

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 3, 2018
Decided October 10, 2018

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1395

JOHN LOHMEIER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District
Court for the Northern District of Illinois,
Eastern Division.

No. 17 C 3200

Samuel Der-Yeghiayan,
Judge.

O R D E R

John Lohmeier has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

United States of America)
v.) Case No: 17 C 3200
John Lohmeier) Judge Samuel Der-Yeghiayan

ORDER

John Lohmeier's (Lohmeier) motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Section 2255) [1] is denied. Should Lohmeier decide to appeal this court's ruling, this court finds that a certificate of appealability would not be warranted, and is denied. Civil case terminated.

STATEMENT

This matter is before the court on John Lohmeier's (Lohmeier) motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Section 2255). On January 13, 2015, Lohmeier pled guilty to Counts One, Two, and Three of the Superseding Information. On May 31, 2016, Lohmeier was sentenced to a total term of 180 months imprisonment. On April 27, 2017, Lohmeier filed the instant Section 2255 motion.

Section 2255 provides that “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255. The relief sought in a Section 2255 Motion “is an extraordinary remedy because it asks the district court essentially to reopen the criminal process to a person who already has had an opportunity for full process.” *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). Rule 4(b) of the *Rules Governing Section 2255 Proceedings for the United States District Courts* provides that “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.” *Id.*

In the instant motion, Lohmeier argues that his trial counsel was ineffective in regard to advising Lohmeier at his change of plea hearing (Claim 1), that the court erred by allegedly inadequately advising Lohmeier at his change of plea hearing (Claim 2), and that his counsel, the prosecutor, and the court conspired against him (Claim 3).

I. Claim 1

Lohmeier argues that his trial counsel was ineffective when advising Lohmeier at his change of plea hearing. To show ineffective assistance of counsel, a petitioner must establish

that: "(1) his attorney's performance fell below an objective standard of reasonableness, and (2) he suffered prejudice as a result." *Wyatt v. United States*, 574 F.3d 455, 457-58 (7th Cir. 2009)(citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Lohmeier contends that at his change of plea hearing on January 13, 2015, he was asked by the court to waive any defense or claim upon the statute of limitations or upon the timeliness with which the charges in the superseding information were brought. Lohmeier now contends that his counsel did not properly explain what rights he was waiving. Lohmeier contends that there must be an evidentiary hearing to examine the performance of his counsel. Lohmeier argues that his charges are all time barred and he believes that "[j]ustice requires no less" than that he be "released from federal custody." (DE 1: 10). There is no indication that Lohmeier was improperly advised by his counsel. In addition, even if Lohmeier could somehow establish that his counsel's performance fell outside the boundaries of effective representation, the transcript from the change of plea hearing on its face shows that any potential prejudice to Lohmeier from his counsel's performance was removed by the court's admonitions. Lohmeier was clearly advised of the rights he was waiving, and he indicated he understood, and knowingly and voluntarily waived such rights.

II. Claim 2

Lohmeier argues in Claim 2 that the court erred in advising him regarding the waiver of the statute of limitations defense. Lohmeier argues that the court should have asked Lohmeier specifically if his counsel had advised him that the charges he was pleading guilty to were time barred. However, again, the advisals by the court rendered any such advice by counsel largely irrelevant. The court specifically informed Lohmeier that he had the "right to have the charges in the superseding information brought against [him] within the period established by the statute of limitations" and that he was waiving any statute of limitations defense. (Plea Hr. 20). Lohmeier indicated that he understood. (Plea Hr. 20). If Lohmeier truly did not understand based on his counsel's alleged prior advice, Lohmeier could have spoken up at that point, but he did not do so. Instead, he agreed to plead guilty in accordance with the plea agreement and received the benefits owed to him pursuant to that plea of guilty and plea agreement. Lohmeier has thus not shown that the court erred in advising him at his change of plea hearing.

III. Claim 3

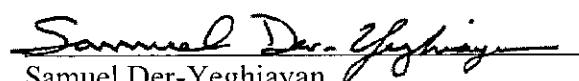
Lohmeier argues in Claim 3 that his counsel, the prosecutor, and the court conspired against him at his change of plea hearing. He accuses the prosecutor of prosecutorial misconduct and demands that the court recuse itself from this case. As explained above, Lohmeier knowingly and voluntarily waived certain rights at his change of plea hearing in exchange for certain concessions from the Government and benefits at sentencing. Lohmeier fails to present any facts regarding any conspiracy against him, or any legitimate basis for recusal by this court, and Claim 3 is utterly frivolous. Based on the above, the instant motion is dismissed and the Clerk of Court is instructed to inform Lohmeier of this ruling.

IV. Certificate of appealability

Finally, pursuant to Rule 11(a) of the *Rules Governing Section 2255 Proceedings for the United States District Courts*, the court must issue or deny a certificate of appealability "when it enters a final order adverse to the applicant." *Id.* A district court should only issue a certificate of appealability "if the applicant has made a substantial showing of the denial of a constitutional

right.” 28 U.S.C. § 2253(c)(2). The petitioner must also show that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDonnell*, 529 U.S. 473, 484 (2000)(quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). In the instant action, Lohmeier has not made a substantial showing of the denial of a constitutional right as to any claims presented in his Section 2255 motion. Nor has Lohmeier shown that reasonable jurists could debate whether the Section 2255 motion should have been resolved in a different manner or that the issues presented in the Section 2255 motion deserve encouragement to proceed further. Therefore, should Lohmeier decide to appeal this court’s ruling, this court finds that a certificate of appealability would not be warranted, and is denied.

Date: 6/28/17


Samuel Der-Yeghiayan
United States District Court Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 26, 2018

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1395

JOHN LOHMEIER, <i>Petitioner-Appellant,</i> <i>v.</i>	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
UNITED STATES OF AMERICA, <i>Respondent-Appellee.</i>	No. 1:17-cv-03200 Samuel Der-Yeghiayan, <i>Judge.</i>

O R D E R

Petitioner-appellant filed a petition for rehearing and rehearing *en banc* on November 5, 2018. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

**Additional material
from this filing is
available in the
Clerk's Office.**