more than ten years old. However, the sentencing guidelines require that if a sentence exceeds one year and one month, the crime is considered for career offender purposes if the sentence was within fifteen years, not ten years. U.S. Sentencing Guidelines Manual §4A1.2(e) and §4B1.2 comment (n.3) (1997). Both of Pierce's previous crimes occurred within fifteen years of his conviction in 1993. Therefore, counsel had no cause to raise the issue. Accordingly, the Court recommends against conducting an evidentiary hearing

on this matter.

### **6. Grand Jury Bias**

Pierce also asserts that counsel should have challenged the indictment on appeal because Pierce's uncle allegedly sat on the grand jury. However, counsel only can raise those issues that are preserved for appeal. Pierce's trial counsel initially raised the issue then withdrew it. Counsel likely concluded Pierce waived the issue by withdrawing the claim.

Even if counsel should have raised the issue Pierce has not shown that he was prejudiced. For Pierce to overturn his indictment, he must offer "substantial proof" of bias. *United States v. Miller*, 105 F.3d 55, 555 (9<sup>th</sup> Cir. 1997). Pierce has not met that burden. Pierce offers an affidavit from his brother Rodney Pierce. In the affidavit Pierce's brother states that a second cousin told him that she had spoken with Vaughn Pierce and that Vaughn Pierce told her that he sat on the grand jury that indicted Pierce. Pierce's brother also states that his cousin told him that there has always been bad blood between Vaughn Pierce and the Petitioner.

Even assuming that the information in the affidavit was admissible at a hearing, a sole secondhand statement by Pierce's brother does meet the "substantial proof" standard.<sup>1</sup> Accordingly, the Court recommends against holding an evidentiary hearing on this issue.

### **E. Other Claims**

Pierce claims that the Court lacked jurisdiction. However federal law clearly gives this court jurisdiction because the offenses began in this jurisdiction. *See* 18 U.S.C. §3237 (1994). Pierce also briefly alleges that the Government withheld evidence in this case, that his civil rights

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<sup>1</sup> For evidence to be offered at an evidentiary hearing the evidence must be admissible. *Barrett v. U.S.*, 965 F.2d 1184 (1<sup>st</sup> Cir. 1992). The affidavit offered by Rodney Pierce is clearly hearsay information and would not be admissible at a hearing. *See* Fed. R. Evid. 801.

were violated, and that he lacked mental competency to stand trial. A court may dismiss a section 2255 motion 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 (1<sup>st</sup> Cir. 1990) (per curium) (citations and internal quotations omitted). Because it finds that Pierce’s allegations are conclusions rather than statements of facts, the Court concludes that a hearing is unnecessary on those claims and recommends that the claims be dismissed without an evidentiary hearing.

### ***Conclusion***

The Court recommends that Pierce’s motion be DISMISSED 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.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on May 6, 1998.