UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 01-03-B-S
	)	Civil No. 03-33-B-S
	)	
MANUEL A. RODERICK,	)	
	)	
	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Roderick is serving a 220-month sentence for guilty-plea convictions on four counts arising out of a robbery of a hotel in Waterville, Maine. Roderick now seeks relief in this 28 U.S.C. § 2255 motion alleging that his trial attorney and his sentencing attorney were each ineffective in their own way. (Docket No. 147.) The United States has filed an answer. (Docket No. 150.) After review of the entire record I have concluded that Roderick's motion has no merit. Accordingly, I recommend that it be **DENIED** pursuant to Rule Governing Section 2255 Proceedings 4.

Background

In passing on the appeal of Roderick's co-defendant, Dennis Mooney, the First Circuit summarized the robbery as follows:

> In the early morning hours of November 27, 2000, Matthew Sliker ("Sliker"), the overnight clerk of the Budget Host Motel in Waterville, Maine had just completed his duties. Sliker was playing a copy of the video game "Syphonfilter 2," which had been rented from a store called "Movie Gallery," on a Sony Playstation in the lobby when the defendant, Dennis Mooney ("Mooney") and his brother, David Mooney ("David"), entered and inquired about a room. After asking about the price, Mooney told Sliker they needed to get money and both men left the hotel. Sliker

> followed them outside to smoke a cigarette and watched the two men approach other men standing next to a dark gray Volkswagen Jetta.
>
> After Sliker returned to the lobby, David and Mooney came back into the motel. David asked to play the video game, and Sliker began filling out a registration form with Mooney. Marquis Craig ("Craig") then entered the lobby and approached the registration desk. Wearing a blue bandana over his face, Craig pulled out a sawed-off pump shotgun with a scope, pointed it toward the ceiling, loaded a round into the chamber, and then put the gun on the counter. The defendant ordered Sliker to raise his hands and not to set off any alarms. Craig demanded money, and after Sliker unlocked the cash drawer, the defendant took $195. David then used a telephone cord to tie Sliker's ankles to his wrists. Pointing the gun in Sliker's face, Craig warned him that if he waited less than two hours to call the police, he would be killed. One of the robbers grabbed the Sony Playstation, and they fled in the Jetta. In the car, Mooney divided the money among the robbers and his other co-conspirators, Nathan D'Amico ("D'Amico") and Manuel Roderick ("Roderick").

United States v. Mooney, 315 F.3d 54, 56 (1st Cir. 2002).

The superseding indictment against Roderick and his co-defendants had six counts, four of which pertained to Roderick: conspiracy to commit a Hobbs Act robbery; using a short barreled shotgun during and in relation to the robbery; knowingly possessing an unregistered short-barreled shotgun; and being a felon in possession of a firearm. In the middle of his severed trial Roderick plead guilty.

Merits of § 2255 Grounds Raised

This § 2255 motion is the proper vehicle for Roderick's ineffective assistance of counsel claims. Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994). As Knight provided:

> The familiar two-part test for ineffective assistance of counsel is laid out by the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 687(1984). Under the first prong of the Strickland test, a defendant claiming ineffective assistance of counsel must first demonstrate that counsel's performance fell below an objective standard of reasonableness. This means that the defendant must show that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citation

> omitted). A court must review counsel's actions deferentially. Strickland, 466 U.S. at 689; Burger v. Kemp, 483 U.S. 776, 789 (1987). Under the second prong of Strickland, the defendant must prove that he or she was prejudiced by the errors. That is, the defendant must prove that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687.

Id.

The First Circuit in David v. United States explained that in order to "progress to an evidentiary hearing, a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings." 134 F.3d 470, 478 (1st Cir. 1998). "Allegations that are so evanescent or bereft of detail that they cannot reasonably be investigated (and, thus, corroborated or disproved) do not warrant an evidentiary hearing." Id. (citing Dalli v. United States, 491 F.2d 758, 761 (2d Cir.1974)); see also United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993) ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets," citations omitted).

First Ground

In his first ground Roderick claims that his first attorney was ineffective in not preparing an adequate defense for Roderick. Specifically, he failed to recognize exculpatory evidence in the United States' possession, inaction Roderick claims was motivated by "prosecutorial favors." Roderick also complains that counsel continually refused to plan defense strategy and insisted that Roderick cooperate with the

government. Further, this attorney was ineffective in failing to even attempt to suppress evidence gained through conduct violative of the Fourth Amendment.

Roderick's trial attorney was appointed on December 18, 2000, the day the complaint was filed. Early on he moved to continue trial on grounds that included the recognition of the seriousness of the charges against Roderick and the need for time to prepare for trial. (Docket No. 14.) Roderick waived speedy trial (Docket No. 17) and consented to the United States' later motion to continue (Docket No.21). On May 7, 2001, counsel moved to suppress a videotape interrogation on the grounds that the statements made were not the product of free will. (Docket No. 35.) On May 31, 2001, counsel again moved for a continuance because the resolution of the motion to suppress would significantly impact trial strategy. (Docket No. 43.) A hearing on the motion to suppress was held on July 12, 2001, briefs were filed, and on August 7, 2001, I issued a decision recommending that the Court deny the motion to suppress. (Docket No. 73.) That decision was affirmed by the District Court judge. (Docket No. 75.)

Counsel also filed a motion in limine to exclude evidence of other crimes and of uncharged conduct involving an assault. (Docket No. 77.) And, again he attempted to continue trial arguing that the September 11, 2001, terrorist attack could create an atmosphere that would impact the trial of Roderick, as he would likely be described as having gang involvement. (Docket No. 82.) This motion met with no success.

Trial commenced on October 1, 2001. Early in the afternoon of the first day of trial, counsel indicated that Roderick had decided to enter a guilty plea. At the plea hearing counsel explained:

> During trial, Mr. Roderick informed me that he wished me to enter into plea discussions with the government. At the break, he reiterated. I've

> spoken with Mr. Roderick. He wishes to plead guilty. I spoke with the government regarding an understanding about, essentially, plea discussions. I believe I've made an accurate representation to Mr. Roderick about the discussions that I had with [the United States Attorney].
>
> And I also – to let the record to be clear, I've met with Mr. Roderick enumerable times and reviewed this case. I didn't – I had no idea that this would be a plea in the middle of trial. I have also made it clear to Mr. Roderick that he may not, for example, get as much consideration for acceptance of responsibility and items like that as the trial approaches and actually begins. I think I've given him the appropriate advice. I also made it clear that the court would likely question him at length and make sure that he does, in fact, wish to plead guilty, and he knows that he had the right to have the trial continue. He's made it clear to me that he wishes to plead guilty.

(R. 11 Tr. at 2-3, emphasis added.) The Court later undertook a thoroughgoing inquiry directly with Roderick, during which Roderick affirmed that he had discussed his options and the plea consequences with his attorney. (Id. at 5-15.) Counsel explained that he had spent quite of bit of time on the case and that he had visited Roderick at the jail numerous times to review the "merits of going to trial and all that sort." (Id. at 7.) He recommended that the Court accept the plea. (Id.) Roderick stated that no one has threatened him and that he was voluntarily pleading guilty. (Id. at 19.) Near the end of the hearing counsel stated that he believed Roderick to be "fully competent to change his plea," he thought he had "considered everything, and I think we've had enough time for him to – to determine what he wants to do." (Id. at 24.)

Counsel did pursue a motion to withdraw the guilty plea by a motion filed just over two months after the October 1, 2001, change of plea. (Docket No. 118.) The motion explained that "as each day has passed since the entry of his guilty plea, Defendant has increasingly become aware of the mistake he made by pleading guilty." It explained that Roderick had "felt trapped, and once his trial began, mistakenly felt the

cooperating co-defendants were unfairly singling him out and creating a situation whereby he was certain to have been found guilty, despite his innocence." The plea, he argued, was not knowingly, intelligently, and voluntarily made because Roderick was "frightened and unable to rationally assess his options." While this motion was pending counsel filed a motion to withdraw, indicting that Roderick had informed him that he would be better served by alternate counsel during whatever proceedings remained. (Docket No. 131.) In short course the Court entered its order denying the motion to withdraw the plea. (Docket No. 132.) The court stated that the proffered reasons for withdrawal were no more than second thoughts of a garden variety. Counsel's motion to withdraw was granted on January 15, 2002.

Not one of the facets of Roderick's claim against trial counsel withstands scrutiny in view of the record. Clearly, counsel did pursue a motion to suppress that this court rejected. Counsel's advocacy vis-à-vis that motion was certainly within the "range of competence demanded of attorneys in criminal cases." Hill, 474 U.S. at 56. If Roderick believes there was another ground for suppression of this or other evidence he has entirely failed to identify what facts and law such a motion would have been premised on. See McGill, 11 F.3d at 225.

With respect to trial preparation, defense strategy, and pressure to cooperate, Roderick has alleged nothing concrete to contradict the record's picture of adequate representation. First, the record above demonstrates that counsel considered the time he spent with Roderick in preparation for the trial to be ample and he described his visits with Roderick as frequent. The accuracy of this subjective impression on counsel's part is fully documented by the many appropriate pre-trial motions pressing evidentiary

concerns and seeking continuances. Throughout the pre-trial preparation counsel demonstrated how he viewed the charges as grave, the stakes as high, and the need for time to prepare as great.

It is a little unclear what different defense strategy Roderick would have liked his counsel to pursue. Trial counsel explained his defense strategy to the Court during the Rule 11 proceeding, stating that he would have produced evidence that Roderick did not take part in planning the robbery, using documents pertaining to the conspirators gained from the government in discovery. (R.11 Tr. at 17.) Roderick's peripheral, uneasy role in the scheme was also the thrust of the motion to withdraw the guilty plea, a claim that this Court took as one of factual innocence not sufficient to justify undoing the plea and convening a new trial. I can identify no alternative strategies that competent counsel might have adopted that would have altered the terrain vis-à-vis the plea or the sentence.

The record also contradicts the suggestion that counsel was inappropriately pressuring Roderick into cooperating. As the United States points out, a recommendation by counsel to plead early and aim for an acceptance of responsibility departure could have dropped Roderick's range to 77 to 96 months from the otherwise applicable 100 to 125 month range, and, accordingly, ineffectiveness would much more likely lie in failing to impress upon Roderick the opportunity to significantly lower his sentencing range. And, once again, Roderick has failed to plead any facts concerning conversations he had with counsel about the pros and cons of cooperation; this allegation is "so evanescent" and "bereft of detail" that it "cannot reasonably be investigated," David, 134 F.3d at 478.

Finally, with respect to the alleged overlooked exculpatory evidence, Roderick has not indicated what the overlooked exculpatory evidence was or given this court any

concrete support for the proposition that his attorney ignored the evidence in order to garner favors from the prosecution. There are no "names, dates, places, or other details" just "threadbare allusions to phantom" exculpatory evidence. Id.

Second Ground

Roderick's second ground pertains to counsel appointed for purposes of sentencing. Roderick claims that he suffered extreme prejudice when this attorney failed to file a timely notice of appeal. He notes that at the sentencing hearing this attorney stated on the record that his office did not handle appeals and complains that no counsel was assigned to provide the basic legal support necessary to pursue a direct appeal.

The United States Supreme Court's Roe v. Flores-Ortega, 528 U.S. 470 (2000), clarified that claims of ineffective assistance of counsel for failure to file a notice of appeal are analyzed under the familiar two-pronged inquiry of Strickland. See Roe, 528 U.S. at 477. In other words, the failure to file a notice of appeal is not per se inadequate performance on counsel's part. Id. at 478.

With respect to appeals following guilty pleas, the Court stated that "a guilty plea reduces the scope of potentially appealable issues." Id. at 480. However, "[e]ven in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." Id.

At the Rule 11 hearing the court told Roderick that he and the government would be able to appeal any sentence imposed and Roderick indicated his understanding thereof. (R. 11. Tr. at 22.) At the close of the sentencing this dialogue transpired:

> The Court: All right, Mr. Roderick, I must advise you that you have a right to appeal the conviction and the sentence, and if you wish to do so, to effectively exercise that right of appeal, you must cause to be filed with the clerk of this court within ten days of today[,] and not after that[,] a written notice of appeal. And if you fail to timely file that written notice of appeal, you will have given up your right to appeal the conviction and the sentence. Do you understand?
> Roderick: Yeah.
> The Court: If you cannot afford to file the appeal, that appeal will be filed without cost to you, and on your request, I will have the clerk of this court immediately prepare and file a notice of appeal on your behalf. Do you understand?
> Roderick: Yeah.

(Sentencing Tr. at 24-25, emphasis added.)

First, contrary to Roderick's single concrete § 2255 factual allegation, I note that at no time during the sentencing proceeding did counsel state on the record that his office did not handle appeals. Even if there was evidence that counsel so advised Roderick, the Court's clear instructions to Roderick offering the court's assistance in filing the notice of appeal was sufficient to impress upon Roderick his ability to pursue an appeal, with or without the assistance and acquiescence of his sentencing attorney. See Roe, 528 U.S. at 479-80 (reflecting that in some case cases a "sentencing court's instructions to a defendant about his appeal rights ... are so clear and informative as to substitute for counsel's duty to consult" and "counsel might then reasonably decide that he need not repeat that information").

Furthermore, Roderick does not give any indication of the nature of his conversation with counsel about the prospect for appeal. "In order to state a claim of

ineffective representation, the petitioner's allegations must clearly indicate the nature of the defense attorney's prejudicial conduct." United States v. Butt, 731 F.2d 75, 78 (1st Cir. 1984). Nowhere does he allege that he asked counsel to file the notice of appeal and was rebuked or that counsel attempted to dissuade him from pursuing an appeal. See cf. Butt, 731 F.2d at 80 n.5 (collecting cases) ("Evidentiary hearings have been granted to § 2255 appellants who have claimed that their plea was induced by attorney misrepresentations only when the allegations are highly specific and usually accompanied by some independent corroboration.").

Conclusion

For these reasons I conclude that Roderick's petition is meritless and he is not entitled to an evidentiary hearing. I recommend that the Court **DENY** the motion.

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 of 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.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

CJACOUNSEL, CLOSED, 2255

Dated July 24, 2003

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:01-cr-00003-GZS-2
Internal Use Only

Case title: USA v. MOONEY
Other court case number(s): None **Date Filed:** 01/09/01
Magistrate judge case number(s): 1:00-mj-00066

Assigned to: Judge GEORGE Z. SINGAL
Referred to:

Defendant(s)

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TERMINATED: 03/08/2002

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Pending Counts	**Disposition**
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18:1951.F HOBBS ACT ROBBERY (1s)	Imprisonment of 100 months on each of Counts 1, 3 and 5, to be served concurrently and 120 months on Count 2, to be served consecutively. Supervised Release of 3 years on each of Counts 1, 2,

	3 and 5, to be served concurrently. $400 special asse ssment. $196.00 restitution, joint & several. Deft remanded to custody of US Marshal.
18:924C.F USE OF FIREARM IN A CRIME OF VIOLENCE (2s)	Imprisonment of 100 months on each of Counts 1, 3 and 5, to be served concurrently and 120 months on Count 2, to be served consecutively. Supervised Release of 3 years on each of Counts 1, 2, 3 and 5, to be served concurrently. $400 special asse ssment. $196.00 restitution, joint & several. Deft remanded to custody of US Marshal.
26:5861D.F POSSESSION OF UNREGISTERED SAWED-OFF SHOTGUN (3s)	Imprisonment of 100 months on each of Counts 1, 3 and 5, to be served concurrently and 120 months on Count 2, to be served consecutively. Supervised Release of 3 years on each of Counts 1, 2, 3 and 5, to be served concurrently. $400 special asse ssment. $196.00 restitution, joint & several. Deft remanded to custody of US Marshal.
18:922G.F FELON IN POSSESSION OF FIREARM (5s)	Imprisonment of 100 months on each of Counts 1, 3 and 5, to be served concurrently and 120 months on Count 2, to be served consecutively. Supervised Release of 3 years on each of Counts 1, 2, 3 and 5, to be served concurrently. $400 special asse ssment. $196.00 restitution, joint & several. Deft remanded to custody of US Marshal.

Highest Offense Level (Opening)

Felony

Terminated Counts	Disposition
18:1951.F HOBBS ACT ROBBERY - INTERFERENCE WITH COMMERCE BY THREAT OR VIOLENCE (1)	
18:924C.F USE OF FIREARM IN CRIME OF VIOLENCE (2)	
26:5861D.F POSSESSION OF SAWED-OFF SHOTGUN (3)	
18:922G.F FELON IN POSSESSION OF FIREARM (in violation of 18:922(g)(1) and 2) (5)	

Highest Offense Level (Terminated)

Felony

Complaints	Disposition
COUNT 1-ALL-Possession of Sawed-Off Shotgun in violation of 26:5861(d) and 18:2; COUNT 2-ALL-Hobbs Act Robbery in violation of 18:1951(a) and 2; COUNT 3-CRAIG-Felon in Possession of Shotgun/Armed Career Criminal in vilation of 18:922(g)(1) and 924(e); COUNT 4-MOONEY-Felon in Possession of Shotgun in violation of 18:922(g)(1) and 2; COUNT 5-RODERICK-Felon in Possession of Shotgun/Armed Career	

Criminal in violation of
18:922(g)(1) and 924(e) and 2 [
1:00-m-66]

Plaintiff

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