

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 98-16-P-C
)	(Civil No. 00-172-P-C)
JUAN CARLOS DURAN,)	
)	
Defendant)	

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

The defendant, appearing *pro se*, moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. The defendant pleaded guilty to a charge of conspiracy to possess heroin with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. Judgment (Docket No. 65) at 1. He was sentenced to a term of 75 months. *Id.* at 2. He now contends that he received constitutionally insufficient assistance of counsel during his plea negotiation and sentencing and that the court made several errors at his plea hearing and in determining his sentence. Petition Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Petition”) (Docket No. 73) at 5-6; Petition for Writ of Habeas Corpus (“Second Petition”) (Docket No. 74) at 2.

A section 2255 petition 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) (internal quotation marks and citation omitted). In this instance, each of the defendant’s

allegations meets one or more of these criteria and I accordingly recommend that the petition be denied without an evidentiary hearing.

I. Procedural Issue

The defendant filed two simultaneous petitions seeking relief under section 2255, Docket Numbers 73 and 74. Docket Number 73 is the form petition that this court requires defendants to use for this purpose; Docket Number 74 is a typewritten document entitled “Petition for Writ of Habeas Corpus” consisting of 31 pages. In section 12 of the form petition, where a petitioner is directed to set forth the grounds for the petition, the defendant lists four grounds. The first entry states: “Ineffective assistance of counsel, ‘See attached memorandum.’” Petition at 5. Under the subheading “Supporting FACTS,” the defendant states “For failure to defend and protect defendant’s due process right during Plea negotiation [sic] and sentencing.” *Id.* Three other grounds are stated; in each instance, the defendant states in the “Supporting FACTS” section of the form “See attached memorandum.” *Id.* at 5-6. The form petition is signed by the defendant following the printed statement “I declare under penalty of perjury that the foregoing is true and correct,” and dated May 26, 2000. *Id.* at 7. Docket Number 74, which is the only document that could be construed to be the “attached memorandum,” begins with seven numbered paragraphs, three of which appear to assert grounds for relief different from those set forth in the form petition. Second Petition at 2. These paragraphs are followed by four lettered requests for relief and, following the defendant’s signature on page three of this document, the following statement: “I declaire [sic] under the Penalty of Purjury [sic] that the foregoing is true and correct to the best of my knowledge. Executed on 26 May 2000.” *Id.* at 3. The defendant’s signature appears a second time on page 30 of this document but is unsworn and is not preceded by the penalty of perjury declaration. Page 31 of the document is a certificate of service that is signed and sworn by the defendant.

The government in its opposition to the petition notes that pages 4-30 of the second petition, the memorandum portion of that document, are not sworn and argues that the petition should be dismissed for this reason alone. Government Opposition to Petition to Vacate, Set Aside, or Correct Sentence, etc. (“Government Opposition”) (Docket No. 77) at 6-7. The defendant filed a reply memorandum on July 20, 2000. Petitioner’s Brief in Opposition of [sic] Government’s Answer to Petitioner’s Brief (Docket No. 78). That document, itself unsworn, does not respond to the government’s argument on this point. The defendant, alerted to the deficiency in his initial pleadings, has made no attempt to rectify the omission.

The First Circuit has held that “[f]acts alluded to in an unsworn memorandum will not suffice” to support a section 2255 motion. *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev’d on other grounds*, 520 U.S. 751 (1997). Accordingly, no factual allegations that appear in pages 4-30 of the defendant’s second petition may be considered by the court. The court to which a section 2255 petition is addressed need not hold a hearing on the petition if the factual allegations in the petition are vague, conclusory, or “palpably incredible.” *David*, 134 F.3d at 478 (quoting *Marchibroda v. United States*, 368 U.S. 487, 495 (1962)). “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.* All of the claims asserted in the defendant’s first petition fall into this category. Nothing other than conclusory assertions appears in the first petition.

A portion of the first ground for relief alleged in the second petition suffers from the same deficiency. The defendant alleges that “[t]he trial court committed reversible error when it decided not to honor the plea bargain agreement reached between the Prosecutor and defense counsel.” Second Petition ¶ 4. In the absence of any sworn factual allegations concerning the substance of the alleged agreement, the court cannot evaluate the merits of this claim.

The petition must be dismissed with respect to the claims raised in Docket No. 73 and the claim concerning the alleged plea agreement raised in Docket No. 74.

II. Analysis

The remaining claims asserted in the first three pages of the second petition are stated in sufficient detail to allow the court to address them.

The first such claim is that “[t]he trial court committed reversible error¹ when it . . . failed to advise Petitioner that he had a right to withdraw [sic] his guilty plea.” Second Petition ¶ 4. A defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *United States v. Marrero-Rivera*, 124 F.3d 342, 347 (1st Cir. 1997). The defendant was informed by the court at the hearing at which he tendered his plea of guilty that he would have no right to withdraw that plea if the sentence imposed by the court was more severe than he expected or cared for, and that the court was not bound by any sentencing recommendation made by the government or defense counsel. Transcript of Proceedings [Rule 11 Proceedings] (“Plea Tr.”) (Docket No. 76) at 21. Failure to give that warning might be grounds for relief. *See United States v. Noriega-Millán*, 110 F.3d 162, 167 (1st Cir. 1997).

Here, the defendant appears to argue the opposite proposition. Assuming that the defendant means that the court was required to inform him that he could withdraw his plea “for a fair and just reason,” *Marrero-Rivera*, 124 F.3d at 347; Fed. R. Crim. P. 32(e), he cites no authority for the proposition that the failure to do so renders a guilty plea invalid, and my research has located none.²

¹ “Reversible error” is not the applicable standard for relief under section 2255. In order to obtain relief, a defendant must show that his sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose the sentence, that the sentence was in excess of the maximum authorized by law, or that the sentence “is otherwise subject to collateral attack.” 28 U.S.C. § 2255. In the absence of a jurisdictional or constitutional error, only a defect that results in a “complete miscarriage of justice” will entitle a defendant to relief. *Davis v. California*, 417 U.S. 333, 346 (1974).

² A defendant is allowed to withdraw his guilty plea if the court rejects a plea agreement that specifies a sentence. In this case, the plea agreement (Docket No. 47) did not include any provision concerning sentence and the court accepted the plea agreement, Transcript of Sentencing Proceedings (Docket No. 68) at 61.

More important for section 2255 purposes, the defendant fails to identify the “fair and just reason” that would be offered in this case. *See id.* (listing factors to be considered in evaluating whether defendant has met burden of persuasion on request to withdraw guilty plea). In the absence of any such evidence, the court cannot conclude that the defendant would have been allowed to withdraw his plea, and the alleged omission, if indeed it was an omission, must accordingly be considered harmless error.

The second appropriately presented claim in the second petition is an allegation that the court failed “to advise petitioner of the consequences of his plea as required by law,” citing Fed. R. Crim. P. 11 and 32. Second Petition ¶ 5. To the contrary, the transcripts of the plea hearing and the sentencing hearing (Docket No. 68) make clear that the court fully complied with the requirements of those rules. Strictly speaking, only Rule 11 addresses the obligation of the court to advise a defendant of the consequences of his plea; Rule 32 deals with the imposition of sentence. Rule 11(c) requires the court, before accepting a guilty plea, to advise the defendant of the nature of the charge; the mandatory minimum penalty, if any; the maximum possible penalty; the fact that the court will consider but may depart from any applicable guidelines in some circumstances; the fact that by pleading guilty he waives the right to a trial; the fact that he has waived the right to appeal or collaterally attack the sentence, if such terms are included in a plea agreement; and the fact that the defendant will retain certain rights if he does not plead guilty. The court included all of this information in its Rule 11 colloquy with the defendant. Plea Tr. at 6-21.

The defendant next contends that the court “failed to advise petitioner of the constitutional rights he would be waving [sic] by pleading guilty.” Second Petition ¶ 6. This claim is conclusively refuted by the record. Plea Tr. at 7-10.

Finally, the defendant asserts that he “is imprisoned pursuant to a sentence that is illegal and void for the reasons presented above set fourth [sic] in the brief in support of the petition.” Second Petition ¶ 7. This conclusory allegation raises no claims other than those for which the defendant provides no sworn factual support or which I have determined to be without merit.

III. Conclusion

For the foregoing reasons, I recommend that the defendant’s petition 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.

Date this 18th day of August, 2000.

David M. Cohen
United States Magistrate Judge