UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 00-16-P-S
	)	Civil No. 02-192-P-S
	)	
RAYMOND DISMORE,	)	
	)	
	)	

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

Raymond Dismore was convicted by a federal jury on three criminal counts: one count of conspiracy to posses with intent to distribute marijuana and two counts of filing false tax returns. Dismore unsuccessfully pursued relief from his conviction in a motion for a new trial and of his 140-month sentence in a direct appeal to the First Circuit. Dismore now seeks relief in this 28 U.S.C. § 2255 motion alleging that his trial and his appellate attorneys were ineffective on multiple grounds, several of which turn on allegations that jury deliberations were tainted by internal coercion and intimidation. (Docket No. 65.) The United States has filed a comprehensive answer (Docket No. 69) and I am convinced that Dismore's motion is without merit. Accordingly, I recommend that it be **DENIED**.

Background

A. Trial and Jury Deliberations

Dismore was tried jointly with co-defendant Harry Noble. The United States produced evidence that Dismore was involved, over a prolonged period, with buying and selling substantial amounts of marijuana and that he falsely reported his ill-gotten income

on federal tax returns. With respect to the defense, Dismore's trial attorney cross-examined the government witnesses who had related dealings with Dismore and who were cooperating with the prosecution. He crossed on topics such as their drug abuse, leniency expectations, prior inconsistent statements, and failure to pay taxes on drug earnings. Dismore did not testify and waived his right to do so, as did his co-defendant.

The jury deliberated for half a day after the closing arguments and instructions, broke for the night, and returned for what turned out to be almost twelve hours the next day before they were dismissed. Over the course of their deliberations the jury sent several notes to the Court.

Initially they asked to hear one witness's testimony again. In response to this request both the prosecution and defense agreed because the testimony lasted six hours the jurors should be instructed to rely on their collective memory. The jurors then asked if they reached agreement on one count and not on another count what they should do about the count on which they could not agree. After input from both sides, the Court told the jury to complete the part of the verdict form that they agreed on and to continue their deliberations on the remainder. Fifty minutes after these instructions the jury reported that with respect to the conspiracy counts they were "hopelessly deadlocked" vis-à-vis both defendants. The Court replied by querying whether the jury had a verdict on any of the counts. The jury responded in the affirmative.

After this paper exchange the prosecutor suggested that the Court take a partial verdict followed by an "Allen" charge[1] asking them to reconsider their lack of agreement. The attorney for each defendant conferred with their respective clients and both moved for a mistrial. However, unlike his co-defendant, Dismore agreed to take a partial

[1] The nature of this charge is discussed below.

verdict. With the judge proposing that they take a partial verdict and then he would give an Allen charge, Dismore's attorney spoke again with Dismore and reported back to the judge that it was unclear to them whether the partial verdict reflected a disagreement over defendants or over counts. Over the objections of both defense attorneys the Court took the verdict on the counts of agreement. The jury found Dismore guilty on the two tax fraud counts and the Court sent the jurors back to the jury room.

Thereafter both defendants moved for a mistrial on the conspiracy count and the motion was denied. The Allen charge was given at approximately 11:45 a.m. (Tr. at 895-97.) At 11:45 a.m. the jurors recommenced deliberations. About an hour later a note from three jurors asked whether one witness had testified that he knew Dismore and his co-defendant. Dismore's attorney agreed with the Court's suggestion that it ask the jurors to give the most precise description possible of the information they sought. After thirty-five minutes the jury wrote that they wished to know whether this witness identified either defendant. Thereafter, transcript excerpts in which the witness identified Dismore were read and the jury was instructed that the witness was not asked whether he knew Dismore's co-defendant.

The jury then deliberated for approximately two and a half hours until 3:57 p.m., when one juror informed the Court that the juror would like to make a telephone call to check on her hospitalized mother. At this juncture, just over four hours after the Allen instructions, the jury also asked that the Allen charge be repeated. With no objection by counsel, a copy of the charge was sent to the jury room. After another hour of deliberations the jury was offered and provided with dinner and given the opportunity to make calls. At 7:16 p.m. the judge and counsel conferred and all agreed that the jury

should deliberate longer. At 8:04 p.m. the Court sent a note to the jury asking if the jury believed that they would be able to reach a verdict on either of the remaining counts. At 8:10 p.m., the jury replied:

> There is no way that this jury is going to come to an agreement on the charge against [Dismore's co-defendant]. But we have come to a unanimous decision on the count against Raymond Dismore, Jr. I cannot see any way this jury can reach a unanimous decision on [Dismore's co-defendant]. We agree to disagree.

With reluctance, Dismore's attorney conceded they would "have to take the verdict." At 8:24 p.m. the jury reported that it found Dismore guilty of partaking in a conspiracy to distribute in excess of 100 kilograms of marijuana. The jury was polled and excused. Dismore's co-defendant's motion for a mistrial was granted. On August 7, 2000, the Court entered an order prohibiting post-verdict contact with jurors.

B. The Post-verdict Jury Deliberation Controversy and Dismore's Motion to Set Aside the Verdict or for a New Trial

The day following deliberations three jurors contacted the clerk's office with concerns about their deliberations and their verdict against Dismore on the conspiracy count. By letter the Court brought the fact of these post-trial communications to the attention of the parties. In short course, Dismore filed a motion to set aside the verdict or for a new trial that was premised on his allegations that during deliberations one or more of the jurors improperly pressured other jurors.

A hearing was held on September 6, 2000. Dismore's counsel argued that the Court's letter suggested that the jury may not have heeded the Allen charge in view of one juror's report that the evidence was "weak, circumstantial, and full of inconsistencies" and that this juror agreed on the verdict only because the juror "was tired of the insults, personal and professional." This juror had written: "I wish I had not said

guilty, referring to Dismore, I wish I had held to my belief that the government did not prove beyond a reasonable doubt that this activity did in fact happen, and I will still believe this six months, a year, 10 years from now." This juror also indicated that other jurors were of the opinion that the fact that the defendants were indicted meant that they must be guilty, a view, defense counsel pointed out, that contravened the Court's instructions.

The Court then told the parties that a second juror had tried to discuss the case with the deputy court clerk/jury administrator and, after a request by Dismore's attorney, the parties were allowed to question this clerk through the Court. The clerk explained that on the day after the verdict she spoke with the letter-writing juror and another juror. She explained that when she arrived at work in the morning a juror was waiting to speak with her about "what happened during deliberations." (See Conf. Tr. at 20.) Later on the same day the clerk got a call from a different juror who thought that the Court should be informed about what transpired during deliberations. (Id. at 21-22.)

Dismore's attorney then made it clear that he was neither maintaining that there was outside influence on the jury nor arguing that there was notice of irregularity during the deliberations. Further he acknowledged that each juror confirmed their role in the verdict when polled. Nevertheless, Dismore's attorney asked the court to investigate the matter further despite the fact that the law on the question counseled against probing into the deliberation process. The Court allowed for post-hearing briefing; however, Dismore's attorney's post-hearing brief admitted he could find no case that would support Dismore's argument that there should be an inquiry into the jury deliberation

process premised on indications that one or more juror was not following the court's instructions during deliberation.

In short course the Court issued an order denying Dismore's motion for acquittal or new trial. The Court's reasoning is set forth in its written opinion denying the motion for a new trial. See United States v. Dismore, 115 F.Supp.2d 23, 25 -27 (D.Me. 2000). The Court also noted, that, even if the alleged juror statement was admissible "the statement was apparently harmless and did not prejudice the jury." (Id. at 26 n.4.) "Although the jury did find Defendant Dismore guilty of the crimes for which he was indicted," the Court reflected, "they did not unanimously find [his co-defendant] guilty although he, like Defendant Dismore, was indicted on the charge of conspiracy." (Id.)

Dismore, represented by a different attorney took a direct appeal to the First Circuit challenging only a sentencing enhancement, a volley that the First Circuit summarily rejected. (Docket Nos. 61 & 62.)

Merits of § 2255 Grounds Raised

A. The Jury Deliberations

Fifteen pages of Dismore's twenty-seven paged 28 U.S.C. § 2255 motion and addendum[2] focus on whether he was "denied the right to a fair trial when the Court failed to make a direct examination of juror(s) who had filed oral and written complaints with the Court concerning jury tampering, jury misconduct, threats, duress, coercion and external influence that resulted in a verdict not worthy of confidence." (Sec. 2255 Mot. at 9.) Dismore had his "chance to appeal" on this ground, in addition to his sentencing enhancement, and the §2255 court is "entitled to presume he stands fairly and finally

[2] Rather than set forth his facts and arguments on the form § 2255 motion, Dismore has left the form bare-bones and has attached this extensive "addendum" that he signed under penalty of perjury.

convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum." United States v. Frady, 456 U.S. 152, 164 (1982).

However, Dismore does assert a number of ineffective assistance claims. Two of these against his trial attorney and two against his appellate attorney allege failures to properly respond to the revelations about the jury deliberations. (Sec. 2255 Mot. at 25.) This § 2255 motion is the proper fulcrum for these 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.)

With regards to the jury deliberation, Dismore faults his trial counsel for not insisting that Dismore be in attendance during the September 6, 2000, hearing on the jury deliberations. He further challenges his trial attorney for not lodging a timely, formal objection in response to the Court's decision not to pursue further inquiry into the deliberation process. With regards to his appellate counsel, Dismore argues that he should have staked a claim based on the denial of the right to a fair trial in view of the

Court's failure to further "examine allegations of juror misconduct indicating external influence."[3]

As the record in this case makes clear, trial counsel pursued the question of jury deliberations to the outer extent possible. And, even if Dismore's attorney could have justifiably pressed the challenge further, the bottom line is that Dismore cannot meet the "prejudice" prong of Strickland. This is because the trial judge was cautious and correct in his application of the law concerning the strict limitations on post-verdict probing of the deliberation process. See e.g., Fed. R. Evid. 606(b)[4]; Mahoney v. Vondergritt, 938 F.2d 1490, 1492 (1st Cir. 1991) ("[A]ny investigation must focus solely on whether the jury was exposed to external influences and, from an objective perspective, whether such influence was likely to have affected the jury's verdict."). There was no dispute, and Dismore has not generated one in this § 2255 motion,[5] that there was an absence of outside influence on the jury, there was no notification of any irregularities during the

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[3] Dismore asserts that his appellate counsel ought to have raised an ineffective assistance claim on appeal mirroring the two ineffective assistance grounds against trial counsel articulated here. The First Circuit has "repeatedly held that collateral attack is the preferred forum for such claims, since there is often no opportunity to develop the necessary evidence where the claim is first raised on direct appeal." Knight, 37 F.3d at 774 (collecting cases).

[4] Federal Rule of Evidence 606(b) delimits inquiry into the validity of jury verdicts, as well as indictments. It reads:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

[5] Dismore has added allegations in this § 2255 motion that immediately after the verdict a visibly shaken juror addressed his father in the parking lot, apologized for the verdict against his son, indicated that deliberations were somehow tainted, and stated: "Jurors aren't supposed to know about a case before the trial." (Sec. 2255 Mot. at 15.) Assuming arguendo that Dismore could offer admissible evidentiary support for this allegation, (the United States maintains the facts are not in proper evidentiary form), the exchange in the parking lot would not establish outside influence, irregularities during deliberations, or the lack of an unanimous verdict. The purported exchange between the father and the juror suggests the same type of "second thoughts" as the jurors revealed to the clerk the next day.

jury's deliberations, and, when individually polled, each juror indicated that they concurred in the verdict finding Dismore guilty. See Jacobson v. Henderson, 765 F.2d 12, 14-15 (2nd Cir. 1985) (undertaking a 28 U.S.C. § 2254 review of a state court's jury deliberations inquiry as the result of post-verdict evidence of inter-jury physical and verbal intimidation and concluding "that state trial court's determinations limiting inquiry were 'fairly supported by the record.'"); see also United States v. Morris, 977 F.2d 677, 689 -690 (1st Cir. 1992) (citing Jacobson for its stress on the fact that there was no evidence of outside influence, that no jurors attempted to draw the court's attention to deliberation problems prior to the verdict, and the jurors each affirmed their verdict upon being polled); id. at 689 ("A juror's acceptance of the verdict upon polling constitutes prima facie evidence of his/her participation in deliberations, lack of irregularity therein, and concurrence in the outcome, and said verdict should not be disturbed absent extraordinary circumstances, not present in this appeal.").

With respect to the manner in which the court conducted the September 6, 2000, hearing -- including the fact that Dismore was not present -- the First Circuit has given the trial judge wide berth to fashion an appropriate process for inquiries into deliberations, including allowing under some circumstance an ex parte hearing involving the court, the prosecution, and the jurors. See United States v. DeLeon, 187 F.3d 60, 66 - 69 (1st Cir. 1999) (concluding that the exclusion of defense counsel (and the defendant) from juror interviews conducted by the prosecution was within the court's discretion under the circumstances); see also Morris, 977 F.2d at 690 (1st Cir.1992) ("We will not disturb the trial court's decision here neither to alter the verdict, nor to not conduct a post-

verdict investigation beyond the polling of the jury, unless we find that the court abused its discretion.").

The September 6 hearing did not involve the actual taking of evidence but was a legal inquiry into the propriety of whether or not further proceedings should be had. As the First Circuit has observed in the context of a motion for a new trial, when the issue under consideration at the post-verdict hearing is a legal one it is "not persuaded" that the defendant's presence "would [] contribute[] to the 'fairness of the proceeding.'" United States v. Sanchez, 917 F.2d 607, 619 (1st Cir. 1990) (comparing Federal Rule of Criminal Procedure 43(a)'s command that the "defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial ..., and at the imposition of sentence...." with Federal Rule of Criminal Procedure 43(c)(3)'s allowance that a defendant need not be present at "argument upon a question of law."); but see United States v. Rosario, 111 F.3d 293, 298 (2d Cir.1997) (assuming without deciding that a defendant has a right to be present at a hearing involving juror testimony about deliberations). From reading the transcripts of the hearing I can identify no way in which Dismore's presence at the hearing would have contributed to the fairness of the proceeding. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993) ("We have repeatedly stated that, even in the criminal context, a defendant is not entitled as of right to an evidentiary hearing on a pretrial or posttrial motion.").

B. Dismore's Other Ineffective Assistance Claims

1. Trial Counsel

Dismore contends, one, that his trial counsel inadequately prepared for trial in that he conducted absolutely no pretrial investigation and failed or refused to interview

defense witnesses, a dozen of which Dismore suggested would have been able to corroborate his "theory of defense" and who could have refuted the testimony of the government's paid informant. Two, he attacks counsel's representation vis-à-vis the plea stage for failing to communicate any plea offer and failing to advise Dismore of the favorable impact on his sentence that could be had if he demonstrated acceptance of responsibility. Three, his trial attorney "employed threats and promise, duress, coercion, mistake, misunderstanding, misrepresentation and misconduct" aimed at preventing Dismore from taking the stand and used similar tactics "in failing to call Dismore's defense witnesses to the stand in lieu of placing Dismore on the stand himself." (Sec. 2255 Mot. at 24.)

With respect to each of these claims, and particularly Dismore's plea bargain ground, I turn to this passage in the First Circuit's David v. United States:

> 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. A representative case is Machibroda v. United States, 368 U.S. 487 (1962), in which the petitioner's section 2255 motion alleged that his guilty plea resulted from an unkept prosecutorial promise. After the trial court dismissed the motion without an evidentiary hearing and the court of appeals affirmed, the Supreme Court reversed, noting that "[t]he petitioner's motion and affidavit contain charges which are detailed and specific." Id. at 495. In a pithy passage that possesses particular pertinence for present purposes, the Court cautioned that a habeas petitioner is not automatically entitled to a hearing and normally should not receive one if his allegations are "vague, conclusory, or palpably incredible." Id. This is true, the Court wrote, even "if the record does not conclusively and expressly belie [the] claim." Id.
>
> Inferior courts routinely have applied the Machibroda standard in determining the need for evidentiary hearings on section 2255 motions. 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. See Dalli v. United States, 491 F.2d 758, 761 (2d Cir.1974) (holding that the district court supportably refused to convene an evidentiary hearing when the petitioner's allegations were "vague, indefinite and conclusory"); see also Amos v. Minnesota, 849

> F.2d 1070, 1072 (8th Cir.1988) (upholding the denial of an evidentiary hearing in a section 2254 case inasmuch as petitioner "offered only general allegations").
>
> In this instance, the district court was not obliged to credit the petitioner's threadbare allusions to a phantom plea bargain. Who, what, when, where, and how details might have placed matters of ascertainable fact at issue and thus have bolstered the case for an evidentiary hearing, but none were forthcoming. To the contrary, the petitioner offered the district court no names, dates, places, or other details, even though such details presumably were within his ken. In the absence of any particulars, the lower court justifiably treated the petitioner's conclusory averments as mere buzznacking.[6]

134 F.3d 470, 478 (1st Cir. 1998); see also McGill, 11 F.3d at 225 ("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).

Dismore has nowhere set forth the terms of the alleged plea agreement allegedly not communicated to him nor does he actually state that he learned too late that there was

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[6] In my search of hardbound and electronic resources I could find no definition of this term beyond, "Gossipy talk; idle chatter." http://www.eyeshot.net/b1.html; see also id. (for an alliterative illustration). In a comprehensive electronic search of all cases, federal and state, I located fifteen other usages. Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 40 (1st Cir.2000); In re Soares, 107 F.3d 969, 973 (1st Cir.1997); Smith v. F.W. Morse & Co., Inc., 76 F.3d 413, 419 (1st Cir. 1996); Nat'l Ass'n Soc. Workers v. Harwood, 69 F.3d 622, 625 (1st Cir. 1995); United States v. Sepulveda, 15 F.3d 1161, 1188 (1st Cir. 1993); United Elec., Radio & Mach. Workers Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1097 (1st Cir. 1992); Feinstein v. Resolution Trust Corp., 942 F.2d 34, 46 (1st Cir. 1991); Kelly v. United States, 924 F.2d 355, 361 (1st Cir. 1991); Kotler v. Am. Tobacco Co., 926 F.2d 1217, 1228 (1st Cir. 1990), vacated on other grounds, 505 U.S. 1215 (1992), (refusing to "linger over ... buzznacking," concerning advanced access to the jury list); United States v. Boylan, 898 F.2d 230, 262 (1st Cir. 1990) ("By the same token, the jurors' midtrial buzznacking also lacked the strong degree of probability needed to animate a Remmer-type presumption."); DiMillo v. Sheepscot Pilots, Inc., 870 F.2d 746, 750(1st Cir.1989); United States v. Hoffman, 832 F.2d 1299, 1308 n. 9 (1st Cir. 1987); Golemis v. Kirby, 632 F.Supp. 159, 162 n.3 (D.R.I.1985); Blue Cross R.I. v. Cannon, 589 F.Supp. 1483, 1492 (D.R.I. 1984); see also United States v. Felton, 2003 WL 40508, (D. Mass. Jan. 3, 2003) (Gertner, J.)(quoting the word "buzznacking" from United States v. Boylan, 898 F.2d 230, 262 (1st Cir.1990) in describing issues raised by an alternate juror respecting premature deliberations and alcohol consumption, "all of which concern intra-jury affairs of a character that does not justify post-trial investigation under Rule 606(b) and relevant case law."). Amazingly two of these cases, Boylan and Felton are directly relevant to the juror issues that arise in this case.

a plea offer made. The United States does not answer this ground by acknowledging that it had made a plea offer to Dismore's attorney (and, based on its history of forthrightness in responding to § 2255 motion, I have reason to believe it would have done so if there had been such an offer). There are no "names, dates, places, or other details" just "threadbare allusions to a phantom plea bargain." David, 134 F.3d at 478. As for Dismore's assertion that he was not counseled by his attorney on the acceptance of responsibility, this is a conclusory statement that I see as a self-interested characterization. There is, as the United States points out, evidence in the Presentence Investigation Report and during sentencing that Dismore and his counsel had engaged on this score. Also, with respect to Strickland prejudice, the sentence he received was within the range of what he would have received had he shown remorse after the jury verdict. Finally, I view Dismore's assertions that trial counsel "employed threats, duress, coercion, misrepresentation and misconduct" aimed at preventing Dismore from taking the stand and in failing to call Dismore's defense witnesses as no more than self-interested and non-creditable inventions. The record indicates that after the United States rested the Court expressly informed the two defendants of their right to testify and concluded that they were making a knowing and voluntary waiver of that right. (Tr. at 750-52.) With respect to all three of these grounds against trial counsel, Dismore's allegations are "so evanescent" and "bereft of detail that they cannot reasonably be investigated," David, 134 F.3d at 478, and they simply do not warrant an evidentiary hearing.

B. Appellate Counsel

With regard to his appellate counsel, Dismore asserts that he was constitutionally ineffective in not raising a sufficiency of the evidence argument on direct appeal in contravention of Dismore's request that he do so. Furthermore, Dismore argues that his appellate counsel should have challenged the "double" Allen charge, as requested by Dismore, on the grounds that it coerced the jury into rendering a guilty verdict. Unlike his claims against his trial attorney, these claims do not rely on factual underpinnings for sustenance (not even, actually, the fact that Dismore requested that his attorney raise these challenges on appeal). Rather, it is clear that the only ground raised on appeal was the sentencing enhancement concern. The only question for the § 2255 court is whether there is deficiency and/or prejudice of a Strickland magnitude in failing to raise these grounds on direct appeal.

I agree with the United States that had counsel raised a sufficiency of the evidence challenge it would have been "doomed for failure" for the very reason that the First Circuit rejected Dismore's argument that the role in the offense as an "'organizer, leader, manager, or supervisor' in the criminal conspiracy" finding was based on insufficient evidence adduced at trial to support the enhancement. If there was enough evidence to support the enhancement, there was enough evidence to support the underlying charge.

As for the second Allen charge, see Allen v. United States, 164 U.S. 492 (1896) (approving a supplemental jury instruction aimed at encouraging a deadlocked jury to reach a verdict), the First Circuit has explained that an "Allen," a.k.a. "dynamite" charge, is to be used gingerly by the trial judge:

> Concerned about the instruction's potentially coercive effect, we have required that it contain three specific elements to moderate any

> prejudice. First, in order that the burden of reconsideration is not shouldered exclusively by those jury members holding the minority view, the court should expressly instruct both the minority and the majority to reexamine their positions. Second, the instruction should acknowledge that the jury has the right not to agree. Third, the court should remind the jury that the burden of proving guilt beyond a reasonable doubt remains, as always, with the government.

United States v. Hernandez-Albino, 177 F.3d 33, 38 (1st Cir. 1999) (citations omitted). The Court's charge (Tr. at 895-97) clearly contains these three safety guards.

Vis-à-vis the repetition of Allen charges, the First Circuit in United States v. Barone stated:

> Although the courts have held that the charge is accepted as a reasonable compromise of conflicting interests, the problem is exacerbated when the charge is given a second time, after the jury has already been told to reconsider and again has found itself in deadlock. A successive charge tends to create a greater degree of pressure, and one could argue that at this point the limit has been reached.

114 F.3d 1284, 1304 (1st Cir.1997). Rejecting a per se rule against two Allen charges Barone provides that "[a]t a minimum, there ought normally to be special circumstances, and not merely a continued inability by the jury to decide, to justify a second charge." Id. at 1305. While "circumstances vary enormously; the trial judge is closer to the facts, and with this one note of warning, we adhere to the majority view that each case must be judged on its own facts." Id.; see also United States v. Crispo, 306 F.3d 71, 77 (2d Cir. 2002) (fact of a second reading and the court's knowledge that there was one holdout did "not necessarily make an Allen charge coercive," but court "must review the totality of the circumstances carefully"); United States v. Cropp, 127 F.3d 354, 360 (4th Cir. 1997) (finding no error in relay of a "brief reminding charge" by the court, accompanied by a reminder to the jurors not to give up their firmly held convictions).

In making the totality of the circumstance determination in this instance it is highly important to note that it was the jury that requested that the charge be repeated. See Barone, 114 F.3d at 1304 (noting that the Ninth Circuit, in United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir.1977) "over a strong dissent, has adopted a per se rule against multiple Allen charges, although this rule is subject to at least one major exception, permitting a successive charge if the jury requests a repetition of the instruction"); United States v. Seawell, 550 F.2d 1159, 1163 (9th Cir. 1977) ("If the charge is to pass muster as instruction on the law there is little need to repeat it save at the jury's request."). I also think that the danger of a double charge was minimized by the fact that the form of repetition was not an oral charge by the Judge but the allowance of a copy of the initial charge to be given to the jury. With regards to the other circumstance of the charge, the request for a repeat of the charge came after just over four hours of deliberations at which time the jury was weighing the evidence, as demonstrated by their note requesting clarification as to one witness's testimony concerning his familiarity with Dismore and his co-defendant.

In view of the fact that the jury requested the copy of the charge after a moderate amount of time I do not believe that Dismore's Allen-based ineffective claim has any merit. Dismore's trial attorney acquiesced to the copy of the charge being provided in answer to the jurors' request (probably seeing little harm since it did not represent additional pressure by the court). On direct appeal the waived claim would be reviewed for plain error. United States v. Keene, 287 F.3d 229, 235 -36 (1st Cir. 2002) (complaint about a consented-to Allen charge on direct appeal "too late and too little" discerning "no error--plain or otherwise--in the trial court's decision"). I cannot but conclude that

Dismore's appellate attorney was not objectively unreasonable in deciding not to appeal on this ground.

Conclusion

For these reasons I conclude that Dismore'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

Dated March 18, 2003

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:00-cr-00016-GZS-1
Internal Use Only

Case title: USA v. DISMORE, et al
Other court case number(s): None **Date Filed:** 02/16/00
Magistrate judge case number(s): None

Assigned to: Judge GEORGE Z. SINGAL
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

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PORTLAND, ME 04104
773-8449
TERMINATED: 04/07/2000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

21:841B=MD.F MARIJUANA - SELL, DISTRIBUTE, OR DISPENSE: Conspiracy to Possess with Intent to Distribute Marijuana
(1)

Disposition

Imprisonment of 140 mnths on Ct 1 and 36 months on each of Cts 2 & 3, to be served concurrently; Supervised Release of 4 years on Ct 1 and 1 year on Cts 2 & 3, to be served concurrently. Special Assessment of $300; Forfeiture of parcel of land i n Town of Raymond. Deft remanded to custody of US Marshal; AMENDED JUDGMENT to

	attach Exhibit A, description of property under forfeiture.
26:7206A.F FRAUD AND FALSE STATEMENTS: Making and Subscribing False Income Tax Returns (2)	Imprisonment of 140 mnths on Ct 1 and 36 months on each of Cts 2 & 3, to be served concurrently; Supervised Release of 4 years on Ct 1 and 1 year on Cts 2 & 3, to be served concurrently. Special Assessment of $300; Forfeiture of parcel of land i n Town of Raymond. Deft remanded to custody of US Marshal; AMENDED JUDGMENT to attach Exhibit A, description of property under forfeiture.
26:7206A.F FRAUD AND FALSE STATEMENTS: Making and Subscribing False Income Tax Returns (3)	Imprisonment of 140 mnths on Ct 1 and 36 months on each of Cts 2 & 3, to be served concurrently; Supervised Release of 4 years on Ct 1 and 1 year on Cts 2 & 3, to be served concurrently. Special Assessment of $300; Forfeiture of parcel of land i n Town of Raymond. Deft remanded to custody of US Marshal; AMENDED JUDGMENT to attach Exhibit A, description of property under forfeiture.
21:853.F CRIMINAL FORFEITURES (4)	Imprisonment of 140 mnths on Ct 1 and 36 months on each of Cts 2 & 3, to be served concurrently; Supervised Release of 4 years on Ct 1 and 1 year on Cts 2 & 3, to be served concurrently. Special Assessment of $300; Forfeiture of parcel of land i n Town of Raymond. Deft remanded to custody of US Marshal; AMENDED JUDGMENT to attach Exhibit A, description of property under forfeiture.

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

Highest Offense Level (Terminated)

None

Complaints

None

Interested Party(s)

KEYBANK NATIONAL ASSOCIATION represented by **JOHN R. BASS, II**
THOMPSON, BULL, FUREY, BASS & MACCOLL, LLC, P.A.
120 EXCHANGE STREET
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Plaintiff

USA represented by **JONATHAN R. CHAPMAN**
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