

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)	
)	
<i>v.</i>)	Criminal No. 93-77-P-H-01
)	(Civil No. 97-192-P-H)
AEDAN C. McCARTHY,)	
)	
Defendant)	

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

Aedan C. McCarthy moves this court to correct, modify or vacate his sentence pursuant to 28 U.S.C. § 2255. McCarthy was convicted after jury trial of conspiracy to commit armed bank robbery in violation of 18 U.S.C. §§ 371 and 2113, armed bank robbery in violation of 18 U.S.C. § 2113, use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c), and possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g) and 924(e)(1). He contends that he was provided with constitutionally ineffective assistance of counsel in four specific respects. He includes with his section 2255 motion motions to “dismiss indictment for lack of jurisdiction” and to “hold this petition in abeyance” pending the outcome of recent challenges that he has filed to two of the state court convictions underlying his conviction in this court on the charge of possession of a firearm as an armed career criminal.

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than

statements of fact.”” *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted). In this instance, I find that certain of the allegations are contradicted by the record and that the remaining allegations would not entitle McCarthy to relief. Accordingly, I recommend that his motion be denied without an evidentiary hearing. I also recommend that the motion to dismiss the indictment be denied. I deny McCarthy’s motion to defer action on his section 2255 motion.

I. Background

As the First Circuit noted on direct appeal, McCarthy’s convictions in this case arose “from a series of bank robberies in Alabama, Connecticut and Maine.” *United States v. McCarthy*, 77 F.3d 522, 524 (1st Cir. 1996). McCarthy was stopped by an Alabama state trooper while driving a pickup truck with Maine license plates near the scene where his co-defendant, Hunter, had fled on foot from an officer who knew that there was an outstanding federal warrant for Hunter’s arrest. *Id.* at 527. McCarthy falsely identified himself to the trooper as John E. Perry and gave the trooper a Maine driver’s license in that name. *Id.* McCarthy was taken into custody at about 12:15 p.m. *Id.* Connecticut officials, when contacted by the arresting sheriff’s department, requested that McCarthy be held while they attempted to obtain an arrest warrant. *Id.* Sometime after midnight, a state judge in Connecticut signed an arrest warrant for McCarthy. *Id.*

That same evening, a deputy sheriff received a call from a neighbor of the man with whom McCarthy and Hunter had been staying. *Id.* In response to that call, the deputy went to the trailer where the three men had been living and found an open suitcase in the kitchen with an assault rifle, ammunition and a bullet-proof vest on top of it. *Id.* The owner of the trailer told the deputy that the suitcase and its contents belonged to McCarthy. *Id.* He also said that McCarthy and Hunter were

preparing to move out of the trailer when he left for work that morning. *Id.* at 528. After learning that McCarthy and Hunter had been arrested, the owner of the trailer found two suitcases that did not belong to him in a room used for storage. *Id.* He moved the one found by the deputy to the kitchen and cut off the lock; after seeing the contents, he asked his neighbor to call the sheriff's department. *Id.* Several days later, the owner of the trailer told an FBI agent about the second suitcase, and the agent and a deputy sheriff removed it at his request. *Id.*

A search warrant was obtained five days later to search McCarthy's truck. *Id.* During that search, a receipt was found which led investigators to a storage unit in Scarborough, Maine. *Id.* After obtaining a search warrant, FBI investigators found a footlocker "containing numerous incriminating items with possible connections to" the Maine bank robbery with which McCarthy was charged. *Id.* The footlocker belonged to McCarthy, who had rented the storage unit under the same false name he had given to the trooper who stopped him. *Id.*

McCarthy's motion to suppress evidence arising from the Alabama and Maine searches was denied. *Id.* On appeal, McCarthy challenged his Alabama arrest, the denial of his suppression motion, the seizure of his suitcases, and the use of his prior state convictions for attempted murder in determining whether he should be sentenced as an armed career criminal. *Id.* at 529-535, 540. The First Circuit affirmed. *Id.* at 540. McCarthy's petition for certiorari was denied. *United States v. McCarthy*, 117 S.Ct. 479 (1996). The Supreme Court also denied McCarthy's request for rehearing. 117 S.Ct. 790 (1997).

II. Analysis

A. Ineffective Assistance of Counsel¹

A claim of ineffective assistance of counsel brought in a section 2255 proceeding is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, that defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. McCarthy must show that, but for the deficiencies in counsel's performance, there was a reasonable probability that the result of his case would have been different. *Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996). Because the defendant must meet both prongs of the *Strickland* test, a court reviewing a claim of ineffective assistance of counsel may consider the two factors in any order; the failure to satisfy either one eliminates the need to consider the other. *Strickland*, 466 U.S. at 697.

McCarthy's first claim concerning the alleged ineffective assistance of his counsel is that his attorney failed to file a motion to suppress the physical evidence introduced against him at trial on

¹ McCarthy's filing includes a Motion to Hold This 2255 in Abeyance Pending the Outcome of Petitioner's State Case. In his state cases, McCarthy is challenging two convictions that were used to establish his status as an armed career criminal for purposes of sentencing on his conviction on Count IV of the indictment in this case. Because McCarthy's section 2255 motion is based solely on allegations of ineffective assistance of counsel during his trial and appeal, the outcome of these state court actions will have no effect on the resolution of the section 2255 motion. Accordingly, the motion to hold this action in abeyance is denied.

the basis of a violation of Fed. R. Crim. P. 5(a), because he was held for 12¾ hours by local Alabama authorities before the arrest warrant issued in Connecticut was sent to Alabama, and he “was never taken before a federal magistrate as required by Rule 5(a).” Motion Under 28 U.S.C. § 2255 (“Defendant’s Motion”), attached to Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (Docket No. 128), at 3-4, 6. Rule 5(a) provides, in relevant part:

Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed.

McCarthy does not refer to any authority for his contention that the delay in his case constituted a violation of this rule, but merely assumes that the nearly 13 hours represented unnecessary delay within the meaning of the rule. That assumption may derive from 18 U.S.C. § 3501(c), which provides that a confession made while under detention is not inadmissible solely because of delay in bringing the defendant before a magistrate if the confession is found by the court to have been made voluntarily and within six hours immediately following his arrest or detention.

Section 3501 was enacted in 1968 in response to *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), in which the Supreme Court invalidated convictions based on confessions obtained after lengthy detention and interrogation before the defendant was brought before a magistrate. 1 C. Wright, *Federal Practice & Procedure* § 72 at 89-90 (1982). The statute deals only with confessions. McCarthy did not confess. Case law has extended the *McNabb-Mallory* rule to evidence that has been obtained by exploitation of the illegal

detention. *Id.* § 75 at 121. Evidence is so obtained when its discovery results from a statement or statements made by the defendant during the illegal detention. McCarthy offers no such link between statements that he may have made during his allegedly illegal detention and the discovery of any of the physical evidence used against him at trial. In fact, there was a sufficient independent basis for the discovery of each item of that evidence, as established by the court’s ruling before trial on McCarthy’s motion to suppress. Docket No. 76. McCarthy cannot demonstrate constitutionally ineffective assistance of counsel on this basis.

McCarthy next asserts that his counsel provided constitutionally deficient assistance when he failed to move to sever for trial Count IV of the indictment, alleging possession of a firearm by a felon, from the other charges against him. This failure, he asserts, resulted in making the jury aware of “evidence concerning [his] prior felony convictions used to support the unlawful possession of a firearm charge,” Defendant’s Motion at 8, because the indictment was given to the jury along with the exhibits when it retired to deliberate. The government responds that the parties stipulated that McCarthy was a convicted felon and that no evidence concerning the number or nature of his prior convictions was adduced, so that any prejudice to McCarthy was minimal. The government relies on *United States v. Rose*, 104 F.3d 1408 (1st Cir.), *cert. denied* 117 S.Ct. 2424 (1997), in which the First Circuit held, on a similar claim raised on direct appeal, that:

The felon-in-possession charge was properly tried with the other charges because it arose out of the same occurrence. Any prejudice was limited because Rose stipulated to his status as a prior convicted felon. Consequently, the government was not permitted to put on evidence concerning the number and nature of Rose’s prior felony convictions.

Id. at 1416.

McCarthy attempts to distinguish *Rose* by stating that a copy of the indictment, listing four

prior convictions for armed robbery, attempted murder, bank larceny and conspiracy to commit bank larceny, was given to the jurors. Defendant's Traverse (Docket No. 133) at 4. In fact, only a redacted copy of the indictment was given to the jurors. [Trial] Transcript of Proceedings, Vol. III (Docket No. 115) ("Trial Tr. III") at 489. That redacted copy has been retained in the court file. It does not list any of the prior convictions included in the original document, and, contrary to McCarthy's suggestion in his initial motion at page 8, does not show any evidence of "whiting out" and does not show the armed robbery conviction. Under these circumstances, *Rose* governs. There was no need for McCarthy's counsel to move to sever Count IV; his conduct was not deficient.

The next salvo in McCarthy's attack on the effectiveness of his attorney concerns his alleged failure to appeal McCarthy's conviction on Count IV based on the ruling in *United States v. Caron*, 77 F.3d 1 (1st Cir. 1996), in which the First Circuit's opinion was issued on the same day that it denied McCarthy's appeal. McCarthy's assertion that his attorney should have moved for reconsideration of the denial of his appeal based on *Caron* arises from the fact that one of the predicate offenses used to determine his status for purposes of sentencing on the felon-in-possession charge was a Massachusetts conviction for armed robbery. In *Caron* the First Circuit held that a convicted felon in Massachusetts who has completed his sentence has had civil rights restored within the meaning of 18 U.S.C. § 921(a)(20), making such a conviction potentially unavailable as a predicate offense for the purposes of sentencing on a felon-in-possession charge. *Id.* at 6.

However, the First Circuit's next pronouncement on this issue is fatal to McCarthy's claim. In *United States v. Estrella*, 104 F.3d 3 (1st Cir.), *cert. denied* 117 S.Ct. 2494 (1997), the First Circuit held that, even though a felon's civil rights are deemed to be restored upon completion of sentence, the continuing restriction upon his right to possess firearms is sufficiently substantial to

make a Massachusetts conviction a qualifying conviction for sentencing purposes on a federal felon-in-possession charge. *Id.* at 8. Any motion for reconsideration based on *Caron* would not have resulted in any change in McCarthy's sentence, and therefore his counsel's failure to seek reconsideration on that basis cannot be considered constitutionally deficient under the second prong of the *Strickland* test.

McCarthy next contends that his counsel provided constitutionally deficient assistance by failing to move for a directed verdict on Count I of the indictment at the conclusion of the prosecution's case. In fact, his counsel did make such a motion. Trial Tr. III at 459-60.

Finally, McCarthy asserts in conclusory fashion that he was denied effective assistance of counsel because his trial attorney "failed to subject the prosecution's case to meaningful adversarial testing" and because the "cumulative errors of his attorney" denied him a fair trial and due process of law. Defendant's Motion at 15-16. The only "errors" specified by McCarthy have been discussed above; none presents an instance of ineffective assistance standing alone, and, since none of the specified activity is actually an error, there are no errors to cumulate. A review of the pretrial activity by McCarthy's counsel, including the use of an investigator, Docket No. 27, a motion to sever, Docket No. 29, motions to suppress, Docket Nos. 33, 34 & 35, and motion for discovery, Docket No. 47, as well as the trial transcripts and the post-trial sentencing memorandum, Docket No. 103-1, confirms that McCarthy's counsel subjected the prosecution's case to meaningful adversarial testing that is easily within the range of professionally competent assistance. McCarthy's motion on this basis fails to meet either prong of the *Strickland* test.

B. Motion to Dismiss Indictment

McCarthy has included with his section 2255 motion a “Motion to Dismiss Indictment for Lack of Jurisdiction,” in which he claims that the government failed to obtain a grand jury concurrence form with the signatures of at least twelve members of the grand jury voting to indict him, in violation of Fed. R. Crim. P. 6(f), and that this failure nullifies the indictment and deprives the court of jurisdiction. Rule 6(f) in fact requires a writing only if 12 jurors do not concur in finding an indictment, and even then the only writing required is a report by the foreperson. The case law cited by McCarthy does not support his argument. *Stump v. Sparkman*, 435 U.S. 349 (1978), has nothing to do with indictments. *Gaither v. United States*, 413 F.2d 1061 (D.C.Cir. 1969), a case on which the First Circuit has taken no position, *see DeVincent v. United States*, 632 F.2d 145, 146 n.3 (1st Cir. 1980), is inapposite. In *Gaither*, there was undisputed evidence that the grand jurors, other than the foreman, had never seen the indictment which the foreman had signed. 413 F.2d at 1065. McCarthy offers no such evidence here.

The government’s response to this motion relies on the court’s denial of McCarthy’s Motion for Disclosure of Signed Grand Jury Concurrence Form, filed February 7, 1997, in which McCarthy merely stated that he “has reason to beleive [sic] that his second superceeding [sic] indictment was only signed by the foreman of the Grand Jury and not concurred in by 12 or more grand juror’s [sic].” Motion (Docket No. 125) at [2]. The court denied the motion by endorsement, stating “The defendant has shown no basis for his ‘reason to believe’ that there is some problem with the grand jury process. See *DeVincent v. United States*, 632 F.2d 145 (1st Cir. 1980).” *Id.* The government merely contends that “nothing has changed since the court ruled” on the initial motion. Government Response to Motion to Vacate, Set Aside or Correct Sentence (Docket No. 131) at 20.

McCarthy’s current motion is in fact presented in considerably more detail than was his first

motion, and it seeks a different result. Nevertheless, McCarthy provides no relevant authority in support of the motion and bases the motion on a misconstruction of the requirements of Rule 6(f). In addition, the *DeVincent* rationale continues to be relevant to McCarthy's request. He offers no proof of his allegation. "Once it appeared from DeVincent's affidavit that he lacked proof of his allegation and was merely speculating about the way in which he was indicted, there was no need to . . . hold further proceedings including an evidentiary hearing." 632 F.2d at 146. Under these circumstances, I recommend that McCarthy's motion to dismiss the indictment be denied.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing and that his motion to dismiss the indictment be **DENIED**. The defendant's motion to hold this action in abeyance is **DENIED**.

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 12th day of September, 1997.

David M. Cohen
United States Magistrate Judge