

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
<i>v.</i>)	Criminal No. 96-59-B-C
)	(Civil No. 99-144-B-C)
FRANK CUNNINGHAM,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Frank Cunningham, appearing *pro se*, moves this court to vacate, set aside or correct his sentence on several grounds pursuant to 28 U.S.C. § 2255. Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Motion”) (Docket No. 44).

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 instead of facts, contradict the record, or are inherently incredible.” *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (citation and internal quotation marks omitted). The majority of Cunningham’s allegations, even as supplemented by his reply memorandum, are conclusory.¹ His remaining

¹On or about July 16, 1999 Cunningham filed a letter motion requesting an extension of time “to reply in depth if I must at this point continue pro-sea [sic]. My understanding upon filing the original motion was to be brief and not sight [sic] case law. I have specifics and positive evidence in my possession [sic] to support my position and much more is available when and if you appoint (continued...) ”

allegations, even if accepted as true, do not entitle him to relief. I accordingly recommend dismissal of his motion without an evidentiary hearing.

I. Background

On September 17, 1996 Frank Cunningham was indicted on one count charging knowing possession by a convicted felon of an Enfield bolt-action rifle, in violation of 18 U.S.C. § 922(g)(1). Indictment (Docket No. 2). On February 10, 1997 Cunningham, his counsel Norman S. Kominsky and Assistant United States Attorney Michael D. Love filed a plea agreement, signed by all three, in which Cunningham agreed to plead guilty to the single count. Agreement To Plead Guilty and Cooperate (Docket No. 23). Among its terms was a representation that the parties agreed “that each party specifically reserves the right to make its own separate, non-binding recommendation of any lawful sentence of imprisonment to the Court.” *Id.* ¶ 2. The agreement further advised that the crime with which Cunningham was charged carried a maximum sentence of ten years’ imprisonment or a fine of \$250,000 or both. *Id.* ¶ 1. Cunningham represented that “I have read this Agreement and carefully reviewed every part of it with my lawyer, Norman S. Kominsky. I understand it and I voluntarily agree to it. I represent that, as I sign this Agreement, I am not under the influence of any drug or alcohol.” *Id.* at 5. Kominsky represented that, to the best of his knowledge, Cunningham understood the agreement and appreciated its consequences. *Id.*

Following a Rule 11 hearing on February 20, 1997 the court accepted Cunningham’s guilty plea, finding it to have been voluntary, knowing and free from coercion. Transcript of Rule 11

¹(...continued)
counsel.” Docket No. 48. I granted the motion, treating it as a motion to amend the petition. Endorsement to *id.* Cunningham subsequently filed a nineteen-page reply/amendment. Petitioner’s Reply to the Government’s Response, etc. (“Reply”) (Docket No. 51).

Proceedings Before Gene Carter, United States District Judge (“Rule 11 Transcript”) (Docket No.

41) at 29. Colloquy among the court, the defendant and counsel included the following:

THE COURT: Mr. Cunningham, have you had an adequate opportunity to discuss the charge set out in this indictment with your attorney?

THE DEFENDANT: Yes, sir. I spent a lot of time with him.

THE COURT: And have you, in fact, done so?

THE DEFENDANT: Yes, sir.

THE COURT: Has he explained to you the elements and nature of the charged offense?

THE DEFENDANT: Yes, he has, your Honor.

THE COURT: Has he explained to you the penalties that may be imposed upon you if you are convicted of that offense?

THE DEFENDANT: Yes, he has.

THE COURT: And are you satisfied with your attorney’s advice and representation in that respect?

THE DEFENDANT: Very satisfied.

THE COURT: . . . Mr. Cunningham has anyone threatened you or has anyone attempted to force or induce you into pleading guilty to this indictment?

THE DEFENDANT: No, they haven’t, your Honor.

THE COURT: Mr. Love, does this plea agreement in any way restrict the sentencing authority of the Court?

MR. LOVE: It does not, your Honor.

THE COURT: Do you agree, Mr. Kominsky?

MR. KOMINSKY: I do, your Honor.

THE COURT: Mr. Cunningham, do you understand that?

THE DEFENDANT: I do, your Honor.

THE COURT: Has counsel explained its content to you?

THE DEFENDANT: He has.

THE COURT: And do you understand and agree that it does not in any way restrict the sentencing authority of the Court under the applicable provisions of law?

THE DEFENDANT: I do.

THE COURT: Mr. Cunningham, do you understand that the final and exclusive authority to determine what will be the appropriate sentence to impose upon you rests with me as the judge of the court[?]

THE DEFENDANT: Yes, I do.

THE COURT: And do you understand that I have not yet made any decision whatever as to what will be an appropriate sentence?

THE DEFENDANT: Yes, I do.

Id. at 9-10, 21-25.

Following an evidentiary hearing on November 3, 1997 the court on December 16, 1997 sentenced Cunningham to a term of imprisonment of ninety-two months, which it determined was the bottom of the applicable United States Sentencing Guideline range based on an adjusted total offense level of 23 and a criminal history category of VI. Memorandum of Sentencing Judgment (Docket No. 34) at 2, 4; *see also* Transcript of Hearing on Obstruction of Justice and Sentencing Proceedings, etc. (“Sentencing Transcript”) (Docket No. 40) at 1.² At the sentencing hearing

²The court found that Cunningham’s base offense level was 24 based on the existence of at least two prior felony convictions of a crime of violence. Memorandum of Sentencing Judgment at (continued...)

Cunningham’s counsel pressed the court to order the sentence to run concurrently with, rather than consecutively to, an eight-year state-court sentence that Cunningham then was serving. Sentencing Transcript at 91-92. The court declined to do so, noting that under that scenario Cunningham effectively would serve no time beyond that imposed for his state conviction. *Id.* (“That makes the whole federal prosecution and federal sentence an exercise of futility. . . . We might just as well have stayed home and eaten jelly beans rather than do any of this work.”). *See also* Memorandum of Sentencing Judgment at 4.

Cunningham’s counsel initially filed a notice of appeal from the conviction/sentencing; however, he ultimately filed a so-called *Anders* brief stating that he could find no non-frivolous issues for appeal and moved to withdraw as Cunningham’s counsel. Notice of Appeal (Docket No. 36); *Anders* Brief, *United States v. Cunningham*, [Docket No. 98-1017] (1st Cir.), attached as Exh. 18 to Reply, at 3. The First Circuit initially denied counsel’s motion to withdraw and to file the *Anders* brief, directing him to order and examine the transcript of the guilty-plea proceeding and then file a renewed motion to withdraw and a supplemental *Anders* brief. Order of Court, *United States v. Cunningham*, Docket No. 98-1017 (1st Cir. April 16, 1998), attached as Exh. 21 to Reply. The First Circuit afforded Cunningham thirty days following service of the supplemental motion to file a supplemental *pro se* brief in support of reversal or modification of the judgment. *Id.* Counsel filed

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1. The court added two points based on its finding that Cunningham had attempted to obstruct justice by threatening a potential witness with death or bodily injury to influence him not to give testimony at Cunningham’s sentencing hearing, and subtracted three points based on Cunningham’s acceptance of responsibility for the offense conduct. *Id.* at 1-2. The court rejected an argument by Cunningham’s counsel that a previous Massachusetts offense for breaking and entering did not qualify as a countable crime of violence for Guideline purposes inasmuch as there had been no final judgment. Sentencing Transcript at 82-85.

a supplemental brief. Supplemental *Anders* Brief, *United States v. Cunningham*, Docket No. 98-1017 (1st Cir.), attached as Exh. 19 to Reply. Cunningham responded by filing a motion for new counsel and a continuance. See Order of Court, *United States v. Cunningham*, Docket No. 98-1017 (1st Cir. Nov. 12, 1998) (“*Anders* Order”) (Docket No. 42) at 1. The First Circuit on November 12, 1998 issued an opinion confirming, upon thorough review of the record, that there were no non-frivolous issues for appeal. See generally *id.* Cunningham’s motion for a continuance and new counsel was denied. *Id.* at [3]. The instant habeas motion followed.

II. Discussion

In his initial motion Cunningham alleged four grounds for habeas relief: (i) prosecutorial misconduct, (ii) ineffective assistance of counsel, (iii) due-process violations and (iv) Fourth Amendment violations based *inter alia* on the allowance of illegally seized material into evidence. Motion at 5-6. The government in its opposition repeatedly observed that the motion was conclusory and vague, meriting its dismissal. See generally Government’s Response to Motion To Vacate, etc. (Docket No. 47). Cunningham in response sought leave to supplement and elaborate upon his petition in view of the fact that the court had not granted his request to appoint counsel. Docket No. 48. The court granted this request. Endorsement to *id.* In his reply Cunningham fleshed out his allegations in significantly greater detail; however, the majority remained unbuttressed by evidentiary support.³ See generally Reply. Such bare, self-serving allegations by a habeas petitioner do not

³Among these are Cunningham’s allegations that (i) the prosecution threatened or coerced certain witnesses to testify against him or refrain from testifying in his favor, (ii) both the prosecution and defense ignored paperwork that would have shown Cunningham “was taking powerful prescription medication and [that] it would be virtually impossible for him to understand the complex legal battles that he was enduring,” and (iii) Cunningham’s attorney violated attorney-client confidentiality. Reply at 3, 6-7.

suffice to merit an evidentiary hearing. *See, e.g., David*, 134 F.3d at 478 (“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.”); *see also United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev’d on other grounds*, 520 U.S. 751 (1997) (“A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. . . . Facts alluded to in an unsworn memorandum will not suffice.”). Cunningham’s conclusory allegations, as a class, warrant summary dismissal. I focus in the remainder of this opinion on those assertions with respect to which Cunningham provides some foundation of factual support.

A. Prosecutorial Misconduct

As his first ground for relief Cunningham alleges prosecutorial misconduct; specifically, that the prosecution coerced and intimidated defense witnesses (including himself), falsely arrested people in exchange for statements and silence, withheld and altered documents and statements and rewarded detainees for false testimony. Motion at 5. Cunningham provides support for two of these allegations: that the government used an illegally obtained weapon to manufacture a charge against him, and that it altered documents in a manner that resulted in an increase in his sentence. Reply at 5-6; Affidavit of William Cary (“Cary Aff.”), attached as Exh. 2 to Reply; documents relating to Massachusetts offenses attached as Exhs. 3-12 to Reply.

The proffered evidence fails to demonstrate entitlement to habeas relief. As the First Circuit has recognized in the context of a section 2255 motion, “[b]ecause conviction on a guilty plea is based solely on the plea, not on the evidence, there is no point in examining the evidence unless it coerced the plea or made it involuntary.” *Gioiosa v. United States*, 684 F.2d 176, 180 (1st Cir.

1982). Absent an allegation, in such cases, that the petitioner’s guilty plea was coerced or made involuntary by the defect of which he or she complains, the petitioner is precluded from challenging the evidence in a section 2255 motion. *Id.* See also *Haring v. Prosise*, 462 U.S. 306, 321 (1983) (“[T]he conclusion that a Fourth Amendment claim ordinarily may not be raised in a habeas proceeding following a plea of guilty . . . rests on the simple fact that the claim is irrelevant to the constitutional validity of the conviction.”); *United States v. Byrd*, 669 F. Supp. 861, 870 (N.D. Ill. 1987) (section 2255 petitioner failed to demonstrate how alleged prosecutorial misconduct had any effect on plea agreement).

Cunningham testified under oath at his Rule 11 hearing that, with one change, he agreed with the prosecution’s description of his commission of the crime with which he was charged. Rule 11 Transcript at 19-21. He fails in his habeas pleadings to indicate how the alleged prosecutorial misconduct in this case rendered his guilty plea involuntary. See Reply at 3-7.⁴

⁴Cunningham’s proffered evidence, moreover, falls short of demonstrating prosecutorial misconduct. Cunningham offers an affidavit of William Cary in which Cary avers that a fire marshal and another man came to his home, asked the whereabouts of a rifle left there by Cunningham and then seized the rifle without showing Cary a badge or a warrant. Cary Aff. There is no indication that the fire marshal acted on behalf of federal prosecutors. Nor do Cary’s averments demonstrate that the prosecution was aware of the manner in which Cary states that the rifle was seized. Cunningham suggests that his documents demonstrate that his past Massachusetts crimes were in fact non-violent misdemeanors that were improperly classified to elevate his Guideline sentencing range. Reply at 5-6. He offers a page from his Presentence Investigation Report in which the following is underlined: “This office was told by our counterparts in the District of Massachusetts that this offense, according to Massachusetts law, was considered a misdemeanor. The information that the government supplies appears to be in contradiction, but nonetheless is supported by documentation.” Exh. 12 to Reply; see also Presentence Investigation Report, *United States v. Cunningham*, Criminal No. 96-59-B-C (D. Me.) (“PSI”), at 17. The underlined sentences apparently refer to a violation of the Domestic Abuse Prevention Act. *Id.* at 6, 17; Sentencing Transcript at 5-6 (explaining that paragraph 25 of PSI had been renumbered paragraph 24). These materials prove neither that the offense was in fact a misdemeanor nor that the prosecution altered or misused documents to mislabel it a felony. The remainder of the materials that Cunningham provides relates
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B. Ineffective Assistance of Counsel

Cunningham next asserts that his initial counsel, Joseph Baldacci, and subsequent counsel Kominsky rendered ineffective assistance in violation of his Sixth Amendment rights. Motion at 5. Specifically, he alleges that Baldacci was selected by the government rather than the court, broke client confidentiality, relayed threats and tried to force a confession, and that Kominsky gave incorrect legal advice, refused his “request to court” and lied to him. *Id.*

Cunningham’s evidence of attorney misconduct consists almost entirely of a series of unsworn statements in his memorandum. *See* Reply at 7-16.⁵ This is fatal to his ineffective-

⁴(...continued)

to a breaking-and-entering charge, described in his PSI as “Burglary reduced to Breaking and Entering at Nighttime with Intent to Commit a Felony.” PSI at 8; Exhs. 3-11 to Reply. Massachusetts law identifies two species of offenses related to breaking and entering in the nighttime. One, breaking and entering with intent to commit a felony, is punishable by imprisonment of not more than twenty years in state prison or not more than two and a half years in jail or a house of correction. Mass. Gen. Laws Ann. ch. 266, § 16. The other, breaking and entering with intent to commit a misdemeanor, is punishable by a fine of not more than two hundred dollars or by imprisonment for not more than six months, or both. Mass. Gen. Laws Ann. ch. 266, § 16A. Cunningham provides one copy of a Massachusetts jury-session docket that does not indicate whether he is charged under section 16 or 16A and a second copy, stamped “A True Copy, Attest,” in which someone has handwritten the notation “CH 266S16A” next to the docket entry concerning his breaking-and-entering charge. *Compare* Exh. 3 to Reply *with* Exh. 8 to Reply. Critically, Cunningham does not clarify the source of the two versions of the docket sheet, neither of which is an original. It is unclear who wrote in the notation, “CH 266S16A” or when, or whether prosecutors were aware of the version containing that handwritten notation — let alone having altered or otherwise misused it. In any event, the First Circuit, in ruling upon counsel’s *Anders* brief, observed that even were the breaking-and-entering charge wholly discounted the record still would have justified the base offense level calculated by the court. *Anders* Order at 2 n.1.

⁵Cunningham does attempt to provide evidentiary backing for his allegation that he tried to withdraw his guilty plea in accordance with Crim. R. Fed. P. 32 prior to sentencing, and that Kominsky rendered ineffective assistance in counseling him against doing so. Reply at 15. Rule 32(e) provides: “If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C.

(continued...)

assistance claim, including his most substantive allegation: that Kominsky induced him to plead guilty by falsely representing that he had worked out a plea agreement with the government whereby Cunningham would receive a sentence of up to sixty months to run concurrent with his state sentence. *See id.* at 7-9. Cunningham relies upon several cases in which petitioners were afforded an opportunity to prove that counsel's ineffectiveness had undermined the voluntariness of a guilty plea; however, in each such case the petitioner had provided a detailed, sworn affidavit putting the issue into play. *See, e.g., Machibroda v. United States*, 368 U.S. 487, 495 (1962) (petitioner's motion and affidavit contained charges that were detailed and specific); *Hernandez-Hernandez v. United States*, 904 F.2d 758, 763 (1st Cir. 1990) (petitioner's allegations corroborated by five sworn affidavits); *United States v. Giardino*, 797 F.2d 30, 32 (1st Cir. 1986) (petitioner's statements in affidavit were neither "inherently incredible" nor mere "conclusory allegations unsupported by specifics") (citations and internal quotation marks omitted). The need to provide such factual underpinnings is particularly glaring in Cunningham's case. Both the plea agreement and the court during its Rule 11 colloquy made crystal-clear that the prosecution remained free to recommend, and the court free to impose, any range of sentencing within the applicable Sentencing Guidelines. Cunningham represented to the court that he understood that no promise had been made with respect

⁵(...continued)

§ 2255." In support of his allegation Cunningham provides a letter from Kominsky dated May 8, 1998, in which Kominsky writes, apparently in response to a letter from Cunningham dated April 15, 1998, "In answer to your question, I do not believe it is possible to take back your guilty plea. You were advised that once having been made, it was final." Letter from Norman Kominsky to Frank Cunningham dated May 8, 1998, attached as Exh. 1 to Reply. This letter supports an inference that Cunningham sought to change his plea well after his December 16, 1997 sentencing, rather than prior thereto. Kominsky therefore would have correctly concluded that Cunningham had forfeited his opportunity to move for a change of plea pursuant to Rule 32(e).

to sentencing.⁶ A defendant’s Rule 11 statements are presumed truthful “unless the allegations in the § 2255 motion are sufficient to state a claim of ineffective assistance of counsel and include credible, valid reasons why a departure from those earlier contradictory statements is now justified.” *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984). Cunningham, like the petitioner in *Butt*, fails to substantiate his claim with any material issues of fact, thus falling short of overcoming “the presumption of regularity which the record . . . imports.” *Id.* (citation and internal quotation marks omitted).⁷

C. Due-Process Violations

As his third ground for relief pursuant to section 2255 Cunningham alleges the following due-process violations: “unlawful appointment of counsel, by Prosecution. Motions ignored and not heard by Judge Carter. U.S. Attorneys Office told defendant if he requested bail hearing they would hang him. Witnesses for defense denied attorney and threatened during questioning. Probation also failed to present Court with favorable information and mental illness background. Bias P.S.I. Report to Judge.” Motion at 5-6. In his Reply Cunningham focuses on his allegation that Baldacci was appointed by the U.S. Attorney’s Office rather than by the court, or at the very least hand-picked to represent the government’s interests and not those of Cunningham. Reply at 16-17. Cunningham

⁶Interestingly, Cunningham informed the court that he did not understand his right to appeal any sentence imposed, whereupon the court explained it in more detail. Rule 11 Transcript at 27. This tends to cast doubt on Cunningham’s suggestion that he “answered all questions in a manner favorable to completing the acceptance of a guilty plea” because “those are the statements he was supposed to make.” Reply at 8.

⁷Cunningham’s allegation that Kominsky provided ineffective assistance in filing an *Anders* brief hinges on his assertion that the First Circuit, in upholding his sentence, was not apprised of the fact that Cunningham’s guilty plea was coerced by Kominsky’s alleged misrepresentations. Reply at 14, 17-18. Cunningham’s failure to evince credible evidence that Kominsky did in fact induce him to plead guilty based on such misrepresentations likewise dooms his *Anders* argument.

presents no evidence whatsoever of the veracity of any of these claims, meriting their summary dismissal.

D. Illegal Search and Seizure

As his final ground for habeas relief Cunningham alleges that certain evidence was obtained in violation of his Fourth Amendment rights, specifically complaining of the use against him of an illegally seized firearm and of statements made under duress and threats, as well as of the deterrence of witnesses from testifying in his favor. Motion at 6. Cunningham supports his claim concerning the alleged illegality of the firearm seizure with the Cary affidavit. Reply at 17; Cary Aff. However, as noted above, a raw allegation of a Fourth Amendment violation is insufficient to raise a reviewable issue in a habeas petition arising from a criminal proceeding in which the petitioner pleaded guilty. *See, e.g., Gioiosa*, 684 F.2d at 179. Cunningham, like *Gioiosa*, does not contend that the alleged Fourth Amendment violation infected the voluntariness of his plea. *Id.*; Reply at 17. His Fourth Amendment claim therefore founders.

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.⁸

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

⁸Cunningham's motion for appointment of counsel for purposes of pursuing the section 2255 motion, Motion for Appointment of Counsel, etc. (Docket No. 49), is accordingly denied.

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 October, 1999.

*David M. Cohen
United States Magistrate Judge*