No. _____

SUPREME COURT OF THE UNITED STATES

ZACHARY JOSEPH LOVE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3457

Zachary Joseph Love, also known as Zackary Joseph Love

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:18-cv-03083-JMG)

ORDER

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

April 01, 2020

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
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

January 31, 2020

Mr. Terrance Waite
WAITE & MCWHA
116 N. Dewey Street
P.O. Box 38
North Platte, NE 69103-0038

RE: 18-3457 Zachary Love v. United States

Dear Counsel:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

HAG

Enclosure(s)

cc: Ms. Sara Elizabeth Fullerton
Mr. Zachary Joseph Love
Ms. Denise M. Lucks

District Court/Agency Case Number(s): 4:18-cv-03083-JMG

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
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January 31, 2020

West Publishing
Opinions Clerk
610 Opperman Drive
Building D D4-40
Eagan, MN 55123-0000

RE: 18-3457 Zachary Love v. United States

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on the brief was Terrance Waite, of North Platte, NE.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Sara Elizabeth Fullerton, AUSA, of Lincoln, NE.

The judge who heard the case in the district court was Honorable John M Gerrard. The judgment of the district court was entered on October 11, 2018.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

HAG

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 4:18-cv-03083-JMG

United States Court of Appeals
For the Eighth Circuit

No. 18-3457

Zachary Joseph Love, also known as Zackary Joseph Love

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of Nebraska - Lincoln

Submitted: November 14, 2019
Filed: January 31, 2020

Before GRUENDER, KELLY, and ERICKSON, Circuit Judges.

ERICKSON, Circuit Judge

Zachary Joseph Love was sentenced to 144 months' imprisonment following a plea of guilty to conspiracy to distribute and possess methamphetamine. Love moved to vacate his sentence under 28 U.S.C. § 2255, claiming ineffective assistance of counsel: first, for failing to secure a plea agreement and second, for failing to

pursue a second competency evaluation. The district court[1] denied Love's motion without holding an evidentiary hearing. Love appeals, reiterating his ineffective assistance of counsel claims and arguing the district court abused its discretion in denying the § 2255 motion without holding an evidentiary hearing. Because we find Love's allegations are either contradicted by the record or would not warrant relief if accepted as true, we affirm.

I. Background

In May 2015, Zachary Joseph Love was charged with conspiracy to distribute and possess 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841 and 846. During the course of Love's representation, his Criminal Justice Act-appointed counsel became aware that Love potentially suffered from various mental health disorders and a traumatic brain injury. Love's counsel was concerned that Love was not competent to stand trial and moved for a mental health evaluation. At the motion hearing Love confirmed that he wanted to be evaluated and that the evaluation should take place as quickly as possible.

Love was transported to the Metropolitan Correctional Center in San Diego ("MCC San Diego") where he was observed and evaluated for six weeks. A Forensic Report was prepared which summarized Love's evaluation and determined that he suffered from post-traumatic stress disorder, attention deficit-hyperactivity disorder, and substance abuse issues. It also noted possible borderline intellectual functioning, traumatic brain injury, and migraines. The Forensic Report concluded that Love understood the charges against him, court processes, plea bargaining, punishment, and pleas of guilty and not guilty. The Forensic Report also suggested Love's

[1]The Honorable John M. Gerrard, Chief United States District Judge for the District of Nebraska.

medications were effective and that his mental health stability should be re-evaluated if his medication changed significantly.

After reviewing the Forensic Report, the magistrate judge found Love competent to stand trial. Love pled guilty and received a below-guideline range sentence of 144 months' imprisonment. Love moved to vacate his sentence under 28 U.S.C. § 2255, arguing his counsel was ineffective when he (1) failed to secure a plea agreement, and (2) failed to request a second evaluation because Love was off his medication for several days prior to the competency hearing. The district court found Love failed to allege facts showing his attorney's performance was objectively unreasonable and denied the motion without an evidentiary hearing.

II. Discussion

A. Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims brought under § 2255 *de novo*, and underlying factual claims for clear error. Davis v. United States, 858 F.3d 529, 532 (8th Cir. 2017). Our review is highly deferential, with a strong presumption that counsel's performance was reasonable. Camacho v. Kelley, 888 F.3d 389, 394 (8th Cir. 2018).

To prove ineffective assistance of counsel, Love must show (1) his attorney's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for that deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). The Strickland factors apply to claims arising from plea negotiations and the second prong is satisfied if accepting a plea offer would have resulted in a lesser sentence. Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995) (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985)).

Love's first contention is that his counsel was ineffective for failing to secure a plea agreement with a recommended 120-month imprisonment term. Assuming the government presented Love with a plea offer in which one of the terms was a recommendation for a 120-month sentence, Love is able to satisfy the prejudice prong of Strickland because accepting a 120-month offer would have reduced his sentence. His claim fails, however, because he cannot demonstrate that his attorney acted unreasonably.

Before the court ordered a competency evaluation, Love admits his attorney informed him that the prosecutor was willing to offer him a 120-month sentence in exchange for pleading guilty. Love alleges that he told his attorney he wanted to accept, but requested the agreement be reduced to writing. Love claims he inquired about the potential plea offer while at MCC San Diego and his attorney advised him not to worry about the plea offer and to concentrate on the evaluation. When he returned, the 120-month offer was no longer available. Love argues his counsel was ineffective in allowing the plea offer to expire while he was at MCC San Diego.

Strickland sets a "high bar" for unreasonable assistance. Buck v. Davis, 137 S. Ct. 759, 775 (2017). We will not find an attorney's performance constitutionally deficient unless it is outside the "wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. "It is only when the lawyer's errors were so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment that Strickland's first prong is satisfied." Buck, 137 S.Ct. at 775 (cleaned up). We make every effort to eliminate the "distorting effects of hindsight" and consider performance from counsel's perspective at the time. Davis, 858 F.3d at 534 (quoting Strickland, 466 U.S. at 689). Generally, the government may unilaterally withdraw a plea offer. See, e.g., United States v. Norris, 486 F.3d 1045, 1049 (8th Cir. 2007) (describing the government's right to withdraw absent unfair advantage in a later proceeding); United States v. Wessels, 12 F.3d 746, 752–53 (8th Cir. 1993) (describing right to withdraw prior to district court accepting a plea agreement).

At the time the prosecutor allegedly made a 120-month plea offer, Love's counsel was faced with the difficult task of balancing his client's interest in a plea agreement and unresolved issues regarding Love's competency. His counsel had grave concerns about Love's competence to stand trial based on attorney-client interactions, Love's purported history of mental health issues, Love's traumatic brain injury, and other information provided by Love's family. Love himself told the district court that he wanted to be evaluated and that he wanted to begin the process as quickly as possible.

With these competing interests in mind, we cannot say that advising Love to focus on the evaluation instead of a potential plea offer was constitutionally unreasonable. Love's counsel was presented with legitimate reasons to doubt Love's ability to understand the charge against him, and therefore, his ability to make a knowing and voluntary decision to plead guilty to it. Viewing the allegations presented by Love in his § 2255 motion in a light most favorable to him, we assume that during the pendency of Love's mental health evaluation, while these serious concerns were live, Love's attorney did not finalize a plea agreement until a determination was made that Love was competent to proceed. Given the strong presumption of reasonableness and the wide range of reasonable behavior, coupled with the competing interests that Love's counsel was facing at the time, we cannot say Love's counsel acted unreasonably by failing to reach a final plea agreement or by failing to find a way to preserve the plea offer during the mental health evaluation.

Although the dissent cites Missouri v. Frye as support for Love's argument that counsel may have been ineffective for allowing a plea offer to expire, Frye is distinguishable because that case involved an attorney who did not communicate an offer before it expired. 566 U.S. 134, 145 (2012). By contrast, Love's § 2255 motion alleges that his counsel told him about the plea offer. Taking Love's allegations as true and making all reasonable inferences in his favor, we are left to determine

whether failing to preserve the plea offer through the pendency of the MCC San Diego evaluation can, by itself, be constitutionally unreasonable.

Love's counsel had little, if any, power to restrain the prosecutor from exercising its unilateral authority to withdraw a plea offer. The dissent would extend Strickland well beyond the parameters of Missouri v. Frye, requiring not merely a duty to pass on offers and allow Love to consider them, but to require Love's counsel to compel the prosecutor to hold open an offer until the competency question was resolved. This is incompatible with Strickland's requirement that ineffective assistance fall below an objective standard of reasonableness.

Love also claims his counsel was ineffective in failing to request a second competency evaluation after a brief period without medication. Love alleges the Forensic Report found his competency to stand trial contingent on maintaining his current medication regimen. This claim fails because the Forensic Report contains no conclusion that Love's legal competency was dependent on a specific medication regime. Instead, it makes a medical recommendation that his mental health stability should be re-evaluated if his medication significantly changed. It was not objectively unreasonable for Love's counsel to move forward with a plea hearing after Love had been comprehensively evaluated and found competent by the court.

B. Evidentiary Hearing

"We review the district court's decision to refuse an evidentiary hearing . . . for abuse of discretion, although review of the determination that no hearing was required obligates us to look behind that discretionary decision to the court's rejection of the claim on its merits, which is a legal conclusion that we review de novo." New v. United States, 652 F.3d 949, 954 (8th Cir. 2011) (internal quotation omitted).

"A § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner 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." Ford v. United States, 917 F.3d 1015, 1026 (8th Cir. 2019) (quoting United States v. Regenos, 405 F.3d 691, 694 (8th Cir. 2005)).

The district court did not abuse its discretion in declining to conduct an evidentiary hearing because Love's allegations regarding the plea offer, viewed in a light most favorable to him, are insufficient to support a grant of relief. Likewise no evidentiary hearing was required to determine Love's second claim of ineffective assistance because the Forensic Report on its face does not condition Love's competence on medication. Love's allegation to the contrary is contradicted by the record. Because Love alleges no other facts which, accepted as true, show his attorney acted unreasonably, no evidentiary hearing was required.

Finally, Love has moved to supplement the record with new affidavits from himself, his mother, and his sister. He claims they will attest to the contents of the plea offer, his competency, and the actions of his trial counsel. Generally, we cannot consider evidence on appeal which was not presented to the district court. United States v. Frederick, 683 F.3d 913, 920 (8th Cir. 2012). A narrow, rarely exercised exception can be made when the interests of justice demand it, such as when a misrepresentation deprived the district court of a complete picture of the case. Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993). Love presents no argument that misrepresentations or other injustice prevented the district court from considering his § 2255 motion. Rather, he seeks to introduce new evidence to support allegations we have accepted as true for the purpose of analyzing his ineffective assistance claim. The motion to supplement the record is denied.

III. Conclusion

For the foregoing reasons, we affirm.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I agree Love failed to allege a viable claim that trial counsel was ineffective by not requesting a second competency evaluation. However, I believe the district court was required to hold an evidentiary hearing to consider Love's first claim, that counsel was ineffective in his handling of plea negotiations. On this issue, I respectfully dissent.

Love filed a pro se motion to vacate his sentence under 28 U.S.C. § 2255. He argued counsel was ineffective for allowing the government's plea offer to expire while he underwent a competency evaluation at MCC San Diego. Love alleged "counsel never advised him that the government had issued a warning or had set a time limit for him to accept the plea offer." Instead, counsel had led him to believe "the offer was still on the table." Love requested an evidentiary hearing to develop a record to show why counsel failed to "secure the plea offer" or "maintain plea negotiations" with the government.

The district court denied Love's motion without holding an evidentiary hearing and without ordering the government to respond. The court read Love's claim as asserting it was unreasonable "for counsel to wait for a competency evaluation" before allowing Love to accept a plea offer, and concluded that even if these allegations were true, they would not entitle Love to relief.

But this misconstrues Love's claim. Love did not contend counsel was ineffective for requesting an evaluation before accepting the plea offer. Nor did he contend that counsel was ineffective for not presenting him with the plea offer.

Rather, Love argued counsel deficiently handled plea negotiations by allowing the government's offer to expire while he was at MCC San Diego. *That* claim warranted an evidentiary hearing.

The right to effective assistance of counsel extends to plea negotiations. Allen v. United States, 854 F.3d 428, 432 (8th Cir. 2017). Love allegedly told counsel that he was interested in accepting the government's offer for a 120-month sentence. I agree it was objectively reasonable for counsel to wait until the competency evaluation concluded before finalizing any plea agreement. But without an evidentiary hearing, we cannot know why the plea offer Love wanted to sign had expired by the time he returned from MCC San Diego. Nor can we know whether counsel could have done anything to keep the plea offer open, or whether counsel's actions may have caused the offer to expire. At this stage of proceedings, it is not appropriate for this court to assume facts not in the record in order to resolve Love's claim.

An evidentiary hearing "must be held . . . unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." Franco v. United States, 762 F.3d 761, 763 (8th Cir. 2014) (cleaned up). Accepting Love's allegations as true, it is possible he is entitled to relief. I would reverse the denial of Love's first claim for relief and remand for an evidentiary hearing on the issue.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3457

Zachary Joseph Love, also known as Zackary Joseph Love

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:18-cv-03083-JMG)

JUDGMENT

Before GRUENDER, KELLY and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 31, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 16-3581

United States of America

Plaintiff - Appellee

v.

Zachary Joseph Love, also known as Zackary Joseph Love

Defendant - Appellant

Appeal from United States District Court
for the District of Nebraska - Lincoln

Submitted: July 20, 2017
Filed: July 25, 2017
[Unpublished]

Before GRUENDER, BOWMAN and SHEPHERD, Circuit Judges.

PER CURIAM.

Zachary Love directly appeals the below-Guidelines-range sentence the district court[1] imposed after he pleaded guilty to a drug charge. His counsel has moved for

[1]The Honorable John M. Gerrard, United States District Judge for the District of Nebraska.

leave to withdraw, and has filed a brief under Anders v. California, 386 U.S. 738 (1967), questioning the district court's Guidelines calculations and suggesting that Love's sentence is substantively unreasonable. Love has filed a motion for new counsel.

To begin, we conclude that Love waived any claim of error with regard to the drug quantity attributed to him by withdrawing his objection to the calculation at sentencing. See United States v. Stoney End of Horn, 829 F.3d 681, 687-88 (8th Cir. 2016) (where defendant withdrew objection to PSR enhancement in district court, claim of error on appeal was waived). Further, we find that there was no plain error in the calculation of Love's criminal history score. See United States v. Lovelace, 565 F.3d 1080, 1087 (8th Cir. 2009) (failure to object at sentencing results in review for plain error that affects substantial rights); United States v. Menteer, 408 F.3d 445, 446 (8th Cir. 2005) (per curiam) (unobjected-to facts in PSR are deemed admitted).

Finally, we conclude that the district court did not impose a substantively unreasonable sentence. See United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (discussing appellate review of sentencing decisions); United States v. McCauley, 715 F.3d 1119, 1127 (8th Cir. 2013) (noting that when district court has varied below Guidelines range, it is "nearly inconceivable" that court abused its discretion in not varying downward further). In addition, we have independently reviewed the record under Penson v. Ohio, 488 U.S. 75 (1988), and have found no nonfrivolous issues for appeal. Accordingly, we grant counsel's motion to withdraw, deny Love's motion, and affirm the judgment.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
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July 25, 2017

Mr. Zachary Joseph Love
FEDERAL CORRECTIONAL INSTITUTION
19215-047
P.O. Box 33
Terre Haute, IN 47808-0000

RE: 16-3581 United States v. Zachary Love

Dear Mr. Love:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion.

Your attorney has been granted leave to withdraw. Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. A notice is attached to this letter, notifying you of the procedures.

Michael E. Gans
Clerk of Court

SRD

Enclosure(s)

cc: Mr. Robert B. Creager
Ms. Sara Elizabeth Fullerton
Ms. Denise M. Lucks

District Court/Agency Case Number(s): 4:15-cr-03059-JMG-1

Notice to Pro Se Litigants in Anders Cases

The court has issued its opinion in your appeal and has permitted your attorney to withdraw from the case. The court treated this appeal as an Anders case. Section V of the Eighth Circuit's Plan to Implement the Criminal Justice Act of 1964, effective August 1, 2015, provides as follows:

> Where counsel is granted leave to withdraw pursuant to the procedures of Anders v. California, 386 U.S. 738 (1967), and Penson v. Ohio, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing pro se a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

This notice will provide you with information about these procedures.

Under Federal Rule of Appellate Procedure 40(a)(1) and Federal Rule of Appellate Procedure 35(c), a petition for rehearing and/or petition for rehearing en banc must be filed within 14 days of the date of the court's judgment. Please note that your petition for rehearing/and or petition for rehearing en banc must be received in the clerk's office within that 14-day period. No grace period is allowed for mailing, and the date of the post-mark is irrelevant. Any petition for rehearing and/or petition for rehearing en banc which is not received within that 14-day period for filing may be denied as untimely. Under Federal Rule of Appellate Procedure 35(b) (2) petitions for rehearing are limited to 15 pages. Only one copy is required.

If you ask for an extension of time to file the petition for rehearing, your motion for extension of time must be received within the clerk's office within the 14 days allowed for filing the petition for rehearing. Under Eighth Circuit Rule 27A(15), the clerk may grant an extension of time not to exceed 14 days.

You may seek a writ of certiorari from the Supreme Court of the United States without filing for rehearing in the court of appeals. You may also seek rehearing in the court of appeals and then seek certiorari if the court of appeals denies your petition for rehearing. Under Supreme Court Rule 13, a petition for a writ of certiorari in a criminal case is timely if it is filed with the Clerk of the Supreme Court within 90 days after the entry of the court of appeals' judgment. The rule also provides that if a timely petition for rehearing is filed with the court of appeals, the 90-day period begins to run from the date the court of appeals denies the petition for rehearing.

The petition for the writ of certiorari is filed directly with the Clerk of the Supreme Court of the United States. You may contact the Clerk at the following address:

Clerk's Office
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543
202-479-3000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3581

United States of America

Plaintiff - Appellee

v.

Zachary Joseph Love, also known as Zackary Joseph Love

Defendant - Appellant

Appeal from U.S. District Court for the District of Nebraska - Lincoln
(4:15-cr-03059-JMG-1)

JUDGMENT

Before GRUENDER, BOWMAN and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 25, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. ZACHARY JOSEPH LOVE, Defendant.	4:15-CR-3059 * RESTRICTED * MEMORANDUM AND ORDER

This matter is before the Court upon initial review of the pro se motion to vacate under 28 U.S.C. § 2255 (filing 138) filed by the defendant, Zachary Love. The motion was timely filed less than 1 year after the defendant's conviction became final. *See* § 2255(f). The Court's initial review is governed by Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, which provides:

> The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

A § 2255 movant is entitled to an evidentiary hearing unless the motion and the files and records of the case conclusively show the movant is entitled to no relief. § 2255(b); *Sinisterra v. United States*, 600 F.3d 900, 906 (8th Cir.

2010). Accordingly, a motion to vacate under § 2255 may be summarily dismissed without a hearing if (1) the movant's allegations, accepted as true, wouldn't entitle the movant to relief, or (2) the allegations can't be accepted as true because they're contradicted by the record, inherently incredible, or conclusions rather than statements of fact. *Engelen v. United States*, 68 F.3d 238, 240 (8th Cir. 1995); *see also Sinisterra*, 600 F.3d at 906.

BACKGROUND

The defendant was arrested on April 13, 2015, on miscellaneous state charges. Filing 107 at 1. He was federally charged in a single-count indictment on May 21, 2015, with conspiring to distribute and possess with intent to distribute 50 grams or more of a methamphetamine mixture, in violation of 18 U.S.C. §§ 841 & 846. Filing 1. That charge was punishable by a term of imprisonment ranging from a minimum of 60 months to a maximum of 480 months. § 841(b)(1)(B)(viii).

A few months after the defendant made his initial appearance, the defendant's counsel moved for a mental health examination, explaining that the defendant's family had reported that the defendant had "suffered from a mental deficit following a traumatic brain injury and from chronic substance abuse" which interfered with his ability to understand the charges against him and assist in his defense. Filing 50. The Magistrate Judge granted the motion. Filing 56.

The defendant was evaluated at a Bureau of Prisons facility in San Diego. *See* filing 62 at 1. The evaluating psychologist concluded that the defendant was suffering from posttraumatic stress disorder, attention deficit hyperactivity disorder, and depression. Filing 62 at 26-27. But she also found the defendant was competent to stand trial. Filing 62 at 28-29. She explained:

> Mr. Love exhibited a good understanding of the criminal charges and general court proceedings. Even though he often stated that he was confused and did not know what was going on with his case, he demonstrated an excellent ability in going over discovery and discussing his case at length. He is aware that he is currently charged with conspiracy to distribute methamphetamine. He was easily able to discuss and explain the nature of the alleged offense as well as the circumstances surrounding the alleged offense and his subsequent arrest. Mr. Love was able to tell the difference between a felony and a misdemeanor and knew that the charges against him were felony charges.

Filing 62 at 28. And, she wrote, "Mr. Love understood the pleas of guilty and not guilty, and he understood the legal consequences for each. He was also familiar with the concepts of plea bargain and probation. . . ." Filing 62 at 29. But, she wrote,

> he will require additional time to process new information and to weigh and consider his options. Moreover, his understanding of new information should be regularly verified by his attorney. It is important to note, that Mr. Love does not respond well to heighten [sic] anxiety (lack of coping skills) and will likely respond to questions or decisions impulsively and without much thought, if not allowed time to consider the question and take time to think of a response.

Filing 62 at 29. Nonetheless, although the defendant could struggle with anxiety, concentration, and "information processing depending on the

environment," it was her opinion "that Mr. Love's present ability to understand the nature and consequences of the court proceedings brought against him, as well as his ability to properly assist counsel in a defense are not substantially impaired by a mental disease or defect at this time." Filing 62 at 29.

On April 21, 2016, the defendant petitioned to enter a guilty plea, without a plea agreement. Filing 89 at 6. At the change of plea hearing, the defendant was asked how he was feeling, and said, "I'm all right." Filing 93 at 4. He said he was able to understand as his counsel explained the terms of the document and consequences of pleading guilty. Filing 93 at 4. He also said that he was satisfied with counsel's representation to that point. Filing 93 at 7.

The Magistrate Judge asked whether any written plea agreements had been extended to the defendant, and the government said that one had been. Filing 93 at 13. The defendant's counsel said that the plea offer had been discussed with the defendant "[a]t great length." Filing 93 at 13. When asked whether counsel had recommended that the defendant accept the plea agreement, counsel said that "[t]he answer to that is that it's hard to say." Filing 93 at 13. Counsel explained:

> To summarize the issue about the offer and the acceptance or rejection, it was an attempt to figure out whether a quantity could be agreed to in this case. There are all the other factors which are always subject to dispute or litigation, depending on what the presentence investigation report discloses, but here there was an effort on the part of the Government, I believe, essentially, to say that the quantity was more than 500 grams but less than 1.5 kilograms. Mr. Love does not agree with that, and there's no version of it that he can agree to.

> It's a noncooperating plea agreement, in any event. So he's rejected it, and I—the fact dispute as to whether to believe the people who are hanging weight on him or not is something I can't pass judgment on. Only Mr. Love can tell me whether those quantities are within the range of something he can accept or not. And as of today, he is not willing to accept that.
>
> So I can't say I recommended for it or against it. It's his decision on whether the weight is something that he can accept.

Filing 93 at 13-14. The Magistrate Judge asked the defendant whether he knew about the plea offer, and had decided to reject it, and the defendant said he had. Filing 93 at 14-15. But the defendant agreed that his offense involved at least 50 grams of methamphetamine, filing 93 at 16, and pled guilty to the charge, filing 93 at 18-19. The Court found that the plea was knowing, intelligent, and voluntary, and accepted it. Filing 90; filing 94.

The presentence report found the defendant responsible for 1.8 kilograms of methamphetamine, resulting in a base offense level of 32. Filing 107 at 9-10. The defendant objected, arguing that he should be held accountable for a total drug quantity of less than 500 grams of methamphetamine. Filing 99; filing 100. The defendant also sent *pro se* correspondence to the Court, asserting that he had been rushed into making the decision to plead guilty and had "been trying from the day [he had] entered [his] plea to with draw it." Filing 95 at 1. He also said he had "never even seen in writing any kind of plea agreement." Filing 95 at 1-2.

But at sentencing, counsel said that "after carefully reviewing the evidence" and discussing it with the defendant and the government, the defendant was "willing to accept the presentence report finding of the conspiracy involving 1.8, or thereabout, kilograms of methamphetamine," and

that the government would correspondingly not pursue a gun enhancement, resulting in a base offense level of 32, an adjusted offense level of 32, and a total offense level of 29. Filing 123 at 5-6. The guideline custody range was 151 to 188 months. Filing 123 at 9.

Counsel argued for a significant downward variance based on the defendant's mental condition. Filing 123 at 9-17. But the Court, noting the defendant's substantial criminal history, sentenced him to 144 months' imprisonment. Filing 123 at 20-22; *see* filing 111; filing 112. The Court said the defendant "should be given credit for time served" and noted that he had been detained since April 13, 2015, filing 123 at 24, and the judgment reflected the same, filing 111 at 2. The Court's judgment was affirmed by the Eighth Circuit on July 25, 2017. Filing 129.

DISCUSSION

The defendant claims that his counsel was constitutionally ineffective. To establish a claim of ineffective assistance of counsel, the defendant must show that his attorney's performance was deficient and that this prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance can be shown by demonstrating that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. However, the Court's scrutiny of counsel's performance is highly deferential, because the Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689.

To satisfy the prejudice prong of *Strickland*, the defendant must show that counsel's error actually had an adverse effect on the defense. *Gregg v. United States*, 683 F.3d 941, 944 (8th Cir. 2012). The defendant must do more than show that the errors had some conceivable effect on the outcome of the proceeding. *Id.* Rather, the defendant 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.* A "reasonable probability" is less than "more likely than not," but it is more than a possibility; it must be sufficient to undermine confidence in the outcome of the case. *Paul v. United States*, 534 F.3d 832, 837 (8th Cir. 2008).

The defendant asserts three different ways in which, he says, his attorney was ineffective: (1) failing to secure a plea agreement, (2) permitting him to plead guilty without reevaluating his competency, and (3) not asking the Court to reduce his sentence to ensure he receive credit for time served in state custody. Filing 138 at 4-5; filing 139.[1]

PLEA AGREEMENT

The defendant first alleges that sometime between his indictment and September 3, 2015, the government "advised [his] counsel that [it] would permit [him] to plead to Count One and receive a 120 Month sentence." Filing 138 at 4.[2] The defendant alleges that he wanted to plead guilty, but that his counsel instead moved for a mental health examination, and that while the defendant was in San Diego for his evaluation, he told his counsel he wanted to accept that plea offer, but counsel advised him not to worry about it and concentrate on the examination. Filing 138 at 4. When he returned to Nebraska, however, he "was advised that the offer was no-longer on the table." Filing 138 at 4, 22-23.

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[1] The third contention is contained in a separately filed "addendum" to his § 2255 petition, which the Court considers to be part of his motion pursuant to *United States v. Sellner*, 773 F.3d 927, 931-32 (8th Cir. 2014). *See* filing 140.

[2] The Court assumes that a plea agreement resulting in a 120-month sentence was offered, although the record strongly suggests otherwise.

The defendant's Sixth Amendment right to counsel extends to the plea-bargaining process—during plea negotiations, defendants are entitled to the assistance of competent counsel. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). As a general matter, where ineffective assistance of counsel is alleged to have led to the rejection of a plea agreement,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 164. In other words, [i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it[,]" and "[i]f that right is denied, prejudice can be shown if loss of the plea opportunity led to . . . the imposition of a more severe sentence." *Id.* at 168.

So on its face, the defendant's § 2255 motion would be supported by *Lafler*—at least, enough for an evidentiary hearing. But there is a complicating factor here—the defendant's mental health. The record establishes counsel's good-faith concern—and the basis for that concern—about whether the defendant was mentally competent. A defendant may not plead guilty unless he does so competently and intelligently. *Godinez v. Moran*, 509 U.S. 389, 396 (1993). And counsel's failure to request a competency hearing where there was evidence raising a substantial doubt about his client's competence may *also*

constitute ineffective assistance of counsel. *See Vogt v. United States*, 88 F.3d 587, 592 (8th Cir. 1996).

So, a lawyer whose client is offered a favorable plea agreement, but who has concerns about whether his client is competent to proceed, faces a dilemma. The Court cannot conclude, however, that counsel is constitutionally ineffective where he demurs regarding the plea offer until he is satisfied, by professional evaluation, that his client is competent to consider it.

A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case, and the lawyer has discharged his constitutional responsibility so long as his decisions fall within the wide range of professionally competent assistance. *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). And a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Davis v. United States*, 858 F.3d 529, 534 (8th Cir. 2017) (citing *Strickland*, 466 U.S. at 689). Here, from the perspective of counsel at the time, even if the defendant's allegations are taken as true, they would not entitle him to relief, because it was objectively reasonable for counsel to wait for a competency evaluation when counsel had at least some reason to question the defendant's ability to understand legal advice and make reasoned decisions. *Cf. id.* at 534.

COMPETENCY TO PLEAD GUILTY

But that, of course, poses another question: was the defendant in fact competent to plead guilty when he did? He says not, and moreover, that counsel should have known it. The record, however, establishes that the defendant was competent to proceed.

The defendant alleges that the examining psychologist for the Bureau of Prisons found him to be competent, but that "his competency relied on him taking his medication." Filing 138 at 5. The defendant says the psychologist's report "stated that if [he] 'missed' his Medication for any period of time, That he should be 'reevaluated' to determined if he could plead guilty or continue to trial." Filing 138 at 5. The defendant further alleges that before the hearing defense counsel advised the Court that the defendant had missed his medication for about a week. Filing 138 at 5. The Court, however, found the defendant competent without reevaluating him. Filing 138 at 5. Counsel, the defendant argues, was ineffective for not objecting. Filing 138 at 5.

To begin with, the defendant isn't precise about when he was off his medications: he says he was medicated in San Diego, and then transferred to Leavenworth, then to Saline County, and then to "'Sandes County'[3] for the purpose of getting ready for the competency hearing[.] However, They didn't have his medication, so he was sent back to Saline County, So he could get his medication, Again too get ready for the competency hearing." Filing 138 at 28-29. Counsel represented at the change of plea hearing, though, that he had expressed his concern about the lack of meds in Saunders County about a week before the hearing, "so they moved him back to Saline County so he could get on his meds so he could be here, and I've spent most of the morning with him, and I'm satisfied today that he's clear thinking." Filing 123 at 12-13.

So at the very least, the record is clear that the defendant's counsel was aware the defendant had been off his medication, made sure the defendant was moved so that he could get back on his medication in time for the change of plea hearing, and considered the defendant's competency before the change of

[3] He means Saunders County. *See* filing 123 at 12.

plea hearing. It's always possible that counsel was mistaken, but it's hard to see how his conduct was objectively unreasonable.

More fundamentally, though, the defendant's description of the psychologist's report—the premise of the defendant's argument—isn't supported by the record. When the defendant arrived in San Diego, he had been prescribed Zoloft, Trazadone, and hydroxyzine (an antihistamine). Filing 62 at 3. The Zoloft and Trazadone were continued, although the antihistamine was discontinued because it has a high abuse rate among inmates. Filing 62 at 3. Zoloft and Trazadone "mostly target depression, but Zoloft is helpful in decreasing anxiety and Trazodone is helpful in maintaining good sleeping patterns." Filing 62 at 27. The report explains, as part of the defendant's "Diagnosis and Prognosis," that:

> As of the writing of this report, Mr. Love stated that he is happy with his current medication regimen. His anxiety and depression are controlled and he feels stable. In addition, he is sleeping well with no complaints of nightmares or headaches. It is highly recommended that Mr. Love continue to meet with a psychiatrist to monitor his medication needs. Please ensure that he remains on these medications unless Mr. Love indicates that the medications are no longer working for him. His medications should not be changed because the facility where he is being detained does not give these medications. If his medications are changed significantly, his mental health stability should be re-evaluated.[4]

[4] Some context: the report reflects that the Lancaster County Jail had previously refused to provide the defendant with his Trazadone, because of an institutional policy. Filing 62 at 11.

Filing 62 at 26, 28. But nothing in the section of the report captioned "Opinion on the Issue of Present Competency to Stand Trial" suggests that the defendant's competency was contingent on his medication regimen. *See* filing 62 at 28-29.

In other words, contrary to the defendant's representation, the evaluating psychologist did *not* say that the defendant's competency relied on him taking his medication. Rather, the psychologist's recommendation in that regard was a *medical* one, suggesting the best course of treatment. And there's certainly nothing to suggest that the defendant's competency at the change of plea hearing was meaningfully undermined by the fact that he had been deprived of his medication a week before the hearing, but had been provided with it since then. In fact, the report plainly supports a finding of competency, and the defendant does little to rebut that.

And more importantly, the question of competency *vel non* isn't precisely the issue—rather, it's whether the defendant's counsel was competent in allowing him to proceed without demanding that his competency be reevaluated. And on that point, the defendant's experienced and capable counsel made a clear record of his belief that the defendant was competent. *See* filing 123 at 12. The defendant's alleged incompetency provides a basis to claim ineffective assistance of counsel only if the defendant's counsel knew or should have known of it at the time, *Davis*, 858 F.3d at 534-35, and the defendant's claim has merit "only when the lawyer's errors were so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," *Buck*, 137 S. Ct. at 775 (cleaned up). The defendant's allegations here, considered in light of the record, don't meet that standard, because the record

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It's not hard to infer that the psychologist's recommendation was responding to that institution's refusal to do what she believed to be in the defendant's best medical interests.

shows that counsel had substantial reason to believe the defendant could understand legal advice and make reasoned decisions. *See id.* at 535.

CREDIT FOR TIME SERVED

Finally, the defendant argues that counsel should have asked the Court to reduce his sentence to provide for time served. According to the defendant, after he was arrested on April 13, 2015, he was "originally charged by the State of Nebraska with several counts including possession with the intent to deliver methamphetamine." Filing 139 at 4. But, he says, after he was indicted "the State allowed [him] to plead to reduced charges, and sentenced him to nine (9) months, time served." Filing 139 at 4. "The State charges," he says, "were also considered in the Pre Sentence Investigation Report ('PSR') as relevant conduct to the federal charges." Filing 139 at 4. The defendant alleges, however, that the Bureau of Prisons won't credit the 6 months and 15 days the defendant says he served on those charges toward his federal sentence. Filing 139 at 5. So, the defendant argues that his counsel should have asked the Court to reduce the sentence pursuant to U.S.S.G. § 5G1.3(b)(1) to make sure he got credit for that time. Filing 139 at 4.

But the defendant's account is not consistent with the record. Rather, the record suggests that the defendant was arrested on a warrant issued for a number of pending unrelated state charges. Filing 107 at 1; *see* filing 8 at 8-10. The defendant was sentenced to jail time on several charges after his arrest, but none appear to have been related to the federal offense of conviction:

July 21, 2015:	75 days for disturbing the peace
	30 days for resisting arrest
October 2, 2015:	90 days for carrying a concealed weapon
	180 days for operating a motor vehicle to avoid arrest

Filing 107 at 15-17. And while the presentence report described in some detail the drug conspiracy that the defendant was part of, no other relevant conduct was identified. *See* filing 107.

In other words, there may have been an error at sentencing—but it was the Court's error, in believing that the defendant should be credited for all the time served since April 13, 2015. In fact, if the defendant's time was credited toward another sentence, he's not entitled to more federal credit. 18 U.S.C. § 3585. And the Court can only reduce a sentence to account for federally uncredited time if the previously served time resulted from relevant conduct to the federal offense of conviction. § 5G1.3. The only support the defendant offers for his claim that he served time in state custody for relevant conduct is that the presentence report says so—but it doesn't.

So, the defendant's assertions are both conclusory and contradicted by the record. *See Engelen*, 68 F.3d at 240. Counsel was not ineffective in failing to object, because the only error evident from the record was one that could have worked in the defendant's favor (although it didn't). And the defendant was certainly not prejudiced by it.

CONCLUSION

The defendant's allegations either entitle him to no relief, or are contradicted by the record. Accordingly, his § 2255 motion will be summarily dismissed. A movant cannot appeal an adverse ruling on his § 2255 motion unless he is granted a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A certificate of appealability cannot be granted unless the movant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, the movant must demonstrate that reasonable jurists would find the Court's assessment of the

constitutional claims debatable or wrong. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *see also Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

A claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that the movant will not prevail. *See Buck*, 137 S. Ct. at 774. The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course. *Id.* In this case, the Court finds that the defendant's claims are at least sufficiently colorable to permit him an appeal. So, the Court will issue a certificate of appealability.

IT IS ORDERED:

1. The defendant's pro se motion to vacate under 28 U.S.C. § 2255 (filing 138) is denied.

2. The Court issues a certificate of appealability.

3. A separate judgment will be entered.

4. The Clerk is directed to mail a copy of this Memorandum and Order to the defendant at his last known address.

Dated this 11th day of October, 2018.

BY THE COURT:

John M. Gerrard

John M. Gerrard
United States District Judge