UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3167

Brock Fay Fish

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:16-cv-00320-DLH)

ORDER

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

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

April 09, 2019

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. 17-3167

Brock Fay Fish

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: November 15, 2018
Filed: January 15, 2019
[Unpublished]

Before COLLOTON, SHEPHERD, and STRAS, Circuit Judges.

PER CURIAM.

Brock Fay Fish, who is currently serving 240 months in prison for conspiring to distribute drugs, filed a motion under 28 U.S.C. § 2255 seeking to set

aside his sentence. The district court[1] denied the motion and refused to issue a certificate of appealability on any of the six issues he raised. An administrative panel of this court granted him a certificate of appealability on one issue:

> Brock Fish's application for a certificate of appealability is granted on the claim that Fish received ineffective assistance of counsel in [his criminal case] when counsel advised him to plead guilty with a stipulation to a base offense level of 38 under the United States Sentencing Guidelines, despite the possibility that USSG § 2D1.1(a)(2) was not applicable in light of *Burrage v. United States*, [571 U.S. 204, 218–19] (2014), and the possibility that Fish would not have pleaded guilty but for the advice. *See* R. Doc. 593 at 10-21; R. Doc. 603. *The parties also may address whether this claim was properly raised in the district court in [Fish's postconviction proceeding].*

(Emphasis added). Upon careful review of the record and the parties' arguments, we conclude that Fish forfeited the certified issue by failing to include it in his section 2255 motion.

Four of the six grounds for relief in the motion identified specific deficiencies in counsel's performance: allowing Fish to talk to investigators without receiving anything in return; failing to tell him about a deadline for accepting a plea deal; letting him enter into an initial plea agreement without a specific sentencing recommendation; and remaining silent when the district court criticized him. A fifth relied on those four to allege "cumulative . . . ineffectiveness." Although these theories alleged ineffective assistance of counsel, none focused upon counsel's advice that he plead guilty to an offense with a stipulated base offense level of 38, which is the only question we certified for review.

[1]The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

The sixth ground came closer to the certified issue. It alleged that the district court should not have sentenced him under U.S.S.G. § 2D1.1(a)(2), which increases the base offense level for selling drugs if they cause "death or serious bodily injury." But the question Fish raised in the motion was whether section 2D1.1(a)(2) applied to him, not whether counsel's advice on this point fell "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). This omission is conspicuous because each of his other claims questioned counsel's performance. The district court cannot be expected to address claims no one properly raises, even when the litigant is pro se.[2] *Cf. Saunders v. United States*, 236 F.3d 950, 953 (8th Cir. 2001).

Finally, we note that Fish does not limit his arguments to the question we certified. For example, the certificate of appealability contemplates a challenge to the guilty plea itself, as indicated by its reference to "the possibility that Fish would not have pleaded guilty" in the absence of counsel's advice. On appeal, however, Fish primarily seeks a new sentencing hearing, not an order setting aside his plea. Fish also attacks various other decisions made by counsel during his criminal case, rather than focusing on the single point we identified. To the extent Fish's arguments address uncertified issues, they are not properly before us. *See* 28 U.S.C. § 2253(c)(1)(B), (3).

Fish forfeited the only issue he was authorized to pursue on appeal, so we affirm the judgment of the district court.

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[2]To be sure, Fish eventually connected his argument about section 2D1.1(a)(2) to his dissatisfaction with counsel's performance, but he did so only in his reply brief, too late to properly raise a new issue before the district court. *See, e.g., McGhee v. Pottawattamie County*, 547 F.3d 922, 929 (8th Cir. 2008); *cf. Hohn v. United States*, 193 F.3d 921, 923 n.2 (8th Cir. 1999).

Local 2255 Judgment (Rev. 6/16)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Brock Fay Fish, Petitioner/Defendant v. United States of America, Respondent/Plaintiff.	**JUDGMENT ON PETITION PURSUANT TO 28 U.S.C. § 2255** Criminal Case No. 1:13-cr-129 Civil Case No. 1:16-cv-320

IT IS ORDERED AND ADJUDGED that the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is dismissed, pursuant to the Order filed on September 5, 2017.

Date: September 5, 2017

CLERK OF COURT

/s/ Carla Schultz, Deputy Clerk

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Brock Fay Fish, Defendant.	)	**ORDER DENYING DEFENDANT'S MOTION FOR HABEAS RELIEF** Case No. 1:13-cr-129

Brock Fay Fish, Petitioner, vs. United States of America, Respondent.	)	Case No. 1:16-cv-320

Before the Court is Defendant Brock Fay Fish's "Motion to Vacate under 28 U.S.C. § 2255" filed on September 6, 2016. See Docket No. 574. The Government filed a response in opposition to the motion on December 8, 2016. See Docket No. 590. Fish filed a reply on February 17, 2017. See Docket No. 593. Fish filed a supplemental reply on July 17, 2017. See Docket No. 603. For the reasons outlined below, the motion is denied.

I. BACKGROUND

On July 16, 2013, Fish was charged by way of indictment with one count of conspiracy to possess with intent to distribute and distribute controlled substances resulting in serious bodily injury or death, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; two counts of possession of a controlled substance with intent to distribute and distribution resulting in death, in violation of 21

U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2; and three counts of possession of a controlled substance with intent to distribute within a school zone, in violation of 21 U.S.C. §§ 841(a)(1), 860, and 18 U.S.C. § 2. See Docket No. 1. On July 10, 2014, Fish pled guilty, pursuant to a written plea agreement, to an information charging one count of conspiracy to possess with intent to distribute and distribute a controlled substance in violation 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2. See Docket Nos. 285, 305, and 307.

The plea agreement explained that the offense carried a maximum of life imprisonment and a mandatory minimum of 10 years imprisonment. See Docket No. 285, ¶ 7. The parties were free to argue for any sentence. See Docket No. 285, ¶ 13. Fish acknowledged in the plea agreement that the conspiracy involved more than 15 kilograms of methamphetamine and the methamphetamine he sold resulted in serious bodily injury to two individuals. See Docket No. 285, ¶ 6. The plea agreement did not contain an agreed upon base offense level.

At the change of plea hearing held on July 10, 2014, the Government explained to the Court that there would be no substantial assistance motion because the "defendant was not inclined to cooperate with our investigation." See Docket No. 317, p. 7. There were also potentially disputed enhancements for leadership role and physical injury. See Docket No. 317, p. 5. The parties advised they would wait until they received the Presentence Investigation Report ("PSR") to try and resolve the disputed enhancements. See Docket No. 317, pp. 7-8. It was generally agreed that the base offense level would be 38. See Docket No. 317, pp. 5, 7, 11, 15, 38.

The PSR was filed on December 9, 2014. See Docket No. 449. The PSR calculated a base offense level of 38 with a 4-level upward adjustment for a leadership role in the conspiracy, resulting in an adjusted offense level of 42. See Docket No. 449, ¶¶ 13, 16, and 18. After a 3-level reduction

for acceptance of responsibility, the total offense level was 39. See Docket No. 449, ¶ 22. Fish's limited criminal history put him in category I. See Docket No. 449, ¶ 28. The resulting advisory Sentencing Guideline range was 262-327 months. See Docket No. 449, ¶ 70. Fish objected to the four-level leadership role enhancement and argued the base offense level should have been 36, but these objections were rejected by the probation officer who wrote the PSR. See Docket No. 449, p. 19.

On March 27, 2015, a Second Plea Agreement Supplement was filed wherein the parties agreed that: (1) the PSR accurately calculated an advisory Sentencing Guideline range of 262-327 months; (2) the Government would not seek an upward departure from the Sentencing Guideline range for multiple victims or physical injury; and (3) despite the Government's earlier position that there would be no substantial assistance motion, Fish would be given another opportunity to cooperate and potentially earn a substantial assistance motion from the Government. See Docket No. 493. The Second Plea Agreement Supplement was signed by Fish and defense counsel on March 11, 2015. The prosecutor signed on March 25, 2015. Fish met with law enforcement officials for a proffer interview on March 17, 2015. Defense counsel attended the interview.

Both parties filed sentencing memorandums prior to sentencing. See Docket Nos. 537-2 and 540. The Government recommended a low-end Sentencing Guideline sentence of 262-months imprisonment. See Docket No. 540. The Government further stated that a substantial assistance motion would not be filed because the information Fish provided was not deemed valuable by the Government. In addition, after proffering said information and while on release pending sentencing, Fish violated portions of the Second Plea Agreement Supplement by getting arrested and charged in state court for the felony offenses of possession of methamphetamine and possession of drug

paraphernalia. Fish also tested positive for methamphetamine and marijuana. Fish argued in his sentencing memorandum that the information he provided to the Government was valuable and the Government should honor its agreement and file a substantial assistance motion. He also argued the base offense level should be 36 and that his role in the conspiracy did not warrant a 4-level enhancement. Fish recommended a 120-month sentence.

At the sentencing hearing held on September 2, 2015, the Court accepted the PSR without change producing an advisory Sentencing Guideline range of 262-372 months. See Docket No. 577, p. 35. Giving some consideration to Fish's age, his lack of criminal history, and some level of cooperation provided, the Court sentenced Fish to 240 months imprisonment with credit for time served. See Docket No. 577, p. 36. Fish did not appeal. Fish is serving his sentence at FCI Sandstone in Sandstone, Minnesota.

On September 6, 2016, Fish filed the current Section 2255 motion. See Docket No. 574. In his motion, Fish has asserted five claims of ineffective assistance of counsel and one claim related to a sentencing enhancement. Fish asks that his sentence be vacate and that he be resentenced. The Government opposes the motion and has submitted an affidavit from defense counsel in support of its resistance to the motion. See Docket No. 590-1.

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a

"fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal, and is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343.

III. LEGAL DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, a defendant must establish that defense counsel's representation was constitutionally deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that counsel made errors so serious that defense counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. at 687-88. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, defense counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining defense counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534 (2003). In a guilty plea context, a defendant must establish a reasonable probability that he would not have pled guilty and would have exercised his right to a trial but for counsel's ineffectiveness. Hill v. Lockart, 474 U.S. 52, 59 (1985). Merely showing a conceivable effect is not enough. Id. An increased prison term may constitute prejudice under the *Strickland* standard. Glover v. United States, 531 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel's performance must make every effort to eliminate hindsight and second-guessing. Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036-37 (8th Cir. 1996). Under the *Strickland* standard, strategic decisions that are made after a thorough investigation of both the law and facts regarding plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690.

1. CLAIM ONE

In his first claim of ineffective assistance of counsel, Fish contends defense counsel failed to protect his interests during interviews. Specifically, Fish contends as follows:

> Counsel allowed her client to make statements only he had knowledge of to these other police agencies without any agreement with the U.S. Attorney regarding a reduction in the recommended sentence based on § 5K1.1 (USSG). Counsel presented

> no proffer or other instrument to protect her client and she allowed client to be disposed in her presence without interruption.

See Docket No. 574, p. 5. Fish did not further elaborate on this claim in his briefs.

Fish's contention that the proffer was made without any agreement with the Government regarding a substantial assistance motion is factually incorrect. Fish proffered on March 17, 2015, with his attorney present. The Second Plea Agreement Supplement, which the Defendant signed prior to his proffer interview, contained the following standard language regarding the use of proffer information and a substantial assistance motion:

> The United States agrees that USSG § 1B1.8 is applicable to defendant. Any information provided by defendant, other than that charged in the Indictment, in connection with defendant's assistance to the United States, including debriefing and testimony, will not be used to increase defendant's Sentencing Guideline level or used against defendant for further prosecution, if, in the opinion of the United States Attorney, defendant has met all of defendant's obligations under the Plea Agreement and provided full, complete, and truthful information and testimony. However, nothing revealed by defendant during defendant's debriefings and testimony would preclude defendant's prosecution for any serious violent crimes.

See Docket No. 493, ¶ 5.

> If, in the opinion of the United States Attorney, defendant has met all of defendant's obligations under the Plea Agreement and provided full, complete, and truthful information and testimony, and defendant's cooperation has provided substantial assistance to the United States in the investigation or prosecution of another person who has committed an offense, the United States agrees to file, at sentencing, a motion for downward departure pursuant to USSG § 5K1.1 and 18 U.S.C. § 3553(e). The defendant understands and agrees that the United States retains the discretion to file a motion under USSG 5K1.1 and 18 U.S.C. § 3553(e).

See Docket No. 493, ¶ 4.

There is never a guarantee that a proffering defendant will earn a substantial assistance motion, because at the point that the agreement is entered into, it is unknown what information the defendant will provide. Defense counsel states in her affidavit that Fish "clearly understood" that the decision

to file a substantial assistance motion was at the discretion of the Government. See Docket No. 590-1, p. 2. Defense counsel further states in her affidavit that she advised Fish to proffer at earlier stages of the case but that he ignored her advice. See Docket No. 590-1, p. 2. That defense counsel was able to convince the Government to give Fish another chance to proffer after he had already pled guilty, and potentially earn a substantial assistance motion, demonstrates the Defendant's interests were well-served by defense counsel. Defense counsel cannot be faulted because the Government did not deem the information provided by the Defendant valuable enough to warrant a substantial assistance motion. Consequently, Fish has failed to demonstrate deficient performance on claim one.

2. CLAIM TWO

In his second claim of ineffective assistance of counsel, Fish contends defense counsel failed to advocate for him at sentencing. The record demonstrates otherwise.

Defense counsel filed a sentencing memorandum which addressed the Sentencing Guideline range, sentencing factors, nature of the offense, Fish's personal history, the purpose of sentencing, and the potential sentencing disparity with co-defendants. See Docket No. 537-2. Defense counsel also filed objections to the PSR relating to the 4-level enhancement for a leadership role in the offense and the base offense level. See Docket No. 449, p. 19. At the sentencing hearing, defense counsel challenged the Government's decision not to file a substantial assistance motion and extensively cross-examined witnesses that the Government produced at the request of defense counsel. See Docket No. 577, pp. 8-21, 29. Ultimately, defense counsel was successful in persuading the Court to take into account Fish's lack of criminal history and some level of cooperation, and Fish was sentenced to 240 months, which is below the low-end of the 262-327 month advisory Sentencing

Guideline range. The Court has carefully reviewed the sentencing transcript and the entire record and finds Fish has not demonstrated defense counsel was unprepared for sentencing or failed to adequately advocate for her client at sentencing.

3. CLAIM THREE

In his third claim of ineffective assistance of counsel, Fish contends defense counsel violated his Sixth Amendment rights by failing to advise him of a plea offer deadline. Specifically, Fish contends he was given a 13 year offer shortly before sentencing but he was not told the offer had a deadline, the deadline passed, and the offer was increased to 16 years before he made up his mind as to whether he should accept the 13 year offer. This contention is contradicted by the record and the affidavit submitted by defense counsel.

In Missouri v. Frye, 566 U.S. 134; 132 S. Ct. 1399, 1408 (2012), the United States Supreme Court held "that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." (emphasis added). Formal plea offers must be promptly communicated to the defendant and a failure to do so constitutes deficient performance. Id. This rule applies only to formal plea offers as informal plea discussions are too easily subject to frivolous, fabricated claims of failure to communicate. Id. at 1408-09.

It appears from defense counsel's affidavit that there were extensive plea discussions between the parties and that a number of potential sentences were discussed. See Docket No. 590-1, pp. 3-5. While there were discussions of a sentence in the 13-16 year range, these discussions related to a possible joint sentencing recommendation and were contingent on the Government filing a substantial

assistance motion, which the Government ultimately declined to do. In addition, these discussion took place well-after Fish pled guilty and the filing of the Second Plea agreement Supplement, and shortly before sentencing which was held on September 2, 2015. The Second Plea Agreement Supplement, which was filed on March 27, 2015, clearly set out an advisory Sentencing Guideline range of 262-327 months absent a substantial assistance motion. See Docket No. 493, ¶ 2. There were no formal 13 year or 16 year offers made in relation to the plea agreement pursuant to which Fish pled guilty. Formal plea offers are generally required to be in writing. Frye, 132 S. Ct. at 1409. Whatever discussions took place prior to sentencing did not rise to the level of a "formal plea offer" under *Frye*. Had the Government filed a substantial assistance motion, Fish likely would have received a sentence in the 13-16 year range. Consequently, Fish cannot establish deficient performance or prejudice.

4. CLAIM FOUR

In his fourth claim of ineffective assistance of counsel, Fish contends the cumulative effect of defense counsel's errors deprived him of his Sixth Amendment right to counsel. Fish cites case law from several circuits in support of his contention. However, the Eighth Circuit Court of Appeals has "repeatedly rejected the cumulative error theory of post-conviction relief." United States v. Brown, 528 F.3d 1030, 1034 (8th Cir. 2008) (citing Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134 (2007)). The cumulative effect of alleged error by defense counsel is not grounds for granting habeas relief in the Eighth Circuit. Middleton, 455 F.3d at 851; Brown, 528 at 1034. Consequently, Fish's fourth claim for relief fails.

5. CLAIM FIVE

In his fifth claim of ineffective assistance of counsel, Fish contends he was coerced into signing the plea agreement. The Court has carefully reviewed the change of plea transcript and finds Fish's guilty plea was knowing and voluntary. The Court meticulously walked Fish through the standard Rule 11 plea colloquy. The transcript of the change of plea hearing provides as follows:

> THE COURT: And do you feel that you've had sufficient time to review the Plea Agreement and discuss that with Ms. Neubauer?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you review the Plea Agreement before you signed it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And are you able to read and understand and comprehend English well?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And did Ms. Neubauer go through that Plea Agreement and explain to you what it all means for you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did she give you a chance to ask questions about what the Plea Agreement means for you?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And if you had questions of Ms. Neubauer, did she answer your questions to your satisfaction?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: All right. And in terms of your overall physical and mental health, are you in good physical health today?
>
> THE DEFENDANT: Yes.

THE COURT: And mentally, is your mind clear?

THE DEFENDANT: Yeah.

THE COURT: Have you had anything to drink or used any illegal street drugs in the last 48 hours leading up to this hearing?

THE DEFENDANT: No.

THE COURT: All right. Are you suffering from any sort of condition that may affect in any manner your ability to understand why we are here today?

THE DEFENDANT: No.

See Docket No. 317, pp. 28-29.

This Court also explained to Fish that he could persist in his not guilty plea and exercise his right to a jury trial. See Docket No. 317, pp. 33-34. Fish stated he wanted to plead guilty under the terms of the plea agreement:

THE COURT: And by signing a Plea Agreement, in that Plea Agreement there's also a specific paragraph which we will talk about. It's paragraph 20 of the Plea Agreement in which you agree to give up your right of appeal. You have agreed in the Plea Agreement to give up your right to appeal this conviction on your record, as well as the sentence that I order you to serve, understood?

THE DEFENDANT: Yes.

THE COURT: And we'll talk about that in just a few minutes, but you've made the decision that you intend to plead guilty, is that correct?

THE DEFENDANT: Yes.

THE COURT: Have you been forced, threatened, intimidated, coerced by anyone at any time to come in here this morning to plead guilty?

THE DEFENDANT: No.

THE COURT: Is this a decision that you have made to plead guilty one that you have made on your own, with the help of your attorney?

THE DEFENDANT: Yes.

THE COURT: And is this a voluntary decision that you have made based upon your review of the evidence with your attorney?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions so far?

THE DEFENDANT: Nope.

See Docket No. 317, pp. 34-35.

In his brief, Fish concedes that the Court "obeyed the rules during the Change of Plea Hearing." See Docket No. 593, p. 10. Rather he contends his brief the plea agreement was so vague he did not know what he was getting into when he pled guilty. Any lack of detail in the plea agreement regarding a disputed enhancement for playing a leadership role in the conspiracy was thoroughly discussed at the change of plea hearing and does not affect whether Fish made a knowing and voluntary guilty plea. See Docket No. 317, p. 5. The parties advised the Court they would wait until they received the PSR to try and resolve the disputed enhancement. See Docket No. 317, pp. 7-8. It was also generally agreed that the base offense level would be 38. See Docket No. 317, pp. 5, 7, 11,15, 38. Ultimately, the Court determined that a four-level enhancement for a leadership role was appropriate. That Fish and his defense attorney lost this debate with the Government does not render the plea unknowing. The benefit of the plea agreement was that it reduced the charge which meant Fish was facing a 10-year mandatory minimum rather than a 20-year mandatory minimum. The Court again finds, based upon a careful review of the change of plea transcript at Docket No. 317, that Fish entered a knowing and voluntary plea of guilty to the conspiracy charged in the information.

B. CLAIM SIX

In his sixth claim for relief, Fish contends the sentence enhancement for bodily harm/death factor was inappropriately applied. Fish pled guilty to an information charging one count of conspiracy to possess with intent to distribute and distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1). See Docket Nos. 305 and 307. The Government contends Fish admitted in the plea agreement that the drugs he sold in furtherance of the conspiracy caused bodily harm.

If a defendant is convicted under 21 U.S.C. § 841(b)(1)(A) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, the base offense level is 38. U.S.S.G. § 2D1.1(a)(2). In the plea agreement, Fish acknowledged "that the methamphetamine he sold as part of this conspiracy resulted in serious bodily injury" to two individuals. See Docket No. 285 at ¶ 6(c). At the change of plea hearing, Fish affirmed the factual basis in the plea agreement. See Docket No. 317, p. 45. At the change of plea hearing, the Government further explained:

> On or about that date Ms. Kirkpatrick took some of Mr. Fish's drugs that was distributed to a guy named Doug Peterson, who was living in Linton, North Dakota. Mr. Peterson consumed those drugs, and the serious bodily injury resulted from that. He actually died in that particular case, and so Mr. Peterson had been a customer of Mr. Fish's throughout the entire duration of the conspiracy, or at least some of the time frame of the conspiracy.

See Docket No. 317, pp. 24-25.

> Moving forward in the conspiracy, on February 6, 2013, Joe Senger, who Mr. Fish already referenced, was buying methamphetamine from Mr. Fish on a regular basis. Mr. Senger provided methamphetamine to -- I think it would be described as his girlfriend, Cheri Bettis, who was living in Mandan. Ms. Bettis consumed that methamphetamine that came from Mr. Fish, and ultimately serious bodily injury resulted and she died.

See Docket No. 317, p. 25. Fish acknowledged that he agreed with those facts. See Docket No. 317, p. 27. The PSR applied U.S.S.G. § 2D1.1(a)(2), resulting in a base level offense of 38 and an advisory Sentencing Guideline range of 262-327 months. See Docket No. 449, ¶¶ 13 and 70. In the Second Plea Agreement Supplement, Fish agreed that "the guideline range as contained in the Pre-Sentence Report is calculated correctly at 262-327 pursuant to U.S.S.G. 2D.1.1(a)(2) and U.S.S.G. 3B1.1(a)." See Docket No. 493, p.1. The Court has already determined that Fish's guilty plea was knowing and voluntary. Fish's argument that the Government did not prove the drugs he sold injured anyone is clearly contradicted by his own repeated admissions to the contrary. The Government need not "prove" what a defendant has admitted in a plea agreement. The argument clearly fails.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. While Fish may be unhappy with his sentence, blaming defense counsel is unavailing. Fish's lengthy sentence is largely the result of his refusal to cooperate with the Government in the early stages of the case and his inability to provide the Government with any useful information when he finally decided to cooperate after his change of plea hearing. For the reasons set forth above, Fish's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Docket No. 574) is **DENIED**. The Court also issues the following **ORDER**:

1) The Court certifies that an appeal from the denial of this motion may not be taken in forma pauperis because such a appeal would be frivolous and cannot be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

2) Based upon the entire record before the Court, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will

not be issued by this Court. Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983). If the defendant desires further review of his motion he may request the issuance of a certificate of appealability by a circuit judge with the Eighth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated this 5th day of September, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court