

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

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b>Criminal Nos. 96-29-P-C,</b>
	)	<b>92-84-P-C and 92-66-P-C</b>
<b>ALBERTO GONZALEZ,</b>	)	<b>(Civil No. 97-130-P-C)</b>
	)	
<b>Defendant</b>	)	

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

Defendant Alberto Gonzalez moves pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence in Docket No. 96-29-P-C for possession of cocaine base with intent to distribute and possession of heroin with intent to distribute. He additionally moves for section 2255 relief in connection with the sentences in Docket Nos. 92-84-P-C and 92-66-P-C revoking the defendant’s supervised release for violating the conditions imposed thereon. The underlying convictions in those cases involved distribution of and possession with intent to distribute cocaine and the receipt of firearms by a person convicted of a crime punishable by imprisonment exceeding one year.

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). For the reasons that follow, I recommend that the motion be granted to the extent that the defendant seeks to have his right of appeal restored in Docket No. 96-29-P-C, and otherwise denied without a hearing because the defendant’s allegations do not entitle him to any further relief.

**I. The Revocation Proceedings**

The defendant's section 2255 motion asserts four grounds for relief: (1) that his guilty plea in Docket No. 96-29-P-C was unlawfully induced or involuntarily entered because his attorney gave him erroneous advice about the likely sentence and its possible subsequent correction, (2) that he suffered the ineffective assistance of counsel because of his attorney's erroneous sentence prediction, (3) that his right to appeal the conviction was unlawfully denied because his attorney ignored his instructions to pursue appellate remedies and (4) that his attorney failed to object to the cocaine charge on the ground that he possessed cocaine base rather than crack cocaine.

As a preliminary matter, I note my agreement with the government that none of these allegations relate to the revocation sentences imposed in Docket Nos. 92-84-P-C and 94-66-P-C. The judgment entered in those dockets recites that the defendant admitted to having violated the terms of his supervised release requiring him to commit no new crimes, to abstain from the use of contraband substances and intoxicants, and to participate in substance abuse therapy to the satisfaction of his supervising officer. Judgment and Memorandum of Sentencing Judgment (Docket Nos. 39 and 38 in 92-66-P-C). Although the new crimes alleged in the revocation proceeding are those at issue in Docket No. 96-29-P-C, the defendant simply omits any discussion of the revocation sentences. Discerning no basis for disturbing those sentences, I recommend that the defendant's motion be denied to the extent that it implicates the revocation proceedings.

## **II. Voluntariness of Plea**

“[D]ue process demands that [a guilty] plea be made voluntarily, knowingly, intelligently, and with an awareness of the overall circumstances and probable consequences.” *United States v. McDonald*, 1997 WL 464957 at \*3 (1st Cir. Aug. 20, 1997) (citation omitted). The defendant

contends that the plea he entered on September 4, 1996 falls short of this standard because his attorney had told him he would receive a Guideline sentence of 121 to 151 months of incarceration, when he was ultimately sentenced to 198 months, and that the court's sentence would be corrected on appeal in any event.

The record of the colloquy between the defendant and the court pursuant to Fed. R. Crim. P. 11 belies this contention. *See United States v. Isom*, 85 F.3d 831, 835 (1st Cir. 1996) (“axiomatic” that Rule 11 colloquy is “crucial in later determining whether the plea was truly understanding and voluntary.”) (citation omitted). The defendant affirmatively indicated that he understood his conviction on the cocaine charge subjected him to a minimum of 20 years' incarceration and up to life imprisonment, in addition to a possible fine and supervised release. Transcript of Rule 11 and presentence and sentencing proceedings (Docket No. 19) at 22. Similarly, the defendant stated that he understood that the heroin charge subjected him to incarceration of up to 30 years in addition to a possible fine and supervised release. *Id.* In both instances, the defendant stated that he clearly understood this to be the extent of his exposure, and that his attorney had explained these realities to him. *Id.* at 22-23. In these circumstances, the court can reach no other conclusion than that the defendant's plea was knowing and voluntary.

### **III. Ineffective Assistance of Counsel**

Two of the defendant's claims alleging ineffective assistance of counsel are subject to summary dismissal based on the standard articulated in *Hill v. Lockhart*, 474 U.S. 52 (1985). As the Supreme Court made clear in *Hill*, the two-pronged cause and prejudice test for ineffective assistance claims, as first set out in *Strickland v. Washington*, 466 U.S. 668 (1984), applies in the context of

guilty pleas, and the prejudice prong requires the defendant to show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 57-59. The defendant’s first ineffective assistance claim is that his attorney told him he would receive a sentence of no more than 12 years and seven months in prison. However, his motion nowhere asserts that he would have entered a different plea had he received more accurate advice from his attorney concerning the applicable sentence. The requisite prejudice is therefore lacking. *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). Moreover, even if the defendant had made such an assertion, there is no prejudice under *Strickland* and *Hill* absent a claim of innocence or the articulation of a plausible defense which could have been raised at trial. *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev’d in part on other grounds*, 117 L.Ed.2d 1673 (1997).

The plaintiff’s third ineffective assistance claim — that his attorney failed to object to the cocaine charge on the ground that the defendant possessed cocaine base rather than crack cocaine — does meet the cause prong of the *Strickland* test, which focuses on attorney competence. *Hill*, 474 U.S. at 58. As the government points out, the federal criminal statutes and Sentencing Guidelines draw no distinction between crack cocaine and cocaine base. *See United States v. Sanchez*, 81 F.3d 9, 10 (1st Cir.) (noting that crack cocaine is “cocaine base” for purposes of 21 U.S.C. § 841(a)(1) regulation of controlled substances), *cert. denied*, 137 L.Ed.2d 137 (1996); U.S. Sentencing Guidelines Manual § 2D1.1(D) (1995). In any event, the record reflects that the government intended to prove at trial that the defendant possessed cocaine base. Prosecution Version (Docket No. 7) at 1.

The defendant’s second ineffective assistance claim, which alleges that his attorney failed

to pursue a direct appeal despite being instructed to do so by the defendant, warrants relief. The government concedes that no evidentiary hearing is necessary to establish that the defendant was denied his right to appeal as the result of his counsel's deficient performance. In these circumstances, the defendant is entitled to have his appellate rights restored without any showing as to the merits of the issues he would raise on appeal. *Bonneau v. United States*, 961 F.2d 17, 23 (1st Cir. 1992).

#### IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **GRANTED** to the extent that it seeks to restore his appellate rights in Docket No. 96-22-P-C and otherwise **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 12th day of September, 1997.*

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*David M. Cohen  
United States Magistrate Judge*