UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 00-89-P-C
	)	Civil No. 02-051-P-C
RANDY PELLOWITZ,	)	
	)	
Petitioner	)	

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

Randy Pellowitz has filed a 28 U.S.C. § 2255 motion seeking relief from his federal sentence, imposed after a guilty plea. (Docket Nos. 37, 47 & 60.) He claims that his counsel was ineffective in a variety of ways and, as a consequence, the Court imposed a higher sentence than it would have had his counsel performed effectively. Pellowitz has also filed a motion for discovery with respect to his § 2255 motion. (Docket No. 61.) I now recommend that the Court **DENY** Pellowitz's request for relief from his sentence and I hereby **DENY** Pellowitz's request for further discovery.

Criminal Conduct

In the summer of 1999 Pellowitz submitted multiple telephonic applications to the American Express Company requesting a corporate line of credit for Eastern Holdings Corporation (Eastern). Each time he applied he represented to American Express that he was James Caverly (an individual that joined Pellowitz in some business ventures). Pellowitz did not inform Caverly that he had applied in Caverly's name, let alone did he seek Caverly's permission to do so. American Express agreed to open a corporate line of credit in the name of "James Caverly/Eastern Holdings Corporation," issuing two cards per Pellowitz's request: one for James Caverly and one for Randy Pellowitz. The cards

and billing statements were mailed to a Biddeford, Maine post office box rented by Pellowitz. Caverly was not aware of this account and did not receive billing statements. From August 1999 through March 2000 Pellowitz used the card to charge goods and services totaling approximately $98,833. The account was eventually closed for non-payment with an overdue balance outstanding of $83,580.63.

Discussion

Pellowitz is serving a fifty-seven month sentence after pleading guilty to one count of mail fraud and one count of credit card fraud. Upon his release he will be subject to thirty-six months of supervised release. Pellowitz makes it crystal clear -- in his reply to the United States' response -- that he is in no way attacking his attorney's performance vis-à-vis the plea; rather, all his ineffective assistance of counsel grounds relate to his sentencing.

Legal Framework for Analyzing Pellowitz's Claims

Relief under 28 U.S.C. § 2255 is an extraordinary remedy. Hill v. United States, 368 U.S. 424, 428 (1962). Pellowitz is entitled to habeas relief from his federal conviction only "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 ¶1. Ineffective assistance of counsel at sentencing is a constitutional claim. Such claims are also properly brought in a § 2255 motion, as opposed to on direct appeal. See United States v. Downs-Moses, 329 F.3d 253, 264-65 (1st Cir. 2003) ("Typically we do not consider claims of ineffective assistance of counsel on direct appeal").

Pellowitz adamantly argues that he is entitled to an evidentiary hearing on his claims. With respect to the necessity of an evidentiary hearing, the First Circuit has stated: "Evidentiary hearings on § 2255 petitions are the exception, not the norm, and there is a heavy burden on the petitioner to demonstrate that an evidentiary hearing is warranted." Moreno-Morales v. United States, __ F.3d __, 2003 WL 21512239, *3 (1st Cir. July 3, 2003) (citing United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993)). With respect to Pellowitz's burden to demonstrate his entitlement to an evidentiary hearing, I examine the record with the following in mind:

> Facially adequate § 2255 claims may be summarily denied when the record conclusively contradicts them. Domenica v. United States, 292 F.2d 483, 484 (1st Cir.1961); Rule 4(b), Rules Governing § 2255 Proceedings (§ 2255 Rules). Thus, presumptively adequate supporting factual allegations may prove untrue when the record is examined, or the record may reveal a course of conduct which warrants concluding that the petitioner's allegations are "patently frivolous or false," United States v. Cermark, 622 F.2d 1049, 1054 (1st Cir.1980). See Blackledge v. Allison, 431 U.S. 63, 78 n. 15 (1977).
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> The district court may also make "its preliminary assessment on the motion's merits [based] on an expanded record that may include, 'in an appropriate case, even affidavits.' " Miller v. United States, 564 F.2d 103, 105 (1st Cir.1977) (quoting Raines v. United States, 423 F.2d 526, 530 (4th Cir.1970)). However, material issues of fact may not be resolved against the petitioner solely by relying on ex parte, sworn or unsworn, statements of the government, Miller v. United States, 564 F.2d at 106; United States v. Underwood, 577 F.2d 157, 159 (1st Cir.1978), or defense counsel, United States v. Pallotta, 433 F.2d 594, 595 (1st Cir.1970); Bender v. United States, 387 F.2d 628, 630 (1st Cir.1967) (allegations of extra-record misrepresentations not disproven by attorney's affidavit).
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> An evidentiary hearing is required if the records and files in the case, or an expanded record, cannot conclusively resolve substantial issues of material fact, "and when the allegations made, if true, would require relief." United States v. Fournier, 594 F.2d 276, 279 (1st Cir.1979); DeVincent v. United States, 602 F.2d 1006, 1009 (1st Cir.1979); Rule 8(a), § 2255 Rules. Cf. United States v. Crooker, 729 F.2d 889 (1st Cir.1984) (motion under Fed.R.Crim.P. 32(d)).

United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984).

To demonstrate ineffective assistance of counsel in violation of the Sixth Amendment, Pellowitz must establish that "counsel's representation fell below an objective standard of reasonableness," and persuade the Court that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Pellowitz has a further pleading burden: "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." Butt, 731 F.2d at 78.

The Ineffective Assistance of Counsel Claims

With these legal parameters in mind, I take Pellowitz's ineffective assistance claims one at a time. There are five discrete claims that are identifiable and cognizable, as raised in Pellowitz's § 2255 petition, responded to by the United States, and, to some extent, readdressed by Pellowitz in his reply. In addition, Pellowitz does seem to have an overriding claim that his attorney made too few objections to the PSR as a whole and was ineffective when he withdrew all the objections that he had interposed, some being withdrawn without informing Pellowitz and some being abandoned despite Pellowitz's objection.[1] Pellowitz states that he clearly did not understand the implications of the PSR and his attorney did not adequately work to inform him about its content.

[1] In his § 2255 motion Pellowitz faulted counsel for generally failing to pursue objections and other issues in the PSR and for failing to "pursue any subsequent collateral issues, which were relative to the case." He also states that his attorney should have objected to "arguments made by the probation department on a variety of issues, including, but not limited to: upward departure, enhancements, no provision of acceptance of responsibility, and a large number of mis-statement of facts." (Sec. § 2255 Mot. at 9.) Such conclusory claims are generally insufficient to trigger § 2255 review. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993).

The Catch-All Claim

The record before me belies the notion that counsel was remiss, let alone constitutionally inadequate, with the respect to either his challenging of and the withdrawal of objections to the PSR or his explanation of the PSR to Pellowitz. I take this claim first as it helps set the stage for the discussion of the delineated grounds.

Initially, defense counsel articulated multiple objections to the presentence report. One, he objected to the representation in the report that Caverly never gave permission for Pellowitz to pursue lines of credit for the company and to the intended amount of loss attributed to him. Two, he objected to the representation concerning the purchase of a trailer in the company's name vis-à-vis which the second of two checks was returned to the seller due to insufficient funds. Counsel argued that there was a sufficient balance in the account to cover the check when the check was written but that prior to its presentation for payment the account was closed because the checkbook had been stolen. Three, counsel objected to the valuation of goods purchased but never paid for --

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The United States' answer addresses a failure to argue for acceptance of responsibility claim. It seems to be based on a passing reference. In response, Pellowitz has stated that he clearly made a timely plea and on a number of occasions took responsibility for what he has done. (Pet.'s Reply at 26.) However, agreeing with Pellowitz that the United States' argument in answering § 2255 petitions "does not define the potential consideration by the court," (id.), I do not believe that Pellowitz's passing reference to the issue generates this claim, nor would the record in this case support it.

In his reply Pellowitz responds to the United States' details concerning the sentencing proceedings, identifying complaints against his attorney such as: his failure to successfully challenge the obstruction of justice adjustment premised upon financial disclosures made in his efforts to have counsel appointed; not clarifying representations made by the United States concerning his college experience; allowing the United States' version of events to go unchallenged; not arguing that the attribution of fraudulent check writing to Pellowitz as relevant conduct; failure to object to inaccuracies concerning Pellowitz's ownership interest in Casco, Maine property; failure to object to a suggestion by the United States that even after indictment Pellowitz paid for items with bad checks and incurred further credit charges; and not adequately challenging the assertion in the PSR that Pellowitz had no legitimate business operations. This is just to name a few. I have limited my consideration of new claims to those that can be linked to the documents that Pellowitz has submitted as supplementation (because he claimed that he was early on denied access to them by his attorney) and those dependant upon and supported by the transcripts Pellowitz requested by motion.

In his reply Pellowitz also disputes numerous facts and argument set forth in the United States' answer to the 28 U.S.C. § 2255 petition. These attacks on the United States' thoroughgoing approach to answering do nothing to further Pellowitz's claims of ineffective assistance of counsel at sentencing.

including a trailer, a chain saw, and a tractor. Pellowitz contended that he was attempting to locate the tractor. Four, counsel objected to the factual basis for several paragraphs pertaining to relevant conduct after the American Express accounts were closed. In his view the conduct was in a different league because the purchases were not made using a credit card but involved checks and lines of credit at business establishments. Five, counsel objected to the representation that Pellowitz had paid for a tow truck with a check that was returned due to account closure and never returned the truck to the seller. Pellowitz contended that the truck had indeed been returned. Six, counsel objected to the characterization of Eastern as "merely a front" for the charging of items and the report's representation that the probation officer had seen no information that it actually engaged in telemarketing or tree trimming.[2] It was Pellowitz's contention that he could prove that he actually engaged in telemarketing. Seven, counsel argued with the PSR's characterization of Pellowitz as being in custody for other offenses at the time of the new offense and against the consequential two-point addition. Pellowitz pointed out that he was serving the last portion of his sentence in a half-way house at the time he obtained the American Express credit cards. And, eight, counsel challenged the PSR's argument that there should be an upward departure under United States Sentencing Guideline § 4A1.3 because the repetitive nature of Pellowitz's prior record, combined with the circumstance of his current offense, indicated that there was a high likelihood for future recidivism when released.

At the pre-sentence conference, defense counsel maintained his objection to the report's fact pertaining to the amount of loss; the concern about whether post American

[2] The PSR noted that the four-level enhancement this representation related to was redundant as Pellowitz's guideline range was already 17.

Express account closure check conduct was relevant conduct; and an objection to the proposed two-level increase for more than minimal planning. (Pre-Sentence Conference Tr. at 24, 32.) He withdrew the objections to the trailer/returned check transaction; the valuation of goods in the multi vehicle purchase; the tow-truck/returned check transaction; the actuality of the telemarketing business; and the half-way house/"in custody" concern (because, as the Court articulated, it would not impact the sentencing range). (Id. at 24-26) The Government stated that it was withdrawing the upward departure issue (id. at 26) and it was clarified that the defense was not seeking to pursue an acceptance of responsibility departure (id. at 33). Defense counsel also articulated a concern about a lot of additional information in an addendum to the PSR that related to new conduct and wished to preserve objection due to the fact he was not able to review the material and also sought to preserve an objection to the consequential two level obstruction of justice increase. (Id. at 27 -28, 32, 42.)

With respect to the amount of loss objection, defense counsel clarified that Pellowitz was not disputing that he made unauthorized charges on the American Express card but was contending that Caverly agreed with the opening of a line of credit. (Id. at 28.) When the Court inquired what the purpose of the objection was in view of Pellowitz's acknowledgement of unauthorized charges, defense counsel explained that he sought only to object to the total loss figure in that he thought the total loss should be $98,000 rather than $137, 433.27. (Id. at 29.) The difference in those figures turned on whether the checks that were fraudulently used after the American Express account was closed were viewed as relevant conduct, which if they were would raise the specific offense level from 6 to 7. (Id. at 29-30). In response to the Court's questioning, Counsel

clarified that the agreement between Caverly and Pellowitz vis-à-vis the opening of the line of credit was irrelevant to the check writing/relevant conduct issue. (Id. at 30-31.)

After the pre-sentence conference the Court issued a procedural order indicating that four matters remained in dispute. These were: whether the loss amount for the offense conduct was $137,437.27 or $98,854.00, a question turning on whether dubious check transactions should be deemed to be related conduct; whether defense counsel had sufficient time to review new materials provided by the United States; whether Pellowitz should be subject to a two-level increase in offense level for obstruction of justice; and, ultimately, the nature of the sentence to be imposed. (Docket No. 8.)

At sentencing, with Pellowitz present, defense counsel continued to press his relevant conduct objection based on the time-frame concern. (Sentencing Tr. at 41 -42.) He withdrew the objections on the review of material issue and on the propriety of the obstruction of justice increase. (Id. at 41-42.)

The Court addressed Pellowitz directly. Pellowitz indicated that he had authorized his attorney to speak on his behalf; his attorney indicated that Pellowitz had read the entire presentence report and that he had explained the contents to Pellowitz; defense counsel assured the court that Pellowitz understood that, to the extent the Court accepted the contents of the report as true, the PSR would become the foundation of the sentence; counsel had reviewed with Pellowitz the contents of the presentence procedural order and that Pellowitz understood and consented to the fact that counsel had withdrawn the review of material and obstruction of justice objections; and, counsel assured the court, Pellowitz understood that the only issue for resolution was whether the conduct involving the checks was related conduct. (Sentencing Tr. at 45-46.)

Again the Court addressed Pellowitz:

> Q. Mr. Pellowitz, is it correct that you have read this presentence report yourself in its entirety?
> A. Yes [,] your Honor.
> Q. Are you satisfied that you know everything contained in it?
> A. Yes[,] your Honor.
> Q. Has [your attorney] explained it to you?
> A. Yes[,] he has your Honor.
> Q. Did you fully understand his explanation?
> A. Yes, your Honor.
> Q. Has he answered any questions you have directed to him about the meaning or significance of any of the contents of the report?
> A. Yes[,] your Honor.
> Q. Did you fully understand all of his answers?
> A. Yes[,] your Honor.
> Q. Do you understand that the objections which he originally filed on your behalf generated issues 2 and 3 of the procedural order of February 23rd have now been withdrawn?
> A. Yes [,]your honor.
> Q. Have you previously read the procedural order yourself?
> A. I have[,] your Honor.
> Q. Did you understand what issues 2 and 3 were about?
> A. Yes[,] your Honor.
> Q. And do you understand that those have now been withdrawn and I will act accordingly?
> A. Yes[,] your Honor.
> Q. Do you consent to their withdrawal?
> A. I do[,] your Honor.
> Q. Do you understand that the only issue remaining to be resolved is whether the course of conduct involving checks in this case, as identified in the presentence report, was related conduct that requires an additional enhancement of the offense level?
> A. I do[,] your Honor.

(Id. at 46-48.) There was a lengthy discussion on the issue of related conduct (id. at 48-57) and the Court reflected that it "could call it either way" and would "give the defendant the benefit of the doubt" (id. at 58). In response to the Court's proffer that it was inclined to impose the maximum sentence of fifty-seven months under the guideline

range of 16, defense counsel requested that the Court consider that Pellowitz did have a two-year consecutive sentence vis-à-vis a revocation that should be consecutive. (Id. at 58-59.)

Pellowitz then addressed the Court, stating that he took full responsibility for what he had done and expressing regret for hurting people, including his wife. (Id. at 59.) He recognized that his opportunities had run out and declared: "[W]hen I'm released from the custody of the Bureau of Prisons, I'm going out and seek a job and do the best I can." (Id. at 60.)

The Court next stated that it was accepting the plea agreement, rejecting the government's request for a Chapter 4 enhancement, and declining to embrace a departure for acceptance of responsibility. (Id. at 61.) This meant a guideline range of forty-six to fifty-seven months; the Court sentenced Pellowitz to fifty-seven months. (Id. at 62.)

Given the direct and careful inquiry made of Pellowitz by the Court concerning the objections emerging from the pre-sentence conference, I cannot credit Pellowitz's conclusory assertions that he remained in the dark vis-à-vis the withdrawal of the other objections. Neither can I credit his assertion that he actively opposed the decision to withdraw some of the objections. Pellowitz indicated to the Court, betraying no hint of a qualm, that he had understood the report, read the procedural order providing that only four objections were being maintained, and assured the court that he consented to the withdrawal of two of these. Pellowitz has not alleged any concrete facts about his attorney's off-the record conduct vis-à-vis the objections that comes anywhere near casting doubt on the picture the printed record presents. See Butt, 731 F.2d at 78.

The Conditions of Release

I reach a same conclusion, for many overlapping reasons, with respect to Pellowitz's claim concerning his attorney's failure to challenge the inclusion of three paragraphs in the sentencing memorandum that set special conditions of supervised release.

The requirements that Pellowitz now takes umbrage with are that he be continuously employed by a disinterested third party; that he cannot be self-employed and must dissolve and refrain from opening any business type operations; and that he submit to searches of his residence when there is a reasonable belief that he has violated the terms of his supervised release. (Mem. Sentencing J. at 7 ¶¶ 7-9.)

Pellowitz is particularly discontent with the condition allowing searches of his residence, viewing it as violative of his due process rights. He contends that a separate condition of release that allows his probation officer to visit him and confiscate contraband in plain view is sufficient guard against his possession of contraband. With respect to the employment provision, he views this as "absurd and pointless" and as virtually precluding his prompt, gainful employment after release. And, as for the bar on self-employment and the pursuit of old or new business entities, he argues that it "only serves to narrow his opportunity to serve as a productive member of his community in this possible capacity."

Pellowitz states that, to the best of his recollection, these conditions were not specifically presented in the plea agreement or at sentencing. He faults his attorney (as well as the clerk of courts and the government) for refusing to give him the information

he needed to challenge the validity of these conditions of supervised release. He alleges that his attorney actively withheld the existence of these conditions from him.

I simply cannot credit Pellowitz's assertion that he remained unapprised of these conditions. The Court expressly stated the two employment-related conditions in reviewing the sentence at the pre-sentencing hearing. (Pre-sentencing Tr. at 37.) With respect to the search provision the Court explained at the pre-sentence proceeding: "I will impose the Gian[n]etta condition here too. That's the one about he has to consent on demand of the supervising officer to a search of any and all premises under his control, the officer having a reasonable basis to believe the search will disclose evidence of violation and terms of supervised release." (Pre-sentencing Tr. at 36-37.) Pellowitz's attorney immediately thereafter indicated he had no objections to the conditions. (Id. at 37.)

Four days later at the sentencing the Court stated:

> It is further adjudged that upon release from imprisonment the defendant should be placed on supervised release for a term of three years, the usual terms of conditions and on the 9 special terms and conditions that will be specified precisely in the memorandum of sentencing judgment. Those have been fully exposed to counsel at presentence conference and I understand, Mr. Webb, there is no objection to any of them. Is that correct?

(Id. at 62.) With Pellowitz present his attorney responded in the affirmative. (Id.) Based upon this visitation of the conditions of release by the Court in open court with Pellowitz present and attentive, I conclude that Pellowitz's protestation of ignorance is likely false. See United States v. Cermark, 622 F.2d 1049, 1054 (1st Cir.1980).

And even if Pellowitz could demonstrate a factual predicate for a conclusion that, due to a deficiency of counsel, he was blindsided by these conditions, he could not prove

that there was Strickland prejudice in allowing these conditions to go unchallenged. With respect to conditions of supervised release, the First Circuit has observed: "Virtually all conditions of supervised release restrict a defendant's liberty. The hallmark that separates impermissible conditions from permissible ones is whether, on a given set of facts, a particular restriction is clearly unnecessary." United States v. Brown, 235 F.3d 2, 7 (1st Cir. 2000). There must only be "an adequate relationship between the nature and circumstances of the offense, the demonstrated propensities of the offender, and the special condition attached to the offender's release." Id.

The statutory basis for shaping conditions of release is found in section 3553 of title 18, which, as applicable, reads:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
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> **(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;
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> **(2)** the need for the sentence imposed—
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> **(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> **(B)** to afford adequate deterrence to criminal conduct;
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> **(C)** to protect the public from further crimes of the defendant; and
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> **(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. § 3553(a)(1), (2).

With respect to the work and business related conditions, section 3563 of title 18 expressly permits a condition of release requiring that an individual:

> refrain ... from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the

> offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances[.]

18 U.S.C. § 3563(b)(5). Such conditions may be imposed only "to the extent that such conditions are reasonably related to the factors set forth in subsections 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in subsection 3553(a)(2)."

The United States Sentencing Guidelines provide that occupational restrictions may be imposed as a condition of supervised release, the appropriateness of which is determined on a case-by-case basis. U.S.S.G. § 5D1.3(e)(4). More particularly, Guideline § 5F1.5 explains:

> (a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:
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> (1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and
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> (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.
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> (b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

U.S.S.G. § 5F1.5

And, the Court imposed the acquiescence to searches requirement in accordance with United States v. Giannetta, 909 F.2d 571 (1st Cir. 1990). Therein the First Circuit recognized that courts could impose search conditions such as the one imposed on Pellowitz, so long as the officer's authority to search was limited to instances in which the officer had an individualized reasonable suspicion. Id. at 575.

All three conditions were eminently reasonable and facially necessary given Pellowitz's admitted criminal conduct underlying the instant offense and his history of related (mis)behavior. At sentencing Pellowitz openly admitted that he had reached the end of the line and that it would be up to him to try to straighten himself out and get a job when released. Conditions such as the ones imposed by the court, rather than being "absurd and pointless," were tailored to the posture of his criminal past and styled to assure that he maintain the straight and narrow while on supervised release. Any challenge by counsel would have been futile.[3]

Failure to Object to the Caverly Statements

Pellowitz also faults his attorney for failing to argue for the excise of statements by James Caverly contained in the pre-sentence investigation report. The prosecution's version and the PSR contain a statement by Caverly that he never gave Pellowitz permission to open any line of credit in his name and that he was not aware that Pellowitz had done so. (Docket No. 4 at 2; PSR at 3 ¶ 3.) Pellowitz contends that counsel's response to Pellowitz when Pellowitz raised the issue was that in his opinion the government would not appreciate having their witness impeached.

The Rule 11 colloquy undermines any argument that the sentence was improperly influenced by the inclusion of this un-nuanced representation by Caverly. In the examination of the factual basis for the plea at the hearing, Pellowitz's attorney raised the fact that Pellowitz contested the statement that Pellowitz neither informed Caverly that he had filed for a line of credit in Caverly's name, nor sought Caverly's permission to do so. (Rule 11 Tr. at 13.) The parties clarified that the disagreement on Pellowitz's part was

[3] For reasons too obvious to explore, it certainly would have been futile to argue that limiting searches to those items in plain view was an adequate substitute for those based on reasonable suspicion that, say, contraband was being concealed.

that Pellowitz believed that Caverly was aware that Pellowitz "would open a credit card, line of credit in Caverly's name but Pellowitz did not inform Caverly that he was going to get a supplemental card in his own name and use that for illegal charges." (Id.) The government indicated that it believed that there was a factual basis for the plea under either the prosecution's or Pellowitz's version of events, as there was sufficient admitted fraud to support the convictions even if Caverly had been aware that Pellowitz was pursuing a line of credit in his name. (Id. at 14.) Defense counsel concurred with this opinion, stating: "Mr. Pellowitz and I discussed it extensively and we both agree that it does not in any way effect the plea." (Id.) The Court than fully discussed with Pellowitz whether he had read the prosecution's version; whether he understood his attorney's explanation of the contents; and explained that the version would form the basis of the Court's sentence, to the extent that the Court accepted the contents. (Id. at 15-16.) The Court then asked: "Other than what has been said about the final paragraph, the final sentence in the second paragraph ... is there anything stated in this document that you believe to be untrue or incorrect in any way?" (Id. at 16.) After Pellowitz asked his attorney a question, he indicated that there was no other dispute. (Id.)[4]

The bottom line, then and now, is that Pellowitz admits that he was guilty vis-à-vis obtaining and using the American Express credit card in his name and that Caverly remained in the dark vis-à-vis this conduct. Thus, Pellowitz's further criticism (in his reply) of his attorney for not introducing evidence that in fact Caverly had signed for a Key Bank line of credit in the company's name and personally guaranteed it is beside the point; it would not have altered the landscape. In a tactical sense, emphasizing Caverly's

[4] The discussion above of the path of Pellowitz's ultimately successful objection to the check fraud loss attribution, and the in-court discussion thereof, also makes clear that the question of whether Caverly had authorized the opening of the line of question was not material to the sentencing determination.

involvement in the Key Bank transactions and Caverly's familiarity with other corporate activities could have done more harm than good; Pellowitz's purposeful, unilateral erection of a Chinese wall to shield Caverly from the American Express transactions could have been determinately juxtaposed against Caverly's knowledge of other Eastern credit affairs. [5]

Pellowitz also faults his attorney for allowing this statement by Caverly in the PSR: "Randy is a bad person he lies, cons and manipulated good trusting people. He is very money hungry and greedy person and doesn't care who or how he hurts people. I would go so far as to say he is close to pure evil." (Id. at 3 ¶ 9.) Pellowitz contends: "Defaming the character of this Petitioner in the 'PSR' served no purpose and in fact it is a direct violation of Federal Rule of Criminal Procedure Rule 32(d)(3)(C) that calls for the exclusion from the PSR of any information the disclosure of which might result in physical or other harm to the defendant or others." It appears that Pellowitz views this defamation as "other harm," and it was this argument that he thinks his attorney should have made.

For one, Pellowitz is very mistaken as to the nature of the harm that the rule is seeking to avert. For another, as the United States points out, there is no indication that the Court considered, much less relied upon, this rather inflammatory passage of opinion at any time during the sentencing proceedings.

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[5] In his reply memorandum Pellowitz also contends that his attorney ought to have challenged a statement made by Caverly that he knew nothing about a $20,000 line of credit owed to Key Bank for loans that Caverly had clearly signed for in his capacity of treasurer for the corporation. I can find no place in the record in which the Key Bank loan was mentioned, let alone where such a denial by Caverly might have had an operative effect in sentencing.

In Pellowitz's view his attorney also should have challenged the PSR's description of Pellowitz as believing that Caverly was aware of the American Express account because Pellowitz was absolutely sure that Caverly knew of the account, the method of application, and his role as guarantor. Once again, this does nothing to alter the fact that Pellowitz admits that Caverly remained unaware of the card in Pellowitz's name and the unauthorized usage by Pellowitz.

The Caverly Harassment

Pellowitz asserts that his attorney should have brought the Court's attention to the fact that starting just prior to Pellowitz's indictment Caverly called him approximately twenty times a day, every day, to harass Pellowitz. Although Pellowitz made counsel aware of this conduct, counsel chose to ignore it. These calls began in August 2000 and continued up until the day of Pellowitz's incarceration. He also wants this Court to take note of the fact that Caverly has been convicted of at least seven theft felonies, that he lied about this at the time of the PSR preparation, and that if this had been demonstrated by his attorney it "would have shown Caverly's inability to tell the truth about anything." Pellowitz asserts that his attorney was remiss in not bringing Caverly's questionable background to the attention of the sentencing court as it went to Caverly's own culpability as the treasurer of the Eastern.

I cannot see how Caverly's conduct toward Pellowitz just prior to and after the indictment in this case could have possibly influenced the Court's sentencing determination. The sentence was imposed on the basis of Pellowitz's and not Caverly's conduct. Once again, Pellowitz concedes his own criminal conduct. That Pellowitz's scheme involved an individual who also had a questionable past and who partook in extra-curricular dunning of Pellowitz during the criminal proceedings are circumstances that would have no operative effect on the sentencing calculations vis-à-vis Pellowitz (although it is the kind of conduct that might appear in a PSR on Caverly).

Refusal to Turn Over Documents

Pellowitz further claims that counsel refused to turn-over documents to Pellowitz, including at least ten documents that demonstrated that Caverly did in fact sign for loans

for Eastern in his name and as guarantor, although he claimed he had not. Pellowitz began requesting these documents from counsel in March or April 2001, and some of these documents he had yet to receive at the time of filing his 28 U.S.C. § 2255 petition. Pellowitz complains that his attorney had these documents at the time of the sentencing and refused to present them to the court because he believed that the government would not appreciate having their own witness impeached.

Pellowitz filed a supplement to his petition that contains some of the previously withheld documents. Many of the pages concern Eastern's accounts with Key Bank, documents that show that Pellowitz and Caverly were involved in obtaining this credit for the corporation. In Pellowitz's view his attorney should have utilized these documents to show that Caverly utilized the Key Bank line of credit and corporate credit card account for Eastern Coast Holdings Corp. as treasurer. Pellowitz has also filed copies of Caverly's driver's license, insurance card, social security card, and bank statement that were utilized by Pellowitz to confirm to Eastern's creditors, including American Express, that Caverly was corporate guarantor and treasurer for Eastern.

Along with his reply, Pellowitz has submitted a copy of a postal inspector's interview with Caverly concerning his dealings with Pellowitz. In this statement Caverly indicates that he never had applied for an American Express card with Pellowitz. He did report that he was approached by Pellowitz with respect to being a truck driver for his tree trimming business. Caverly indicated that he would need help with gas money and Caverly applied for Key Bank Credit Card that had a $2000 limit and a $2000 line of credit. He closed the account, but had since learned that the limit had gone up to $20,000. Although Caverly affirmed to Pellowitz that he would like to have a company

card, Pellowitz never told Caverly that he would be applying for an American Express card using Caverly's personal identification and credit information. When shown the American Express credit applications by the inspector, Caverly said that he had never applied for any of them and never gave his permission to anyone to use his personal information to apply for a credit card. He indicated that the handwriting and signature on the application was not his. Furthermore, he said that while recently visiting Pellowitz, Pellowitz asked him to say that he had authorized the credit card application and that Pellowitz did have access to Caverly's credit information from the office computer.

Yet again, these documents highlight the fact that, while Caverly admitted being aware of certain substantial business credit transactions pursued in the name of Eastern, he was not, as Pellowitz admits, aware of the Pellowitz American Express card issuance and usage. Certainly the postal report of the interview with Caverly has much information that is damaging to Pellowitz. As with the claim concerning the Caverly statements in the PSR, I see no prejudice in any decision that might have been made to let this sleeping dog lie.

With respect to any lingering concerns about counsel's performance relative to the turnover of documents, it appears that Pellowitz has received much of what he sought. To the extent that Pellowitz feels like he has not had all the success that he might have anticipated on his fishing expedition, his failure to state with any specificity what documents his attorney has withheld and how they relate to his § 2255 claims ends the matter. 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).

Inadequate Challenge to Adjustment for More than Minimal Planning

Pellowitz also asserts that counsel should have challenged the United States' claim that Pellowitz did more than minimal planning, as a consequence of which, Pellowitz's sentence was enhanced pursuant to United States Sentencing Guideline § 2F1.1(b)(2)(A). The crux of his argument on the impropriety of the "more than minimal planning" increase is that his charging of the approximately $100,000 in goods and services was "purely opportune" because "it took little or no planning to obtain and make use of the credit cards."

Little need be said on this claim. A defendant's view of the ease of his crime is not determinative of the propriety of this enhancement; some individuals are naturally gifted in fraud and others have to tap deep into their brain power and/or apply more elbow grease. Pellowitz notes that he had easy access to the personal information on Caverly needed for opening the accounts and that it was easy for him to hide his fraud from American Express and Caverly. It seems that Pellowitz sees these circumstances that make the application process and card usage over the course of eight months purely opportunistic. This is simply a misapprehension of the meaning of the guideline in question. Put another way, this is not an enhancement that is triggered only in situations where the victims are hard to deceive and the course of fraud is complicated and difficult to conceal. The record before the Court fully supported the imposition of this

enhancement and there could be no Strickland prejudice in acquiescing to its inclusion in the calculations.

Motion for Discovery

Pellowitz has filed a motion for discovery. (Docket No. 61.) In this pleading he claims that he has requested all discovery from the United States Attorney's Office and his former attorney and has received nothing from the former and a nominal portion from the latter. Pellowitz claims that the discovery is crucial to the success of his § 2255 motion and would "better support the basis for an evidentiary hearing." He states that the documents are "vital to establish and argue existing facts" relevant to the grounds discussed above "as well as additional issues that have obviously been suppressed."

In an order, dismissing without prejudice, Pellowitz's appeal on his motion for a release of copies of American Express statements and his transcripts, the First Circuit allowed that Pellowitz could renew "his request for documents in the district court [in a motion that] explains, in relationship to the pending § 2255 petition, why documents are needed, whether defendant has specifically requested them from his former trial counsel, and what counsel's response to the request was." (Docket No. 49.)

The only concrete description of the discovery Pellowitz offers is that he requires "any reports, statements or other discovery relative to any dialogue between the government or any law enforcement or agents of the same and Edwin Rolfe of Harrison, Maine." Edwin Rolfe is nowhere mentioned in Pellowitz's § 2255 petition. This court does not treat the filing of a § 2255 petition as a "rolling start" in "the anticipation that the court will allow new factual assertions ... to be introduced on an ongoing basis, and

even after the United States has filed its response." United States v. Paul 2003 WL 2004407, *5 (D. Me. 2003). The motion for additional discovery is **DENIED**.

Federal Rule of Criminal Procedure 35 Relief

Pellowitz also requests relief under Federal Rule of Criminal Procedure 35(c) to work a correction in the restitution amount of $75,863.02 indicated on page eight of the Sentencing Memorandum (as well as three times on page five of the Judgment) to $72,863.02, the figure indicated on page seven of the Judgment. (Sentencing Tr. at 61-62.) Contrary to Pellowitz's view of the matter, it seems apparent that $75,863.02 is the correct figure, and that the $72,863.02 entry was a clerical error, a matter that can be corrected with an amended judgment at the issuing judge's behest.

Conclusion

For these reasons, I recommend that the Court **DENY** Pellowitz's request for 28 U.S.C. § 2255 relief and I hereby **DENY** Pellowitz's request for further discovery.

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.

July 17, 2003.

_____
Margaret J. Kravchuk

2255, BANGOR, CJACOUNSEL, CLOSED
United States Magistrate Judge

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:00-cr-00089-GC-ALL
Internal Use Only

Case title: USA v. PELLOWITZ, et al
Other court case number(s): None
Magistrate judge case number(s): None
Date Filed: 09/29/00

Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

Defendant(s)

RANDY PELLOWITZ (1)
TERMINATED: 03/02/2001

represented by **RANDY PELLOWITZ**
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PRO SE

Pending Counts	**Disposition**
18:1341.F FRAUDS AND SWINDLES: Mail Fraud (1)	Fifty-Seven Months Imprisonment on each of Counts 1 and 2, to be served concurrently with each other, and consecutively to the sentence imposed in MC-00-46-P-C; Defendant remaned to USMS;

	Thirty-Six Months Supervised Release; Special Assess ment, ,863.02 Restitution;
18:1029A.F PRODUCES/TRAFFICS IN COUNTERFEIT DEVICE: Access Device Fraud (2)	Fifty-Seven Months Imprisonment on each of Counts 1 and 2, to be served concurrently with each other, and consecutively to the sentence imposed in MC-00-46-P-C; Defendant remaned to USMS; Thirty-Six Months Supervised Release; Special Assess ment, ,863.02 Restitution;

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Garnishee(s)

GREATER PORTLAND MUNICIPAL CREDIT UNION

MECHANICS SAVINGS BANK

SAINT JOSEPHS FEDERAL CREDIT UNION

AMERITRADE

Plaintiff

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