UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1014

Octavio Cortez Fierros

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02103-LRR)

ORDER

The petition for rehearing by the panel is denied.

March 20, 2023

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1014

Octavio Cortez Fierros

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:20-cv-02103-LRR)

JUDGMENT

Before GRUENDER, SHEPHERD, and STRAS, Circuit Judges.

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

January 31, 2023

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

/s/ Michael E. Gans

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

OCTAVIO CORTEZ FIERROS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 20-CV-2103-LRR
No. 18-CR-2002-LRR

ORDER

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I. INTRODUCTION

The matter before the court is Petitioner Octavio Cortez Fierros's ("the movant") Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 ("Motion"), which was filed on December 9, 2020 (civil docket no. 1).

On July 1, 2021, the court directed the government to brief the claims of ineffective assistance of counsel that the movant asserted in the motion (civil docket no. 2). The court also directed trial counsel to file with the court an affidavit responding only to the movant's specific allegations of ineffective assistance of counsel (*id.*). Trial counsel timely filed the affidavit ("Affidavit") on August 2, 2021 (civil docket no. 3). The government timely filed a responsive brief on August 25, 2021 (civil docket no. 4). On November 9, 2021, after receiving an extension, (*see* civil docket nos. 6 & 8), the movant filed a reply (civil docket no. 9).

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On February 8, 2018, a single count Indictment (criminal docket no. 7) was filed charging the movant with conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846. On September 4, 2018, the movant appeared before a magistrate judge and entered a plea of guilty to the Indictment (criminal docket no. 88). The magistrate judge entered a Report and Recommendation that a United States District Court Judge accept the movant's plea of guilty (criminal docket no. 89). The movant did not object to the Report and Recommendation (civil docket no. 95). On September 20, 2018, the court entered an order adopting the Report and Recommendation concerning the movant's guilty plea and finding him guilty of the crimes charged in Count 1 of the Indictment (criminal docket no. 95).

A final presentence report was filed on December 17, 2018, (criminal docket no. 127). The statutory range of imprisonment was 10 years to life (*id.*). The presentence report calculated the movant's total offense level as 39 (*id.* at 9, ¶ 27). This calculation included a three-level reduction for acceptance of responsibility (*id.*, ¶¶ 25-26). *See* U.S.S.G. § 3E1.1. A sentencing hearing was held on February 28, 2019 (criminal docket no. 170). There, the court found that the movant "frivolously contested the facts of the case" (criminal docket no. 188 at 82). Thus, the court determined there would be no reduction for acceptance of responsibility (*id.*). The court calculated the movant to have a total offense level of 42 and a criminal history category I (*id.*). With that calculation,

the movant's advisory guideline sentence range was a minimum of 360 months' sentence ran imprisonment to life imprisonment, with a five-year term of supervised release to follow (*id.*). The court imposed a sentence of 420 months' imprisonment on Count 1 of the Indictment (criminal docket nos. 172 & 173). In addition, the court imposed five years of supervised release and a $100 special assessment (criminal docket no. 172).

On March 1, 2019, the movant filed a Notice of Appeal (criminal docket no. 179). On April 1, 2020, the Eighth Circuit Court of Appeals filed an Opinion (criminal docket no. 193) affirming the movant's conviction and sentence.

In the Motion, the court understands the movant is asserting five claims. The movant claims that trial counsel was ineffective for failing to 1) meet with Movant; 2) convey to him he was pleading guilty without a plea agreement; 3) provide the movant with discovery in his case; 4) meet several deadlines in his case; 5) adequately argue his case and present rebuttal witnesses or evidence at sentencing. Motion at 4.

III. LEGAL STANDARDS

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

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

the judgment and [it is required to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

When enacting 28 U.S.C. § 2255, Congress "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)) (internal quotation mark omitted). Although it appears to be broad, 28 U.S.C. § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). Rather, 28 U.S.C. § 2255 is intended to redress constitutional and jurisdictional errors and, apart from those errors, only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Sun Bear*, 644 F.3d at 704 (clarifying that the scope of 28 U.S.C. § 2255 is severely limited and quoting *Hill*, 368 U.S. at 428); *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987))). A collateral challenge under 28 U.S.C. § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) (making clear that a motion pursuant to 28 U.S.C. § 2255 will not be allowed to do service for an appeal). Consequently, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (quoting *Addonizio*, 442 U.S. at 184).

The law of the case doctrine has two branches. *See Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). The first branch involves the "mandate rule (which, with only a few exceptions, forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case)." *Id.* The second branch, which is somewhat more

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

Hence, in collateral proceedings based on 28 U.S.C. § 2255, "[i]ssues raised and decided on direct appeal cannot ordinarily be relitigated." *United States v. Wiley*, 245 F.3d 750, 751 (8th Cir. 2001) (citing *United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000)); *see also Lefkowitz v. United States*, 446 F.3d 788, 790-91 (8th Cir. 2006) (concluding that the same issues that have been raised in a new trial motion and decided by the district court cannot be reconsidered in a subsequent collateral attack); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003) ("It is well settled that claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." (quoting *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981))); *Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (per curiam) (concluding that claims already addressed on direct appeal could not be raised); *United States v. Kraemer*, 810 F.2d 173, 177 (8th Cir. 1987) (concluding that a movant could not "raise the same issues . . . that have been decided on direct appeal or in a new trial motion"); *Butler v. United States*, 340 F.2d 63, 64 (8th Cir. 1965) (concluding that a movant was not entitled to another review of his question). With respect to a claim that has already been conclusively resolved on direct appeal, the court may only consider the same claim in a collateral action if "convincing new evidence of actual innocence" exists. *Wiley*, 245 F.3d at 752 (citing cases and emphasizing the narrowness of the exception).

Further, movants ordinarily are precluded from asserting claims that they failed to raise on direct appeal. *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001); *see also Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam) (citing *Frady*, 456 U.S. at 167-68, for the proposition that a movant is not able to rely on 28 U.S.C. § 2255 to correct errors that could have been raised at trial or on direct appeal); *United States v. Samuelson*, 722 F.2d 425, 427 (8th Cir. 1983) (concluding that a collateral proceeding is not a substitute for a direct appeal and refusing to consider matters that could have been raised on direct appeal). "A [movant] who has procedurally defaulted a claim by failing to raise it on direct review may raise that claim in a [28 U.S.C. §] 2255 proceeding only by demonstrating cause for the default and prejudice or actual innocence." *McNeal*, 249 F.3d at 749 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)); *see also Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the [movant] shows cause and prejudice."). "'[C]ause' under the cause and prejudice test must be something *external* to the [movant], something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). If a movant fails to show cause, a court need not consider whether actual prejudice exists. *See McCleskey v. Zant*, 499 U.S. 467, 501 (1991). Actual innocence under the actual innocence test "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623; *see also McNeal*, 249 F.3d at 749 ("[A movant] must show factual innocence, not simply legal insufficiency of evidence to support a conviction."). To establish actual innocence, a movant "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation omitted) (internal quotation marks omitted).[1]

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

B. Standards Applicable to Constitutional Right to Counsel

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

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

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

Id. at 687; *see also Williams v. Taylor*, 529 U.S. 362, 390 (2000) (reasserting *Strickland* standard). Thus, *Strickland* requires a showing of both deficient performance and prejudice. However, "a court deciding an ineffective assistance claim [need not] address both components of the inquiry if the [movant] makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed." *Id.*; *see also Apfel*, 97 F.3d at 1076 ("[A court] need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice.").

The "deficient performance" prong requires the movant to show that his or her "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the [movant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That showing can be made by demonstrating that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. There are two substantial impediments to making such a showing, however. First, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Second, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689)); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland*, 466 U.S. at 694). The "reasonableness of counsel's challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. In sum, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.*

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

IV. ANALYSIS

A. Request for Evidentiary Hearing

A district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the alleged facts, if true, entitle the movant to relief. *See Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). Accordingly, a district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing "if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted); *see also Delgado v. United States*, 162 F.3d 981, 983 (8th Cir. 1998) (stating that an evidentiary hearing is unnecessary where allegations, even if true, do not warrant relief or allegations cannot be accepted as true because they are contradicted by the record or lack factual evidence and rely on conclusive statements); *United States v. Hester*, 489 F.2d 48, 50 (8th Cir. 1973) (stating that no evidentiary hearing is necessary where the files and records of the case demonstrate that relief is unavailable or where the motion is based on a question of law). Stated differently, the court can dismiss a 28 U.S.C. § 2255 motion without a hearing where "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *accord Adejumo v. United States*, 908 F.3d 357, 361 (8th Cir. 2018); *Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court concludes that it is able to resolve the movant's claims from the record. *See Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (holding that "[a]ll of the information that the court needed to make its decision with regard to [the movant's] claims was included in the record" and, therefore, the court "was not required to hold an evidentiary hearing" (citing Rule Governing Section 2255 Proceedings 8(a) and *United*

States v. Raddatz, 447 U.S. 667, 674 (1980))). The evidence of record conclusively demonstrates that the movant is not entitled to the relief sought. Specifically, it indicates that the movant's assertions are without merit. As such, the court finds that there is no need for an evidentiary hearing and the movant's request for an evidentiary hearing is denied (*see* civil docket no. 9 at 4-5).

B. The Movant's Arguments

With respect to the merits of the movant's claims, the court deems it appropriate to deny the motion for the reasons that are stated in the government's resistance because it adequately applied the law to the facts in the case. Specifically, the government correctly concluded that trial counsel provided professional and effective assistance to the movant and that he suffered no prejudice as a result of counsel's actions.

First, the movant argues that trial counsel was ineffective for failing to meet with the movant. Motion at 4. The movant alleges trial counsel only met with him briefly, "a couple of times" and "only brought an interpreter one time."

The court finds the movant's first claim baseless. Trial counsel met with the movant on eight separate occasions. *See* Affidavit at 3-8. It was only at the first meeting that trial counsel did not have an interpreter present. *Id.* at 3. Also, the meetings between trial counsel and the movant were not exclusively brief. On July 19, 2018, trial counsel met with the movant for an hour. *Id.* at 4. Meetings on August 23, 2018 and September 25, 2018 also lasted an hour. *Id.* Although trial counsel does not provide the duration, on December 6, 2018, the movant and trial counsel went through the presentence investigation report line by line. *Id.* at 7. Lastly, on February 27, 2019, the movant and trial counsel met for an hour and a half. Further, the movant also stated he was satisfied with trial counsel's services at his change of plea hearing (criminal docket no. 208 at 6). In addition to failing to show how trial counsel's performance was deficient, the movant also fails to assert what prejudice resulted from the meetings or lack thereof.

Accordingly, based on the foregoing, because the movant cannot show deficient performance or prejudice, the movant's claim of ineffective assistance of counsel for failing to meet with the movant is denied.

Second, the movant claims that trial counsel was ineffective because the movant did not understand that he was "pleading guilty, without a plea agreement" or that he had "other options." Motion at 4.

The court finds that nothing in the record supports that the movant did not understand his guilty plea or his other options. Trial counsel explained the movant's options and went over the government's proposed plea agreement with the movant. Affidavit at 4-5. Further, at the change of plea hearing, the magistrate judge determined the movant was competent and understood the charge (criminal docket nos. 89 at 1-2; 208 at 5-6). The movant had the benefit of a certified Spanish interpreter at the hearing (criminal docket no. 208 at 2). The movant acknowledged receiving a copy of the Indictment and having fully discussed it with trial counsel (criminal docket nos. 89 at 1-2; 208 at 3). Moreover, the magistrate judge informed the movant that by pleading guilty the movant would give up: 1) the right to assistance of counsel at every stage of the case; 2) the right to a speedy, public trial; 3) the right to have the cases tried by a jury; 4) the presumption of innocence and that he would be found not guilty unless the government proved each and every element of the offense beyond a reasonable doubt; 5) the right to see and hear all government witnesses and have his attorney cross examine those witnesses; 6) the right to subpoena witnesses to testify at trial; 7) the privilege against self-incrimination; 8) a unanimous jury verdict; and 9) the right to appeal that verdict (criminal docket nos. 89 at 2; 208 at 6-9). The magistrate judge "explained that if [the movant] pleaded guilty, [the movant] would be giving up all of these rights" (criminal docket nos. 89 at 3; 208 at 9). The magistrate judge determined the movant had received a formal plea offer but was not pleading guilty pursuant to a plea agreement (criminal docket nos. 89 at 3; 208 at 12). The movant did not object to the Report and Recommendation (criminal docket no. 95). Thus, the movant's assertion that he did not

understand he was pleading guilty, without a plea agreement, or that he had other options is specious. Further, the movant fails to identify how trial counsel's alleged failure resulted in prejudice. Accordingly, the movant's second claim is denied.

Third, the movant claims that trial counsel was ineffective for failing to provide discovery in the case at the movant's request. Motion at 4. The movant asserts that not being able to personally review the discovery materials prevented him from making "a knowledgeable choice about how to proceed." *Id.* In his reply brief, the movant argues that trial counsel's failure to review discovery materials with him prior to his sentencing caused the movant to contest factual issues at sentencing leading to the loss of credit for acceptance of responsibility (civil docket no. 9 at 3).

As described above, the movant knowingly and voluntarily entered a valid guilty plea and thus, the movant's assertion that trial counsel's alleged failure to show him discovery in the case prevented him from knowing how to proceed is foreclosed. *See Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997). Only in his reply brief does the movant assert that prejudice may have resulted at sentencing in relation to this claim (*see* civil docket no. 9 at 3). As such, the court will consider whether the alleged failure to show the movant discovery material led the movant "to contest factual issues at sentencing" leading to a loss of credit for acceptance of responsibility and a lengthier sentence. *Id.*

The court finds that the movant's argument is meritless. Trial counsel informed the movant that he would provide "the most damaging parts" of the discovery materials for the movant to review. Affidavit at 4. On July 19, 2018, trial counsel "visit[ed] with [the movant] to review the relevant discovery." *Id.* Trial counsel discussed with the movant what the discovery material showed. *Id.* During that discussion, trial counsel notes that the movant "scoffed at" trial counsel's assessment of the discovery material and the strength of the government's case. *Id.* In response to trial counsel's account, however, the movant disputes "how much of the discovery, if any, was reviewed with [the movant]" (civil docket no. 9 at 2-3).

The court finds that the movant was able to and did review the relevant discovery. Specifically, finding trial counsel's account credible, the court finds that trial counsel visited the movant to review the relevant discovery and that the relevant discovery he discussed with the movant included evidence that the movant delivered methamphetamine, evidence that the movant was at the top of the conspiracy and that the government had witness cooperators. *See* Affidavit at 4. Nothing supports the movant's assertion that trial counsel failed to show him discovery in the case. Thus, the movant is unable to show counsel was deficient.

Moreover, the record shows that the movant was aware of the relevant discovery in this case. The Report and Recommendation noted that the movant had "fully conferred with [the movant's] counsel prior to deciding to plead guilty" (criminal docket no. 89 at 2). At that time the movant also stated he was satisfied with trial counsel's services. *Id.* Critically, the magistrate judge informed the movant at the change of plea hearing that his sentence would be determined at a sentencing hearing after a presentence investigation report was complete and that he could present evidence at that hearing (criminal docket no. 89 at 3). The movant went through the presentence investigation report line by line with trial counsel and with that thorough review was aware of the evidence against him and its basis. Affidavit at 7. Nevertheless, in the presentence investigation report, the movant objected to various paragraphs detailing his role in the offense and the quantity of drugs (criminal docket no. 127 at 4-7). In the responses to the movant's objections to the presentence investigation report, the probation officer noted that the paragraphs were not modified because they "reflect[ ] the information contained in the discovery file." *Id.* Thus, the movant was also aware of that discovery through the review, objections, and responses to the presentence investigation report. Nothing in the record indicates that trial counsel failed to show the relevant discovery to the movant or that the movant was unaware of the evidence against him in the discovery file. Rather, the record and the Affidavit show that the movant ignored trial counsel's evaluation of the discovery material and that the movant chose to deploy a strategy at sentencing trial counsel warned

him against. On that record, the movant is unable to show a reasonable probability that he would not have continued to contest his role and drug quantity at his sentencing had he discussed or been shown additional discovery, *Strickland*, 466 U.S. at 694, and thus, the movant is unable to show prejudice.

Accordingly, based on the foregoing, because the movant cannot show deficient performance or prejudice, the movant's claim of ineffective assistance of counsel for failing to provide him with discovery materials is denied.

Fourth, the movant claims trial counsel missed several deadlines. The movant fails to identify any resulting prejudice. Moreover, there is no factual basis for this claim. The movant fails to identify a single deadline missed in the case. Moreover, nothing in the motion, files, or record supports this claim. Thus, the movant has failed to identify any deficiency of trial counsel or any prejudice. Accordingly, the movant's fourth claim is denied.

Fifth, the movant claims that trial counsel was ineffective for failing to adequately represent him at sentencing because he did not present witnesses or evidence. Motion at 4. The movant asserts this failure led to the movant losing "credit for acceptance of responsibility" and a higher sentence. *Id.*

The court finds this claim to be meritless. The movant's loss of an acceptance for responsibility reduction was because he "frivolously contested the facts of the case" (docket no. 188 at 81). Trial counsel thoroughly explained to the movant that he could lose acceptance of responsibility and receive a more serious sentence if he contested the offense conduct. Affidavit at 7. Specifically, on December 6, 2018, trial counsel explained to the movant that challenging the drug quantity and role information in the presentence investigation report at sentencing could cause the movant to lose the acceptance of responsibility reduction. *Id.* Trial counsel advised him to consider this carefully because "[the movant's] position was likely to get him an increased sentence." *Id.* at 8. Still, the movant chose to contest the facts in the presentence investigation report and at sentencing (docket no. 188 at 6-7).

Here, trial counsel reviewed and discussed the discovery with the movant as described above. Trial counsel also considered and discussed strategy for sentencing with the movant and, at the movant's insistence, made a strategic decision to assert at sentencing that "[the movant] was not the leader/organizer and that the witnesses' statements or the officer's investigations did not support drug quantity." Affidavit at 6. Furthermore, finding trial counsel credible, the court notes again that trial counsel warned the movant not to pursue this strategy, but the movant insisted on contesting the drug quantity and his role in the offense. *Id.* at 8. The sentencing transcript shows that trial counsel's arguments and cross-examination of government witnesses reasonably executed this strategy (*see generally* criminal docket no. 188). The movant also had the benefit of a certified Spanish interpreter (*id.* at 3). The record only shows that the movant was adequately represented at sentencing. Thus, the movant cannot overcome the presumption of reasonableness as to trial counsel's strategic decisions and the movant cannot establish deficient performance by trial counsel.

Moreover, the movant cannot establish prejudice. The movant identifies no witnesses that should have been called to testify on his behalf or evidence that should have been used to discredit government witnesses. The movant also fails to show there is a reasonable probability that had witnesses been called or evidence presented the outcome would have been different. Regardless, trial counsel's decision to not call witnesses also qualifies as a reasonable trial strategy. *See United States v. Staples*, 410 F.3d 484, 488-89 (8th Cir. 2005). Thus, the movant has failed to establish prejudice.

Accordingly, based on the foregoing, because the movant cannot show deficient performance or prejudice, the movant's claim of ineffective assistance of counsel for failing to adequately represent him at sentencing is denied.

V. CONCLUSION

The court has thoroughly reviewed the record and finds that dismissing the movant's claims comports with the Constitution, results in no "miscarriage of justice" and is consistent with the "rudimentary demands of fair procedure." *Hill*, 368 U.S. at

428; *see also Apfel*, 97 F.3d at 1076 ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder*, 810 F.2d at 821)). The court concludes that the movant knowingly and voluntarily pleaded guilty. *See Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on conviction unless 'on the face of the record the court had no power to enter the conviction or impose the sentence.'"); *United States v. Jennings*, 12 F.3d 836, 839 (8th Cir. 1994) (a voluntary and unconditional guilty plea waives all defects except those related to jurisdiction). Further, it is apparent that the conduct of trial counsel fell within a wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, and any deficiencies in trial counsel's performance did not prejudice the movant's defense, *id.* at 692-94, or result in the imposition of a sentence in violation of the Constitution or laws of the United States, *Bear Stops*, 339 F.3d at 781. Considering all the circumstances and refraining from engaging in hindsight or second-guessing trial counsel's strategic decisions, the court finds that the record belies the movant's claims and no violation of the movant's constitutional right to counsel occurred.

In sum, the alleged errors that are asserted by the movant warrant no relief under 28 U.S.C. § 2255. The movant's claims are meritless. Based on the foregoing, the movant's 28 U.S.C. § 2255 motion shall be denied.

VI. CERTIFICATE OF APPEALABILITY

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F. 3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a

certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

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

IT IS THEREFORE ORDERED:

(1) The movant's 28 U.S.C. § 2255 motion (civil docket no. 1) is **DENIED**.

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

(3) This case is **DISMISSED**, and the Clerk of Court is **DIRECTED** to **CLOSE** this case.

DATED this 15th day of November, 2022.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA