UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 96-21-B***
	)	***(Civil No. 98-204-B)***
IRA W. DAMON, III,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF PURSUANT TO 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. A sentence of 84 months was initially imposed after he pleaded guilty to a charge of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Judgment (Docket No. 30) at 1-2. A sentence of 50 months was imposed following a successful appeal. *United States v. Damon*, 127 F.3d 139, 148 (1st Cir. 1997); Correction or Reduction of Judgment (Docket No. 61) at 1-2. The defendant now contends that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution during his plea negotiations, plea, and appeal; that the government breached the plea agreement; and that he was deprived of due process of law when the court "rejected his plea agreement, without allowing [him] to withdraw his guilty plea or to plea anew."[1] Petition Under 28 USC § 2255 to Vacate, Set Aside,

[1] The defendant raises additional claims, specifically that the government violated his rights under the Fifth and Sixth Amendments during plea negotiations and that the government failed to file a motion under section 5K1.1 of the United States Sentencing Commission Guidelines (continued...)

or Correct Sentence by a Person in Federal Custody ("Motion") (Docket No. 74) at 9[s].[2]

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) (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

As the First Circuit noted in its decision on the defendant's direct appeal of his initial sentence,

> Ira Damon was stopped while driving his car on February 28, 1996

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[1](...continued)
("U.S.S.G.") "based on unconstitutional motives," in his Rebuttal to Government's Response to Writ of Habeas Corpus 28 USC 2255 ("Defendant's Reply") (Docket No. 82), at 13-21. Issues raised for the first time in a reply memorandum will not be considered by the court. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

[2] The defendant's motion is submitted on a standard form which has seven numbered pages. The defendant has inserted, in lieu of page 5 of that form, a document entitled "Motion for Findings of Facts Pursuant to FRCP Cr 32 and Modification of Sentence Pursuant to 28 U.S.C. Code Section 2255" with pages numbered 1 through 13. I will refer to the pages of this supplemental document with the numbers 1[s]-13[s]. Fed. R. Cr. P. 32, which governs criminal sentencing and entry of judgment, does not specifically provide for findings of fact, but such findings are included in the court's Memorandum of Resentencing Judgment (Docket No. 56), and on the record at the defendant's first sentencing, Transcript of Proceedings, Presentence Conference & Sentencing Hearing ("Tr. II") (Docket No. 35) at 96-97. The body of the defendant's motion seeks only relief that is compatible with section 2255 and does not specify what relief he seeks under the rule. Therefore, I will not address further any matters other than the claims under section 2255.

> by officer Brent Beaulieu of the Newport, Maine police. Beaulieu patted-down Damon and found pistol and shotgun ammunition in Damon's pockets. Damon's car held a shotgun, a pistol, two rifles, and a loaded clip of pistol ammunition.
>
> Damon pled guilty to the federal charge of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On December 6, 1996 the district court sentenced Damon, inter alia, to 84 months in prison.
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> * * *
>
> In this appeal, Damon primarily argues that his prior conviction for criminal mischief should not have been classified as a "crime of violence," that the court should not have awarded him additional criminal history points for related offenses, and that the court erred in determining that he was under a criminal justice sentence at the time of his arrest. We conclude that Damon's first argument has merit, unlike the second and third.

Damon, 127 F.3d at 140-41. An appeal following the resentencing was unsuccessful. Judgment [of the First Circuit Court of Appeals] (Docket No. 73).

The defendant was represented by four attorneys, successively, between his arrest and his second appeal.

II. Discussion

Because the motion raises only two discrete claims concerning alleged constitutional violations by the government and the court, as opposed to ten claims concerning the alleged ineffective assistance of the attorneys who represented the defendant, I will first address the claims that are not based on the performance of counsel.

A. Breach of the Plea Agreement

The defendant contends that "the government breached its plea agreement in that the government refused to disclose information contained in the agreement to his attorney's [sic]." Motion at 8[s]. Specifically, he contends that information he supplied to the government at a

meeting on June 6, 1996 was not provided to two attorneys who subsequently represented him, despite their requests for it. *Id.* at 9[s]. He identifies the following language in the plea agreement as that which was breached under these circumstances: "The United States Attorney's Office agrees to confirm defendant's cooperation to any individual or entity to whom defendant wishes confirmation to be given." Defendant's Reply at 11 (quoting Amended Agreement to Plead Guilty and Cooperate, Docket No. 9, at ¶ 11).

The defendant does not make clear how this alleged failure resulted in the imposition of a sentence that violates the Constitution or laws of the United States, or otherwise meets the requirements of section 2255, other than a conclusory assertion that the denial of his attorneys' requests for such information "caus[ed] [his] sentence to be increased." Motion at 9[s]. Even assuming *arguendo* that such a connection could be established, however, the language of the plea agreement requires the government to do nothing more than to state, in response to an inquiry made with the defendant's approval, that he provided cooperation to the government. The language does not require the government to produce its notes, if any, of an interview in which the defendant provided information to the government in accordance with his agreement to cooperate to the defendant's attorneys, or to repeat the information so provided to his attorneys, or indeed to anyone authorized by the defendant to ask. The plea agreement also provides that "Defendant understands that the United States has made no promises or agreements other than those in this Agreement, and that none will be made except in writing signed by all parties." Amended Agreement to Plead Guilty and Cooperate ¶ 19. The existence of promises not expressly articulated or necessarily implied in plea agreements may not be inferred, particularly when the agreement specifically denies the existence of any agreements other than those explicitly set forth. *United States v. Doyle*, 981 F.2d

591, 594 & n.3 (1st Cir. 1992).

The defendant is not entitled to relief on this claim.

B. Rejection of Guilty Plea

The defendant contends that the court rejected the plea agreement at his initial sentencing, failed to advise him of his rights under the circumstances, failed to explain his rights to him fully, and wrongfully denied him the opportunity to withdraw his guilty plea. Motion at 9[s]-10[s]. To the extent that this claim rests on a rejection of the plea agreement by the court, it is refuted by the record. The transcript of the hearing conducted when the defendant entered his plea establishes only that the court expressed concern that the original plea agreement included a waiver of the defendant's right to appeal any sentence imposed and to pursue a section 2255 claim for collateral relief without any corresponding consideration. Transcript of Proceedings, Hearing on Change of Plea ("Tr. I") (Docket No. 18) at 10-11. Those portions of the plea agreement were removed by agreement of the parties. *Id*. at 11. The court stated that it would "reserve decision on acceptance of the plea agreement, and . . . would appreciate that an amended plea agreement be filed with the court reflecting our discussion on the waiver." *Id*. at 14-15. The court was required to reserve decision on the government's nonbinding sentence recommendation pursuant to the original plea agreement then before the court, Agreement to Plead Guilty and Cooperate (Docket No. 7) ¶ 3, by U.S.S.G. § 6B1.1(b). The court informed the defendant that he would not be entitled to withdraw his plea once the court accepted it, as required by U.S.S.G. § 6B1.1(b), and it accepted the plea. Tr. I at 13-14.

An amended plea agreement was filed two days later. Docket No. 9. The defendant filed a motion to withdraw his plea, Docket No. 14, which was rejected by the court, Docket No. 20. The court sentenced the defendant several months later. Tr. II at 1. The defendant filed a successful

appeal of his sentence and has now filed the instant motion for section 2255 relief. Under these circumstances, where the court's action resulted in the defendant retaining rights that he had been prepared to give up as a result of his plea negotiations, the defendant certainly was not deprived of any due process rights. Nor can it be said that the court rejected the plea agreement. Even if the court had rejected the agreement, however, the defendant would not have been entitled to withdraw his guilty plea because the sentencing recommendation portion of the written agreement was explicitly made pursuant to Fed. R. Crim. P. 11(e)(1)(B), in Paragraph 3 of the Amended Agreement to Plead Guilty and Cooperate. *United States v. Noriega-Millán*, 110 F.3d 162, 164 (1st Cir. 1997) ("Rule 11(e)(1)(B) agreements [to plead guilty] cannot be withdrawn if the court chooses to reject the terms of the agreement.").

To the extent that the defendant relies on the alleged failure of the court to explain his rights to him at the initial sentencing hearing, that contention is belied by the record.[3] The defendant was informed that by pleading guilty he was giving up his rights to a trial before the court or a jury, the presumption of innocence, to confront and cross-examine witnesses, to present witnesses in his own behalf (including himself), to challenge any pre-trial rulings, and to appeal from the conviction. Tr. I at 4-6. The court addressed all of the elements of Fed. R. Crim. P. 11(c), (d) & (f). In his reply memorandum, the defendant suggests that the court was required to inform him of the elements and nature of the charge, despite the assurances given to the court by the defendant and his attorney that

[3] The defendant also argues that the transcript of this proceeding is inaccurate and requests a copy of the "audio tape" of the hearing. Defendant's Reply at 12. The hearing was recorded and transcribed by a court reporter, whose certified transcript provides the official record of the hearing. This court does not maintain any form of the official record other than the transcript produced by the court reporter. "The transcript in any case certified by the reporter . . . shall be deemed prima facie a correct statement of the testimony taken and proceedings had." 28 U.S.C. § 753(b).

he had been so informed by his attorney, Tr. I at 3, and specifically that the court was required to inform him "of the meaning of the addition of a 924(A)(2) or the 2255 waiver" and that "he had to know the serial numbers had been removed to establish a need [sic] element" with respect to sentencing. Defendant's Reply at 7. To the contrary, the court's Rule 11 colloquy was sufficient. *See United States v. Marrero-Rivera*, 124 F.3d 342, 350 (1st Cir. 1997).

Indeed, two of the three items of specific information listed by the defendant are erroneous and the absence of the third could not have affected his sentence. The waiver of the right to bring a motion pursuant to section 2255 was removed from the plea agreement before the defendant was sentenced and thus had no bearing on his sentence. The "924(A)(2)" is apparently a reference to 18 U.S.C. § 924(a)(2), which provides penalties for violation of 18 U.S.C. § 922(a)(6), (d), (g), (h), (j), or (o). The defendant was charged with violation of 18 U.S.C. § 922(g)(1). Indictment (Docket No. 2). Section 924 provides the only penalties for such violations. It is unclear how anything could have been "added" by reference at the plea hearing to the statutory penalty for the crime with which the defendant was charged.[4] In any event, the defendant could not have been harmed thereby. Knowledge that the serial number had been obliterated from the firearm in question is not an element of the sentencing enhancement factor, U.S.S.G. § 2K2.1, application note 19 ("The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number

[4] The government suggests that the defendant means to refer to 18 U.S.C. § 924(e)(1), which provides a mandatory minimum prison term under certain conditions. Government's Response to Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C. Section 2255 ("Government's Response") (Docket No. 80) at 26. If that is in fact the case, that statutory section was not applied to the defendant by the court, and no section 2255 issue exists. The defendant's reply suggests that his citation of section 924(a)(2) is meant to refer to a sentence enhancement for a past violent crime. Defendant's Reply at 9. This issue was resolved in the defendant's favor on his first appeal, *Damon*, 127 F.3d at 141-48, and accordingly cannot have affected his current sentence, which is the only subject of the pending motion.

applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."); *United States v. Abernathy*, 83 F.3d 17, 19 (1st Cir. 1996), so any information provided by the court to the contrary would have been erroneous.

The defendant is not entitled to relief on the basis of any claimed errors by the court.

C. Ineffective 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.* 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's specific claims concerning the performance of his counsel will be discussed in the order in which he presents them.

1. "Double Counting." The defendant contends that his counsel at the time of sentencing and on appeal provided constitutionally deficient assistance by failing to argue that the Presentence Investigation Report ("PSI") at paragraphs 13-15 impermissibly counted a single offense twice, resulting in an offense level under the sentencing guidelines that was two levels higher than it should have been. Motion at 3[s]-4[s]. He refers to U.S.S.G. § 2K2.1(a)(4)(A) as the basis for the allegedly erroneous offense level calculation. *Id*. at 4[s]. However, the sentence the defendant is presently serving was not imposed pursuant to that section of the Guidelines. The sentence imposed after remand from the First Circuit was imposed under U.S.S.G. § 2K2.1(a)(6).

It is not possible to discern from the defendant's submissions whether the alleged double counting involved the enhancement under U.S.S.G. § 2K2.1(b)(4) for an obliterated serial number, or the state criminal mischief conviction, or even whether it occurred in connection with the second sentencing, which produced the only sentence at issue in this proceeding. In either case, I do not see how any double counting could have occurred.[5] Accordingly, this argument and the defendant's additional argument that his appellate counsel fell below the Sixth Amendment standard by failing to raise this issue on appeal of his first sentence can only be considered to lack the necessary specificity to require the court to consider them further. *See United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993).

2. The Gun's Serial Number. The defendant contends that he was deprived of the effective

[5] The government argues that "Damon's lawyer . . . raised this issue" in his objections to the PSI, Government's Response at 18, but its reference to the record ("Objections at 5-6") does not direct the court to any document filed by defense counsel in connection with the second sentencing. The defendant responds that "[t]he defense argued the issue whether the serial number were [sic] in fact obliterated not the issue described" in his claim. Defendant's Reply at 5. This assertion is similarly unhelpful.

assistance of counsel at sentencing and on appeal because his attorney did not argue that the serial number on the gun in question had not been obliterated. Obliteration of the serial number results in a 2-level increase in offense level under U.S.S.G. § 2K2.1(b)(4). He argues that, because an expert witness for the government was able to discern a serial number on the gun after chemical processing, Tr. II at 44-46, the number was not "obliterated." The defendant also sees ineffective assistance in the failure of his attorney to request that the court define the term "obliterated" as it is used in the guideline. The defendant's attorney did in fact assert this argument more than once before sentencing. *E.g.*, Defendant's Memorandum in Aid of Sentencing ("Sentencing Mem.") (Docket No. 22) at [2], ¶ 15; Tr. II at 47-49. Even if he had not done so, however, there would be no basis for finding a Sixth Amendment violation. The defendant's interpretation deprives the guideline of any meaning. If a serial number can only be considered "obliterated" if its former visible presence cannot be detected by any means, no firearm could have an obliterated serial number because it would not be possible to differentiate between firearms whose numbers had been removed and those that never had a serial number. Similarly, there could be no offense level enhancement when the serial number had been deliberately removed and made invisible to the naked eye, but could be resurrected chemically or by other means. That is precisely the conduct that the guideline was meant to address. Any "definition" of the term that the court might have given if requested by the defendant's attorney would not have made any difference in the outcome. An appeal based on the defendant's interpretation would be subject to summary dismissal.[6] Counsel who does not undertake

[6] The defendant refers in this section of his motion to 18 U.S.C. § 922(k). Motion at 5[s]. That subsection of the statute makes it unlawful for a person knowingly to transport or receive a firearm which has had the serial number removed. The defendant was not charged with violation of that subsection of the statute, and its "knowing" element has no application or relevance to the (continued...)

a futile exercise cannot be found to have provided constitutionally deficient assistance. *Carter v. Johnson,* 110 F.3d 1098, 1111 (5th Cir.), *vacated on other grounds* 118 S.Ct. 409 (1997). The defendant is not entitled to relief on the basis of this claim.

3. Criminal History Points. The defendant's next challenge to his counsel's performance concerns the asserted failure to object to assessment of additional criminal history points in the PSI for offenses for which only a fine was imposed upon conviction, specifically paragraphs 26, 37, 38[7] and 42.[8] Motion at 6[s]. As the government points out, the defendant's attorney did object to the assessment of these criminal history points. Sentencing Mem. at [4]-[5]. There is no factual basis for this claim.

4. Motion to Suppress. The defendant contends that his counsel should have filed a motion to suppress the firearm that was the subject of the charge to which he pleaded guilty because it was found in the car he was driving as the result of an illegal, warrantless search. Motion at 6[s]-7[s]. He asserts that the police officer who stopped and arrested him had no probable cause to search the enclosed and locked hatchback area of the vehicle, where the gun was found. Defendant's Reply at

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[6](...continued)
section of the sentencing guidelines that was applied to the defendant after he pleaded guilty to violation of 18 U.S.C. § 922(g).

[7] Contrary to the defendant's argument, it appears that some jail time may have been included in the sentence for the crime listed in paragraph 38 of the PSI. PSI at 10. This discrepancy has no effect on the outcome of the defendant's claim for relief on the basis of the criminal history points assessed in the PSI, however.

[8] In his reply memorandum, the defendant adds to this claim the assertions that his attorneys should have raised this issue on appeal and that his attorney should have complied with his request to contact the state court and request that the charges included in paragraphs 37, 38 and 42 of the PSI be consolidated. Defendant's Reply at 5-6. As noted above, claims raised for the first time in a reply memorandum will not be considered by the court.

6. He cites *Ornelas v. United States*, 517 U.S. 690 (1996), in support of his position. However, *Ornelas* holds only that determinations of reasonable suspicion and probable cause made by a federal district court should be reviewed de novo, rather than under a deferential standard, by a federal appellate court. 517 U.S. at 699. That holding provides no assistance to the defendant here.

The government argues that, once the officer had arrested the defendant, he had the authority to search the passenger compartment of the car, citing *New York v. Belton*, 453 U.S. 454, 460-61 (1981),[9] and the defendant himself, citing *United States v. Robinson*, 414 U.S. 218 (1973). The defendant does not disagree. His contention is that the officer did not have authority to search the enclosed, locked trunk of the car, to which there was no access from the passenger compartment, under the circumstances.[10] Although he does not cite the case, this argument appears to be based on *United States v. Doward*, 41 F.3d 789 (1st Cir. 1994), in which a defendant was arrested after a traffic stop and the arresting officer found a handgun in a suitcase in the hatchback area of the vehicle, which was accessible from the passenger compartment. *Id*. at 791. The First Circuit rejected the defendant's claim that the handgun should be suppressed because the hatch area in which the handgun was found was more akin to an automobile trunk. *Id.* at 793-94.[11] The

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[9] The holding in *Belton* specifically authorizes search of the interior of the passenger compartment of an automobile (including closed containers therein), but not of the automobile's trunk. 453 U.S. at 460 n.4.

[10] The only evidence in the record bearing on the accessibility of the hatchback area from the passenger compartment of the vehicle the defendant was driving comes from the testimony of the defendant's stepson, who was the only passenger in the vehicle at the time it was stopped. Testimony of Patrick Fitzgerald ("Fitzgerald Test."), Tr. II at 33.

[11] Indeed, although the court in *Doward* specifically characterized the hatch area of the vehicle at issue in that case as accessible from the back seat, even though the officer accessed it by unlocking the hatch from outside the vehicle, it held that under *Belton* the only relevant inquiry is (continued...)

government does not address this argument.

The Supreme Court most recently addressed automobile searches in *Pennsylvania v. Labron*, 518 U.S. 938 (1996), where it held, simply and directly: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id*. at 940. *See also United States v. Staula*, 80 F.3d 596, 602 (1st Cir. 1996) (officer may search vehicle without warrant as long as he has probable cause to believe that it contains contraband or other evidence of criminal activity). In *Labron*, the police searched the trunk of the defendant's car without a warrant and found cocaine. 518 U.S. at 939. The probable cause consisted of officers watching the defendant put drugs in the trunk of the car. *Id*. at 940. In this case there is no evidence in the record indicating that the hatch area of the automobile the defendant was driving was generally reachable without exiting the vehicle. The issue, instead, is whether the officer had probable cause to believe that the trunk contained contraband, or, in the alternative, whether the officer's search of the trunk was in the nature of an inventory search.[12]

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[11](...continued)
"whether the area searched is generally 'reachable *without exiting the vehicle*, without regard to the likelihood in the particular case that such a reaching was possible.'" *Id*. at 794 (quoting 3 Wayne R. Lafave, *Search & Seizure: A Treatise on the Fourth Amendment* § 7.1(c), at 16-17 (2d ed. 1987) (emphasis in original)).

[12] The government took the position before sentencing that the arresting officer found the firearm in the trunk during a search incident to arrest. Government's Proposed Facts and Version of Offense, Exh. 1 to Response of the United States to Defendant's Motion and Supporting Memorandum for Withdrawal of Guilty Plea (Docket No. 19), at 1. The Eighth Circuit has suggested that such a search does not violate the Fourth Amendment under similar circumstances. *E.g., United States v. Richards*, 967 F.2d 1189, 1192-93 (8th Cir. 1992) (defendant stopped for traffic violation not entitled to suppression of evidence found in trunk after officer determined that defendant was recently released felon and saw ammunition in plain view in passenger compartment); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir. 1991) (defendant not entitled to suppression of gun found in vehicle where vehicle left empty and running led police to nearby defendant, who had (continued...)

Staula, 80 F.3d at 603.

Here, the officer's unchallenged search of the defendant had found shotgun shells and .45 caliber automatic ammunition in the vest he was wearing, and an unchallenged search of the glove compartment yielded a loaded clip of ammunition for the firearm at issue. Government's Proposed Facts and Version of Offense (Docket No. 8) at 1. The officer had also determined that the defendant had a conditional driver's license and that the license plates on the vehicle he was driving were registered to a different vehicle. *Id.* Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas*, 517 U.S. at 696. The defendant was arrested, but not on the charge at issue here, because the officer discovered that the defendant was a felon only after the arrest. Prosecution Version at 2. I am unable to determine from the record before the court the charge upon which the defendant was arrested, although operating a vehicle under the influence of alcohol appears likely.

In any event, it is not necessary to probe the question of the officer's probable cause further because the facts before the court do establish that the officer's search of the trunk was in the nature of an inventory search. The defendant had been arrested, and the only other occupant of the vehicle, his 18-year-old stepson, testified that he watched the officer remove the firearms from the trunk of the vehicle after the stepson had been instructed to place a telephone call to find someone to give him a ride home. Fitzgerald Test., Tr. II at 33. Accordingly, the vehicle had been taken into the

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[12](...continued)
cocaine and a loaded magazine for the gun). However, *Doward* strongly suggests that the First Circuit would hold otherwise if the area of the vehicle searched incident to the arrest was not within the arrestee's immediate control. 41 F.3d at 792-93.

possession of the police and the firearm at issue was found during an inventory search of the vehicle. There was no Fourth Amendment violation. *Staula*, 80 F.3d at 603. *See generally Colorado v. Bertine*, 479 U.S. 367, 371-75 (1987) (discussing inventory searches).

Because a motion to suppress the firearm as evidence could not have been successful, the defendant has failed to meet the prejudice prong of the *Strickland* test and is not entitled to relief on his Sixth Amendment claim on this basis.

5. Consolidation of state charges. The next basis for his ineffectiveness-of-counsel claim offered by the defendant is an allegation that his attorney failed to obtain consolidation of two state charges so that he could have been assessed one criminal history point instead of two, citing U.S.S.G. § 4A1.2(a)(2), application note 3.[13] Motion at 7[s]. In support of this claim the defendant offers his own Motion to Formally Consolidate Sentences in the two state cases, Exh. 1 to Motion, brought in state court more than two months after the second sentencing in this case, with the state court's endorsement consolidating the sentences in May 1998, *id*. at [3].

The relevant sentencing guidelines provide:

> **§ 4A1.1. Criminal History Category**
>
> The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
>
> (b) Add 2 points for each prior sentence of imprisonment of at

[13] The defendant wisely abandons in his reply memorandum, Defendant's Reply at 6, the contention made in his initial motion that his attorney did not object to the PSI on this basis, Motion at 7[s], because his attorney clearly did so, Sentencing Memorandum at [5]-[6], ¶¶ 45-46. The defendant again attempts to add in his reply memorandum a claim of ineffective assistance based on the failure of counsel to raise this issue on appeal, a claim not asserted in his initial motion and one that, for reasons already noted, will not be considered here.

least sixty days not counted in (a).

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§ A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

(1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

The state sentences at issue were for convictions of aggravated criminal mischief and criminal threatening. Motion at 7[s].

This argument was raised on the merits in the defendant's first appeal and rejected by the First Circuit. *Damon*, 127 F.3d at 146-47. Again, defense counsel's performance does not fall below the requirements of the Sixth Amendment when he fails to undertake a futile exercise. The First Circuit's conclusion that these two offenses "are unrelated for sentencing purposes," *id*. at 147, is dispositive here.

6. "Abandonment" during June 6, 1996 meeting with the government. The defendant next contends that he was deprived of the effective assistance of counsel on June 6, 1996 when his then-attorney "abandoned [him] two hours into a critical stage of pre-trial-sentencing interviews with the government." Motion at 7[s]. He asserts that "[a]t this meeting, the parties were to negotiate a plea agreement." *Id*. at 8[s]. However, the plea agreement had been executed on May 20, 1996. Plea

Agreement[14] at 8. The defendant also contends that, after his attorney left this meeting, the government offered "no actual service of any sentence for [his] information concerning the drug ring," and that his lawyer's absence "resulted in the government reneging on the pro-offer [sic] agreement." Motion at 8[s]. Of course, the original written plea agreement, already in effect at that time and presented to the court the next day, June 7, 1996, Tr. I at 1, did not bind the government to recommend any particular sentence and recited the fact that the court could impose any lawful sentence, Plea Agreement ¶ 3. It also recites that no further promises or agreements will be made by the government except in writing signed by all parties. *Id.* ¶ 19. Under these circumstances, even accepting the defendant's characterization of the June 6 meeting after his attorney left, there is no showing of any prejudice to the defendant resulting from the attorney's absence. The government could not be bound by any offers not in writing and the court could not be bound in any event by the government's sentencing recommendation. *See generally United States v. Connolly*, 51 F.3d 1, 3-4 (1st Cir. 1995) (discussing effect of alleged oral promise re sentencing in light of written plea agreement). Most significant for purposes of the defendant's section 2255 motion is the fact that he does not allege that any information he provided to the government during this interview after his lawyer left was used against him by the government in any way. He contends only that the government reneged on a promise made after his lawyer left to recommend that he be sentenced to no prison time, a highly unlikely event given the minimum sentence established by the sentencing guidelines for the crime with which he was charged and the possibilities for downward departure

[14] An amended plea agreement, Docket No. 9, was executed on June 7, 1996. The only difference between the amended agreement and the original agreement is the deletion from the original agreement of a waiver of the defendant's right to seek collateral relief from the sentence to be imposed. *Compare* original plea agreement (Docket No. 7) ¶ 18, with amended plea agreement ¶ 18. This change was made in response to concerns raised by the court. Tr. I at 11, 14-15.

from that term. There is no basis for a finding of a violation of the Sixth Amendment in the defendant's argument on this claim.

Of the numerous cases cited by the defendant in support of his argument on this point, only three are sufficiently relevant to merit mention. In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Supreme Court held that a criminal defendant has the right to have the assistance of counsel at postindictment interviews with law enforcement authorities. *Id*. at 290. In that case, the interview in question resulted in a confession, *id.* at 288-89, but the Court held that the provision of a *Miranda* warning to the defendant before the interview was sufficient, *id*. at 300. Here, the government did not prevent the defendant from having counsel throughout the interview, which occurred after he had agreed in writing to plead guilty. Under these circumstances, *Patterson* provides no help to the defendant.

In *United States v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990), the probation officer in charge of preparing a presentence investigation report on the defendant refused to allow the defendant's attorney to be present at his interview of the defendant. *Id*. at 1432. On direct appeal, the Ninth Circuit held that the defendant was entitled to have counsel present at any such meeting. *Id*. at 1437. Again, in this case there is no allegation that the information provided by the defendant to the government after his attorney left had any negative impact on the presentence investigation report or on his sentence.[15] A more important distinction is that the government in this case made

[15]While the change of plea was accomplished the following day, sentence was not imposed until December 6, 1996, Judgment (Docket No. 30) at 1, some six months later, leaving plenty of time for the June 6 meeting to be reconvened when the defendant's counsel could again be present. The defendant does not suggest that he asked that the meeting be discontinued when his lawyer left. *See generally United States v. Ming He*, 94 F.3d 782, 793 (3d Cir. 1996) (discussion of waiver of right to counsel in connection with probation interviews).

no attempt to bar the defendant's counsel from the meeting. That is the only circumstance addressed by *Herrera-Figueroa*.

In the third case, *Ming He*, the Second Circuit held that cooperating witnesses are entitled to have counsel present at government debriefings. 94 F.3d at 793. In that case, the government had failed to notify the defendant's counsel that her client would be debriefed, and the government stated that it was standard practice in that judicial district to debrief witnesses without counsel being present. *Id*. at 786. The government concluded that the defendant was less than candid during the debriefing and disparaged his assistance to the court, "obviously affect[ing] the district court's decision on the length of defendant's prison term." *Id.* at 786-87. No such lack of notice or disparagement occurred here. In fact, the government told the court at sentencing that the defendant "did meet with the government on two proffer sessions, provided some information concerning drug trafficking" and recommended that the court impose a sentence at the mid to low end of the range, despite the recommendation of an upward departure by the PSI, "in light of the defendant's participation in the proffers." Tr. II at 92. *Ming He* is distinguishable.

The defendant has failed to meet the *Strickland* prejudice standard on this issue.

7. Plea Agreement. The defendant contends that his attorney provided constitutionally deficient assistance by failing to advise him of "the consequences of the adverse effect of the court's rejection of the plea agreement," by not advising him that he could withdraw his plea (presumably at the time of its "rejection"), and by erroneously advising him that he was waiving "his rights under 924(A)(1)" and that his sentence would not be affected "by anything that was said in court based on [his] substantial assistance." Motion at 9[s]. As discussed above, the court did not reject the plea agreement, and there were no adverse effects from the court's direction that the waivers of appeal

from the sentence and of a motion under section 2255 be removed from the plea agreement. Accordingly, the defendant's attorney could not have failed to advise him of such adverse consequences. There was no reason for the defendant to withdraw his plea when the only result of the court's action was more favorable to him. The defendant had no "rights" under 18 U.S.C. § 924(a)(1), which merely establishes the maximum penalties for the charge to which he had pleaded guilty. Finally, absent a motion by the government for a downward departure due to his cooperation, a procedure which the government was expressly not required to invoke by the terms of the plea agreement, Plea Agreement ¶ 17, it is true that nothing that was said at the sentencing hearing about his assistance would affect the sentence imposed.

I can only conclude, therefore, that none of the alleged failures of counsel alleged in this section of the defendant's motion constitutes grounds for a Sixth Amendment violation.

8. Coerced plea. The defendant contends that he was "forced" to plead guilty by his attorney because the attorney erroneously advised him that his sentence would not be enhanced by a state conviction classified as a violent crime if he did so. Motion at 10[s]-11[s]; Defendant's Reply at 9.[16] As discussed above, the substantive issue was resolved in the defendant's favor by his first appeal, and the sentence which he is serving has not been so enhanced. Accordingly, he has not been prejudiced by the alleged advice.

To the extent that any allegation that the defendant's guilty plea was coerced by his attorney

[16] The defendant's claim on this point is made somewhat difficult to understand by his references to "the career offender statute," Motion at 10[s], presumably 18 U.S.C. § 924(e)(1), which was never applied in this case and was not, for all that appears in the record, applicable to this charge, and to 21 U.S.C. § 851, Motion at 11[s], a statute that (i) deals with increased sentences due to prior felony drug convictions, *United States v. Romero-Carrion*, 54 F.3d 15, 17 (1st Cir. 1995), which are not involved here, and (ii) does not in any event apply to increases under the sentencing guidelines, *United States v. Sanchez*, 917 F.2d 607, 616 (1st Cir. 1990).

remains viable, the defendant assured the court at his Rule 11 hearing that no one had attempted to coerce his plea. Tr. I at 9. Such statements may be credited by the court, *Marrero-Rivera*, 124 F.3d at 349, and will be presumed true for purposes of a section 2255 motion in the absence of credible, valid grounds for departing from this presumption, *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984). *See also Jones v. Page*, 76 F.3d 831, 845 (7th Cir. 1996). An "overly rosy" prediction of the prospective sentence by defense counsel will not render a defendant's plea involuntary. *Marrero-Rivera*, 124 F.3d at 348-49.

The defendant has not established a Sixth Amendment violation on the basis of this claim.

9. Abandonment during resentencing. The defendant contends that he was deprived of the effective assistance of counsel in a manner that violated the Sixth Amendment when his attorney "abandoned" him during the hearing on his resentencing. Motion at 11[s]. This "abandonment" consisted of his attorney's alleged refusal to argue certain issues. Defendant's Reply at 9.[17] The defendant refers specifically to the following statement by his attorney at the outset of the resentencing hearing:

> Your Honor, just so the record is clear, my client and I are in agreement as to certain issues to be presented to the court, and certain others he has filed on pro se basis, and I at this point in time would defer to him in support of his pro se motions, this being one of them.

Transcript of Proceedings ("Tr. III") (Docket No. 66) at 3. The government responds to this claim in a minimal fashion, merely asserting that the defendant's counsel "argued [the defendant's] position and represented him throughout." Government's Response at 27.

The defendant was given the opportunity at this hearing to present all of the issues that his

[17] Again, the defendant raises only in his reply the claim that his attorney failed to "allow [him] prior viewing of [the second] appeal and its issues before filing." Defendant's Reply at 9. As discussed previously, the court will not address claims raised for the first time in a reply memorandum.

counsel did not argue. Therefore, his argument must be that his attorney violated the Sixth Amendment by refusing to present to the court all of the issues the defendant wanted him to present. A lawyer does not have duty to raise every non-frivolous claim advanced by his client. *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (Sixth Amendment assistance-of-counsel case). An attorney may ignore frivolous claims pressed by his clients. *United States v. Hart*, 933 F.2d 80, 83 (1st Cir. 1991). Here, the defendant was allowed to argue his motions to withdraw his plea, for subpoenas to be issued for witnesses to testify in connection with the withdrawal of his plea, a motion for production of documents pertaining to the plea withdrawal, a motion for production of an audiotape, and a motion for appointment of a particular lawyer as defense counsel. Tr. III at 3-16. The first three motions can only be considered frivolous because the only issue before the court at the resentencing hearing was the appropriate sentence to be imposed. The fourth motion sought production of an audiotape that I have already noted did not exist. The final motion, for appointment of counsel other than the counsel representing the defendant at the hearing, could hardly have been argued by the attorney who would have been replaced if the motion were granted. There is no Sixth Amendment violation present here.

Contrary to the defendant's further argument, the failure of defense counsel to argue every issue that the defendant wishes him to argue is not the kind of "conflict" between a defendant and his attorney that the court must investigate. It is only when the conflict between the defendant and his attorney arises because the lawyer's own interests may be at odds with the best interests of his client that such investigation is required. *See, e.g., United States v. Shorter*, 54 F.3d 1248, 1252-53 (7th Cir. 1995) (counsel stated at sentencing that defendant had accused her of forcing him to plead guilty and that defendant had made false statements to the court). That was not the situation in this

case.

10. Attorney's conflict of interest. The defendant contends that he was deprived of the effective assistance of counsel when Attorney Billings, whom he had retained, "turned [his] case over" to Billings' partner, Attorney Silverstein, because Silverstein "refused to investigate [the defendant's] case; failed to look into the facts and circumstances of [the defendant's] case and argue viable issues of prosecutorial misconduct." Motion at 12[s]. With respect to the first two allegations raised here against Silverstein, the defendant provides only conclusory allegations, to which the court need not give any weight. *McGill*, 11 F.3d at 225. *See also United States v. Michaud*, 925 F.2d 37, 41-42 (1st Cir. 1991) (discussing insufficient allegations of defense attorney's conflict of interest). To the extent that the claim of prosecutorial misconduct is sufficiently supported by the defendant's reply memorandum, *cf. United States v. Candelaria-Silva*, ___ F.3d ___, 1999 WL 16782 (1st Cir. Jan. 22, 1999) at *17 (movant must develop arguments concerning prosecutorial misconduct), he appears to be referring to the allegations concerning notes of the June 6, 1996 meeting or debriefing and an alleged oral promise made at that meeting to file a request for a downward departure in his sentence pursuant to U.S.S.G. § 5K1.1. Defendant's Reply at 10, 13-21.

As discussed above, the alleged failure of the government to provide notes or other records of the June 6 meeting to the defendant's attorneys did not breach the plea agreement. In addition, there is no sense in which such a refusal could constitute prosecutorial misconduct warranting section 2255 relief. With respect to the assertion that the government made an oral promise to move for a downward departure from the guideline sentencing range pursuant to U.S.S.G. § 5K1.1, which provides that the court may depart from the guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another

person," the defendant has failed to provide the necessary factual basis for court review. The plea agreement specifically provides that the government has no obligation to file such a motion. Amended Plea Agreement ¶ 17. The government's discretionary decision not to file such a motion may not be reviewed by the courts in the absence of an allegation of a constitutional violation as the reason for that decision. *Wade v. United States*, 504 U.S. 181, 185-86 (1992). In his reply memorandum, the defendant does not assert that the government had an unconstitutional motive for refusing to seek a downward departure in this case, but merely that the failure to do so was not "rationally related to any legitimate state objective." Defendant's Reply at 19. In this circuit, such review does not usually take place in the absence of a promise included in a written plea agreement to file a motion for downward departure upon the receipt of substantial assistance from the defendant. *United States v. Romolo*, 937 F.2d 20, 23 n.3 (1st Cir. 1991). *See generally United States v. Catalucci*, 36 F.3d 151, 152-54 (1st Cir. 1994). Nothing in the defendant's submissions to this court, including his sealed affidavit, reaches the level of "overwhelming evidence of enormously fruitful cooperation" that is necessary for the courts in this circuit to intervene in the face of "government intractability" when there is no plea agreement obligating the government to request a downward departure in return for the defendant's substantial assistance.[18] *United States v. LaGuardia*, 902 F.2d 1010, 1018 (1st Cir. 1990).

Under these circumstances, any argument by defense counsel that the defendant was entitled to a downward departure pursuant to U.S.S.G. § 5K1.1 would have been futile. Accordingly, no Sixth Amendment violation may be premised on the failure of defense counsel to undertake that

[18] In fact, the only evidence in the record concerning the defendant's cooperation as a result of the debriefing sessions is that he was not of assistance. Tr. II at 65-67.

futile effort. *See Isabel v. United States*, 980 F.2d 60, 65 (1st Cir. 1992).

11. Acceptance of responsibility. The final challenge to the assistance of his counsel raised by the defendant is an assertion that the Sixth Amendment was violated when his counsel "allow[ed] the government to breach its plea agreement in that the government made a plea agreement with [the defendant] knowing that [he] had a prison contraband charge pending." Motion at 12[s]. The defendant apparently contends that the government agreed to a three-level adjustment to his offense level for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, while knowing that the pending prison contraband charge would make that adjustment unavailable. He also argues that the charge existed before he entered into the plea agreement, and therefore the plea agreement means that this conduct "would not be held against" him.[19] *Id*. at 13[s]. The defendant attaches great significance to the facts that the prison contraband incident occurred on April 9, 1996 and that he "was not indicted or charged with instant offense until April 10, 1996." Defendant's Reply at 10. The latter assertion is simply wrong; the defendant was first charged by a criminal complaint dated March 5, 1996. Docket No. 1. A superceding indictment was issued on April 9, 1996. Docket No. 2.

The plea agreement contains no promise by the government to seek an adjustment for the defendant's acceptance of responsibility. As discussed above, the government cannot be bound at sentencing to promises not included in the plea agreement, particularly when the agreement itself disclaims any promises other than those specifically set forth and the defendant states that no other

[19] The defendant cites no authority for this novel interpretation of the effect of a plea agreement, and my research has located none. It is inconsistent with extensive reported case authority taking into consideration for purposes of U.S.S.G. § 3E1.1 post-offense conduct to conclude that such conduct occurring before a plea agreement is signed is removed from the court's consideration, without an explicit statement to that effect, by the mere fact of the existence of a plea agreement. It is highly unlikely that any court would be willing so to interpret criminal plea agreements.

promises were made. *See Connolly*, 51 F.3d at 3.

There was extensive discussion of the defendant's claim that he was entitled to such an adjustment at the first sentencing hearing, and considerable discussion, including the taking of testimony, on the question of the prison contraband incident. Tr. II at 55-72. In order to take post-charge[20] conduct into consideration in terms of a possible acceptance-of-responsibility reduction, the court must conclude that the defendant engaged in the alleged conduct, but it need not wait until the defendant is convicted of the charge. *United States v. O'Neil*, 936 F.2d 599, 601 (1st Cir. 1991). *Lagasse*, discussed by the court and counsel at the sentencing hearing, Tr. II at 59-60, 68-72, and invoked by the defendant here, Motion at 13[s], Defendant's Reply at 10, does not help the defendant. In *Lagasse*, the defendant's attempt to receive illicit drugs while in prison was thwarted, and there is no indication that he was charged with a crime as a result. 87 F.3d at 25. Yet, the First Circuit upheld the trial court's reliance on this information to conclude that the defendant was not entitled to an acceptance-of-responsibility reduction. *Id.*

Even if *Lagasse* were not dispositive on this issue, the court clearly relied as well on the fact that the defendant had attempted to withdraw his guilty plea in choosing not to award a sentence reduction for acceptance of responsibility. Tr. II at 51. That independent ground is sufficient to justify the court's decision. *E.g.,United States v. McCarty*, 99 F.3d 383, 387 (11th Cir. 1996); *United States v. Newson*, 46 F.3d 730, 734 (8th Cir. 1995).

In any event, the defendant's counsel did argue vigorously for a reduction due to acceptance

[20] It is clear that it is post-offense conduct, and not post-indictment conduct, that the court may consider in this regard. *E.g.*, *United States v. Lagasse*, 87 F.3d 18, 25 (1st Cir. 1996). Here, the prison contraband incident occurred on April 9, 1996, well after the occurrence on February 28, 1996 of the offense to which the defendant pleaded guilty. Whether the conduct occurred before or after the defendant was indicted is irrelevant.

of responsibility under section 3E1.1 of the guidelines at the sentencing hearing. He specifically argued that the prison contraband issue should not be considered. Tr. II at 58-60. The *Strickland* standards require nothing more.

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 11th day of February, 1999.

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David M. Cohen
United States Magistrate Judge