UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 95-75-P-H***
	)	***(Civil No. 98-279-P-H)***
MICHAEL GIGNAC,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255

The defendant moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 240 months was imposed after he was found guilty by a jury of interfering with interstate commerce by means of robbery, in violation of 18 U.S.C. §§ 2 and 1951(a) & (b)(1). Judgment (Docket No. 39) at 1-2. The defendant contends that he was deprived of the effective assistance of counsel at trial, at sentencing and on appeal; that judicial and prosecutorial misconduct each require the vacation of his conviction; and that there was insufficient evidence to support his conviction.

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 each of the defendant's allegations meets one or more of these tests. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

As the First Circuit noted in its opinion on the defendant's direct appeal:

> On the night of August 17, 1995, defendant-appellant Michael Gignac and two other men robbed a store in Portland, Maine. The robbers all wore masks; two of them were armed. Gignac was indicted on three counts: Count I alleged that he interfered with commerce by means of robbery in violation of 18 U.S.C. § 1951(a), § 1951(b)(1), and 18 U.S.C. § 2. Count II charged Gignac with using and carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), § 924(c)(3), and 18 U.S.C. § 2. Count III accused Gignac of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g), § 924(e)(1), and 18 U.S.C. § 2. The jury found Gignac guilty on Count I, but not guilty on Counts II and III. The court sentenced Gignac as a career offender under § 4B1.1 of the United States Sentencing Guidelines. The court found that Gignac was a career offender because of prior convictions for arson, burglary of a church, and assault on a prison officer.

United States v. Gignac, 119 F.3d 67, 68 (1st Cir. 1997). Gignac's appointed counsel on appeal was not the same lawyer who had been appointed to represent him through trial and sentencing. The issues raised in the defendant's unsuccessful appeal were whether the trial court erred in applying the career offender enhancement provision of the Sentencing Guidelines or in allowing the prosecutor to impeach the defendant's testimony with the number, but not the nature, of his prior convictions. *Id.*

II. Discussion

The defendant argues that he received constitutionally defective assistance from his trial counsel in that his counsel (i) failed to review the entire discovery file with him before trial, (ii) failed to discuss the case sufficiently with him before trial, so that he "did not have even a basic grasp of the facts of this case" and failed to "perform as requested;" (iii) failed to adequately

investigate alternative suspects; (iv) failed to obtain the testimony of "necessary" alibi witnesses; (v) failed to "move for impeachment" of prosecution witnesses, despite having their prior inconsistent statements; (vi) failed to present testimony contesting the rebuttal testimony of the defendant's landlord; (vii) used cocaine while representing the defendant; (viii) failed to object to the admission at trial of "certain pieces of evidence," including three specific examples; (ix) failed to present the objections to the pre-sentence investigation report that the defendant wanted him to present; (x) failed to move for a mistrial after return of the verdict; and (xi) failed to meet with the defendant after trial as promised.[1] Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence ("Motion") (Docket No. 49) at 5, (1)-(10).[2]

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[1] On November 13, 1998, after the defendant had filed his response to the government's objection to his motion seeking relief under section 2255, I granted in part the defendant's Motion for Production of Trial Transcripts (Docket No. 53), as follows:

> The defendant shall be provided with a copy of the transcripts of the complete trial as the same are on file with the court. . . . The defendant shall have until 12/18/98 within which to file a single supplemental reply memorandum if he so chooses, which memorandum shall be strictly limited to a supplementation of the defendant's reply memorandum (which he refers to as a "traverse") that refers to the trial transcript to the extent the defendant feels the transcript supports his reply to the government's opposition to his § 2255 motion.

Id., Endorsement. The defendant has filed a 37-page document entitled Supplement to defendant/Movants reply memorandum/Traverse ("Defendant's Sur-Reply") (Docket No. 62) that includes, *inter alia*, allegations concerning his trial counsel, the court's jury instructions, and the court's acceptance of stipulations offered at trial that were not present in his initial motion or reply, and considerable factual material not drawn from the transcripts that was not presented in his initial motion or reply, all of which is beyond the scope of my November 13 order. Any such material will be disregarded by the court.

[2] The defendant's motion is filed on a printed form with several typewritten pages inserted between pages 6 and 7 of the form. The inserted pages are numbered (1) - (21) and will be (continued...)

The defendant asserts that his appellate counsel provided constitutionally defective assistance in that she (i) refused to meet with him; (ii) "failed to raise grounds which were readily discernible from the record;" (iii) refused to raise the ineffective assistance of the defendant's trial counsel on direct appeal, erroneously telling the defendant that she could not do so; (iv) refused to raise the inconsistencies in the testimony of the prosecution witnesses as an issue on appeal; and (v) refused to raise the issue of insufficiency of the evidence as an issue on appeal. *Id*. at 5, (11) - (14). The defendant finds evidence of judicial misconduct warranting relief in the trial court's (i) denial of motions to have the defendant moved to a place of imprisonment where his counsel could more easily meet with him; (ii) interrupting the defendant's testimony at trial using "harsh words and a surly, disbelieving tone," thereby leading the jury to believe that the defendant was lying; (iii) failure to allow the defendant sufficient time during the trial to review a videotape of the robbery with which he was charged; (iv) denial of the defendant's motion for acquittal at the end of the prosecution's case in chief, as well as its denial of a similar motion at the close of trial and of the defendant's motion for judgment notwithstanding the verdict after the trial; and (v) giving of an improper jury instruction concerning the testimony of the prosecution witnesses. *Id*. at 5, (15) - (17).

The defendant contends that he was deprived of due process of law and his right to a fair trial by prosecutorial misconduct consisting of (i) failure to comply with the Interstate Agreement on Detainers Act in moving the defendant between custody on state charges and custody on the federal charges resulting in the conviction at issue here, forcing the defendant to "fight on two fronts;" (ii) presenting at trial the testimony of witnesses the prosecutor knew to be perjurious; (iii) extensive

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[2](...continued)
distinguished in this recommended decision from the numbered pages of the form by the use of parentheses around each number.

coaching of prosecution witnesses before trial; (iv) use of "improper, prejudicial and inflammatory" statements during closing argument, including vouching for the credibility of prosecution witnesses and calling defense witnesses liars; (v) failure to provide before trial the prior statement of one of the prosecution's rebuttal witnesses; and (vi) improper "purchase" of the testimony of prosecution witnesses. *Id*. at 6, (18) -(20). Finally, the defendant argues that the evidence presented at trial was insufficient to support his conviction because there was no evidence that the store at which the robbery took place was involved in interstate commerce. *Id*. at (21).

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 Sixth Amendment right to counsel has been violated. First, the defendant must show that his 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 element means that the defendant is not entitled to relief. *Id*. at 697. In the First Circuit, courts "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.

He must show more than a possibility that counsel's errors had some conceivable effect on the outcome of the proceeding. He must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Argencourt*, 78 F.3d at 16.

1. Trial Counsel. The defendant's challenges to the performance of his trial counsel begin with the claim that he failed to review the entire discovery file provided by the prosecutor with the defendant before trial. This claim is related to, and will be discussed with, the defendant's second challenge — that his trial counsel did not meet with him and discuss the case with him sufficiently before trial. The defendant cites no authority for his argument that a failure by defense counsel to go over the discovery file with his client before trial, standing alone, constitutes constitutionally defective assistance of counsel, and my research has discovered none. When considered together with the second challenge, this claim amounts to an assertion that trial counsel failed to discuss the case sufficiently with his client before trial. The First Circuit has addressed this issue in general terms.

> The most liberal standard on this issue suggests that "[c]ounsel should confer with his client without delay and *as often as necessary* to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client."

United States v. Maguire, 600 F.2d 330, 332 (1st Cir. 1979) (emphasis in original) (quoting *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C.Cir. 1973)). If counsel demonstrated reasonable competence at trial and the record is devoid of evidence that he lacked significant information, this standard cannot be met. *Id*. In addition, counsel need not raise every non-frivolous claim advanced by his client, and certainly may ignore frivolous claims pressed by his client. *United States v. Hart*, 933 F.2d 80, 83 (1st Cir. 1991). The brevity of time spent by a lawyer in consultation with his client, without more, does not establish that counsel was ineffective. *Jones v. Estelle*, 622 F.2d 124, 127

(5th Cir. 1980) (only one meeting before trial). *See also United States v. Reed*, 756 F.2d 654, 657 (8th Cir. 1985) (only two-hour meeting on day before trial). In his reply to the government's opposition to his motion, the defendant amplifies his position on this point by arguing that his trial counsel never discussed with him stipulating to the fact that the store which the defendant was charged with robbing was involved in interstate commerce. Movant's Traverse to the Government's Opposition to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 USC § 2255 ("Defendant's Reply") (Docket No. 60) at 6. The defendant offers this unsworn statement as further evidence of the constitutional deficiency of his trial representation. However, the decision to enter into a stipulation is considered a tactical one, which will not support a claim of constitutionally deficient assistance of counsel. *E.g., United States v. Kennedy*, 797 F.2d 540, 543 (7th Cir. 1986). "[A] stipulation does not require the defendant's consent." *Poole v. United States*, 832 F.2d 561, 564 (11th Cir. 1987) (stipulation to essential element of crime charged).

Contrary to the defendant's assertion, the performance of his counsel at trial demonstrated that he did in fact have a basic grasp of the facts of this case and that his representation was reasonably competent. To the extent that his trial counsel failed to perform as the defendant requested, "counsel's decision not to abide by the wishes of his client has no necessary bearing on the question of professional competence; indeed, in some instances, listening to the client rather than to the dictates of professional judgment may itself constitute incompetence." *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993). That is the case here. Accordingly, the first two grounds raised by the defendant do not support his Sixth Amendment claim.

The third ground upon which the defendant bases his Sixth Amendment claim concerning his trial counsel is that he failed adequately to investigate alternative suspects. The defendant never

identifies these possible suspects in his submissions to this court in connection with the instant motion. Such allegations are insufficiently particular and lack the necessary support allegations of fact to create a viable claim under section 2255. *Barrett v. United States*, 965 F.2d 1184, 1186 (1st Cir. 1992). The defendant is accordingly not entitled to relief on this ground.

The defendant next asserts that his trial counsel was constitutionally deficient in that he failed to obtain the testimony of two alibi witnesses, Joey Garland and "his fiancee, Brandy." Motion at (4). According to the defendant, he went to Garland's residence at 5 a.m. on August 16, 1995 to ask for help in moving so that he would not have to appear in court for eviction proceedings scheduled for later that day. *Id*. Brandy helped him move that day. *Id*. The defendant apparently contends that their testimony would refute the rebuttal testimony of his landlord that the defendant's apartment had been vacated by the night of August 15. Transcript of Proceedings ("Tr. III") (Docket No. 45) at 584. The alibi testimony presented as part of the defendant's case by Arnold Prior, Jason O'Brien, Daniel Kilton, Lana Murphy and Misty Pelletier concerned the defendant's whereabouts on the day after they helped him move; they all testified that the defendant moved on August 16. Transcript of Proceedings ("Tr. II") (Docket No. 44) at 394, 435, 447, 469, 481. The robbery was committed on August 17, 1995. Transcript of Proceedings ("Tr. I") (Docket No. 43) at 42-43. The defendant relies on *Tosh v. Lockhart*, 879 F.2d 412 (8th Cir. 1989), to support this argument. In addition to the fact that Eighth Circuit precedent is not binding on this court, *Tosh* involved a situation readily distinguishable from the circumstances present in this case. In *Tosh*, defense counsel presented only the testimony of one of four witnesses available to provide the defendant with an alibi, and that witness was the one of the four whose objectivity was most in doubt. 879 F.2d at 413-14. Here, defense counsel had presented the testimony of six alibi witnesses. The proposed testimony of the

two additional witnesses, as set forth by the defendant, could only have been cumulative. *See Barrett,* 965 F.2d at 1196 (cumulative evidence insufficient to establish ineffective assistance of counsel in decision not to present it). Under the circumstances, the defendant cannot show that there is a "reasonable probability" that the jury's conclusion would have been different if it had had the testimony of Garland and Brandy to consider. *Bryant v. Vose*, 785 F.2d 364, 369 (1st Cir. 1986). "The decision to call a particular witness is almost always strategic, requiring a balancing of the benefits and risks of the anticipated testimony." *Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993). Nothing in the defendant's presentation suggests any reason for this court to find that trial counsel's decision not to call these two witnesses was anything other than a strategic one and thus beyond review through a section 2255 Sixth Amendment claim. The defendant is not entitled to relief on the fourth claim raised against his trial counsel.

The defendant's fifth claim against his trial counsel, that he failed to impeach the prosecution's witnesses based on their prior inconsistent statements, is simply incorrect. The record demonstrates numerous instances of attempted impeachment of prosecution witnesses by the defendant's trial counsel on this basis. *E.g.*,Tr. I at 157, 163-65, 207-09, 215; Tr. II at 296-98, 357-59. Even if this were not the case, "[w]hether and how to conduct cross-examinations are tactical decisions that fall squarely within the domain of the attorney." *United States v. Ciancaglini*, 945 F. Supp. 813, 822 (E.D.Pa. 1996). *See also Mills v. Armontrout*, 926 F.2d 773, 774 (8th Cir. 1991) (failure to impeach a witness is trial tactic not cognizable in federal habeas corpus proceeding). The defendant does not demonstrate a Sixth Amendment violation on this ground.

The defendant next contends that his trial counsel fell below the Sixth Amendment standard by failing to present testimony contesting the testimony of his landlord presented by the prosecution

in rebuttal. The defendant identifies Garland, Brandy, Joe Sweetsir, Peter James and himself as the witnesses who could provide this testimony. For the reasons previously discussed, the failure to present this cumulative testimony does not provide a basis for finding a Sixth Amendment violation. The defendant also asserts in connection with this ground that "logs from the dump," where the landlord testified that a refrigerator was taken from the defendant's apartment, would have proved that the refrigerator was not removed on August 15 but rather on August 16. Motion at (4)-(5). The landlord testified that he took the "stuff" left in the defendant's apartment to the dump on August 18. Tr. III at 586-87. Even assuming that taking a refrigerator to the dump on August 16 or later would somehow constitute proof that it was not removed from the apartment on August 15, a dubious proposition at best, the landlord testified that a refrigerator was present in the apartment on August 15 and on August 18. *Id*. at 591. He never testified that he removed the refrigerator. The defendant states that the refrigerator was removed from the apartment and given away, Motion at (4) - (5), so the purported dump records have no relevance at all under the defendant's own scenario. The defendant is not entitled to relief on this ground.

The defendant's next contention is that he is entitled to relief because his trial counsel used cocaine while representing him. If the defendant means to suggest that his trial counsel used cocaine during the trial, and that such use diminished his capacity to conduct a defense, in the absence of specific evidence that drug use or drug dependency impaired his trial counsel's actual conduct at trial, the defendant cannot meet his initial burden to show that the representation fell below an objective standard of reasonableness. *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987). There is no such showing here, and the defendant is therefore not entitled to relief on this ground.

In his eighth challenge to the representation he received from his trial counsel, the defendant contends that his trial counsel was constitutionally deficient in that he failed to object to (i) the admission at trial of testimony of an employee of the burgled store that the store was involved in interstate commerce and (ii) the statement of the prosecutor in closing argument concerning one of the defendant's alibi witnesses, "Are you going to believe the likes of Arnie Prior?" Motion at (6)-(7). The defendant also claims that his trial counsel failed to "bring to light the discrepancies in the testimony" of the store employee who was present during the robbery. *Id*. In fact, the employee did not testify concerning the involvement of the store in interstate commerce. That evidence was presented through a stipulation. Tr. I at 89-90. In fact, the prosecutor did not make the statement attributed to him by the defendant. The closest the prosecutor came to such a remark in his closing argument was to say "I suspect you know better than to believe Arnold Prior's testimony." Tr. III at 631. Because that remark, taken in context, was not improper, as is discussed in section III(C) below, the failure of the defendant's trial counsel to object to it could not constitute constitutionally deficient performance. *Carter v. Johnson*, 110 F.3d 1098, 1111 (5th Cir.), *vacated on other grounds* 118 S.Ct. 409 (1997) (counsel not required to engage in futile exercise). Finally, the choice of the defendant's trial counsel not to cross-examine the store employee in detail concerning possible differences between her testimony and what was shown in the videotape of the robbery is a quintessential example of a trial strategy decision that the courts will not second-guess on collateral review. *Ciancaglini*, 945 F. Supp. at 822.

The defendant next asserts that his trial counsel failed to present objections to the presentence investigation report that the defendant wanted him to present. Again, trial counsel is not required to present every issue, claim or argument that his client wishes him to present. *McGill*, 11 F.3d at

227. In any event, the defendant presented these objections directly to the court himself, Exh. 14 to Memorandum of Law in Support of Motion to Vacate, Correct, or Set Aside Sentence pursuant to 28 USC § 2255 ("Defendant's Memorandum") (attached to Motion), and the court considered them before imposing sentence, Order Scheduling Guideline Sentencing Hearing and Imposition of Sentence and Specifying Disputed and Undisputed Facts and Issues (Docket No. 36) at 1-2. Under the circumstances, the defendant cannot show that the outcome would have differed on this basis, and he therefore is not entitled to section 2255 relief.

The defendant's penultimate attack on the assistance provided to him by his trial attorney is based on his counsel's failure to move for a mistrial after the jury returned a verdict convicting the defendant on only one of the three charges against him. The defendant merely asserts in conclusory fashion that "[i]t would have been proper to move for mistrial under these circumstances." Motion at (8). Contrary to the defendant's apparent supposition, the reason why such a motion would have been proper is not self-evident. In addition, this claim lacks the particular factual allegations necessary for the court to address it. *Barrett*, 965 F.2d at 1186. The defendant's trial counsel did move after the verdict was returned for both entry of a judgment of acquittal on the count on which he was convicted and for a new trial. Docket Nos. 32 & 33. If the defendant means to suggest that his trial counsel should have proffered some ground for a mistrial beyond those that were presented, it is his burden to specify that ground, and he has not done so.

The defendant's final salvo is directed at his trial counsel's failure to meet with him personally after trial to review the presentence investigation report. It is clear from the exhibits submitted by the defendant that his trial counsel provided him with copies of both the original and the revised report, Exhs. 12 & 13 to Defendant's Memorandum, and at the sentencing hearing, when

he was asked whether he had read and discussed the presentence report with his lawyer, the defendant responded "Yes," Transcript of Proceedings (Docket No. 46) at 3. When asked "Did you have enough time to do that?" the defendant again responded "Yes." *Id.* The defendant has given no reason why he should be relieved of these statements to the court, which should be presumed truthful for the same reason that statements made by a defendant in the course of a plea proceeding are presumed truthful. *See United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984). In addition, the defendant was able to present all of his objections to the presentence report directly to the court. Under the circumstances, he cannot establish that the outcome would have been different if his lawyer had met with him face-to-face to discuss the report.

The defendant has made no showing of constitutionally ineffective assistance by his trial counsel.

2. Appellate Counsel. The first two claims raised by the defendant against his appellate counsel are subject to the same legal standards as those he raised against his trial counsel. An allegation that the defendant's appellate counsel "failed to raise grounds which were readily discernible from the record," Motion at 5, is not sufficiently specific to merit section 2255 review. The defendant alleges that his appellate counsel's refusal to meet with him in person deprived him of the "most basic and fundamental right" to present to his appellate counsel the issues he wished to present in the appeal. *Id*. at (11). However, the defendant corresponded with his appellate counsel about the issues he wished to present, Exhs. 19, 21 & 22 to Defendant's Memorandum, and does not list any additional issues that he was unable to convey to his appellate counsel in his submissions in connection with the instant motion. Again, a lawyer, whether representing his client at trial or on appeal, need not raise every claim advanced by his client. *Hart*, 933 F.2d at 83. A decision by counsel not to abide

by the wishes of his client does not necessarily bear on his professional competence; indeed, there are occasions when following the wishes of the client would itself constitute incompetence. *McGill*, 11 F.3d at 227. That is the case here, where the three specific issues that the defendant contends his appellate counsel should have raised could not have succeeded on their merits. *See United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995) (when defendant challenges failure to raise an issue on appeal, court will examine merits of omitted issue).

The first of these issues is the alleged constitutional deficiency of the assistance provided by the defendant's trial counsel. The defendant admits, as he must, that claims of ineffective assistance of counsel are not ordinarily considered on direct appeal in the First Circuit. *E.g., United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998).

> We have held with a regularity bordering on the monotonous that fact-specific claims of ineffective assistance cannot make their debut on direct review of criminal convictions, but, rather, must originally be presented to, and acted upon by, the trial court. The rule has a prudential aspect. Since claims of ineffective assistance involve a binary analysis — the defendant must show, first, that counsel's performance was constitutionally deficient and, second, that the deficient performance prejudiced the defense — such claims typically require the resolution of factual issues that cannot efficaciously be addressed in the first instance by an appellate tribunal. In addition, the trial judge, by reason of his familiarity with the case, is usually in the best position to assess both the quality of the legal representation afforded to the defendant in the district court and the impact of any shortfall in that representation.

United States v. Mala, 7 F.3d 1058, 1063 (1st Cir. 1993) (citations omitted).

The defendant contends that the nature of his specific claims of ineffective assistance by his trial counsel made his case one in which the First Circuit would have considered such claims on direct appeal due to "exceptional circumstances." *See, e.g., United States v. Santiago*, 83 F.3d 20, 24 n.3 (1st Cir. 1996). However, the First Circuit has made clear that the "exceptional

circumstances" exception to its general rule on this issue does not refer to the nature of the claims themselves but rather is limited to cases where "the critical facts are not in dispute and the record is sufficiently developed to allow reasoned consideration of the claim." *Mala*, 7 F.3d at 1063 (cited in *Santiago*); *see United States v. Ortiz*, 146 F.3d 25, 27 (1st Cir.), *cert. den.* 1998 WL 553454 (Oct. 5. 1998) (where only claim of ineffective assistance arose from failure to file motion to suppress and trial counsel's reason for not filing motion was matter of record, court considered and denied claim on direct appeal). Here, the defendant presents numerous fact-specific claims of ineffective assistance by his trial counsel which were not sufficiently developed in the trial record to allow reasoned consideration on direct appeal. His appellate counsel correctly declined to present this issue on direct appeal, where the First Circuit would have declined to consider it. Appellate counsel's performance did not fall below minimal Sixth Amendment requirements when she refused to engage in a futile exercise. *Hart*, 933 F.2d at 83.

The defendant next contends that his appellate counsel wrongfully refused to raise on appeal inconsistencies in the testimony of prosecution witnesses. This claim is closely related to the defendant's claim that the issue of insufficiency of the evidence should also have been raised on appeal. When a defendant challenges the sufficiency of the evidence to support his conviction, the First Circuit will "review the evidence in the light most favorable to the verdict, drawing all reasonable inferences and resolving all credibility determinations in favor of the verdict." *United States v. Romero-Carrion*, 54 F.3d 15, 17 (1st Cir. 1995). Under this standard, the inconsistencies in the testimony of the prosecution witnesses perceived by the defendant carry no weight. The First Circuit views the evidence in the light most favorable to the verdict, and leaves credibility assessments to the jury. *United States v. Woodward*, 149 F.3d 46, 60 (1st Cir. 1998). An appeal

based on inconsistencies in any witness's trial testimony would thus be certain to fail. In addition, this court has already considered a challenge to the sufficiency of the evidence in this case, Memorandum of Law in Support of Defendants [sic] Motion for Judgment of Acquittal or a New Trial (Docket No. 34) at 1, and denied it, Endorsement dated May 21, 1996, Motion for Judgment of Acquittal (Docket No. 32). That assessment of the evidence presented by the prosecution continues to be valid. Neither the second nor the third specific issues which the defendant contends his appellate counsel should have pursued on appeal could have succeeded. Accordingly, his claim for ineffective assistance by his appellate counsel based on these claims must fail.

The defendant has not satisfied either prong of the *Strickland* test with regard to his claims against his appellate counsel.

B. Judicial Misconduct

The government argues correctly that the defendant's claims for section 2255 relief on the basis of alleged misconduct by the trial court must fail because they could have been raised on direct appeal, but were not. *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). The defendant responds, Defendant's Reply at 1-2, that his appellate counsel refused to raise the issues he requested be raised on appeal, and that he could have discovered the issues he now raises if his appellate counsel had met with him in person as requested, suggesting that his situation presents exceptional circumstances that would except him from the procedural bar, *Knight*, 37 F.3d at 772. The defendant's position on this issue is considerably weakened by the fact that he did suggest to his appellate counsel, by letter, issues that he wished her to raise, Exh. 19 to Defendant's Memorandum, and did not mention any of the claims raised in this section of his motion. It is difficult to imagine

how a face-to-face meeting with his appellate counsel, who did not raise any of these issues after a careful review of the trial record, would have resulted in timely recognition of these claims which are now apparent to the defendant, acting alone. I see no reason to excuse the defendant from the procedural bar in this case.

Even if the defendant's claims were not procedurally barred, they are without merit. The only one of the claims of judicial misconduct asserted in the defendant's motion that raises a constitutional claim is the assertion that the failure to allow the defendant sufficient time during trial to review a videotape of the robbery with which he was charged deprived him of his right under the Sixth Amendment "to confront the evidence against him." Defendant's Reply at 8. The right of confrontation established by the Sixth Amendment, however, extends only to witnesses who testify against the defendant. *See Barber v. Page*, 390 U.S. 719, 721 (1968). There is no sense in which a nontestimonial videotape is a "witness," and there is no sense in which a defendant has a right to "confront" a videotape, or any other piece of physical evidence. This claim must therefore be considered under the same legal standard as the other four claims of judicial misconduct raised by the defendant. When claims under section 2255 rely on neither constitutional nor jurisdictional grounds, they are properly brought only if the claimed error presents exceptional circumstances, either "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Knight*, 37 F.3d at 772, quoting *Hill v. United States*, 368 U.S. 424, 428 (1962). Denial of a motion to move the defendant's place of incarceration to one more convenient for meetings with his counsel, failure to allow the defendant an amount of time during trial that he considers sufficient to review the videotape of the

crime with which he is charged,[3] and interrupting the defendant's testimony[4] fail to meet either of these criteria. Failure to grant motions for acquittal, when the evidence was sufficient to go to the jury and when the evidence was sufficient to support the conviction, is not an error at all. And the jury instruction given concerning the testimony of the prosecution witnesses, Tr. III at 608, was fully consistent with the law of the First Circuit, *United States v. Hernandez*, 109 F.3d 13, 17 (1st Cir. 1997), and accordingly provides no basis for the relief sought by the defendant.

C. Prosecutorial Misconduct

The six instances of allegedly improper conduct by the prosecutors listed by the defendant as grounds for section 2255 relief suffer from the same infirmity as those he identified under the heading of "judicial misconduct" — they each could have been raised on direct appeal and were not. *Knight*, 37 F.3d at 772. Like those claims, these were not presented by the defendant to his appellate counsel before she presented his appeal. Unlike those claims, the defendant casts these in constitutional terms, but again, like the judicial claims, these fail on the merits.

Two of the six claims are based on mere speculation, without any factual support, and will

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[3] The fact that the videotape was entered into evidence by stipulation, Tr. I at 90, weakens the defendant's claim on this point even further.

[4] There are only two instances in the trial transcript where the court could possibly be perceived as "interrupting" the defendant's testimony. Both occurred during cross-examination. In the first instance, after the prosecutor asked a question and no answer was recorded, the court said to the defendant, "You have to answer out loud, sir." Tr. III at 572. In the second instance, the defendant had answered the prosecutor's question, no question was pending, and the defendant began to testify further. *Id*. at 579. The court said, "You've answered the question." *Id.* No defendant is entitled to testify narratively at will on cross-examination. Even if these two directions by the court had been delivered, as the defendant asserts, in a "surly, disbelieving tone," Motion at (15), an extremely unlikely event, the words were neither harsh, nor could they lead the jury to believe the defendant was lying, as the defendant also claims. Indeed, the court made identical remarks to other witnesses during the trial. *E.g.*, Michelle St. Amand, Tr. II at 285; Arnold Prior, *id.* at 405.

not be considered further here. The defendant opines that there must have been a prior statement by his landlord that the prosecutor failed to produce in violation of 18 U.S.C. § 3500(b) (sometimes called the "Jencks Act") because "[i]t is a foregone conclusion that the government did not put their rebuttal witness on the stand without a prior statement in order to learn what he would say." Defendant's Reply at 3. The prosecutor could easily learn what a witness would say by asking him, without any written statement being made. In addition, there is no indication in the record that defense counsel requested any prior statement, as required by section 3500(b), and it is the rankest speculation to assume that such a statement, if it existed, would have included material so contradictory to the witness's testimony that its use on impeachment would have resulted in the acquittal of the defendant. Similarly, the defendant offers only speculation in support of his allegation that the prosecutor knowingly presented perjured testimony at trial, a very serious charge. The only support offered by the defendant for this claim is that the witnesses had lied in the past, before trial, concerning the events about which they testified, and that the witnesses' testimony was not always consistent regarding specific details. Motion at (18)-(19); Defendant's Reply at 5-6 ("testimony of persons admitted by the government to be known liars"); Defendant's Sur-Reply at 9-32. The fact that a witness has lied previously, outside court and not necessarily under oath, does not and cannot mean that his or her testimony at trial under oath can only have been false. The fact that two witnesses presented by the government differ in their recall of details concerning events surrounding, but not part of, the crime charged does not mean that either is necessarily lying concerning those details or other facts to which they testify. Neither of these two claims could possibly entitle the defendant to relief.

The defendant's first remaining argument concerning the conduct of the prosecutor is an

assertion that the government intentionally circumvented procedures established by the Interstate Agreement on Detainers Act ("IAD"), 18 App. U.S.C. § 1 *et seq*., resulting in a deprivation of the defendant's rights to due process of law and a fair trial. According to the defendant, the IAD "prohibits the United States from allowing any other jurisdiction to have custody while he is in their temporary custody before the complete satisfaction or trial of untried charges, and the penalty for failure to adhere thereto is dismissal of all charges in the jurisdiction having temporary custody." Defendant's Reply at 9. He states that he was first taken into custody by the federal government while in the custody of the state of Maine by means of a writ of habeas corpus ad prosequendum "in lieu of the utilization of" the IAD, and thereafter returned to state custody "on numerous occasions 'prior' to the disposition of the federal charges against him." *Id*. (internal quotation marks and emphasis in original). The prejudice that the defendant claims to have suffered as a result is "being forced to answer charges in both places at the same time and thus dividing his attention and allowing the United States . . . to gain a substantial and unfair tactical advantage in the case at bar." *Id*. at 10. The government somewhat unhelpfully replies to this argument only with the statement that, because the defendant was "produced on a writ of habeas corpus," the IAD does not apply. Government Opposition to Motion to Vacate, Set Aside, or Correct Sentence and Supporting Memorandum of Law ("Government's Opposition") (Docket No. 57) at 41.

The First Circuit has said that "the IAD provides a speedy trial for a person imprisoned in one jurisdiction and removed to another to face different charges." *Hart*, 933 F.2d at 84. By its terms, the IAD applies "[w]henever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State." 18 U.S.C. § 2 Article III(a). The defendant here alleges that he had not yet been tried on the charges for which he was being held by the state at the time he

was transferred to federal custody for pretrial proceedings on the charge of which he was later convicted in this court. Thus, the IAD does not apply to his situation. "The terms of the Agreement apply exclusively to prisoners who are actually serving their sentences, and not to pretrial detainees." *United States v. Currier*, 836 F.2d 11, 16 (1st Cir. 1987). That is the end of the matter.

The defendant next asserts that the prosecution's "coaching" of the witnesses against him before trial somehow violates his right to due process, because the number of visits which some of the witnesses (unidentified by the defendant) had with the prosecutor before trial, and comparison of their pretrial statements with their testimony at trial, proves that the trial testimony was "tailored" and "not the truth." Defendant's Memorandum at (20)-(21). This again is speculation on the defendant's part. It does not follow from the fact that a witness visited the prosecutor "as many as 8 to 10 times, for up to 2 hours per visit," *id*. at (20), that his or her testimony at trial was not the truth. Only if the defendant has proof, and not just a personal belief, that the testimony of any such witness at trial was false, to a degree that leads to the conclusion that the result of the trial would have been different were it not for the false testimony, should the court even reach the question whether the witness was coached by the prosecutor to testify falsely. *See Testa v. United States*, 971 F. Supp. 833, 834-36 (S.D.N.Y. 1997) (evidentiary hearing held after cooperating government witness who did not testify stated publicly after trial that he had been induced by government to coach a government witness to testify falsely at trial). The defendant has presented nothing approaching this standard and is not entitled to relief based on his insufficiently supported allegations.

The defendant next levels the charge that the prosecutor improperly vouched for the credibility of prosecution witnesses and called defense witnesses liars during his closing argument.

The government responds that the prosecutor "merely identified the objective reasons to find the Government's witnesses believable," including corroboration of some details by disinterested witnesses. Government's Opposition at 41. Improper vouching occurs when "the prosecution . . . place[s] the prestige of the government behind the witnesses [] by making explicit personal assurances of the witness' veracity" or when the prosecutor "implicitly vouch[es] for the witness' veracity by indicating that information not presented to the jury supports the testimony." *United States v. Grant*, 971 F.2d 799, 811 n.22 (1st Cir. 1992) (brackets in original; internal quotation marks and citation omitted). My review of the prosecutor's closing argument, Tr. III at 618-36, 652-56, reveals no statements that meet either standard set forth in *Grant.* Here, the prosecutor made no explicit personal assurances nor did he indicate that information not presented to the jury supported the testimony of any government witness.

The prosecutor's remarks concerning Prior, a defense witness, in his closing were not improper under governing First Circuit precedent and so could not serve as the basis for section 2255 relief. Here, the prosecutor referred to Prior several times in his closing argument. He said that the defendant had "presented the untrue testimony of Arnold Prior, if you find that it was untrue," Tr. III at 619; "Was he a believable witness. . . . I suspect you know better than to believe Arnold Prior's testimony. . . . And if — if Michael Gignac is presenting a witness like Arnold Prior giving a false alibi, why would he do that," *id*. at 631; "We know that what Prior and Gignac were talking about, about moving stuff out on the 16th, on the 16th, didn't happen, did it," *id*. at 632; "when you think about the question of why would they present an alibi witness like Prior, and why would they present all of this simply wrong alibi testimony," *id*. at 635; and "why does he go to the length of presenting the testimony of the likes of Arnold Prior," *id*. at 655. In *United States v. Smith*, 982 F.2d 681 (1st

Cir. 1993), the First Circuit held that the following argument about a defense witness was not improper:

> This business about Sacco is a complete fabrication. *That's what the evidence shows*. . . .
>
> Does that sound like someone who's worthy of belief to you? Of course not. She . . . never did those things, ladies and gentlemen. She never filed a complaint against Sacco because Sacco never did anything. There was no Sacco. It's a convenient story. It's a complete fabrication. She never tried to help him out [] because he's guilty. He didn't do anything to disarm Sacco and save her. That's a lot of nonsense.
>
> There was no George Sacco anyplace because George Sacco wasn't there.

Id. at 683 n.1 (brackets and emphasis in original). While it is improper for the prosecutor to characterize a defense witness's testimony as lies, *see United States v. Rodriquez-Estrada*, 877 F.2d 153, 159 (1st Cir. 1989), it is acceptable for the prosecutor to suggest inferences that the jury might draw from the evidence, *Smith*, 982 F.2d at 683. Here, the prosecutor's remarks concerning Prior were less pejorative than the remarks in *Smith* which the First Circuit held did not entitle the defendant to a new trial. The only remark that does not directly suggest an inference to be drawn from the evidence is the statement "I suspect you know better than to believe" Prior's testimony, and that remark, standing alone, is insufficient under the circumstances and in light of the full text of the prosecutor's closing remarks and the court's instructions, to have violated the defendant's constitutional rights or otherwise to entitle him to section 2255 relief.

The defendant's final challenge to the prosecutor's conduct is the allegation that he illegally "purchased" the testimony of five of the government witnesses by promising leniency and in some cases dismissal with respect to criminal charges against them.[5] Motion at (20). He contends that this

[5] The record does not reflect that any such promises were made. Indeed, for one of the five (continued...)

activity violated 18 U.S.C. § 201(c)(2), Defendant's Reply at 5, and, since, without the testimony of these witnesses, "there is an absolute certainty that the Movant would not even have been charged in the case at bar," Defendant's Memorandum at (24), he is entitled to section 2255 relief. He relies on a decision of the Tenth Circuit, *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), that was widely reported in the press when it was issued. The fact that the *Sullivan* opinion was subsequently vacated by the Tenth Circuit, *United States v. McGuire*, ___ F.Supp.2d ___, 1998 WL 564234 (D. Kan. Aug. 19, 1998) at *3, was not so widely reported. The government's response to this argument merely points out that the jury was made aware that "each of the cooperators entered a plea agreement and the terms of those agreements were, as the prosecutor argued, 'all in writing for all to see.'" Government's Opposition at 41. The statute to which the defendant refers defines the crime of bribery to include the promise by a public official of anything of value to a person for his testimony under oath. This statute has never been interpreted in the First Circuit, or in any circuit other than the Tenth, to bar the general practice of entering plea bargains with cooperating defendants conditioned on their testifying truthfully at the trial of another defendant. Based on the evidence, that is what happened here, and it cannot serve as the basis for section 2255 relief.

D. Sufficiency of the Evidence

The defendant's claim that the evidence presented at trial was insufficient to support his conviction because there was no evidence that the store at which the robbery took place was involved

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[5](...continued)
witnesses mentioned by the defendant, Webb, there is no testimony at all concerning any plea agreement or other possible inducement or consideration for her testimony. Three of the five, Caldwell, Tr. I at 94-97; James, Tr. I at 173, 198; and Sugden, Tr. II at 324, 354, all identified their plea agreements and testified that no promises were made to them in return for their testimony. The fifth, Sweetsir, testified that he had entered into no agreement other than his plea agreement. Tr. II at 259.

in interstate commerce rests on an incorrect premise. That evidence was provided by a stipulation, as previously noted. There is accordingly no factual basis for this claim, which should in any event have been brought on direct appeal.

IV. 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 11th day of December, 1998.

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David M. Cohen
United States Magistrate Judge