UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DENNIS ROWE,	:	
	:	
Petitioner,	:	
	:	
V.	:	CASE NO. 3:99CR266(RNC)
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

RULING AND ORDER

Petitioner moves pursuant to 28 U.S.C. § 2255 for relief from his sentence of 70 months for conspiracy to distribute, and possession with intent to distribute, marijuana. He alleges that his counsel rendered ineffective assistance at the sentencing hearing because they refused to permit him to make a statement demonstrating acceptance of responsibility, which could have led to a two-level reduction in his offense level pursuant to U.S.S.G. § 3E1.1. The government contends that the motion should be dismissed without a hearing on the ground that petitioner cannot possibly make the showing required by Strickland v. Washington, 466 U.S. 668 (1984). I agree.

I. Facts

After a jury trial, petitioner was convicted of conspiracy to distribute 1000 kilograms or more of marijuana and possession of marijuana with intent to distribute. He promptly retained counsel to

represent him on appeal but continued to be represented in connection with sentencing by the same lawyers who had represented him at trial. Before sentence could be imposed, it was necessary to conduct somewhat lengthy hearings to determine the quantity of marijuana for which petitioner should be held accountable. Petitioner did not testify at the hearings but he did tell the Probation Office in a post-trial interview that he had been involved in a couple of 20-pound deals. See Presentence Report ¶ 280. Ultimately, the quantity involved in the charged conspiracy was found to be less than 50 kilograms, and the relevant conduct quantity was found to be more than 100 but less than 400 kilograms. Based on these findings, petitioner received a guideline sentence of 70 months, consisting of a sentence of 60 months on the conspiracy count, and a consecutive sentence of 10 months on the substantive count.

Before sentence was imposed, petitioner argued through counsel that he should receive a two-level reduction for acceptance of responsibility on the ground that, prior to trial, he had offered to plead guilty to a conspiracy offense involving less than 100 kilograms of marijuana.[1] The government opposed any reduction, partly on the basis of petitioner's post-trial statements to the

[1] The government had insisted that petitioner plead guilty to a conspiracy involving at least 100 kilograms, which he was unwilling to do because of the mandatory minimum sentence of 5 years. See 21 U.S.C. § 960(b)(2)(G).

Probation Office, which were inconsistent with the true extent of his involvement in dealing marijuana as determined by the court. I informed petitioner that he was not automatically precluded from seeking a reduction for acceptance of responsibility, but that to have any chance of getting
a reduction he would have to accept responsibility before sentence was imposed. I also stated that even if he made a clean breast of it, his request for a reduction might well be denied. After a recess, petitioner's counsel reported that, in view of petitioner's decision to pursue an appeal, they would "leave it as it [was]." Tr. of Sentencing Hearing, Vol. III, page 49.

Petitioner appealed his conviction on three grounds. He contended that (1) a mistrial should have been declared after a juror reported an out-of-court encounter with a stranger who appeared to be associated with petitioner; (2) translated transcripts of wiretapped conversations should not have been admitted; and (3) the evidence was insufficient to support the verdict.[2] No issue of ineffective assistance of counsel was raised. The conviction was affirmed. See United States v. Richards, 48 Fed. Appx. 353 (2d Cir. 2002).

II. Discussion

A motion under § 2255 may be dismissed without an evidentiary hearing if "the motion and the files and records of the case

[2] The insufficiency argument was subsequently withdrawn.

conclusively show that a petitioner is entitled to no relief." 28 U.S.C. § 2255; Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974). To obtain relief in this case, petitioner must show that (1) his lawyers' performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the deficiency, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 687-88, 694. Petitioner cannot make either showing. Accordingly, an evidentiary hearing is unnecessary.

Petitioner cannot overcome the "strong presumption" that his lawyers' performance was "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Even assuming his lawyers advised him to remain silent at the sentencing hearing against his better judgment, their advice was objectively reasonable in the circumstances. Petitioner had retained counsel to challenge his conviction on appeal. A reasonable lawyer could believe that for petitioner to truthfully admit his involvement in selling more than 100 kilograms of marijuana, which he had previously denied, would prejudice his ability to obtain a reversal of his conviction. At a minimum, it would make it difficult for him to show that a trial error seriously affected the fairness, integrity or public reputation of judicial proceedings. At the same time, a reasonable lawyer could conclude that even if petitioner truthfully

admitted the full extent of his marijuana sales, getting credit for acceptance of responsibility at that late stage in the proceedings over the government's vigorous objection was extremely unlikely, particularly in view of U.S.S.G. § 3E1.1, Application Note 2, which requires that post-trial determinations of acceptance of responsibility be based "primarily upon pre-trial statements and conduct." Balancing these considerations, a reasonable lawyer could conclude that petitioner should remain silent.

For much the same reason, petitioner cannot show that but for his lawyers' advice, he probably would have gotten credit for acceptance of responsibility. Under Application Note 2, a defendant can get credit for acceptance of responsibility after trial only in "rare situations." Here, petitioner would have had to point to pretrial words and conduct reflecting a willingness on his part to truthfully admit, and not falsely deny, his involvement in selling more than 100 kilograms of marijuana. As the government correctly emphasizes, that was not petitioner's position prior to trial. Clearly, then, this was not one of those "rare situations" where a reduction for acceptance could be granted after the defendant had tried the case and lost.[3]

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[3] Petitioner contends that his appellate lawyer was ineffective because he failed to carry out petitioner's instruction to include the above claim for ineffective assistance of counsel in his direct appeal. Here, too, petitioner cannot satisfy either prong (continued...)

III. Conclusion

For the foregoing reasons, petitioner's motion to set aside his sentence is hereby denied. The Clerk may close the file.

So ordered.

Dated at Hartford, Connecticut this 12th day of May 2004.

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Robert N. Chatigny
United States District Judge

[3](...continued)
of Strickland. Ineffective assistance claims are generally not addressed on direct appeal, see Billy-Eko v. United States, 8 F.3d 111, 114 (2d Cir. 1993), and petitioner could not have demonstrated to the appeals court, any more than he can now, that the claim he wanted his appellate counsel to pursue has merit.