



of counsel at the time of trial and not by hindsight. Lockart v. Fretwell, 506 U.S. 364 (1993). Even if counsel's actions are professionally unreasonable, it may not warrant setting aside the judgment if the error had no effect on the judgment.

### **JUDGMENT**

The Court has reviewed movant's amended motion (Doc. No. 8) respondent's opposition (Doc. No. 10), and movant's reply (Doc. No. 12), and Court transcripts of the change of plea and sentencing hearings, and finds that movant's allegations are without merit. In particular, movant has waived his post-conviction rights, and movant acknowledged as much during his change of plea hearing. Further, movant's substantive claims included in Claims 1 and 2 are without merit for the reasons stated in respondent's opposition (Doc. No. 10). This Court adopts and incorporates by reference herein that analysis as its own. Regarding Claim 3, movant concedes in his reply (Doc. No. 12) that he never requested or instructed his counsel to file an appeal, which is confirmed by the trial counsel's affidavit, see Doc. No. 10, Exhibit A.

For the aforesaid reasons movant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 8), filed October 9, 2008, is **DENIED**.

No evidentiary hearing will be held in this matter because the issues raised are resolvable by the record. Furthermore, movant will be denied a motion for certificate of appealability, in that the issues raised are not debatable among reasonable jurists, nor could a court resolve the issues differently.

Date: 1/22/09  
Kansas City, Missouri

**S/ FERNANDO J. GAITAN, JR.**  
Fernando J. Gaitan, Jr.  
Chief United States District Judge