UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 96-42-P-H***
	)	***(Civil No. 99-16-P-H)***
DAVID GELL,	***)***	
	)	
Defendant	***)***	

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

The defendant, appearing *pro se*, moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 108 months was imposed upon his plea of guilty to a charge of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (b)(1)(B). Judgment (Docket No. 24) at 1-2. An unsuccessful appeal of his sentence followed. *United States v. Gell,* 134 F.3d 361 (table), 1998 WL 42172 (1st Cir. Feb. 4, 1998), at **1. The defendant now contends that during sentencing he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.[1] Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 31) at 5.

A section 2255 motion may be dismissed without an evidentiary hearing if "(1) the motion is

[1] In an untimely reply memorandum, the defendant suggests that he also seeks relief for the alleged ineffective assistance of his counsel on appeal, Response to Government's Brief (Docket No. 35) at 2, but, even if the reply had been timely filed, issues raised for the first time in reply memoranda will not be considered by this court, *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

inadequate on its face, or (2) the movant's allegations, even if true, do not entitle him to relief, or (3) the movant's allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible." *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (internal quotation marks and citation omitted). In this instance, each of the defendant's allegations meets one or more of these criteria. Accordingly, I recommend that the motion be denied without an evidentiary hearing.

I. Background

The defendant was indicted on July 10, 1996 on a charge of conspiracy to distribute and possess with intent to distribute substances containing cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Indictment (Docket No. 8). On August 23, 1996 his then-counsel filed a motion to suppress statements the defendant made at the time of his arrest. Docket No. 12. Trial was initially set for September 9, 1996. Order in Respect to Discovery (Docket No. 9). The motion to suppress was denied after hearing on November 12, 1996. Criminal Minute Sheet (11/12/96) at 1-2. On November 14, 1996, the day on which his trial was scheduled to begin, the defendant changed his plea to guilty. Revised Presentence Investigation Report ("PSI") at 3; Government Opposition to Motion to Vacate, Set Aside, or Correct Sentence ("Government's Opposition") (Docket No. 34) at 2.

The prosecution version states that the conspiracy involving the defendant and at least three other individuals began in or about the spring of 1993 and continued until in or about February 1996 and that the defendant during that time regularly sold cocaine in New York to other conspirators whom he knew transported the cocaine to Maine and distributed it to others there. Prosecution Version (Docket No. 21). The presentence investigation report attributed 7.8 kilograms of cocaine to the

defendant for sentencing purposes, producing an offense level of 32. PSI at 9-10, 11. The defendant's criminal history score of 0 made him eligible for the "safety valve" two-level reduction in offense level provided by § 2D1.1(b)(4) of the United States Sentencing Commission Guidelines ("U.S.S.G."). *Id.* at 11. The PSI recommended a two-level enhancement in the offense level for obstruction of justice due to the defendant's expressed intention to have other alleged members of the conspiracy killed, *id.* at 10, and a two-level acceptance-of-responsibility reduction pursuant to U.S.S.G. § 3E1.1(a) due to his guilty plea and willingness to discuss the offense with the probation office, *id.* at 10-11. At the resulting offense level of 30 and criminal history category I, the guideline sentencing range was 97 to 121 months in prison. *Id.* at 14.

The defendant's second attorney filed an objection to the PSI based on the calculation of the drug quantity and requested a hearing on the obstruction of justice enhancement. *Id.* at 17-18. At sentencing, the government presented the testimony of Rick Lachance, one of the alleged co-conspirators, and a transcript of his testimony at the trial of the other co-conspirators. Transcript of Proceedings ("Sentencing Tr.") (Docket No. 28) at 5-7. Lachance testified concerning the amounts of cocaine that he had purchased from Gell and then sold in Maine. *Id.* at 11-12, 14-15, 32-34, 43-45. The court found that the defendant was responsible for not less than five kilograms of cocaine but not more than fifteen, giving him a base offense level of 32. *Id.* at 54-55. It adopted the recommended "safety valve" and acceptance-of-responsibility reductions and the obstruction of justice enhancement. *Id.* at 56. The government recommended a sentence of 115 months. Id. at 59. The court sentenced the defendant to 108 months imprisonment, a term at the middle of the guideline range. *Id.* at 65.

The defendant filed a *pro se* notice of appeal of the sentence on the day it was imposed. Docket No. 25. He was represented by counsel before the First Circuit, which denied the appeal. Judgment

(Feb. 4, 1998) (Docket No. 30). The First Circuit found that "there was no clear error in the sentencing court's conclusion that appellant was responsible for the distribution of at least five kilograms [of cocaine]." 1998 WL 42172 at **1.

II. Discussion

The defendant contends that his counsel at the time of sentencing provided constitutionally deficient assistance in the following ways: (i) he failed to seek a downward departure under U.S.S.G. § 3B1.2 "for minor-minimum role;" (ii) he did not seek a one- to two-level downward departure "for waiver of deportation;" (iii) he failed to "effectively argue and present witnesses to attack credibility of snitch/witnesses, all of whom were not corroborated and are drug addicts;" (iv) he failed to argue for a three-level downward departure for acceptance of responsibility; (v) he failed to argue for a downward departure under U.S.S.G. §§ 5H and 5K2.0; and "no effective section 6A1.3 USSG given." Motion at 5.

A. Applicable Legal Standard[2]

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. First, the defendant must show that his counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second,

[2] The government argues as a preliminary matter that the defendant's petition should be summarily dismissed because it is unsworn. Government's Opposition at 16-17. The petition filed with the court by the defendant does bear his signature and the handwritten date after the printed statement "I declare under penalty of perjury that the foregoing is true and correct." Motion at 7. Nothing further is required in this regard. *See* 28 U.S.C. § 1746.

the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* This standard also applies to cases in which the defendant pleaded guilty. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. 466 U.S. at 697. The "prejudice" element of the test presents the defendant with a high hurdle. He must show more than a possibility that counsel's errors had some conceivable effect on the outcome of the proceeding. Rather, he must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel's errors. *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996).

The defendant's specific claims concerning the performance of his counsel will be discussed in the order in which he presents them.

B. U. S. S. G. § 3B1.2

The defendant contends that his attorney should have argued for a downward departure in his offense level under U.S.S.G. § 3B1.2, which at the time of his sentencing provided as follows:

> Based on the defendant's role in the offense, decrease the offense level as follows:
>
> (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
>
> (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.
>
> (c)
> In cases falling between (a) and (b), decrease by **3** levels.

The court specifically found at sentencing that

> [t]here are issues to be sure under the guidelines where all conspirators are held responsible for an entire amount of drug quantity, as to whether a particular conspirator should get an enhancement as being a leader or

> supervisor, manager, and perhaps Mr. Peralta if he were before the court would receive such enhancement.
>
> But there is not sufficient [sic] here to suggest that Mr. Gell was a minor participant, which is what would have to be shown in order to get some kind of reduction. So having participated in the conspiracy, certainly Mr. Gell is responsible for at least the quantity which he was directly involved in.
>
> There's a strong argument he's responsible for much more than that.
> . . .

Sentencing Tr. at 55.

The commentary to section 3B1.2 provides significant guidance. Application Notes 1-3 provide:

> 1. Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
>
> 2. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.
>
> 3. For purposes of § 3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.

The defendant provides no factual allegations concerning his role in the drug sales at issue. None of the evidence in the record supports application of section 3B1.2. To the contrary, the evidence is that the defendant, while he may have been Peralta's employee, was by 1995, when Lachance bought nine kilograms, the sole contact from whom Lachance purchased cocaine 80% of the time. Sentencing Tr. at 10-11, 13, 33. Lachance began buying cocaine from Peralta in 1992 and soon thereafter was

introduced to Gell as Peralta's employee. *Id*. at 8, 24. Along with Albin Lavallee, Raymond Bergeron, and Jeffrey Cressey, Lachance sold in Maine the cocaine that he bought from the defendant and Peralta. PSI at 4. These men and Gregory Couture and Corey Ison also occasionally accompanied Lachance to New York when he purchased cocaine from the defendant or Peralta. *Id*. The defendant knew that Lachance and Lavallee were from Maine and that they were selling in Maine the cocaine that they bought from him and Peralta. Prosecution Version. The defendant has the burden at sentencing to show his entitlement to a section 3B1.2 reduction. *United States v. Munoz,* 36 F.3d 1229, 1238 (1st Cir. 1994).

Evidence of the relative roles of other participants in the criminal activity must be evaluated when a section 3B1.2 adjustment is under consideration. *United States v. Gault,* 141 F.3d 1399, 1404 (10th Cir. 1998). Here, the only participant with a possibly larger role was Peralta. The other participants all had lesser roles than the defendant, who was aware of the scope and structure of the enterprise and the activities of the other participants. The defendant was not one of the least culpable of the participants nor could his participation be described as minimal. Accordingly, any argument by his attorney at sentencing for a reduction under section 3B1.2 could not have succeeded, and the defendant's argument on this claim fails to meet the prejudice prong of *Strickland*. *See Isabel v. United States*, 980 F.2d 60, 65 (1st Cir. 1992). In addition, counsel's performance cannot be considered constitutionally deficient when the action he or she is alleged to have failed to undertake would have been futile.[3] *United States v. Wright*, 573 F.2d 681, 684 (1st Cir. 1978).

[3] The defendant suggests that the court was required to provide him with a two-level reduction under section 3B1.2 because it provided him with a two-level reduction under the "safety valve" provisions of 18 U.S.C. § 3553(f), "which implies at the very least, a minimal role." Motion at 5. The defendant misreads the statute, which only requires that the defendant not be "an organizer, leader, (continued...)

C. Waiver of Deportation

The defendant contends that his counsel provided constitutionally deficient assistance at sentencing by failing to argue for a one- or two-level reduction in his offense level "for waiver of deportation," Motion at 5, although he does not state that he was willing at the time of sentencing to waive objection to deportation. The court noted at sentencing that it had taken into consideration "the fact that it is extremely likely that [the defendant] will be deported at the end of his prison term." Sentencing Tr. at 66. The defendant does not cite any provision of the sentencing guidelines that might provide the possibility of such a reduction, and I am not aware of any.

The First Circuit addressed a similar claim in *United States v. Clase-Espinal*, 115 F.3d 1054 (1st Cir. 1997). In that case, the defendant stipulated at sentencing that he was a deportable alien and that he would waive any deportation hearing and any appeal from a deportation order after his release from prison. *Id*. at 1055. The trial court held that it lacked authority to depart from the offense level otherwise determined under the guidelines on this basis. *Id*.

> On April 28, 1995, the Attorney General of the United States disseminated a memorandum ("the Memorandum") authorizing United States Attorneys to recommend a departure below the applicable guideline sentencing range in return for an admission of alienage and deportability, as well as waivers of any administrative deportation hearing and any judicial appeal from the resulting deportation order. The Memorandum indicates that a downward departure based on such cooperative conduct on the part of alien criminal defendants is permissible because it is a ("mitigating circumstance of

[3](...continued)
manager, or supervisor of others in the offense, as determined under the sentencing guidelines . . . ." 18 U.S.C. § 3553(f)(4). Section 3B1.1 of the guidelines deals with those conditions and provides an increase in the offense level for defendants found to have participated in the criminal activity in one of those roles. Finding that a defendant did not have a leadership or organizational role justifying an increase in his offense level is distinct from finding that he had only a minor or minimal role in the criminal activity. The two are not mutually exclusive. A decision not to apply section 3B1.1 does not and cannot mean that a sentencing court must apply section 3B1.2.

> a kind, or . . . degree, not adequately taken into consideration by the Sentencing Commission . . . .").

Id. at 1056. The First Circuit held that the proffered stipulation was insufficient, as a matter of law, to warrant a downward departure. *Id*. at 1057. While the court did not hold that such a stipulation may never serve as an adequate ground for a downward departure, it did require that the defendant seeking such a departure present evidence that his or her factual situation was "meaningfully atypical" in some "material respect." *Id*. at 1060. The defendant here has made no attempt to show that his situation at the time of sentencing was meaningfully and materially atypical. In the absence of such a showing, as well as in the absence of any allegation that he would have entered into such a stipulation at the time, the failure of his counsel to seek such a departure, which by the terms of the Attorney General's memorandum may only be sought by the government, cannot be said to have caused any prejudice to the defendant, let alone the kind of prejudice required by *Strickland*.

The defendant is not entitled to relief under section 2255 on this basis.

D. Witness Credibility

The defendant next argues that his attorney provided constitutionally deficient assistance at sentencing by "fail[ing] to effectively argue and present witnesses to attack credibility of snitch/witnesses, all of whom were not corroborated and are drug addicts; net worth does not corroborate snitch's statements as to drug amounts — snitches are unreliable." Motion at 5. The defendant does not identify the witnesses whose credibility he alleges his attorney did not attack. Only one witness, Rick Lachance, testified at the sentencing hearing, and a transcript of other testimony by Lachance was admitted. Sentencing Tr. at 5, 6-45, 46. The defendant's attorney cross-examined Lachance at length, including questions about inconsistent prior testimony and a previous arrest. *Id*. at 24-41.

The defendant does not indicate the relevance of the statement about net worth. There is no suggestion in the record that the court relied on evidence of anyone's net worth in imposing sentence. The defendant does not identify any witnesses whom his attorney should have presented to attack Lachance's credibility or what they would have said. *See United States v. Hart*, 933 F.2d 80, 83 (1st Cir. 1991) (defendant's requests that his attorney "track down and present as alibi witnesses" unnamed or unlocated persons may be deemed frivolous). When the ground for relief asserted in a petition under section 2255 amounts to "mere 'bald' assertions without sufficiently particular and supportive allegations of fact," the petition is subject to dismissal. *Barrett v. United States*, 965 F.2d 1184, 1186 (1st Cir. 1992). That is the case with the present claim. "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." *David*, 134 F.3d at 478. The court need not give weight to conclusory allegations, *United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993), and that is all that the defendant has presented on this point.

No further consideration of this ground is required.

E. Acceptance of Responsibility

In an apparent reference to section 3E1.1(b) of the sentencing guidelines, the defendant contends that his attorney's performance fell below the Sixth Amendment minimum when he failed to seek a three-level reduction in offense level for the defendant's acceptance of responsibility instead of the two-level reduction which the defendant received. Subsection (b) of this section of the guidelines allows an additional one-level decrease in the offense level to defendants who have qualified for a two-level decrease for acceptance of responsibility under subsection (a), if the defendant has also "timely provid[ed] complete information to the government concerning his own involvement in the offense"

or "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently." The defendant's decision to plead guilty on the first day of trial clearly disqualifies him for an additional reduction under the second alternative. Indeed, it was for this reason that the government objected to any further downward departure for acceptance of responsibility, a position with which the presentence investigator agreed. PSI at 17.

The defendant makes no allegation in his motion that he was qualified for the additional decrease at the time of sentencing under the first alternative of subsection (b), and the lack of such a factual allegation alone means that he cannot establish any entitlement to relief under *Strickland*. In addition, the defendant received a two-level enhancement in offense level under U.S.S.G. § 3C1.1 for obstructing the administration of justice. Application Note 4 to section 3E1.1 provides that "[c]onduct resulting in an enhancement under § 3C1.1 . . . ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply." In this case, the defendant had already received the "extraordinary" relief of a two-level downward departure under section 3E1.1(a) while also being assessed an enhancement for obstruction of justice under section 3C1.1. Under these circumstances, any further downward adjustment would be beyond extraordinary and therefore extremely unlikely. Indeed, the PSI suggested that the two-level reduction under section 3E1.1(a) itself was problematical. PSI at 10. It was within the range of reasonable tactical decisions of counsel not to press for a further reduction. *Strickland*, 466 U.S. at 689 (court must apply "strong presumption" that tactical decisions of counsel fall within wide range of reasonable professional assistance).

G. U. S. S. G. §§ 5H and 5K2.0

Citing *United States v. Coleman*, 138 F.3d 616, *vacated* 146 F.3d 1051 (6th Cir. 1998), and *United States v. Soto*, 132 F.3d 56 (D.C.Cir. 1997), the defendant next argues that he was deprived of the effective assistance of counsel by the failure of his attorney to argue for downward departures under sections 5H and 5K2.0 of the sentencing guidelines. *Coleman*, a direct appeal of a sentence that did not involve allegations of ineffective assistance of counsel, is of little assistance to the court in this case. The Sixth Circuit held that use of improper investigatory techniques by the government could justify a departure under section 5K2.0, particularly when coupled with the disparity between powder cocaine and crack cocaine under the guidelines which even the Sentencing Commission believed should be modified, and remanded for consideration of those factors by the sentencing court. 138 F.3d at 618-19, 621-22. Neither of those factors is present in the instant case. In *Soto*, a lawyer's failure to request a downward departure under section 3B1.2 when the defendant "appeared to satisfy the standards" for such a departure was held to entitle the defendant to remand on appeal from his sentence. 132 F.3d at 57. Here, the defendant offers no indication of the nature of the downward departure for which he must contend that he was qualified in order to obtain section 2255 relief as a result of constitutionally insufficient assistance from his attorney at sentencing.

Section 5K2.0 of the sentencing guidelines is a policy statement allowing the sentencing court to impose a sentence outside the range established by the applicable guideline if the court finds certain aggravating or mitigating circumstances "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The defendant makes absolutely no attempt to identify any such circumstances that existed at the time of his sentencing. In the absence of such basic information, this court cannot begin to evaluate whether

he would have been entitled to such a departure, and, in the absence of such an evaluation, no conclusion can be drawn that counsel's failure to seek such a departure deprived the defendant of his Sixth Amendment right to counsel.

There is no section 5H of the guidelines as such, but rather a series of guidelines numbered 5H1.1 through 5H1.12. Each of these guidelines is also a policy statement. All but three of these guidelines list factors that are not relevant or not ordinarily relevant in the determination of a sentence. Sections 5H1.7 (role in the offense), 5H1.8 (criminal history), and 5H1.9 (criminal activity as a livelihood) list factors that are relevant in determining a sentence, each of which is specifically addressed by a different section of the guidelines. The defendant's failure to specify which of these guidelines his counsel should have invoked, together with his failure to allege any facts to which one of these guidelines might apply, makes it unnecessary for this court to consider this claim any further.[4]

H. U. S. S. G. § 6A1.3

As the final basis for his Sixth Amendment claim, the defendant asserts, in full, "[n]o effective section 6A1.3 USSG given." Motion at 5. That section of the sentencing guidelines, also a policy statement, requires the court to give the parties an adequate opportunity to present information to the court concerning any factor important to the sentencing determination that is reasonably in dispute and requires the court to resolve disputed sentencing factors in accordance with Fed. R. Crim. P. 32(a)(1). If the defendant means by this statement to challenge the actions or failures to act of the sentencing court,

[4] I do note, however, that failure to argue for a downward departure based on a factor specifically identified by the guidelines as "not relevant in the determination of a sentence" could not constitute ineffective assistance of counsel under any circumstances, and failure to argue for a downward departure based on a factor listed as "not ordinarily relevant" cannot constitute ineffective assistance of counsel in the absence of "exceptional" circumstances. *See* Introductory Commentary to U.S.S.G. Part H.

to which this section of the guidelines by its term applies, such a challenge provides no grounds for section 2255 relief due to ineffective assistance of counsel. If the defendant means instead to claim that his attorney should have argued that he was not given an adequate opportunity to present information to the court regarding any sentencing factor that was disputed by the defendant at the time of sentencing, that contention is effectively refuted by the record. In addition, this allegation is the type of conclusory statement that the court need not address on a motion for relief under section 2255. *McGill*, 11 F.3d at 225.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of April, 1999.

David M. Cohen
United States Magistrate Judge