

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 97-25-P-H
)	(Civil No. 98-317-P-H)
BRIAN MALCOLM O'LEARY,)	
)	
Defendant)	

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

The defendant moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 60 months was imposed after he pleaded guilty to charges of possession of a sawed-off shotgun, in violation of 26 U.S.C. §§ 5822, 5845(a), 5861(c) and 5871, and distribution of marijuana, in violation of 21 U.S.C. § 859(a). Judgment (Docket No. 11) at 1-2. The defendant now contends that his conviction violated various provisions of the United States Constitution and that Titles 21 and 26 of the United States Code were not properly promulgated. Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Motion”) (Docket No. 28) at 5-6.

A section 2255 motion may be dismissed without an evidentiary hearing if “(1) the motion is 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 in stead 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 initially indicted on nine counts. Indictment (Docket No. 1). He entered into a plea agreement with the government in which he agreed to plead guilty to the third and seventh counts of the indictment. Plea Agreement (Docket No. 6) at 1.¹ The defendant pleaded guilty to these two counts at a hearing held on June 11, 1997. Transcript of Proceedings ("Plea Tr.") (Docket No. 40) at 4-5. At that hearing the defendant stated that he did not disagree with the factual statements in the prosecution version of his actions with respect to these two counts. *Id.* at 9-11. The prosecution version states, *inter alia*, that officers of the Bath, Maine police department seized from the defendant's residence a sawed-off Harrington and Richardson Model 099 .20 gauge shotgun that had not been manufactured in Maine and that the defendant from August 1996 through January 30, 1997 distributed marijuana between 20 and 30 times to a person under 18 years of age. Prosecution Version (Docket No. 7) at 1-2.

The defendant was sentenced on September 23, 1997 to a term of 60 months. Transcript of Proceedings ("Sentencing Tr.") (Docket No. 41) at 14. The applicable sentencing range under the United States Sentencing Commission Guidelines was 57 to 71 months. *Id.* at 8, 11. The defendant did not appeal the sentence imposed.

¹ The government agreed to move to dismiss the remaining counts. *Id.* at 3. These counts were dismissed at sentencing. Judgment at 1.

II. Discussion

A. Fifth Amendment Claim

The defendant contends that the requirement of 26 U.S.C. §§ 5822 and 5861 that he register with the federal government in order to transfer, make or own a sawed-off shotgun violates his constitutional privilege against self-incrimination. The Supreme Court has ruled that this statutory scheme does not violate the Fifth Amendment on this basis. *United States v. Freed*, 401 U.S. 601, 605 (1971). This claim accordingly cannot provide the basis for section 2255 relief.²

B. Enactment of Titles 21 and 26

Asserting that Titles 21 and 26 of the United States Code were not promulgated “as required by the Administrative Act (Procedures), 5 USC 551 et seq.,” Motion at 5, the defendant concludes

² The defendant also refers to section 207 of P.L. 90-618 in support of this claim. Motion at 5. That statute provided, in relevant part:

- (a) Section 201 of this title shall take effect on the first day of the first month following the month in which it is enacted.
- (b) Notwithstanding the provisions of subsection (a) or any other provision of law, any person possessing a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 (as amended by this title) which is not registered to him in the National Firearms Registration and Transfer Record shall register each firearm so possessed with the Secretary of the Treasury or his delegate in such form and manner as the Secretary or his delegate may require within the thirty days immediately following the effective date of section 201 of this Act. . . . No information or evidence required to be submitted or retained by a natural person to register a firearm under this section shall be used, directly or indirectly, as evidence against such person in any criminal proceeding with respect to a prior or concurrent violation of law.

1968 U.S.C.C.A.N. (82 Stat.) 1423-24. P.L. 90-618 was enacted on October 22, 1968. The final sentence quoted above, upon which the defendant relies, clearly applies only to individuals who registered firearms within 30 days after November 1, 1968. The defendant does not claim to have registered the firearm at issue here at all, and certainly not in 1968. P.L. 90-618 provides no basis for section 2255 relief in this case.

that he is therefore entitled to section 2255 relief because holding him accountable under statutes not properly promulgated violates Article I, section 8, clause 18 of the Constitution.³ As the government correctly argues, Government’s Response to Motion to Vacate, etc. (“Government’s Response”) (Docket No. 45) at 12, the Administrative Procedure Act applies only to the promulgation of regulations, not to statutory enactment. 5 M.R.S.A. § 553. The constitutional section cited by the defendant merely gives the United States Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.” The Supreme Court has repeatedly held that the Congress has the power to enact criminal statutes. *E.g., Logan v. United States*, 144 U.S. 263, 283-84 (1892). The defendant is not entitled to relief based on this claim.⁴

C. Civil Rights Violations

The defendant next contends that unspecified actions by an agent of the Bureau of Alcohol,

³ In his reply memorandum, the defendant adds an additional argument to this section of his motion, contending that the statutes which he was charged with violating with respect to the sawed-off shotgun apply only to manufacturers of such firearms. Respon[s]e to Gover[n]ment’s Respon[s]e, etc. (“Defendant’s Reply”) (Docket No. 47) at 5-6. This issue is raised for the first time in the reply memorandum and therefore will not be considered by the court. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991). Even if the issue were properly before the court, the defendant’s interpretation of the statutes is clearly erroneous. *E.g.*, 28 U.S.C. § 5861(c) (making it unlawful to receive or possess a firearm made in violation of the provisions of chapter 53, Title 26). The defendant’s claim that he “did not own, transfer or manufacture this weapon,” and that instead he “was a mere custodian,” Defendant’s Reply at 4, is likewise insufficient to take him out of the scope of the statute, since he acknowledges that he was in possession of it.

⁴ The defendant also refers to 44 U.S.C. § 1507 in this section of his motion. That statute states that a document required by 44 U.S.C. § 1505(a) to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until it has been filed with the Office of the Federal Register and a copy made available for public inspection. Section 1505(a) does not require the publication in the Federal Register of statutes enacted by Congress.

Firearms and Tobacco, along with police officers from Bath, Maine, violated his rights under “Article[s]” 9, 10 and 14 of the United States Constitution, several articles of the Maine Constitution, and 18 U.S.C. §§ 241 and 242. Motion at 5.

Neither 18 U.S.C. § 241 nor 18 U.S.C. § 242 confers any rights upon an individual. They are criminal statutes which may be invoked by the government when a person acts to deprive another of any rights secured by the Constitution or laws of the United States. “Only the United States as prosecutor can bring a complaint under 18 U.S.C. §§ 241-242 (the criminal analogue of 42 U.S.C. § 1983).” *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989). The defendant is not entitled to section 2255 relief based on any alleged violation of these statutes.

Section 2255 provides relief only when a sentence has been imposed in violation of the federal constitution or the laws of the United States. A claim of violation of a state constitution is not cognizable under section 2255.

Since the Constitution has only seven articles, I assume that the defendant’s reference is to the Ninth, Tenth and Fourteenth Amendments. The defendant’s allegations in this section of his motion lack specificity. He does not set forth the manner in which these amendments were allegedly violated. The defendant’s direction to “see all records this instant CASE,” Motion at 5, provides no assistance to the court. “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.” *David*, 134 F.3d at 478. “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.” *Id.* Here, the defendant’s third asserted ground for relief cannot be construed as anything other than precisely the type of allegation identified by the First Circuit in *David* as

insufficient to invoke section 2255 relief.

D. Sixth Amendment Violation

The final ground for relief asserted by the defendant is based on an allegation that he received constitutionally defective assistance of counsel, manifested, *inter alia*, by the defendant's "unwitting" signing of the plea agreement, coercion into pleading guilty, and providing information to the probation officer for the presentence investigation report without knowing that the information could be used to enhance his sentence. Motion at 6.

The defendant also asserts that his counsel provided constitutionally deficient assistance because "[h]e was silent concerning the admissibility of a justice of the peace as signatory on documents lacking and requiring a MAGISTRATE JUDGE to sign FRCF RULE 54." *Id.* Fed. R. Cr. P. 54, dealing with application of and exceptions to the Federal Rules of Criminal Procedure, does not appear relevant to the substance of this claim. In his reply memorandum, the defendant makes clear that this claim refers to the search warrant the execution of which led to the discovery of the firearm that provides the basis for one of the charges to which he pleaded guilty. Defendant's Reply at 2-3. He argues that the search warrant was invalid because it was obtained by local police rather than federal agents, because Bath, Maine is not subject to the criminal jurisdiction of the United States and because the warrant was signed by a justice of the peace rather than a neutral magistrate, federal magistrate judge or judge. *Id.* He also contends that he is entitled to relief because the gun was not mentioned in the search warrant. *Id.* None of these contentions has merit.

The authority cited by the defendant suggests that he is contending that the strictures of Fed. R. Crim. P. 41(a) were applicable to the search warrant at issue. The search warrant, a copy of which

is not in the record, was apparently applied for by the Bath police and issued by the Maine District Court. Affidavit and Request for Search Warrant, State of Maine, Sixth District Court, Division of Sagadahoc, Affidavit of Officer Stanley K. Cielinski, attached to Motion to Vacate, Set Aside the Order/Conviction Pursuant to 28 USC Rule 60(b)(2)(3)(6) (Docket No. 16) (jurat signed by John W. Voorhees, Maine Justice of the Peace). Rule 41(a), like the other authority cited by the defendant, applies only to search warrants sought by federal officers. *United States v. Rivas*, 99 F.3d 170, 176 (5th Cir. 1996); *United States v. Williams*, 977 F.2d 866, 869-70 (4th Cir. 1992). The fruits of a validly issued state search warrant are lawfully obtained for the purposes of federal prosecution if the warrant satisfies federal constitutional requirements and “does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers.” *United States v. Mitro*, 880 F.2d 1480, 1485 (1st Cir. 1989) (quoting *United States v. Sellers*, 483 F.2d 37, 43 (5th Cir. 1973)). The defendant does not argue that the warrant was issued without probable cause, so there is no issue concerning satisfaction of federal constitutional requirements. *United States v. Soule*, 908 F.2d 1032, 1039 (1st Cir. 1990). Issuance of search warrants by justices of the peace is expressly allowed by Maine law. 4 M.R.S.A. § 161.⁵ There is no indication in this record that the warrant contravened any policy embodied in the federal rules of criminal procedure.

Physical evidence of a crime, other than the items specified in a search warrant, may be seized during the execution of the warrant and used as the basis for prosecution. *Coolidge v. New*

⁵ The statute provides that the justices of the peace, who must also be attorneys-at-law, are to be paid a salary. This means, contrary to the defendant’s argument, that they are not paid a fee for issuing each warrant, making them “neutral and detached” as required by *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977).

Hampshire, 403 U.S. 443, 465-66 (1971). See also *United States v. Johnston*, 784 F.2d 416, 419-21 (1st Cir. 1986) (officers who discovered notebook, cash, and adding machine tapes while looking into closed containers that might contain marijuana, the object of the search warrant, were justified in seizing these materials as evidence of a crime); *United States v. Dusablon*, 534 F.Supp. 1368, 1379 (D. Me. 1982) (items not identified in search warrant admissible if evidentiary significance was obvious at time of search and seizure was reasonable). The defendant has no claim, direct or for insufficient assistance by his counsel, for section 2255 relief on this basis.

The argument that the federal government may not criminalize activity that occurs anywhere other than on land owned by the federal government 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) (including convictions under 26 U.S.C. §§ 5822, 5841, 5845, 5861 and 5871); *United States v. Sitton*, 968 F.2d 947, 953 (9th Cir. 1992); *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 on this issue.

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, 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 contends that his counsel fell below Sixth Amendment standards when, “in violation of the use of the Brady rules [he] did nothing to bring forward the lack of the obvious exculpatory evidence in this matter.” Motion at 6. The defendant does not further describe the “obvious exculpatory evidence,” and this conclusory allegation is simply insufficient to allow the court to evaluate his claim on this point. Without knowing the “[w]ho, what, when, where, and how details [that] might have placed matters of ascertainable fact at issue,” *David*, 134 F.3d at 478, it is impossible to determine whether the unknown evidence would have resulted in a different outcome. Indeed, the defendant fails even to assert that he would not have pleaded guilty if this evidence had been “brought forward,” a necessary element of his claim here. *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). Accordingly, he is not entitled to section 2255 relief on the basis of this claim.

The next allegation in this section of the defendant’s motion is that he signed the plea agreement “unwittingly” and “coerced with a 90 year potential sentence.” Motion at 6. Again, the failure to allege that he would not have pleaded guilty in the absence of coercion or with fuller knowledge is fatal to this claim. *Knight*, 37 F.3d at 774. Even if this were not the case, the transcript of the defendant’s plea hearing belies this claim. The defendant stated that he understood the charges to which he was pleading guilty. Plea Tr. at 6-7. He understood that he had the right to

continue to plead not guilty. *Id.* at 7. He understood that he was giving up the right to a trial and that he would have no right to appeal the conviction. *Id.* at 8-9. He understood the possible range of sentences that could be imposed. *Id.* at 7. The court informed him that “by pleading guilty, you also give up your right not to incriminate yourself.” *Id.* at 9. When asked whether anyone had threatened him or attempted to force him to plead guilty, the defendant responded, “Not at all.” *Id.* at 11. He stated that he had signed the plea agreement voluntarily, that he understood everything in it before signing it, that he intended to agree to all of its terms and conditions, and that he understood that the authority to determine an appropriate sentence remained with the court. *Id.* at 12-13. He denied that anyone had made any promise other than the plea agreement in an effort to get him to plead guilty. *Id.* at 14. The defendant has presented nothing in his motion to overcome the presumption of truthfulness that attaches to statements made by a defendant at the hearing during which he tenders his plea. *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984) (presumption cannot be overcome in absence of credible, valid reasons why a departure from those earlier contradictory statements is now justified). *See also United States v. Isom*, 85 F.3d 831, 835-36 (1st Cir. 1996) (describing Rule 11 colloquy adequate to refute contention that plea was not made knowingly).

Finally, the defendant claims that his counsel did not tell him that the information he provided to a probation officer who was preparing the presentence investigation report for the court “was to be used against to enhance my time to serve” or that the two offenses to which he pleaded guilty would be “coupled,” an apparent reference to section 3D1.2(c) of the United States Sentencing Commission Guidelines (“U.S.S.G.”). Motion at 6. The defendant fails to identify any statements that he made in connection with the preparation of the presentence investigation report that in fact were used to enhance his sentence, and my review of that document reveals none. Presentence

Investigation Report at 3-6. The only enhancement to his sentence recommended in the report resulted from statements made to the Bath police by third parties. *Id.* at 7. Accordingly, the defendant has not been prejudiced by the alleged failure to inform him about the uses to which the information he provided would be put. Similarly, the “coupling” of the two offenses did not result in prejudice to the defendant because the eventual sentence imposed did not exceed that which could have been imposed on one of the counts to which he pleaded guilty. U.S.S.G. § 3D1.3(a).

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 14th day of January, 1999.

*David M. Cohen
United States Magistrate Judge*