

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	<i>Criminal No. 92-19-P-H</i>
)	<i>(Civil No. 98-223-P-H)</i>
DONALD R. LOTHROP,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON DEFENDANT’S PETITION FOR
WRIT OF ERROR CORAM NOBIS 28 U.S.C. § 1651**

The defendant, appearing pro se, moves this court to vacate his conviction following his guilty plea to a charge of possession of a firearm by a felon, a violation of 18 U.S.C. § 922(g)(1), and the sentence imposed upon that conviction of 188 months imprisonment pursuant to Fed. R. Civ. P. 60(b)(6), 28 U.S.C. § 1651, the section of the United States Constitution providing that the availability of the writ of habeas corpus is to be suspended only in very limited circumstances (although he maintains that his motion is not brought pursuant to 28 U.S.C. § 2255, the statute governing such relief for federal prisoners), and the court’s “inherent power to protect the integrity of the judicial process.” Petition for Writ of Error Coram Nobis 28 U.S.C. § 1651 (“Petition”) (Docket No. 54) at 1. I recommend that the petition be denied.

I. Procedural Background

Lothrop pleaded guilty on July 6, 1992. Transcript of Proceedings (Docket No. 39) at 3. He stated that he had no disagreement with the Prosecution Version (Docket No. 30), which stated, inter

alia, that he “knowingly possessed a Hi-Standard .22 Caliber Revolver” and that he had fourteen prior criminal felony convictions. *Id.* at 1-2. At his sentencing, Lothrop was advised of his right to appeal within ten days. Transcript of Proceedings (Docket No. 40) at 13. No appeal was filed.

Lothrop filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on April 21, 1997. Docket No. 41. The motion was based on assertions of ineffective assistance of counsel and illegality of the United States Sentencing Commission Guidelines. *Id.* at 5. In response to my recommendation that the motion be denied, Docket No. 48, Lothrop filed an objection that asserted, inter alia, that this court lacked jurisdiction to try or sentence him due to the fact that the crime took place on property that was not “under federal jurisdiction,” Objections and Jurisdiction (Docket No. 51) at 2-3. The court affirmed my recommended decision and denied the motion on December 9, 1997. Docket No. 52.

Lothrop filed the instant motion on June 18, 1998.

II. Discussion

Lothrop contends in his current petition that the federal government did not have “lawful jurisdiction” to charge him with a crime and that the judgment of conviction entered against him is therefore void. Petition at 1-2. While his argument is difficult to follow, he appears to assert that the federal government has the power to charge individuals with crimes only if the crimes are committed on property owned by the federal government or on the high seas. The actions constituting the crime with which he was charged, Lothrop contends, took place in Lewiston, Maine, within the “exclusive legislative jurisdiction of the Sovereign State of Maine.” Petition at 8 (internal quotation marks omitted). In an equally confusing memorandum of law that accompanies his

petition, Lothrop also argues that his attorney at the time he pleaded guilty provided him with constitutionally ineffective assistance by failing to inform him that this court had no jurisdiction. Memorandum of Law in Support of Petition for Writ of Error Coram Nobis Pursuant to Title 28 U.S.C. § 1651 (Docket No. 55) at 7-8. The memorandum of law does not mention the charge to which Lothrop pleaded guilty, but asserts that he “is legally and actually innocent of the charge of bank robbery and the use of a weapon during a crime of violence.” *Id.* at 10. It refers to “the insured status of the alleged banks,” *id.* at 3, the “‘contrived’ harm that the bank was federally insured,” *id.* at 6, and “the insured status of the alledge [sic] offense,” *id.* at 7, as the government’s assumed bases for asserting jurisdiction in this case. None of this material is the least bit relevant to the underlying criminal conduct at issue here.

Excluding the irrelevant material from Lothrop’s submissions and construing the remaining material generously in his favor, he has failed to establish a colorable claim to the relief that he seeks.

A. Rule 60(b)(6)

To the extent that Lothrop seeks relief under Fed. R. Civ. P. 60(b)(6), his petition must fail. Rule 60(b)(6) “simply refers to relief from Judgments or Orders entered by mistake in *civil* cases. [The defendant’s] conviction was not a civil case.” *United States v. Chapman*, 955 F. Supp. 781, 782 (W.D.Mich. 1997) (emphasis in original). An attack on the sentence imposed in a criminal case may be brought on direct appeal of the sentence, under 28 U.S.C. § 2255, and in certain limited circumstances under 18 U.S.C. § 3582. It may not be brought under Rule 60(b)(6). The same is true of a motion to set aside a conviction. *See, e.g., United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998) (motions purportedly brought under Rule 60(b) by federal prisoners which seek to set aside

convictions on constitutional grounds may be treated as § 2255 motions); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (Rule 60(b) motion to vacate judgment denying § 2254 petition entered eight years earlier treated as second habeas petition); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996) (purported Rule 60(b)(6) motion construed as second or successive habeas corpus application).

B. Writ of Coram Nobis

The writ of coram nobis

is an unusual legal animal that courts will use to set aside a criminal judgment of conviction only under circumstances compelling such action to achieve justice. Those circumstances include an explanation of why a coram nobis petitioner did not earlier seek relief from the judgment; a showing that the petitioner continues to suffer significant collateral consequences from the judgment; and a demonstration that an error of the most fundamental character, relevant to the plea decision, occurred.

Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993) (internal quotation marks and citations omitted). Lothrop has made no attempt to present the first two of the three listed circumstances. Even if he had done so, his arguments fail to demonstrate that an error of the most fundamental character has occurred, such that reversal of his conviction is compelled in order to achieve justice.

“Historically, *coram nobis* has been justified where errors of fact are raised which have not previously been before the court.” *United States v. Michaud*, 925 F.2d 37, 39 (1st Cir. 1991). Lothrop makes a legal rather than a factual argument. In addition, that legal argument was available to Lothrop if he had filed a timely appeal and when he filed his section 2255 motion. In fact, Lothrop made the jurisdictional argument, albeit in summary form, in his objection to my recommended decision on his section 2255 motion, and that argument was rejected by the court.

Even if Lothrop’s substantive argument did not suffer from these procedural infirmities, it

would be of no avail. The government correctly points out that the First Circuit has repeatedly upheld 18 U.S.C. § 922(g)(1) against constitutional attack, most recently in *United States v. Blais*, 98 F.3d 647, 648-50 (1st Cir. 1996).¹ Lothrop's attack is much more sweeping, however. He essentially asserts that the federal government may not criminalize activity that occurs anywhere other than on land owned by the federal government.² This argument has been soundly rejected by those courts that have addressed it in reported opinions. *E.g.*, *United States v. Lampley*, 127 F.3d 1231, 1245-46 (10th Cir. 1997) (convictions under 18 U.S.C. §§ 2, 371 and 844(i) and 26 U.S.C. §§ 5822, 5841, 5845, 5861 and 5871); *United States v. Sitton*, 968 F.2d 947, 953 (9th Cir. 1992) (conviction of conspiracy to manufacture and possess methamphetamine with intent to distribute); *United States v. Collins*, 920 F.2d 619, 629 (10th Cir. 1990) (referring to argument as "the hackneyed tax protester refrain"). I find the reasoning of these courts to be persuasive and dispositive.

A claim of ineffective assistance of counsel is cognizable on a coram nobis petition, so long as the other conditions for such relief are met. *See Michaud*, 925 F.2d at 40-41. However, where, as here, the basis for the claim of ineffective assistance is the asserted failure to raise a meritless argument, the claim of ineffective assistance is also without merit. *See Carter v. Johnson*, 110 F.3d

¹ The First Circuit in *Blais* also rejected Lothrop's argument, raised in Petitioner's Traverse to the Petition Coram Nobis (Docket No. 59) at 3-10, that the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), requires a conclusion that section 922(g)(1) is unconstitutional. 98 F.3d at 649-50.

² Lothrop also asserts for the first time in his "traverse" that section 922(g)(1) is unconstitutional under the Second Amendment. A claim not raised in the initial petition may not be considered by this court. *Isabel v. United States*, 980 F.2d 60, 61 n.1 (1st Cir. 1992). Even if this were not the case, Lothrop's argument is foreclosed by the Supreme Court's holding in *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980), that statutes prohibiting the possession of a firearm by a felon do not violate the Second Amendment.

1098, 1111 (5th Cir. 1997) (counsel’s performance cannot be deficient if error alleged is failure to engage in a futile exercise).

C. Constitutional Provision

Lothrop also invokes Article 1, Section 9, Clause 2 of the United States Constitution as a jurisdictional basis for the relief he seeks. Petition at 1. That clause provides, in its entirety: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Since Lothrop is also at pains to state that his is “not a § 2255 motion,” *id.*, it is unclear how this provision provides any authority for the relief he seeks. To the extent that Lothrop seeks relief in the nature of habeas corpus, his claim is governed by section 2255, which bars second or successive motions without certification from the appropriate court of appeals allowing the motion to proceed. 28 U.S.C. § 2255. Lothrop has not obtained such certification and, in light of his earlier section 2255 motion, he is barred from raising any such claim here. *See In re Green*, 144 F.3d 384, 388 (6th Cir. 1998).

D. The Court’s Inherent Power

Lothrop also invokes this court’s “inherent power to protect the integrity of the judicial process within this circuit,” Petition at 1, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991) (court’s power to impose sanctions for bad-faith conduct), and *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) (courts may allow attack on judgment based on after-discovered fraud). Neither case is applicable here. More important, Lothrop’s substantive arguments are without merit. Accordingly, he has not established any threat to the integrity of the judicial process that this court need address.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's petition be **DENIED**.³

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 4th day of September, 1998.

*David M. Cohen
United States Magistrate Judge*

³ The First Circuit directs that the petitioner's entitlement to a hearing on a petition for a writ of coram nobis is to be evaluated by application of the same criteria as those applied to motions under section 2255, namely, "if the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Michaud*, 925 F.2d at 39 (internal quotation marks and citations omitted). Lothrop is not entitled to a hearing on his petition.