UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	***)***	
	)	
v.	***)***	***Criminal No. 94-34-P-C***
	)	***(Civil No. 99-317-P-C)***
STUART L. SMITH,	***)***	
	)	
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 was convicted by a jury of conspiracy to defraud the Internal Revenue Service in the determination and collection of income taxes, in violation of 18 U.S.C. § 371 and sentenced to a term of 60 months. Judgment (Docket No. 585) at 1-2. He now contends that he received constitutionally insufficient assistance of counsel, that the evidence at trial so varied from the charge in the indictment that a "constructive amendment" of the indictment took place, that the prosecutor engaged in misconduct, that he was denied his constitutional right to confront witnesses who testified against him, that there was insufficient evidence to support his conviction, that the trial court's instructions to the jury were prejudicial, and that the grand jury proceedings leading to his indictment "may have been deficient." Petition Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("First Petition") (Docket No. 704); three Petitions Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a

Person in Federal Custody ("Second Petitions") (Docket No. 711).[1]

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, doe 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 motion be denied without an evidentiary hearing.

I. Background

As the First Circuit stated in its opinion on the defendant's direct appeal,

> [a] three-count indictment charged [the defendant] with drug conspiracy, criminal forfeiture on the drug count, and tax conspiracy. After severance of the tax conspiracy charge, Smith was acquitted of drug conspiracy and therefore forfeited no property. Smith was then tried for tax conspiracy, i.e., conspiracy to defraud the Internal Revenue Service (IRS). Evidence of drug trafficking was admitted in the tax conspiracy trial to demonstrate receipt of revenue that was not reported to the IRS. Smith was convicted . . . .
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> * * *
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> In the tax conspiracy trial, the government introduced evidence that Smith paid no taxes from 1986 through April 1994, the period charged in the indictment. The government's theory was that during this period Smith derived substantial income from distributing marijuana and had a tacit agreement with the others involved in the drug distribution activity not to report this income to the IRS. To prove its theory, the government relied

[1] In the first of the Second Petitions, the defendant states as his ground for relief "The S.Ct. needs to expound on its decision in Dowling." Second Petitions [1] at 5. This is an apparent reference to *Dowling v. United States*, 493 U.S. 342 (1990). This court has no power to suggest a course of action to the Supreme Court, and the claim as stated does not come within the scope of 28 U.S.C. § 2255. If the defendant means to contend that the decision of the First Circuit on his direct appeal was inconsistent with *Dowling*, that claim can only be addressed by the Supreme Court on *certiorari*. The defendant's request for a writ of *certiorari* after the First Circuit denied his direct appeal was denied by the Supreme Court. *Smith v. United States*, 525 U.S. 953 (1998).

> heavily on evidence of Smith's participation in the drug trafficking. Much of this evidence duplicated that introduced in the drug conspiracy trial.
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> * * *
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> Smith admitted that he did not file individual tax returns during the charged period and that he derived income during this period. He denied, however, receiving money from or having knowledge of a drug conspiracy. He testified that he generated income in legitimate ways . . . . His former wife confirmed that Smith generated cash income from his lawful businesses, and testified that she had never seen evidence that he was involved in a drug conspiracy.

United States v. Smith, 145 F.3d 458, 459-60 (1st Cir. 1998). Following his acquittal on the drug charges, Smith had appealed to the First Circuit from the denial of his motion to dismiss the tax conspiracy charge on the grounds of double jeopardy and collateral estoppel. The First Circuit denied that appeal. *United States v. Morris*, 99 F.3d 476, 483 (1st Cir. 1996). The defendant was represented by the same law firm after the court ordered that trial on the tax conspiracy count be held separately from trial on the drug conspiracy and forfeiture counts through the appeal of his conviction.

II. Discussion

A. Assistance of Counsel

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.* 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 attorneys provided him with constitutionally deficient assistance because they "fail[ed] to file proper motions or arguments against bifurcation," withheld "pertinent materials which were needed for Centiorari [sic] preparation to the U. S. Supreme Court," neglected to raise issues at his request, did not prepare for arguments, had conflicts of interest, allowed constructive amendment of the indictment by failing to object to the government's intent to present evidence of legitimate sources of income at the second trial, failed to argue constructive amendment as an issue when bringing an interlocutory appeal from the denial of the defendant's motion to dismiss the indictment after the first trial, failed to file a motion to restrict the use of "spillover" evidence from the first trial at the second trial, refused to subpoena witnesses identified by the defendant, and failed to argue that the evidence presented by the government at trial was insufficient to support a conviction. First Petition, Supplemental Sheet at 1-2; Petitioner's Memorandum of Law in Support of Motion Under 28 U.S.C. § 2255, etc. ("Defendant's Memorandum"), attached to First Petition, at 8-26.[2]

[2] In his reply memoranda, the defendant specifies additional ways in which he alleges his counsel provided constitutionally deficient assistance: filing an inadequate motion to dismiss, failing to request a jury instruction on "the voluntary nature of the United States Tax Code," failure to point out on cross-examination a discrepancy in the testimony of unspecified prosecution witnesses, failure (continued...)

1. Bifurcation.

The defendant's argument on this issues founders because he has not indicated how he was prejudiced by the failure of his earlier counsel to argue against bifurcation, which the court ordered on its own motion. Docket Nos. 217 & 222. The defendant contends that bifurcation allowed the government "to try petitioner twice — in effect — by using the *same* evidence that was used in the first trial, as well as be using information gained through the first trial in relation to *legitimate sources of income*," Defendant's Memorandum at 9 (emphasis in original), but makes no attempt to show that it is reasonably probable that he would have been acquitted on the tax conspiracy count if all three counts against him had been tried together, which is the test for prejudice under *Strickland*. To the extent that the defendant intends to rely on his argument that there was evidence only of legitimate income once the first jury found him not guilty on the drug conspiracy charge, that conclusion is incorrect, as discussed below, and, even if correct, it would not establish that acquittal would have resulted if a single trial had been held on all three counts. In addition, the double jeopardy and "same evidence" arguments have been resolved against the defendant by the First

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[2](...continued)
to produce information regarding the payment for the boat "Miss Molly," failure to offer an identified defense witness with unspecified exculpatory evidence, failure adequately to cross-examine three witnesses, failure to offer evidence concerning the defendant's tax-paying businesses and a check from the government to the defendant, "woeful[] inadequa[cy]" in voir dire of unidentified witnesses, and failure to object to the jury instruction allowing the drawing of an inference from the defendant's failure to file a return, Petitioner's Answer to Government's Response, etc. ("Defendant's First Reply Memorandum") (Docket No. 712), at 3-6; failing to argue that resentment of his acquittal by his alleged co-conspirators was a viable subject of cross-examination when they testified (making it necessary that the jury be informed of his acquittal), failing to maintain contact with the defendant during the appeal process, and allowing "re-litigation of the 'Miss Molly' from the original indictment on Count II," Petitioner's Answer to Government's Supplemental Response to Motion to Vacate, etc. (Docket No. 720) ¶¶ 2, 5, 9. Claims raised for the first time in a reply memorandum will not be considered by the court. *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 7 (1st Cir. 1995).

Circuit, *Morris*, 99 F.3d at 479-80, and may not be relitigated in a section 2255 action, *United States v. Michaud*, 901 F.2d 5, 6 (1st Cir. 1990).

Further, the government contends that the decision not to contest bifurcation was "obviously a matter of strategy for Smith's defense," Government's Response to Motion to Vacate, Set Aside or Correct Sentence, etc. ("Government's Response") (Docket No. 709) at 46. Here, the defendant has failed to overcome the presumption that, under the circumstances, this decision might be considered sound trial strategy, *Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993), particularly given the fact that he was acquitted on the first two counts at the first trial. Indeed, the decision whether to seek or oppose bifurcation of trial is inherently a strategic decision.

2. Materials needed to prepare petition for writ of certiorari.

The government correctly points out that the defendant has not identified the materials that he contends his counsel withheld from him at the time he was preparing a petition for a writ of certiorari to the Supreme Court nor has he suggested that the Supreme Court would have granted the writ and considered his appeal if any specific materials had been promptly made available by the counsel who represented him at trial and in the appeal to the First Circuit. For both reasons, this argument is insufficient to entitle the defendant to relief under section 2255. *David*, 134 F.3d at 478 (vague and conclusory allegations insufficient); *Argencourt*, 78 F.3d at 16 (defendant must show reasonable probability of different outcome).

3. Issues defendant requested counsel to argue.

The allegation that "neglection [sic] of clear paths pointed out for the defense to follow, rendered defendant's representation well outside of the Range of Competence required by the 5th and 6th Amendments of The United States Constitution," First Petition, Supplemental Sheet at 1,

is another conclusory allegation that cannot provide the basis for relief under section 2255.[3] If the defendant means to argue that his lawyers did not argue every claim that he wanted them to advance, a lawyer does not have a duty to raise every non-frivolous claim urged by his client, *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (Sixth Amendment assistance-of-counsel case), and may ignore frivolous claims pressed by his client, *United States v. Hart*, 933 F.2d 80, 83 (1st Cir. 1991). Here, it is not possible to determine whether the unspecified "clear paths" were claims and, if so, whether those claims were frivolous. It is possible that the "clear paths" are something other than issues or claims that the defendant believes his lawyers should have raised.[4] In any event, the failure of defendant to specify the allegedly neglectful acts or omissions of his lawyers makes it impossible to conclude that the outcome of his trial or appeal would have been different but for that neglect.

4. Preparation for arguments.

The defendant's claim that his counsel failed to prepare for argument also lacks the specificity necessary to provide the basis for a claim of ineffective assistance of counsel. In the absence of any indication of which arguments and motions or issues were involved, it is impossible to determine whether the defendant was prejudiced by the alleged lapses.[5]

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[3] A claim of constitutionally insufficient assistance of counsel invokes the Sixth Amendment. *See, e.g., Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999). The defendant's claim under the Fifth Amendment concerns the indictment, which will be discussed below.

[4] The defendant does state that one "clear path[] would have led to the rebuttal of new witnesses such as David Beal." Defendant's Memorandum at 26. In the absence of any indication of how this rebuttal would have been accomplished, this allegation is not sufficiently specific to provide a basis for section 2255 relief.

[5] To the extent that the defendant's claims concerning this issue and the preceding issue are based on argument found in the government's memoranda of law, Defendant's Memorandum at 8, or advanced orally by the prosecutor, *id*. at 12, zealous advocacy by opposing counsel does not (continued...)

5. Conflict of interest.

It is difficult to discern the nature of the conflict of interest alleged by the defendant to have affected his counsel. The defendant appears to suggest that conflicts of interest followed from his counsel's other alleged failings, First Petition Supplemental Sheet at 1, but that claim fails on two grounds. First, the defendant has failed to establish that any of the other alleged failings of his counsel provide grounds for relief under section 2255, so there can be no basis for relief if those allegations are aggregated. Second, the defendant has again made no showing of the manner in which the alleged conflicts of interest, if they existed, caused him prejudice within the meaning of *Strickland*.

The defendant also suggests that the alleged conflict of interest arose after he became unable to pay his lawyers. *Id*.; Defendant's Memorandum at 26. The defendant has identified a possible cause of what he believes to have been a marked change in the quality of the representation provided to him by his counsel; that conclusion does not mean, however, that the quality of that representation necessarily fell below a constitutionally acceptable level. A lawyer who is no longer being paid by a client does not thereby acquire a conflict of interest that prevents him or her from continuing to represent that client or otherwise automatically causes harm to the client. *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (defendant does not establish constitutional predicate for ineffective assistance claim until he shows that his counsel "actively represented conflicting interests");*United States v. Rodriguez Rodriguez*, 929 F.2d 747, 751 (1st Cir. 1991) (in order to establish actual conflict of interest with adverse effect on representation, defendant must demonstrate both some plausible

[5](...continued)
constitute evidence of constitutionally deficient representation. Argument is not evidence for this purpose.

alternative defense strategy or tactic that might have been pursued and that this alternative was inherently in conflict with or not undertaken due to attorney's other loyalties or interests).[6]

6. Constructive amendment of the indictment.

The defendant contends that his attorneys failed to object "to the government's intention of presenting legitimate sources of income at trial on Count III, allowing a constructive amendment of the indictment," and that they failed to raise this issue on appeal from this court's denial of his motion to dismiss count III after his acquittal on counts I and II of the indictment. Defendant's Memorandum at 9, 13. In fact, the defendant's counsel did make an objection on this basis prior to the trial on count III. *United States v. Morris*, 914 F. Supp. 637, 642 (D. Me. 1996). The defendant's first contention accordingly need not be accepted as true, because it is contradicted by the record. There is no indication in the First Circuit's opinion denying the appeal from this court's decision on the motion to dismiss that the defendant's counsel raised this issue on appeal, but such an action would have been a fruitless effort. This court found that the issue was prematurely raised and could not be considered unless and until the challenged evidence was offered at trial, or by motion *in limine* prior to trial. *Id*. at 642-43. Neither trial nor the filing of motions *in limine* had taken place before the defendant appealed from the denial of his motion to dismiss. The First Circuit will not consider an issue that is not ripe. *See, e.g., United States v. Marino*, 200 F.3d 6, 12 (1st Cir. 1999). Accordingly, any attempt by the defendant's lawyers to raise this issue in that appeal would have been ineffective. Defense counsel are not required to make futile arguments. *Isabel v. United*

[6] If the defendant means to suggest that his counsel had a conflict of interest at the time of his direct appeal, *see* Petitioner's Answer to Government's Response, etc. (Docket No. 712) at 2, because they could not be expected to argue their own ineffectiveness at trial, ineffective assistance of counsel is an issue that the First Circuit ordinarily will not address on direct appeal, *United States v. Ademaj*, 170 F.3d 58, 64 (1st Cir. 1999), so no such conflict existed.

States, 980 F.2d 60, 65 (1st Cir. 1992). Accordingly, the defendant's second "constructive amendment" contention provides no basis for section 2255 relief.

7. "Spillover" evidence.

The defendant next faults his lawyers for allegedly failing to file a motion before the start of the second trial to restrict the use of evidence that had been used at the first trial. Defendant's Memorandum at 8-9, 25. However, as the government points out, this issue was decided against the defendant by the First Circuit before the second trial started, *Morris*, 99 F.3d at 479-80, and therefore cannot be relitigated here, *Michaud*, 901 F.2d at 6. Any attempt by the defendant's lawyers to file such a motion in this court would have been futile. *United States v. Wright*, 573 F.2d 681, 684 (1st Cir. 1978) (defense counsel not required to make frivolous motions).

8. Refusal to subpoena witnesses.

The defendant's entire allegation against his counsel on this point is that "[t]hey refused to subpoena witnesses." Defendant's Memorandum at 26. This conclusory allegation cannot serve as the basis for section 2255 relief. The defendant must, at a minimum, identify the witnesses at issue, show that they were available to testify and what their testimony would have been, and demonstrate how their testimony would have changed the outcome of the trial. The defendant's consolidated motions provide none of this information. *See, e.g., 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.").

9. Failure to raise sufficiency of the evidence as an issue on appeal.

Defense counsel's performance does not fall below constitutionally acceptable levels if he or she does not make an implausible argument. *Isabel*, 980 F.2d at 65. The act of "laundering"

money derived as profits from drug trafficking constitutes impeding the IRS in its ability to collect taxes. *United States v. Tarvers*, 833 F.3d 1068, 1075 (1st Cir. 1987). The government need not prove that the defendant understood the tax consequences of his actions or that the primary goal of the conspirators was to evade taxes. *Id*. Evidence of participation in a conspiracy under 18 U.S.C. § 371 includes failure to file personal tax returns and repayment of loans with the proceeds of drug sales. *Id*. at 1076. The government may prove a tacit agreement under section 371 circumstantially through evidence of joint actions. *United States v. Hurley*, 957 F.2d 1, 4 n.2 (1st Cir. 1992). If the government's evidence demonstrated that the defendant knew that he was receiving income from illegal drug proceeds, the jury would have had a circumstantial basis to infer that the defendant — by his own testimony an experienced businessman — understood that he and his co-conspirators were conducting business in an unorthodox manner in order to conceal their criminal conduct and avoid paying taxes on their profits. *Id*. at 5. A review of the transcript of the second trial reveals that this is just what the evidence showed in this case. In addition, evidence very similar to that presented against the defendant here was found sufficient in *United States v. Paiva*, 892 F.2d 148, 161-62 (1st Cir. 1989). Any appeal on the basis of insufficiency of the evidence would have been futile, and the failure of the defendant's lawyers to raise this issue accordingly cannot constitute ineffective assistance of counsel for purposes of section 2255.

B. Constructive Amendment of the Indictment

The defendant argues at considerable length that the government presented evidence outside the scope of the crime with which he was charged in the indictment and that this allowed him to be convicted of a crime with which he was not charged. First Petition, Supplemental Sheet at 1; Defendant's Memorandum at 9-16. Specifically, he contends that he was not charged with

conspiracy to defraud the Internal Revenue Service by failing to report legitimate sources of income, but only income from the distribution of marijuana and that the government introduced evidence of unreported income from legitimate sources at his second trial. Defendant's Memorandum at 10. The government responds that the only evidence concerning legitimate sources of the defendant's income introduced at trial was offered by the defendant, but that response misses one important, albeit erroneous, aspect of the defendant's argument. The defendant's initial claim is that his acquittal on the drug conspiracy charge rendered any and all income that he might have derived from the drug trafficking involved in count I legitimate income for purposes of the tax conspiracy. That leap of logic goes too far.

First, it is important to note the actual language of the applicable indictment, which is not as limited as the defendant suggests.

> Commencing in or about 1986 and continuing to in or about April 1994, in the District of Maine and elsewhere, the defendants . . . [including] Stuart L. Smith . . . did knowingly, willfully, and intentionally combine, conspire, confederate, and agree, together and with others both known and unknown to the grand jury, to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department, an agency of the United States, in the ascertainment, computation, assessment, and collection of federal income taxes.

Superseding Indictment (Docket No. 32), Count III at 15-16. The indictment goes on to list activities in furtherance of the conspiracy, which included "but were not limited to" eight specific activities, six of which are described to include distribution of marijuana, and 28 paragraphs setting forth overt acts. *Id*. at 16-29. Given the language of the indictment, it is not at all clear that failure to report "legitimate" income could not serve as a predicate for liability. However, the government does not make this argument and the defendant's claim fails for other reasons as well.

The defendant attempts to make the "not guilty" verdict on the drug conspiracy count bear far too much weight. Contrary to the assumption central to his argument, acquittal on that charge did not mean that any income he might have obtained from the activities that were the subject of the charge was "legitimate." The jury found that the government had not proved beyond a reasonable doubt that the defendant had engaged in a conspiracy to distribute in excess of 1,000 kilograms of marijuana. Superseding Indictment at 1. That does not, and cannot, mean that any income that the defendant might have derived from the distribution of marijuana was "legitimate" and beyond the scope of an indictment that charged him with conspiracy to conceal that income from the Internal Revenue Service. To construe the jury's verdict as the defendant urges would be, in effect, to apply the doctrine of collateral estoppel, which the First Circuit has already ruled is unavailable to the defendant in this case. *Morris*, 99 F.3d at 481-83 (jury could have acquitted a defendant in the first trial whose only involvement was to launder the funds generated by operation of the drug conspiracy). The defendant was charged with conspiring to defraud the Internal Revenue Service by failing to report income earned by, *inter alia*, distributing marijuana. The government presented evidence of those elements at trial. *Smith*, 145 F.3d at 460. Nothing about the outcome of the first trial changes the nature of that evidence.

With the appropriate nature of the evidence concerning the defendant's income from the distribution of marijuana in mind, it appears that the only evidence of income from other sources that was presented at trial was submitted by the defendant. *Id*. The defendant offers no citation to the transcript of the tax conspiracy trial to support his allegation that the government introduced any evidence concerning his income from sources other than the marijuana operation. The government represents that it has found no such instance in its own review of the trial transcript. Government's

Response at 42. Evidence introduced by the defendant himself cannot serve to justify relief on the basis of a claim of improper amendment of the charging instrument. *See United States v. Pelose*, 538 F.2d 41, 45 (2d Cir. 1976).

In order to show that a violation of the Fifth Amendment has occurred due to conviction for an offense not charged in an indictment, a defendant must demonstrate that the indictment cannot be fairly said to give him notice of the nature and cause of the accusation. *United States v. Santa-Manzano*, 842 F.2d 1, 2-3 (1st Cir. 1988). The evidence presented at trial in this case, properly viewed, did not deviate so far from the charge that a constructive amendment of that charge was necessary in order for the jury to convict the defendant. *See generally United States v. Glenn*, 828 F.2d 855, 858-60 (1st Cir. 1987) (describing fatal variances between indictment and evidence).

C. Prosecutorial Misconduct

The defendant asserts that the prosecutor

> stepped outside the bounds of "fair play" from pre-trial proceedings through Trial I and into Trial II. Evidence was misrepresented by [the prosecutor] at Trial I (Count I & II). At Trial II he covered up this action by coaching Agt. Haffe [sic] to recant his Grand Jury & Trial I Testimony attempting to exonerate his manipulation of the Evidence.

First Petition, Supplemental Sheet at 1. He also contends that the prosecutor "planted a drug list on the petitioner through Special Agent Haffe [sic]" and that the government took him to trial on count III out of vindictiveness and rage after his acquittal on the first two counts. Defendant's Memorandum at 24-25.

Without more, this presentation is insufficient to support section 2255 relief. The defendant has made no attempt to show that the "drug list" was even mentioned at the second trial, much less that it had a determinative effect on the outcome. Similarly, there is no showing that Agent Haff's

"recanting" of earlier testimony, if in fact it occurred, had any effect on the outcome of the second trial. Indeed, the defendant's own testimony at the second trial is the only mention of any attempt by Haff to "plant" anything on the defendant. Trial Transcript, Volume III ("Tr. III") (Docket No. 606) at 1241. There is nothing in the record beyond the defendant's unsupported allegation that this attempt was made at the direction of the prosecutor. This conclusory statement cannot provide the basis for relief under section 2255. *David*, 134 F.3d at 477-78. Similarly, the defendant fails to identify the evidence that he alleges the prosecutor "misrepresented" at his second trial. In addition, actions of the prosecutor at the first trial, where the defendant was acquitted, cannot provide the basis for relief from a sentence imposed as a result of the second trial.

A defendant may show vindictive prosecution in two ways:

> First, a defendant may produce evidence of *actual* vindictiveness sufficient to show a due process violation. Alternatively, a defendant may convince a court that the circumstances show there is sufficient "likelihood of vindictiveness" to warrant a presumption of vindictiveness. If so, the prosecutor bears the burden of rebutting that presumption by showing objective reasons for the additional charge that were not present when the original charge was brought.

United States v. Marrapese, 826 F.2d 145, 147 (1st Cir. 1987) (emphasis in original; citations and internal punctuation omitted). Here, the defendant offers no evidence of actual vindictiveness, arguing only that "it is highly unlikely" that he would have been tried on count III if he had been found guilty on counts I and II, the "government was noticeably disturbed" by his acquittal at the first trial, the second trial "was totally based on information presented and learned at the first trial," the evidence offered by the government at the second trial "strayed so far from" the indictment, and the government proceeded against the defendant on count III "in somewhat of a blind rage seeking only to obtain a conviction." Defendant's Memorandum at 25.

As the First Circuit determined, there was nothing wrong as a matter of law with the use in the second trial of evidence presented at the first trial. *Morris*, 99 F.3d at 479-80. I have already concluded that the evidence offered at the second trial by the government did not stray so far from the indictment as to constructively amend it. The defendant's remaining allegations of vindictiveness are purely speculative and cannot serve to establish circumstances that would allow a presumption of vindictiveness to arise. This is particularly true in this case where the defendant was indicted on the charge upon which the allegation of vindictive prosecution is based at the same time he was indicted on the charges on which he was acquitted and the bifurcation of trial on those charges did not occur at the government's request.[7]

D. Witness Confrontation

The defendant contends that the trial court denied him his constitutional right to confront the witnesses against him by refusing to allow him to mention on cross-examination of his alleged co-conspirators that he had been acquitted of the drug conspiracy charges to which they had pleaded guilty. He asserts that these individuals were "facing up to 10 years in jail and forfeiture's [sic] of their homes . . . hence jealousy and envy, these are strong motivators to provide false testimony." First Petition, Supplemental Sheet at 2. This issue was raised in the defendant's direct appeal, *Smith*, 145 F.3d at 459, and decided against him, *id*. at 462-63. He may not relitigate this issue under section 2255. *Michaud*, 901 F.2d at 6.

[7] To the extent that the defendant argues that his counsel's failure to "pursue or even consider arguing against" certain aspects of what he has alleged to be prosecutorial misconduct constitutes constitutionally deficient assistance of counsel, Defendant's Memorandum at 24-25, his failure to demonstrate that any such misconduct occurred or affected the outcome of the trial means that any such claim of ineffective assistance of counsel must fail as well.

E. Sufficiency of the Evidence

The defendant next turns his attention to the evidence presented at the second trial, asserting that there was insufficient evidence of an overt act, intent to defraud the Internal Revenue Service, or of a common objective among the co-conspirators to allow the jury to convict him. First Petition, Supplemental Sheet at 2. He contends that there could not have been an agreement not to pay income taxes on the marijuana proceeds because certain alleged co-conspirators did pay taxes "[a]s supported by the record," and that there was no evidence of his intent to evade taxes. Defendant's Memorandum at 17, 23.[8]

The government correctly points out that this claim is procedurally defaulted. The defendant did not raise this issue in his direct appeal. *Smith*, 145 F.2d at 459-60. When insufficiency of the evidence is raised as an issue in a section 2255 petition, and the defendant did not raise that issue on direct appeal, he must show cause and prejudice for that failure. *Santoro v. United States*, 187 F.3d 14, 17 (1st Cir. 1999); *see also Bousley v. United States*, 523 U.S. 614, 621-22 (1998). The defendant here has made no attempt to show cause or prejudice, even after the government made this deficiency in his petition known to him in its response. Government's Response at 48. Accordingly, he is not entitled to section 2255 relief on this basis.

F. Jury Instructions

The defendant attacks the instructions given by the court to the jury at his second trial, contending that

> [t]he Court[']s Instructions when taken as a whole, resulted in an

[8] The defendant also suggests that his trial counsel was constitutionally deficient by failing to assert insufficiency of the evidence. First Petition, Supplemental Sheet at 2. To the contrary, defense counsel did move for a directed verdict on this ground at trial. Tr. III at 891.

> incomplete story for presentation to the jury. . . . The court's decisions left a black hole for the jury to be drawn into allowing the government to provide specific parts of a story and not allowing the defense to properly examine the allegations. This resulted in an unfair trial, with prejudicial results.

First Petition, Supplemental Sheet at 2. This conclusory statement, with no suggestion of how the jury should have been instructed in order to remedy the alleged prejudice, is insufficient to provide a basis for section 2255 relief. *David*, 134 F.3d at 477-78. It is not even possible to tell whether the decisions to which the defendant refers are decisions concerning jury instructions or something else altogether.

G. Grand Jury

Finally, the defendant contends that the grand jury proceedings, presumably those which led to the superceding indictment on which he was tried, "may have been deficient." First Petition at 6. He "requests access to the preliminary proceedings for exploration of the government's actions from jury selection to final presentation," apparently because the prosecutor "time and time again has been found [In court records] to miss-represent factual circumstances to the court and others." *Id*., Supplemental Sheet at 2. In a confusing passage in his memorandum, he adds:

> The record *did not* reveal how the marijuana conspiracy charged in Count I supported the tax conspiracy charged in Count III, or vice versa; nor did it indicate that petitioner thought the two separate actions were interdependent — where success of one might facilitate completion of the other. The evidence used in the grand jury therefore was *erroneous*, and could not have possibly shown that petitioner expressly or tacitly agreed to do more than transport, store, and distribute marijuana. Variance between tax conspiracy charged in Count III, and petitioner's own understanding of conspiracy was sufficiently serious enough to warrant a *dismissal* of indictment.

Defendant's Memorandum at 16-17 (emphasis in original; citations omitted). If the defendant means

to direct this argument to his claim that the grand jury proceedings may have been deficient in some way, it misses the mark. Proof of count III of the indictment was not dependent upon proof of count I, and what the defendant may have thought about conspiracy in general or the charges specifically is irrelevant to the task of a grand jury.[9]

Assuming *arguendo* that the pending motion is the appropriate means to obtain access to grand jury proceedings, disclosure may be ordered only upon a showing that the records would provide possible grounds for dismissal of the indictment. *United States v. Llaca Orbiz*, 513 F.2d 816, 818-19 (1st Cir. 1975). A mere allegation of the possible existence of an irregularity, without some showing of the likelihood of that irregularity, is insufficient to overcome the strong presumption of regularity accorded to the findings of grand juries. *Id.*; *United States v. West*, 549 F.2d 545, 554 (8th Cir. 1977). A desire "to conduct broad-scale discovery in hopes of establishing [a] claim" in the context of a section 2255 motion is "a fishing expedition" that the court need not allow; lacking proof, the defendant's allegations here are based merely on speculation, and he is not entitled to the relief he seeks. *DeVincent v. United States*, 632 F.2d 145, 146 (1st Cir. 1980). *See also United States v. Latorre*, 922 F.2d 1, 7 (1st Cir. 1990) (indictment not subject to challenge on ground that grand jury acted on basis of inadequate or incompetent evidence); *Porcaro v. United States*, 784 F.2d 38, 43 (1st Cir. 1986) (objections to composition of grand jury must be filed before trial; absent cause and prejudice cannot be challenged for first time in § 2255 motion). The defendant here presents nothing more than a desire to conduct discovery in the hope of establishing

[9] Again, the defendant attempts to add a specific claim on this subject through a reply memorandum, arguing that "[t]here can be no tacit agreement 'not to file', as that is a given right of each and every citizen." Defendant's First Reply Memorandum at 8. This court will not consider that argument, although I note that it is an incorrect statement of the law. 26 U.S.C. § 1.

a claim. He is not entitled to relief on this ground.

IV. 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 18th day of April, 2000.

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David M. Cohen
United States Magistrate Judge

[For the government: F. Mark Terison, AUSA; defendant appeared *pro se*.]