

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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|---------------------------------|---|-------------------------------|
| UNITED STATES OF AMERICA |) | |
| |) | |
| <i>v.</i> |) | Criminal No. 94-51-P-H |
| |) | (Civil No. 99-360-P-H) |
| GEORGE R. JORDAN, JR., |) | |
| |) | |
| Defendant |) | |

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

George R. Jordan, Jr., appearing *pro se*, moves this court for a new trial pursuant to 28 U.S.C. § 2255. Petitioner’s Augmentation of Motion for New Trial Pursuant to Title 18 USC Federal Rule Criminal Procedure: 33, etc. (“Motion”) (Docket No. 134).¹

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). Jordan’s allegations are either

¹Jordan styles the Motion as the amendment of combined motions for recusal and for a new trial pursuant to Fed. R. Crim. P. 33. Motion at 1. The motion for recusal was denied on March 1, 2000. *See* Endorsement to *id.* I construe the so-called Rule 33 motion as an amended Section 2255 motion inasmuch as (i) its contents are nearly identical to those of a Section 2255 motion filed the same day (*see* Docket No. 133) and (ii) the document filed by the petitioner on October 17, 1997, which he references as the underlying motion he amends, appears not to be a Rule 33 motion but rather a request to preserve certain objections for appeal (*see* Docket No. 124).

conclusory, unsupported by the record or, even if accepted as true, would not warrant relief. Accordingly, I recommend dismissal of the Motion without an evidentiary hearing.

I. Background

On October 18, 1994 Jordan was indicted on five counts of mail fraud (Counts I-V), four counts of wire fraud (Counts VI-IX) and one count of money laundering (Count X) in connection with an alleged scheme to defraud his employer, Pioneer Plastics Corporation (“Pioneer”). Indictment (Docket No. 1). In essence, Jordan was alleged to have used an assumed name, PineTree Insurance Services (“PineTree”), to bill for and obtain money from Pioneer for unperformed or unnecessary services while concealing his relationship with PineTree from his employer. *Id.* ¶¶ 5, 14-15. Following trial, a jury on June 28, 1995 found Jordan not guilty of all wire-fraud charges but was unable to reach a verdict on the remaining counts. Partial Transcript of Proceedings (Docket No. 95) at 15. Defense counsel moved for and was granted a mistrial. *Id.* at 15-20. The court entered a judgment of discharge with respect to Counts VI-IX. Judgment of Discharge (“Discharge Judgment”) (Docket No. 52).

On August 22, 1995 Jordan was separately indicted on four counts of tax evasion (Counts I-IV) and two counts of filing a false tax return (Counts V and VI) in connection with the alleged scheme to defraud Pioneer. Indictment (Docket No. 1), *United States v. Jordan*, Crim. No. 95-48-P-H (D. Me.). Over defense counsel’s objection, the new charges were joined with the original mail-fraud and money-laundering charges for purposes of retrial. *See* Endorsement to Government’s Motion To Join Indictments for Trial, etc. (Docket No. 2), *United States v. Jordan*, Crim. No. 95-48-P-H (D. Me.); Defendant’s Objection to Government’s Motion To Join Indictments, etc. (Docket No. 9), *United States v. Jordan*, Crim. No. 95-48-P-H (D. Me.). Following trial, a second jury on

December 18, 1995 found Jordan guilty of all charges. *See* Transcript of Proceedings (“Second Trial Transcript”), Vol. VI (Docket No. 103) at 1042-44. Jordan appealed to the First Circuit, which on April 29, 1997 affirmed his convictions with respect to the mail-fraud and money-laundering charges but vacated those pertaining to all six tax charges on the ground that the latter had been improperly joined with the former for purposes of retrial. *United States v. Jordan*, 112 F.3d 14, 16-19 (1st Cir. 1997).

The government chose not to retry Jordan on any of the tax charges. *See* Transcript of Proceedings (“Resentencing Transcript”) (Docket No. 125) at 2; Amended Order (Docket No. 65), *United States v. Jordan*, Crim. No. 95-48-P-H (D. Me. Jan. 6, 1998) (dismissing indictment). On October 3, 1997 Jordan was resentenced with respect to his mail-fraud and money-laundering convictions. Resentencing Transcript at 50. He then filed a direct appeal challenging the grouping at resentencing of the mail-fraud and money-laundering counts under the United States Sentencing Guidelines; the First Circuit on February 10, 1998 declined to disturb the amended sentence. *United States v. Jordan*, No. 97-2236, 1998 WL 56041 (1st Cir. Feb. 10, 1998). This motion followed.

II. Discussion

In his Motion Jordan sets forth twenty-seven enumerated grounds for relief, in addition to an unnumbered introductory paragraph containing additional allegations. *See generally* Motion. The government in its opposition observes that the Motion is not only unbuttressed by evidentiary support but also conclusory and in some respects so vague as to leave the court and the government in the dark. *See generally* Government’s Response to Motion To Vacate, etc. (Docket No. 137).

Bare, self-serving allegations by a habeas petitioner do not suffice to merit an evidentiary hearing. *See, e.g., David*, 134 F.3d at 478 (“To progress to an evidentiary hearing, a habeas

petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings.”); *see also United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd on other grounds*, 520 U.S. 751 (1997) (“A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits.”).

As an initial matter, certain of Jordan’s allegations (none of which rests on an evidentiary foundation) are too vague to enable an intelligent response, let alone to merit a hearing. These are:

1. The court excluded evidence of the defendant that prevented the defendant from creating a reasonable doubt regarding the credibility and admissibility of the government’s witnesses and evidence, including business records.

5. A new trial is warranted in the interests of justice when there is prosecutorial misconduct.

9. The sufficiency of the evidence is totally inadequate when one discounts the perjured testimonies of virtually all the government’s witnesses and the false business records which were introduced by government employees.

17. Counsel failed to appeal on the Cohen doctrine to have the appellate review the expanded record prior to the second trial.

20. The prosecutor posed as defense counsel to deny defendant due process and a fair trial.

27. Ineffective assistance of counsel at trial, *in re ante*, and a financial conflict of interest with counsel and at appeal as to a failure of appeal counsel to adequately prepare, and present direct appeal issues.

Motion at 1, 3-5.

Other allegations, though more detailed, are fatally flawed inasmuch as their validity neither

is discernable from the record nor supported by extrinsic evidence. In this category are: that portion of Allegation No. 2 claiming bias and knowledge of perjury on the part of the trial judge; that portion of Allegation No. 3 claiming that the prosecution lied about and destroyed exculpatory evidence; Allegation No. 4, that the trial judge violated certain of Jordan's rights and undermined his trial preparation by changing jury pools at voir dire and that defense counsel deceived Jordan; Allegation No. 6, that the prosecution engaged in prohibited contact with jurors and jury tampering; Allegation No. 7, that the prosecution suborned perjured testimony and that the trial judge and prosecution permitted the jury to consider unadmitted evidence; and those portions of the introductory paragraph and of Allegation No. 23 claiming that the plaintiff was separated from his legal documents and that the court's agents tampered with his papers. *See id.* at 1-3, 5.

Still other allegations, while susceptible of support in the record, are either unsupported or contradicted by it, namely:

1. Portions of Allegation Nos. 2, 3, 7 and 10, and Allegation Nos. 12 and 26 in their entirety, based on the premise that Pioneer did not exist at all or did not exist as a legal corporation. *Id.* at 2-5. The defense presented evidence that Pioneer delayed in registering a name change with the Maine Secretary of State, not that it did not exist at all or did not exist as a legal corporation. *See* Second Trial Transcript, Vol. II (Docket No. 99) at 400-02 (testimony of Pioneer employee), 422-25 (colloquy between trial judge, counsel).

2. Allegation No. 10, that the trial judge prevented Jordan from accessing court documents regarding a financial conflict of interest of his attorney. Motion at 4. Jordan apparently alludes to a request for copies of his appointed defense counsel's billings made in the context of a misconduct complaint filed against the trial judge. *See* Transcript of Proceedings ("Sentencing Transcript")

(Docket No. 96) at 13-14; Memo of Record from George R. Jordan, Jr. dated February 23, 1996, *In re Complaint No. 205, George R. Jordan, Jr.* (Cir. Council for 1st Cir.), ¶ 1(a). The trial judge in response to Jordan's Memo of Record advised First Circuit Executive Vincent Flanagan: "If I am to take any action upon it [the Memo of Record], I will expect you to notify me." Letter from D. Brock Hornby to Vincent Flanagan dated February 29, 1996. There is no evidence that the trial judge was required to take any action. On March 5, 1996 the complaint was dismissed as frivolous. Order, *In re Complaint No. 205, George R. Jordan, Jr.* (Cir. Council for 1st Cir. March 5, 1996).

3. Allegation No. 11, that the trial judge at sentencing failed to determine Jordan's competency to assist counsel. Motion at 4. To the contrary, the record reveals that, upon being informed at the start of sentencing proceedings that Jordan was taking medication, the trial judge repeatedly pressed Jordan on his ability to participate. Sentencing Transcript at 2-10. Jordan indicated that he was capable of so doing. *Id.* at 10. Toward the conclusion of proceedings, the trial judge specifically found that Jordan had been able to operate "intelligently this morning in a focused manner" *Id.* at 42.

4. Allegation No. 15, that the mails were never proven to have been used or that it was foreseeable they would be used by Pioneer and that invoices were hand-delivered. Motion at 4. That invoices were hand-delivered is not dispositive of the issue whether the mails were used. *See, e.g., United States v. Royal*, 100 F.3d 1019, 1030 (1st Cir. 1996) ("A particular defendant need not have placed a specific item into the mails. It is enough that the use of the mails took place in the ordinary course of business . . . or was reasonably foreseeable as a result of the conspiracy participants' actions"). There was sufficient evidence at trial from which the jury could have concluded beyond a reasonable doubt that in the ordinary course of its business Pioneer mailed checks in payment of

PineTree invoices to a post office box in Westbrook. *See, e.g.*, Second Trial Transcript, Vol. I (Docket No. 98) at 107-08 (testimony of Pioneer employee with overall supervision of mailroom).

5. Allegation No. 18, that the trial judge failed to take into account Jordan's ability to pay in ordering restitution. Motion at 4. Both at sentencing and at resentencing the trial judge considered Jordan's ability to pay, resting his decision primarily on Jordan's intelligence and capabilities. *See* Sentencing Transcript at 43-44; Resentencing Transcript at 22.

6. Allegation No. 19, that appellate counsel was *per se* ineffective by not raising double jeopardy at appeal. Motion at 4. Appellate counsel did raise a double-jeopardy issue on appeal. *See Jordan*, 112 F.3d at 19.

7. Allegation No. 21, that the trial judge dismissed the indictment in this case (Crim. No. 94-51-P-H) and then reinstated it without notice to the defendant. Motion at 5. A judgment of discharge was indeed entered with respect to this case, but it pertained only to wire-fraud charges (Counts VI-IX). Discharge Judgment. There is no evidence that Jordan ever was re-indicted or retried with respect to the discharged counts. *See* Second Trial Transcript, Vol. I at 34-38 (outlining issues before second jury).

8. Allegation No. 22, that the trial judge failed upon remand from the First Circuit to consider a new trial on the basis of violation of the prejudicial joinder rule. Motion at 5. The trial judge was not required upon remand to consider a new trial. Rather, the First Circuit vacated Jordan's convictions as to all tax counts and affirmed his mail-fraud and money-laundering convictions. *Jordan*, 112 F.3d at 19. The government chose not to retry Jordan on the tax counts. *See* Resentencing Transcript at 2.

9. Allegation No. 24, that the trial judge failed to allow Jordan's pretrial appeal of double

jeopardy pursuant to *Abney*, etc. Motion at 5. *Abney* permits interlocutory appeal of orders rejecting certain double-jeopardy claims. *See, e.g., United States v. Morris*, 99 F.3d 476, 478 (1st Cir. 1996) (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)). The trial judge did not fail to permit an *Abney* appeal. Rather, he denied a motion filed by Jordan personally in which, among other things, Jordan sought leave to file a motion for dismissal on double-jeopardy grounds. *See* Memorandum dated October 11, 1995 from George R. Jordan, Jr. to D. Brock Hornby, USDJ (Docket No. 64); Order (Docket No. 65). Jordan filed an appeal of this denial with the First Circuit, which deemed his notice to have been mistakenly filed. *See* Letter dated November 13, 1995 from Francis P. Scigliano to William S. Brownell and attachments thereto (Docket No. 71).²

Jordan's remaining allegations, even if accepted as true, would not warrant relief:

1. That portion of the introductory paragraph claiming that the court "violated established statutory and case law" and due process by failing to schedule a hearing or assign an attorney to assist Jordan in this matter. A section 2255 petitioner is not entitled as a matter of right either to a hearing or to assignment of counsel. *See, e.g., David*, 134 F.3d at 477 (outlining circumstances under which section 2255 petition may be dismissed without a hearing); *United States v. Mala*, 7 F.3d 1058, 1064 (1st Cir. 1993) (assignment of counsel rarely warranted in section 2255 cases).

2. Those portions of Allegation No. 2 claiming that the trial judge and the prosecution failed to act upon "constructive" knowledge that Pioneer committed wrongdoing. Motion at 1-2. Such wrongdoing, if any, is irrelevant to the question whether Jordan properly was convicted of the

²The trial judge did consider and reject defense counsel's argument prior to Jordan's second trial that a retrial would constitute double jeopardy inasmuch as Jordan had earlier been acquitted of wire-fraud charges. *See* Second Trial Transcript, Vol. I at 22-23, 58-59. There is no indication that an *Abney* appeal of this ruling was attempted.

charges of which he was accused.

3. That portion of Allegation No. 3 claiming that the prosecutor prejudiced Jordan and violated his Fifth Amendment right to remain silent by referring to one of the defense's factual assertions as "cockamamie." *Id.* at 2. Jordan apparently alludes to the prosecutor's remark during closing arguments in the second trial that Jordan had come up with "this cockamamie idea" of arguing to the Internal Revenue Service that money he earned through PineTree was tax-exempt. Second Trial Transcript, Vol. VI at 1013-14. The word "cockamamie" is defined in relevant part as "[n]onsensical; ludicrous." Webster's II New Riverside University Dictionary 276 (1994). Jordan had defended himself with respect to the tax charges by arguing, among other things, that he had engaged in a good-faith dispute with the IRS over whether payments for services rendered to a tax-exempt trust were taxable to the recipient. *See, e.g.*, Second Trial Transcript, Vol. I at 72-73 (defense opening statement); Vol. VI at 1037-38 (defense closing argument). During trial the prosecution elicited testimony from an IRS agent, John A. Love, II, that Love knew of no basis upon which that income would be tax-exempt. Second Trial Transcript, Vol. IV (Docket No. 101) at 792, 817-18. There also was evidence that while employed for Pioneer Jordan handled sophisticated business matters, albeit workers' compensation rather than tax. *See, e.g.*, Second Trial Transcript, Vol. I at 79. Thus, there was sufficient evidence from which the jury could draw an inference that Jordan did not possess a good-faith belief that the income was tax-exempt. The government's "cockamamie" comment represented a fair, if colorful, characterization of the evidence. *See United States v. Glantz*, 810 F.2d 316, 321 (1st Cir. 1987) (dictum that government's description to jury of "kickbacks or legal fees" theory accurately described evidence in case). Nor can the comment reasonably be construed as violating Jordan's Fifth Amendment right to remain silent inasmuch as

it did not even obliquely reference his failure to testify in his own behalf. *See id.* at 322 (standard is whether, in circumstances of case, “the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.”) (citations and internal quotation marks omitted).

4. Allegation No. 8, decrying the failure of the court to sever the mail-fraud and money-laundering counts from the tax counts for purposes of the second trial. Motion at 3. This allegation was addressed by the First Circuit. *Jordan*, 112 F.3d at 16-19. A section 2255 petition may not be used to relitigate arguments previously aired on direct appeal. *See, e.g., United States v. Michaud*, 901 F.2d 5,6 (1st Cir. 1990); *Tracey v. United States*, 739 F.2d 679, 682 (1st Cir. 1984).

5. Allegation No. 13, claiming ineffective assistance of counsel for failure to file motions for a new trial or for arrest of judgment pursuant to Fed. R. Crim P. 33 or 34. Motion at 4. *Jordan* does not elucidate, nor is it self-evident, how these omissions could have been outcome-determinative in his case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defendant in ineffective-assistance claim must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”); *Jordan*, 112 F.3d at 19 (government presented sufficient evidence that jury could have found *Jordan* deprived Pioneer of his services and/or its money through a scheme to defraud).

6. Allegation No. 14, that the trial judge failed to instruct the jury as to the necessary element of intent. Motion at 4. *Jordan* apparently refers to the trial judge’s ruling during the first trial declining to incorporate willfulness as an element of the intent necessary to prove money laundering pursuant to 18 U.S.C. § 1956(a)(1)(B)(ii). *See* Transcript of Proceedings, Vol. V (Docket No. 109) at 865-70. No willfulness instruction was given with respect to the money-laundering

charge in either trial. *Compare id.* at 886-87 with Partial Transcript of Proceedings, Jury Instructions (Docket No. 111) at 13. The money-laundering statute provides in relevant part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —

(B) knowing that the transaction is designed in whole or in part —

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1)(B)(ii). The statute does not on its face require a showing of willfulness, nor have circuit courts of appeal considering the issue construed it to incorporate one. *See, e.g., United States v. Lewis*, 117 F.3d 980, 984 (7th Cir. 1997) (government need not show that defendant acted willfully in order to convict him of money laundering); *United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1995) (“[w]illfulness is not a statutory requirement of money laundering”). The trial judge accordingly did not err in declining to include such an instruction in Jordan’s case.

7. Allegation No. 16, that the government was estopped from alleging a scheme to defraud after judgment was rendered in the first trial that Jordan was not guilty of the wire-fraud charges. Motion at 4. In discharging Jordan of wire-fraud charges, the court had stated that Jordan had been found not guilty “of the offense of devising a scheme to defraud and using or causing the use of interstate wire communication, that is telephone calls, in furtherance of that scheme to defraud as

charged in counts 6-9 of the indictment” Discharge Judgment. A fair reading of the judgment, given its use of the conjunctive “and,” is that Jordan was discharged of the crime of using interstate wire communication in furtherance of a scheme of fraud — not that he was discharged of devising the scheme of fraud alleged. Double jeopardy therefore did not attach for purposes of retrial on the mail-fraud and money-laundering charges.

8. That portion of Allegation No. 23 claiming that the trial judge “backed his agents for failing to assist the defendant to report what he knows to Janet Reno and to US congressional judiciary committees.” Motion at 5. Neither the trial judge nor any law enforcement agents had any such affirmative duty.

9. Allegation No. 25, that the judge abused his discretion in failing to group the mail-fraud and money-laundering counts for purposes of sentencing. Motion at 5. This argument was rejected on direct appeal. *Jordan*, 1998 WL 56041. It cannot be relitigated through a section 2255 motion. *See, e.g., Michaud*, 901 F.2d at 6.

III. Conclusion

For the foregoing reasons, I recommend that the defendant’s section 2255 motion 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 10th day of April, 2000.

David M. Cohen
United States Magistrate Judge

ADMIN
U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 99-CV-360
JORDAN v. USA
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Referred to: MAG. JUDGE DAVID M. COHEN
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Jurisdiction: US
Defendant Dkt # in USDC, Portland, ME is 2:94-cr-00051
Cause: 28:2255 Motion to Vacate Sentence

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