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Appendix A – Order Denying En Banc and Petition for Rehearing (April 30, 2025)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1365

Robert Carl Sharp

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cv-00113-LRR)

ORDER

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

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

April 30, 2025

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

/s/ Susan E. Bindler

Appendix B – Judgment (March 31, 2025)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1365

Robert Carl Sharp

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cv-00113-LRR)

JUDGMENT

Before GRUENDER, BENTON, and ERICKSON, Circuit Judges.

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

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

March 31, 2025

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

/s/ Susan E. Bindler

Appendix C – Panel Opinion Affirming District Court (March 31, 2025)

United States Court of Appeals
For the Eighth Circuit

No. 23-1365

Robert Carl Sharp

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: January 16, 2025
Filed: March 31, 2025

Before GRUENDER, BENTON, and ERICKSON, Circuit Judges.

GRUENDER, Circuit Judge.

Robert Carl Sharp appeals the district court's[1] denial of his 28 U.S.C. § 2255 motion. Sharp claims that his pretrial counsel's performance was ineffective due to that counsel's previous representation of multiple potential witnesses. We conclude that Sharp did not receive ineffective assistance of counsel and affirm.

[1]The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

I.

As this court summarized in *United States v. Sharp*, 879 F.3d 327 (8th Cir. 2018), Sharp was released from federal prison in 2012 after serving a sentence for possession with intent to distribute cocaine base. While on supervised release, Sharp sold herbal incense products containing a chemical that he referred to as "THJ-011," but which was in fact a synthetic cannabinoid and Schedule I controlled substance known as AB-FUBINACA. Law enforcement learned in May 2014 that Sharp was selling AB-FUBINACA and arrested him for violating the terms of his supervised release.

While in custody, Sharp participated in a proffer interview, in which he was represented by attorney Joel Schwartz. Sharp told the interviewing officers that he had provided samples of synthetic cannabinoids to Mohammad and Melissa Al Sharairei. In addition, Sharp told the officers that he regularly sold synthetic cannabinoids to an incense dealer named Hadi Sharairi. According to Sharp, Sharairi knew that Sharp "was manufacturing synthetics and that it was illegal." Sharairi and the Al Sharaireis were eventually indicted for their roles in the same synthetic cannabinoid drug sweep that implicated Sharp.

In September 2015, a grand jury indicted Sharp for conspiracy to manufacture and distribute a controlled substance (i.e., AB-FUBINACA), *see* 21 U.S.C. § 846, and possession with intent to distribute that same controlled substance, *see id.* § 841(a)(1). While represented by Schwartz, Sharp pleaded guilty to all counts without a plea agreement.

In December 2015, while awaiting sentencing, Sharp retained Michael Lahammer as his new counsel and filed a motion to withdraw his guilty plea. Sharp asserted that he did not know that THJ-011 was in fact AB-FUBINACA and that Schwartz had told him that his conduct was legal. Sharp therefore claimed that Schwartz had represented him while operating under an actual conflict of interest

because Schwartz was simultaneously acting as his attorney and necessarily would also be a witness for his advice of counsel defense.

At a subsequent hearing on the motion before a magistrate judge, Sharp testified that he and Sharairi had hired Schwartz to advise them on the legality of selling herbal incense products. Sharp asserted that they had met together with Schwartz at least two times. In those meetings, Sharp claimed that Schwartz told Sharairi that he had tested products for the Al Sharaireis because he was advising them on their legality. Sharp claimed that Schwartz never warned him that the government had scheduled AB-FUBINACA as a controlled substance and that he had sent Schwartz a sample of THJ-011. Schwartz, who also testified at the hearing, stated that Sharp had told him that he was selling synthetic cannabinoids and had sought representation "for a potential future criminal case"—not for advice on how to sell his herbal incense products legally. He testified that he told Sharp to stop selling synthetic cannabinoids and that he had no recollection of Sharp ever giving him a sample of THJ-011. The magistrate judge found Schwartz to be credible, Sharp not to be credible, and issued a report and recommendation that Sharp's motion to withdraw his guilty plea be denied. The district court adopted the report and recommendation and denied Sharp's motion.

At Sharp's sentencing, Sharp contested whether he was subject to an enhancement for obstruction of justice based on a letter he had authored to Sharairi before he was indicted. In the letter, Sharp informed Sharairi that he was going to be indicted and needed Sharairi to "quickly act on" that information. Specifically, Sharp told Sharairi: "[T]o confirm what's already obvious. That we hired Schwartz together, the amount we paid him, what he told us he'd provide us with, that he took samples for testing, that we spoke to him about THJ-011 and he advised us on [its] legality." Sharairi, who testified at the sentencing hearing, described Schwartz as his "previous lawyer" but otherwise denied much of the substance of Sharp's letter. In particular, Sharairi testified that he had never met Schwartz together with Sharp, did not know "anything about chemicals," had never sent a sample of THJ-011 to

Schwartz, and Schwartz had never told him to sell products containing THJ-011. The district court sentenced Sharp to 360 months' imprisonment.

Sharp appealed, arguing in relevant part that he received ineffective assistance of counsel because Schwartz operated under an actual conflict of interest by acting as his attorney on the same matter in which he also was a potential witness. Sharp argued that effective counsel would have advised Sharp to proceed to trial instead of pleading guilty. We affirmed Sharp's conviction, concluding that Sharp had not shown that "such a strategy would have been objectively reasonable under the facts," or that "Schwartz's advice to plead guilty was linked to the actual conflict." *Sharp*, 879 F.3d at 334 (internal quotation marks omitted).

Sharp subsequently filed this 28 U.S.C. § 2255 motion, seeking to vacate, set aside, or correct his sentence on the basis that he had been denied effective assistance of counsel. He again asserts that Schwartz had an actual conflict of interest, but this time he claims that the conflict arose out of Schwartz's previous representation of Sharairi and the Al Sharaireis. The district court determined that Sharp had not received ineffective assistance of counsel because he had not shown that Schwartz failed to pursue a reasonable alternative defense strategy due to any of the alleged conflicts. Accordingly, the district court denied Sharp's motion.

II.

We review the denial of a § 2255 motion "as a mixed question of law and fact, affirming the district court's factual findings absent clear error and considering *de novo* its legal conclusions." *Kiley v. United States*, 914 F.3d 1142, 1144 (8th Cir. 2019). There are four grounds upon which a petitioner may obtain relief under 28 U.S.C. § 2255: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose the sentence, (3) the sentence exceeds the maximum sentence authorized by law, or (4) the sentence is otherwise "subject to collateral attack." 28 U.S.C. § 2255. A sentence is imposed in violation of the Constitution if a petitioner was denied effective

assistance of counsel at trial or on direct appeal. *See* U.S. Const. amend. VI (stating that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003).

Sharp first claims that he was denied effective assistance of counsel because Schwartz represented Sharp even though he "unequivocally knew that he had previously formed an attorney-client relationship with Hadi Sharairi and Mohammad and Melissa Al Sharairei."[2] According to Sharp, Schwartz's prior representation of these three individuals "created [a] tangled web of duties to each client that impermissibly impaired [Sharp's] right to independent and unbiased legal advice."

In ineffective assistance of counsel cases, we ordinarily ask whether the defendant has demonstrated that, (1) his attorney's performance was deficient and outside the range of reasonable professional assistance and (2) he was prejudiced by his counsel's deficient performance to the extent that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 689, 694 (1984). To show prejudice, a defendant who pleaded guilty "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). However, in *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980), the Supreme Court stated that a defendant who "shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain

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[2]The exact nature of the relationship between Schwartz and Mohammad Al Sharairei is unclear. Both Sharp and Sharairi believed that Mohammad Al Sharairei had retained Schwartz as his attorney. However, the record reflects that only Melissa Al Sharairei—not Mohammad Al Sharairei—had retained Schwartz as her attorney. Schwartz had represented Melissa Al Sharairei in the initial stages of a criminal prosecution, which arose out of the same synthetic cannabinoid investigation that implicated Sharp. That representation ended before Sharp was indicted.

relief" based on ineffective assistance of counsel. "Effect on representation means that the conflict caused the attorney's choice [to engage or not to engage in particular conduct], not that the choice was prejudicial in any other way." *Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004) (internal quotation marks omitted). The defendant must "identify a plausible alternative defense strategy or tactic that defense counsel might have pursued, show that the alternative strategy was objectively reasonable under the facts of the case, and establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006) (internal quotation marks omitted).

In *Cuyler*, counsel's conflict arose out of the joint representation of multiple codefendants. It is unclear whether *Cuyler* applies to all kinds of alleged conflicts of interest, or only those involving the joint representation of multiple codefendants. Indeed, this circuit has not decided whether an alleged conflict of interest arising out of successive representation—as is the allegation Sharp makes in this case—requires a defendant to show deficient performance and prejudice under *Strickland* or whether the defendant need only show that the conflict actually affected the adequacy of his representation under *Cuyler*. *See United States v. Roads*, 97 F.4th 1133, 1137 (8th Cir. 2024). Since Sharp's claim fails under both, we need not choose between the *Strickland* and *Cuyler* standards.

We begin and end with *Cuyler*'s analysis because a defendant who does not show that a conflict of interest actually affected the adequacy of his representation under *Cuyler* necessarily fails to meet *Strickland*'s "more stringent standard." *Sharp*, 879 F.3d at 334. Here, Sharp identifies two alternative defense strategies that Schwartz might have pursued absent the alleged conflicts. First, Sharp claims that Schwartz could have advised him not to plead guilty. Sharp asserts that Schwartz then could have called Sharairi and the Al Sharaireis to testify as witnesses in his favor at trial. Second, Sharp claims that Schwartz could have advised Sharp to enter into a cooperation agreement with the Government to plead guilty and mitigate his

exposure in exchange for testimony against Sharairi or the Al Sharaireis in their respective criminal prosecutions.

Sharp has not shown that either alternative strategy was objectively reasonable under the facts of the case. While Sharp claims that Schwartz should have advised him to proceed to trial and then subsequently called Sharairi and the Al Sharaireis as witnesses, the Al Sharaireis fled the United States in 2014 and were fugitives for the duration of Sharp's prosecution. The Al Sharaireis' fugitive status made it impossible for them to be called as witnesses. And, with respect to Sharairi, any testimony by Sharairi would not have helped Sharp, as demonstrated by Sharairi's testimony at Sharp's sentencing. Sharairi testified that he did not know "anything about chemicals," had never met Schwartz together with Sharp, had never sent a sample of THJ-011 to Schwartz, and Schwartz had never told him to sell products containing THJ-011. Sharp admits that Sharairi's testimony at sentencing "rebut[ted] [the] factual contentions" that he had made at the hearing to withdraw his guilty plea. It was therefore not objectively reasonable for Schwartz to advise Sharp to call Sharairi or the Al Sharaireis as witnesses at trial.

In addition, it was not objectively reasonable for Schwartz to advise Sharp to enter into a cooperation agreement with the Government because there is no indication that Sharp could have entered into one. Sharp presents no evidence that the Government was willing to enter into such an agreement even though, prior to being indicted, Sharp actually participated in a proffer interview in which he discussed his interactions with Sharairi and the Al Sharaireis. Moreover, there is no indication that the Government needed his cooperation given that the Al Sharaireis were fugitives for the duration of Sharp's prosecution and the Government did not charge Sharairi with a federal crime until well after Sharp pleaded guilty. Sharp thus fails to show that any of the alleged conflicts of interest actually affected the adequacy of his representation under *Cuyler*.

Sharp additionally claims that he was denied effective assistance of counsel by his new counsel—Lahammer. In Sharp's motion to withdraw his guilty plea,

Lahammer asserted that Schwartz operated under an actual conflict of interest by simultaneously acting as Sharp's attorney on the same matter in which he was also a potential witness. Sharp faults Lahammer for not also asserting that Schwartz had an actual conflict of interest based on his prior representation of Sharairi and the Al Sharaireis. Because Lahammer did not labor under an actual conflict of interest, we apply *Strickland* as opposed to *Cuyler*. As discussed previously, Sharp has not shown the existence of an actual conflict based on Schwartz's prior representation of Sharairi or the Al Sharaireis. Lahammer therefore did not perform deficiently or act outside the range of reasonable professional assistance in failing to raise the conflict of interest issue concerning Sharairi and the Al Sharaireis. *See Strickland*, 466 U.S. at 689. We conclude that Sharp was not denied effective assistance of counsel. The district court did not err in denying Sharp's § 2255 motion.

III.

For the foregoing reasons, we affirm the judgment of the district court.

Appendix D – Order Appointing Rockne Cole
under Criminal Justice Act (June 9, 2023)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1365

Robert Carl Sharp

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cv-00113-LRR)

ORDER

Attorney Rockne Ole Cole is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

June 09, 2023

Order Entered under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix E – Order Granting In Forma Pauperis
and Certificate of Appealability (June 9, 2023)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1365

Robert Carl Sharp

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cv-00113-LRR)

ORDER

Appellant's motion to proceed in forma pauperis is hereby granted.

A certificate of appealability is granted as to the claims under *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) that attorney Schwartz performed deficiently by operating under a conflict concerning his representation of other individuals, and that attorney Lahammer performed deficiently by not raising that issue in the motion to withdraw the guilty plea.

A certificate of appealability is denied as to all other claims.

June 09, 2023

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

/s/ Michael E. Gans

Appendix F – Order Denying In Forma Pauperis (Feb. 27, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ROBERT CARL SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 19-CV-113-LRR

ORDER

The matter before the court is Petitioner Robert Carl Sharp's ("the movant") "Movant's Motion to Proceed in Forma Pauperis on Appeal" ("Motion") (docket no. 38), which was filed on March 24, 2023. On November 8, 2022, the court denied the movant's § 2255 motion and denied a certificate of appealability.

The movant seeks leave to appeal the court's denial of his § 2255 motion in forma pauperis. Motion at 1. The movant notes the court previously allowed him to proceed in forma pauperis in *Sharp v. United States*, No. 15-cr-31. *Id.* 1-2. He also resubmits the affidavit he used in the underlying case. *Id.* at 2.

Federal Rule of Appellate Procedure 24(a)(3)(A) provides that a party previously approved to proceed in forma pauperis may not do so when a district court "certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis." *See* Fed. R. App. P. 24(a)(3)(A). When the court denied a certificate of appealability, it determined that "because [the movant] does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability" (docket no. 22 at 35). Because the movant failed to present a question of substance, the movant's appeal would be frivolous and not in good faith. Thus, it may not be taken in forma pauperis.

Accordingly, the Motion (docket no. 38) is **denied**.

IT IS SO ORDERED this 27th day of March, 2023.

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

Appendix G – Notice of Appeal (Feb. 21, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS

ROBERT SHARP,	)	
	)	
Movant,	)	No. 1:19-CV-00113-LRR-MAR
	)	
v.	)	Underlying Criminal Case - (1:15-cr-00031-LRR-1)
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MOVANT'S NOTICE OF APPEAL
NO CERTIFICATE OF APPEALABILITY GRANTED
IFP WILL BE SOUGHT

Pursuant to Fed. R. of App. Proc. (a) (1) (B) (i), Movant Robert Sharp files his Notice of Appeal from each and every adverse factual and legal ruling entered herein, including, but not limited to:

A. Order Denying Motion to Amend (Nov. 8, 2022), R. Doc. 21.

B. Order Denying Section 2254 (Nov. 8, 2022), R. Doc. 22 and Judgment, R. Doc. 23.

C. Order Denying Pro Se Motion (Dec. 1, 2022), R. Doc. 25, and

D. Order Denying Motion to Amend (February 17, 2023), R. Doc. 30.

RESPECTFULLY SUBMITTED,

/s/ Rockne Cole

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ATTORNEY FOR MOVANT

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the parties or attorneys of record.

/s/ Rockne Cole

Appendix H – Order Denying Motion to Enlarge Findings (Feb. 17, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ROBERT CARL SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 19-CV-113-LRR
No. 15-CR-31-LRR

ORDER

The matters before the court are Petitioner Robert Carl Sharp's ("the movant") Motion to Amend/Correct Judgment Order on Motion to Vacate, Set Aside or Correct Sentence ("the Motion"), which was filed on December 6, 2022 (civil docket no. 26) and the movant's Motion for Order Allowing Consideration of Motion to Enlarge Findings ("Motion to Allow Consideration") which was filed on December 9, 2022 (civil docket no. 27).

On November 8, 2022, the court denied the movant's pro se § 2255 motion and denied the issuance of a certificate of appealability (civil docket no. 22). The movant filed a motion to reconsider (civil docket no. 24) which the court also denied (civil docket no. 25). The movant, now represented by counsel, filed the Motion (civil docket no. 26). Then, on December 9, 2022, the movant filed another motion asking that the court consider the Motion (civil docket no. 27). On January 3, 2023, the court directed the government to respond to the Motion to Amend and the Motion to Allow Consideration (civil docket no. 28). The government timely filed a response (civil docket no. 29). The court also notes that the movant has an appeal pending before the Eighth Circuit in his

other § 2255 case (civil docket no. 10 in Case No. 22-CV-23-LRR).[1] In that case, the court denied the movant's § 2255 motion as an untimely attempt to amend his §2255 motion in the present civil case (civil docket no. 6 in Case No. 22-CV-23-LRR).[2]

In the Motion to Allow Consideration, the movant urges the court to accept the Motion as properly filed in addition to the pro se motion to enlarge or amend findings, filed at civil docket no. 24. The court already considered and denied that pro se motion (civil docket no. 25). The pro se motion requested that the court "reinstate [the movant's] 2255 motion from Sharp v. United States, Case No. 1:22-cv-0023-LRR-MAR and grant him equitable tolling" (civil docket no. 24 at 10). Accordingly, the court found the pro se motion was improperly filed in the present case (civil docket no. 25 at 1). Additionally, the court found that nothing in the pro se motion changed its ruling that the movant's motion to amend in this case was untimely. *Id.* Regardless, the court will consider the merits of the Motion.

The movant asserts that the Motion is made under Federal Rule of Civil Procedure 59(a)(2) which provides that: "After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." Motion at 1. The judgment in this case, however, was made solely on the files and record before the court—there was no proceeding before the court that could be characterized as a nonjury trial. It appears the motion was meant to be made under

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[1] The movant's notice of appeal in that case was filed after the Motion on December 9, 2022 (civil docket no. 10 in Case No. 22-CV-23-LRR). To the extent that case is in fact a part of this one, the notice of appeal does not prevent the court from issuing an order here. *See* Fed. R. App. P. 4(a)(4)(B)(i); *see also Stone v. J & M Securities, LLC*, 55 F.4th 11550, 1152 (8th Cir. 2022) (explaining that a notice of appeal "lies dormant" until the trial court disposes of the pending motion because "the time to file an appeal does not run until the entry of an order disposing of a motion to alter or amend judgment under Rule 59(e), the notice of appeal did not become effective until the district court ruled on the motion.").

[2] The movant filed a motion to reconsider which was also denied (civil docket nos. 8 & 9 in Case No. 22-CV-23-LRR). There too, the court denied the issuance of a certificate of appealability (civil docket no. 15 in Case No. 22-CV-23-LRR).

Federal Rule of Civil Procedure 59(e) which more generally permits a party to file a motion to alter or amend a judgment not later than 28 days after the entry of the judgment. *See* Fed. R. Civ. P. 59(e). Under Rule 59, "[a] new trial is warranted when the outcome is against the great weight of the evidence so as to constitute a miscarriage of justice." *Bank of Am., N.A. v. JB Hanna, LLC*, 766 F.3d 841, 851 (8th Cir. 2014). Also, "Rule 59(e) motions serve the limited function of correcting "manifest errors of law or fact or to present newly discovered evidence." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). Regardless of whether the motion is properly made under Rule 59(a)(2) or 59(e), the motion fails. The movant has failed to show the outcome is against the great weight of the evidence or that the court should enlarge findings or amend judgment due to error or newly discovered evidence.

In the Motion, the movant argues that the court erred by not granting an evidentiary hearing and requests that one now be granted (civil docket no. 26-1). Specifically, the movant argues that an evidentiary hearing should have been granted to make a finding regarding attorney Joel Schwartz's pre-indictment representation of Mohammed Al Sharairei, Melissa Al Sharairei, Hadi Al Sharairei and the movant. *Id.* at 1, 4. He asserts that the hearing would allow the court to make detailed findings related to the timing, nature, and substance of Attorney Schwartz's representation of these individuals so that the court could make a factual finding related to Attorney Schwartz's alleged conflict of interest. *Id.* at 5. Second, the movant asserts the court erred when deciding a factual issue about Attorney Lahammer's alleged failure to argue that Attorney Schwartz had a conflict of interest in the motion to withdraw guilty plea on the affidavits and that an evidentiary hearing should have been granted to address that dispute. *Id.* at 5.

The movant's argument regarding Attorney Schwartz's alleged conflict of interest is meritless. The movant bases this argument on the claim that a conflict exists between two statements—one by Hadi Al Sharairei and one by Attorney Schwartz (*see* civil docket no. 26-1 at 2-3). But nothing in Hadi Al Sharairei's statements at sentencing and Attorney

Schwartz's affidavit creates the conflict he imagines. There is nothing in the language the movant quotes that supports a conflict between the two exists. *See id.* This argument is nothing more than empty and imprecise speculation. Accordingly, it is not enough to overcome the record. The court found that "the record belies the movant's claim that Attorney Schwartz had an actual conflict of interest" (civil docket no. 22 at 15). In reaching that conclusion, the court thoroughly discussed the record including: the testimony by Attorney Schwartz and the movant at the hearing on the motion to withdraw the guilty plea (criminal docket no. 193); the affidavits the movant made at the time he attempted to withdraw the guilty plea (criminal docket no. 173-3); the letter and affidavit in which the movant denied ever meeting Mohammad Al Sharairei (civil docket no. 5-2); the testimony by Hadi Al Sharairei's at the movant's sentencing (criminal docket no. 229); and the proffer meeting the movant had with the government (docket no. 173-3). The record shows that Attorney Schwartz's conduct fell within the wide range of reasonable professional assistance and did not prejudice the movant's defense (civil docket no. 22 at 15). As such, there is no reason for the court to amend its findings on this issue.

The movant's argument that Attorney Lahammer's supposed failure to raise Attorney Schwartz's alleged conflict of interest as a basis to withdraw the movant's guilty plea is also meritless. First, the movant's assertion that the court resolved the factual issue of whether he discussed the conflict of interest issue with Attorney Lahammer solely on their affidavits is mistaken (*see* civil docket no. 22 at 5). Importantly, the movant does not claim he raised this issue with Attorney Lahammer in an affidavit (*see generally* criminal docket no. 173-3). He only makes that claim in his motion, (civil docket no. 1 at 9-10), and it is totally unsubstantiated, especially in light of his affidavit made at the time he sought to withdraw his guilty plea. As the court noted, in the movant's affidavit made at the time he attempted to withdraw his guilty plea he made no mention of Melissa and Hadi Al Sharairei and did not identify any way his interests differed from Mohammed Al Sharairei's (civil docket no. 22 at 16). Furthermore, the movant did not listen to the

advice of Attorney Schwartz but freely answered questions about Mohammed Al Sharairei (civil docket no. 22 at 17). The movant's argument is entirely unsupported and that reality does not come down to a credibility determination. Indeed, the court found both affidavits credible finding that although the movant's affidavit did not support his claim, it did support Attorney Lahammer's affidavit. Thus, the movant's argument here is unavailing.

Additionally, the Eighth Circuit concluded that the movant was unable to show any prejudice related to Attorney Schwartz's representation addressing a related issue when the movant challenged the district court's refusal of his motion to withdraw his guilty plea. *United States v. Sharp*, 879 F.3d 327, 333-35 (8th Cir. 2018). As the Eighth Circuit explained:

> Inasmuch as Schwartz's testimony would have probative value under this standard, Sharp has not shown that such a strategy would have been "objectively reasonable under the facts of this case," nor has he shown that Schwartz's advice to plead guilty "was linked to the actual conflict." *See Covey*, 377 F.3d at 908. Schwartz reasonably expected that the Government could prove beyond a reasonable doubt that Sharp knowingly possessed a controlled substance.
>
> Indeed, in his testimony at the plea withdrawal hearing, Schwartz mentioned the undercover purchase attempt where Sharp's employee stated that Sharp took the herbal incense out of the store at night; Sharp's emails ordering THJ-011 under the heading of AB-FUBINACA; the alias Sharp used to purchase a storage locker for the incense; his paying his employee in cash; and his labeling the incense as not for human consumption even though Sharp knew his customers were smoking it. In addition, Sharp knew that the substance had a disorienting effect, and his prior drug conviction demonstrates some familiarity with the drug laws. Moreover, had Schwartz testified, he would have explained that he told Sharp that synthetic drugs were either illegal or would soon be classified as illegal. He also would have stated that he told Sharp that this business was "too dangerous" and that Sharp should stop. If anything, such testimony would burnish the Government's case that Sharp *did* know that his product was illegal. Given these facts, the alleged conflict did not adversely affect Schwartz's performance in advising Sharp to plead guilty. For the same reasons, Sharp also fails to establish deficient performance and prejudice under *Strickland*'s more stringent standard. *See* 466 U.S. at 687; *see also Hill v. Lockhart*,

474 U.S. 52, 59 (1985) (explaining that there is prejudice under *Strickland* when, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial).

Id. at 334. The movant's new conflict of interest argument in his § 2255 motion does not upset that conclusion. "A guilty plea is open to attack on the ground that counsel did not provide the defendant with reasonably competent advice." *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (quotation omitted). The movant "must identify some actual and demonstrable adverse effect on the case, not merely an abstract or theoretical one." *Sharp*, 879 F.3d 327, 333 (8th Cir. 2018). Nothing in the Motion causes the court to doubt its finding that the movant is unable to show he suffered any actual harm related to Attorney Schwartz's alleged conflict of interest. As on appeal, the movant has failed to show a demonstrable adverse effect on the case the alleged conflict of interest created. The movant also fails to argue that there is any evidence of actual innocence. *See id.* Even if Attorney Lahammer erred by not making the movant's desired argument, the movant is unable to show any resulting prejudice from Attorney Lahammer's decision because, as stated above, the movant is unable to show that Attorney Schwartz's alleged conflict resulted in prejudice or that the conflict adversely affected Attorney Schwartz's performance.

In sum, the files and records show that the movant is not entitled to relief on this claim and thus, an evidentiary hearing is unnecessary. *See* 28 U.S.C. § 2255(b) (providing that, when "the files and records of the case conclusively show that the prisoner is entitled to no relief" an evidentiary hearing is unnecessary).

For the foregoing reasons, the court finds that an evidentiary hearing is unnecessary in this case and that there is no reason to enlarge or amend findings. As such, the court's denial of the issuance of a certificate of appealability previously entered (civil docket no. 22) is affirmed.

IT IS THEREFORE ORDERED:

1) The movant's Motion to Consider the Merits of Motion to Enlarge or Amend Findings (civil docket no. 27) is **GRANTED**.

2) The movant's Motion to Enlarge or Amend Findings Evidentiary Hearing Requested (civil docket no. 26) is **DENIED**.

DATED this 15th day of February, 2023.

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

Appendix I – Judgment in Civil Action (Nov. 8, 2022)

UNITED STATES DISTRICT COURT

for the

Northern District of Iowa

ROBERT CARL SHARP
Petitioner

UNITED STATES OF AMERICA
Respondent

Civil Action No. 19-CV-113-LRR-MAR
15-CR-31-LRR-MAR

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ _____ recover costs from the plaintiff *(name)* _____ _____.

☑ other: The Petitioner's 28 U.S.C. § 2255 motion (civil docket no. 1) is denied. A certificate of appealability is also denied. Judgment is hereby entered in favor of Respondent United States of America.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Linda R. Reade by Order on motion for relief under 28 U.S.C. § 2255 (civil docket no. 22).

Date: November 8, 2022

PAUL DE YOUNG,
CLERK OF COURT

s/Sarah K. Melvin, Deputy Clerk
Signature of Clerk or Deputy Clerk

Appendix J – Order Denying Section 2255
Motion to Vacate Judgment (Nov. 8, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ROBERT CARL SHARP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 19-CV-113-LRR
No. 15-CR-31-LRR

ORDER

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I. INTRODUCTION

The matter before the court is Petitioner Robert Carl Sharp's ("the movant") motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 ("the motion"), which was filed on October 8, 2019 (civil docket no. 1). On April 26, 2021, the court directed the government to brief the movant's claims of ineffective assistance of counsel (civil docket no. 3). The court also directed the movant's counsel to file with the court affidavits responding only to the movant's specific allegations of ineffective assistance of counsel (*id.*). Attorney Joel J. Schwartz timely filed his affidavit on May 20, 2021 (civil docket no. 5). Attorney Michael K. Lahammer filed his affidavit on May 24, 2021 (civil docket no. 6). After receiving an extension, the government timely filed a responsive brief on July 9, 2021 (civil docket nos. 8, 12 & 13). After receiving an extension, the movant timely filed a reply brief on August 23, 2021 (civil docket nos. 16 & 17).

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On September 22, 2015, the grand jury returned a Superseding Indictment (criminal docket no. 99), charging the movant[1] with conspiracy to manufacture and distribute a controlled substance, AB-FUBINACA, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846 (Count 1); possession with intent to distribute a controlled substance, AB-FUBINACA, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Count 2); and possession with intent to distribute and aiding and abetting the possession with intent to distribute, a controlled substance, AB-FUBINACA, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Count 3). On October 5, 2015, the movant appeared before a magistrate judge and entered a plea of guilty to Counts 1-3 of the Superseding Indictment (criminal docket no. 135). Movant did not have a plea agreement with the government. The magistrate judge filed a Report

[1] Wayne Christopher Watkins was also charged in Counts 1 and 3 of the Indictment.

and Recommendation that a United States District Court Judge accept the movant's pleas of guilty (criminal docket no. 136). On October 5, 2015, with the movant's waiver of objections to the report and recommendation, 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 Counts 1-3 of the Superseding Indictment (criminal docket nos. 137 & 138).

On January 22, 2016, the movant filed a Motion to Withdraw Guilty Plea (criminal docket no. 173). On February 5, 2016, a hearing on the motion to withdraw guilty plea was held before a magistrate judge (criminal docket no. 184). On March 17, 2016, the magistrate judge entered a Report and Recommendation that the motion to withdraw guilty plea should be denied (criminal docket no. 189). After the movant filed his Objection to the Report and Recommendation, the court entered an order adopting the report and recommendation, overruling the movant's objections, and denying the motion to withdraw guilty plea (criminal docket nos. 196 & 203).

The Second Revised Final Presentence Report was filed on May 19, 2016 (criminal docket no. 204). The statutory range of imprisonment was up to twenty years on each count of conviction. The presentence report calculated the movant's total offense level as 40 (*id.* at 16, ¶ 27). With a total offense level of 40 and a criminal history category of VI, the movant's advisory Guidelines range was 360 to 720 months' imprisonment. (*id.* at 26, ¶ 71). *See* U.S.S.G. § 5G1.2(b). A sentencing hearing was held on August 8, 2016 and continued on October 5, 2016 (criminal docket nos. 215 & 221). The court imposed a sentence of 360 months' imprisonment, consisting of 240 months' imprisonment on Count 1 of the Superseding Indictment and 240 months' imprisonment on Count 2 of the Superseding Indictment to be served concurrently; and 120 months' imprisonment on Count 3 of the Superseding Indictment to be served consecutively (criminal docket nos. 221 & 222). In addition, the court imposed three years of supervised release on each count of conviction to run concurrently and a $100 special assessment on each count of conviction (criminal docket no. 222).

On October 17, 2016, the movant filed a Notice of Appeal (criminal docket no. 225). On January 5, 2018, the Eighth Circuit Court of Appeals filed an Opinion (criminal docket no. 237) affirming the movant's conviction and sentence. On July 2, 2018, the movant filed a petition for a writ of certiorari (criminal docket no. 251). On October 9, 2018, the United States Supreme Court denied the movant's petition for a writ of certiorari (criminal docket no. 252).

In the motion, the court understands the movant is asserting seven claims of ineffective assistance of counsel and a single claim of prosecutorial misconduct.

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).

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).[2]

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 v. United States*, 339 F.3d 777, 780 (8th Cir. 2003). 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

[2] 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).

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.

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 and appellate counsel provided professional and effective assistance to the movant and that he suffered no prejudice as a result of trial counsel's and appellate counsel's actions.

1. Advice regarding statutory sentencing exposure

The movant claims that Attorney Schwartz's advice about maximum sentence outcomes led to an involuntary plea of guilty. The movant asserts that Attorney Schwartz advised him that his maximum sentence would be twenty years' imprisonment and that his sentence could be as low as six to seven years' imprisonment (civil docket no. 1 at 6). The movant contends that, if he had been advised that he could receive a thirty-year sentence, he would not have pleaded guilty (*id.* at 9).

Without doubt, to be constitutionally valid, a guilty plea must be knowing, voluntary and intelligent, and because a guilty plea constitutes a waiver of various constitutional rights, it must be made with sufficient awareness of relevant circumstances and likely consequences. *See, e.g.*, *United States v. Martinez-Cruz*, 186 F.3d 1102, 1104 (8th Cir. 1999). The Eighth Circuit Court of Appeals has recognized that a plea agreement may not be knowing and voluntary when it is the result of the ineffective assistance of counsel. *See DeRoo v. United States*, 223 F.3d 919, 923-24 (8th Cir. 2000). At the same time, a defendant's representations during plea-taking, such as those concerning the voluntariness of the plea, carry a strong presumption of verity and pose a "'formidable barrier in any subsequent collateral proceedings.'" *Nguyen v. United States*, 114 F.3d 699, 703 (8th Cir. 1997) (quoting *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985)). Moreover, allegations that counsel misled a defendant into accepting a plea agreement by misleading the defendant about the likely sentence are insufficient to justify withdrawal of the defendant's guilty plea as involuntary, where the court informed the defendant of the maximum possible sentence. *See United States v. Granados*, 168 F.3d 343, 345 (8th Cir. 1999) (per curiam) (the defendant's reliance on an attorney's mistaken impression about the possible length of sentence was insufficient to render a plea involuntary as long as the court informed the defendant of the maximum possible sentence).

The record plainly does not support the movant's claim that Attorney Schwartz's advice led to an involuntary plea. In his affidavit, Attorney Schwartz explains that:

> I did not tell [the movant] that his sentence was capped at 20 on all three charges. Rather, early in his case, negotiations with the U.S. Attorney contemplated that in exchange for his plea of guilty, the [g]overnment would dismiss some of the counts of the indictment. If he were to plead guilty to only one count, with the other counts dismissed, then he would not face the possibility of consecutive sentences totaling more than 20 years. I specifically discussed with [the movant] that if he were to proceed to trial, and if he were convicted on all three counts, then the court could sentence him to consecutive terms. . . .
>
> In June [2015], [the movant] was aware that if he pled, the [g]overnment would dismiss some of his counts. He was aware that when he rejected that offer, the [g]overnment would proceed on all counts. He was aware that he could be sentenced consecutively if convicted. In October [2015], when he finally decided to plea, he knew he was pleading to all three counts, and was informed that he could be sentenced up to 60 years.

(civil docket no. 5 at 2, 4). The unauthenticated transcripts of jail telephone conversations between the movant and Attorney Schwartz, on which the movant relies so heavily, support Attorney Schwartz's recollections in his affidavit. For example, in June 2015, Attorney Schwartz discussed with the movant his plea negotiation conversations with the government which would cap his sentence at twenty years by dismissing the other charge so that he would not get a "double bump" to forty years by the court running his sentence on two charges consecutively (civil docket no. 1-1 at 65-67). In September 2015, shortly before trial was set to commence, the movant and Attorney Schwartz discussed sentencing outcomes, during which Attorney Schwartz stated that the movant could be sentenced to thirty, forty, or fifty years and the movant stated he thought it could even be sixty years (civil docket no. 1-1 at 109).

Moreover, at the plea change hearing, the issue of the movant's potential sentence was thoroughly discussed. Specifically, the following colloquy occurred between the court and the movant at the plea change hearing:

> THE COURT: Mr. Sharp, at this time, I want to talk to you about the penalties that apply in this case. The same penalty applies to each count. That is, on each count, you can

be sent to prison for up to 20 years, and fined up to $1 million, a mandatory special assessment of $100; and then, following your release from prison, you will be placed on supervised release for at least 3 years, and you could be on supervised release for the balance of your life. Now, these are separate counts and can be sentenced separately, so all together, you could be sent to prison for up to 60 years, and fined up to $3 million, with $300 in special assessments; and then following your release from prison, be placed on supervised release for at least 3 years, and you could be on supervised release for the balance of your life.

Do you understand the maximum penalties which could be imposed in this case?

[THE MOVANT]: Yes, sir.

THE COURT: At the time of sentencing, Judge Reade will perform a calculation under the Federal Sentencing Guidelines, which are guidelines issued by the United States Sentencing Commission. This calculation will result in what called an advisory guideline range, which is a range of months within which the Sentencing Commission suggests that you be sent to prison. Judge Reade must consider this range in determining your sentence, but she is not required to sentence you within that range. So long [as] the sentence she gives you is reasonable she can depart or vary from the advisory guideline range, based on the factors listed in the sentencing guidelines or the sentencing statutes. So you could receive a sentence below or above the advisory guideline range, and, in fact, you could receive a sentence all the way up to the maximum statutory sentence, which in this case is 60 years.

Do you understand all that?

[THE MOVANT]: Yes, sir.

(criminal docket no. 165 at 24-26).

It is clear from the transcript of the plea change hearing that, prior to pleading, the movant was aware of and understood the potential sentencing ramifications of

pleading guilty. Furthermore, at the plea change hearing, the movant admitted to the facts of the charges against him, in particular that he conspired to distribute AB-FUBINACA and that he possessed controlled substances and intended to distribute them. *See id*. at 12-24. The movant also acknowledged that he was not pressured or promised anything to plead guilty. *See id*. at 29-30. The movant also confirmed that his decision to plead guilty was voluntary. *See id*. at 30.

The movant cannot demonstrate that there was a reasonable probability that, but for the alleged errors of trial counsel, he would not have pleaded guilty and would instead have insisted on going to trial. Therefore, the movant's first claim of ineffective assistance of counsel is denied.

2. Alleged conflict of interest

The movant asserts that Attorney Schwartz improperly represented the movant "while simultaneously representing several targets of the same synthetics investigation," Mohammad Al Sharairei, Melissa Al Sharairei and Hadi Sharairei (civil docket no. 1 at 10-11). The movant contends that Attorney Schwartz provided ineffective assistance due to the conflict because Attorney Schwartz failed to identify his former clients as potentially favorable witnesses to the movant. The movant asserts the conflict caused Attorney Schwartz not to suggest to the movant that he cooperate with the government to mitigate his exposure. *See id*. at 17-18.

"The Sixth Amendment right to counsel has been interpreted to provide for representation that is 'free from conflicts of interest or divided loyalties.'" *Caban v. United States*, 281 F.3d 778, 781 (8th Cir. 2002) (quoting *United States v. Reed*, 179 F.3d 622, 624 (8th Cir. 1999)). In order to prove ineffective assistance of counsel based on a conflict of interest, "a defendant must prove the existence of an actual conflict of interest." *Morelos v. United States*, 709 F.3d 1246, 1252 (8th Cir. 2013) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id*. (quoting *Noe,* 601 F.3d 784). In order to show that the conflict adversely affected

counsel's performance, a defendant must show that the effect was "actual and demonstrable, causing the attorney to choose to engage or not to engage in particular conduct." *Id*. (quoting *Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004)). This requires the defendant to "identify a plausible alternative defense strategy or tactic that defense counsel might have pursued, show that the alternative strategy was objectively reasonable under the facts of the case, and establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id*. (quoting *Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006)). In other words, "[t]o show adverse effect, a defendant must show that his [or her] attorney failed to pursue a reasonable alternative defense strategy because of the conflict." *Kiley v. United States*, 914 F.3d 1142, 1145 (8th Cir. 2019).

In his affidavit, Attorney Schwartz states:

> I am often hired by individuals pre-indictment, so that the client can have an attorney available in the event they are arrested, detained, or questioned. I will always inform these individuals that, if charged, there may exist a conflict between them and co-defendants that will either require a waiver or will require alternative representation. As public records reveal, I did represent Melissa Al Sharairei when she was charged in 14-cr-00063-CLK. That representation ended shortly after she failed to appear for her change of plea hearing, on October 20, 2014. I did not represent either Mohammed Al Sharairei or Hadi Sharairei during that matter. At no time during my representation of Melissa did any party, be it the [g]overnment, Mohammed Al Sharairei, or Hadi Sharairei, or any of the defense counsel suggest that the pre-indictment representation created a conflict of interest. To assert the existence of a conflict is to assert that I and the U.S. Attorney's Office both concealed it from the [c]ourt. It also assumes that the Federal Public Defenders representing both Mohammed Al Sharairei and Hadi Sharairei either concealed or declined to investigate that conflict. No one suggested that a conflict existed based on my duties of loyalty and confidentiality. No one suggested that a conflict existed between my personal interest and those of my current or former clients. No such conflict existed.

(civil docket no. 5 at 5).

Attached to Attorney Schwartz's affidavit is a letter authored by Sharp in which he denies ever meeting Melissa and Mohammed Al Sharairei and states Mohammed Al Sharairei was not in his customer base. He also stated that Mohammed and Melissa Al Sharairei did not mention him in their proffers. (docket no. 5-2, at 2-3).

Having thoroughly reviewed the record, the court finds that dismissing the movant's second claim 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)). 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 his performance did not prejudice the movant's defense or sentencing (*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 claim that Attorney Schwartz had an actual conflict of interest and no violation of the movant's constitutional right to counsel occurred. Accordingly, the movant's second ineffective assistance of counsel claim is denied.

a. Attorney Lahammer's alleged failure to raise Attorney Schwartz's conflict of interest as grounds to withdraw guilty plea

The movant additionally argues that Attorney Lahammer, who appeared on his behalf after the withdrawal of Attorney Schwartz, rendered ineffective assistance of counsel because he failed to raise Attorney Schwartz's alleged conflict of interest due to his representation of Melissa Al Sharairei, Mohammed Al Sharairei, and Hadi Al

Sharairei, as a separate ground to withdraw his plea (civil docket no. 1 at 9-10). The movant alleges that he advised Attorney Lahmmer of the alleged conflict and that Attorney Lahammer stated that he would include the alleged conflict in his Motion to Withdraw Guilty Plea but failed to raise it as a separate ground to withdraw. *Id*. The movant also states that he himself identified the alleged conflict in his affidavit in support of the Motion to Withdraw Guilty Plea. *Id*. at 10. In his affidavit, the movant states that Attorney Schwartz instructed movant to minimize any disclosure of information regarding Mohammed Al Sharairei during a proffer meeting with prosecutors because Mohammed Al Sharairei was also Attorney Schwartz's client but the movant answered questions about Mohammed Al Sharairei despite Attorney Schwartz's instructions (criminal docket no. 173-3 at 3).

In his affidavit, Attorney Lahammer explains that the movant was very involved in his defense and insisted on approval of any motions or briefs prior to them being filed with the court (civil docket no. 6 at 1). Further, Attorney Lahammer states that he did raise the issue of conflict of interest and that the issues in the motion to withdraw the plea were limited to whether Attorney Schwartz had a direct conflict due to claims of prior representation made by the movant, and whether the movant was aware of the statutory penalties, the elements of the plea and was provided a factual basis for his plea. *Id*. at 2.

The court finds Attorney Lahammer's statements are credible. The affidavit signed by the movant and filed in support of his Motion to Withdraw Guilty Plea, upon which movant relies in this argument, does not support his argument. In the movant's affidavit, the movant did not mention either Melissa Al Sharairei or Hadi Al Sharairei, and discussed only Mohammed Al Sharairei (criminal docket no. 173-3 at 3). The movant did not identify any way in which Mohammed Al Sharairei's interests differed from his nor did he discuss any way in which Melissa Al Sharairei, Mohammed Al Sharairei or Hadi Al Sharairei's testimony might establish his innocence. *Id*. The reference to Mohammed Al Sharairei was made in one paragraph in which movant

attacked Attorney Schwartz overall. Moreover, the movant averred in his affidavit that he did not act as Attorney Schwartz directed but instead freely answered questions about Mohammed Al Sharairei, which indicates that even if Attorney Schwartz had advised the movant not to discuss Mohammed Al Sharairei, he did not follow Attorney Schwartz's directives and could not have been harmed by them. *Id.*

Based upon the record before it, the court could not determine that the movant suffered any actual harm from Attorney Lahammer's failure to argue Attorney Schwartz's alleged conflict of interest as grounds for movant's Motion to Withdraw Guilty Plea. As noted above, the court found that Attorney Schwartz's conduct was not improper, and that movant had failed to establish that he suffered any actual harm as a result of the alleged conflict. Accordingly, the court finds that the movant is not entitled to any relief on the basis of this claim.

b. Alleged prosecutorial misconduct for failing to raise Attorney Schwartz's conflict of interest with the court

The movant alleges that the government committed prosecutorial misconduct when the prosecutor failed to advise the court that Attorney Schwartz had represented three other targets in the same synthetic investigation, specifically naming Mohammed Al Sharairei, Melissa Al Sharairei and Hadi Al Sharairei (civil docket no. 1 at 18-19). Specifically, the movant alleges that the government was aware that Attorney Schwartz represented the three individuals in question during a substantial portion of the government's investigation into illegal synthetics. *Id.*

This claim is procedurally defaulted because this issue was not raised on appeal. The movant has not met the first prong of the two-prong test to show cause as to why the issue was not raised and prejudice resulting from the alleged misconduct. Because the movant has failed to state any cause as to why he did not raise the claim on appeal the court need not address the second prong of actual prejudice. The court finds, however, that even if the court were to continue on and address the issue of prejudice the movant's argument would fail as well.

Attorney Schwartz stated in his affidavit that he had represented Melissa Al Sharairei when she was charged in 14-cr-00063-CLK, but that his representation ended shortly after she failed to appear for her change of plea hearing (civil docket no. 5 at 5). Additionally, Attorney Schwartz stated that his representation of Hadi Al Sharairei was terminated prior to movant's indictment. *Id.* Attorney Schwartz stated further that while the movant and Melissa Al Sharairei and Hadi Al Sharairei were targets of the same investigation by federal agents regarding synthetic cannabinoids, they were not charged as the movant's co-conspirators. *Id.*

While the movant alleges that he proffered to the government that Mohammed Al Sharairei had potential exculpatory evidence (civil docket no. 1 at 12-13), he concedes simultaneously that Attorney Schwartz was not known by the government to be representing Mohammed Al Sharairei. *Id.* at 11. Specifically, movant states in his affidavit that Attorney Schwartz briefly represented Melissa Al Sharairei when she was indicted in 2014, but that Mohammed Al Sharairei was represented by the public defender. *Id.* In those circumstances, the government cannot be found to have any knowledge that Attorney Schwartz was alleged to have ever represented Mohammed Al Sharairei, who was the only one of the Al Sharairei family whom movant identified in his proffer meeting.

Additionally, the movant alleges that the testimony presented by Hadi Al Sharairei at the movant's sentencing hearing further prove his claim that the government should have told the court that Attorney Schwartz was representing Hadi Al Sharairei while he was representing the movant, but the testimony of Hadi Al Sharairei does not support the movant's claims. Hadi Al Sharairei identified Attorney Schwartz as his "previous lawyer" (criminal docket no. 229 at 128).[3] Additionally, Hadi Al Sharairei denied that he had ever hired Attorney Schwartz with the movant and stated that he had never met

[3] Hadi Al Sharairei was represented in his own criminal proceeding by Attorney Robert Callahan of Illinois.

with Attorney Schwartz with the movant. *Id.* at 128-130. Additionally, Hadi Al Sharairei testified that while the movant was incarcerated the movant sent a letter to Hadi Al Sharairei asking him to testify that they had hired Attorney Schwartz together and each paid half his attorney fee but that what the movant wanted him to state was untrue. *Id.*

Having reviewed the record, the court finds for the reasons stated above that the movant has failed to show any cause as to why he did not raise the issue of the alleged prosecutorial misconduct on appeal or at any time before appeal. Additionally, the movant concedes that the government had no reason to believe that Attorney Schwartz represented Mohammed Al Sharairei, the only individual he mentioned in his proffer. Further, the court finds the movant has failed to establish that a conflict of interest existed or that he suffered any actual harm as a result of any alleged conflict of interest. Accordingly, the court finds the movant is not entitled to relief on this basis.

3. Alleged failure to prepare for trial, investigate defenses, and provide advice regarding benefits of going to trial rather than accepting a plea agreement

The movant concedes that an attorney's trial decisions made after thorough investigation of law and fact are given wide deference, but then goes on to allege that that Attorney Schwartz rendered ineffective assistance because he failed to properly investigate his case (civil docket no. 1 at 19-20). In support of his contention, the movant avers that he gave Attorney Schwartz the names of seven witnesses whom he believed Attorney Schwartz should subpoena for testimony at trial and Attorney Schwartz failed to do so. *Id.* at 20-29. Of course, the movant plead guilty so there was no trial testimony from anyone.

In its resistance the government argued:

> None of Movant's proposed witnesses would have tended to mitigate the strong inference of willful blindness that could be drawn from the government's evidence. Some of them, including Watkins, Sharairei, and Dr. Carter, would have served to strengthen that inference. Movant's other witnesses likely would not have been allowed to provide any testimony of substance, as their testimony would have largely consisted of inadmissible

> attempts to recount what Movant had told them. Movant asserts that these statements went to his state of mind, and that "[s]tate of mind was Mr. Sharp's defense." (*Id*. at 24). While then-existing state of mind can be used as an exception to the hearsay rule, it does not apply to statements made "after [the defendant] ha[s] had ample opportunity to reflect on the situation." *United States v. Naiden*, 424 F.3d 718, 722 (8th Cir. 2005). Movant identifies no situation in which his comments to potential witnesses were so expedited that the witnesses' testimony would have been admissible at trial.

Civil docket no. 13 at 36.

In Attorney Schwartz' s affidavit, he addressed the proposed testimony of the seven named individuals, explaining the basis upon which he rendered a decision not to call each proposed witness.

1. Patrick Van Aken –

The movant alleges that he advised Attorney Schwartz to subpoena Patrick Van Aken, who manufactured synthetic marijuana and sold the product to movant. *Id*. at 21. Movant alleged that this witness would testify that he misrepresented his product to movant. *Id*.

In his affidavit, Attorney Schwartz explained that at the time in question both Patrick Van Aken and his wife, Sarah Van Aken, were under indictment and that ethically he could only reach them through their attorneys (civil docket no. 5 at 10). Attorney Schwartz explained further in his affidavit that he did attempt to reach both Patrick Van Aken's and Sara Van Aken's attorneys but neither responded to his calls. *Id*. Further, Attorney Schwartz stated that movant requested that Attorney Schwartz advise their attorneys that movant would threaten to testify against them if they did not testify favorably for him. *Id*. at 10.

A portion of the unauthenticated transcripts of jail telephone conversations between the movant and Attorney Schwartz, which the movant submitted to the court and on which he relies so heavily, support Attorney Schwartz's recollections in his affidavit. In one call, Attorney Schwartz told the movant that he did attempt to contact Patrick Van Aken

and Sarah Van Aken but was told that they had new charges pending against them (civil docket no. 1-1, at 144). The following conversation followed:

> Movant: I think it would be more beneficial that they come forward and tell the truth I mean considering that you know my alternative is corroborating against them and greatly increasing whatever quantities they would be. I don't know, I don't know if you've discussed that with their attorneys. . .
>
> Schwartz: There's no way that we're going to be able to threaten them that you're going to testify against them and try to force them into testifying on your behalf.

Id.

A reading of the relevant portion of the transcript disproves movant's argument and establishes that Attorney Schwartz attempted to obtain testimony from Patrick Van Aken and Sarah Van Aken within the bounds of ethics.

2. Lisa McDaniel

Movant alleges that Attorney Schwartz was ineffective because he failed to call Lisa McDaniel as witness (civil docket no. 1 at 23-24). The movant argues that Lisa McDaniel could have testified to the fact that other businesses sold synthetic cannabinoids and that the products that she purchased from movant did not have a hallucinogenic effect on her. *Id*.

Attorney Schwartz explained in his affidavit that Lisa McDaniel's testimony was largely irrelevant to the issues litigated (civil docket no. 5 at 10). Attorney Schwartz also stated that Lisa McDaniel's testimony that movant kept the product in question, "Spice", behind the counter and only took it out in the open after it was asked for by a customer tended to support a belief that he knew it was illegal and thus her testimony would be inculpatory. *Id*. The relevant portion of the movant's jail telephone conversation with Attorney Schwartz on September 16, 2015, supports Attorney Schwartz's recollection (civil docket no. 1 at 141-142).

3. Tina Grenier

The movant alleges that Attorney Schwartz was ineffective because he failed to subpoena this witness who would have testified as to his state of mind and stated that he did not want to act illegally (civil docket no. 1 at 23-24). The movant also asserts that this witness could have verified the movant's statements that he had hired Attorney Schwartz previously. *Id.*

Attorney Schwartz stated in his affidavit that he did not call Tina Grenier because she would have only been able to testify to hearsay statements which would have been inadmissible (civil docket no. 5 at 10-11).

4. James Sackfield

The movant alleges that Attorney Schwartz failed to subpoena movant's stepfather, James S Sackfield, who would have testified that the movant told him that he did not sell illegal products and that he had taken his products to the police for testing (civil docket no. 1 at 25).

Attorney Schwartz explained in his affidavit that he did not call movant's stepfather as a witness because his testimony would have been inadmissible hearsay and would have been potentially inculpatory (civil docket no. 5 at 11).

A review of James Sackfield's later testimony at the movant's sentencing hearing supports Attorney Schwartz's assertion. James Sackfield testified at the movant's sentencing hearing that the movant had told him that he had products tested to assure everything he sold was legal and consulted an attorney (criminal docket no. 229 at 172-173). On cross-examination James Sackfield testified further that that he had no personal knowledge that such a statement was true. *Id.* at 176. James Sackfield testified that he met with Attorney Schwartz after the movant was charged and Attorney Schwartz was representing movant in the present action. *Id.* at 174. James Sackfield further testified that Attorney Schwartz was seeking to have the movant's products tested to ascertain the chemicals they contained but that the testing was quite costly and would cost six thousand to twenty thousand dollars. *Id.*

James Sackfield's testimony at the sentencing hearing supports Attorney Schwartz's statement. The only personal knowledge which James Sackfield held was that after movant was indicted and Attorney Schwartz was representing him in this matter, Attorney Schwartz stated that he could get the products movant sold tested but that it would cost more than six thousand dollars. This testimony was not helpful to movant's case and was contrary to movant's assertion that those tests would cost nine hundred dollars.

5. Wayne Watkins

The movant alleges that Attorney Schwartz provided ineffective assistance of counsel because he did not interview movant's co-defendant, Wayne Watkins, and did not subpoena him to testify (civil docket no. 1 at 25-27).

Attorney Schwartz explained in his affidavit that he did not interview Wayne Watkins because he was represented by counsel and that he did not call Wayne Watkins to testify because his testimony would potentially support the government's case against the movant for "willful blindness" (civil docket no. 5 at 11-12).

At the sentencing hearing, Wayne Watkins testified that he worked for the movant as a part-time employee at Smoke N' Ink (criminal docket no. 229 at 56). Wayne Watkins testified that when he was working at Smoke N' Ink he was not allowed to sell "Spice" in the shop, as customers purchasing "Spice" needed to deal directly with the movant. *Id*. Wayne Watkins testified further that he was allowed to sell "spice" outside of the store but first needed to "buy" it himself and then take it to whomever he would sell it to outside of the store. *Id*. at 56-57.

Wayne Watkin's testimony would in fact support the government's case for "willful blindness" and further support an inference that the movant was aware the substance was not legal. This is consistent with Attorney Schwartz's explanation that the testimony of Wayne Watkins would be inculpatory rather than exculpatory.

6. Hadi Al Sharairei

The movant alleges that Attorney Schwartz provided ineffective assistance of counsel he failed to subpoena Hadi Al Sharairei to testify to several hearsay statements that movant's state of mind was that he did not want to violate the law (civil docket no. 1 at 27-28). Notably, movant rehashes in this argument his prior argument that Hadi Al Sharairei would have testified that Attorney Schwartz advised both the movant and Hadi Al Sharairei regarding the legality of cannabinoids and that Attorney Schwartz did not call him to testify because he was protecting his own interests. *Id*.

Attorney Schwartz explained in his affidavit that he did not call Hadi Al Sharairei because his testimony would not have been helpful and would have potentially implicated movant in additional crimes (civil docket no. 5 at 12).

Notably, in his testimony at the sentencing hearing, Hadi Al Sharairei testified that he did not hire Attorney Schwartz with the movant (criminal docket no 229 at 130, 133). Hadi Al Sharairei also testified that the movant wrote him a letter which asked him to state certain facts on movant's behalf which were not true, including the fact that they together hired Attorney Schwartz. *Id*. At 128-131. Hadi Al Sharairei testified further that he felt the letter threatened him if he did not agree to make the statements the movant asked him to make. *Id*. at 132.

To the extent that Hadi Al Sharairei's testimony from the sentencing hearing might have resulted in an additional charge of obstruction of justice if it had been introduced at trial, the court finds Attorney Schwartz's concerns regarding inculpatory evidence well-founded.

7. Dr. Karen Carter

Lastly, the movant alleged that Attorney Schwartz rendered ineffective assistance when he failed to subpoena Dr. Karen Carter (civil docket no. 1 at 29). Specifically, movant asserts that Dr. Carter would have provided evidence that he attempted to have certain drugs tested but that Dr. Carter said testing of those drugs was prohibited. *Id*.

Attorney Schwartz stated under oath that he did not call Dr. Carter, because the evidence was inculpatory rather than exculpatory (civil docket no. 5 at 12). Specifically, Attorney Schwartz asserts that when Dr. Carter advised the movant that the substance could not be tested due to orders from the D.E.A., that placed the movant on notice that the substance was illegal, and Dr. Carter's testimony would thus have supported the government's allegation of "willful blindness." *Id.*

Thus, nothing in the record supports the movant's arguments and his third claim is denied. There was no prejudice in any event because the movant pled guilty before trial.

4. Alleged failure of counsel to adequately prepare for plea withdrawal hearing

The movant alleges that Attorney Lahammer provided ineffective assistance of counsel (civil docket no. 1 at 30) because Attorney Lahammer failed to raise the issue of conflict of interest relating to Attorney Schwartz's other clients and failed to subpoena witnesses, Attorney Schwartz's time records (both as to movant and other clients), Attorney Schwartz's banking records, or the tape recordings of jail telephone conversations between movant and Attorney Schwartz. *See* (civil docket no. 1 at 29-40).

In his claim against Attorney Lahammer for ineffective assistance of counsel the movant argues that Attorney Lahammer failed to call witnesses, Hadi Al Sharairei, James Sackfield, Tina Grenier and Wayne Watkins as witnesses in his plea withdrawal hearing. *Id.* at 36-40.

Attorney Lahammer explained in his affidavit:

> Mr. Sharp also claims that counsel was ineffective in failing to prepare for the motion to withdraw plea hearing. Specifically, he claims that counsel did not subpoena Attorney Schwartz' time records, his bank records, his time records for several other clients, recorded phone calls, Borsberry Law files, and several witnesses for testimony. It is counsel's recollection that he was well aware that Mr. Schwartz was going to be a witness at the hearing, and that the issues in the motion to withdraw were limited to whether Mr. Sharp's attorney had a direct conflict of interest, and whether

> Mr. Sharp was aware of the statutory penalties, the elements of the offense, and provided a factual basis for his plea. Mr. Sharp was aware of the witnesses being called by the government in advance of the hearing, and had discussed with Counsel the arguments and strategy for the hearing, and approved the positions taken.

(civil docket no. 6 at 2)

The court finds Attorney Lahammer's affidavit credible. At the hearing, the court transcript indicates Attorney Lahammer zealously argued that Attorney Schwartz had advised the movant that his business dealings were legal. *See generally*, criminal docket no. 193. The movant filed the cover letter sent to him by Attorney Lahammer which accompanied a copy of the proposed Motion to Withdraw Guilty Plea (civil docket no. 1-1 at 52-54). In that letter there is no discussion of whether a conflict existed due to Attorney Schwartz's representation of other clients. *Id*. Additionally, the movant provided two letters which he sent to Attorney Lahammer in response to the proposed Motion to Withdraw Guilty Plea (civil docket no. 1-1 at 52-64). In neither of those letters did the movant advise Attorney Lahammer that he wished for him to add an argument regarding Attorney's Schwartz's alleged conflict due to representation of other clients. *Id*. The only mention made of other clients was a statement which the movant made to Attorney Lahammer that he and Hadi Al Sharairei each paid Attorney Schwartz half of a retainer of twenty-five thousand dollars. *Id*. at 57. As noted previously, Hadi Al Sharairei testified at the movant's sentencing hearing that this was not true (criminal docket no. 229 at 128-129). Additionally, the movant wrote to Attorney Lahammer in his letter that Hadi S. had confronted Attorney Schwartz that he was testing drugs for Hadi Al Sharairei's cousin and would not test them for the movant and Hadi Al Sharairei (civil docket no. 1-1 at 58). In his testimony at the movant's sentencing hearing, Hadi Al Sharairei denied that he ever gave Attorney Schwartz any product to test (criminal docket no. 229 at 130-131). Presumably, Hadi Al Sharairei would have given testimony at the hearing on the movant's Motion to Withdraw Guilty Plea which would have been the same as the testimony he gave at movant's sentencing hearing.

As to the movant's claims that Attorney Lahammer failed to subpoena witnesses, telephone recordings and Schwartz's billing records, the court finds that even if the movant had advised Attorney Lahammer to subpoena those records he can show no prejudice. The court reiterates its findings herein regarding the potential testimony of witnesses named by the movant. As previously noted by the court, the proposed testimony of the witnesses in question was largely hearsay except for Hadi Al Sharairei. Apart from Hadi Al Sharairei, whom the movant asserted had personal knowledge of Attorney Schwartz's advice to movant, the witnesses had no knowledge beyond movant's self-serving statements to them that Schwartz advised movant that his business dealings were legal. Additionally, the testimony of Hadi Al Sharairei at movant's sentencing hearing contradicted movant's assertions and would not have helped in his motion but rather might have resulted in further charges being brought against the movant.

The movant suffered no prejudice as a result of the fact that Attorney Lahammer failed to submit the unauthenticated transcripts of the jailhouse conversations between the movant and Attorney Schwartz as evidence. Contrary to the movant's assertions, the transcripts in question do not support the movant's assertions regarding Attorney Schwartz's representation. At no time during the recorded conversations did the movant confront Attorney Schwartz about any advice pre-indictment that what he was doing was legal (civil docket no. 1-1 at 65-115). To the contrary, the movant stated to Attorney Schwartz during his telephone call of September 16, 2015, that he had been "consulting with attorneys" but never stated that he had consulted with Attorney Schwartz. *Id*. at 100. Had Attorney Schwartz advised the movant that he was conducting his business legally, it stands to reason that the movant would have confronted Attorney Schwartz with the fact that he gave erroneous advice and nothing in the record indicates that the movant did so. A reasonable man who was advised by his attorney that he was acting legally and who was then arrested for those actions would confront the attorney regarding the fact that he rendered erroneous advice.

The recorded statements made by the movant to Attorney Schwartz after the movant's arrest are not consistent with the movant's assertions that he consulted with Attorney Schwartz as to the legality of his business. Instead, those recorded statements are consistent with Attorney Schwartz's assertion that the movant told him he had consulted with three other attorneys about the legality of his business dealings, but that Attorney Schwartz rendered no such advice prior to the movant's indictment.

In short, the evidence supports Attorney Lahammer's assertion that the movant did not request that he raise the issue of Attorney Schwartz's representation of other clients at the hearing for Motion to Withdraw Guilty Plea.

The court shall deny the motion as to this issue.

5. ***Alleged failure of sentencing counsel to request reconsideration of the denial of the movant's Motion to Withdraw Guilty Plea after discovery of new evidence during the sentencing hearing***

The movant asserts that Attorney Lahammer provided ineffective assistance because he did not file a motion for reconsideration of the court's denial of his Motion to Withdraw Guilty Plea (civil docket no. 1 at 40-43). Specifically, the movant asserts that the sentencing hearing testimony presented by government witnesses Hadi Al Sharairei, Wayne Watkins and James Sackfield proved that Attorney Schwartz advised the movant how to legally sell synthetic cannabinoids. *Id.* at 40.

Attorney Lahammer responded in his affidavit that he did not file a motion to reconsider because "any motion to reconsider would have been denied by the sentencing judge as she already found Attorney Schwartz to be a credible witness as relates to his representation of [the movant]" (civil docket no. 6 at 2).

The court finds the movant's arguments meritless. The hearing testimony presented did not prove what the movant alleges it proved. As noted previously, the testimony of James Sackfield and Wayne Watkins contained hearsay statements which do not prove that Attorney Schwartz advised the movant that he was acting legally. Moreover, Hadi Al Sharairei was the only witness with first-hand knowledge. Hadi Al

Sharairei's testimony contradicted the movant's allegations, as he testified that he did not retain Attorney Schwartz with the movant and that he personally had never given any substance to Attorney Schwartz to be tested. Additionally, on appeal, the Eighth Circuit Court of Appeals found that Hadi Al Sharairei's testimony that the movant urged him to lie to police undermined the movant's protestations of innocence. *United States v. Sharp*, 879 F.3d 327, 338 (8th Cir. 2018).

In his Report and Recommendation, which recommended denying the movant's Motion to Withdraw Guilty Plea, Magistrate Judge Scoles determined that Attorney Schwartz's testimony was credible and that evidence including the movant's own letter to Attorney Schwartz, dated April 2, 2015, asserted that Attorney Inman, Attorney Boresberry and a third attorney in Florida had told the movant that his activities were legal but that he never alleged Attorney Schwartz made any such statement (criminal docket no. 189 at 10). Judge Scoles noted further that "[the movant] did not claim he relied on [Attorney] Schwartz's advice regarding the legality of selling THJ-011 until after the filing of a draft presentence investigation report containing an advisory guideline range of 235-293 months' imprisonment." *Id*. at 11. Judge Scoles additionally found it significant that at the time that he entered his guilty plea, the movant admitted that he engaged in willful blindness by not getting the substances he sold tested and that at the time he made that admission, the movant made no assertion that he had attempted to have Attorney Schwartz have the substance tested. *Id*. at 15.

On appeal the Eight Circuit Court of Appeals Ruled that:

> evidence elicited at defendant's sentencing, pursuant to his guilty plea to charges related to possession with intent to distribute a controlled substance, neither rehabilitated defendant's credibility nor undermined the evidence of his guilt, and thus, the district court did not plainly err in failing to reconsider his motion to withdraw his guilty plea sua sponte.

Sharp, 879 F.3d at 338.

Considering the Eighth Circuit's finding that the evidence at sentencing did not affect the credibility of movant's claims, Attorney Lahammer was not deficient in failing to file a motion to reconsider the withdrawal of guilty plea, as Attorney Lahammer reasonably determined that such a motion would not be meritorious.

The court finds that in light of the ruling by the Court of Appeals of the Eighth Circuit as to this issue, the movant has failed to establish any prejudice. Accordingly, the court shall deny the motion as to this issue.

6. ***Failure of appellate counsel to appeal the district court's denial of a continuance after government disclosed additional discovery three weeks before trial***

In his last claim of ineffective assistance of counsel, movant claims that appellate counsel provided ineffective assistance when he failed to appeal the district court's denial of his second motion to continue (docket no. 1 at 43). The movant states:

> Approximately, three weeks prior to trial, the Government provided nearly 5000 pages of discovery. That discovery revealed an email from a supplier indicating [movant] had purchased products containing THJ-011, a product [movant] believed to be legal. [Movant] would not have pleaded guilty if he had been aware of that evidence. This information was available to appellate counsel, yet he elected not to raise it on appeal.

Id.

In his affidavit Attorney Lahammer explained:

> Mr. Sharp also claims that appellate counsel was ineffective for failing to appeal the district court's denial of his motion to continue due to late disclosure of discovery. However, the disclosure of 5000 pages of discovery 3 weeks in advance of trial is not all that unusual, and the fact that prior counsel has never claimed that he did not review it and did not consider that evidence in his advice to Mr. Sharp to plead obviously shows that there was no prejudice suffered as a result of this late disclosure. There was also nothing in the record that indicated that prior Counsel had any difficulties in evaluating this discovery prior to trial or prior to the plea hearing. This claim is without merit.

(civil docket no. 6 at 3).

In its resistance, the government argues that Attorney Lahammer's appellate strategy not to argue what was a weaker argument should be afforded deference. (*See* civil docket no. 13 at 42 (citing *United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008)). The government argues further:

> Denials of a request for a continuance, like the denial at issue here, are reversed on appeal only when the District Court has abused its discretion. *United States v. Cotroneo*, 89 F.3d 510, 514 (8th Cir. 1996). Movant states no reason why the Court of Appeals would have found an abuse of discretion in this case, particularly in light of the minimal probative evidence of the single email and the otherwise overwhelming evidence of Movant's guilt. This is particularly so when there is no indication that trial counsel was unaware of the email Movant cites or that he failed to adequately assess the importance of the email in the grand scheme of the case.

Id. at 43.

On September 10, 2015, Attorney Schwartz filed the Motion to Continue (criminal docket no. 72). In the motion Attorney Schwartz stated that on August 27, 2015, additional discovery was received which consisted of several thousand pages of material and that the movant was in the process of reviewing the materials with counsel. *Id*. at 1. Attorney Schwartz then went on to argue as his primary reason for the necessity of a continuance that he wished to have samples of the alleged illegal substances retested by an independent laboratory and had communicated about this with the government. *Id*. at 2-3. He stated it would take several weeks to retest the samples according to the chemist. *Id*. at 3.

The court finds it significant that the time between Attorney Schwartz's receipt of the additional discovery material and the date of trial was not three weeks, but almost six weeks. The additional discovery was received on August 27, 2015. Attorney Schwartz filed his Motion to Continue exactly two weeks later on September 10, 2015. Trial was then scheduled for October 5, 2015, approximately three weeks and four days after the

date the motion was filed. Thus, the discovery was received just over five and a half weeks prior to trial.

In his brief, the movant offers no argument or evidence that his appellate counsel's representation was unreasonable under prevailing professional norms or that appellate counsel's decision not to raise the issue was unsound strategy. *See Kimmelman v. Morrison*, 477 U.S. 365, 381(1986) ("[T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy."). Thus, the movant fails to show contrary evidence to rebut the assumption that "appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *Brown*, 528 F.3d at 1033 (quoting *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998)).

Moreover, Attorney Lahammer opined that nothing in the record showed that Attorney Schwartz had difficulty reviewing the discovery received on August 27, 2015, and that the record did not support that the movant had been prejudiced (civil docket no. 6 at 3). For that reason, Attorney Lahammer refrained from arguing this as ground for appeal. *Id*. Based on the record, the court finds that Attorney Lahammer's decision falls within the *Strickland* standards.

Further, for Attorney Lahammer to successfully argue that the district court erred in denying Attorney Schwartz's Motion to Continue, the movant would have needed to show the district court abused its discretion. "We will reverse a district court's decision to deny a motion for continuance only if the court abused its discretion *and* the moving party was prejudiced by the denial." *United States v. Thurmon,* 368 F.3d 848, 851 (8th Cir.2004) (quoting *Cotroneo*, 89 F.3d at 514) (emphasis added). The grant of continuances is disfavored and "should be granted only when the party requesting one has shown a compelling reason." *Controneo,* 89 F.3d at 514.

The movant offers no argument as to how the court abused its discretion in denying the Motion to Continue. Indeed, the record shows that the district court's denial of the Motion to Continue was well within its discretion. As noted by Attorney Lahammer, it

is not unusual for discovery to be served within several weeks of trial. Moreover, the discovery in question was served on the movant's counsel almost a month and a half prior to trial, not within three weeks as alleged by the movant. The district court correctly determined that the movant and his counsel had more than a month to review the documents. Moreover, the movant gave no explanation in his motion why he waited until less than a month prior to trial to request independent testing of his products when he could have had the products tested at any time in the six months prior.

Thus, the movant also cannot show prejudice, as there is no evidence that the result would have been different if appellate counsel raised the issue of the trial court's denial of the motion on appeal. *See id.*(providing that show demonstrate prejudice a movant must show that "'the result of the proceeding would have been different' had . . . the . . . issue [been raised] on direct appeal") (quoting *Brecht v. United States*, 403 F.3d 541, 546 (8th Cir. 2005))). As such, his final claim is denied.

V. CONCLUSION

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). It is apparent that the conduct of trial counsel and appellate counsel fell within a wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, and any deficiencies in either counsel's performance did not prejudice the movant's defense or sentencing, *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 and appellate 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. The movant's motion is meritless.

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 claim 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 the movant 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**; and
2) A certificate of appealability **WILL NOT ISSUE**.

DATED this 8th day of November, 2022.

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

Appendix K - Sixth Amendment to the United States Constitution

APPENDIX K

Relevant Constitutional Provision

6th Amendment to United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."