

APPENDIX: A

UNITED STATES COURT OF APPEALS October 21, 2020

TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FREDERICO RAMSEY,

Defendant-Appellant.

No. 19-3289

(D.C. No. 2:09-CR-20046-CM-4)

(D.C. No. 2:14-CV-02608-CM)

(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES, BACHARACH** and, **MORITZ**, Circuit Judges.

A federal prisoner, Mr. Federico Ramsey, has filed a request for a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2255 motion to vacate his drug convictions and sentence.¹ Exercising jurisdiction under 28 U.S.C. § 1291, we **deny** Mr. Ramsey's request for a COA and **dismiss** this matter.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Mr. Ramsey appears pro se, we afford his filings a liberal construction, but we do not serve as his advocate. *See, e.g., Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010); *Ford v. Pryor*, 552 F.3d 1174, 1178 (10th Cir. 2008).

I

Mr. Ramsey was convicted in 2010 of four charges related to the possession and distribution of heroin, including a conspiracy charge where a drug-death resulted. In July 2011, he was sentenced to 292 months' imprisonment. Mr. Ramsey appealed from his convictions, and, in 2013, we affirmed both his convictions and sentence.

On December 4, 2014, Mr. Ramsey filed a pro se motion, pursuant to 28 U.S.C. § 2255, to vacate his sentence, based on twenty-two claims that his court-appointed attorney was ineffective both before and during his trial and sentencing. In a September 16, 2015 order, the district court denied nearly all of Mr. Ramsey's claims, but took three under advisement. Eventually, in November 2019, the district court denied the three remaining claims. The court also declined to issue a COA. This appeal followed.

II

To appeal the denial of relief under § 2255, a prisoner must receive a COA. *See* 28 U.S.C. § 2253(c)(1)(B) (“Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255.”); *see also Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012) (noting the “‘clear’ jurisdictional language . . . in § 2253(c)(1)”). “We may grant a COA only if the petitioner makes a ‘substantial showing of the denial of a constitutional right.’” *Milton v. Miller*, 812 F.3d 1252, 1263 (10th Cir. 2016) (quoting 28 U.S.C. § 2253(c)(2)). Under this standard, Mr. Ramsey must show “that reasonable jurists could

debate whether . . . the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

III

Mr. Ramsey’s request for a COA rests on two claims that his court-appointed attorney was ineffective.

First, Mr. Ramsey alleges that his counsel was ineffective for failing to raise a particular argument at trial and on appeal. Specifically, Mr. Ramsey contends that under 21 U.S.C. § 841(b)(1)(C), a penalty enhancement provision, the government had the burden to show that his distribution of drugs was the “but-for” cause of the victim’s death. *See* Aplt.’s Br. at 6–9. The Supreme Court later held as much in *Burrage v. United States*, 134 S. Ct. 881 (2014), a ruling that came nearly four years after Mr. Ramsey’s conviction.

Second, Mr. Ramsey alleges that his counsel was ineffective for failing “to apprise him of the option and benefits of entering an open plea to be entitled to a three (3) level reduction.” Aplt.’s Opening Br. at 11. According to Mr. Ramsey, if his counsel had informed him of this option, he would have received a sentence of 210 months instead of the 292-month sentence that he ultimately received.

IV

We decline to grant Mr. Ramsey a COA on these two grounds. Both suffer from the same defect: Mr. Ramsey never raised them before the district court in the § 2255 proceedings below.

“We have long applied the rule that we do not consider issues not raised in the district court.” *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015). Thus, if an “argument was not raised in [an appellant’s] habeas petition, it is waived on appeal.” *Id.*; see also *Harmon v. Sharp*, 936 F.3d 1044, 1085 (10th Cir. 2019) (Holmes, J., concurring) (“[I]n the AEDPA context, our precedent usually has treated arguments that petitioners have not advanced before the district court as waived viz., not subject to review at all.”). This waiver principle holds true even if, as here, a prisoner generally alleges ineffective assistance of counsel in the district court and on appeal yet includes new particular claims of ineffective assistance of counsel for the first time on appeal. See *Milton v. Miller*, 812 F.3d 1252, 1264 (10th Cir. 2016) (“Although this claim [in the defendant’s COA request on appeal] and the Original Claim [in the original § 2255 petition] both allege ineffective assistance of counsel, they are separate claims. [Defendant] cannot allege an ineffective-assistance claim and then usher in anything fitting under that broad category as the same claim. Counsel can perform ineffectively in myriad ways.”).

Mr. Ramsey’s initial § 2255 motion raised twenty-two claims of ineffective assistance of counsel. Mr. Ramsey even later supplemented his initial motion with several additional claims. Yet, he never raised the precise two claims presented in his

COA request. In light of our “general rule against considering issues for the first time on appeal,” even in the habeas context, we will not consider these two new claims now as grounds for a COA. *United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012).

V

We therefore **DENY** Mr. Ramsey’s request for a COA and **DISMISS** this matter.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

APPENDIX: B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Frederico Ramsey,
Petitioner,

Case No.: 09-CR-20046-04-CM

v.

United States of America,
Respondent.

PETITION TO AMEND RAMSEY'S § 2255 PETITION
PERSUANT TO THE FEDERAL RULE OF CIVIL
PROCEDURE 15(C)(1)(B), AND 15(D), AND
PETITION TO RECONSIDER ITS PREVIOUS
DENIAL OF HIS **BURRAGE V. UNITED STATES**,
134 S.Ct. 881, 187 L.E.D2d 715 (2014)

Petitioner Federico Ramsey moves the Honorable court for leave to amend his § 2255 petition pursuant to the Federal Rules of Civil Procedure (Fed.R.Civ.P.) 15(c)(1)(B), 15(d), and to reconsider its previous denial of his **Burrage v. United States**, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014) to amend, and clarify previously raised claims in his § 2255 petition, previous motion to amend, and the fact that **Burrage** announces a new substantive rule of law applicable to cases on initial collateral review. Good cause exists to grant this petition.

1. On December 2, 2014, Ramsey filed his first motion to amend based on clarifying and amplifying to include appellate counsel's ineffectiveness. He stated that "He was denied effective assistance of appellate counsel when his attorney failed to raise all the claims presented in his § 2255 on direct appeal. Hereby fully incorporated to this additional theory/claim."

2. On February 13, 2015, Ramsey filed his motion to add a new claim based on **Burrage v. United States**, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). Petitioner posit the flawed jury instruction here in this case is itself

a stand alone ground to vacate the sentence and or correct sentence because the enhanced term imposed under U.S.S.G. §2D1.1A2 is premised upon a preponderance of evidence absent a specific jury finding beyond a reasonable doubt in light of **Burrage**.

3. On July, 2015 in Ramsey's reply to the government's opposition he raised the fact that **Burrage** should apply retroactive to his case....

4. Under Fed.R.Civ.P. 15(d) contemplates supplemental pleadings "setting out any transaction, occurrence, or event that happen after the date of the pleading to be supplemented." (emphasis added).

MEMORANDUM OF LAW

The Court may exercise discretion to permit the argument as "relating back" to the original motion pursuant to Fed.R.Civ.P. 15(c)(1)(B). See **United States v. Espinoza-Saenz**, 235 F.3d 501, 505 (10th Cir. 2000) (explaining Rule 15(c) as it applies to untimely proposed amendment to § 2255 motions). A Court has discretion to permit an untimely amendment to a § 2255 where the proposed amendment (1) clarifies or amplifies a claim or theory in the original motion by way of additional facts; and (2) does not seek to add a new claim or insert a new theory into the case. *Id.*

The Court must liberally construe Ramsey's pleadings. **McBride v. Deer**, 240 F.3d 1287, 1289 (10th Cir. 2001).

Ramsey will demonstrate that both trial and appellate counsels rendered ineffectiveness, and demonstrate that his **Burrage** claim relates back to claims 1, 13, 14, A, E, i, and ii, and that **Burrage** is retroactive.

Ramsey will quote the relevant language that will demonstrate that he raised a **Burrage** claim.

Claim:1. "That rather than conduct a reasonable investigation into the actual causes of overdose injuries and death of each

alleged victims ... trial counsel merely chose to only enter into "stipulation" with counsel for the government based upon. which relieved the prosecutria of her burden of proof...."

Document 784, at 7

Claim: 13. "That trial counsel's pretrial performance was constitutionally deficient in that counsel failed to reasonably contest the "cause of death" of the alleged victims that purportedly died from overdosing on heroin."

Document 784, at 10.

Claim: A. "that counsel's trial performance was constitutionally deficient in that he failed to call upon or subpoena a medical examiner who could have testified to the victims' usage of other illicit-drugs along with prescription and non-prescription pharmaceutical narcotics. Prejudice is demonstrated in that the actual causes of the alleged victims' death was solely presented by the prosecution without any objections or presentations of any evidentiary facts to the contrary from trial counsel. Thus, the fact finders had only one version of the evidence and the adversarial system was not put to a true test by counsel...."

Document 784, at 11.

Prejudice is demonstrated in that all of the above-named government witnesses were permitted to give one-sided testimonial evidence regarding the alleged causes of each of the decedents' deaths and or believed causes of their own injuries from heroin overdoses. Significantly, the above-named doctors or physicians gave expert opinion that were uncollected with respect to the alleged causes of the decedents' death. Nonetheless, each and every alleged victims were also using and had used other drugs, e.g., pharmaceutical drugs. Therefore, each victims' injuries and or death may have resulted from multi-drug toxicity or poly-drug toxicity. Counsel's pretrial "stipulation" as to the cause of death amounted to an unauthorized and unapproved concession of guilt."

Document 784, at 11.

"In support of this constitutional violation or meritorious allegation movant states that ocycodone, tetrahydrocannabinol and other pharmaceutical drug were found in the system of some of the decedents. These facts were revealed during hospital emergency room care visits, and during autopsy procedures."

Document 784, at 12.

Claim: E. "That counsel's trial performance was constitutionally deficient in that his complete failure to challenge the drug evidence before and during trial. Which prevented (and still prevents) movant from "proving that any of the drug substance allegedly purchased from one of the alleged co-conspirators were the **but-for** cause of the alleged victims deaths or serious bodily injuries via overdose solely on each of their use of heroin." Furthermore, counsel's pretrial and trial "stipulation[s]" clearly shows that he neglected to contest the drug evidence throughout the critical pretrial stage and at trial...."

Document 784, at 12.

Claim: i. "... at sentencing he once again neglected to challenge the actual causes of the alleged victims' deaths. Prejudice is shown in that counsel knew or should have known that failure to object to, or otherwise challenge the purported causes of death of the alleged victims' would be considered by the court as an enhancement in increasing the sentencing range imposed on this case."

Document 784, at 13.

Claim: ii. "... his unprofessional omissions in failing to conduct a reasonable pretrial investigation and afterwards challenge the actual cause of the alleged victims' demise deprived movant Ramsey of both substance and procedural rights. ... Such negligence allowed the movant to receive improper enhancements under the sentencing Guidelines and ... 21 U.S.C. § 841(b)(1)(C) for heroin being the **but-for** cause of each victims deaths despite the fact that the victims were multiple drug users and abusers. And therefore, may have overdosed as a result of their use of multiple drugs (also known as poly-drug toxicity and or multi-drug toxicity)."

Document 784, at 13.

QUESTION PRESENTED UNDER RULE 15(c):

1. Whether the Supreme Court's recent decision in *Burrage v. United States*, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), interpreting statutory language concerning a sentencing enhancement, requires that the court set aside Ramsey's conviction and/or sentence on his conviction, and 2. whether Ramsey's trial and appellate counsels were ineffective.

THE BURRAGE DECISION.

In Janaury 27, 2014, the Supreme Court issued *Burrage v. United States*,

134 S.Ct. 881, 187 L.Ed.2d 715 (2014). In that case, Marcus Burrage was charged with violating § 841(a)(1) for distributing heroin to Joshua Banka who later died. The government alleged that Burrage was subject to the enhanced penalty because Banka's death "resulted from" the heroin use. Burrage, 134 S.Ct. at 885. Two medical experts testified regarding the cause of Banka's death. Id. The first testified that multiple drugs were present at the time of death and that only the heroin was above the therapeutic range, but he was not sure "whether Banka's would have lived had he not taken the heroin." Id. The expert opined that the combined drugs caused "respiratory and/or central nervous system depression," and the heroin was a "contributing factor" to Banka's death. Id. The second expert also testified that the heroin played a "contributing role," but could not say whether Banka would have lived had he not taken the heroin. Id. at 886. The jury was instructed that the government only had to prove that the heroin was a "contributing cause" of death. Id. Burrage was convicted and received the enhanced penalty. Id.

The Eighth Circuit affirmed. *United States v. Burrage*, 687 F.3d 1015 (8th Cir. 2012). The Supreme Court rejected the Eighth Circuit's contributing cause standard by stating: "The language Congress enacted requires death to 'result from' use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed." Burrage, 134 S.Ct. at 891. Instead, 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." Id. at 892.

Ramsey's conviction on the enhanced charge, count-1 must be set

side in light of *Burrage* because the court did not instruct on "but-for" causation.

When a Supreme Court decision "results in a 'new rule,' that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances." *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)(citation omitted). While substantive rules generally apply retroactively, new procedural rules do not. See *id.* at 2522-23. *Burrage* announce a new substantive rule of law applicable to cases on initial collateral review.

TRIAL AND APPELLATE COUNSELS INEFFECTIVENESS:

Ramsey's trial and appellate counsels cause any procedural default of this claim. A meritorious claim of ineffective assistance of counsel constitutes cause and prejudice for purposes of summounting the procedural bar. *United States v. Horey*, 333 F.3d 1185, 1187 (10th Cir. 2003). A successful claim of ineffective assistance of counsel must meet the two prong test set forth in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a defendant must show that his counsel's performance was deficient in that it "fell below an objective standard of reasonableness." *Id.* at 688. Second, a defendant must show that counsel's deficient performance actually prejudice his defense. *Id.* at 687. That is, that "there is a reasonable possibility that, but for counsel's professional error, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Ramsey's trial counsel was ineffective for failing to raise the "but-for" causation argument at pretrial and trial, and appellate counsel also failed to raise the "but-for" causation argument on direct appeal because

there was a circuit split on the issue during pretrial, trial, and appeal, and the Tenth Circuit was silent. At the time of trial, there was a split among the circuit as the government's burden of proof to establish that the victim's death or serious injury "result from" the defendant's distribution of drugs. Appellate counsel failed to raise this claim on appeal, even though there was a split among the circuit. See *United States v. Harfield*, 591 F.3d 945, 948 (7th Cir. 2010) (The statutory term "result from" required the government to prove the "death or injury would not have occurred had the drugs not been ingested: 'but-for' (had it not been for) the ingestion, no injury."); *United States v. Rodriguez*, 279 F.3d 947, 951 (11th Cir. 2002) (same); *United States v. Pacheco*, 489 F.3d 40, 46-47 (1st Cir. 2007) ("the government was not required to show that [the drug] was either the sole or the direct cause of [the victim's] injuries; it had to show only that there was a but-for causal connection between [the drug] and those injuries."); *United States v. Martinez*, 588 F.3d 301, 318-19 (6th Cir. 2009) ("proximate cause is the appropriate standard to apply in determining whether a health care fraud violation 'result in death."); *United States v. Carbajal*, 290 F.3d 277, 284 (5th Cir. 2002) (strict liability, no proof of proximate causation or reasonable foreseeability); *United States v. Martinez*, 412 F.3d 859, 862 (8th Cir. 2005) ("results from" requirement is met by a "contributing cause.").

In *United States v. Dupree*, 108 Fed. App'x 602, WL 1941305 (10th Cir. 2004), the Tenth Circuit held that counsel was ineffective for failing to raise an issue when there was a circuit split and the Tenth Circuit had not yet ruled on the issue. Therefore, in light of the circuit split at the time of pretrial, trial, and appeal, it is at least arguable that both trial and appellate counsels were obligated to raise this issue.

Ramsey must show that both trial and appellate counsels' deficient performance actually prejudiced his defense. *Strickland*, 466 U.S. at 687. That is, Ramsey "must show a reasonable probability that, but for counsels' unreasonable [failure to raise this issue at trial, preserved it for further appellate review], and appellate counsel failure to file a merit brief, he would have prevailed on appeal." *Smith v. Robbins*, 528 U.S. 259, 286, 120 S.Ct. 746, 764, 145 L.Ed.2d 756 (2000).

Ramsey have established prejudice because regardless of the outcome at trial, and at the Tenth Circuit on his direct appeal, he would have ultimately prevailed on his appeal at the Supreme Court had he raised the "but-for" issue. *Burrage* holds that "the language Congress enacted requires death to 'result from use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed.'" *Id.* at 891. "At least where use of 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 panalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is but-for cause of the death." *Id.* 892.

This evident is not sufficient to support the "but-for" causation. *Burrage*, 134 S.Ct. at 891. It render Ramsey's sentence unlawful and unconstitutional.

Numerous District courts and Courts of appeals had held that *Burrage* is retroactive, and some cases the government has conceded its retroactive. See *United States v. Schneider*, 112 F.Supp.3d 1197, 1207 (D. kan. 2015) ("The government concedes, and the court agrees, that *Burrage* announces a new substantive rule of law applicable to cases on initial collateral review."), *aff*, no. 15-2347, 2016 U.S. App. Lexis 19932, 2016 WL 6543342 (10th Cir. Nov. 4, 2016); *Gaylord v. United States*, 829 F.3d 500, 505

(7th Cir. 2016)(Burrage narrowed the scope of the "death result" enhancement and is thus substantive and applies retroactive"); **Krieger v. United States**, 842 F.3d 490 (7th Cir. 2016)(same). The government has made concession before several other courts which have accepted the concession. See **Ragland v. United States**, 784 F.3d 1213, 1214 (8th Cir. 2015)("The government conceded ... Burrage applies retroactively"); see also, **Weldon v. United States**, no. 14-0691-DRH, 2015 U.S. Dist. Lexis 50959, 2015 WL 1806253, at *3 (S.D. Ill. Apr. 17, 2015)(the government conceded that Burrage is substantive in nature and is retroactive, but argued that it was inconsequential for other reasons), vacated, on other grounds, no. 15-1994, 2016 U.S. App. Lexis 15626, 2016 WL 4468077 (7th Cir. Aug. 24, 2016); **United States v. Snider**, no. 3:07-CR-124-SI, 2016 U.S. Dist. Lexis 49420, 2016 WL 1453878, at *10 (D. Or. Apr. 13, 2016)(accepting government concession that Burrage standard applies); **Santillana v. Upton**, 2017 U.S. App. 747 (5th Cir. Jan. 11, 2017)(Fifth Circuit held Burrage applies retroactively, and reverse and remand Section 2241 petition).

The district court ruling on this claim utilized decisions of numerous district courts to denied relief, that have issued opinions holding that Burrage does not apply retroactively although none with any significant analysis. **Stewart v. United States**, no. 15-CV-73-JBS, 89 F.Supp.3d 993, 2015 U.S. Dist. Lexis 13762, 2015 WL 477226, at *2 (E.D. Wis. Fed. 5, 2015); **United States v. Bourlier**, No. 3:14CV609, 2014 U.S. Dist. Lexis 166432, 2014 WL 6750674, at *2 (S.D. Fla. Dec. 1, 2014); **Alvarez v. Hastings**, No. CV214-070, 2014 U.S. Dist. Lexis 124420, 2014 WL 4385703, at *1 (S.D. Ga. Sep. 5, 2014); **De La Cruz v. Quintana**, No. 14-28-KKC, 2014 U.S. Dist. Lexis 60526, 2014 WL 1883707, at *6 (E.D. Ky. May 1, 2014); **Taylor v. Cross**, No. 14-CV-304, 2014 U.S. Dist. Lexis 39858, 2014 WL

1256371, at *3 (S.D. Ill. Mar. 26, 2014); *Powell v. United States*, No. 3:09-CV-2141, 2014 U.S. Dist. Lexis 144289, 2014 WL 509272, at *2 (D. Conn. Oct. 10, 2014)); see also, *Minaya v. United States*, 41 F.Supp.3d 343, 345 (S.D. N.Y. 2014).

The previous cited precedents has concluded that Burrage is retro-active and should reconsider its previous ruling, and should follow suit. Furthermore, Ramsey's Rule 15(c) arguments relates back to his initial claims cited above.

Ramsey raised in claim: 2, "the fact that ... Also such active pre-trial performance would have gotten counsel to actively and sincerely seek a pretrial reasonable plea bargain of his client Ramsey's behalf. Whereby Ramsey may have chosen to avoid going to trial to be subjected to such harsh punishment...." Document 784, at 8.

A. FORMER PRETRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRETRIAL STAGES BY FAILING TO APPRISE RAMSEY OF HIS RIGHT TO ENTER AN OPEN PLEA OF GUILTY TO QUALIFY FOR A THREE (3) LEVEL REDUCTION, IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT.

During pretrial Attorney Kenton M. Hall provided constitutionally ineffectiveness by failing to apprise Ramsey of the option and benefits of entering an open plea.

Hall rendered constitutionally ineffectiveness because he neglected to apprise Ramsey about the possibility of entering an open plea in a timely manner, which would have resulted in a sentence of 210 months--this calculation is based on the lower end sentence imposed. Ramsey arrives at the 210-262 months by departing three (3) levels for acceptance of responsibility from the total offense level of 40, criminal history category 1 calculation. Hall's failure to apprise Ramsey of the favorable plea option caused him prejudice and ultimately, receiving a 292-month

sentence, instead of a 210-month sentence. Ramsey's 3-level reduction would have resulted in a guidelines range of 210-262 months. Hall neglected to advise him of this more favorable plea option of entering an open plea whereby he would be eligible for a 210-262 month sentence, and a sentence of 210 months.

Hall neglected to apprise Ramsey of this option. Ramsey has sufficiently demonstrated that Hall deprived him of an opportunity to make a reasonable informed decision of whether to enter an open plea, instead of proceeding to a trial.

A claim of ineffective assistance of counsel in negotiating and advising a defendant to plead guilty is properly raised in a collateral proceeding. See *United States v. Ibarra-Coronel*, 517 F.3d 1218, 1222 (10th Cir. 2008)(citing *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995)). *United States v. Gutierrez-Vasquez*, 373 F. App'x 860, 862-63 (10th Cir. 2010).

Hall provided ineffectiveness by neglecting to apprise Ramsey of the favorable option and benefits of timely entering an open guilty plea. The difference in sentencing would have been substantial--210 month sentence for example--Ramsey was prejudiced, because "any amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). As a result Ramsey has satisfied the requirement that he show a reasonable probability that his sentence would have been shorter had he plead to an open plea.

In support of this claim Ramsey cites to *United States v. Booth*, 432 F.3d 542, 547-49 (3d Cir. 2005)(counsel failure to inform the defendant about the option of entering an open plea resulted in the defendant's ignorance of an unilateral action he could have taking

(entering an open guilty plea), which would have resulted in a significant reduction at sentencing).

Clearly, Hall "committed serious errors in light of prevailing professional norms" such that his legal representation fell below an objective standard of reasonableness" and there is "a reasonable probability that, but for his unprofessional errors, the result of the proceeding would have been different." *Grant v. Tremmell*, 727 F.3d 1006, 1017 (10th Cir. 2013)(internal quotation marks omitted)(quoting *Wickerly v. Workman*, 580 F.3d 1171, 1176 (10th Cir. 2009)), cert. denied, 134 S.Ct. 2731, 189 L.Ed. 2d 771 (2014).

Hall neglected to provide Ramsey with the necessary information relevant to entering an open plea needed to make an informed and intelligent decision whether to pursue an open plea in timely resolving his case, prejudiced him.

Consideration of the undisputed factual facts supports a finding that Ramsey was prejudiced by Hall's omitted advice on entering an open plea option. This favorable plea option that was not utilized would have provided an avenue in avoiding an increase sentence. Ramsey would have been in a position to avoid any increase imprisonment, and an opportunity for the court to sentence him accordingly, had he been represented effectively by competent counsel. Thus it is reasonably probable that Ramsey would have ended up with a sentence less severe than the 292 months ultimately imposed. This omission significantly undermined Ramsey's ability to make a knowingly decision on the best resolution of his case.

The facts presented demonstrated both that Hall's performance was constitutionally deficient and that that performance prejudiced Ramsey. Ramsey is entitled to a resentencing of 210 months sentence, or alternatively

a prompt evidentiary hearing should be convened.

CONCLUSION

Wherefore, for the aforesaid reasons, Ramsey respectfully avers that the Honorable Court revisit its previous ruling based on Burrage not being applicable retroactively, and grant his amended claims pursuant to Fed.R.-Civ.P. 15(c) and 15(d), or alternatively convene a prompt evidentiary hearing to fully develop any factual ambiguity of the current record.

I Frederico Ramsy declare under the penalty of perjury that the aforesaid undisputed factual facts are occurrate and correct to the best of my personal knowledge and recollections pursuant to 28 U.S.C. § 1746.

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of March, 2017, a copy of the foregoing petition was furnished upon: AUSA, Sheri Catania, 500 State Avenue, Suite 360, Kansas City, Ks 66101, by providing it to prison officials for mailing utilizing the legal mail system, first class U.S. mail postage prepaid.

Respectfully submitted,

Federico Ramsey

Frederico Ramsey
USMCFP-Springfield
Reg. No.: 12070-031
P.O. Box 4000
Springfield, Mo 65801

APPENDIX: C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

FREDRICO RAMSEY,

Defendant.

Case No. 09-20046-04

MEMORANDUM AND ORDER

This matter is before the court on defendant Fredrico Ramsey's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Doc. 784) and defendant's Motion to Appoint Counsel (Doc. 817). Defendant claims that his attorney provided ineffective assistance of counsel before trial, during trial, and at sentencing.

I. FACTUAL BACKGROUND

Defendant was charged with conspiracy to distribute and possess with the intent to distribute 100 grams or more of heroin with death and serious bodily injury resulting (Count 1); two related counts of distributing heroin (Counts 2 and 8); and one related count of possession of heroin with the intent to distribute (Count 9). (Doc. 285.) From November 22, 2010, to December 16, 2010, the court held a trial, and the jury found defendant guilty on all counts. On July 20, 2011, the court sentenced defendant to 292 months' imprisonment on Count 1 and 240 months' imprisonment on Counts 7, 8, and 9—all to run concurrently.

Defendant timely filed a Notice of Appeal. (Doc. 601.) On appeal, defendant argued the district court erred in denying his *Batson*¹ challenge and refusing to sever his trial from his codefendant, Verdale Handy. Defendant also argued the evidence was insufficient to sustain the conspiracy conviction and one of the convictions for possession with intent to distribute heroin. On April 17, 2013, the Tenth Circuit denied defendant's appeal on the *Batson* challenge and affirmed defendant's convictions and sentence. (Doc. 767.)

On October 3, 2014, defendant filed a Motion for Reduction of Sentence. (Doc. 780.) On November 3, 2014, the defendant filed a Motion for Order for Discovery. (Doc. 781.) The court denied both motions. (Doc. 783.) The court now considers defendant's pro se motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255.²

II. LEGAL STANDARDS

Defendant argues that his counsel provided ineffective assistance during the pretrial phase, at trial, and at sentencing. The court applies the standard identified in *Strickland v. Washington*, 466 U.S. 668 (1984), when determining whether a habeas petitioner's counsel provided ineffective assistance. *See Romano v. Gibson*, 278 F.3d 1145, 1151 (10th Cir. 2002) (applying *Strickland*). Under *Strickland*, a petitioner bears the burden of satisfying a two-pronged test in order to prevail. First, he must show that his attorney's "performance was deficient" and "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. The court affords considerable deference to an attorney's strategic decisions and will "indulge in a strong presumption" that counsel's performance was not deficient. *Welch v. Workman*, 639 F.3d 980, 1010 (10th Cir. 2011) (quoting *Strickland*, 466 U.S. at 689). Counsel's performance is deficient if it falls "below an objective standard of

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

² The court is mindful of defendant's pro se status and liberally construes his pleadings. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) ("Finally, because Pinson appears pro se, we must construe his arguments liberally; this rule of liberal construction stops, however, at the point at which we begin to serve as his advocate.").

reasonableness . . . [based on] prevailing professional norms.” *Strickland*, 466 U.S. at 688. To prove ineffective assistance of counsel, the petitioner must show “that counsel did not exercise the skill, judgment and diligence of a reasonably competent defense attorney,” *United States v. Voigt*, 877 F.2d 1465, 1468 (10th Cir. 1989), and that counsel’s decisions were “completely unreasonable, not merely wrong,” *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999) (citing *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997)). The reasonableness standard is purposefully and necessarily broad, for “[n]o particular set of detailed rules” would encompass all possible scenarios that an attorney might face. *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009).

Under the second prong of *Strickland*, a habeas petitioner must demonstrate prejudice, which requires a showing 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.* But, despite the existence of two prongs, “there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the [petitioner] makes an insufficient showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Id.* at 697.

III. ANALYSIS

Defendant claims twenty-two grounds of ineffective assistance and categorizes the grounds as: during the pretrial phase (Grounds 1–14); at trial (Grounds A–E); and at sentencing (Grounds I–III). Several of the grounds defendant argues overlap, and some are in the wrong category. Nevertheless, the court will address each ground, although not necessarily in the order presented in defendant’s brief.

A. Pretrial Investigation

Defendant argues that his attorney failed to sufficiently investigate and challenge the government's case. Attorneys have a duty to make reasonable investigations on behalf of their clients. *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). However, attorneys are not required to investigate every fact and potential legal theory, as long as the decision not to investigate is reasonable. *Strickland*, 466 U.S. at 691. Thus, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

Because no two cases are alike, and because "[e]ven the best criminal defense attorneys would not defend a particular client in the same way," tactical decisions based on sufficient investigation are "virtually unchallengeable." *Id.* at 689–90. Furthermore, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Attorneys are not expected to prepare for every remote possibility. *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Lastly, the Tenth Circuit has stated that, even if the client and attorney disagree on the correct trial strategy, the "[d]isagreement over trial strategy is generally not a basis for ineffective assistance of counsel." *United States v. Ambort*, 282 F. App'x 714, 717 (10th Cir. 2008). Here, the court starts with the presumption that defendant's attorney was not constitutionally ineffective.

1. Victims' Causes of Death (Grounds 1, 13, and 14)

In Ground 1, defendant claims his counsel was ineffective by failing to investigate other possible causes of each alleged victims' overdose injuries and deaths. In Grounds 13 and 14, defendant claims counsel's pretrial performance was constitutionally deficient in that counsel failed to reasonably contest the victims' causes of death and that defense counsel should have had an independent autopsy conducted on each and every victim. (Doc. 784 at 4–5.) According to the sworn

affidavit of defendant's attorney, Kenton Hall, defense counsel considered that potential evidence and determined that he had no good faith basis to challenge the victims' causes of death. (Doc. 810-1 at 5.) Defense counsel stated that he "reviewed the discovery concerning the overdose deaths as well as the relative purity of the heroin that was distributed during the conspiracy, and confirmed that heroin at the 60% purity level or greater would likely result in death or serious bodily injury." (*Id.*) Rather than waste resources on a losing battle, defendant's attorney focused on proving his client was not part of the conspiracy. (*Id.* at 2 and 5.) The choice to focus on defendant's innocence—instead of the victims' causes of death—is a tactical decision, and this court cannot say the choice was unreasonable or deficient based on the circumstances and evidence.

2. Pretrial Interviews (Grounds 2 and 6)

Defendant argues that his counsel should have interviewed every cooperating witness. Defendant's counsel states that he did not conduct personal interviews of every witness, but he did review the reports of the interviews, as well as the proffer statements. (Doc. 810-1 at 2.) Counsel also reviewed the reports and other evidence, which tended to corroborate the substance of the interviews of the cooperating witnesses. (*Id.*)

Defendant has failed to show that he was prejudiced by his attorney's decision to not personally interview every witness. To be prejudiced, defendant must establish that there is a *reasonable probability* that the case would have turned out differently had his attorney interviewed every witness. First, as the government points out, defendant's counsel would have had to obtain permission from the cooperators' attorneys, which likely would not have been granted. Second, defendant has failed to satisfy his burden of proof because additional interviews would not have changed the witnesses' incriminating testimony—these witnesses testified against defendant, and he has not suggested that interviewing these witnesses would have changed what they said at trial.

+ Defendant specifically claims his counsel was ineffective by not conducting a pretrial interview of co-defendant Henry Nelson, despite the fact Mr. Nelson had a notarized affidavit proclaiming defendant's innocence. This claim fails under *Strickland* because defendant does not explain how a pretrial interview of Mr. Nelson would have changed the outcome of the trial. Mr. Nelson was cross-examined, and the notarized affidavit was admitted into evidence, along with other inconsistent statements the defense addressed during trial. Defense counsel's affidavit states that he had access to Mr. Nelson's prior statements, both written and recorded, and therefore did not need to interview Mr. Nelson. (*Id.* at 3.) Defendant fails to explain how conducting an in-person interview would have impacted the trial or defendant's decision to enter into a plea, nor is there any credible evidence before the court tending to show the outcome would have been different.

B. Assistance in Preparing a Defense

Defendant makes a number of ineffective assistance claims related to defense counsel's preparations before trial.

1. Preparing a Defense (Ground 10)

Defendant argues that his attorney "neglected to prepare any defense strategy whatsoever." (Doc. 784 at 4.) Defense counsel points out that the defense strategy he used was to show that defendant was not a member of the alleged conspiracy. Indeed, defense counsel used this strategy as a defense at trial, which contradicts defendant's assertion that his attorney neglected to prepare any defense strategy.

2. Potential Alibi (Ground 7)

Defendant claims that his attorney "neglected and refused" to investigate his alibi defense on the day the heroin was distributed at 5915 Cernech. (Doc. 784 at 3.) Defendant claims the alibi witness, Antonio Ramsey, "had timely informed counsel of [defendant's] whereabouts" on the day of

the heroin sale in question, but that defense counsel did not investigate the alibi defense or subpoena the alibi witness. (Doc. 784 at 3.) However, defense counsel swears in his affidavit that neither the defendant, nor the alleged alibi witness, contacted him regarding the alibi witness and defense. Additionally, the affidavit states, "[t]he only time Antonio Ramsey was mentioned by petitioner was to advise counsel that Antonio Ramsey dropped off petitioner at Henry Nelson's house so that Henry Nelson could give petitioner a ride on the day petitioner was alleged to have sold heroin from the location of 5915 Cernich." (Doc. 810-1 at 3.) As such, defendant's sworn statements contradict his attorney's sworn statements.

If defense counsel failed to investigate an alibi witness who contacted him directly or who was otherwise made known to him, then defense counsel's legal assistance could be considered ineffective. Moreover, if Antonio Ramsey in fact would have testified that defendant could not have sold heroin on the day the heroin was distributed at 5915 Cernich, then the result of the trial may have been different. Defendant is entitled to a hearing on the issue of 1) whether Antonio Ramsey contacted defense counsel about a possible alibi and 2) whether Antonio Ramsey would have provided favorable testimony about the defendant's whereabouts.

3. Withholding Discovery (Grounds 8 and 9)

In Ground 8, defendant claims his attorney "purposely withheld all of the discovery materials from the petitioner throughout the entirety of the proceedings held on this case beginning during the pretrial stage and lasted throughout trial and sentencing." (Doc. 784 at 4.) Defendant also claims in Ground 9 that his attorney failed to go over the discovery materials with him during the critical pretrial stage. Defendant's attorney maintains these claims are false. Defense counsel states that he reviewed all discovery materials and met with the defendant in person on multiple occasions, and he reviewed discovery with the defendant as it was made available by the government. (Doc. 810-1 at 4.) Given

that the court already is granting a hearing on the alibi-witness issue, the court will also allow evidence on the issue of whether defense counsel timely shared discovery with defendant before trial.

C. Assistance at Trial

1. Pole-Camera Footage (Ground 3)

Defendant next argues that his attorney did not adequately challenge the government's evidence. Again, the court gives great deference to the attorney's trial strategy. *Strickland*, 466 U.S. at 691. Attorneys are not expected to challenge evidence if the objection is meritless. *See United States v. Cronin*, 466 U.S. 648, 657 n.19 (1984). Subjecting a jury to the "useless charade" of raising meritless objections can actually work against the client's interests and make the attorney appear obstructionist. *Id.*

The government introduced as evidence video footage taken from a pole-camera showing defendant participating in drug transactions. Defendant argues his attorney should have challenged the government's introduction of these videos into evidence. However, defendant's attorney believed he had "no good faith basis, such as an alibi witness, upon which to challenge the evidence." (Doc. 810-1 at 2.) If the evidence at the hearing shows that Antonio Ramsey contacted defense counsel as a potential alibi witness, and if that alibi places defendant somewhere else at the time the pole-camera videos were taken, then the court will revisit whether defense counsel's decision to not challenge this evidence was objectively reasonable.

Absent proof that Antonio Ramsey contacted defense counsel as a potential alibi witness and that Antonio Ramsey would have provided an alibi, the court sees no legitimate basis upon which defendant's attorney should have moved for exclusion of the pole-camera video. The video was obtained from lawfully-mounted recording devices. And while defendant claims he is not the subject in the video, he made that claim at trial. Deputy Justin Branner, who worked as an undercover officer

in the case, testified that defendant was in fact the individual who sold him drugs on two separate occasions. Additionally, Deputy Branner recalled defendant counting the money during the controlled buys in a particular way.

The court finds that defense counsel was objectively reasonable in not challenging the video, but the court may modify this finding if defendant proves that Antonio Ramsey contacted defense counsel as a witness who could have provided an alibi for the time-frame the videos were taken.

2. Voice Recordings (Ground 4) and Expert Analysis (Ground 5)

Defendant argues that his attorney should have objected to the voice recordings and compared those recordings to voice exemplars (Ground 4), and that defense counsel should have had the pole-camera footage and voice recordings analyzed by experts (Ground 5). In his affidavit, defense counsel states that there was no good faith basis upon which to object to the voice recordings, as the government laid the proper foundation prior to seeking admission of the evidence. (*Id.*) Defense counsel also did not feel he had a “good faith basis upon which to request funding and permission of the Court for such purpose. A request for funding of expert consultation in his area would have been purely speculative in that other evidence, such as testimony of cooperating witnesses and police officers, tended to corroborate the pole-cam and tape-recorded voice evidence.” (*Id.* at 3.)

The court believes that defense counsel’s rational for not objecting to the properly-admitted voice recordings, and his reason for not requesting expert analysis, are objectively reasonable decisions. Defendant may not like the fact that the jury heard voice recordings and watched video footage of the drug deals, but as the ultimate finders of fact, the jury gets to decide whether it was defendant, or someone else, on the voice recordings and in the video footage. Here, the jury believed it was defendant. Defendant has failed to show why objecting to the video footage and voice recordings

would have been anything more than a useless charade. In fact, raising these meritless objections could have been more damaging to defendant's case than helpful.

3. Crack Cocaine References (Ground 11)

Defendant claims he was prejudiced because defense counsel did not file a motion in limine to "keep out any and all reference to 'crack cocaine.'" (Doc. 784 at 4.) At trial, there was testimony by witnesses about controlled purchases of crack cocaine from members of defendant's heroin-selling conspiracy. However, defendant was not indicted for any crack cocaine offenses, so a motion in limine seeking to preclude mention of the controlled crack cocaine purchases from his co-conspirators would have had no merit. Defendant has failed to show that he suffered prejudice as a result of his attorney not filing a limine motion seeking to exclude all references to the term "crack cocaine" at trial.

4. Batson Challenge (Ground 12)

Defendant claims his attorney's legal assistance was ineffective because he failed to object to the racial composition of the jury under *Batson v. Kentucky*, 476 U.S. 79 (1986). The record, however, shows that defense counsel joined in the *Batson* challenge made by co-defendant Verdale Handy's attorney.³ (Doc. 658 at 192.) The court denied the *Batson* challenge, and the Tenth Circuit affirmed that ruling. See *United States v. Ramsey*, 510 F. App'x 731, 735 (10th Cir.) *cert. denied*, 134 S. Ct. 714 (2013).

To the extent defendant is claiming his attorney failed to challenge any other peremptory strikes, defense counsel states that additional objections would have been groundless and in bad faith. The court agrees. Defendant's claim that his attorney was constitutionally ineffective by failing to raise a *Batson* challenge fails.

5. Victims' Causes of Death (Grounds A and E)

³ The *Batson* challenge was raised because the prosecution used a peremptory strike to dismiss an African-American juror.

Defendant claims his attorney was ineffective during trial because he did not subpoena a medical examiner (Ground A) or challenge the drug evidence of the victims' causes of death (Ground E).⁴

The Tenth Circuit has said that "the speculative witness is often a two-edged sword. For as easily as one can speculate about favorable testimony, one can also speculate about unfavorable testimony." *Boyle v. McKune*, 544 F.3d 1132, 1138 (10th Cir. 2008). Defendants must provide specifics about the content of an expert witness's testimony. *See Cummings v. Sirmons*, 506 F.3d 1211, 1233 (10th Cir. 2007). Although hypothetical testimony might appear helpful, the prosecution's subsequent cross-examination could make calling the witness more damaging than beneficial. *Boyle*, 544 F.3d at 1139. "This is why the decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney." *Id.*

Defense counsel declares that he is unaware of any expert witness who could have given such medical testimony, and defendant offers no specifics about who the attorney should have called. Furthermore, there is nothing in the record to suggest this testimony would have been favorable to defendant, much less could have changed the trial's outcome—additional medical testimony could just as easily be incriminating as exculpatory. This is a classic example of a speculative witness, and the court has no basis to assume that expert testimony would favor defendant or that it would have changed the jury's verdict.

Furthermore, even if defense counsel was aware of a medical expert who could give testimony about the victims' past drug use, choosing not to call that witness or otherwise disputing that drug evidence was still sound strategy. Defense counsel's strategy focused on showing defendant was not part of the conspiracy and, therefore, could not be responsible for *any* deaths or injury resulting from

⁴ These claims relate to defendant's claims in Grounds 1, 13 and 14 at the pretrial stage.

the overdoses. (Doc. 810-1 at 5.) Testimony from medical examiners would likely contribute nothing to that defense strategy.

6. Additional Alleged Trial Errors (Grounds B, C, and D)

In Ground B, defendant claims that because his attorney did not call any witnesses for his defense, including an alibi witness, his counsel was ineffective. In Ground C, defendant claims that his attorney's lack of preparation prevented his attorney from "adequately presenting a proper defense and from effectively cross-examining government witnesses, Bradley Scott Dawdy, Braden Bandel, Daniel Flores, Carine Stone, and government medical examiner witnesses, Dr. John Bradley, Dr. Christopher Long, and Dr. Erik Krag Mitchell." (Doc. 784 at 5.) In Ground D, defendant claims that his attorney was ineffective by not conducting pretrial interviews of "persons included but may not be limited to Bradley Scott Dawdy, Braden Bandel, Daniel Flores, Carine Stone, Rachel Teasly, Detective Justin Branner, Henry Nelson, Clifton Milton, Ferdinand Handy and Susan Sergheyev." (*Id.* at 6.)

Defendant fails to identify any witness (but for Antonio Ramsey) who should have been called on his behalf, nor does defendant detail the subject of any such witness testimony. Defendant lists witnesses he believes should have been interviewed before trial by his attorney, but defendant makes no detailed assertions as to how not interviewing these witnesses prejudiced him, and the court already found that the decision to not interview these witnesses was reasonable given the discovery defense counsel had reviewed.

* Regarding defense counsel's failure to call Antonio Ramsey, the court has granted defendant an evidentiary hearing. Accordingly, in this limited regard, the court grants defendant an evidentiary hearing on Ground B to determine whether defense counsel was ineffective by failing to call Antonio Ramsey as an alibi witness.

Regarding defense counsel's cross examination of government witnesses, defendant's claims of error involve the overdose victims' causes of death. The court has found that defense counsel's decision to pursue an innocence defense was reasonable. Accordingly, to the extent defense counsel did not conduct cross examinations regarding the victim's drug overdoses, the court finds this decision to be reasonable.

C. Assistance at Sentencing

1. Victims' Causes of Death (Grounds I and II)

In Ground I, defendant claims that counsel's performance was constitutionally deficient because he failed to challenge the cause of the victims' deaths. In Ground II, defendant claims that counsel was ineffective for failing to conduct an investigation into the cause of death of the victims. These are essentially the same claims defendant alleged in Grounds 1, 13, and 14 (pretrial stage) and Grounds A and E (trial stage). As already discussed, defendant fails to meet the prongs of *Strickland* on the issue of refuting the victims' causes of death.

2. Conflict of Interest (Ground III)

Defendant claims defense counsel's performance caused "a conflict of interest against the movant throughout the sentencing phase of this case because of counsel's lack of sincere advocacy and lack of thoroughness in his preparations for trial prevented him from even attempting to contest either the drug evidence and or the alleged victims' purported causes of death." (Doc. 784 at 12.) Defendant claims that because of this conflict of interest, he received sentencing enhancements that did not apply to him. (Doc. 784 at 7.) Defendant does not specifically state what sentencing enhancements were applied to him as a direct result of the alleged "conflict of interest," and the court does not believe that defense counsel's choice of defense—defendant's innocence—created any sort of conflict of interest at sentencing.

3. *Burrage v. United States*


In his reply brief, defendant states that “Burrage should apply retroactively to his case on collateral review.” (Doc. 812 at 1.) In *Burrage*, the Supreme Court held that a defendant cannot be liable for the death-results enhancement provision unless the use of the drug supplied was a but-for cause of the death. *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

Courts have decided that *Burrage* did not announce a new rule of constitutional law and that, even if it had, the Supreme Court did not make *Burrage* retroactively applicable. *Stewart v. United States*, No. 15-CV-73-JPS, 2015 WL 477226, at *2 (E.D. Wis. Feb. 5, 2015); *United States v. Bourlier*, No. 3:14cv609, 2014 WL 6750674, at *2 (N.D. Fla. Dec. 1, 2014); *Alvarez v. Hastings*, No. CV214-070, 2014 WL 4385703, at *1 (S.D. Ga. Sep. 5, 2014); *De La Cruz v. Quintana*, No. 14-28-KKC, 2014 WL 1883707, at *6 (E.D. Ky. May 1, 2014); *Taylor v. Cross*, No. 14-CV-304, 2014 WL 1256371, at *3 (S.D. Ill. Mar. 26, 2014); *Powell v. United States*, No. 3:09-CV-2141, 2014 WL 5092762, at *2 (D. Conn. Oct. 10, 2014)); *see also Minaya v. United States*, 41 F. Supp. 3d 343, 345 (S.D.N.Y. 2014). The court finds *Burrage* is inapplicable to defendant’s case.

D. Request for Counsel

Finally, defendant requests that he be appointed counsel to assist him with this habeas proceeding. The court believes that the interests of justice favor appointing an attorney for the purpose representing defendant at the evidentiary hearing. The court will therefore appoint counsel for defendant and set a hearing to receive evidence on the following, limited issues:

1. Whether defense counsel was contacted by Antonio Ramsey or was otherwise informed that Antonio Ramsey could have provided an alibi for the drug transactions that occurred at 5915 Cernech (Grounds 7 and B).

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2. Whether Antonio Ramsey would have provided testimony at trial that defendant could not have sold heroin on the day the heroin was distributed at 5915 Cernech.
 3. Whether defense counsel timely shared discovery with defendant (Grounds 8 and 9).

The parties should be prepared to address and present evidence on both prongs of the *Strickland* test.

IT IS THEREFORE ORDERED that defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody (Doc. 784) is denied in part and taken under advisement in part.

IT IS FURTHER ORDERED that defendant's Motion to Appoint Counsel (Doc. 817) is granted. The court will appoint counsel for defendant and set a hearing on defendant's claims of ineffective assistance of counsel, as set forth in this order.

Dated this 16th day of September, 2015, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge