APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2641

Ronald Raymond Fowlkes

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:15-cv-00120-LRR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

February 08, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2641

Ronald Raymond Fowlkes

Plaintiff - Appellant

v.

United States of America

Defendant - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:15-cv-00120-LRR)

JUDGMENT

Before WOLLMAN, GRUENDER and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 12, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

RONALD RAYMOND FOWLKES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 15-cv-0120-LRR
14-cr-0103-LRR

JUDGMENT

DECISION BY THE COURT: This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Order filed June 15, 2017 (docket number 6): That the Plaintiff's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 is denied. A certificate of appealability under 28 U.S.C. § 2253 will not issue.

DATED this 15th day of June, 2017.

ROBERT L. PHELPS, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

K Yorgensen

By: Karen S Yorgensen, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

RONALD RAYMOND FOWLKES, Movant, vs. UNITED STATES OF AMERICA.	No. C15-0120-LRR No. CR14-0103-LRR ORDER

This matter appears before the court on Ronald Raymond Fowlkes' motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1). Ronald Raymond Fowlkes ("the movant") filed his 28 U.S.C. § 2255 motion on November 3, 2015.[1] In addition, the movant filed a motion to amend (civil docket no. 3) on November 23, 2016.

The movant is unable to amend his motion to vacate, set aside or correct sentence by adding new claims because the applicable statute of limitation ran in March of 2016 and

[1] No response from the government is required because the 28 U.S.C. § 2255 motion and file make clear that the movant is not entitled to relief. *See* 28 U.S.C. § 2255; Rule 4(b), Rules Governing Section 2255 Proceedings. Further, because the record is clear, an evidentiary hearing is not necessary, *see* Rule 8, Rules Governing Section 2255 Proceedings; *see also Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (stating that district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing "if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact"); *United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986) (stating that district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255).

he sought to include an additional claim in November of 2016. *See United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999) (concluding an otherwise untimely amendment to a 28 U.S.C. § 2255 motion does not relate back to a timely filed motion when the original claims are distinctly separate from the claims in the amendment); *see also Mandacina v. United States*, 328 F.3d 995, 999-1000 (8th Cir. 2003) (citing *Craycraft*, 167 F.3d at 457); *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999) (discussing *Craycraft*, 167 F.3d at 456-57). The motion to amend is untimely and does not sufficiently relate back to the movant's original claim. Moreover, given the record, the movant's new claim is baseless, especially considering the parties' plea agreement and the pre-sentence investigation report. Accordingly, the movant's motion to amend is denied.

The movant raises ineffective assistance of counsel as a basis for seeking relief. Specifically, the movant contends that counsel provided ineffective assistance because counsel did not properly challenge the application of the advisory sentencing guidelines.

Having considered the indictment (docket no. 5), the notice of intent to plead guilty (docket no. 71), the Rule 11 letter (docket no. 74), the plea agreement (docket no. 86), the report and recommendation to accept guilty plea (docket no. 85), the offense conduct statement (docket no. 89), the order accepting the guilty plea (docket no. 90), the objections to the pre-sentence investigation report (docket nos. 96 & 98), the pre-sentence investigation report (docket no. 102), the sentencing memoranda (docket nos. 106 & 108), the sentencing exhibit (docket nos. 106-2) and the joint notice of resolved sentencing issues (docket no. 120), the court finds that the movant's contentions are contradicted by the record. It is apparent that the conduct of counsel fell within a wide range of reasonable professional assistance, *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and counsel's performance did not prejudice the movant's defense, *id.* at 692-94. Considering all the circumstances and refraining from engaging in hindsight or second-guessing counsel's

strategic decisions, the court finds that the record belies the movant's claims and no violation of the movant's constitutional right to counsel occurred.

The court's application of the advisory sentencing guidelines, consideration of the parties' sentencing arguments and application of the sentencing factors under 18 U.S.C. § 3553(a) violated no constitutional right. *See United States v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009) (observing that a sentencing judge is only constrained by the statutory maximum and minimum for an offense and the factors included in 18 U.S.C. § 3553(a)). Nothing restricted the court's discretion during the sentencing hearing, and the sentence that the movant received is appropriate and consistent with the parties' understandings. Indeed, the court properly considered the unobjected-to portions of the pre-sentence investigation report. *See* Fed. R. Crim. P. 32(i); *see also United States v. Paz*, 411 F.3d 906, 909 (8th Cir. 2005) (explaining that facts in pre-sentence investigation report are deemed admitted unless the defendant objects to those facts); *United States v. Rodamaker*, 56 F.3d 898, 902 (8th Cir. 1995) (stating that it is permissible to rely on unobjected-to facts in the pre-sentence investigation report).

Given the movant's stipulations in his plea agreement, the unobjected-to facts in the pre-sentence investigation report and the parties' joint notice of resolved sentencing issues, it is clear that no valid basis to challenge the offense conduct and/or to contest the application of USSG §2D1.1(b)(13)(C)(ii) existed. Even if a valid basis existed, nothing prevented the court from varying from the otherwise applicable advisory sentencing guidelines range. Thus, the court is unable to conclude that counsel provided constitutionally ineffective assistance. *See Donnell v. United States*, 765 F.3d 817, 820-21 (8th Cir. 2014) (emphasizing that only errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment are actionable); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland*, 466 U.S. at 694); *see also United States v.*

Cronic, 466 U.S. 648, 657 (1984) (stating that counsel is not required to attempt a useless charade).

Moreover, the movant's assertions as to what counsel did or failed to do would not have changed the outcome. Stated differently, the movant suffered no prejudice. The movant does not credibly assert facts that indicate he did not create a substantial risk of harm to human life or the environment. It is undeniable that the movant could have faced a lengthier sentence if the government proved by a preponderance of evidence that USSG §2D1.1(b)(13)(D) applied or successfully argued that an upward variance was warranted. In the event that the movant raised frivolous arguments during the sentencing hearing, it is a near certainty that the movant would have received a longer sentence, that is, between 121 and 151 months imprisonment or 168 and 210 months imprisonment. This is especially so because it is a close call whether the movant created a substantial risk of harm to the life of a minor and it is very likely that the movant would have lost acceptance of responsibility if he frivolously contested offense conduct. So, the decisions that counsel made benefitted the movant.

In sum, the evidence of record conclusively demonstrates that the movant is not entitled to the relief sought. Specifically, it indicates that the movant's claims are without merit, especially considering that counsel represented the movant in a manner that exceeded constitutional requirements. Given the record, the court finds that the denial of the movant's motion under 28 U.S.C. § 2255 comports with the Constitution, results in no "miscarriage of justice" and is consistent with the "rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987))). Accordingly, the movant's motion to vacate, set aside or correct

sentence pursuant to 28 U.S.C. § 2255 is denied. As for a certificate of appealability, the movant has not made the requisite showing. *See* 28 U.S.C. § 2253(c)(2). Accordingly, a certificate of appealability under 28 U.S.C. § 2253 will not issue.

IT IS SO ORDERED.

DATED this 14th day of June, 2017.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Additional material from this filing is available in the Clerk's Office.