UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 93-0001-B
	)	
RANDY FRANCIS YOUNG,	)	
	)	
Defendant	)	

RECOMMENDED DECISION

Defendant has filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. In it, he alleges that his attorney was ineffective for failing to inform the Court that Defendant is a "sportsman, hunter and collector and never unlawfully discharge[d] or used [a] firearm in violence." In Defendant's view, a factual finding to that effect would have resulted in a reduction in his offense level under the United States Sentencing Guidelines ["Guidelines"].[1]

Defendant was convicted in this Court on his plea of guilty to one count of providing a false statement in the acquisition of a firearm. On May 28, 1993, Defendant was sentenced to a term of incarceration of 60 months. The Court arrived at this particular sentence as follows:

> I find the following:
>
> (a) Under United States Sentencing Commission Guideline (hereinafter "Guideline") 2K2.1(a)(2), the base offense level is 24.
>
> (b) The defendant has accepted responsibility for the offense. He is, therefore, eligible to have the base offense level decreased two levels under Guideline 3E1.1(a) and is also eligible to have the base offense level decreased one additional level under Guideline 3E1.1(b) to a Total Offense Level of 21.

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[1] Defendant also argues that the Presentence Investigation Report contained an inaccuracy regarding the dates of conviction for two of Defendant's predicate felonies. However, he fails to articulate how this inaccuracy affected his sentence in this case.

(c) The defendant's Criminal History Category is Category VI.

> Based on a Total Offense Level of 21 and a Criminal History Category of VI, the guideline range is 77 to 96 months. However, according to Guideline 5G1.1(a), where the statutory authorized maximum sentence is less than the minimum of the applicable guideline range, the statutory authorized maximum sentence shall be the guideline sentence. Therefore, the guideline provisions for this offense is 60 months.

Defendant's argument that his attorney should have attempted to raise the special circumstance of Defendant's alleged status as a collector of firearms who never unlawfully used the firearms is unavailing. Guideline § 2K2.1(b)(2) indeed provides that a person fitting into this exception may be assigned an offense level no greater than 6. However, it specifically *excludes* those defendants "subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5)." Defendant does not challenge his status as a "defendant subject to subsection . . . (a)(5)." Accordingly, it is clear from the plain language of section 2K2.1(b)(2) that it would not have applied in Defendant's case. Inasmuch as Defendant can show no prejudice from his attorney's failure to raise the (b)(2) exception, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), he cannot prevail on his claim of ineffective assistance of counsel.

Conclusion

For the foregoing reason, I hereby recommend the Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 be DENIED.

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.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on December 11, 1996.