

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal No. 95-95-P-H</b>
	)	<b>(Civil No. 98-280-P-H)</b>
<b>ELWIN BAKER,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION  
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Elwin Baker, appearing *pro se*, moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Baker complains that, as a result of ineffective assistance of counsel at revocation proceedings and upon direct appeal therefrom, he is serving an unduly harsh thirty-five month sentence of imprisonment imposed for violation of three conditions of supervised release. Memorandum of Law in Support of Collateral Challenge Pursuant to 28 U.S.C. § 2255 (“Petitioner’s Memorandum”) (Docket No. 27) at 2, 6. He also contends that, by virtue of being forced to appear at revocation proceedings in identifiable prison garb, he was denied his constitutional rights to due process and equal protection of the laws. Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Petition”) (Docket No. 27) at 5.

A section 2255 motion may be dismissed without an evidentiary hearing if “(1) the motion is inadequate on its face, or (2) the movant’s allegations, even if true, do not entitle him to relief, or (3) the movant’s allegations need not be accepted as true because they state conclusions instead of

facts, contradict the record, or are inherently incredible.” *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (citation and internal quotation marks omitted). In this case, I find that the allegations, even if accepted as true, would not entitle the defendant to relief and accordingly recommend that the motion be denied without an evidentiary hearing.

### **I. Background**

On April 12, 1993 Elwin Baker was sentenced in the United States District Court for the District of New Jersey to sixteen months’ imprisonment and four years’ supervised release after pleading guilty to a charge of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. Judgment (Docket No. 1). Under the Sentencing Guidelines, the imprisonment range for Baker’s offense was sixty to seventy-one months. *Id.* The sentencing judge, however, departed downward upon the motion of the government as the result of Baker’s substantial assistance to the government. *Id.*

Baker began his period of supervised release in Maine on May 12, 1994. Petition for Warrant or Summons for Offender Under Supervision for Revocation of Supervised Release (Docket No. 2). On October 17, 1995 the government sought a warrant for Baker’s arrest on grounds he had violated the terms of his supervised release by testing positive for the use of cocaine and marijuana. *Id.* On March 8, 1996, after Baker admitted to the violation, he was sentenced to time served plus two years’ supervised release on conditions including complete abstinence “from use or possession of all contraband substances and intoxicants.” Judgment (“Revocation Judgment”) (Docket No. 6). Time served amounted to three days. Revocation Report dated 3/7/96 at 2. The range of imprisonment under the Sentencing Guidelines for Baker’s violation of supervised-release conditions was five to eleven months. Transcript of Proceedings of March 8, 1996, attached as Exh. A to Revocation

Judgment, at 1. At the sentencing hearing the presiding judge remarked: “I’m taking into account what was told to me in chambers about Mr. Baker’s conduct in this matter and other matters afoot, and I conclude that there is ground for what would be in the nature of a departure on the government’s motion, if this were a regular guideline proceeding.”<sup>1</sup> *Id.* at 2.

On May 12, 1997 the government sought a second warrant for Baker’s arrest, alleging two violations of the conditions of his supervised release:

The defendant failed to refrain from the illegal use or possession of drugs as evidenced by positive urinalysis results for cocaine use on testing dates 10/24/96, 1/13/97, 4/10/97 and 4/28/97. The subject also admitted to the use of cocaine on or about 1/31/97 during an office visit on February 7, 1997.

The defendant failed to report for urinalysis testing as required on 10/15/96, 11/6/96, 12/26/96, 12/31/96, 1/29/97, 2/3/97 and 5/2/97.

Petition for Warrant or Summons for Offender Under Supervision (Docket No. 7). The following day, the government filed an amended petition adding a third violation:

On or about 5/11/97, the defendant was charged by the Biddeford Police Department with committing new criminal conduct: (1) gross sexual assault; and (2) unlawful sexual contact. These charges are currently pending in Maine District Court in Biddeford under docket numbers 97-1699 and 97-1700.

Amended Petition for Warrant or Summons for Offender Under Supervision (Docket No. 8).

The court scheduled a revocation hearing in the matter for July 15, 1997; however, on

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<sup>1</sup>Judge Hornby referred to the fact that the United States Sentencing Commission has issued only policy statements, not sentencing guidelines, addressing supervised-release violations. U.S. Sentencing Guidelines Manual (“Sentencing Guidelines”) at 368 (1997). Baker vigorously contests the government’s characterization that, at the March 8, 1996 revocation hearing, he received a “substantial downward departure.” Government’s Response to Motion to Vacate, Set Aside or Correct Sentence, etc. (“Response”) (Docket No. 32) at 3, 26; Petitioner’s Reply to Government’s Response to Vacate, Set Aside, or Correct Sentence, etc. (“Petitioner’s Response”) (Docket No. 34) at 8. As Judge Hornby explained, Baker received a sentence that, although not technically a downward departure based on a government motion, was “in the nature” of one.

Baker's motion the hearing was continued until such time as the charges pending against him in state court were resolved. Motion to Continue and endorsement thereon (Docket No. 11). Baker then changed his mind and, in December 1997, alerted the court to his intent to seek prompt scheduling of a revocation hearing although the charges against him in state court still were pending. Letter dated 12/10/97 (Docket No. 14); Transcript of Proceedings of December 30, 1997 ("Hearing Transcript") (Docket No. 25) at 2.

The court held Baker's revocation hearing on December 30, 1997. Hearing Transcript at 1. Baker admitted to two of the alleged positive urinalysis tests for cocaine, on January 13, 1997 and April 10, 1997, but denied the remaining two. *Id.* at 5. He also denied having admitted cocaine use to his probation officer, stating that he merely had confessed that he was "tempted to do cocaine." *Id.* He denied that he had failed to report for urinalysis, claiming he had been excused from reporting. *Id.* Finally, he denied that he had committed the alleged sexual offenses. *Id.*

Among those testifying, in addition to Baker, were the two minor girls with whom Baker was alleged to have engaged in unlawful sexual contact. *Id.* at 18-54, 54-79, 110-33. The following day, the court found that Baker had committed all three supervised-release violations. Transcript of Proceedings of December 31, 1997 ("Sentencing Transcript") (Docket No. 26) at 170-72, 175. Given Baker's underlying conviction and criminal history rating, he was subject to a statutory maximum additional sentence of three years' imprisonment for violations of supervised release. *Id.* at 173; 18 U.S.C. § 3583(g). The Sentencing Guidelines provided for a range of eighteen to twenty-four months' imprisonment in view of Baker's criminal history category and the nature of the supervised-release violations with which he was charged. Sentencing Transcript at 172-73; Sentencing Guidelines § 7B1.4(a). Commentary to the Guidelines observed, however, that an

upward departure might be warranted in cases in which the defendant had been the beneficiary of a previous downward departure. Sentencing Transcript at 173; Application Note 4 to Sentencing Guidelines § 7B1.4. In its revocation report, the United States Probation Office recommended a sentence of thirty-five months — essentially, the statutory maximum with sufficient allowance for the three days Baker had served upon his previous revocation of supervised release. Revocation Report dated 7/2/97 at [9].

In imposing a sentence of thirty-five months' imprisonment, Judge Hornby explained:

I conclude that an upward departure is warranted here for the following reasons. First of all, not only did the defendant receive a substantial downward departure at his original sentencing, he also received a substantial departure at the time of the first revocation violation. I believe it is appropriate under those circumstances to depart upward because in fact, what those incidents reflect is that the defendant did not learn from the opportunities that were afforded to him.

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[P]utting aside even the sexual charges, he is here back before me with what can only be considered an ongoing major problem with the abuse of cocaine. And indeed, even without the sexual activity that's been alleged, I would be departing upward in this case because of Mr. Baker's either inability or unwillingness, however you couch it, he has had any number of opportunities to deal with this problem, but continues flagrantly to violate the conditions by using cocaine on a regular basis.

And so I am departing upward even without considering the sexual acts.

Sentencing Transcript at 179-80. He recommended that Baker be incarcerated in an institution at which he could receive substance-abuse treatment. *Id.* at 181.

Represented by new counsel, Baker appealed this sentence to the First Circuit on four grounds:

- A. The District Court erroneously failed to consider relevant factors under 18 U.S.C. § 3553(a)(2)(D) in sentencing Baker.
- B. The District Court abused its discretion in finding that Baker had engaged in gross sexual assault.

C. Putting aside the alleged sexual assault, the applicable guideline range was, 5-11 Months, And The District Court abused [its] discretion in upwardly departing to 35 months.

D. Application Note 4 to USGS [sic] Section 7B1.4, which penalizes defendants who received a downward departure when the defendant is re-sentenced after revocation of supervised release, deprives defendants such as Baker of their right to equal protection and due process.

Petitioner's Memorandum at 3.

On June 22, 1998 the State of Maine dismissed the two sexual-misconduct charges against Baker in view of his entry of a plea of *nolo contendere* to two counts of visual sexual aggression against a child in violation of 17-A M.R.S.A. § 256, a Class D offense under Maine law.<sup>2</sup> Exh. 2 to Response. For these offenses, Baker received two concurrent sentences of 364 days in jail, to be served consecutive to his federal revocation sentence, plus one year of probation. *Id.*

On July 1, 1998 the First Circuit affirmed Baker's revocation sentence *per curiam* without a published opinion. Exh. 1 to Response. In so doing, it observed that "[t]he upward departure was amply supported by the record and reasonable in degree." *Id.* It declined, however, to address constitutional arguments raised for the first time on appeal. *Id.*

## II. Discussion

Baker raises three grounds for the vacation or correction of his sentence: (i) ineffective assistance of counsel at his revocation hearing, (ii) ineffective assistance of counsel on appeal therefrom, and (iii) violation of his equal protection and due process rights in that he was forced to

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<sup>2</sup>A person violates 17-A M.R.S.A. § 256 "if, for the purpose of arousing or gratifying sexual desire or for the purpose of causing affront or alarm, the actor, having in fact attained 18 years of age, exposes the actor's genitals to another person or causes the other person to expose that person's genitals to the actor and the other person, not the actor's spouse, has not in fact attained 14 years of age."

wear identifiable prison garb in court.<sup>3</sup> Petitioner’s Memorandum at 6; Petition at 5.

### **A. Ineffective Assistance of Counsel**

*Strickland v. Washington*, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his or her Sixth Amendment right to counsel has been violated. First, the defendant must show that counsel’s performance was deficient, i.e., that the attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Second, the defendant must make a showing of prejudice, i.e., “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* The court need not consider the two elements in any particular order; failure to establish either precludes judgment in the defendant’s favor. *Id.* at 697. The court “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (quoting *Strickland*) (internal quotation marks omitted).

The “prejudice” element of the *Strickland* test also presents the defendant with a high hurdle. *Id.* The defendant must show more than a possibility that counsel’s errors had some conceivable effect on the outcome of the proceeding. *Id.* He or she must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel’s errors. *Id.*

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<sup>3</sup>In the belief that the government failed to file a timely answer to his petition, Baker also filed a motion for the court to grant his petition for relief on the ground that the government defaulted. Motion for the Court to Grant Petitioner’s § 2255 Due to Respondent’s Failure to Comply with Court’s Order (Docket No. 33). The government’s response was timely filed at 4:19 p.m. on September 21, 1998. Response at 1. The petitioner’s default motion therefore is denied.

Baker's claims of ineffective assistance cannot clear this hurdle inasmuch as all but one of his specified deficiencies in counsel's performance concern the sexual-misconduct charges. Petitioner's Memorandum at 8-10. Judge Hornby clearly stated at sentencing that he would have departed upward even in the absence of the sexual-misconduct allegations, based upon Baker's serious and continuing substance-abuse problem. Thus, even assuming *arguendo* that counsel's performance was constitutionally deficient with respect to the sexual-misconduct charges, Baker cannot demonstrate that this altered the outcome of the revocation proceedings.

Turning to the sole identified deficiency that touches on the substance-abuse aspects of Baker's revocation proceeding, he complains that counsel failed to make the court aware that, despite the fact that 18 U.S.C. § 3583(g) mandates revocation of supervised release when a defendant is found to have possessed a controlled substance, a court may still consider rehabilitative factors outlined in 18 U.S.C. § 3553(a) in determining sentencing. *Id.* at 10. The First Circuit apparently has not had occasion to consider whether the section 3553(a) factors may be taken into account in a mandatory revocation. Courts that have considered the issue have held that a court may — though it need not — take those factors into consideration. *See, e.g., United States v. Jackson*, 70 F.3d 874, 880 (6th Cir. 1995); *United States v. Giddings*, 37 F.3d 1091, 1097 (5th Cir. 1994). Thus, as an initial matter, it is far from clear that an attorney's request that a court consider such factors could be outcome-determinative. The court could choose to ignore the factors entirely or weight some, but not others. Several of the factors, moreover, could cut against the defendant. *See, e.g.,* 18 U.S.C. § 3553(a)(2)(A) (describing “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”).

Further, as the government points out, in this case Judge Hornby did take the section 3553(a)

factors into account. Response at 39-41. Among those factors is “the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D). Judge Hornby recommended that, in view of Baker’s ongoing cocaine addiction, he be detained in a facility that could provide substance-abuse treatment. Baker thus fails to demonstrate any possible prejudice from this asserted error of counsel.

### **B. Due Process and Equal Protection Violation**

Baker next contends that his due process and equal protection rights were violated when he was forced to appear for revocation proceedings in identifiable prison garb. The mandating of such wearing apparel can violate a prisoner’s constitutional rights; however, this is so because of presumed taint in the eyes of the jury. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (constant presence of jail attire “may affect a juror’s judgment”). In bench trials in which the judge sits without a jury, such concerns of prejudice are obviated. Such was the case at Baker’s non-jury revocation proceeding.

### **III. Conclusion**

For the foregoing reasons, I recommend that the defendant’s motion to vacate, set aside or correct his sentence be **DENIED** without a 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.*

*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.*

*Dated this 13th day of November, 1998.*

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*David M. Cohen  
United States Magistrate Judge*