

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Criminal 95-1-B</b>
	)	
<b>DAVID A. LANE, III</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON PETITIONER’S MOTION TO  
VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO TITLE  
28 U.S.C. § 2255**

Petitioner, David A. Lane, moves the Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The United States District Court for the District of Maine, Judge Morton Brody, imposed a sentence of eighty-seven months after Petitioner pled guilty to conspiracy to possess marijuana with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Now, Petitioner contends that his plea was improperly induced and not knowingly made and that he was deprived of effective assistance of counsel.

A Court must dismiss a § 2255 motion without conducting an evidentiary hearing if accepting the petitioner’s allegations as true, the petitioner is still not entitled to relief, or if the allegations are “contradicted by the record, inherently incredible, or conclusions rather than statements of fact.” *Dzuirgot v. Luther*, 897

F.2d 1222, 1225 (1<sup>st</sup> Cir. 1990) (quoting *United States v. Mosquera*, 845 F.2d 8, 11 (1<sup>st</sup> Cir. 1988)). After reviewing the record, the Court is satisfied that Petitioner's allegations do not warrant an evidentiary hearing. Accordingly, the Court recommends that Petitioner's motion be DENIED.

## **I. Background**

On October 28, 1996, Petitioner entered a guilty plea to conspiracy to possess marijuana with the intent to distribute. Petitioner's guilty plea was made pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Under *Alford*, a defendant can maintain his innocence but plead guilty when he recognizes that the evidence supports his conviction. The court imposed an eighty-seven month prison sentence, a \$100 felony assessment and three-year term of supervised release. On Petitioner's direct appeal, the First Circuit Court of Appeals affirmed his conviction. Petitioner then filed the motion now under consideration on December 7, 1998.<sup>1</sup>

## **II. Discussion**

### *A. Adequacy of the factual allegations in Petitioner's Memorandum*

Attached to Petitioner's § 2255 motion is a unsworn memorandum in

---

<sup>1</sup> The Government has conceded that since the mandate by the First Circuit Court of Appeals was issued on January 2, 1998, Petitioner's motion was made within the one year statute of limitations.

support of the motion. The First Circuit has made clear that, “A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. Facts alluded to in an unsworn memorandum will not suffice.” *United States v. LaBonte*, 70 F.3d 1396, 1413 (1<sup>st</sup> Cir. 1995), *rev’d on other grounds*, 520 U.S. 751 (1997). Although Petitioner’s motion is properly verified, his unsworn memorandum containing the factual assertions to support his motion is not. However, as explained below, even if the Petitioner properly verified the factual allegations contained in the memorandum his motion would still be denied.

*B. Ground One - Denial of Due Process*

Petitioner claims that his guilty plea was unlawfully induced and made without his understanding the consequences of the plea. Specifically, Petitioner claims counsel indicated to him that because he maintained his innocence he would be granted a liberal sentence. Petitioner also alleges that counsel stated that unless the Petitioner pled guilty, counsel would not continue to represent him in this matter. Under the Due Process Clause of the Fifth Amendment a guilty plea must be made voluntarily and knowingly. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Here, Petitioner’s claim that he pled guilty “involuntarily” because of representations made by counsel that he would receive a “liberal sentence”

pertains not to adequacy of the proceeding but to the effectiveness of counsel. *See, Hill v. Lockart*, 472 U.S. 52, 56 (1985) ( Applying ineffective assistance analysis to the petitioner’s claim that he was induced to plead guilty based on advice from counsel). Accordingly, the Court will address that claim below.

Petitioner’s other claim that counsel coerced him into pleading guilty thereby depriving him of the chance to testify at trial by threatening to withdraw from the matter is best determined by looking at the Rule 11 proceeding itself. As the First Circuit stated, the “strictures of Rule 11 . . . are calculated to insure the voluntary and intelligent character of the plea.” *United States v. Parra-Ibanez*, 936 F.2d 588, 593-94 (1<sup>st</sup> Cir. 1991). Absence of coercion is one of the concerns the Rule 11 proceeding should explore. *United States v. Allard*, 926 F.2d 1237, 1244-45 (1<sup>st</sup> Cir. 1991). At the change of plea hearing the following exchanges occurred:

THE COURT: Are you satisfied that Mr. Lane has personally analyzed the reasons that have been put forth and is satisfied that the acceptance of the plea agreement is in the best interest exclusive of the interest of any other person?

[DEFENSE COUNSEL]: Yes.

THE COURT: And are you satisfied that, as of today, he has made this decision to tender his guilty plea in a knowing and intelligent and understanding way?

[DEFENSE COUNSEL]: I believe all of that, Your Honor.

THE COURT: Are you satisfied that this decision is free from any

effect or influence from any emotional or psychological difficulties?

[DEFENSE COUNSEL]: Yes.

THE COURT: Are you, Mr. Lane, satisfied of all this in your own mind?

THE DEFENDANT: Yes.

(Tr. at p.8)

...

THE COURT: Now, I take it you've had an adequate opportunity to discuss the charges set forth in Count One of this indictment with [defense counsel]?

THE DEFENDANT: Yes, sir, I have.

THE COURT: And he has explained to you the elements and nature of the offense charged and the penalties which may be imposed upon conviction for that offense?

THE DEFENDANT: Yes, sir, he has.

THE COURT: Are you satisfied with his advice and his representation in that respect?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any promises or assurances to you of any kind in an effort to induce you to plead guilty or has anyone attempted to force you to plead guilty in this case?

THE DEFENDANT: No, sir.

(Tr. at p.9)

...

THE COURT: . . . Has anyone threatened you, Mr. Lane, or in any way forced you to enter a plea of guilty to this charge?

THE DEFENDANT: Not yet.

THE COURT: I'm sorry?

THE DEFENDANT: No, sir.

(Tr. at p.16)

The transcript from the change of plea hearing clearly demonstrates that the Court inquired into whether Petitioner was entering his guilty plea under coercion of any

type. As the First Circuit noted on Petitioner's direct appeal, "appellant's current claims of coercion are contradicted by his statements at the change of plea hearing in the record before us." *United States v. Lane*, No. 97-1182, (1<sup>st</sup> Cir. 1997).

Petitioner has not offered any additional information to cast doubt on the veracity of his statements at the hearing. Accordingly, Petitioner is not entitled to relief on this ground.

*C. Ground Two - Ineffective Assistance of Counsel*

Petitioner next argues that he was denied effective assistance of counsel. To support this ground, Petitioner lists a multitude of claims hoping that one hits the constitutional mark. He claims that counsel failed to: conduct a pretrial investigation; make any effort to find witnesses on Petitioner's behalf; challenge perjured testimony; investigate whether the Government conducted an improper search; and prepare a defense. In addition, Petitioner also claims that counsel withdrew a motion for speedy trial against his wishes.

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, Petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. Petitioner must also show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no

requirement that the Court 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.*

The Supreme Court later applied this same analysis to challenges to guilty pleas based on ineffective assistance of counsel. *Lockart*, 474 U.S. at 56-57 (1985). Under the principles laid down in *Lockart*, a court must examine whether counsel's performance was deficient and whether a reasonable probability exists that but for counsel's errors, the petitioner would not have pled guilty. *Id.*

*i. Counsel's sentencing promise*

Petitioner alleges that counsel inaccurately advised him that he would receive a lighter sentence if he entered into a guilty plea. Here, two points are worth mentioning. First, the record clearly demonstrates that at several times during the plea and sentencing the court through a variety of questions asked

whether Petitioner was entering a guilty plea on the basis of any promises or assurances. At every instance Petitioner indicated that he was pleading guilty to the charge voluntarily. Second, even if this Court disregarded the veracity of every spoken word by Petitioner at the hearing and accepted Petitioner's present statements as true, an inaccurate prediction by counsel regarding the sentence Petitioner may serve is not enough to sustain this claim. *See Knight v. United States*, 37 F.3d 769, 774 (1<sup>st</sup> Cir. 1994) (“[A]n inaccurate prediction about sentencing will generally not alone be sufficient to sustain a claim of ineffective assistance of counsel.”) Accordingly, Petitioner is not entitled to relief on this ground.

*ii. Failure to conduct a pre-trial investigation*

Next, Petitioner alleges that counsel rendered ineffective assistance by failing to conduct a pre-trial investigation. Petitioner claims that counsel never spent enough time on the matter to properly investigate the charges made against him. Specifically, Petitioner asserts that counsel “failed to investigate the background that led to the Search Warrants, statements of witnesses, transcripts of wiretapped conversations between other defendants and Petitioner served on Petitioner during the pretrial period. And to discover whether any drug tests were performed and, if so, the results thereof.” (Petitioner's memorandum at 7).

Further, Petitioner maintains that counsel failed to challenge perjured testimony offered against Petitioner.

There is no question that an ineffective assistance claim may be supported by counsel's failure to investigate. *Strickland*, at 690. However, the amount of time spent on a claim does not necessarily indicate that counsel provided ineffective assistance of counsel. *United States v. Raineri*, 42 F.3d 36, 44 (1<sup>st</sup> Cir. 1994). In *Raineri*, the court stated that although the amount of time spent on a matter may be relevant, it cannot support an ineffective assistance claim by itself without the petitioner providing additional information delineating how counsel spending additional time on the matter would have ultimately changed *the plea agreement*. *Id.* (italics added).

At the hearing the Government recited the evidence it gathered against the Petitioner, much of which Petitioner now challenges. The court specifically asked Petitioner whether he challenged the Government's representation of the evidence and Petitioner stated that he did not. (Tr. 13-15). In light of Petitioner's statement at the hearing that he did not challenge the Government's presentation of the evidence, the Court fails to see how counsel spending additional time on the issue *would have changed the plea* he entered at the hearing. Accordingly, Petitioner's

claim must be denied.<sup>2</sup>

*iii. Counsel's alleged failure to challenge search of Petitioner's home*

Petitioner alleges that counsel rendered him ineffective assistance by failing to challenge whether the Government conducted an illegal search. Specifically, he claims that counsel failed to investigate whether “there were any illegalities in the way the information from the witnesses or the issuance of the search warrant was elicited, to determine whether or not that information could be used at trial” (Petitioner’s memorandum at 8). Petitioner’s general assertions that counsel failed to investigate whether “any illegalities” occurred in obtaining the search warrant lack the specificity needed to support this claim. *See Therrien v. Vose*, 782 F.2d 1, 3 (1<sup>st</sup> Cir. 1986) (without specific allegation of errors ineffective assistance of counsel claim fails.)

Further, as explained above, Petitioner’s own statement from the hearing that he did not challenge the Government’s representation of the evidence against him suggests any challenge regarding the sufficiency of evidence or the way it was

---

<sup>2</sup> Petitioner also appears to claim that counsel focused on pursuing a double jeopardy motion on Petitioner’s behalf against Petitioner’s direction. As stated above, under an ineffective assistance of counsel claim, Petitioner must allege that but for counsel’s error he would not have pled guilty. Here, Petitioner fails to allege how counsel’s decision to explore the double jeopardy motion led to Petitioner’s guilty plea.

gathered would have been futile. (Tr. 15). Instead, counsel merely chose to pursue other pretrial motions that had more merit. In fact, at the hearing, the court commended the counsel on his performance for leaving no stone unturned in bringing evidentiary motions before the court. (Tr. 23). This Court will not second-guess counsel's sound strategic decision. *United States v. Argencourt*, 78 F.3d 14, 16 (1<sup>st</sup> Cir. 1996). Accordingly, Petitioner's claim must be denied.

*iv. Withdrawal of speedy trial motion*

Petitioner next claims that counsel withdrew his motion for a speedy trial without his consent. However, as the Government properly points out, once Petitioner entered a knowing and voluntary plea, he waived all nonjurisdictional defects. *United States v. Coffin*, 76 F.3d 494, 496 (2<sup>nd</sup> Cir. 1996). A speedy trial motion is considered a non-jurisdictional claim. *Lebowitz v. United States*, 877 F.2d 207, 209 (2<sup>nd</sup> Cir. 1989). Further, even if Petitioner properly preserved his right to appeal the motion, he fails to explain how the withdrawal of the motion induced his guilty plea. For the reasons set forth above, this claim must be denied.

**Conclusion**

For the reasons set forth above, the Court recommends that the motion 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 on March 3, 2000.