# UNITED STATES COURT OF APPEALS
# FOR THE EIGHTH CIRCUIT

No: 20-2477

Louis John Fontanez

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:20-cv-00135-JAJ)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Appellant's motion for appointment of counsel is denied.

January 06, 2021

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
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No: 20-2477

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Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:20-cv-00135-JAJ)

**JUDGMENT**

Before SHEPHERD, KELLY, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

October 22, 2020

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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| LOUIS JOHN FONTANEZ,<br><br>Petitioner.<br><br>vs.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | No. 4:20cv00135-JAJ<br><br>**ORDER** |

This matter comes before the court pursuant to petitioner's April 21, 2020 Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. [Dkt. No. 1] Pursuant to Rule 4 of the Rules Governing § 2255 Proceedings, the court conducts the following initial review to determine whether any of the claims in the petition have arguable merit. The court finds that six of the seven claims have no arguable merit and they are summarily dismissed. Because the record does not affirmatively refute the claim made in ground 6, it will be set for an evidentiary hearing.

## I. Procedural History

On April 18, 2018 the grand jury for the Southern District of Iowa returned an Indictment charging the petitioner and another with engaging in a conspiracy to distribute and possess with intent to distribute heroin and crack cocaine. They were also charged with the October 23, 2017 distribution of heroin that resulted in serious bodily injury. *United States v. Louis John Fontanez*, 3:18cr0033 (S.D. Iowa) at Dkt. 15. The petitioner and the government entered into a plea agreement that was filed on November 30, 2018. [Dkt. 112] In it, the petitioner agreed to plead guilty to Count 2 which carried a mandatory minimum term of incarceration of twenty years. In the plea agreement, the petitioner admitted that he agreed to sell heroin to the victim R.Z on October 23, 2017 at the Kwik Star gas station in Davenport, Iowa. He admitted that he previously distributed

heroin to R.Z. R.Z. contacted petitioner's co-defendant to obtain the heroin and the petitioner distributed it. As a result of ingesting the substance, R.Z. vomited, stopped breathing, lost his pulse and began to turn blue. He was determined to be "medically dead." After the administration of CPR and Narcan, R.Z. was revived and he survived. The petitioner admitted that the substance distributed by him caused serious bodily injury to R.Z. and that "but for the use of that substance, R.Z. would not have suffered a serious bodily injury." [Dkt. 112, p. 3]

At his guilty plea hearing, the petitioner testified under oath that he is 55 years old and had gone to college for a year. He suffered from no mental illness, took no medication and had no difficulty understanding the proceeding. The court informed the petitioner that he had been charged in four counts of the Indictment but was instantly corrected by the prosecutor. He was fully informed and stated that he fully understood his right to proceed to trial and the rights that would attach at a trial. He understood that he would be sentenced to twenty years in prison and that he would not see a parole board about getting out early. He was informed of the elements of the offense charged and the plea agreement that was offered. The petitioner testified that he and his attorney discussed the plea agreement thoroughly. He stated that he had ample time to review the agreement. He specifically stated that the factual basis set forth in the plea agreement was true. He then testified that he distributed a mixture of heroin and cocaine to the victim and that the transaction took place at the Kwik Star gas station in Davenport, Iowa. He knew that it was a controlled substance that he was delivering and that the victim ingested it and, as a result, suffered a serious bodily injury. He agreed that the victim would not have suffered a serious bodily injury but for the use of the controlled substances distributed by the petitioner. He stated that no one forced or pressured him to enter the plea of guilty and that no promises were made to him other than what was in the plea agreement. Finally, in an effort to assure himself of the petitioner's knowing and voluntary decision to plead guilty, the judge stated, "I want to be sure that you understand absolutely all of it because I do not want you to

come back at any time in the future and state a claim that you were confused or that someone forced you to plead guilty, okay? ... So I want you to confirm right now, have you been able to understand absolutely everything that we have discussed here today?" To which the petitioner stated, "Yes, Your Honor." He again stated that no one forced or pressured him to plead guilty and that it was his voluntary decision.

The parties entered into a binding plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) calling for a sentence of 240 months, the mandatory minimum. In addition, the petitioner waived his right to bring a § 2255 petition, except to claim ineffective assistance of counsel or prosecutorial misconduct. The court accepted that plea agreement and imposed the 240 month sentence of incarceration on April 11, 2019. [Dkt. 146] The petitioner did not appeal.

## II. § 2255 Petition

### A. The § 2255 Petition

The petitioner casts his 133 page petition into seven claims. Ground 1 is 45 pages long. In it, he alleges that his attorney was ineffective in that he "made no effort to develop defense theories or investigate substantial defenses." Specifically, he contends that there were five theories of defense that should have been investigated by his attorney. First, that the petitioner did not transfer drugs to the victim. Second, that the substance transferred was not heroin. Third, that in the intervening six hours between the distribution and ingestion of the heroin by the victim, someone else could have distributed additional heroin to him. Fourth, the heroin was not the "but for" cause of the victim's injury, and, fifth, that the injury was not a foreseeable result of distributing heroin to the victim. He claims his attorney should have consulted an expert on drug abuse and a toxicologist. He contends that his attorney failed to interview potential witnesses and failed to seek additional discovery and forensic testing of government evidence. Finally,

in ground 1, he contends that his attorney failed to consult with counsel for the co-defendant and petitioner's prior counsel in a related state court case.

Ground 2 of the petition alleges ineffective assistance of counsel for failing to file motions to suppress evidence. First, he contends that his attorney should have filed a motion to suppress the victim's eyewitness identification of the petitioner on November 21, 2017. Second, he contends that his attorney should have moved to suppress evidence gathered pursuant to a search warrant for his apartment at 311 Paul Revere Place. In his other arguments in ground 2, he contends that the search warrant was based on an allegedly unconstitutional eyewitness identification, that it did not state probable cause, that it contained false statements and that the information contained therein was stale. Finally, he contends that because the warrant for his residence was invalid, any statements he later made during custodial interrogation should have been suppressed as well.

In ground 3 of the petition, the petitioner contends that his plea agreement was not knowingly and voluntarily entered into. He contends that the court improperly influenced him by denying his motion for substitution of counsel. He claims that his attorney informed him that he would face four charges if he went to trial instead of two. Third, he contends that his attorney told him that his sentencing guidelines would suggest a range of imprisonment between thirty years and life. Fourth, he contends that his attorney informed him that he would not have to do all twenty years of incarceration because "the laws are always changing." Finally, he claims that his attorney told him that the jury would be comprised of a majority of, if not all, white people and that he would lose the trial.

In ground 4, the petitioner alleges that his attorney was ineffective for advising him to sign "a flawed plea deal." In support of this ground, the petitioner claims that he was led to believe that there were four charges against him instead of two. He also contends that the Indictment charged that he distributed heroin and cocaine and the government was inaccurate as to whether the cocaine was cocaine hydrochloride or cocaine base.

In ground 5, the petitioner contends that his attorney was ineffective for refusing to file a motion to withdraw his guilty plea following the petitioner's receipt of a witness interview conducted by an investigator with the Public Defender's office.

In ground 6, the petitioner alleges that he told his attorney to file an appeal during sentencing. He contends that his attorney agreed to file a notice of appeal and failed to do so. The record does not affirmatively refute this claim.

Finally, in ground 7, the petitioner contends that the cumulative nature of the errors set forth in grounds 1 through 6 are grounds for relief.

**B. Standards for Relief Pursuant to Section 2255**

Title 28, of the United States Code, section 2255, provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground (1) that the sentence was imposed in violation of the Constitution or laws of the United States, or (2) that the court was without jurisdiction to impose such sentence, or (3) that the sentence was in excess of the maximum authorized by law, or (4) is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. Section 2255 does not provide a remedy for "all claims errors in conviction and sentencing." *United State v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, § 2255 is intended to redress only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.") (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987)). A § 2255 claim is a collateral challenge and not

interchangeable for a direct appeal, *see United States v. Frady*, 456 U.S. 152, 165 (1982), and an error that could be reversed on direct appeal "will not necessarily support a collateral attack on a final judgment." *Id.*

**C. Ineffective Assistance of Counsel Standard**

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The United States Supreme Court reformulated the *Strickland* test for constitutionally ineffective assistance of counsel in *Lockhart v. Fretwell*:

> [T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

506 U.S. 364, 369 (1993) (*quoting United States v. Cronic*, 466 U.S. 648, 658 (1984)). The Eighth Circuit Court of Appeals applies the *Lockhart* test:

> Counsel is constitutionally ineffective . . when: (1) counsel's representation falls below an objective standard of reasonableness; and (2) the errors are so prejudicial that the adversarial balance between defense and prosecution is upset, and the verdict is rendered suspect.

*English v. United States*, 998 F.2d 609, 613 (8th Cir. 1993) (citing *Lockhart*, 506 U.S. at 364). Where conduct has not prejudiced the movant, the court need not address the reasonableness of that conduct. *United States v. Williams*, 994 F.2d 1287, 1291 (8th Cir. 1993); *Siers v. Weber*, 259 F.3d 969, 984 (8th Cir. 2001) (citing *Strickland*, 466 U.S. at 697) (courts need not reach the effectiveness of counsel if it is determined "that no prejudice resulted from counsel's alleged deficiencies."). To determine whether there is prejudice, the court examines whether the result has been rendered "fundamentally unfair or unreliable" as the result of counsel's performance. *Lockhart*, 506 U.S. at 369. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive

the defendant of any substantive or procedural rights to which the law entitles him. *Id.* at 372. Prejudice does not exist unless "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 994 F.2d at 1291.

**D. Analysis**

Ground 1 of the petition is summarily dismissed. Based on the elements of the offense, the petitioner lays out five potential defenses to the charge. First, he contends that maybe the petitioner did not transfer the drugs to the victim. However, he was caught on videotape doing it and later admitted it was him. He contends that if such evidence were contradicted, the government's case "would have been substantially weakened." All of which is true and all of which is completely unsupported by any evidence to suggest that someone else distributed the heroin at issue.

Similarly, the petitioner sets forth the possible defense that the substance transferred to the victim was not heroin. The testimony of the victim and the government's toxicologist, among others, shows that it was heroin. The petitioner contends that perhaps his co-defendant would say that it was crack cocaine, but such testimony would be inconsistent with his co-defendant's statements under oath at his guilty plea. The claim here is completely speculative. Similarly, it is speculative to suggest that in the six hours between the petitioner's distribution of heroin and the victim's ingestion of it, that maybe someone else distributed more heroin to the victim during that time. The petitioner does not suggest that such evidence exists, only that his attorney should have looked for it. This is not sufficient to demonstrate prejudice.

Next, the petitioner contends that it would be a defense to the penalty provision of this crime if heroin was not the "but for" cause of the victim's injury. That is true. However, the government had a well-qualified toxicologist and the co-defendant consulted another toxicologist. There is no evidence to suggest that heroin was not the "but for" cause of the victim's injury. Finally, the petitioner suggests that his attorney should have

developed a theory that death or serious bodily injury was not foreseeable from the distribution of heroin. This is another completely speculative claim.

The petitioner's second argument in support of ground 1 relates to his attorney's failure to hire experts. He contends that his attorney should have hired a drug abuse expert to undermine the victim's credibility. He contends that an expert on drug abuse would have contradicted the victim's statements about the frequency and manner in which he ingested drugs. An expert would also inform the court that users have multiple dealers and that the administration of cocaine and heroin ("speedball") is not consistent with the victim's claim of relatively infrequent drug use. He contends that a drug expert would inform the jury that the victim should have been expected to use drugs immediately and that the claim to have used it six hours later is without credibility.

Second, the petitioner contends that his attorney should have retained a toxicologist. He contends that a toxicologist "could have" or "may have" contradicted the government's expert..."Not consulting experts who could have instilled reasonable doubt as to the movant's guilt on count 2 resulted in direct prejudice."

There is no assurance that the court would have permitted the testimony of a drug usage expert for the purposes identified by the petitioner, or that it would have any likelihood of resulting in acquittal at trial or change the petitioner's mind as to whether to plead guilty. A toxicologist was hired by the defense in this case. It was hired by the public defender who represented the co-defendant of the petitioner. The opinions of that expert were available to the petitioner and the petitioner does not allege that the toxicologist retained by the defense in this case or any other toxicologist would support the petitioner's claims. Petitioner is simply left with the claim that his attorney did not hire a toxicologist and that sometimes toxicologists can help defendants in similar cases. This is not enough.

The third claim in support of ground 1 is that petitioner's attorney was ineffective

for failing to interview witnesses. This includes a witness that implicated the co-defendant in other drug transactions, but who was silent with respect to the petitioner. It includes another witness who testified in front of the grand jury and has recently recanted her testimony relating to peripheral drug trafficking activity by the petitioner. The claim also refers to witnesses who would testify that they did not know the petitioner to sell drugs. He contends that such witnesses "would have weakened the government's case." However, none of the alleged witnesses are alleged by the petitioner to provide substantially exculpatory evidence. The court does not know whether his attorney interviewed them but the failure to discover witnesses who did not observe the petitioner selling drugs is not grounds for relief. His attorney is certainly not responsible for failing to discover evidence that did not exist at the time of the petitioner's guilty plea. Finally, in ground 1 the petitioner alleges that his attorney was ineffective for failing to secure additional discovery and to independently test the government's evidence forensically. However, he does not suggest what this additional discovery would have revealed or what additional forensic testing would have revealed. He simply states several times that doing these things "would have been helpful" to his defense. This is not a sufficient allegation of prejudice.

In ground 2, the petitioner alleges that his attorney was ineffective for failing to file motions to suppress evidence. The first is a motion to suppress an out of court eyewitness identification. The victim apparently identified the petitioner from a single photograph shown to him approximately one month after petitioner sold heroin to him. Petitioner's co-defendant brought a very similar motion to suppress eyewitness identification. The court held an evidentiary hearing on the motion, and it was denied. [Dkt. 148] The petitioner has not alleged facts from which it could be found that a motion to suppress the eyewitness identification could be successful. This claim is summarily dismissed.

In his second and third arguments supporting ground 2, the petitioner claims his attorney was ineffective for failing to move to suppress evidence gathered pursuant to the search warrant for his residence and failing to bring a motion pursuant to *Franks v. Delaware*. The petitioner contends that there was not probable cause to search his residence, that the evidence in support of the warrant was stale and that the affiant made false or misleading statements concerning the informant's credibility.

The petitioner's co-defendant made similar arguments and those arguments were rejected. [Dkt. 153]

**Search Warrant Standards**

Because the evidence sought to be suppressed was gathered pursuant to a search warrant, the court employs the standard set forth in *Illinois v. Gates*, 462 U.S. 213 (1983), to determine the existence of probable cause. It is well established that a warrant affidavit must show particular facts and circumstances in support of the existence of probable cause sufficient to allow the issuing judicial officer to make an independent evaluation of the application for a search warrant. The duty of the judicial officer issuing a search warrant is to make a "practical, commonsense decision" whether a reasonable person would have reason to suspect that evidence would be discovered, based on the totality of the circumstances. *United States v. Peterson*, 867 F.2d 1110, 1113 (8th Cir. 1989). Sufficient information must be presented to the issuing judge to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusion of others. *Gates*, *supra*, at 239. However, it is clear that only the probability, and not a prima facie showing, of criminal activity is required to establish probable cause. *Gates*, *supra*, at 235.

This court does not review the sufficiency of an affidavit de novo. An issuing judge's determination of probable cause should be paid great deference by reviewing

courts. *Gates*, *supra*, at 236. The duty of the reviewing court is simply to ensure that the issuing judge had a substantial basis for concluding that probable cause existed, *Gates*, *supra*, at 238-39.

Even where probable cause is lacking, the court's inquiry does not end. Pursuant to *United States v. Leon*, 468 U.S. 897 (1984), in the absence of an allegation that the issuing judge abandoned a neutral and detached role, suppression is appropriate only if the affiant was dishonest or reckless in preparing the affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. In *Leon*, the United States Supreme Court noted the strong preference for search warrants and stated that in a doubtful or marginal case a search under a warrant may be sustainable where without one, it would fall. *Leon*, *supra*, at 914.

> Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, . . . for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search. . . . Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable,
> . . . and it is clear in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

*Leon*, *supra*, at 922-23.

Pursuant to *Leon*, suppression remains an appropriate remedy: (1) where the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth, *Franks v. Delaware*, 438 U.S. 154 (1978); (2) where the issuing magistrate wholly abandons the judicial role and becomes a "rubber stamp" for the government; (3) where the officer relies on a warrant based on an affidavit so lacking in indicia of probable cause

as to render official belief in its existence entirely unreasonable; or (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid. In *Leon*, the remedy of suppression was not ordered despite the fact that the affidavit in that case did not establish probable cause to search the residence in question. Further, the information was fatally stale and failed to properly establish the informant's credibility. The standard announced in *Leon* is an objective standard.

***Franks v. Delaware* Standards**

In order to prevail on a challenge to a warrant affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), the challenger must show (1) that a false statement knowingly and intentionally or with reckless disregard for the truth, was included in the affidavit and (2) that the affidavit's remaining content is insufficient to establish probable cause. *United States v. Gladney*, 48 F.3d 309, 313 (8th Cir. 1995).

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

*Franks v. Delaware, supra*, at 171.

Further, in order to mandate a hearing, the challenged statements in the affidavit must be necessary to a finding of probable cause. *United States v. Flagg*, 919 F.2d 499 (8th Cir. 1990). *United States v. Streeter*, 907 F.2d 781, 788 (8th Cir. 1990) (contested material must be "vital" to probable cause). It must also be remembered that although the affidavit must contain statements that are truthful,

> This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct. For probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

*Franks v. Delaware, supra*, at 165.

Omissions of facts are not misrepresentations unless they cast doubt on the existence of probable cause. *United States v. Parker*, 836 F.2d 1080, 1083 (8th Cir. 1987). The same analytical process used to determine whether an affidavit contains a material falsehood is used to determine whether an omission will vitiate a warrant affidavit under *Franks*. *United States v. Lueth*, 807 F.2d 719, 726 (8th Cir. 1986). The defendant must show that (1) the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, and (2) that the affidavit, if supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. With respect to the second element, suppression is warranted only if the affidavit as supplemented by the omitted material could not have supported the existence of probable cause. *Lueth, supra*, at 726.

For example, the fact that an informant had a criminal record and was cooperating under a plea agreement is not critical to the finding of probable cause. *Flagg, supra*; *United States v. Martin*, 866 F.2d 972 (8th Cir. 1989) (omission of fact of informant's drug addiction of no consequence to determination of probable cause). The fact that the police omitted information that an informant had been a drug dealer, was cooperating with the police in order to receive leniency, and was being paid by the police did not warrant relief in *United States v. Wold*, 979 F.2d 632 (8th Cir. 1992). *See also United States v. Reivich*, 793 F.2d 957 (8th Cir. 1986). It is not necessary to notify the magistrate of an informant's criminal history if the informant's information is at least partially corroborated. *United*

*States v. Parker, supra.* Similarly, it was not misleading, as a matter of law, to omit the fact that the informant was the defendant's sister. *United States v. Johnson*, 925 F.2d 1115 (8th Cir. 1991).

Pursuant to the standards set forth above, it is clear that the warrant at issue demonstrated probable cause to search the petitioner's residence and the evidence was not fatally stale. Even jurists who might debate those issues would not debate the applicability of the good faith exception to the exclusionary rule found in *Leon.* Because the petitioner has not alleged facts from which it could be found that the evidence was subject to suppression, these claims are summarily dismissed.

The petitioner claims that statements he later made to the police were the product of the allegedly illegal search warrant. Because of the court's ruling above, that claim is summarily dismissed, as is the claim that the search warrant is the product of the allegedly unconstitutional eyewitness identification. Ground 2 of the petition is summarily dismissed.

Ground 3 of the petitioner's petition is summarily dismissed. In it, the petitioner contends that the court "improperly influenced" him by denying his motion for substitution of counsel. This is not grounds for relief. The court had to rule on the motion. He then states that he was "tricked" into a meeting where he signed the plea agreement. He notes that the plea agreement originally contained a typographical error in that it implied that the petitioner was charged in Counts 3 and 4 as well. The plea agreement was amended to remove references to Counts 3 and 4 and this was made patently clear to the petitioner at the plea hearing, before he pleaded guilty. He contends that his attorney and the prosecutor both indicated that his sentencing guideline range would call for a range of imprisonment between 360 months and life. However, the petitioner does not allege that this was inaccurate. He was informed at the time of his guilty plea of the range of punishment being twenty years' to life incarceration and informed that he would receive a twenty year sentence. There are no ground for relief here.

Next, he alleges that the plea was not voluntary because his attorney told him that he would not do the full twenty years in prison because the laws are already changing. However, at the time he pleaded guilty, he testified under oath that no one had made any promise other than those contained in the plea agreement. He cannot create an issue by simply contradicting his earlier testimony given under oath.

Finally, petitioner contends that his plea was not voluntary because his lawyer told him that he would lose at trial. His attorney told him that the jury would be composed of a "majority, if not all, white" people. It is not grounds for relief that the attorney advised the petitioner of his opinions regarding the outcome of the trial. Advice concerning the effect of race on jurors, if given, is not grounds to withdraw the petitioner's guilty plea or find ineffective assistance of counsel.

In ground 4, the petitioner contends that his attorney was ineffective for advising him to sign "a flawed plea deal." He again cites the typographical error in the plea agreement concerning additional counts with which he was not charged. Again, that typographical error was immediately rectified. It was rectified before the petitioner pleaded guilty. Finally, he alleges that the Indictment charged distribution of heroin and cocaine but that the Indictment charges that the victim suffered serious bodily injury from ingestion of the "substance." The claimed errors in ground 4 are of no legal significance. This ground is summarily dismissed.

In ground 5, the petitioner contends that his attorney was ineffective for failing to file a motion to withdraw his guilty plea prior to sentencing. The standard for withdrawing a guilty plea is vague but such motions are rarely granted. The petitioner contends that he wanted to withdraw his guilty plea when he reviewed the public defender's report of an interview with prosecution witness John McGrone. The court has read this report and knows that it would not have allowed the petitioner to withdraw his guilty plea even if the report was newly discovered to him. This report provided little significance to the petitioner's defense. This claim is summarily dismissed.

Ground 6 alleges that the petitioner demanded that his attorney file an appeal and that his attorney agreed to file a notice of appeal but failed to do so. The court notes that it imposed the sentence requested by the petition in his plea agreement, that the plea agreement contained an appeal waiver and the law dramatically limits appeals for those who enter into plea agreements pursuant to Rule 11(c)(1)(C). Still, the record does not affirmatively refute this claim and it will be set for an evidentiary hearing.

Finally, in ground 7, the petitioner contends that the cumulative effect of his allegations in grounds 1 through 6 entitle him to relief. However, the cumulative effect of a series of meritless claims is still a meritless claim.

Upon the foregoing,

**IT IS ORDERED** that grounds 1 through 5 and 7 of the petition are summarily dismissed.

**IT IS FURTHER ORDERED** that the respondent shall file its answer to the petition on or before May 18, 2020.

**IT IS FURTHER ORDERED** that the clerk's office shall appoint counsel to represent the petitioner.

**IT IS FURTHER ORDERED** that the court sets ground 6 for an evidentiary hearing on **July 9, 2020 at 2:30 p.m.** in Davenport, Iowa. The government is responsible for making arrangements for the petitioner to appear telephonically.

**DATED** this 25th day of April, 2020.

JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA