

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

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal No. 92-85-P-H</b>
	)	<b>(Civil No. 97-27-P-H)</b>
<b>GERALD HOYT HUMPHREY,</b>	)	
	)	
<b>Defendant</b>	)	

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

Gerald Hoyt Humphrey moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Humphrey was convicted of two counts of possessing a firearm in violation of 18 U.S.C. § 922(g)(1), the “felon-in-possession” law. The court determined that he was subject to sentence enhancement under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(1), which applies when a person who violates section 922(g)(1) has at least three previous convictions for a violent felony and/or serious drug offense. Humphrey contends he suffered the ineffective assistance of counsel and was thereby improperly convicted of more than one count of the offense and was also improperly sentenced 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) (citation omitted). In this instance, I find that the allegations of Humphrey are either contradicted by the record or are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion

be denied without an evidentiary hearing.

## I. Background

The grand jury returned its indictment of Humphrey on December 9, 1992, charging him with two violations of the felon-in-possession law, both occurring on or about November 12 of that year. Indictment (Docket No. 1). One count alleged possession of a .38 caliber revolver, and the other a 12-gauge shotgun. *Id.*

Through counsel, Humphrey filed but ultimately withdrew a motion seeking to strike the second count of the indictment on the ground that, *inter alia*, the government would be unable to show that he “separately possessed” each firearm.<sup>1</sup> Notice of Motion and Motion to Strike (Docket No. 5) at 2; Notice of Withdrawal of Motion [to] Strike (Docket No. 8). Humphrey ultimately entered a plea of guilty, Transcript of Proceedings (“Rule 11 Tr.”) (Docket No. 27) and the court conducted a sentencing hearing on June 21, 1993, Transcript of Sentencing Hearing (“Sentencing Tr.”) (Docket No. 17).

The Pre-Sentence Report prepared for the court recited the following prior convictions: a manslaughter conviction dating from 1961, an armed robbery that occurred on June 17, 1976 and three additional offenses -- attempted homicide and kidnapping -- all stemming from incidents that took place on the following day, June 18, 1976. Pre-Sentence Report at ¶¶ 28, 36, 38-44. The latter offenses took place only weeks after Humphrey’s discharge from the manslaughter sentence on May 3, 1976. *Id.* at 28. The court adopted, as undisputed, these factual assertions concerning

---

<sup>1</sup> The withdrawn motion also sought to strike as “surplusage” the references in the indictment to the ACCA and the indictment’s recitation of prior felony convictions beyond the one such conviction required to establish the crime of being a felon-in-possession. Notice of Motion and Motion to Strike (Docket No. 5) at 3.

Humphrey's criminal record. Undisputed Findings Affecting Sentencing, appended to Judgment (Docket No. 15) at ¶ 1.

Through counsel, Humphrey took issue with the inclusion of the manslaughter conviction as a predicate offense for sentencing purposes. Specifically, he contended that the manslaughter was not properly a predicate offense under the ACCA because, although he was prosecuted as an adult, he committed the offense at the age of 13. Defendant's Sentencing Memorandum (Docket No. 12) at 5-11; Defendant's Memorandum [in] Opposition to the Government's Sentencing Memorandum ("Reply Memo") (Docket No. 13) at 1-3; Sentencing Tr. at 5-14. Counsel to Humphrey also took the position that the four offenses dating from a two-day period in 1976 did not take place on separate occasions and therefore could only collectively comprise one predicate offense for ACCA purposes. Defendant's Sentencing Memorandum at 11-15; Reply Memo at 3-5; Sentencing Tr. at 14-17.

These views did not prevail. The court concluded that the manslaughter conviction was properly considered a predicate offense. Sentencing Tr. at 26. Further, it found at least two additional predicate offenses by separating for purposes of the ACCA the armed robbery of June 17, 1976 and the offenses that took place on the following day. *Id.* at 27-28. Therefore, sentencing Humphrey as an armed career criminal, the court ordered him incarcerated for 188 months -- at the high end of the applicable range under the United States Sentencing Guidelines. *Id.* at 29, 31. The 188 months were imposed on each count, but concurrent with one another. *Id.* at 31. The court also sentenced Humphrey to two concurrent five-year terms of supervised release, and a special assessment of \$50 on each count. *Id.* at 32.

Appeal followed. The First Circuit affirmed the judgment, *United States v. Humphrey*, 66

F.3d 306 (1st Cir. 1995) (table), holding in a *per curiam* opinion that Humphrey was properly sentenced as an armed career criminal.<sup>2</sup> The appellate panel discussed only the issue of whether the 1976 convictions were committed on occasions different from one another, permitting them to be counted as two of the three requisite predicate offenses, answering the question in the affirmative. Thereafter, Humphrey filed the instant motion for collateral relief. The motion presents three grounds: (1) that his attorney provided ineffective assistance by permitting him to be sentenced as an armed career criminal, (2) that his sentencing as an armed career criminal was illegal and therefore also violative of due process, and (3) that his attorney provided ineffective assistance by permitting him to plead guilty to more than one count. I take up these assertions in reverse order.

## II. Multiple Counts

Claims of ineffective assistance of counsel are analyzed pursuant to the familiar 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, the 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. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In such a case, the issue is whether the guilty plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant,"

---

<sup>2</sup> A copy of the First Circuit's opinion appears in the record as Docket No. 20.

which depends on whether the advice of counsel “was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 56 (citations and internal quotation marks omitted).

Among the issues that confronted Humphrey and his attorney prior to the entry of the guilty plea was the question of whether Humphrey committed, or the government could prove that he committed, two separate offenses under the felon-in-possession statute. Both Humphrey and the government cite cases from other circuits suggesting that multiple counts of this offense are only appropriate where the defendant not only possessed more than one weapon but acquired them at different times and/or stored them in different places. *See, e.g., United States v. Hutching*, 75 F.3d 1453, 1460 (10th Cir.), *cert. denied*, 116 S.Ct. 2502 (1996). For purposes of evaluating Humphrey’s motion, the court can assume this principle is an accurate statement of First Circuit law as well.

It is Humphrey’s present contention that, because the government “presented no evidence” of separate receipt or storage, it is “axiomatic” that his attorney provided ineffective assistance “by failing to object to this multiplicitous indictment prior to advising [him] to enter pleas of guilty to each count.” Defendant’s Memorandum, appended to section 2255 motion (Docket No. 22) at 19. The record belies this assertion. In fact, trial counsel did interpose such an objection, *see* Notice of Motion and Motion to Strike (Docket No. 5) at 2-3, but withdrew it after Humphrey pleaded guilty to both counts, *see* Notice of Withdrawal (Docket No. 8). Moreover, the issue explicitly arose when Humphrey and his attorney appeared before the court for a change-of-plea hearing pursuant to Fed. R. Crim. P. 11. On that occasion, the court noted that Humphrey was potentially exposed to the maximum statutory penalty as to each of the two counts. Rule 11 Tr. at 5. This prompted Humphrey’s attorney to express “concerns” about the plea, stating that he had advised his client to forego a trial “on the understanding the effective result of [the change of plea] would be

[Humphrey's] being charged as a single count" because "the weapons were found at the same time, same premises under the same circumstances." *Id.* at 8. The court indicated that the issue of concurrent versus consecutive sentences would be "left open for possible argument" at the sentencing hearing. *Id.* at 9-10. Both attorney and client affirmatively indicated they were satisfied with this explanation. *Id.* Indeed, concurrent sentences (except for the \$50 special assessment as to each count) were ultimately imposed by operation of the U.S. Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual (1992) at § 3D1.2.

It is thus apparent that both Humphrey and his trial attorney were fully aware at the time Humphrey pleaded guilty to two counts that there was some question as to whether prosecution on more than one count was appropriate. It is further apparent that the attorney's advice to plead guilty on both counts was premised on the notion that it would lead to precisely the kind of nearly concurrent sentence the court ultimately imposed.

[A] court must indulge a strong presumption that counsel's conduct falls 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."

*Strickland*, 466 U.S. at 689 (citation omitted). While it may be that the government would not have been able to present proof sufficient to sustain conviction on two counts, and while significant consequences may flow from conviction on multiple counts even when they result in concurrent sentences, *Ball v. United States*, 470 U.S. 856, 865 (1985), Humphrey presents no contentions in his petition that would rebut the presumption that he was fully counseled by his attorney to make a strategic decision to concede this issue.

Moreover, even if Humphrey could demonstrate that his attorney fell below the objective

standard of competence in making such a recommendation, his motion also fails to allege the requisite prejudice flowing from such an error. When the issue is whether the defendant entered a plea of guilty as the result of ineffective assistance, the prejudice prong of the *Strickland* test “requires him to show that, but for his counsel’s unprofessional errors, he probably would have insisted on his right to trial.” *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *cert. granted on other grounds*, 116 S.Ct. 2545 (1996). Humphrey’s motion contains no such assertion.

### **III. The Armed Career Criminal Act**

Humphrey’s remaining contentions -- that his sentencing as an armed career criminal was illegal, violative of due process and the result of ineffective assistance of counsel -- are also without merit. To the contrary, Humphrey was properly sentenced as an armed career criminal and his counsel’s assistance in this regard therefore cannot be said to have the outcome-determinative significance that the “prejudice” prong of the *Strickland* test requires in these circumstances. *See Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996) (defendant must show “reasonable probability that, but for counsel’s error, the result of the [sentencing] proceedings would have been different”).

According to Humphrey, his trial attorney’s failed to determine that his manslaughter conviction is not a predicate offense for purposes of the ACCA in light of 18 U.S.C. § 921(a)(20), providing that

[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of [the ACCA and the felon-in-possession statute], unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20). For purposes of this provision, civil rights “generally encompass the right to vote, the right to seek and hold public office, and the right to serve on a jury.” *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (citation and internal quotation marks omitted), *petition for cert. filed* (U.S. Feb. 18, 1997) (No. 96-8000). According to Humphrey, his civil rights were fully restored following his discharge from his sentence on the manslaughter conviction in May 1976 and his trial attorney should therefore have argued for exclusion of this conviction from the ACCA calculus. *See id.* at 689 (noting that Maine restored civil rights to convicted felons as of 1975).

The problem with this argument is the factor that was dispositive in *Sullivan*: Notwithstanding Maine’s restoration of civil rights to convicted felons, an ongoing restriction on firearms possession set forth in 15 M.R.S.A. § 393 implicates the exception-to-the-exception language in section 921(a)(20). *Sullivan*, 98 F.3d at 689. Section 393 provides in relevant part:

**1. Possession prohibited.** A person may not own, possess or have under that person's control a firearm, unless that person has obtained a permit under this section, if that person:

A. Has been convicted of a crime, under the laws of the United States, this State or any other state, that is punishable by imprisonment for one year or more;

B. Has been convicted of a crime, under the laws of the United States, this State or any other state, that was committed with the use of a dangerous weapon or a firearm against a person . . . , or

C. Has been adjudicated in this State or under the laws of the United States or any other state to have engaged in conduct as a juvenile that, if committed by an adult, would have been a disqualifying conviction:

(1) Under paragraph A and bodily injury to another person was threatened or resulted; or

(2) Under paragraph B.

15 M.R.S.A. § 393(1). A person subject to the limitations set forth in section 393(1) may not seek a permit until five years after discharge from sentence and, in any instance, may not be issued a permit to carry a concealed firearm. *Id.* at § 393(2).

Humphrey seeks to distinguish *Sullivan* by pointing out that, at the time of his discharge from the manslaughter sentence, a different version of section 393 was in effect. From 1965 through 1977, this provision read in relevant part as follows:

It shall be unlawful for any person who has been convicted of a felony under the laws of the United States or of the State of Maine, or of any other state, to have in his possession any pistol, revolver or any other firearm capable of being concealed upon the person until the expiration of five years from the date of his discharge or release from prison or termination of probation. Such a person convicted of any offense, except misdemeanors, the maximum punishment for which is a fine of \$100 or less, or imprisonment for 90 days or less, during the 5-year period, shall be forever barred from having in his actual or constructive possession any of the weapons described herein.

P.L. 1965, ch. 327, § 2. Although this earlier version of section 393 is less restrictive than its successors, it still prohibited Humphrey from possessing at least some firearms for the five years after his discharge from the manslaughter sentence in May 1976. Moreover, within weeks of his discharge in 1976 Humphrey committed the two felonies that form the remainder of his predicate offenses. Therefore, by operation of this former version of section 393, the five-year restriction imposed therein on concealed weapons possession was extended indefinitely. In 1977, section 393 was amended such that its restrictions assumed their present form, with certain exceptions not relevant here. P.L. 1977, chs. 225, 564. Thus, from the date of his discharge on the manslaughter charge through the date he violated the federal felon-in-possession statute, Humphrey's right to carry concealed firearms had never been restored. Humphrey would have the court adopt a construction of section 393, as it has evolved and been applicable to him over the years, that focuses on the

firearm possession rights of which he was not deprived, i.e., the right to possess rifles and other firearms not capable of concealment, at the time of his 1976 discharge. But the relevant case law requires the court to view the glass as half empty rather than half full. “Section 921(a)(20) provides that a conviction may serve as a predicate offense under the ACCA notwithstanding the restoration of civil rights theretofore forfeited if the restoration statute imposes a restriction on the felon’s ability to possess a firearm.” *Sullivan*, 98 F.3d 689 (citing statute). Although “there might be close cases where . . . some other state’s restriction [on firearms possession] is arguably *de minimis*,” *United States v. Estrella*, 104 F.3d 3, 8 (1st Cir. 1997) (holding that Massachusetts ban on handgun possession outside home or business a section 921(a)(20) restriction), this is not such a case. Since Humphrey was properly sentenced as an armed career criminal, he cannot establish the prejudice necessary to advance his claim of ineffective assistance in this regard, and his related claims concerning illegality and due process must also fail.

### **III. Conclusion**

For the foregoing reasons, I recommend that the petitioner’s motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary 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 26th day of March, 1997.*

---

*David M. Cohen  
United States Magistrate Judge*