APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6105

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD ASHBAUGH,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. John Preston Bailey, District Judge. (3:05-cr-00060-JPB-RWT-1)

Submitted: August 31, 2018 — Decided: September 7, 2018

Before KEENAN and DIAZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Vacated and remanded with instructions by unpublished per curiam opinion.

Valena E. Beety, Christopher W. Maidona, Third-Year Law Student, Victoria G. Bittorf, Third-Year Law Student, Morgantown, West Virginia, Thomas J. Gillooly, West Virginia Innocence Project, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, Charleston, West Virginia, for Appellant. William J. Powell, United States Attorney, Paul T. Camilletti, Assistant United States Attorney, Tara Tighe, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Richard Ashbaugh seeks to appeal the district court's denial of his Fed. R. Civ. P. 60(b) motion to reconsider the denial of his motion to reopen his 28 U.S.C. § 2255 (2012) case. We have reviewed the record on appeal and conclude that Ashbaugh's Rule 60(b) motion was actually a second or successive habeas motion because he sought, in essence, to collaterally attack his sentence and the district court adjudicated his first § 2255 motion on the merits. Ashbaugh did not obtain prefiling authorization from this court to file a second or successive § 2255 motion, and, thus, the district court lacked jurisdiction to consider Ashbaugh's motion for reconsideration.

United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003). As a result, we must "Vacate the order denying [Ashbaugh's] motion for reconsideration and remand to the district court with instructions to dismiss the motion." *Id*. at 208.

Next, following *Winestock*, we "construe [Ashbaugh's] notice of appeal and his appellate brief as a motion for authorization to file a successive application." 340 F.3d at 208. To obtain permission to bring a second or successive § 2255 motion, a movant must show that his claim: (1) "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or (2) relies on newly discovered facts that tend to establish the movant's innocence. 28 U.S.C. § 2255(h). We conclude that Ashbaugh's claims do not satisfy either of these criteria.

Accordingly, we vacate the district court's order and remand with instructions to dismiss Ashbaugh's motion for lack of jurisdiction, and we deny authorization to file a second or successive § 2255 motion. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

VACATED AND REMANDED WITH INSTRUCTIONS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG

RICHARD ASHBAUGH,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL ACTION NO. 3:14-CV-31
CRIMINAL ACTION NO. 3:05-CR-60-1 (BAILEY)

ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF UNOPPOSED MOTION FOR AN AMENDED SENTENCE

Pending before this Court is the Motion for Reconsideration of Denial of Unopposed Motion for an Amended Sentence [Crim. Doc. 157 / Civ. Doc. 14] and Defendant's Supplemental Pleading in Support of Unopposed Motion for an Amended Sentence [Crim. Doc. 158 / Civ. Doc. 15]. Petitioner moves this Court pursuant to Fed. R. Civ. P. 60(b) to reconsider its April

18, 2017, Order Denying Unopposed Motion for an Amended Sentence [Civ. Doc. 11].[1]

While reviewing the briefs in this matter, the undersigned judge was admittedly tempted at times to entertain the thought of crafting some form of relief for this defendant; however, this Court was reminded by that which a former Chief Justice of the United States once said:

> The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery slope. Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done.

Bifulco v. United States, 447 U.S. 381, 401–02, 100 S.Ct. 2247 (1980)(Burger, C.J., concurring)(internal citations omitted).

In reaching its decision today, this Court has resisted the very temptation of which Chief Justice Burger speaks. Therefore, applying the existing law, it is the opinion of this Court that the Motion for Reconsideration of Denial of Unopposed Motion for an Amended Sentence [Crim. Doc. 157 / Civ. Doc. 14] and Defendant's Supplemental Pleading in Support of Unopposed Motion for an Amended Sentence [Crim. Doc. 158 / Civ. Doc. 15] should be, and the same are, **DENIED**.

It is so **ORDERED**.

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[1] The factual and procedural history, as well as this Court's reasons for denying relief, are adequately addressed in its prior rulings.

The Clerk is directed to transmit by certified mail a copy of this Order to any counsel of record.

DATED: January 23, 2018.

/s/ John Preston Bailey
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA
MARTINSBURG

RICHARD ASHBAUGH,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL ACTION NO. 3:14-CV-31
CRIMINAL ACTION NO. 3:05-CR-60-1
(BAILEY)

ORDER DENYING UNOPPOSED MOTION FOR AN AMENDED SENTENCE

On this day, the above-styled matter came before the Court for consideration of the petitioner's Unopposed Motion for an Amended Sentence [Civ. Doc. 10 / Crim. Doc. 145], which was filed on April 18, 2017. The Motion asks this Court "to reopen [defendant's] previously-filed action under 18 U.S.C. § 2255 and permit him to amend it to include a request for an amendment of his sentence." For the reasons that follow, the Motion is **DENIED**.

I. Factual and Procedural History

Petitioner pled guilty to Aiding and Abetting the Distribution of Heroin Resulting in Death, in violation of Title 21 United States Code, Section 841(a)(1). The Controlled Substances Act imposes a 20-year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug, when "death or serious bodily injury results from the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C). Ashbaugh was sentenced to the 20-year minimum.

The petitioner previously filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Civ. Doc. 1 / Crim. Doc. 112], an Emergency Motion to Correct Sentence Under 28 U.S.C. § 2255 [Civ. Doc. 2 / Crim. Doc. 113], and the petitioner's Reply to the Government's Motion to Dismiss [Crim. Doc. 129], which was docketed as a Motion for Resentencing, Motion for Evidentiary Hearing, and Motion to File Under § 2244 for Second or Successive Application to the Fourth Circuit Court of Appeals. On July 3, 2014, this Court dismissed this action and ordered it stricken. See Crim. Doc. 134.

Previously, on October 25, 2007, this Court adopted the magistrate judge's Report and Recommendation [Crim. Doc. 100], thereby denying and dismissing the petitioner's § 2255 petition. As previously noted, the petitioner filed a second § 2255 on March 12, 2014 [Doc. 112]. Subsequently, the petitioner filed a motion under § 2244 for a second or successive application with the Fourth Circuit Court of Appeals [Crim. Doc. 129]. At that time, this Court found this matter was properly before the Appellate Court for consideration.

This Court noted that if granted the requested relief to file a second or successive § 2255 petition, the petitioner must do so in a new action. Id.

On July 2, 2014, the Fourth Circuit Court of Appeals summarily denied the motion under § 2244 to file a second or successive petition. See Crim. Doc. 133. Petitioner then filed a Rule 60(b) Motion, which this Court denied on September 29, 2014 [Crim. Doc. 138]. Petitioner filed a similar Rule 60(b) Motion less than a year later [Crim. Doc. 140], which Chief Judge Gina M. Groh denied [Crim. Doc. 141].

In the Spring of 2014, the DOJ announced an initiative in which then President Barrack Obama would consider commuting the sentences of certain federal inmates who had, among other things, served at least ten years of a lengthy sentence that, because of changes in law or policy, would be shorter if imposed today. While the United States Attorney's Office for this District supported the petitioner's request for clemency, the President denied the same. The petitioner, through *pro bono* counsel, now essentially asks this Court to reconsider the President's decision.

II. Discussion

As noted by the defendant, the White House and Pardon Attorney do not give reasons for decisions to deny clemency. This Court notes, however, that the defendant's criminal history is not just significant, it is egregious. Defendant Ashbaugh managed to amass an impressive 19 criminal history points, which represents a criminal history category of 6. And while the Clemency Project certainly served its purposes, this Court is less concerned with what the Executive branch may do and more concerned with what this

Court has jurisdiction to do. And in this context, it is the Legislative branch which has set the parameters of what relief this Court may provide. Indeed, 18 U.S.C. § 3582(c) provides that a "court may not modify a term of imprisonment once it has been imposed," except in very limited circumstances, none of which apply to this defendant.

It appears the defendant does not even attempt to argue that any of the narrow § 3582(c) exceptions apply to him. Rather, defendant argues a peculiar case from the Eastern District of New York, *United States v. Holloway*, 68 F.Supp.3d 310 (E.D. N.Y. July 28, 2014), in which the district judge appears to have disregarded 150 years of United States Supreme Court precedent. *See Ex parte Garland*, 71 U.S. 333, 380 (1866) (noting the exclusive pardon power of the President). This was recently recognized by another judge in the Fourth Circuit. In *Green v. United States of America*,[1] 2017 WL 679644 (Feb. 21, 2017 D. S.C.)(Wooten, CJ), the Court stated:

> The power to grant pardons, which is the effect of vacating a conviction, is simply not a power possessed by federal judges under Article III of the Constitution, even if they act with consent of the Department of Justice. If the Department feels that such relief is warranted, the proper

[1] The defendant's Motion states that "[a]pplication of *Holloway* has been denied by a few district courts within the Fourth Circuit – either because the government did not agree to the proposed relief or because the sentence was not viewed as unfair, or both . . .." Apparently counsel's research overlooked the *Green* case.

remedy is to recommend to the President that he issue a pardon.

The *Green* Court was also quick to point out that the *Holloway* opinion lacked any explanation of any statutory or constitutional basis for vacating the defendant's convictions.

As discussed above, the petitioner in this case tried the proper avenues; however, the request was denied. Now, the defendant asks this Court to do what the Fourth Circuit Court of Appeals and President would not, and with authority that it lacks.[2]

Next, this Court can find no authority, nor does counsel supply any – to support its proposition that the Government could simply agree to strike the "resulting in death" portion of the count of conviction. Paragraph 9 of the Plea Agreement, which was accepted by this Court, stated that "the parties hereby stipulate and agree that the total drug relevant conduct of the defendant with regard to the Indictment is the distribution of heroin, a controlled substance, the use of which resulted in death." See [Doc. 73 at 32]. Not only did the defendant plead to the Count of conviction, he specifically stipulated to the factual conduct which formed the basis for the statutory 20-year minimum. Twelve years later, the parties believe this Court can simply turn its pencil over and erase history. In making its ruling today, this Court is left without words, save for one: **DENIED**.

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[2] This Court recognizes that if both sides agree to a proposed disposition, no appeal will follow, and the ruling will stand. The undersigned would like to remind the reader, however, that he has taken an oath to uphold the Constitution and to follow the doctrine of *stare decisis*.

CONCLUSION

For the reasons stated above, the petitioner's Unopposed Motion for an Amended Sentence [Crim. Doc. 145 / Civ. Doc. 10] must be **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit by certified mail a copy of this Order to any counsel of record.

DATED: April 18, 2017.

/s/ John Preston Bailey
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG

RICHARD ASHBAUGH,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL ACTION NO. 3:14-CV-31
CRIMINAL ACTION NO. 3:05-CR-60-1 (GROH)

ORDER DISMISSING MOTION FOR RELIEF UNDER FED. R. CIV. P. 60(B)

This matter is before the Court for consideration of the Petitioner's Motion for Relief Under Fed. R. Civ. P. 60(b)(6), filed on May 22, 2015. ECF 140. For the following reasons, the Court **DISMISSES** this motion.

I. Background

Petitioner pled guilty to Aiding and Abetting the Distribution of Heroin Resulting in Death, in violation of 21 U.S.C. § 841(a)(1). The Controlled Substances Act imposes a twenty-year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug when "death or serious bodily

injury results from the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C). Petitioner was sentenced to the twenty- year minimum.

On September 29, 2006, Petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. On October 25, 2007, this Court denied the § 2255 petition. Petitioner filed a second § 2255 petition on March 12, 2014. Petitioner subsequently filed a motion under § 2244 for a second or successive application with the Fourth Circuit. On July 2, 2014, the Fourth Circuit denied this motion. The Court denied the second § 2255 petition the next day.

On September 22, 2014, Petitioner filed a motion for relief under Federal Rule of Civil Procedure 60(b)(6). He argued that he should be resentenced because, under the Supreme Court's decision in *Burrage v. United States* 134 S. Ct. 881 (2014), he should have been assessed the penalty enhancement based on a jury verdict. In *Burrage*, the Supreme Court held that, because the "death results" enhancement of § 841(b)(1)(C) "increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." *Id*. at 887. This Court denied Petitioner's motion on the basis that the Fourth Circuit had not authorized him to file a second or successive petition and, regardless, that *Burrage* does not retroactively apply to his case.

On May 22, 2015, Petitioner filed the instant Rule 60(b) motion, again seeking resentencing pursuant to *Burrage*. He adds the argument that the Eighth Circuit Court of Appeals held in *Ragland v. United*

States, 756 F.3d 597 (8th Cir. 2014) that *Burrage* retroactively applies.

II. Discussion

Rule 60(b) motions that "add a new ground for relief" or attack the "federal court's previous resolution of a claim *on the merits*," are effectively successive petitions for writ of habeas corpus under § 2255(h). *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Section 2255(h) provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

It is clear that Petitioner is attempting to bring a second or successive § 2255 motion under § 2255(h) rather than a motion pursuant to Rule 60(b) because he argues that *Burrage* requires resentencing. Indeed, a motion that directly attacks a prisoner's sentence typically amounts to a successive motion "in 60(b)'s clothing." *United States v. Winestock*, 340 F.3d 200, 207 (4th Cir. 2003). As previously stated, however, the Fourth Circuit denied Petitioner authorization to file a second or successive § 2255 petition.

In the absence of pre-filing authorization allowing for successive filings, "a district court lacks jurisdiction to consider an application containing

abusive or repetitive claims." *Id.* at 205. The Fourth Circuit has held that "district courts *must* treat Rule 60(b) motions as successive collateral review applications when failing to do so would allow the applicant to 'evade the bar against relitigation of claims presented in a prior application or the bar against litigation of claims not presented in a prior application.'" *Winestock*, 340 F.3d at 206 (citation omitted); *see also Reid v. Angelone*, 369 F.3d 363, 374–75 (4th Cir. 2004) (finding a district court erred in denying a Rule 60(b) motion instead of treating the motion as a successive habeas application). As Petitioner did not obtain pre-filing authorization to attack his sentence, this Court lacks jurisdiction to address the merits of his claim and dismisses his motion.

III. Conclusion

For the foregoing reasons, the Court **DISMISSES** the Motion for Relief Under Fed. R. Civ. P. 60(b).

The Clerk is directed to mail a certified copy of this Order to all counsel of record and *pro se* parties.

DATED: June 23, 2015

/s/ Gina M. Groh
GINA M. GROH
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG

RICHARD ASHBAUGH,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL ACTION NO. 3:14-CV-31
CRIMINAL ACTION NO. 3:05-CR-60-1 (BAILEY)

ORDER DENYING MOTION FOR RELIEF UNDER FED. R. CIV. P. 60(B)(6)

On this day, the above-styled matter came before the Court for consideration of the petitioner's Motion for Relief Under Fed. R. Civ. P. 60(b)(6) [Doc. 136], which was filed on September 22, 2014. For the reasons that follow, the Motion is **DENIED**.

I. Factual and Procedural History

Petitioner pled guilty to Aiding and Abetting the Distribution of Heroin Resulting in Death, in violation of Title 21 United States Code, Section 841(a)(1). The Controlled Substances Act imposes a 20-year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug, when

"death or serious bodily injury results from the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C). Ashbaugh was sentenced to the 20-year minimum.

The petitioner previously filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Civ. Doc. 1 / Crim. Doc. 112], an Emergency Motion to Correct Sentence Under 28 U.S.C. § 2255 [Civ. Doc. 2 / Crim. Doc. 113], and the petitioner's Reply to the Government's Motion to Dismiss [Crim. Doc. 129], which was docketed as a Motion for Resentencing, Motion for Evidentiary Hearing, and Motion to File Under § 2244 for Second or Successive Application to the Fourth Circuit Court of Appeals. On July 3, 2014, this Court dismissed this action and ordered it stricken. See Crim. Doc. 134.

Previously, on October 25, 2007, this Court adopted the magistrate judge's Report and Recommendation [Crim. Doc. 100], thereby denying and dismissing the petitioner's § 2255 petition. As previously noted, the petitioner filed a second § 2255 on March 12, 2014 [Doc. 112]. Subsequently, the petitioner filed a motion under § 2244 for a second or successive application with the Fourth Circuit Court of Appeals [Crim. Doc. 129]. At that time, this Court found this matter was properly before the Appellate Court for consideration. This Court noted that if granted the requested relief to file a second or successive § 2255 petition, the petitioner must do so in a new action. Id.

On July 2, 2014, the Fourth Circuit Court of Appeals summarily denied the motion under § 2244 to file a second or successive petition. See Crim. Doc. 133. Petitioner now files the instant Rule 60(b) Motion.

II. Applicable Law

"The judiciary has long had a strong interest in the finality of judgments, revising a judgment under Rule 60 is ordinarily the exception and not the rule. A party moving for relief under Rule 60(b) must make a showing of timeliness, a meritorious defense, and a lack of unfair prejudice to the opposing party, and exceptional circumstances . . .. Rule 60(b)(6) is a catch-all provision . . . that is rooted in the Court's historical equitable power: it vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. Perhaps in recognition of the extraordinary discretion the provision provides to trial courts, our Court of Appeals has declared that such a motion may not be granted absent extraordinary circumstances. This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." *United States v. Reeves*, 2012 WL 2524721, *9 (W.D. Va. June 29, 2012) (internal citations and quotations omitted).

Additionally, the law is clearly developed that merely because relief has become unavailable under § 2255 because of a limitation bar, the prohibition against successive petitions, or a procedural bar due to failure to raise the issue on direct appeal, does not demonstrate that the § 2255 remedy is inadequate of ineffective. *In re Vial*, 115 F. 3d 1192, 1194 (4th Cir. 1997). Moreover, in *Jones*, the Fourth Circuit held that:

> § 2255 is inadequate and ineffective to test the legality of a conviction when: (1) at the time of the conviction, settled law of this circuit or the Supreme Court established the legality of the

> conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

In re Jones, 226 F.3d 328, 333–334 (4th Cir. 2000).

Therefore, the remedy provided under § 2255(e) opens only a narrow door for a prisoner to challenge the validity of his conviction or sentence under §2241. Based on the language in ***Jones***, it is clear the Fourth Circuit contemplated a situation in which a prisoner is imprisoned for an offense which is no longer a crime.

III. Discussion

Petitioner does not argue that he is imprisoned for an offense which is no longer a crime. Rather, relying on *Burrage v. United States*, —— U.S. ——, 134 S. Ct. 888 (Jan. 27, 2014), he argues that he was not assessed the penalty enhancement based upon a jury verdict. This follows the line of cases such as *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), which hold that facts which produce enhancements to minimum and maximum sentences must be submitted to a jury and found beyond a reasonable doubt.

In *Burrage*, the Supreme Court interpreted the "death results" enhancement set forth in 21 U.S.C. § 841(b)(1)(C), and held that "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C.

841(b)(1)(C) unless such use is a but-for cause of the death or injury." 134 S. Ct. at 888. The Supreme Court ruled that, "[b]ecause the 'death results' enhancement increased the minimum and maximum sentences to which *Burrage* was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." 134 S. Ct. at 887.

Similar to *Alleyne*, however, even if *Burrage* announced a new rule of constitutional law, the decision has not been applied retroactively to cases on collateral review, and this Court is not inclined to do so. *De La Cruz v. Quintana*, No. 14–28–KKC, 2014 WL 1883707, at *6 (E.D.Ky. May 1, 2014) (unable to find any authority making *Burrage* retroactively applicable); *Taylor v. Cross*. No. 14–cv–304, 2014 WL 1256371, at *3 (S.D.Ill. Mar.26, 2014) (*Burrage* has not been found to apply retroactively); and *In re: Carlos Alvarez*, No. 14–10661–D (Mar. 6, 2014) (declining to extend *Burrage* because the Supreme Court "did not expressly hold that *Burrage* is retroactive[ly applicable to cases] on collateral review.").

Even if *Burrage* were retroactive, Mr. Ashbaugh entered a plea of guilty to Count I of the Indictment, which charged him with distributing heroin to a person resulting in that person's death. The plea agreement executed by the defendant specifically states that the minimum penalty under his plea is 20 years [Doc. 58]. By entering his plea, the defendant admitted the facts necessary to trigger the 20 year minimum. The petitioner's guilty plea serves as an admission of all the elements and material facts alleged in the Indictment for purposes of applying the appropriate statutory range and for sentencing. *United States v. Nicholson*, 676 F.3d 376, 384 (4th Cir.

2012) (quoting *United States v. Bowman*, 348 F.3d 408, 414 (4th Cir. 2003)).

It is clear that Ashbaugh is attempting to bring a second or successive § 2255 motion pursuant to § 2255(h), which provides: A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. As previously stated, the Fourth Circuit denied this request.

Fundamentally, "Fourth Circuit precedent does not support the extension of the savings clause to petitioners who challenge only their sentences." *Petty v. O'Brien*, No. 1:11cv9, 2012 WL 509852 (N.D. W. Va. Feb. 15, 2012) (citing *United States v. Poole*, 531 F.3d 263, 267 n. 7 (4th Cir. 2008)). Rather, the § 2255 savings clause is "confined to instances of actual innocence of the underlying offense of conviction," not just "innocence" of a sentencing factor. *Darden v. Stephens*, 426 F. App'x 173, 174 (4th Cir. 2011)(per curiam) (emphasis added) (refusing to extend the savings clause to reach the petitioner's claim that he was actually innocent of being a career offender). Here, the petitioner does not assert that the conduct for which he was actually convicted is no longer criminal. See *In re Jones*, 226 F.3d at 334. Accordingly, relying on the decision in *Petty*, and the guidance of the Fourth Circuit in *Darden*, the

undersigned concludes that the petitioner's *Burrage* argument fails to state cognizable § 2241 claim. See also *Little v. Hamidullah*, 177 F. App'x 375, 375–76 (4th Cir. 2006): *Green v. Hemingway*, 67 F.App'x 255, 257 (6th Cir. 2003) ("Even if it is assumed that [Petitioner]'s allegations are true, the 'actual innocence' exception of the savings clause of § 2255, as it has been interpreted by this Court, is actual innocence of the underlying, substantive offense, not innocence of a sentencing factor.") (internal quotations omitted); *Kinder v. Purdy*, 222 F.3d 209, 213–14 (5th Cir. 2000) (holding that § 2241 is not available where a petitioner "makes no assertion that he is innocent of the crime for which he was convicted"); *White v. Rivera*, 518 F.Supp.2d 752, 757 n.2 (D. S.C. 2007), *aff'd* 262 F.App'x 540 (4th Cir. 2008) ("Furthermore, his 'actual innocence' argument concerning an enhancement does not entitle him to relief under § 2241, as it 'is not the type of argument that courts have recognized may warrant review under § 2241.'"); *Boynes v. Berkebile*, No. 5:10cv00939, 2012 WL 1569563, *7 (S.D.W. Va. May 1, 2012).

The *Burrage* decision provides no relief to the defendant in this case. First, neither the Supreme Court, nor the Fourth Circuit have not made *Burrage* retroactively applicable to cases on collateral review. See *United States v. Stewart*, 540 F. App'x 171 (4th Cir. 2013). Thus, the petitioner does not fulfill the first condition to invoke the savings clause or to proceed under § 2255(h). Ashbaugh does not satisfy the savings clause, and the Court need not address the relative merits of his section 2241 petition or the extraordinary relief he seeks through his 60(b) Motion. Because Ashbaugh has not satisfied the requirements

of § 2255's savings clause, he cannot "open the portal" to argue the merits of his claim.

CONCLUSION

For the reasons stated above, the petitioner's Motion for Relief Under Fed. R. Civ. P. 60(b)(6) [Doc. 136] must be **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit by certified mail a copy of this Order to any counsel of record and the *pro se* petitioner.

DATED: September 29, 2014.

/s/ John Preston Bailey
JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

FILED: November 14, 2018

UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 18-6105
(3:05-cr-00060-JPB-RWT-1)

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

RICHARD ASHBAUGH
Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> . . .

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> **(1)**
>
> . . .

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least

3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

. . .

. . .

. . .

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would

be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX H

Case No. 18-6105

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States of America
Plaintiff - Appellee,

v.

Richard Ashbaugh
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
District Judge John Preston Bailey

APPELLEE'S BRIEF

Respectfully Submitted,

United States Attorney
William J. Powell

/s/ Paul T. Camilletti
/s/ Tara Tighe
Assistant United States Attorneys
P.O. Box 591
Wheeling, WV 26003
(304) 234-0100

Counsel for United States of America

* * *

ARGUMENT

I. The district court did not abuse its discretion when it declined to resentence Ashbaugh.

Respect for the finality of judgments is "deeply engrained in our legal system." *Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousement & Helpers of Am.*, 675 F.2d 1349, 1354 (4th Cir. 1982). Indeed, courts are generally very protective of the solemnity and finality of a properly counseled guilty plea. *See Tollet v. Henderson*, 411 U.S. 258, 267 (1973); *United States v. Moussaoui*, 591 F.3d 263, 279 (4th Cir. 2010); *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975). Accordingly, as the district court here correctly recognized, a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). Ashbaugh did "not even attempt to argue that any of the narrow § 3582(c) exceptions apply to him," and the district court correctly and independently concluded that none of these exceptions apply to Ashbaugh. JA 201. As detailed herein, Ashbaugh has not established that the district court abused its discretion when it declined to modify Ashbaugh's sentence.

* * *

Ashbaugh's insistence that his second motion to vacate his sentence was not actually successive is misplaced, misleading, and irrelevant. *Id.* Ashbaugh knowingly waived his right to collateral review. JA16–46, 124–135. Therefore, he is generally precluded from

collaterally challenging his conviction or sentence regardless of how that collateral challenge is characterized and regardless of whether the challenge is rpesented in a first, second, or twentieth petition. *Lemaster*, 403 F.3d at 220.

C. Ashbaugh cannot circumvent his conviction and sentence by relying on *Burrage*, which is not retroactive.

The United States Supreme Court did not expressly make *Burrage* retroactive. *See Burrage* 134 S. Ct. 881. Indeed, a thorough review of *Burrage* suggests that it is not, in fact, a substantive, retroactive legal rule. *Id.*

Generally, when the United States Supreme Court announces a new rule of *substantive* criminal law, that rule is automatically retroactive. *Schiriro v. Summerlin*, 542 U.S. 348, 351–22 (2004) (citing *Bousley v. United States*, 523 U.S. 614, 620 (1998)). A new rule is substantive where it narrows the scope of a criminal statue by interpreting its terms or provides a constitutional determination that places particular conduct or persons beyond the government's power to punish. *Id.* (citations omitted). New substantive rules are automatically retroactive because "they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.*

In contrast, new *procedural* rules are generally not retroactive because they merely raise the possibility that "someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. Specifically, a substantive rule alters the range of conduct or the class or persons that the law

punishes while a procedural rule governs only the *manner of determining* the defendant's culpability. *Id.* at 353 (citations omitted) (emphasis in original).

Burrage did not narrow the scope of any criminal statute or change the fact that it is unlawful to manufacture or distribute certain drugs. *Id*. *Burrage* did not alter the range of conduct that the law punishes. *Id.* Similarly, *Burrage* did not change the fact that the government can prosecute an individual that manufacturers or distributes certain drugs. *Id.*

Indeed, it is still a crime to manufacture or distribute a controlled substance. 21 U.S.C. § 841(a)(1). Heroin is a Schedule I controlled substance. 21 U.S.C. § 841(b)(1)(C). When the drug causes death or serious bodily injury, the penalty is enhanced, and the defendant faces between twenty (20) years and life in prison. *Id*. Accordingly, Ashbaugh could have been sentenced to twenty (20) years in prison even without the penalty enhancement for causing a death. *Id.*

Ultimately, *Burrage* was not a substantive legal change. *See Burrage* 134 S. Ct. 881. Instead, *Burrage* merely clarified the applicability of a sentencing enhancement. *Id*. Ashbuagh admits that Jonathan Parks died as the result of the heroin that Ashbaugh provided. JA 19. *Burrage* does not change the fact that this conduct is a crime. *See Burrage* 134 S. Ct. 881; 21 U.S.C. § 841(a)(1) and (b)(1)(C). Similarly, *Burrage* did not expose Ashbaugh to a punishment that the law could not otherwise impose on him. *Id*. He could still be sentenced to twenty (20) years in prison even without the penalty enhancement. *Id*.

Ashbaugh provides no controlling legal authority to support his contention that *Burrage* should apply

retroactively. Ashbaugh Opening Brief, Doc. No. 21 at 13–17. Instead, Ashbaugh relies upon factually distinguishable cases from other circuits. *Id.* In those cases, which are not binding upon this Court, the government expressly and explicitly conceded that *Burrage* applied retroactively. *Id.* Here, the government has never specifically conceded that *Burrage* is retroactive. JA 147–239.

In contrast, this Court has affirmed a decision from the United States District Court for the Northern District of West Virginia, the same court from which Ashbaugh appeals, that declined to apply *Burrage* retroactively. *See Atkins v. O'Brien*, 148 F. Supp. 3d 547, 552 (N.D.W. Va. 2015) (Bailey, J.), *aff'd Atkins v. O'Brien*, 647 F. App'x 254 (4th Cir. 2016) (per curiam) (unpublished). The district court declined to apply *Burrage* retroactively. *Id.* This Court found no reversible error and affirmed. *See Atkins v. O'Brien*, 647 F. App'x 254.

Ashbaugh's insistence that other courts have, in certain circumstances, applied *Burrage* retroactively is unavailing where, as here, this Court has already provided guidance to its constituent district courts. *Fed. Deposit Ins. Corp. v. Fagan*, 459 F. Supp. 933, 935 (D.S.C. 1978) (district courts within the Fourth Circuit are generally bound by this Court's precedent). Specifically, by affirming the district court decision in Atkins, which declined to apply *Burrage* retroactively, this Court suggested that *Burrage* will not be applied retroactively in this circuit. *Id.* Indeed, other district courts within the Fourth Circuit have declined to apply *Burrage* retroactively. *United States v. Owens*, 2016 WL 1562917, at *3 (E.D. Va. Apr. 15, 2016); *United States v. Thomas*, 2016 WL 1070868, at *3

(W.D. Va. Mar. 16, 2016); *United States v. Grady*, 2015 WL 4773236, at *4 (W.D. Va. Aug. 12, 2015).

Finally, Ashbaugh's contention on appeal that his sentence is somehow unconstitutional because the government did not prove that the heroin he distributed was the "but for" cause of Jonathan Parks' death in compliance with *Burrage* is inherently incongruous. First, the United States Supreme Court decided *Burrage* nearly a decade *after* the district court sentenced Ashbaugh and, as detailed above, *Burrage* is not retroactive. Further, Ashbuagh pled guilty and specifically admitted that Jonathan Parks died as the result of the heroin that Ashbuagh provided. JA 16–46. During the plea hearing, Ashbuagh explicitly agreed that he was admitting to the criminal charge against him instead of requiring the government to prove that charge and any required factual elements beyond a reasonable doubt. *Id*.

CONCLUSION

Ashbaugh has not and cannot prove that the district court acted arbitrarily, failed to consider limitations on its discretion, or relied on any erroneous factual or legal premise. Therefore, Ashbaugh has not and cannot meet his burden to prove that the district court abused its discretion when it declined to resentence him. Accordingly, the United States of America respectfully requests that this Court affirm the district court's January 23, 2018 denial of Ashbaugh's motion to reconsider its decision not to resentence Ashbaugh.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

RICHARD ASHBAUGH,	:	
Petitioner,	:	
vs.	:	**Case No. 3:05-CR-60-1**
UNITED STATES OF AMIERICA,	:	
Respondent.	:	

MOTION FOR RELIEF

UNDER FED.R.CIV.P. 6O(b)

Statement of Facts and Argument
In Support of this Motion

On or about in January 2006, Petitioner, Richard Ashbaugh, pleaded guilty to Count One of his indictment, which charged him with Aiding and Abetting Distribution of Heroin Resulting in Death. Count Two of the indictment charged Petitioner with Interstate Commerce to Further a Drug Enterprise. The District Court relied on only judge-Found Facts which were insufficient to sentence Petitioner under mandatory guidelines. It was never substantiated how the person died; only it was ruled by the Chief Medical examiner of West Virginia that Jonathan Parks' death was classified as an Accident, as a result of all these Drugs found in his body. **See EXHIBIT (A)** from the Toxicology Report, attached. Petitioner's Counsel was very ineffective for not bringing this to the Court's attention during the Plea Process. Petitioner pled guilty to a crime he never committed. Petitioner's Counsel stated: "Here's the deal, plead guilty or spend the rest of your life in prison."

Now based on the recent ruling by the Supreme Court in **Burrage v. United States, _____ U.S. _____, 134 S.Ct. 881 (2014)**, Petitioner is factually and actually innocent of the sentence enhancement he received. And now based upon the Eighth Circuit Court of Appeals in **Ragland v. United States, No. 14-3748 (April 29, 2015)**. The Government in this case conceded that **Burrage** does and should be applied retroactively to **Ragland's Case**, and the Court granted Ragland's COA, vacated his conviction, and remanded with instructions to the district court to resentence on the lesser included offense of Distribution of Heroin.

Now the Supreme Court held in **Burrage v. United States** that, at least where use of the Drugs distributed by the Petitioner in this motion did not cause the victim's death, he cannot be held liable for a penalty enhancement under 21 U.S.C. § 841(b)(l)(C) unless such use is a "but-for" cause of the Death.

Petitioner in this motion had no part of the victim's Death, and cannot be held liable for a crime he did not commit.

Conclusion

Now Petitioner now asks this Honorable Court to vacate this Sentence, and resentence him under **Burrage v. United States**, and remove this enhancement that he was Sentence under.

Respectfully submitted,

/s/ Richard Ashbaugh

Richard Ashbaugh
Federal Correctional Institution
P.O. Box 1000
Cumberland, MD 21501-1000

APPENDIX J

Exhibit A

PARKS, Jonathan
WV-2005-912 Page 6

OPINION: CAUSE OF DEATH AND CONTRIBUTORY CONDITIONS/FACTORS

Jonathan Parks, a 26 year old man, died as the result of combined cocaine, heroin, phencyclidine, alprazolam and diazepam intoxication. No injuries were identified at postmortem examination.

RULING: MANNER OF DEATH

The manner of death is classified as Accident

/s/ Zia Sabet 10/25/05
Zia Sabet, M.D. Date
Deputy Chief Medical Examiner

/s/ James A. Kaplan 10/25/05
James A. Kaplan, M.D. Date
Chief Medical Examiner

APPENDED: Toxicology Laboratory Report #2005-912

ZS/JAK/rkm
9.12/9.27

STATE OF WEST VIRGINIA
OFFICE OF THE CHIEF MEDICAL EXAMINER

TOXICOLOGY REPORT

Name of Deceased:	Parks, Jonathan	**Date of Death:**	09-01-05
Case Number:	05-912	**Date of Request:**	09-02-05
Pathologist:	Dr. Sabet	**Date Received:**	09-02-05
Cause of Death:	Pending Toxicology	**Manner of Death:**	Pending

Samples Received

- ☒ Subclavian Blood
- ☐ Heart Blood
- ☒ Urine
- ☒ Vitreous Humor
- ☒ Gastric Contents
- ☒ Liver
- ☐ Tissue _____
- ☐ Other _____

Analysis Performed

- ☒ Blood Alcohol
- ☐ Drugs of Abuse Immunoassay (Blood)
- ☐ Drugs of Abuse Immunoassay (Urine)
- ☒ Alkaline Drug Screen (Urine)
- ☒ Alkaline Drug Screen (Blood)
- ☒ Acidic and Neutral Drug Screen (Blood)
- ☐ Carbon Monoxide (Blood)
- ☐ Other _____

Results

Sample	Drug	Concentration	Therapeutic	Toxic	Lethal
Blood	Ethanol	Negative			
Blood	Morphine	0.14 mg/L	0.04-0.15 mg/L		0.05-4.00 mg/L
Blood	Phencyclidine	0.02 mg/L			1.0-5.0 mg/L
Blood	Cocaine	0.15 mg/L			
Blood	Cocaine metabolite (Benzoylecgonine)	5.50 mg/L			
Blood	Cocaine metabolite (Ecgonine Methyl Ester)	0.20 mg/L			
Blood	Alprazolam	0.03 mg/L	0.01-0.05 mg/L		
Blood	Diazepam	0.09 mg/L	0.02-4.00 mg/L		
Blood	Nordiazepam	0.08 mg/L	0.02-1.80 mg/L		
Urine	Morphine, 6-Monoacetylmorphine, Codeine, Phencyclidine, Alprazolam, Cocaine, Norcocaine	Positive			

Comments

The narcotic analgesic morphine was present in the blood at a concentration which can cause fatal respiratory depression in the absence of adequate tolerance to opiate medications. Cocaine and its cocaine metabolite were also present in the blood, with the heroin metabolite, 6-monoacetylmorphine detected in the urine. The hallucinogen, phencyclidine (PCP) was present in the blood.

James C. Kraner, Ph.D.
Chief Toxicologist

9/21/05
Date

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA
MARTINSBURG

UNITED STATES OF AMERICA,

Plaintiff,

v. **Criminal Action No. 3:05CR60**
3:14CV31

RICHARD ASHBAUGH,

Defendant.

MOTION TO DISMISS PETITION

Now comes the United States of America, and William J. Ihlenfeld, II, United States Attorney for the Northern District of West Virginia, by Paul T. Camilletti, Assistant United States Attorney for said District, and states the following:

Introduction

On September 20, 2005, Richard Ashbaugh was indicted for distribution of heroin and death resulting from the use of such heroin in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C). Mr. Ashbaugh executed a plea agreement with the United States and entered a guilty plea to the distribution of heroin resulting in

death on January 4, 2006 (Documents 57–62). On March 20, 2006, Mr. Ashbaugh was sentenced to 240 months imprisonment, 4 years of Supervised Release, a $100.00 Special Assessment and a fine of $1,100.00 (Documents 72–78). He did not appeal the sentence.

Mr. Ashbaugh filed his first § 2255 Petition on September 29, 2006 (Documents 87–101). According to the Magistrate Judge's Report and Recommendation, Mr. Ashbaugh raised three grounds for relief in this first petition:

i. The Court relied on judge found facts to sentence him under the mandatory guidelines violating his Sixth Amendment right to have such facts proven beyond a reasonable doubt.

ii. Counsel provided ineffective assistance because she was unwilling to prepare a defense, gave bad advice regarding the plea agreement, and failed to argue mitigating factors.

iii. The Court did not have subject matter jurisdiction because the elements of the crime were insufficient to sustain a guilty verdict. (sic).

The Magistrate Judge found that Mr. Ashbaugh made a knowing, intelligent and voluntary waiver of his right to file a collateral attack and recommended that the Petition be denied (Document 100[1]). The District Court adopted the Magistrate Judge's Report

[1] The Magistrate Judge also noted that Mr. Ashbaugh had stipulated in his plea agreement to the distribution of heroin, the use of which resulted in death (Document 100).

and Recommendation and dismissed Mr. Ashbaugh's petition (Document 101).

The Instant Petition

In the petition filed March 12, 2014, Mr. Ashbaugh argues that his case is similar to *Burrage v. United States*, ___ U.S. ___, 134 S.Ct. 881 (2014). *Burrage's* conviction was reversed and remanded for further proceedings: use of the heroin which was distributed must be the but for cause of death. *Id*. p. 892. Ashbaugh argues the decedent in his case ingested multiple drugs and there is no indication that the heroin he distributed is a but-for cause of death.

Statutes

Title 28, United States Code, Section 2255(h)(2) provides, in part:

> "A second or successive motion must be certified as provided in Section 2244 by a panel of the appropriate Court of Appeals to contain…
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Title 28, United States Code, Section 2244 provides, in part:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application

for a writ of habeas corpus, except as provided in Section 2255.

"(b)(2)(A). A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable;

"(b)(3)(A). Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

Discussion

On January 27, 2014, the Supreme Court of the United States decided *Burrage v. United States*, ___ U.S. ___, 134 S.Ct. 881 (2014). This decision prompted the filing of Mr. Ashbaugh's second petition. He has not moved for nor obtained a certification from a panel of the 4th Circuit Court of Appeals

In *Burrage*, the Supreme Court held, "At least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death. . ., a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death. . .." p. 892. The Supreme Court did not hold this opinion to be retroactive to cases on collateral review.

Teague v. Lane, 489 U.S. 288 (1989) addresses the retroactive application of new constitutional rules in the initial § 2255. In *Teague*, the Supreme Court held that a new rule of criminal procedure will not be applicable to those cases which have become final before the new rule is announced. *Id*. p. 301. There are two exceptions which allow a new rule to be applied retroactively if (1) the rule is a new substantive rule or (2) the rule is a watershed rule of criminal procedure. *Id*. p. 311. A rule is substantive rather than procedural if it, "narrow[s] the scope of a criminal statute" or "place[s] particular conduct. . .beyond the state's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351–352 (2004) (citations omitted). A new watershed rule of criminal procedure will rarely, if ever, be found. *Whorton v. Backting*, 549 U.S. 406, 418 (2007).

Successive petitions such as the instant § 2255 are governed by *Tyler v. Cain*, 533 U.S. 656 (2001). Before a new rule may be applied to a case on a second or successive petition for collateral review, the Supreme Court must first hold that the new rule is retroactive. *Id*. pp. 664–665. There are "three prerequisites to obtaining relief in a second or successive petition: First, the rule on which the claim relies must be a 'new rule' of constitutional law; second, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court'; and third, the claim must have been 'previously unavailable.'" *Id*. p. 662. "The only way the Supreme Court can, by itself, 'lay out and construct' a rule's retroactive effect, or 'cause' that effect 'to exist, occur, or appear' is through a holding. The Supreme Court does not 'make' a rule retroactive when it merely establishes principles of retroactivity

and leaves the application of those principles to lower courts. . . .We thus conclude that a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Id*. p. 663.

The Fourth Circuit Court of Appeals has addressed the retroactivity of new rules to cases on collateral review repeatedly. In *United States v. Powell*, 691 F.3d 554 (4th Cir. 2012), the Court reviewed a § 2255 filed six years after conviction. Powell sought to vacate his conviction based on the Supreme Court's opinion in *Carachuri-Rosendo v. Holder*, ___ U.S. ___, 130 S.Ct. 2577 (2010) "which held that the question of whether a prior conviction is an 'aggravated felony'. . .must be resolved by looking at the offense for which he could have been convicted in view of his conduct," *Id*. p. 555, rather than looking at some hypothetical most serious offense. The Court of Appeals rejected Powell's argument that this holding created a new substantive rule finding that *Carachuri* articulated a procedural rule rather than a substantive one. *Id*. p. 558. As such, it was not retroactively applicable to cases on collateral review. *Id*. p. 560.

In *United States v. Mathur*, 685 F.3d 396 (4th Cir. 2012), the Court held that the Supreme Court's decision in *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473, 1486 (2010) "was not a watershed rule. . .implicating fundamental fairness." *Id*. p. 397. *Padilla* held that "the Sixth Amendment right to counsel requires defense lawyers to inform their clients whether a guilty plea pursuant to a plea agreement carries a risk of deportation." *Id*. The Fourth Circuit recognized that the right recognized in

Padilla "has little, if anything, to do with the accuracy of the fact finding process." *Id*. p. 400. Nor does the *Padilla* opinion discuss *Teague v. Lane* and its progeny. "The only way to make a new rule retroactive 'is through a holding' not through dictum, *Tyler v. Cain*, 533 U.S. 656, 663–64 (2001)." *Id*. p. 401.

In *United States v. Morris*, 429 F.3d 65 (4th Cir. 2005), the court considered whether *United States v. Booker*, 543 U.S. 220 (2005) holding that the Sentencing Guidelines are advisory applies retroactively to cases on collateral review. Determining that the rule in *Booker* was not retroactive. *Id*. p. 70; the court, nevertheless, found that *Booker* announced a new rule, *Id*. p. 71; which was not a watershed rule as "Infringement of the rule [does not] seriously diminish the likelihood of obtaining an accurate conviction nor does the holding in *Booker* "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Id*. Moreover, "the practical net result of *Booker* is minimal." *Id*. p. 72.

In *United States v. Thomas*, 627 F.3d 534 (4th Cir. 2010), the Court held that the Supreme Court's decision in *Watson v. United States*, 522 U.S. 74, 83 (2007), that a person did not use a firearm under 18 U.S.C. § 924(c)(1)(A) when he receives it in trade for drugs, "is a new substantive right which must be applied retroactively to cases on collateral review." *Id*. p. 538. "New substantive rules. . .generally apply retroactively. . .because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." *Id*. p. 537.

In *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013), the court recognized that its decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011), holding that Simmons' prior conviction under North Carolina law for which he could not have received more than a year in prison was not a qualifying conviction prohibiting possession of a firearm, is a new substantive rule that may be applied retroactively. *Id*. p. 147. The court noted that other cases announcing new substantive rules include *Bailey v. United States*, 516 U.S. 137 (1995) (using a firearm under § 924(c) requires active employment); and *Watson v. United States*, 552 U.S. 74, 83 (2007) (trading drugs for a firearm is not use). These are cases, as is *Simmons*, which announce a rule that "narrowed the scope of a criminal statute as it had previously been construed." *Id*. p. 46.

In light of these decisions, it is clear that *Burrage* did not announce a new constitutional rule that will be applied retroactively. The *Burrage* decision did not "narrow the scope" of drug distribution nor "place particular" drug distributions "beyond the state's power to punish." *Schriro*, pp. 351–352. Mr. Ashbaugh entered his guilty plea to distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1). The *Burrage* decision did not "alter[] the range of conduct" of § 841(a)(1), *Id*. p. 353, nor did Ashbaugh receive "a punishment that the law cannot impose upon him." *Id*. p. 352. The twenty year sentence which Ashbaugh received is the maximum allowed by § 841(b)(1)(C) for drug distribution with no penalty enhancement. The *Burrage* decision is not a "constitutional determination" that place[d] Ashbaugh's "conduct. . .beyond the state's power to

punish. *Id*. p. 352. While *Burrage* limited the application of a "penalty enhancement" found in 21 U.S.C. § 841(b)(1)(C), it did not place Mr. Ashbaugh, beyond the reach of the Controlled Substances Act. *Burrage*, p. 892. Accordingly, the *Burrage* decision is not retroactive and has no application to Mr. Ashbaugh's conviction.

Mr. Ashbaugh stipulated to the fact that be distributed heroin, the use of which resulted in death. He waived his right to bring this petition in his plea agreement. The district court has found that this waiver was knowing, intelligent and voluntary. His initial § 2255 was dismissed on this basis. The *Burrage* opinion upon which Mr. Ashbaugh relies does not announce a new rule. Nor was the *Burrage* decision held by the Supreme Court to be retroactive to cases on collateral review. Mr. Ashbaugh has no certificate from the Court of Appeals recognizing that a new rule has been announced. He has not complied with the requirements of 28 U.S.C. § 2244(b)(3) and § 2255(h)(2). This petition should be dismissed.

Respectfully submitted,

WILLIAM J. IHLENFELD, II
UNITED STATES ATTORNEY

By: /s/ Paul T. Camilletti
Paul T. Camilletti
Assistant United States Attorney

APPENDIX L

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT	District Northern District	
Name of Movant Richard Ashbaugh	Prisoner No. 05224-087	Case No. 3:05 CR60
Place of Confinement 7 C.I. Cumberland – P.O. box 1000 Cumberland Md, 21501		
UNITED STATES OF AMERICA v. Richard Ashbaugh (name under which convicted)		

MOTION

1. Name and location of court which entered the judgment of conviction under attack
   U.S. Courthouse 217 W. Kingstreet, Suite 400, Martingsburg WV 25401
2. Date of judgment of conviction
   March 23, 2006
3. Length of sentence
   240 months
4. Nature of offense involved (all counts)
   21 U.S.C. § 841(b)(1)(c), Distribution of heroin resulting in a death.
5. What was your plea? (check one)
   (a) Not guilty ☐
   (b) Guilty ■
   (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☐
   (b) Judge only ■
7. Did you testify at the trial?
   Yes ☐ No■
8. Did you appeal from the judgment of conviction?
   Yes ☐ No■

* * *

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Recent Supreme Court Ruling of (Burrage v. U.S.) No. 12 75-15

Supporting FACTS (state *briefly* without citing cases or law)

Burrage and I were both convicted of 21 U.S.C. § 841(b)(1)(c). His case was overturned 1/27/14 in the Supreme Court because the court contributing

causes could not be held liable for the resulting in death inhancement. I contributed 1 of 5 drugs to the death, just as he did 1 of 4. After this ruling I feel I am not guilty of the resulting in death inhancement.

* * *

APPENDIX M

DEPARTMENT OF JUSTICE

THOMAS E. JOHNSTON
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF WEST VIRGINIA

P. O. BOX 591
WHEELING, WV 26003

(304) 234-0100
(304) 234-0110 FAX (MAIN) ◆ (304) 234-0111 FAX (CRIMINAL)
(304) 234-0112 FAX (CIVIL)

P. O. BOX 190
ELKINS, WV 26241
(304) 636-1739 (304) 636-1967 FAX

◆◆◆◆

U. S. COURTHOUSE
217 W. KING STREET, SUITE 400
MARTINSBURG, WV 25401-3286
(304) 262-0590 (304) 262-0591 FAX

CLARKSBURG FEDERAL CENTER
320 WEST PIKE STREET, SUITE 300
CLARKSBURG, WV 26301-2710
(304) 623-7030 (304) 623-7031 FAX

January 4, 2006

Carmela Cesare, Esq.
P.O. Box 69
Shepardstown, WV 25443

In re: United States v. Richard Ashbaugh
Criminal No. 3:05CR60

Dear Ms. Cesare:

This will confirm conversations with you concerning your client, Richard Ashbaugh (hereinafter referred to as defendant).

All references to the "Guidelines" refer to the guidelines established by the United States Sentencing Commission, effective November 1, 1987, as amended.

It is agreed between the United States and your client as follows:

1. Defendant will plead guilty to Count I, Aid and Abet Distribution of Heroin Resulting in Death, in violation of Title 21, United States Code, Section 841(a)(1) of the above-referenced Indictment.

Richard Ashbaugh — 1-04-05
Richard Ashbaugh, Defendant — Date Signed

Carmela Cesare — 1-4-06
Carmela Cesare, Esq.
Counsel for Defendant — Date Signed

Carmela Cesare, Esq.
January 4, 2006
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2. The maximum penalty to which defendant will be exposed by virtue of his plea of guilty, as stated in paragraph 1 above, is imprisonment for twenty (20) years to life, a fine of $1,000,000.00 and a term of at least three (3) years of supervised release [21 USC 841(b)(1)(C)]

It is further understood by Defendant that there is a special mandatory assessment of $100.00 (18 USC 3013) per felony conviction **which must be paid within 40 days following entry of his plea** by money order or certified check to the United States District Court. It is also understood that Defendant may be required by the Court to pay the costs of his incarceration, supervision, and probation.

3. Defendant will be completely forthright and truthful with regard to all inquiries made of him and will give signed, sworn statements and grand jury and trial testimony relative thereto. Defendant will agree to submit to a polygraph examination if requested to do so by the United States Attorney's Office for the Northern District of West Virginia.

4. A. Nothing contained in any statement or any testimony given by Defendant, pursuant to paragraph 3, will be used against him as the basis for any subsequent prosecution. It is understood that any

information obtained from Defendant in compliance with this cooperation agreement will be made known to the sentencing Court; however, pursuant to Guideline 1B1.8, such information may not be used by the Court in determining Defendant's applicable guideline range.

B. This agreement does not prevent Defendant from being prosecuted for any violations of other Federal and state laws he may have committed should evidence of any such violations be obtained from an independent legitimate source, separate and apart from that information and testimony being provided by him pursuant to this agreement.

C. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Defendant for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of his fulfilling the conditions of paragraph 3 above.

5. At final disposition, the United States will advise the Court of defendant's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give the same such weight as the Court deems appropriate. The United States will also recommend that the remaining count in the Indictment be dismissed.

Richard Ashbaugh — 1-4-05
Richard Ashbaugh, Defendant — Date Signed

Carmela Cesare — 1-4-05
Carmela Cesare, Esq.
Counsel for Defendant — Date Signed

6. There have been no representations whatsoever by any agent or employee of the United States, or any other law enforcement agency, or defendant's counsel as to what the final disposition in this matter should and will be. This agreement includes nonbinding recommendations by the United States, pursuant to Rule 11(e)(1)(B); however, the defendant understands that the Court is **not** bound by these sentence recommendations, and that the defendant has **no** right to withdraw a guilty plea if the Court does not follow the sentencing recommendations set forth in this plea agreement.

7. Contingent upon Defendant's payment of the $100.00 special assessment fee **within 40 days following the entry of his plea**, the United States will make the following **nonbinding** recommendations:

A. If, in the opinion of the United States Attorney's Office, Defendant accepts responsibility and if the probation office recommends a two-level reduction for "acceptance of responsibility," as provided by Guideline 3E1.1, then the United States will concur in and make such recommendation;

B. Should Defendant give timely and complete information about his own criminal involvement and provide timely notice of his intent to plead guilty, thereby permitting the United States to avoid trial preparation and if he complies with all the requirements of this agreement, the United States will recommend an additional one level reduction, so long

as Defendant executes the plea agreement on or before December 6, 2005 at 5:00 p.m. and returns an executed copy to the United States by that day;

C. The United States will recommend that any sentence of incarceration imposed should be at the twenty (20) year statutory mandatory minimum.

8. If in the opinion of the United States, the Defendant either engages in conduct defined under the Application Notes of Guideline 3C1.1, fails to cooperate as promised, **fails to pay the special assessment within 40 days following the entry of his plea,** or violates any other provision of this plea agreement, then the United States will not be bound to make the foregoing recommendations, and the Defendant will not have the right to withdraw the plea.

Richard Ashbaugh — 1-4-06
Richard Ashbaugh, Defendant — Date Signed

Carmela Cesare — 1-4-06
Carmela Cesare, Esq.
Counsel for Defendant — Date Signed

Carmela Cesare, Esq.
January 4, 2006
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9. Pursuant to Sections 6B1.4, 1B1.3 and 2D1.1 [Application Note 12] of the Guidelines, the parties hereby stipulate and agree that the total drug relevant conduct of the defendant with regard to the indictment is the distribution of heroin, a controlled substance, the use of which resulted in death. The parties understand that pursuant to Section 6B1.4(d), the Court is not bound by the above stipulation and is not required to accept same. Defendant understands and

agrees that should the Court not accept the above stipulation, defendant will not have the right to withdraw his plea of guilty.

10. Defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, and in exchange for the concessions heretofore made by the United States in this plea agreement, Defendant knowingly and voluntarily waives the right to appeal any sentence which is within the maximum provided in the statute of conviction or in the manner in which that sentence was determined on any ground whatever, including those grounds set forth in Title 18, United States Code, Section 3742. Defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to, a motion brought under Title 28, United States Code, Section 2255 (habeas corpus). The United States does not waive its right to appeal the sentence; however, in the event that there would be an appeal by the United States, Defendant's waiver contained in this paragraph will be voided provided Defendant complies with the provisions of Rule 4(b)(1)(A)(ii) of the Federal Rules of Appellate Procedure.

11. Defendant waives any right he may have to ask the court for any departures under USSG 5H or USSG 5K.

12. The United States reserves the right to provide to the Court and the United States Probation Office, in connection with any presentence investigation that may be ordered pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure, or in connection with the

imposition of sentence should the Court, pursuant to Rule 32(c)(1), not order a presentence investigation, relevant information including defendant's background, criminal record, offense charged in the indictment and other pertinent data appearing at Rule 32(c)(2) of the Federal Rules of Criminal Procedure as will enable the Court to exercise its sentencing discretion. The United States also retains the right to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the anticipated presentence report to be prepared by the Probation Office of this Court, and to respond to any written or oral statements made by the Court, by defendant or his counsel.

Richard Ashbaugh — 1-4-06
Richard Ashbaugh, Defendant — Date Signed

Carmela Cesare — 1-4-06
Carmela Cesare, Esq.
Counsel for Defendant — Date Signed

Carmela Cesare, Esq.
January 4, 2006
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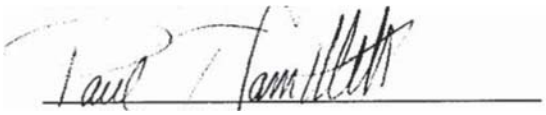
13. The defendant agrees to waive the right to request or raise the issue of D.N.A. testing in any post-conviction proceeding under 18 U.S.C. Section 3600 or in conjunction with any other collateral challenge to the conviction.

14. If the defendant's plea is not accepted by the Court or is later set aside or if the defendant breaches any part of this agreement, then the Office of the United States Attorney will have the right to void this agreement.

15. The above fifteen (15) paragraphs constitute the entire agreement between defendant and the United States of America in this matter. There are no agreements, understandings or promises between the parties other than those contained in this agreement.

Very truly yours,

THOMAS E. JOHNSTON
United States Attorney

By: 
Paul T. Camilletti
Assistant United States Attorney

PTC/lbm

As evidenced by my signature at the bottom of the 5 pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby, fully approve of each provision.