UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1013

Alvin Stanley Briggs, Jr.

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:15-cv-01020-LRR)

ORDER

The petition for rehearing by the panel is denied.

July 23, 2018

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1013

Alvin Stanley Briggs, Jr.

Plaintiff - Appellant

v.

United States of America

Defendant - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:15-cv-01020-LRR)

JUDGMENT

Before BENTON, SHEPHERD and STRAS, 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.

May 25, 2018

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ALVIN STANLEY BRIGGS, JR., Movant, vs. UNITED STATES OF AMERICA, Respondent.	No. 15-CV-1020-LRR No. CR13-1004-LRR **ORDER**

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I. INTRODUCTION

This matter comes before the court on Alvin Stanley Briggs, Jr.'s amended motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 ("amended motion"), which he filed on September 25, 2015 (civil docket no. 8).[1] On April 12, 2016, the court directed the government to brief the claims that movant asserted in the amended motion (civil docket no. 10). The court also directed counsel to file with the court an affidavit responding only to movant's specific allegations of ineffective assistance of counsel (*id.*). Trial counsel timely complied with the court's order by filing his affidavit on April 15, 2016 (civil docket no. 11).[2] The government, after obtaining an extension of time to file a responsive brief (civil docket no. 14), filed its responsive brief on June 28, 2016 (civil docket no. 15). Movant did not file a reply.

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Movant was charged in a five count indictment filed on March 20, 2013 (criminal docket no. 2). Movant's charges were: count 1, distribution of heroin resulting in death, a violation of 21 U.S.C. § 841(a)(1), (b)(1)(c); and counts 2-5, distribution of heroin within 1,000 feet of an elementary school and a playground, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(c) and 860 (criminal docket no. 2). In May 2013, movant filed a motion for a ruling on the standard of proof required for count 1 (distribution of heroin resulting in death) (criminal docket no. 23). Relying on Eighth Circuit precedent, the court ruled that "under 21 U.S.C. § 841(b)(1), there is no proximate cause or

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[1] Movant initially filed a pro se 28 U.S.C. § 2255 motion on July 9, 2015 (civil docket no. 1). After the court appointed counsel to represent movant (civil docket no. 6), trial counsel filed the amended motion.

[2] Movant's first trial counsel, Jill Johnston, withdrew from representation following entry of movant's first guilty plea (criminal docket nos. 32 & 33). Ms. Johnston has filed an affidavit (civil docket no. 12) in response to movant's allegations; however, Ms. Johnston's representation is not at issue in the amended motion.

forseeability requirement—that is, the government need only prove that the heroin was a contributing cause of S.R.'s death" (criminal docket no. 25 at 2).

Movant conditionally pleaded guilty to count 1, reserving the right to appeal the standard-of-proof ruling (criminal docket nos. 30 & 31). In the plea agreement, the parties stipulated: "An autopsy determined the cause of S.R.'s death was 'acute application of heroin.' S.R.'s use of the heroin [movant] distributed to S.R. on or about July 3 was, at a minimum, a contributing cause of S.R.'s death" (criminal docket no. 31 at 9, ¶ 14(D)). The court sentenced movant to 360 months' imprisonment (criminal docket no. 43).

Movant appealed his conviction and sentence (criminal docket no. 45). While his appeal was pending, the Supreme Court of the United States decided *Burrage v. United States*, 571 U.S. ___, 134 S. Ct. 881 (2014). The Court held:

> 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.

Burrage, 134 S. Ct. at 892. Relying on *Burrage*, the Eighth Circuit Court of Appeals concluded that the court erred in ruling that the government "need only prove that the heroin was a contributing cause of S.R.'s death," reversed the judgment and remanded the case for further proceedings. *See United States v. Briggs*, 559 F. App'x 604-05 (8th Cir. 2014) (unpublished decision).

On remand, movant again pleaded guilty to count 1 of the indictment—distribution of heroin resulting in death, a violation of 21 U.S.C. § 841(a)(1), (b)(1)(c) (criminal docket nos. 69 & 70).[3] There was no plea agreement. A second revised presentence

[3] The remaining counts in the indictment were dismissed at the previous sentencing hearing (criminal docket no. 43). The government did not seek to reinstate those previously dismissed charges (criminal docket no. 66 at 1 n.1).

report was filed on November 24, 2014 (criminal docket no. 72), and a sentencing hearing was held on December 22, 2014 (criminal docket no. 76). The court enhanced movant's sentence pursuant to 21 U.S.C. § 841(b)(1)(C) and sentenced him to 360 months' imprisonment (criminal docket no. 78). In addition, the court imposed a total of five years of supervised release and a total of $100 in special assessments (*id.*). Movant did not appeal his conviction or sentence.

In the amended motion, the court understands movant to assert ineffective assistance of counsel claims. He alleges that trial counsel was ineffective because he: (1) failed to object to the court's application of the "death results" sentencing enhancement under 21 U.S.C. § 841(b)(1)(C); and (2) failed to object to the revised presentence report "on the basis that the heroin was not an independently sufficient cause of death" and failed to retain an expert "to provide a supporting opinion" (civil docket no. 8 at 4-5).

III. LEGAL STANDARDS

A. Standards Applicable to Motion Pursuant to 28 U.S.C. § 2255

A prisoner in custody under sentence of a federal court is able to move the sentencing court to vacate, set aside or correct a sentence. *See* 28 U.S.C. § 2255(a). To obtain relief pursuant to 28 U.S.C. § 2255, a federal prisoner must establish: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction to impose such sentence"; (3) "that the sentence was in excess of the maximum authorized by law"; or (4) "[that the judgment or sentence] is otherwise subject to collateral attack." *Id.*; *see also Hill v. United States*, 368 U.S. 424, 426-27 (1962) (listing four grounds upon which relief under 28 U.S.C. § 2255 may be claimed); *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007) (same); *Lee v. United States*, 501 F.2d 494, 499-500 (8th Cir. 1974) (clarifying that subject matter jurisdiction exists over enumerated grounds within the statute); Rule 1 of the Rules Governing Section 2255 Proceedings (specifying scope of 28 U.S.C. § 2255).

If any one of the four grounds is established, the court is required "to vacate and set aside the judgment and [it is required to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

When enacting 28 U.S.C. § 2255, Congress "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)) (internal quotation mark omitted). Although it appears to be broad, 28 U.S.C. § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). Rather, 28 U.S.C. § 2255 is intended to redress constitutional and jurisdictional errors and, apart from those errors, only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Sun Bear*, 644 F.3d at 704 (clarifying that the scope of 28 U.S.C. § 2255 is severely limited and quoting *Hill*, 368 U.S. at 428); *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))). A collateral challenge under 28 U.S.C. § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) (making clear that a motion pursuant to 28 U.S.C. § 2255 will not be allowed to do service for an appeal). Consequently, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (quoting *Addonizio*, 442 U.S. at 184).

The law of the case doctrine has two branches. *See Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). The first branch involves the "mandate rule (which, with

only a few exceptions, forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case)." *Id.* The second branch, which is somewhat more flexible, provides that "a court ordinarily ought to respect and follow its own rulings" throughout subsequent stages of the same litigation. *Id.*; *see also United States v. Bloate*, 655 F.3d 750, 755 (8th Cir. 2011) ("The [law of the case] doctrine applies only to actual decisions—not dicta—in prior stages of the case."); *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995) ("Law of the case applies only to issues actually decided, either implicitly or explicitly, in the prior stages of a case."). "[R]ulings are the law of the case and will not be disturbed absent an intervening change in controlling authority." *Baranski v. United States*, 515 F.3d 857, 861 (8th Cir. 2008); *see also Davis*, 417 U.S. at 342 (observing that law of the case did not preclude relief under 28 U.S.C. § 2255 because of intervening change in the law).

Hence, in collateral proceedings based on 28 U.S.C. § 2255, "[i]ssues raised and decided on direct appeal cannot ordinarily be relitigated." *United States v. Wiley*, 245 F.3d 750, 751 (8th Cir. 2001) (citing *United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000)); *see also Lefkowitz v. United States*, 446 F.3d 788, 790-91 (8th Cir. 2006) (concluding that the same issues that have been raised in a new trial motion and decided by the district court cannot be reconsidered in a subsequent collateral attack); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003) ("It is well settled that claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." (quoting *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981))); *Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (per curiam) (concluding that claims already addressed on direct appeal could not be raised); *United States v. Kraemer*, 810 F.2d 173, 177 (8th Cir. 1987) (concluding that a movant could not "raise the same issues . . . that have been decided on direct appeal or in a new

trial motion"); *Butler v. United States*, 340 F.2d 63, 64 (8th Cir. 1965) (concluding that a movant was not entitled to another review of his question). With respect to a claim that has already been conclusively resolved on direct appeal, the court may only consider the same claim in a collateral action if "convincing new evidence of actual innocence" exists. *Wiley*, 245 F.3d at 752 (citing cases and emphasizing the narrowness of the exception).

Further, movants ordinarily are precluded from asserting claims that they failed to raise on direct appeal. *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001); *see also Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam) (citing *Frady*, 456 U.S. at 167-68, for the proposition that a movant is not able to rely on 28 U.S.C. § 2255 to correct errors that could have been raised at trial or on direct appeal); *United States v. Samuelson*, 722 F.2d 425, 427 (8th Cir. 1983) (concluding that a collateral proceeding is not a substitute for a direct appeal and refusing to consider matters that could have been raised on direct appeal). "A [movant] who has procedurally defaulted a claim by failing to raise it on direct review may raise that claim in a [28 U.S.C. §] 2255 proceeding only by demonstrating cause for the default and prejudice or actual innocence." *McNeal*, 249 F.3d at 749 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)); *see also Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the [movant] shows cause and prejudice."). "'[C]ause' under the cause and prejudice test must be something *external* to the [movant], something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). If a movant fails to show cause, a court need not consider whether actual prejudice exists. *See McCleskey v. Zant*, 499 U.S. 467, 501 (1991). Actual innocence under the actual innocence test "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623; *see also McNeal*, 249 F.3d at 749 ("[A movant] must show factual innocence, not simply legal insufficiency of evidence to support a conviction."). To

establish actual innocence, a movant "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation omitted) (internal quotation marks omitted).[4]

B. Standards Applicable to Constitutional Right to Counsel

The Sixth Amendment to the United States Constitution provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defen[s]e." U.S. Const., amend. VI. Thus, a criminal defendant is constitutionally entitled to the effective assistance of counsel both at trial and on direct appeal. *See Evitts v. Lucey*, 469 U.S. 387, 393-96 (1985); *Bear Stops*, 339 F.3d at 780. By the same token, "ineffective assistance of counsel" could result in the imposition of a sentence in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255; *Bear Stops*, 339 F.3d at 781 ("To prevail on a § 2255 motion, the [movant] must demonstrate a violation of the Constitution or the laws of the United States.").

The Sixth Amendment right to effective counsel is clearly established. *See Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court explained that a violation of that right has two components:

> First, [a movant] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [movant] by the Sixth Amendment. Second, [a movant] must show that the deficient performance prejudiced the defense.

Id. at 687; *see also Williams v. Taylor*, 529 U.S. 362, 390 (2000) (reasserting *Strickland* standard). Thus, *Strickland* requires a showing of both deficient performance and

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[4] The procedural default rule applies to a conviction obtained through trial or through the entry of a guilty plea. *See, e.g., Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997); *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997); *Reid v. United States*, 976 F.2d 446, 448 (8th Cir. 1992).

prejudice. However, "a court deciding an ineffective assistance claim [need not] address both components of the inquiry if the [movant] makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed." *Id.*; *see also Apfel*, 97 F.3d at 1076 ("[A court] need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice.").

The "deficient performance" prong requires the movant to show that his "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [movant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That showing can be made by demonstrating that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. There are two substantial impediments to making such a showing, however. First, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Second, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689)); *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). The "reasonableness of counsel's challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. In sum, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.*

Even if counsel's performance was "deficient," the movant must also establish "prejudice." *See id.* at 692. To satisfy this "prejudice" prong, the movant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Thus, "[i]t is not enough for the [movant] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693; *see also Pfau v. Ault*, 409 F.3d 933, 939 (8th Cir. 2005) (same).

IV. ANALYSIS

A. Request for Evidentiary Hearing

A district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the alleged facts, if true, entitle the movant to relief. *See Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). Accordingly, a 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." *Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted); *see also Delgado v. United States*, 162 F.3d 981, 983 (8th Cir. 1998) (stating that an evidentiary hearing is unnecessary where allegations, even if true, do not warrant relief or allegations cannot be accepted as true because they are contradicted by the record or lack factual evidence and rely on conclusive statements); *United States v. Hester*, 489 F.2d 48, 50 (8th Cir. 1973) (stating that no evidentiary hearing is necessary where the files and records of the case demonstrate that relief is unavailable or where the motion is based on a question of law).

Stated differently, the court can dismiss a 28 U.S.C. § 2255 motion without a hearing where "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *accord Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court concludes that it is able to resolve movant's claims from the record. *See Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (holding that "[a]ll of the information that the court needed to make its decision with regard to [the movant's] claims was included in the record" and, therefore, the court "was not required to hold an evidentiary hearing" (citing Rule Governing Section 2255 Proceedings 8(a) and *United States v. Raddatz*, 447 U.S. 667, 674 (1980))). The evidence of record conclusively demonstrates that movant is not entitled to the relief sought. Specifically, it indicates that movant's assertions are meritless and/or frivolous. As such, the court finds that there is no need for an evidentiary hearing.

B. Movant's Arguments

With respect to the merits of movant's claims, the court deems it appropriate to deny movant's 28 U.S.C. § 2255 amended motion for the reasons that are stated in the government's resistance because it adequately applied the law to the facts in the case. The government correctly asserted that trial counsel provided professionally competent assistance to movant and did not make objectively unreasonable choices regarding the appropriate action to take or refrain from taking that prejudiced movant's defense or sentencing on remand. Trial counsel thoroughly explained his strategy in his affidavit (civil docket no. 11), and such explanation is consistent with what occurred during plea and sentencing proceedings on remand.

Movant first argues that, at resentencing, the "district court judge found that the 'death results' enhancement under [21 U.S.C. §] 841(b)(1)(C) applied" and that the application of the judge-found fact was a constitutional violation under *Alleyne v. United*

States, 570 U.S. 99, 133 S. Ct. 2151 (2013), and that trial counsel provided ineffective assistance by failing to object to the enhancement of his sentence based upon the judge-found fact (civil docket no. 8 at 4). The court rejects these arguments.

In *Burrage*, the Supreme Court held that "[b]ecause the 'death results' enhancement increase[s] the minimum and maximum sentences to which [a movant is] exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt." 134 S. Ct. at 887 (citing *Alleyne*, 570 U.S. at __, 133 S. Ct. at 2162-63; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Also, after *Apprendi*, it was well settled under case law that a movant's admission of an element that would enhance his sentence during his guilty plea allocution was equivalent to that element having been determined by a jury beyond a reasonable doubt. *See United States v. Booker*, 543 U.S. 220, 244 (2005). *Alleyne* did not disturb this rule.[5]

Movant's characterization of the court's application of the "death results" sentencing enhancement as judicial fact-finding is inaccurate and his reliance on *Alleyne* is misplaced. Movant pleaded guilty to the charge in count 1 (distribution of heroin resulting in death) (criminal docket no. 2), which included as an essential element the "death resulting" language of 21 U.S.C. § 841(b)(1)(C). Although the record does not include the transcript of the plea hearing, the government's Rule 11 letter to Chief Magistrate Judge Jon S. Scoles, informing him of movant's intent to plead guilty to count 1, cited *Burrage* and stated in relevant part as follows:

- **ELEMENTS OF THE OFFENSE, INCLUDING SENTENCING FACTORS**

[5] *Apprendi* holds that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Alleyne* holds "that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 133 S. Ct. at 2155.

As a **sentencing factor**, the government would have to prove beyond a reasonable doubt that S.R.'s use of the heroin [movant] distributed to S.R. resulted in S.R.'s death.

In *Burrage v. United States*, 134 S. Ct. 881 (2014), the United States Supreme Court held "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." *Id.* at 892. The "but-for" cause standard means that the evidence must show the victim "would have lived but for" the use of heroin. *Id.*

(criminal docket no. 66 at 2) (emphasis in original).

- **FACTUAL BASIS FOR THE PLEA**

An autopsy determined the cause of S.R.'s death was 'acute application of heroin [distributed by movant].' S.R.'s use of the heroin [movant] distributed to S.R. on or about July 3 was cause of S.R.'s death [sic]. S.R. would have lived but for S.R.'s use of [movant's] heroin on or about July 3

(*id.* at 3).

- **MAXIMUM AND MINIMUM PENALTIES**

"The penalt[y] for distribution of heroin resulting in death pursuant to 21 U.S.C. § 841(b)(1)(C)" is "a mandatory minimum sentence of 20 years and not more than life imprisonment without the possibility of parole"

(criminal docket no. 66 at 2).

The government sent a copy of the Rule 11 Letter to movant's trial counsel (*id.* at 3).

The court found that movant's guilty plea was knowing and voluntary (criminal docket nos. 69 & 70). The report and recommendation concerning movant's guilty plea reflects that, during the plea hearing, the court: summarized the charge against movant; listed the elements of the crime; ascertained that movant's counsel had previously explained each and every element of the crime to movant; determined that movant understood each and every element of the crime; elicited a full and complete factual basis

for all the elements of the crime charged in count 1 of the indictment; and advised movant of the consequences of his plea, including the maximum punishment possible and any applicable mandatory sentencing considerations (criminal docket no. 69 at 3). In addition, the Assistant United States Attorney "recalls that a factual basis for 'but for' causation was elicited from [m]ovant by the [c]ourt" during the plea hearing (civil docket no. 15 at 8 n.3).

Movant did not appeal his conviction or sentence. Absent a showing of cause and prejudice, which movant has not shown, movant may not now bring claims regarding the adequacy of the factual basis for his guilty plea through collateral attack. Furthermore, movant does not allege in his amended motion that his plea is involuntary due to ineffective assistance of counsel.

Accordingly, by pleading guilty to count 1, movant admitted that he distributed the heroin that resulted in S.R.'s death and that S.R. would have lived but for S.R.'s use of movant's heroin. Movant's plea admission to the "death results" element was equivalent to that element having been determined by a jury beyond a reasonable doubt. *See Booker*, 543 U.S. at 244. Thus, the court's application of the "death results" enhancement under 21 U.S.C. §] 841(b)(1)(C) was not judicial fact-finding and was not a constitutional violation under *Alleyne*. Hence, trial counsel's failure to object at sentencing to the court's imposition of the enhancement did not constitute ineffective assistance.

Movant's second claim that trial counsel was ineffective for failing to object to the revised presentence report "on the basis that the heroin was not an independently sufficient cause of death" and for failing to retain an expert "to provide a supporting opinion" (civil docket no. 8 at 5) is without merit.

In support of this claim, movant asserts that, "[u]nder *Burrage*, a controlled substance is not a 'but-for' cause if there is no evidence that the drug's 'use was an

independently sufficient cause of his death'" (civil docket no. 8 at 5). Movant continues: "In this case, there is no dispute that [S.R.] died of a mixed drug intoxication. The amount of heroin distributed by [movant] in this case was not enough to be an independently sufficient cause of death" (*id.*). As an initial matter, movant's pincite to *Burrage*, 134 S. Ct. at 899, is incorrect as there is no page 899. In any event, movant appears to misconstrue the holding in *Burrage*, which makes clear that, when use of the drug distributed by a movant is "*not* an independently sufficient cause of the victim's death," a movant "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." *Burrage*, 134 S. Ct. at 892 (emphasis added). *Burrage* does not hold—as movant appears to suggest—that the use of the drug distributed by a movant cannot be a "but for" cause of a victim's death if the use was not an "independently sufficient" cause of death. Stated differently, *Burrage* does not require that the heroin that a movant distributed be the only reason for a victim's death. As previously stated, the pertinent inquiry is not whether movant's distribution of heroin was the sole cause of S.R.'s death, but rather whether it was a "but for" cause. *See id.* ("[W]here use of the drug distributed by the [movant] is not an independently sufficient cause of the victim's death or serious bodily injury, a [movant] 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."). Other factors, such as use of other drugs, could have contributed to S.R.'s death so long as S.R.'s use of heroin that movant supplied was a "but for" cause of S.R.'s death. For example,

> [W]here A shoots B, who is hit and dies, [it is clear] that A [actually] caused B's death, since but for A's conduct B would not have died. The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-

> for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.

Id. at 888 (third alteration in original) (citations and quotation marks omitted). Like the Supreme Court in *Burrage*, the court was required to consider whether the evidence shows that the statutorily prohibited outcome, that is, S.R.'s death, would not have occurred in the absence of the factor at issue, that is, movant's distribution of heroin. Hence, for the "death results" sentencing enhancement to apply, the government was not required to show that the heroin distributed to S.R. by movant was an "independently sufficient" cause of S.R.'s death. As such, trial counsel cannot be ineffective for failing to object to the revised presentence report "on the basis that the heroin was not an independently sufficient cause of death" and for failing to retain an expert "to provide a supporting opinion" (civil docket no. 8 at 5).

Furthermore, the record belies any argument that trial counsel failed to retain an expert regarding the "but for" causation element. Trial counsel explained in his affidavit that, after remand, he "pursued and found an expert for the purpose of presenting evidence with regard to the 'but for' portion of the statute the [movant] was charged under pursuant to the change brought about by" *Burrage* (civil docket no. 11 at 1). That medical examiner opined that, "without the ingested heroin," S.R. "would not have died on the morning of July 4, 2012" (*id.* at 17). Trial counsel explained in his affidavit that, based on the medical examiner's report and "further discussions with this expert in regard to his findings, it was both counsel and the expert's opinion that presenting his findings at the [r]esentencing would simply help the government make its case" (*id.* at 2). The fact that the medical examiner did not reach a conclusion favorable to movant's defense does not somehow render trial counsel's conduct ineffective.

Based on the above, the court finds that trial counsel's strategic decision not to object to the revised presentence report "on the basis that the heroin was not an independently sufficient cause of death" (civil docket no. 8 at 5) was reasonable.

Moreover, the court thoroughly reviewed the record and finds that the denial of movant's 28 U.S.C. § 2255 amended motion comports with the Constitution, results in no "miscarriage of justice" and is consistent with the "rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Apfel*, 97 F.3d at 1076 ("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*, 810 F.2d at 821)). It is not subject to debate that movant knowingly and voluntarily pleaded guilty. *See Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on conviction unless 'on the face of the record the court had no power to enter the conviction or impose the sentence.'"); *United States v. Jennings*, 12 F.3d 836, 839 (8th Cir. 1994) (a voluntary and unconditional guilty plea waives all defects except those related to jurisdiction). A voluntary and intelligent guilty plea forecloses federal collateral review of alleged constitutional errors preceding the plea. *See Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973). Further, it is evident that the court appropriately sentenced movant to 360 months' imprisonment. The court's application of the advisory sentencing guidelines and consideration of the parties' arguments violated no constitutional right. *See United States v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009). Lastly, it is apparent that the conduct of trial counsel fell within a wide range of reasonable professional assistance, *see Strickland*, 466 U.S. at 689, and any deficiencies in counsel's performance did not prejudice movant's defense, *see id.* at 692-94, or result in the imposition of a sentence in violation of the Constitution

or laws of the United States, *Bear Stops*, 339 F.3d at 781. Movant's claims regarding ineffective assistance of counsel are devoid of merit.

V. CONCLUSION

In sum, the alleged errors that are asserted by movant warrant no relief under 28 U.S.C. § 2255. Movant's claims are without merit. Based on the foregoing, movant's 28 U.S.C. § 2255 amended motion shall be denied.

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F. 3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that the reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds that movant failed to make the requisite "substantial showing" with respect to the claims that he raised in his 28 U.S.C. § 2255 amended motion. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his 28 U.S.C. § 2255 amended motion, movant may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

IT IS THEREFORE ORDERED:

1) Movant's 28 U.S.C. § 2255 amended motion (civil docket no. 8) is **DENIED**.

2) A certificate of appealability is **DENIED**.

DATED this 8th day of December, 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.