

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 18-1464

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William E. Brown

Movant - Appellant

v.

United States of America

Respondent - Appellee

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:17-cv-00613-GAF)

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**JUDGMENT**

Before GRUENDER, KELLY and GRASZ, 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.

The motion to take judicial notice is denied as moot.

August 08, 2018

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

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/s/ Michael E. Gans

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**MANDATE**

In accordance with the judgment of 08/08/2018, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

October 10, 2018

Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX: B.

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

## ORDER

On January 12, 2018, the Court denied Movant relief pursuant to 28 U.S.C. § 2255 and declined to issue a certificate of appealability. On February 20, 2018, the Court denied Movant’s motion to alter judgment. On March 1, 2018, Movant filed a notice of appeal from both orders. The Court construes this notice as containing a request for leave to proceed as a pauper on appeal, which the Court denies. *See* 28 U.S.C. § 1915(a)(3) (“appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith”). The Clerk of the Court shall send this case to the Court of Appeals.

So ORDERED.

/s/ Gary A. Fenner  
GARY A. FENNER  
UNITED STATES DISTRICT JUDGE

Dated: March 1, 2018.

## APPENDIX: C.

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

**ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255**

Movant pled guilty to his role in a conspiracy to distribute cocaine, and the Court sentenced him to 135 months' imprisonment. Crim. Docs. 754 (judgment), and 781-1, pp. 2-3 (opinion).<sup>1</sup> Movant appealed, and the Court of Appeals affirmed. Crim. Doc. 781-1. Movant now seeks to vacate his sentence pursuant to 28 U.S.C. § 2255.

As grounds for relief, Movant claims he was denied effective assistance of plea counsel. Doc. 1, p. 4 (motion); Doc. 2 (memorandum). Specifically, Movant faults his attorney for (1) failing to object to the drug quantity calculation in the presentence investigation report (PSR), Doc. 2, pp. 3-7; (2) coercing him into pleading guilty by threats, *id.* at 6; and (3) failing to seek a sentencing departure under U.S.S.G. § 5H1.4 because he suffers from advanced kidney disease and other ailments, *id.* at 7-11, 15-19.<sup>2</sup> In a subsequent pleading, Movant added as a ground for relief that (4) he is entitled to relief under Amendment 794 to the United States Sentencing Guidelines. Doc. 5.

<sup>1</sup>“Crim. Doc.” refers to documents filed in Movant’s criminal case. “Doc.” refers to documents filed in this civil case.

<sup>2</sup>Movant's grounds for relief are not clearly enumerated. See Doc. 2 (memorandum)

The Court must grant relief if “the sentence was imposed in violation of the Constitution or laws of the United States[.]” § 2255(a). Based on the nature of Movant’s claims, in order to prevail, he must show that the performance of counsel was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (*Strickland* standard applies to the performance of plea counsel). Additionally, Movant has the burden of proof regarding his claims. *Kress v. United States*, 411 F.2d 16, 20 (8<sup>th</sup> Cir. 1969).

As for ground (1) (drug quantity calculation), Respondent argues that the record disproves Movant’s claim:

The record demonstrates that defense counsel filed written objections to the PSR drug quantity. The majority of the sentencing hearing was devoted to litigating this objection, including witness testimony over defense counsel objection. Defense counsel strenuously objected to the drug quantity calculation. This Court found that the drug quantity used in the PSR was accurate based on Brown’s knowledge of the Andre Taylor drug trafficking organization.

Doc. 7, p. 10 (citations and footnote omitted). Respondent’s argument is correct. *See* Doc. 759, pp. 3-22 (transcript of sentencing hearing). The Court finds that counsel did not render ineffective assistance as alleged in ground (1).

As for ground (2) (alleged attorney coercion), again, the record disproves Movant’s claim. *See* Doc. 720, p. 13 (transcript of plea hearing during which Movant testified that his guilty plea was not induced by threats or promises); *see also United States v Hyde*, 520 U.S. 670, 677 (1997) (guilty plea is a “grave and solemn act” and should not be lightly set aside) (citations and quotation marks omitted). Having reviewed the record, the Court finds that Movant has failed to present evidence that is sufficient to show (and overcome his earlier testimony to the contrary) that his attorney coerced him into pleading guilty. Therefore, relief is denied on ground (2).

As for ground (3) (failure to seek a sentencing departure), Respondent argues:

Brown alleges that defense counsel should have sought a departure under U.S.S.G. § 5H1.4, because Brown suffers from advanced kidney disease. Brown contends his sentence of 135 months is “basically a death sentence” due to his serious medical condition.

The record demonstrates that defense counsel requested a variance, rather than a Guidelines departure, based on Brown’s medical issues. The record shows that defense counsel made a cogent and reasoned argument, which included many facts not contained within the PSR. Defense counsel may have made a strategic choice to see a variance rather than a Guidelines departure. Unlike a variance, a Guidelines departure requires that the district court assess certain factors to determine if the departure is warranted. Defense counsel may have elected to seek a variance based on the lesser standard.

Furthermore, this Court was aware of its authority to grant a variance and determined that a lesser sentence was not warranted. This Court simply declined to grant the variance.

Doc. 7, p. 14 (citations omitted). Respondent’s argument is correct. The Court considered counsel’s argument for a lesser sentence and rejected it – based on the facts of the case and not due to any deficiency in counsel’s argument. *See* Doc. 759, pp. 24-36 (transcript of sentencing hearing). Therefore, relief is denied on ground (3).

As for ground (4) (U.S.S.G. Amendment 794), for the reasons set out by Respondent, the Court agrees that the Amendment does not apply retroactively on collateral review. *See* Doc. 7, pp. 16-17; *United States v. Vaca-Gomez*, No. 12-50008-003, 2016 WL 6821118, at \*2 (W.D. Ark. Oct. 11, 2016) (same, Amendment 794 claim is not cognizable in a § 2255 case). Therefore, relief is denied on ground (4).

The Court has considered Movant’s ancillary claims and finds that none has merit. For the reasons explained above, Movant’s motion for relief pursuant to 28 U.S.C. § 2255 is denied, and this case is dismissed. Finally, Court declines to issue a certificate of appealability. *See*

28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a constitutional right”). The Clerk of the Court shall enter judgment accordingly.

So **ORDERED**.

/s/ Gary A. Fenner  
GARY A. FENNER  
UNITED STATES DISTRICT JUDGE

Dated: January 12, 2018.