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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO LOPEZ, SR.,	)	No. CV-F-07-1449 OWW
	)	(No. CR-F-03-5204 OWW)
)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 AND
UNITED STATES OF AMERICA,	)	DIRECTING CLERK OF COURT TO
	)	ENTER JUDGMENT FOR
	)	RESPONDENT
Respondent.)	
)	
)	

By Memorandum Decision and Order filed on June 9, 2009, Petitioner Guillermo Lopez, Sr.'s motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 was denied on all grounds, except that the United States was ordered to file a response to Petitioner's claim that no search warrant was issued for the search of his residence and property for evidence of methamphetamine manufacturing on April 24, 2003. The United States has filed a response and Petitioner has filed a reply thereto. All briefing is now complete.

1 Petitioner claims he was denied the effective assistance of
2 defense counsel by his failure to investigate "whether or not,
3 there existed any authentic search warrants or any authentic
4 criminal complaints issued by the State of California to search
5 The Defendant's property/residence on April 22, and April 24,
6 2003, ... and whether or not such documents were issued by the
7 Honorable Judge Linda McFadden of the Juvenile Court of
8 Stanislaus County, in Modesto, California." Petitioner asserts
9 that he told defense counsel that Detective Nicholas refused to
10 give a copy of the search warrant to Petitioner during the search
11 of his residence on April 24, 2003 and that Petitioner was
12 charged on April 28, 2003 by the Stanislaus County District
13 Attorney's Office with controlled substance and firearms charges
14 under the California Penal Code. Petitioner contends:

15 When Detective Nocholas [sic] entered The
16 Defendant residence on April 24, 2003, he
17 told The Defendant that he had a search
18 warrant to search his property and his
19 residence ... The Defendant asked Detective
20 Nicholas to show him the warrant, he told The
21 Defendant to sit down on the sofa, however,
22 The Defendant again, asked Detective Nicholas
23 to let him see his search warrant, then,
24 Detective Nicholas became irriated [sic] and
25 he handcuffed The Defendant and he then
26 pushed The Defendant down onto the sofa, but,
The Defendant still persisted with his
request of Detective Nicholas to show him his
search warrant, at that time, Detective
Nicholas told The Defendant that he didn't
need to show him a search warrant and that he
was the police and that he can do whatever he
wanted to do, he then told The Defendant to
sit down and be quite [sic] and don't ask him
anything about a search warrant anymore, and,
he told The Defendant that I will show you
the search warrant when I'am [sic] ready to.

1 Subsequently [sic], on April 28, 2003, The
2 Defendant was charged by the State of
3 California's District Attorney's Office, by
4 Prosecutor Archibald with controlled
5 substance and firearm charges under the
6 California Code Sections

7 The Defendant's first Court appearance in
8 Stanislaus County Criminal Court, was made on
9 April 28, 2003, before the Honorable Criminal
10 Court Judge Nancy Ashley ... When Prosecutor
11 Archibald presented his case to the Court,
12 the Honorable Judge Nancy Ashley became
13 highly upset with Prosecutor Archibald for
14 failing to present to the Court any authentic
15 criminal complaints, or any authentic
16 affidavits in support thereof, or any
17 authentic search warrants, authorizing a
18 search of The Defendant's property/residence,
19 however, reluctantly, The Honorable Judge
20 Nancy Ashley gave Prosecutor Archibald until
21 May 3, 2003 to produce the criminal
22 complaints and the sworn affidavits in
23 support thereof and the search warrants that
24 was allegedly issued by The Honorable Judge
25 Linda McFadden on April 22

26 On May 5th, 2003, the Court ordered another
Court appearance date for, May 12, 2003. A
few days later, The Defendant's state lawyer,
(Attorney McAllister), told The Defendant
that the alleged Criminal Complaint and the
Sworn Affidavit in support thereof, is not on
file in The Honorable Judge Linda McFadden's
Court and the alleged sworn affidavits and
the search warrants that was provided to him
by the California State Attorney's Office,
was not stamped filed by the Court, and did
not have a case number on them, and, they
were not authentic, as such, they would not
be filed into The Honorable Judge Nancy
Ashley's Court, and therefore, the charges
against The Defendant would be dismissed by
the Court.

Just like The Defendant's State Lawyer
(McAllister) told him The Defendant's State
Court date was moved up to May 8, 2003, and
the charges against him was dismissed ...
Counsel told the Defendant that there was not
going to be any trial because Prosecutor

1 Archibald did not have the non-existent,
2 Criminal Complaint, nor a Sworn Affidavit in
3 support thereof, nor did he have any search
4 warrant.

5 Exhibit G to the Petitioner's motion is a copy of the minute
6 order issued by the Stanislaus County Superior Court stating that
7 the state action was dismissed "to be federally prosecuted."

8 Attached to the motion to suppress filed in this action is a
9 copy of the affidavit in support of the search warrant executed
10 and signed by Detective Robert Nicholas and subscribed and sworn
11 to Judge McFadden on April 22, 2003 at 4:45 p.m. This search
12 warrant authorized the search of Petitioner's property for "[t]he
13 black 1989 Chevy pickup, with a cowboy decal in the rear window
14 and tubular chrome steps and any other vehicles with altered or
15 missing VIN numbers, VIN plates, license plates, federal
16 certification labels and car parts that would show they were
17 taken from stolen vehicles. Indicia to include keys, utility
18 bills, receipts, and letters addressed to the occupants." The
19 affidavit is signed by Detective Nicholas and was sworn before
20 Judge McFadden on April 22, 2003 at 4:45 p.m. Also attached to
21 the motion to suppress is a copy of the search warrant which is
22 also signed by Judge McFadden on April 22, 2003 at 4:45 p.m.
23 The return to the search warrant is signed by Detective Nicholas
24 on April 28, 2003. However, the attached order permitting the
25 evidence described in the return to be delivered to the custody
26 of Turlock Police Services is not signed by a judge of the
 Stanislaus County Courts. Nonetheless, the record establishes

1 that the April 22, 2003 search warrant was issued by Judge
2 McFadden. To the extent Petitioner's motion asserts ineffective
3 assistance of counsel for failing to challenge the April 22, 2003
4 search warrant on the ground that it was fictitious and never
5 issued by a state court judge, it is without merit.

6 According to the Affidavit of AUSA Servatius in support of
7 the criminal complaint filed in this action, members of the
8 Stanislaus County Auto Theft Task Force (STANCAT) advised members
9 of the Modesto HIDTA Task Force, the Stanislaus Drug Enforcement
10 Agency, and Special Agent Sumner of the DEA that STANCAT had
11 observed chemicals and equipment consistent with use in making
12 methamphetamine while executing the April 22, 2003 search warrant
13 on April 24, 2003, of Petitioner's residence and property in
14 connection with STANCAT's ongoing auto theft investigation. Ms.
15 Servatius avers that a second search warrant was then obtained
16 for the drug-related evidence on April 24, 2003 and the second
17 search occurred on that day. The second search warrant was not
18 challenged by Petitioner on any grounds other than that it was
19 the fruit of the allegedly illegal first search. No challenge
20 was made that the second search warrant was never issued by a
21 state court judge. At the hearing on October 21, 2005 in
22 connection with Petitioner's motion to suppress the first search
23 warrant, Petitioner attempted to provide a handwritten document
24 to the Court:

25 THE COURT: All right. Well, Mr. Lopez, I
26 think, has another document that he wishes
for you to see.

1 THE DEFENDANT: (In English) For you, your
2 Honor. This is for you, your Honor, this
document.

3 THE COURT: All right -

4 THE DEFENDANT: It's an explanation where that
5 - (In Spanish) where the agents arrived at
5:20 in the afternoon to my house -

6 MR. HOMOLA: Your Honor, I would ask that -

7 THE DEFENDANT: - without a search warrant.
8 Okay, your Honor, so I have the search
9 warrant that they did come up with three
10 hours after the search was done. And it is
11 not signed, your Honor. I have it here, if
12 you would like to look at it. And I also
13 have the one that was signed two days before.
14 The 24th of April, at 5:20 in the afternoon,
the officers arrived at my home without a
search warrant. At the moment that they
entered our home, they handcuffed us, they
had guns drawn, and I asked them for a search
warrant. They told me they didn't need a
search warrant.

15 So three hours later, at 10:30 at nighttime,
16 after they had searched throughout my home,
they brought in a search warrant without
signature, and I do have that search warrant
with me.

17 After a month later, when we were brought
18 here, a search warrant appears, the same one,
19 that is signed and it is dated April 22nd.
My attorney, Mr. Homola, he says that that's
20 legal to do that ... [¶] I showed this to Mr.
21 Capozzi at first also, when he was my
attorney, and all he did was scratch his head
and say that what they did was legal.

22 (CT 5:11-6:25). The Court ordered Petitioner to provide a copy
23 of his written statement to Mr. Homola for his review and
24 investigation and continued the hearing on the motion to
25 suppress, giving the parties the opportunity to file supplemental
26 briefs if Mr. Homola believed that Petitioner's statement raised

1 additional grounds for suppression. Petitioner's statement, Doc.
2 94 in the official file, states:

3 [O]n the 24 of April appox. At 5:20 pm
4 without any reason and without an order or a
5 search warrant they entered and violating our
6 rights ... The agents of the Police
7 Department Turlock and Modesto after
8 violating our legal rights at about 9:30 or
9 10:00 pm at night ... they brought me a
10 search warrant without a signature of a judge
11 and we got this order of the search warrant
12 without the signature.

13 No supplemental briefs were filed.

14 In response to Petitioner's claim that no search warrant was
15 issued to search his residence and property for evidence of
16 methamphetamine manufacturing, the United States submits a copy
17 of the Affidavit in Support of Application for Search Warrant,
18 executed by Reserve Deputy Sheriff Hoek of the Stanislaus County
19 Sheriff's Department before Judge McFadden of the Stanislaus
20 County Superior Court on April 24, 2003 at 8:15 p.m. The
21 affidavit avers:

22 On the afternoon of April 24th, 2003 agents
23 of the Stanislaus Drug Enforcement (here
24 after referred to a [sic] SDEA and the High
25 Intensity Drug Trafficking Agency (here after
26 referred to as HIDTA) were asked to assist
members of the Stanislaus County Auto Theft
Detail in serving a search warrant at 5824
Santa Fe Ave., Denair, California. They had
obtained a search warrant for the property to
look for stolen autos and parts.

Agent Perry of SDEA advised your affiant that
when he cleared a shed to the rear of the
residence he observed a plastic garbage
container which had a whitish liquid which
had the odor of alcohol in it. Agent Perry
advised that it was his opinion that it was
part of pill extraction process. Agent Perry

1 is a recognized expert in clandestine lab
2 investigations.

3 Agent Corona of HIDTA advised your affiant
4 that when he cleared the residence he saw in
5 plain sight, filter papers with residue in
6 the kitchen and what he believes to be
7 finished methamphetamine on the kitchen
8 counter. Agent Corona is a qualified
9 clandestine lab expert.

10 The second search warrant authorizing the search of Petitioner's
11 residence and property for items associated with the possession,
12 sales, transportation and manufacturing of methamphetamine was
13 issued and signed by Judge McFadden on April 24, 2003 at 8:20
14 p.m.

15 Petitioner replies that the copy of the second search
16 warrant provided by the United States does not have the "Court
17 seal" on any of the signature pages of the judge and does not
18 have a Bates-stamp on any of the cover pages of these documents.

19 Petitioner asserts that he:

20 wrote a letter on August 14, 2007 to the
21 Clerk of the Court of Stanislaus [sic] County
22 Superior Court on August 14, 2007 requesting
23 copies of the search warrant, and affidavit
24 in support thereof. (Exhibit A) On October 9,
25 2007, the defendant was sent the documents
26 requested. (Exhibit B) However, the
27 Defendant was only sent the documents
28 pursuant to the first search warrant
29 initiated by Agent Nicholas. On three (3)
30 separate occasions defendant's family visited
31 the Clerk of Courts in Modesto to retrieve
32 documents pursuant to the second search
33 warrant. Each time they only found documents
34 pertaining to the first search warrant.

35 Petitioner argues that the reason is that the second search
36 warrant was never issued by a judge of the Stanislaus County

1 Superior Court.

2 Petitioner's contention is not supported by his exhibits.
3 Exhibit A to Petitioner's reply is a copy of a letter from
4 Petitioner dated August 14, 2007 to the Clerk of the Stanislaus
5 County Superior Court:

6 I never received a copy of the Search Warrant
7 nor the Affidavit in support thereof, that
8 may have issued in this case. Would you
9 please be so kind and provide for me a copy
 of the Search Warrant and the Affidavit in
 support of the request for the Search
 Warrant?

10 My lawyer told me that a Search Warrant in
11 this case was issued on April 22nd, 2003, at
12 455 [sic] P.M. by this Court, by the
13 Honorable Judge Linda A. McFadden. The
14 search warrant in question was said to have
15 been issued pursuant to an Auto Theft
 Investigation by Detective Robert Nicholas fo
 the City of Turlock, California Police
 Services in the County of Stanislaus, of
 which, involved alleged violations of,
 10752(a) C.V.C. and 10801 C.V.C.

16 I have enclosed several Court Documents for
17 the purposes of assisting you in identifying
18 my case and enabling you to more effectively
 comply with my request.

19 Attached as Exhibit B to Petitioner's reply is a copy of an Order
20 issued by Judge Cordova of the Stanislaus County Superior Court
21 dated October 9, 2007:

22 The Court is in receipt of Defendant's
23 request for a copy of the complaint,
24 affidavit in support of criminal complaint
25 and search warrant in this matter. Court
 records indicate this matter was dismissed on
 May 8, 2003. Defendant has not made a
 showing of good cause for the Court to
 provide the documents to him free of charge.

26 Defendant can obtain copies of the documents

1 through the Clerk's office. Cost is \$.50 per
2 page. The requested documents consist of 18
pages.

3 Petitioner's exhibits demonstrate that he requested a copy
4 of the first search warrant issued on April 22, 2003; his letter
5 to the Clerk makes no mention that a second search warrant was
6 issued on April 24, 2003 and he did not request a copy of the
7 April 24, 2003 search warrant. Petitioner presents no
8 affidavit(s) from any member of his family that they went to the
9 Stanislaus County Superior Court Clerk's Office to request a copy
10 of the second search warrant issued on April 24, 2003 and were
11 not provided with a copy.

12 Petitioner's contention that the absence of a court seal on
13 the signature pages of the second search warrant and a Bates-
14 stamp on the copy provided by the United States is evidence that
15 the second search warrant was not issued is without merit.
16 Petitioner cites no authority and the Court is aware of none that
17 requires a court seal on a judge's signature that the affiant to
18 a search warrant has subscribed and sworn before that judge or to
19 the judge's signature authorizing the search warrant. The
20 absence of Bate-stamp numbers merely reflects that the copy
21 provided by the United States in response to the Section 2255
22 motion is not a copy that was provided in discovery in the
23 underlying criminal case.

24 Petitioner's claim of ineffective assistance of counsel
25 because of counsel's alleged failure to investigate and raise the
26 issue that a search warrant to search Petitioner's residence and

1 property for evidence of methamphetamine manufacturing is DENIED.
2 The second search warrant was in fact issued by the Stanislaus
3 County Superior Court judge. The only arguable challenge to the
4 validity of the second search warrant was that it was the fruit
5 of an illegal search. The Court ruled that the first search
6 warrant was valid under the Fourth Amendment and the Ninth
7 Circuit affirmed that ruling. "The failure to raise a meritless
8 legal argument does not constitute ineffective assistance of
9 counsel." *Shah v. United States*, 878 F.2d 1156, 1162 (9th
10 Cir.1989). A decision to waive an issue where there is little or
11 no likelihood of success and concentrate on other issues is
12 indicative of competence, not ineffectiveness. *See Miller v.*
13 *Keeney*, 882 F.2d 1428, 1434 (9th Cir.1989).

14 For the reasons stated above and in the Memorandum Decision
15 and Order filed on June 9, 2009:

- 16 1. Petitioner Guillermo Lopez, Sr.'s motion to vacate, set
17 aside or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED;
- 18 2. The Clerk of the Court is directed to enter JUDGMENT FOR
19 RESPONDENT.

20 IT IS SO ORDERED.

21 Dated: July 13, 2009

22 /s/ Oliver W. Wanger
23 UNITED STATES DISTRICT JUDGE
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