

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 97-68-P-H
)	(Civil No. 00-304-P-H)
LAURIER J. DOYON,)	
)	
Defendant)	

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

Laurier J. Doyon, appearing *pro se*, moves pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence on three grounds. *See* Motion Under 28 USC ' 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Petition”) (Docket No. 61) at 5. Inasmuch as the petitioner plainly is not entitled to the requested relief, I recommend that the Petition be summarily denied. *See Carey v. United States*, 50 F.3d 1097, 1098 (1st Cir. 1995) (“Summary dismissal of a § 2255 petition is appropriate if it plainly appears from the face of the motion that the movant is not entitled to relief.”).

I. Analysis

The petitioner seeks relief on three grounds: (i) the trial court’s abuse of discretion in admitting tape-recording evidence; (ii) prosecutorial misconduct and violation of his Fifth Amendment right to due process; and (iii) incorrect application of the Sentencing Guidelines. Petition at 5. He appends two memoranda in support thereof, one titled Memorandum of Law in Support of Motion for Writ of Habeas Pursuant to § 2255 (“Tape-Recording Memorandum”) and the other “Motion for

Reduction and/or Review of Sentence Pursuant to Downward Departure, or in the Alternative Post-Conviction Rehabilitation” (“Sentencing Memorandum”).¹ He represents that Grounds Two and Three “were not previously presented because petitioner/defendant was not aware or cognizant of the errors, or that they were being committed at the time. Petitioner/defendant only became aware of the grounds during and after appellate review.” Petition at 6.

As the Tape-Recording Memorandum makes clear, Grounds One and Two are predicated on the same constellation of facts. This includes assertions that (i) the government failed to lay a proper foundation for admission of tape recordings, (ii) the tape-recording device was malfunctioning, (iii) the tape, which purportedly recorded a conversation between the petitioner and an informant, contained an unidentified third voice, calling into question its authenticity, (iv) a government agent transcribed the tape and wrote the informant’s purportedly involuntary statement for him, and (v) no chain of custody was established for the tape. *See generally* Tape-Recording Memorandum.

The First Circuit on direct appeal considered and rejected the petitioner’s contention that “there was an inadequate ‘foundation’ for admitting the tapes because the government did not establish that the recording device was in proper working order.” *United States v. Doyon*, 194 F.3d 207, 212 (1st Cir. 1999). To the extent that the petitioner is attempting to relitigate this issue under the same or a different label, he is barred from so doing. *See, e.g., Singleton v. United States*, 26 F.3d 233, 240 (1st Cir. 1994) (“[i]ssues disposed of in a prior appeal will not be reviewed again by way of a 28

¹ Although attached to the Petition, the Sentencing Memorandum arguably could be construed as a motion for correction or reduction of sentence pursuant to Fed. R. Crim. P. 35. However, to do so would not avail the petitioner. The petitioner’s offense was committed after November 1, 1987. *See* Indictment (Docket No. 5). The applicable version of the rule affords him no relief. *See, e.g., Scott v. United States*, 997 F.2d 340, 341 (7th Cir. 1993) (“Nothing comparable to the former Rule 35 remains. A new Rule 35(a) allows a district court to alter sentences on remand from the court of appeals, and Rule 35(b) permits reductions on motion of the prosecutor. The only power the district judge may exercise on his own is contained in a new Rule 35(c), which permits the judge to correct a sentence only within seven days, and then only if the sentence was imposed as a result of arithmetical, technical, or other clear error. Once seven days have run, sentences said to be illegal or improvident or just plain too long are beyond the power of the district court to modify.”) (citation and internal quotation marks omitted).

U.S.C. § 2255 motion”) (citations and internal quotation marks omitted); *United States v. Michaud*, 901 F.2d 5, 6 (1st Cir. 1990) (claims decided on direct appeal “may not be relitigated under a different label on collateral review”).

Conversely, to the extent the petitioner is attempting to interject something new into the mix, he falls short of excusing his failure to have presented such claims on direct review.² The petitioner asserts both a nonconstitutional claim (Ground One) and a constitutional claim (Ground Two). “A nonconstitutional claim that could have been, but was not, raised on appeal, may not be asserted by collateral attack under § 2255 absent exceptional circumstances.” *Knight v. United States*, 37 F.3d 769, 772 (1st Cir. 1994). Such “exceptional circumstances” are present “only if the claimed error is a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.” *Id.* (citation and internal quotation marks omitted). The petitioner makes no such showing; to the contrary, he argues that “there are those who say that under our constitutional exclusionary doctrine the criminal is to go free because someone blundered. . . . Defendant Doyon is that criminal, and the government . . . did the blundering.” Tape-Recording Memorandum at 7-8.

Nor is the petitioner’s failure to raise any new elements of the constitutional claim (Ground Two) excused. “Normally, failure to raise a constitutional issue on direct appeal will bar raising the issue on collateral attack unless the defendant can show cause for the failure and actual prejudice.” *Knight*, 37 F.3d at 774.³ The petitioner utterly fails to do so. He merely states, in conclusory fashion, that he was unaware of errors not previously asserted. *See* Petition at 6. He neither explains the

² The petitioner does not explain what, if anything, is new in Grounds One and Two. Inasmuch as appears, he did not press certain of his current allegations on direct review—for example, that the authenticity of the tapes is called into question by the presence of a third, unidentified voice. *See Doyon*, 194 F.3d at 212-13 (no discussion of presence of third voice).

³ A notable exception is a claim of ineffective assistance of counsel, which may be asserted for the first time on collateral review without need to demonstrate cause and prejudice. *Knight*, 37 F.3d at 774. However, no such claim is made in this case.

nature of these newly recognized errors nor his reasons for having been unaware of them. Indeed, it is difficult to perceive how he could have been unaware of the factual underpinnings of Grounds One or Two, including the tapes' contents and any transcriptions made of them.

In Ground Three, the petitioner presents a nonconstitutional issue that he acknowledges was not raised on direct appeal. He fails to make the requisite showing of "extraordinary circumstances" that would serve to excuse this default. The gravamen of the petitioner's claim is that he should have been deemed to have fallen outside the "heartland" of career-offender status inasmuch as he was merely a street-level drug dealer. *See generally* Sentencing Memorandum. The petitioner's case does not appear distinguishable from *United States v. Perez*, 160 F.3d 87 (1st Cir. 1998), in which the First Circuit upheld the trial court's refusal to depart from the Sentencing Guidelines on the basis of the small role played by a career offender in a heroin-dealing scheme.

The petitioner's secondary argument that he is entitled to a downward departure on the basis of his rehabilitation in prison, *see* Sentencing Memorandum at 6 does not even present a claim cognizable on collateral review. *See, e.g., United States v. Bradstreet*, 207 F.3d 76, 83 (1st Cir. 2000) (noting that, while post-sentencing rehabilitation could form basis for downward departure upon a resentencing, the goal of the Sentencing Reform Act "was to turn prisoners over to the Bureau of Prisons with a definite sentence, free from the wrangling between it and the Parole Commission"); *United States v. Dugan*, 57 F. Supp.2d 1207, 1209 (D. Kan. 1999) ("Dugan's post-sentencing rehabilitation and education are not circumstances, standing alone, that provide a basis for collaterally attacking his sentence.").

II. Conclusion

For the foregoing reasons, I recommend that the Petition be summarily **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) 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 31st day of October, 2000.

David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-304

DOYON v. USA

Filed: 10/23/00

Assigned to: JUDGE D. BROCK HORNBY

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000

Nature of Suit: 510

Lead Docket: None

Jurisdiction: US Defendant

Dkt # in USDC, Portland, ME : is 97cr68ph

Cause: 28:2255 Motion to Vacate Sentence

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