



It is quite evident that United States Magistrate Judge Welsh has thoroughly addressed the four points of defendant's motion in her Report and Recommendation, and the Court agrees with the Magistrate's findings and recommendations, summarized as follows.

With respect to the first two points in defendant's motion, "[o]nce a legal argument has been litigated and decided adversely to a criminal defendant at his trial and on direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. § 2255." United States v. Orejuela, 639 F.2d 1055, 1057 (3d Cir. 1981). Thus, where a federal court had an opportunity to consider the merits of the contention it is within the discretion of the § 2255 court whether or not to relitigate the issue. Konigsberg v. United States, 418 F.2d 1270, 1273 (3d Cir. 1969).

In this case, the defendant's first two points have already been litigated and decided adversely to him. On February 22, 1993, this Court conducted a hearing concerning the Speedy Trial Act claim in the context of defendant's motion to dismiss the indictment. The motion was denied and trial was scheduled for March 8, 1993. The second issue was also litigated during a motion to suppress the results of the one man show-up. On March 8, 1993, after hearing the testimony of four witnesses, this Court denied the defendant's motion prior to the commencement of trial. Accordingly, in the interests of "the strong policies favoring finality in litigation and the conservation of scarce judicial resources," it is within this Court's discretion to decline to revisit these issues in the present motion. Orejuela, 639 F.2d at 1057.

Defendant's third claim contends ineffective assistance of counsel. Specifically,

defendant asserts that trial counsel was ineffective for:

(1) failing to adequately consult with defendant prior to trial; (2) failing to send any of the discovery in the case to the defendant and for failing to interview prospective witnesses; (3) failing to adequately prepare for trial; (4) failing to “put the government case to the adversarial test”; (5) failing to call any witnesses on behalf of the defendant; (6) erroneously advising the defendant to “submit to the court, thus allowing the court to deliver a[n] ex-parte instruction to the jury after deliberations began”; (7) erroneously advising the defendant that it was counsel’s decision concerning whether the defendant would testify.

Report and Recommendation of United States Magistrate Judge, at 3-4.

As Magistrate Judge Welsh correctly noted, the trial record belies defendant’s fifth, sixth, and seventh assertions because defense counsel did call witnesses to testify in the defendant’s behalf, the Court did not instruct the jury again after the deliberations began, and the defendant did testify at trial. Id. at 4. Moreover, as Magistrate Welsh has noted, the defendant’s third and fourth assertions are “vague and conclusory.” Id. Defendant has not set forth the facts required to support his contentions. See Zettlemyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir.), cert. denied, 502 U.S. 902 (1991).

In order to address the first and second assertions of ineffective assistance of counsel, Magistrate Welsh parsed the evidence produced at trial and concluded that, even if “trial counsel did fail to adequately consult with the defendant prior to trial, that trial counsel failed to send any of the discovery to the defendant and that trial counsel failed to interview prospective witnesses, the defendant has failed to explain how these errors had any effect on the outcome of his trial.” Report and Recommendation of United States Magistrate Judge, at 9. In essence, Magistrate Welsh explains, the defendant has failed to show “that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 8-9 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). In light of the government's strong case against Smith, this Court is in agreement with Magistrate Welsh's determination. See Strickland, 466 U.S. at 696 (stating that when government presents strong case, it is less likely that counsel's alleged errors would have affected the outcome of the trial). Furthermore, the Court is not convinced that defendant has offered evidence to show that defendant has even met the first prong of the Strickland test, namely, that the "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688.

Finally, regarding defendant's assertion that counsel was ineffective on appeal for not advancing certain arguments which defendant wanted them to advance, the Court agrees with Magistrate Welsh's determination that counsel was acting within the bounds enunciated in Jones v. Barnes, 463 U.S. 745 (1983). In Barnes, the Court recognized that because of counsel's superior ability to marshal arguments, examine the record and research the law, on direct appeal, it is left to counsel, and not to the defendant, to decide what issues to raise in the appeal. Id. at 751-54.

The fourth claim which defendant asserts in the present motion is also without merit. Defendant claims that he has procured new evidence suggesting that the involved bank was not federally insured at the time that it was robbed. The new evidence, attached to defendant's *pro se* Objections to Report and Recommendation, consists of a May 23, 1997 letter to defendant from the office of the Executive Secretary of the FDIC stating that, despite a name change in 1986 and a merger in 1992, the institution in question has been federally insured continuously since 1940 to

the present. This information in no way proves that the bank was not federally insured at the time of the robbery in July, 1992, nor does it undercut the trial testimony that the bank *was* federally insured through its parent corporation in July of 1992.

This Court finds that Magistrate Welsh's Report and Recommendation has fully addressed the merits, or more precisely, the lack of merits, of defendant's Motion, and therefore, this Court will adopt said Report and Recommendation. An appropriate order follows.