UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	
	)	
	)	
v.	)	Criminal No. 99-34-P-C
	)	Civil No. 03-245-P-C
	)	
STEPHEN K. BROWN,	)	
	)	
Petitioner	)	

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

Stephen K. Brown pleaded guilty to and was sentenced on a multi-count federal indictment in late 1999. Before me now is Brown's 28 U.S.C. § 2255 motion (Docket No. 70.)[1] Brown delineates three grounds each based on his assertion that he was not mentally competent to enter his guilty plea. I recommend that the Court **DENY** Brown 28 U.S.C. § 2255 relief.

Discussion

Brown argues that his lack of competence to enter the guilty plea was evidenced, primarily, by his attempt at suicide while a pretrial detainee on these federal charges and his question during the change of plea hearing as to whether it would be possible to compel the death penalty over life imprisonment because he preferred death to a term of life in prison. In

[1] On December 26, 2000, Brown filed a different motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docket No. 39.) After Brown further supplemented his motion (Docket No. 47), the United States responded, consenting to the reinstatement of Brown's direct appeal in light of Brown's allegations that he told his attorney to file a direct appeal and his attorney did not heed that directive. (Docket No. 51.) The United States proffered a stipulation that: "all claims raised in the pending § 2255 except the one relating to the lost appeal be dismissed without prejudice to raising them again in a timely § 2255 proceeding filed after the direct appeal is decided." I consider the current § 2255 filing by Brown to be Brown's first § 2255 petition in view of that stipulation.

Ground I Brown faults the Court for infringing his due process rights by not sua sponte ordering a competency hearing. In Ground II he faults his attorney for not presenting to the Court at the change of plea hearing evidence of Brown's continuing psychological history. And, in Ground III, Brown states, simply, that he was not competent to enter the plea so his plea was not knowing and intelligent.[2]

Legal Standard for Determining Competency to Plead Guilty

Based upon the constitutional tenant that "[a] criminal defendant may not be tried unless he is competent" Godinez v. Moran, 509 U.S. 389, 397 (1993) (citing Pate v. Robinson, 383 U.S. 375, 378 (1966), the United States Supreme Court has concluded that the same standard that governs an analysis of the competence to stand trial governs the competence to plead guilty inquiry. Id. at 402. The inquiry into competence to stand trial or enter a plea "is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. (quoting Dusky v. United States, 362 U.S. 402 (1960)); see also id. at 397 n.7 ("A criminal defendant waives three constitutional rights when he pleads guilty: the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers.") (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)). In Godinez the Court explained that the competency requirement had "a modest aim." Id. at 402:

> It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt

[2] I recognize that there are concerns with Brown's first and third ground as he did not pursue these claims on his direct appeal. However, because it is clear that they rise and fall on the same facts and analysis as does the ineffective assistance of counsel claim, in this instance it is best not to dwell on the question of whether these previously unaired constitutional claims are properly tendered in the 28 U.S.C. § 2255 motion and, also best, to forgo pondering the implications of how the advice to save his competency challenge for a 28 U.S.C. § 2255 motion, rendered to Brown by his appellate attorney (Pet.'s Resp. Gov.'s Opp'n Ex. A), might figure into this analysis.

> competency standards that are more elaborate than the Dusky formulation, the Due Process Clause does not impose these additional requirements.

Id.; accord United States v. Giron-Reyes, 234 F.3d 78, 80 (1st Cir. 2000).

With respect the Court's obligation to sua sponte conduct a competency hearing, the First Circuit has stated that 18 U.S.C. § 4241(a) "imposes a duty on district courts to order a hearing sua sponte in order to make an initial determination of competency 'if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent.'" Giron-Reyes, 234 F.3d at 80 (quoting 18 U.S.C. § 4241(a)). However, there is "no reasonable cause to hold an initial competency hearing where all the information from the psychiatrist, defense, and the plea colloquy judge is in agreement. Id. at 80-81; see also Johnson v. Norton, 249 F.3d 20, 27 (1st Cir. 2001) ("We thus follow the Eighth Circuit's approach and adopt a standard of "sufficient doubt," the phrase used to express the Court's holding in Drope, 420 U.S. at 180, and used in subsequent Supreme Court cases.").

Brown's § 2255 Explication

The case that Brown makes for his three grounds is as follows. Brown points to his history of documented psychiatric disabilities, arguing that the Court should have recognized and counsel should have brought to the Court's attention, his troubled psychiatric history and attempted suicide(s). He argues that his attorney's request for an independent psychological examination should, alone, have triggered the sua sponte competency hearing order. With regards to Brown's ineffective assistance claim, he asserts that it should have been obvious to his counsel at the time that Brown was not competent to plead guilty in light of Brown's request for the death penalty and demand to waive his rights; these were, in Brown's view, red flags for his attorney, alerting him to the fact that Brown was not a rational, competent individual.

Brown explains that he was abused through his childhood and into his early adulthood. He was expelled from high school for assaulting the principal. He eventually enlisted in the United States Marine Corps. A May 1981 psychological evaluation during his enlistment – precipitated by many bizarre behavioral incidents – resulted in a diagnosis of antisocial behavior, a paranoid personality disorder, and an impulse-explosive personality disorder. Brown states that the report revealed that Brown was "a depressed young man who harbors hostility and resentfulness, when under stress, becomes paranoid." The report further indicates that when Brown becomes paranoid he has deteriorated judgment, which can lead to aggressive and bizarre behavior, perhaps posing a threat to others. Brown was discharged from the Marines based, at least in part, on this report.

Brown states that he made a video explaining his intentions of committing suicide and the manner in which he would carry out these intentions, certainly actions not "within the realm of normalcy." In August 1999, while in pretrial detention, he attempted suicide by cutting his neck, tying sheets together around his neck and jumping from a second story catwalk. After his injuries were treated he was transferred to a different jail and remained on suicide watch. Brown argues that there is "no question" that he "performed in an unusual and irrational manner while incarcerated prior to his guilty plea" in that attempted suicide "is not a usual or rational manner of performance."[3]

[3] In its response, the United States attacks the notion that Brown was not competent to enter the plea by observing that it was basically rational for him to attempt to take his own life and to seek the death penalty in view of the direness of Brown's situation. It also emphasizes the fact that both the attorney for Brown and the Assistant United States Attorney concurred at the time, after a psychological evaluation of Brown, that Brown was competent to plead guilty. In his response, Brown vigorously complains about the United States' reliance on the agreement between defense counsel and the prosecutor's view of Brown's competency, a determination that Brown believes could only be made by a qualified expert. With respect to the United States' additional contention that the plea was wise because he benefited at sentencing from pleading guilty, Brown asks how he could benefit from the acceptance of responsibility adjustment given the fact that he faced, at best, life in prison.

The Change of Plea Proceeding

At the conference of counsel prior to the change of plea hearing, Brown's attorney indicated that Brown desired to plead and resolve the case as quickly as possible. (Plea Tr. at 1.) As the Court had ruled that there was only one sentencing option (Mem Decision & Order, Docket No. 34), counsel indicated Brown would like to "dispense with the necessity with presentence report" and be sentenced forthwith. (Plea Tr. at 1.) However, the Court declined to take this shortcut and directed, instead, an expedited preparation of the pre-sentence report. (Id. at 3.) When a question arose as to whether certain sentences would run consecutively or concurrently, the Court inquired of defense counsel whether he was satisfied that Brown understood in a meaningful way what he was agreeing to. (Id. at 5.) In response counsel indicated that he did wish a chance to confer with Brown, which he did prior to going on the record for the change of plea hearing.

At the change of plea hearing, Counsel indicated that Brown intended to go forward with the change of plea. (Id. at 6.) When the Court asked Brown whether it was his intention to plead guilty to nine of the ten counts Brown responded: "I'm going to plead guilty to whatever you charge me to." (Id. at 7.) The Court reacted commencing to explain its question, but Brown stated: "I know what your question is; yes it is." (Id.) "Is it your intention today," the Court reiterated, "to plead guilty to the counts as I have designated them?" (Id.) "Yes," Brown responded, indicating, that he had conferred with counsel. (Id.) Counsel then broke to confer yet again with Brown. (Id. at 8.) When read the indictment by the Clerk and asked for his plea, Brown answered: "Guilty to everything." (Id.)

The change of plea colloquy continued, with Brown indicating that he dropped out of high school at tenth grade and that he had been under the care of a psychiatrist or psychologist

from 1983 to the present for "explosive disorder." (Id. at 9 – 10.) At this juncture, the Court asked defense counsel whether there was any indication that Brown was diagnosed in a manner that would reflect adversely on his competency. (Id. at 10.) Counsel replied: "He has been evaluated. There were funds accredited by the Court for independent evaluations. We have investigated those issues, your Honor, and I have consulted with Mr. Brown and we didn't go any further." (Id.) When asked directly by the Court if he was satisfied on this score, Brown replied affirmatively. (Id.) Counsel indicated that he was "[a]bsolutely" satisfied that Brown understood the natures of the charges against him. (Id.) Brown told the Court that he was taking medication for a leg injury and for anxiety but that it did not affect his thought process in any way. (Id. 10-11.) He told the Court that he was "[a]bsolutely" able to understand what the Court was saying to him in the hearing and, to the question of whether counsel had explained the consequences of changing his plea, Brown replied, "He sure has," and then indicated that he clearly understood it. (Id. at 11.) When asked, the defense attorney represented that he had no reason to doubt the competency of Brown to waive his right and enter a plea of guilty to the nine counts. (Id.) The prosecutor had the same conviction. (Id.)

"Now, Mr. Brown," the Court proceeded, "have you tendered you pleas of guilty to these 9 counts of this indictment because you are in fact guilty as charged in each of them and for no other reason?" (Id.) Brown replied, "Yes." Defense counsel shared Brown's opinion. (Id. at 12.) Brown represented to the Court that he had had an adequate opportunity to discuss the charges on the nine counts with his attorney; that his attorney fully explained the elements and nature of each offense; that his attorney explained the potential penalties; and that he understood in all respects the explanations given. (Id.) Brown stated he was satisfied with his attorney's advice. (Id.) He understood his right to continue to plead not guilty, his entitlement to have a

jury trial on all of the charges and be represented by counsel (court appointed if necessary), the burden of proof the United States would have to meet, the fact that witnesses would be required to come to testify against Brown in open court subject to cross-examination by Brown's attorney, that his attorney could test the evidence, and the right to and implication of not testifying on his own behalf. (Id. at 12-14.) Brown indicated that he realized that if his plea was accepted he would be giving up his right to all this process and these protections. (Id. at 14-15.) He also replied that he understood that he would have no effective right of appeal upon acceptance of the plea to the nine counts. (Id. at 15.)

The Court went on with its inquiry: "Now, in view of all I have just explained to you[,] do you still choose to plead guilty to the charges set forth in the 9 counts of this indictment previously enumerated?" (Id. at 16.) Brown responded: "Absolutely, yes." (Id.) Counsel recommended that the pleas be accepted and, again, both Brown and his attorney indicated that they were satisfied that Brown understood the nature of each charge. (Id.) The Court proceeded to review each charge and meticulously identify the associated penalties. (Id. at 16-21.) The United States then introduced the prosecution's version of the offense as an exhibit, which defense counsel and Brown indicated that Brown fully understood, leading to the Court's conclusion that there was a factual basis for the pleas to each count. (Id. at 21-25.) After completing the full inquiry, the Court found that Brown understood his right to trial and the maximum possible punishment and that Brown was not coerced but had voluntarily and knowingly tendered his pleas of guilty to each of the nine counts. (Id. at 29.)

When asked at the conclusion of the change of plea hearing if he had anything further, counsel for Brown reported:

> Yes your honor, as I'm sure the Court was aware, we had some discussions during the pendency of the Rule 11 procedure. We had discussions

> and Mr. Brown is mindful of the fact that there is a mandatory life sentence in the kidnapping count and there is a potential sentence of death penalty. The discussion basically is concerning his desire, if it would be possible to compel the Court to impose the death penalty, he had indicated to me that he would think that would be a better sentence.

(Id. at 30.) The Court indicated that because the United States was not seeking the death penalty, and in that it would have to meet the applicable burden of proof if it did so, that the case was not in a posture in which the Court could impose the death penalty. (Id. at 31.)

Analysis

Brown's assertions to the contrary, on this record I conclude that Brown has not presented any basis for crediting his § 2255 claims. He relies for the most part on his past record of psychological troubles (primarily his 1980-81 Marine Corps evaluation) and subsequent unidentified treatment, the request for (but not the contents of) the psychological evaluation pursued by defense counsel, and his penchant to die contemporaneous with his criminal proceedings. He does not state that the psychological evaluation done during the course of his prosecution demonstrated a basis for a competency hearing in contravention of counsel's indication at the plea hearing that counsel and Brown agreed that the evaluation did not shed doubt on his competency to plead guilty. (Plea Tr. at 10.) Nothing in the post-Rule 11 December 3, 1999, Presentence Report or the December 20, 1999, sentencing transcript would compel the Court or counsel to revisit the question of Brown's competency at the time of the November 4, 1999, change of plea hearing.

As the Court knows first hand, see United States v. McGill, 11 F.3d 223, 225 (1993) (observing that, when, a "petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned during previous proceedings and make findings based thereon without convening an additional hearing."), the

Court was entirely thorough and cautious in conducting its Rule 11 inquiry, and, as the First Circuit observed in its decision on the direct appeal, United States v. Brown, 295 F.3d 152, 156 (1st Cir. 2002) ("[T]he multiple colloquies between the district court and the appellant reveal that Brown was completely aware of all of the charges against him and of the concomitant penalties."), Brown gave every indication of understanding and no signs of confusion. This is not a case in which the Court ignored uncontradicted testimony of Brown's "history of pronounced irrational behavior." Pate v. Robinson, 383 U.S. 375, 385-86 (1966). From the Court's view, Brown was an active and rational defendant. See United States v. Pryor, 960 F.2d 1, 2 (1st Cir.1992) (affirming conviction without competency hearing where the court witnessed the defendant "vigorously, and rationally, participating in his defense").

And, while I would not go so far as to join the United States in characterizing Brown's suicide attempt and his request for the death penalty as a 'reasonable' reaction to his circumstances, I do not believe that this conduct is a de facto signal of a lack of competency. It must be viewed in the context of Brown's demeanor at the change of plea hearing, and this record indicates that Brown did have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and had "a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402.[4]

Finally, I note vis-à-vis his attorney's performance as measured by Strickland v. Washington, 466 U.S. 668 (1984), defense counsel did pursue the psychological evaluation and Brown has not alleged a factual basis for concluding that his attorney ignored other indications of a want of legal competency. Nor does Brown suggest that he had any communications with his attorney that would or should have generated a competency concern in counsel's mind. See McGill, 11 F.3d at 225 ("When a petition is brought under section 2255, the petitioner bears the

[4] Also of note, the attempted suicide occurred in August 1999. Brown pled guilty on November 4, 1999.

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); United States v. Butt , 731 F.2d 75, 80 n.5 (1st Cir. 1984) ("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.") (collecting cases). He rests this ground simply on the irrationality of his suicide attempt/request for the death penalty and his psychological history. However, a want of competency within the meaning of Dusky is the exception rather than the rule and it is certainly not the exception to find that defendants facing serious criminal charges such as Brown have a history of psychological troubles and exhibit behavior, as Brown phrases it, "outside the range of normalcy."

Conclusion

For these reasons I recommend that the Court **DENY** Brown's 28 U.S.C. § 2255 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) (1988) 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.

March 5, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:99-cr-00034-GZS-ALL
Internal Use Only

Case title: USA v. BROWN
Other court case number(s): None **Date Filed:** 05/27/99
Magistrate judge case number(s): 2:99-mj-00016

Assigned to: JUDGE GEORGE Z. SINGAL
Referred to:

Defendant(s)

STEVEN K BROWN (1)
TERMINATED: 12/28/1999

represented by **STEVEN K BROWN**
REG NO 03810-036
USMCFP
P.O. BOX 4000
SPRINGFIELD, MO 65801-4000
PRO SE

Pending Counts

18:371.M CONSPIRACY TO DEFRAUD THE UNITED STATES (1)

life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7, and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences

	imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution: $8,024.00
18:1201.F KIDNAPPING (2)	life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7, and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution: $8,024.00
18:924C.F VIOLENT CRIME/DRUGS/MACHINE GUN: Use of a firearm during and in relation to a crime of violence (3-4)	life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7, and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution:

	$8,024.00
18:2261.F INTERSTATE DOMESTIC VIOLENCE (5-6)	life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7, and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution: $8,024.00
18:2261.F INTERSTATE DOMESTIC VIOLENCE: Interstate Stalking (7)	life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7, and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution: $8,024.00
18:2262.F INTERSTATE VIOLATION OF PROTECTION ORDER (9)	life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7,

	and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution: $8,024.00
18:924C.F VIOLENT CRIME/DRUGS/MACHINE GUN: Transporting a firearm in interstate commerce with intent to commit a felony (10)	life on Counts 2,5,6,7, and 9; for sixty (60) months on Count 1 and for one hundred twenty (120) months on Count 10, to be served concurrently with each other and with the sentences imposed on Counts 2,5,6,7, and 9; and for a term of sixty (60) month s on Count 3 and sixty (60) months on Count 4, to be served concurrently with each other and consecutively to each of the sentences imposed on Counts 1,2,5,6,7,9 and 10; Supervised Release: five (5) years on each of counts 2,5,6,7 and 9, and for a te rm of three (3) years on Counts 1,3,4 and 10, to be served concurrently with each other; Special Assessment: $900; Restitution: $8,024.00

Highest Offense Level (Opening)

Felony

Terminated Counts ---	**Disposition** ---
18:2261.F INTERSTATE DOMESTIC VIOLENCE: Interstate Stalking (8)	Count 8 of the Indictment dismissed by Court on oral motion of the Government and without objection

Highest Offense Level (Terminated)

Felony

Complaints	**Disposition**
COUNT I, both dfts: conspiracy to kidnap Deborah Brown, 18:1201(a)(1) and (c); COUNT II, both dfts: kidnapping, 18:1201(a)(1) and 2; COUNT III, both dfts: use of a firearm during and in relation to a crime of violence, 18:924(c) and 2; COUNT IV, dft BROWN: interstate domestic violence, dft TEETER: aiding and abetting this offense, 18:2261(a)(2) and (b)(3) and (4) and 2; COUNTS V-VI, both dfts: interstate stalking (NY to ME), 18:2261A, 2261(b)(3) and (4) and 2; COUNT VII, dft BROWN: interstate violation of a protective order, dft TEETER: aiding and abetting this offense, 18:2262(a)(1) and (b)(3) and (4) and 2; COUNT VIII, both dfts: transporting a firearm in interstate commerce with intent to commit a felony, 18:924(b) and 2 [2:99-m -16]	

Plaintiff

USA	represented by	**JAY P. MCCLOSKEY** MCCLOSKEY, MINA & CUNNIFF, LLC 27 BELLEVUE AVENUE BANGOR, ME 04402-2088 207/772-6805

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