UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MARK S. HIDER,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Docket No. 99-167-P-C***
	)	
SHERIFF, CUMBERLAND COUNTY,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Cumberland County) on a charge of trafficking in marijuana. The petition asserts seven grounds for relief. I recommend that the petition be dismissed.

I. Background

The defendant was first convicted on this charge in 1993. Docket Sheet, *State of Maine v. Mark Hider*, Docket No. CR 92-1836, Maine Superior Court (Cumberland County), at 3. On his appeal from that conviction, the Maine Law Court recited the relevant facts as follows:

> In September 1992, a Portland police officer, responding to a report of a purse snatching at the Portland Jetport, was following the trail of the thief with his police tracking dog, which was also trained in narcotics identification. Coming through underbrush, the officer and his dog unknowingly entered the property located at 70 Cobb Avenue from the rear. The dog reacted in a manner indicating narcotics and the officer discovered that they were standing in a patch of forty-four marijuana plants. The marijuana later obtained from the plants weighed more than six and a half

> pounds. The patch was situated about seventy feet from the back of a single family residence and equidistant from another building, a studio in which Hider operated a martial arts school.
>
> Based on the officer's affidavit, a search warrant for all of the structures on the property was obtained and executed. In doing so, the police failed to "knock and announce" their presence, and forced open the studio's door. From the studio, police seized a container with what appeared to be marijuana residue and seized what appeared to be drug paraphernalia. From the residence, which belonged to Hider's former wife, police seized a quantity of marijuana from her bedroom and from their teenage son's bedroom.

State v. Hider ("Hider I"), 649 A.2d 14, 15 (Me. 1994). The Law Court rejected Hider's appeal based, *inter alia*, on claims of unlawful entry by the officer who discovered the marijuana, the failure of the police to knock and announce before entering to execute the search warrant, and insufficiency of the evidence. *Id*. at 15-16. It vacated the judgment based on an improper jury instruction. *Id*. at 16.

The defendant was re-indicted, tried and convicted again on the same charge. *State v. Hider* ("*Hider II*"), 715 A.2d 942, 944 & n. 2 (Me. 1998). After his conviction in the first trial, the state petitioned for civil forfeiture of "multiple guns and weapons that police had seized from Hider during the execution of the search warrant," and the resulting forfeiture was upheld on appeal. *Id*. at 945, n.5. In his appeal from the second conviction, the defendant again challenged the search warrant on the basis of the allegedly unlawful entry by the officer who discovered the marijuana, the forced entry into the studio, and the sufficiency of the evidence; he added assertions that his right to a speedy trial had been violated, that he was subjected to double jeopardy by virtue of the forfeiture and his conviction, that evidence seized inside the studio was improperly admitted, and that the trial court erroneously refused to allow him to cross-examine state witnesses concerning his then-pending legal dispute with the police department. *Id*. at 945-49. The Law Court denied the

appeal. *Id*. at 949.

The defendant was sentenced to incarceration in the Cumberland County Jail for a term of nine months, all but 90 days suspended, and placed on probation for a term of two years. Docket Sheet, *State of Maine v. Mark Hider,* Docket No. CR 95-43, Maine Superior Court (Cumberland County), at [3, reverse]. He began to serve this sentence on May 12, 1999. *Id*. at 4 [reverse].[1]

II. Discussion

A. Validity of the Warrant

The first issue set forth in the petition is a challenge to the validity of the search warrant, based on the asserted illegality of the discovering officer's entry onto the property at 70 Cobb Avenue. Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 2) at 5. This issue was raised in both of the defendant's appeals to the

[1] The defendant has also filed in this court a motion seeking bail during the pendency of this petition. Motion for Enlargement on Bail in Federal Habeas Corpus Proceeding and Motion for Appointment of Counsel ("Motion for Enlargement") (Docket No. 3) at 1-2. By the time the period set by this court's Local Rules for the filing of a reply memorandum by the defendant to the opposition filed by the attorney general to his petition had passed, the Cumberland County Jail reported to the court that the defendant was no longer incarcerated there. Accordingly, his request for bail is moot. His petition must nonetheless be considered by this court, because his term of probation has not elapsed, *e.g., Johnson v. State*, 974 F. Supp. 185, 187 (E.D.N.Y. 1997), and the suspended period of his sentence is still in effect, *E.g., Wright v. Bailey*, 381 F. Supp. 924, 925 (W.D.Va. 1974), *aff'd*, 544 F.2d 737 (4th Cir. 1976). Either of those conditions satisfies the requirement of 28 U.S.C. § 2254 that the petitioner be in custody when relief is sought under the statute. For the same reasons discussed *infra* upon which my recommendation that the petition be dismissed is based, I deny the motion for appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2)(B); *Abdullah v. Norris*; 18 F.3d 571, 573 (8th Cir. 1994) (discussing factors to be considered in evaluating motion for appointment of counsel on § 2254 petition); *United States v. Mala*, 7 F.3d 1058, 1064 (1st Cir. 1993) (discussing application of section 3006A to § 2255 actions for relief from sentence in federal cases).

Maine Law Court. This court may not grant relief under section 2254 "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court adjudication of that claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In addition, any factual determinations made by a state court are presumed to be correct; the defendant must rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e).

Here, the defendant has made no effort to provide clear and convincing evidence that any factual determination necessary to the denial of his motion to suppress the evidence on this basis was incorrect. He merely alleges, in conclusory fashion, that the evidence was obtained "as the result of an illegal initial entry and false swearing," Petition at 5; that the initial entry that led to the discovery of the marijuana plants "was the result of a trespass," Motion for Enlargement at 2; and that the prosecution presented no evidence "in support of the legality of that initial entry" at the suppression hearing, *id*. Hearing on a petition for a writ of habeas corpus need not be granted on the basis of "vague, conclusory, or palpably incredible" allegations. *Machibroda v. United States*, 368 U.S. 487, 495 (1962) (§ 2255 claim). *See Rogers v. Carver*, 833 F.2d 379, 385 nn. 1 & 2 (1st Cir. 1987) (conclusory statements insufficient in § 2254 petition).

To the extent that this claim is not based on a factual determination by the state court, the state court's ruling does not involve an unreasonable application of clearly established Supreme Court precedent. The Law Court found in the defendant's appeal from the second conviction that

he was collaterally estopped to relitigate the motion to suppress on this basis, as it had been "vigorously litigated" during the first trial. *Hider II*, 715 A.2d at 945-46. In the defendant's appeal from the first conviction on this issue, the Law Court held as follows:

> The search warrant was not based on illegally obtained evidence. Assuming without deciding that the marijuana patch was located within the curtilage of a dwelling, we find no wrongdoing on the part of the police officer whose inadvertent discovery was the result of a lawful entry. *See United States v. Calandra*, 414 U.S. 338, 347 . . . (1974) (purpose of exclusionary rule is to deter police misconduct). *See also State v. Townsend*, 571 A.2d 1206, 1207 (Me. 1990) (no Fourth Amendment violation where police entered property on legitimate police business).

Hider I, 649 A.2d at 15.[2] The respondent concedes that there is no Supreme Court precedent that specifically addresses the issue raised by the petitioner. State's Response to Petition for Writ of Habeas Corpus, etc. ("State's Response") (Docket No. 9) at 14-15.[3] The inquiry therefore is whether the state court's use of existing law involved an unreasonable application of Supreme Court

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[2] If the defendant's reference to the state's failure to produce evidence at the hearing on his suppression motion is a reference to the motion he submitted in the second prosecution, the court at that hearing properly relied on the transcript of the hearing on the identical motion filed in the first prosecution. *Hider II*, 715 A.2d at 945. It is the decision made at that proceeding that governed the resolution of the issue in the second proceeding and it is that decision that is reviewable here. However, the defendant has not provided a transcript of the suppression hearing in the first proceeding nor has he sought the production of such a transcript by motion. Accordingly, his assertion concerning what went on in that hearing, if indeed he means to refer to that hearing, is without the necessary support in the record to entitle him to a hearing in this court on this allegation that can only be construed to assert an unreasonable determination of the facts by the state court.

[3] The state's memorandum of law in opposition to the petition was served only on Peter Evans, Esq., the attorney who represented the defendant in the state-court proceedings. Certificate of Service, State's Response at 28. The defendant is not represented by Attorney Evans in this proceeding. If the fact that he appears *pro se* were not obvious from the petition, it is certainly obvious from the fact that he has moved for appointment of counsel in this proceeding, as part of a pleading to which the state responds in its memorandum. Motion for Enlargement at 5; Motion for Appointment of Counsel (Docket No. 8). This error by counsel for the state, while not excusable, is harmless in this case because the defendant did receive a copy of the state's opposition. Statement of Marie Cross (Docket No. 10).

precedent. *O'Brien v. Dubois*, 145 F.3d 16, 24 (1st Cir. 1998).

The Law Court's decision, affirming that of the trial court, did not involve an unreasonable application of Supreme Court Fourth Amendment precedent. In *Katz v. United States*, 389 U.S. 347 (1967), the Court stated that "the Fourth Amendment protects people, not places," *id*. at 351, and that as a result "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure," *id*. at 353. In *Oliver v. United States*, 466 U.S. 170 (1984), the Court noted that the Fourth Amendment protects legitimate expectations of privacy and that "[t]he test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity," but rather "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment," *id*. at 182-83. "The law of trespass," upon which the defendant relies here, Motion for Enlargement at 2, "forbids intrusions upon land that the Fourth Amendment would not proscribe." *Id.* at 183. When a defendant asserts that a search has unlawfully invaded the curtilage of his home,[4] the "centrally relevant consideration" is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987).

The only evidence concerning the officer's discovery of the marijuana plants in the record before the court at this time that could also have been available to the court hearing the motion to suppress is the affidavit of the officer submitted in support of the application for the search warrant. Affidavit of Barry C. Bartlett ("Bartlett Aff."), dated September 4, 1992, included in Superior Court Clerk's Record, *State of Maine v. Mark Hider*, Docket No. CR 92-1836, Maine Superior Court

[4] In this regard, it is interesting to note that the defendant does not contend that he was a resident of the house on the property. *See Hider II*, 715 A.2d at 944 n.3.

(Cumberland County). The officer states under oath that his tracking dog, with whom he was tracking a purse-snatching suspect, pulled him into a wooded area, then into a small field, and then into a small garden area. Bartlett Aff. ¶ III. He then "recognized" that he was "in the middle of a large patch of 6' to 8' Marijuana plants" at the rear of a single family residence and barn, about 70 feet directly behind the residence and between a small vegetable garden and an area of lawn. *Id*. This evidence does not and cannot establish that any of the Supreme Court case law discussed above was unreasonably applied when the state court denied the motion to suppress. *See also* W. LaFave, *Search & Seizure* § 2.3(f) (3d ed. 1996) at 509 ("[L]egitimate police business may occasionally take officers to parts of the premises not ordinarily used by visitors.").

For the foregoing reasons, the defendant is not entitled to relief based on the entry of the police officer onto the property where the marijuana was growing.

B. Manner of Entry

The defendant next contends that the entry of officers executing the search warrant into the karate studio without knocking and announcing themselves was constitutionally unreasonable, requiring the suppression of evidence seized in the studio (but presumably not the suppression of the marijuana itself, which was not inside the studio). Petition at 5; Motion for Enlargement at 2-3. While the Law Court had addressed this issue in the defendant's first appeal, *Hider I*, 649 A.2d at 15, it took up the issue again on the second appeal due to the intervening decision of the Supreme Court in *Wilson v. Arkansas*, 514 U.S. 927 (1995), which it applied retroactively, *Hider II*, 715 A.2d at 946.

In *Wilson*, the Supreme Court held that "the common law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry." 514 U.S. at 930. However, it is

clear that the *Wilson* decision applies by its terms only to entry into homes and dwellings. *Id*. at 931, 934, 936. As the Law Court pointed out, *Hider II*, 715 A.2d at 947, the entry at issue here was into the karate studio, a place of business, not a dwelling.[5] *See United States v. Francis*, 646 F.2d 251, 258 (6th Cir. 1981) ("[t]he lesser privacy interest in a business implies that the exigencies required to justify an unannounced, forceful entry there are correspondingly less"); *United States v. Westmoreland*, 982 F.Supp. 376, 382 (S.D.W.Va. 1997) (no need to knock and announce when premises to be searched, a doctor's waiting room, was open to the public). The decision of the trial court and the Law Court that the entry into the karate studio in execution of the search warrant without knocking and announcing was not unreasonable under the Fourth Amendment does not involve an unreasonable application of Supreme Court precedent. *See Richards v. Wisconsin*, 520 U.S. 385, 394-96 (1997) (reasonableness of officers' decision to enter residence without knocking or announcing must be evaluated as of the time they entered).

The defendant is not entitled to section 2254 relief on this basis.

C. Speedy Trial

The defendant next argues that his "state and federal constitutional rights and court ordered right to a speedy trial" were denied by the second prosecution "and perjury." Petition at 5. It is unclear at best how a defendant's right to a speedy trial may be violated by perjury, but in any event the lack of any further explication of this claim makes it unnecessary for the court to consider it. *See*

[5] The defendant's submissions suggest that he also intends to challenge the search of the house at 70 Cobb Avenue where his ex-wife and son resided. Motion for Enlargement at 2 ("entry into the residence at 70 Cobb Avenue was effected without a knock"). The defendant does not have standing to challenge the search of a house in which he has shown no reasonable expectation of privacy. *United States v. Aguirre*, 839 F.2d 854, 859 (1st Cir. 1988). Accordingly, any evidence seized from the house could be used against the defendant.

Rogers, 833 F.2d at 385 nn. 1 & 2. Issues of state statutory and constitutional law are not cognizable int his proceeding. 28 U.S.C. § 2254(a). The following discussion addresses only the federal constitutional claim.

The defendant bases this claim on the "forty-seven (47) months [that] had elapsed between Defendant's arrest and second trial, and nearly twenty-two (22) months [that] had elapsed between the second trial and the vacation of the first conviction." Motion for Enlargement at 3. When he raised this issue at his second trial and on appeal from that conviction, the defendant "conceded that analysis of the delay issue begins not at the arrest in 1992, but on October 27, 1994 when the first conviction was vacated." *Hider II*, 715 A.2d at 947 n. 11. He may not now repudiate that concession and argue that the time runs from his initial arrest.[6] The state contends, without citation to authority, that the period should only run from the date of the reindictment of the defendant following the vacation of his first conviction to the date of the second trial, a period of nineteen months. State's Response at 18. I disagree. The state's interpretation would allow a prosecutor to delay indefinitely re-trial of a defendant whose conviction had been overturned on appeal merely by choosing to reindict him many months after the vacation of the conviction. The twenty-two month period is the appropriate starting point for this claim.

The state also contends that no more than eight months of the delay was attributable to the state. State's Response at 20. To this must be added the three months between the Law Court's

[6] Even in the absence of this concession, the defendant could not successfully maintain a claim that the period from his initial arrest to the second trial is the appropriate period for evaluation of a speedy trial claim. The time elapsing in the appeal from the first conviction, initiated by the defendant, is beyond the control of the state and could otherwise, if more than a few months, alone prevent re-trial under the defendant's scenario. There was no trial to be anticipated until the Law Court's action on the appeal became final. Accordingly, that is the appropriate date from which the relevant period runs.

decision and the reindictment of the defendant, which was an act solely within the state's discretion and control. In addressing the defendant's speedy trial claim, the Law Court found that both the state and the defendant contributed to the delay. *Hider II*, 715 A.2d at 948 & n.12 ("[m]uch of the delay was caused by Hider's motion for grand jury transcripts").

The right to a speedy trial is guaranteed by the Sixth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515 (1972). The Supreme Court has identified four factors which, among others, should be assessed in determining whether a defendant has been deprived of his right to a speedy trial: length of the delay, the reason for the delay, the defendant's assertion of his right, and any prejudice to the defendant resulting from the delay. *Id*. at 530. In the First Circuit, a delay of nineteen months may be assumed to be presumptively prejudicial, *United States v. Munoz-Amado*, ___ F.3d ___, 1999 WL 428613 (1st Cir. Jun. 30, 1999), at *3, thereby triggering review of the second, third and fourth factors, *Barker*, 407 U.S. at 530-31.

The fourth factor, prejudice to the defendant caused by the delay,

> should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. [The Supreme] Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. at 532. The Law Court considered these factors in *Hider II*, 715 A.2d at 948. In this proceeding, the defendant has offered nothing to suggest any possibility that his defense in the second trial was impaired by the delay, and nothing to suggest that he suffered anxiety and concern during the period after his conviction was overturned. He was not incarcerated during this period. He has shown no prejudice resulting from the delay.

With respect to the second factor, which is the "focal inquiry" for a Sixth Amendment speedy trial claim, *United States v. Santiago-Becerril*, 130 F.3d 11, 22 (1st Cir. 1997), *quoting United States v. Sears, Roebuck & Co*., 877 F.2d 734, 739 (9th Cir. 1989), the record reflects that a delay from February 21, 1995 to February 27, 1996 resulted from the defendant's request for grand jury transcripts. Docket Sheet, *State of Maine v. Mark Hider*, Docket No. CR 95-43, Maine Superior Court (Cumberland County), at 1-2 [reverse]. These twelve months of the delay are attributable to the defendant. *See Munoz-Amado*, 1999 WL 428613 at *4 (delay caused by motions filed by defendant excused); *Santiago-Becerril*, 130 F.3d at 22 (same). Of the remaining ten months, an unexplained delay between the denial of the defendant's March 28, 1996 motion for "discharge" due to alleged violation of his right to a speedy trial and the scheduling of the second trial, despite the court's order on April 9, 1996 that the case be set for trial on the "ne[x]t trial list," Docket Sheet, *State of Maine v. Mark Hider*, Docket No. CR 95-43, Maine Superior Court (Cumberland County), at 2[reverse]- [3], is troubling, but the four-month delay involved is not sufficient to violate the Sixth Amendment. At best, the defendant can only show that he and the state contributed equally to the delay in reaching the second trial.

With respect to the third factor, "[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right," *Barker*, 407 U.S. at 531-32, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial," *id*. at 532. Here, the defendant first raised the speedy trial issue on March 28, 1996, slightly less than five months before the second trial began. Docket Sheet, *State of Maine v. Mark Hider*, Docket No. CR 95-43, Maine Superior Court (Cumberland County), at 2[reverse]-[3]. At that point, seventeen months of the disputed period had

already passed. In *United States v. Salimonu*, ___ F.3d ___, 1997 WL 450332 (1st Cir. Jul. 7, 1999), the defendant first moved for dismissal of the indictment due to violation of his Sixth Amendment right to a speedy trial more than two years after his first appearance in court. *Id*. at *1. His trial began eleven months later. The First Circuit held that "[w]hile the two-year delay in proceeding with Salimonu's trial was inordinately lengthy, Salimonu never made an attempt promptly to assert this speedy trial right or to expedite his trial." *Id*. at *4. The same is true in the instant case.

Of the four *Barker* factors, therefore, only the first can be applied in the defendant's favor. He suggests no other factors that would demonstrate a violation of his Sixth Amendment right to a speedy trial. Accordingly, he is not entitled to section 2254 relief on this basis.

D. Double Jeopardy

The defendant contends that the civil forfeiture of his guns and weapons after his first conviction renders his second conviction a violation of the double jeopardy clause of the Fifth Amendment. Petition at 6. As the Law Court noted, *Hider II*, 715 A.2d at 948, *United States v. Ursery*, 518 U.S. 267 (1996), is dispositive of this claim. In that case, the Supreme Court held that civil forfeitures are a remedial civil sanction and do not constitute punishment under the double jeopardy clause. *Ursery*, 518 U.S. at 278, 292. The defendant is not entitled to section 2254 relief on this basis.

E. Limits on Cross-Examination

The defendant contends that the trial court erroneously refused to allow his counsel to question prosecution witnesses "about bias against the defendant." Petition at 6. This is apparently an attempt to invoke the Sixth Amendment right to confront witnesses. The petition does not provide even the most basic information about this claim, *e.g.*, which witnesses were involved, what

gave rise to the alleged bias, and how the alleged bias affected the witnesses' testimony. For that reason alone, his claim for section 2254 relief on this basis must be dismissed. *See Rogers*, 833 F.2d at 385 nn. 1 & 2.

Even if that were not the case, this claim, as set forth by the Law Court in *Hider II*, 715 A.2d at 948-49, does not implicate the defendant's Sixth Amendment rights. The cross-examination at issue, going to the decision to charge the defendant rather than to the testimony of the witnesses itself, *id*. at 949, was of marginal relevance at best. Trial courts retain "wide latitude" under the confrontation clause "to impose reasonable limits on . . . cross-examination based on concerns about . . . interrogation that is . . . only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *United States v. Anderson*, 139 F.3d 291, 303 (1st Cir. 1998) (no constitutional error in failure to permit cross-examination on issue of marginal relevance). So far as appears from the record in this court, the trial court did not apply this Supreme Court precedent unreasonably to the defendant. He is not entitled to section 2254 relief on this basis.

F. Admission of Certain Evidence

The defendant next contends that admission of evidence found in the studio[7] had an "unfair prejudicial effect" and that this evidence "became impermissible character evidence." Petition at 6. As an initial matter, the state contends that this claim was asserted in state court only on the basis of a violation of the Maine Rules of Evidence, and therefore cannot be presented to this court as a claim based on federal constitutional error, with the result that it must be dismissed.[8] State's

[7] According to the defendant, this evidence consisted of trace amounts of marijuana, a broken postal scale, empty rolling paper containers and a purported "drug record." Petition at 6.

[8] The state does not seek dismissal of the entire petition due to the inclusion of a claim for (continued...)

Response at 12-13. Neither the Law Court's decision, *Hider II*, 715 A.2d at 949, nor the defendant's briefs to the Law Court, Brief of Defendant/Appellant, *State of Maine v. Mark Hider*, Docket No. CUM-96-591, at 42-46; Reply Brief of Defendant/Appellant, *State of Maine v. Mark Hider*, Docket No. CUM-96-951, at 14, mention any federal claim in this regard.

State-law claims are not cognizable under section 2254. If the defendant means to assert a federal claim in this context, he must first have brought it to the attention of the state court. *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Failure to exhaust state-court remedies in this regard means that the defendant may not proceed in this court on this claim. *Adelson v. DiPaola*, 131 F.3d 259, 263-64 (1st Cir. 1997). If the defendant means to assert a state-law basis for this claim, he may not proceed. If he means to assert a federal basis, he has failed to exhaust his state-court remedies and may not proceed. In either case, he is not entitled to section 2254 relief on this claim.

G. Sufficiency of the Evidence

The defendant's final argument includes two separate assertions: "false statements to jury by police" and insufficiency of the evidence to support his conviction. Petition at 6. The defendant offers nothing further in explanation or support of the allegation of false statements, and that claim must therefore fail, for the reasons already discussed in connection with his other conclusory claims for relief. *See Rogers*, 833 F.2d at 385 nn. 1 & 2.

Established Supreme Court precedent holds that when a defendant challenges the sufficiency of the evidence underlying his state-court conviction in a section 2254 proceeding, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any*

[8](...continued)
which the defendant has not exhausted all state remedies. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982).

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).[9] My review of the transcript of the defendant's second trial leads me to conclude that application of the *Jackson* standard requires denial of section 2254 relief on this ground. Viewing the evidence in the light most favorable to the state, a rational jury could have found the defendant guilty of trafficking in marijuana, a violation of 17-A M.R.S.A. § 1103. The state courts' decisions on this issue were not contrary to *Jackson*. The analysis need go no further; the defendant is not entitled to section 2254 relief on this basis.

IV. Conclusion

For the foregoing reasons, I deny the defendant's motions for appointment of counsel; declare the defendant's motion for bail or bond to be **MOOT**; and recommend that the petition for a writ of habeas corpus 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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

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[9] While the First Circuit has expressed some doubt about the continued vitality of *Jackson*, *see Stewart v. Coalter*, 48 F.3d 610, 613-14 (1st Cir. 1995), it has continued to apply *Jackson* in direct appeals, *e.g.*, *Salimonu*, 1999 WL 450331 at *8. It has also referred to *Jackson* as "sufficiently shap[ing] the contours of an appropriate analysis of a claim of constitutional error to merit review of a state court's decision under section 2254(d)(1)'s 'contrary to' prong." *O'Brien*, 145 F.3d at 25 & n. 6.

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

Dated this 21st day of July, 1999.

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David M. Cohen
United States Magistrate Judge