APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1451

Kenneth Ray Borders

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-00589-DGK)

JUDGMENT

Before WOLLMAN, COLLOTON and GRUENDER, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The motion for leave to proceed in forma pauperis is denied as moot. The appeal is dismissed.

May 31, 2018

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

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1451

Kenneth Ray Borders

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-00589-DGK)

ORDER

The petition for rehearing by the panel is denied.

August 14, 2018

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

/s/ Michael E. Gans

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KENNETH RAY BORDERS, Movant, v. **UNITED STATES OF AMERICA,** Respondent.	Civil No. 17-00589-CV-W-DGK-P Crim. No. 12-00386-01-CR-W-DGK

GOVERNMENT'S RESPONSE AND SUGGESTIONS IN OPPOSITION TO MOVANT'S MOTION UNDER 28 U.S.C. § 2255

The respondent, the United States of America, respectfully requests this Court deny the motion under 28 U.S.C. § 2255 filed by the movant, Kenneth Ray Borders, seeking to vacate his conviction and sentence. The Government provides the following suggestions in opposition to the motion:

I. Summary

A jury convicted Borders of conspiracy, aiding and abetting the transportation of stolen goods, and aiding and abetting the possession of stolen vehicles. This Court sentenced Borders to 262 months' imprisonment. Borders appealed, and the Eighth Circuit affirmed the conviction and sentence.

Borders has now filed a motion under § 2255 seeking to vacate his conviction and sentence. Borders alleges two claims of ineffective assistance of counsel. However, the record demonstrates that Borders has not demonstrated prejudice as to either claim, as

required by *Strickland v. Washington*, 466 U.S. 668 (1984). As a result, the claims should be denied by this Court.

Since the claims may be resolved based on the current record, and because the claims are inadequate on their face, the Government requests that this Court deny the claims without holding an evidentiary hearing. Since the claims are contrary to the record and not debatable among jurists of reason, the Government requests that this Court deny a certificate of appealability.

II. Procedural History

On December 14, 2012, an indictment was returned in the Western District of Missouri charging Borders with 15 violations of federal law for his involvement in a conspiracy to possess stolen goods in interstate commerce. (D.E. 1.) After indictment, the Government moved to dismiss seven counts of the indictment, leaving eight counts for trial. (D.E. 148, 150.) On February 18, 2014, a nine-day jury trial began. (D.E. 187.)

At the start of the second day of trial, an allegation that one of the jurors was biased against the defendants was raised. (Tr. 87-148.) The allegation was that one of the jurors stated that the defendants were "all guilty." (Tr. 87-88.) A witness to the alleged statement was sworn. (Tr. 90-91.) The witness stated that he was present for moral support for co-defendant Reginald Tidwell. (Tr. 91.) The witness stated he addressed two jurors on the elevator and offered congratulations for being selected for the jury. (Tr. 91-92.) One of the jurors allegedly responded with the statement that "they're all guilty." (Tr. 92.) The second juror did not respond to the comment and "rushed off the elevator." (Tr. 94.) The witness stated that the conversation took place at the end of the day. (Tr. 95.) This

Court brought the jurors in so the witness could identify the jurors present in the elevator. (Tr. 100.)

Afterwards, the witness identified the juror who allegedly made the statement about guilt, but not the other juror. (Tr. 100-01.) The witness also expanded his testimony and included allegations against a third juror. (Tr. 101-02.) This Court further inquired about the witness's past criminal history before excusing him for the moment. (Tr. 102-03.) After hearing the testimony, another individual related to another of the defendants confirmed the second allegation. (Tr. 104.) This Court developed a plan of inquiry of the jurors. (Tr. 104-14.)

A male juror was questioned by the court and admitted that he made the statement "they're all guilty of something." (Tr. 114-15.) After discussion and further questioning, the juror was dismissed. (Tr. 115-23.) A female juror alleged to have made a statement about guilt denied the allegation, and denied hearing anyone else make statements concerning guilt. (Tr. 123-24.) There was further discussion regarding the female juror. (Tr. 124-27.)

The defense attorneys requested a mistrial, based upon the statement of the male juror and that it was purportedly made in front of additional jurors. (Tr. 127.) Defense counsel for Borders joined in the request for mistrial, while other counsel reserved the right to request a mistrial at a later time. (Tr. 127-30.) A separate request for an inquiry of all the jurors individually was also sought. (Tr. 128.) This Court brought in another defendant's wife for inquiry (Tr. 132137), dismissed the female juror as a precaution

(Tr. 144-45), and admonished the viewers in the gallery not to have any contact with the jurors. (Tr. 145-46.)

This Court questioned the jurors further as a group (Tr. 139-40), provided them information about the issues raised (Tr. 146-47), and inquired concerning statements overheard and impartiality of the jurors. The remaining jurors denied making or hearing any statements presuming guilt. (Tr. 147-48.) The jury was then impaneled. (Tr. 148.)

After opening statements, and hearing evidence for the first day of trial, this Court again took up the matter regarding the jurors. (Tr. 367-74.) Counsel for Borders requested a mistrial and for the case to be tried again in front of a different jury, and that request was joined in by the other co-defendants. (Tr. 367-73.) This Court overruled the request for a mistrial. (Tr. 373-74.)

At the conclusion of the nine-day jury trial, Borders was convicted of seven of the eight counts charged. (D.E. 209.) He was found not guilty on Count Sixteen (transportation of stolen goods in interstate commerce). (D.E. 209, 218.) The jury could not decide on a verdict regarding defendant Verdie Carr and found Reginald Tidwell not guilty on all counts. (D.E. 208, 212, 220.) Carr later pled to an information. (D.E. 240-42.)

On July 31, 2014, a revised presentence investigation report (PSR) was issued. The PSR summarized the offense conduct. (PSR 4-13, ¶¶ 2-26.) The offense conduct included a total loss amount calculation and a list of restitution victims resulting from the crimes. (PSR 10-13, ¶¶ 25-26.) The PSR calculated a base offense level of 6 under U.S.S.G. § 2B1.1. (PSR 14, ¶ 33.) The PSR applied a 16-level increase under § 2B1.1(b)(1), based

on a loss amount of more than $1 million; a two-level increase under § 2B1.1(b)(2)(A) because the offense involved more than 10 victims; a two-level increase under § 2B1.1(b)(4) because Borders was in the business of receiving and selling stolen property; a two-level increase under § 2B1.1(b)(10)(C) because the offense involved sophisticated means; a two-level increase under § 2B1.1(b)(13) because the offense involved stealing vehicles or parts, or stealing goods or chattels that are part of a cargo shipment; and a four-level increase under § 3B1.1(a), because Borders was an organizer or leader of a criminal activity that involved five or more participants. (PSR 14, ¶¶ 34-43.) This yielded a total offense level of 34. (PSR 15, ¶ 45.)

Borders was assessed eight criminal history points, yielding a criminal history category of IV. (PSR 15-20, ¶¶ 48-71.) This yielded an advisory Sentencing Guidelines range of 210 to 262 months' imprisonment. (PSR 23, ¶¶ 100-101.)

Borders objected to the enhancements for sophistic means and for being an organizer or leader. (PSR Adden. July 31, 2014.)

Borders filed a sentencing memorandum, seeking a variance from the Sentencing Guidelines to a range of 77 to 96 months' imprisonment. (D.E. 335.) The sentencing memorandum outlined the factors under 18 U.S.C. § 3553(a) that Borders contended support the large variance. (D.E. 335.)

Borders also filed *pro se* objections to the PSR. (D.E. 349.) In that document, Borders asserted that a cooperating co-defendant lied during the trial, listed several objections to portions of the offense conduct, and requested that this Court dismiss the case or set a new trial. (D.E. 349.)

On December 8, 2014, Borders appeared before this Court for sentencing. (D.E. 350.) This Court first took up the objections to the PSR. (Sent. Tr. 4-8, 15-18.) This Court found that the sophisticated means enhancement applied (Sent. Tr. 5-7), as well as that for an organizer or leader. (Sent. Tr. 7-8.) This Court next addressed the *pro se* objections, and agreed with the Government that a defendant is accountable for acts done as part of a conspiracy while incarcerated. (Sent. Tr. 15-18.) This Court adopted the Sentencing Guidelines calculations in the PSR and found an advisory Sentencing Guidelines range of 210 to 262 months. (Sent. Tr. 18.)

The Government sought a sentence within the Sentencing Guidelines range. (Sent. Tr. 19.) Defense counsel cited the § 3553(a) facts that warranted a variance and requested leniency. (Sent. Tr. 19-22.) Borders denied participating in a conspiracy, and repeated his allegations from the *pro se* PSR objections, that the cooperating witnesses lied during testimony and that Borders had been incarcerated during specific acts of the conspiracy. (Sent. Tr. 21-22.)

This Court addressed the § 3553(a) factors it found affected the sentence. (Sent. Tr. 22-25.) This Court sentenced Borders to 60 months' imprisonment on Count One, 120 months on Counts Three, Four, Fourteen, Fifteen, and Seventeen, concurrent to each other but consecutive to Count One, and 82 months on Count Twenty-Five, consecutive to all other counts, yielding an aggregate sentence of 262 months' imprisonment. (Sent. Tr. 25; D.E. 351.) Borders requested that a notice of appeal be filed on his behalf, expressing that he desired new counsel for appeal. (Sent. Tr. 27-29.)

Borders appealed, raising numerous claims of trial and sentencing error. *United States v. Borders*, 829 F.3d 558 (8th Cir. 2016). As part of that appeal, Borders specifically appealed the total loss amount utilized by this Court for sentencing. *Borders*, 829 F.3d at 567-68. The Eighth Circuit noted that the issue had not been preserved, and was subject to plain error review, but held that this Court did not err in calculating the loss amount. *Id*. at 568. The Eighth Circuit determined that Borders should be held liable for any loss reasonably foreseeable, within the scope and in furtherance of the conspiracy, and that losses related to the alteration of vehicle identification numbers (VINs) was properly included. *Id.*

Borders now has filed a motion under § 2255 seeking to vacate his conviction and sentence. The Government does not dispute that the motion, although without merit, is timely under 28 U.S.C. § 2255(f)(1).

III. Argument and Authorities

In his motion, Borders raises two claims of ineffective assistance of counsel. In his first claim, Borders contends that defense counsel was ineffective for failing to seek a new trial based on events involving juror partiality. In the second, Borders contends that defense counsel was ineffective for failing to challenge the loss amount and the corresponding increase in the offense level under the Sentencing Guidelines.

A. Ineffective Assistance of Counsel Generally

"In a § 2255 proceeding, the burden of proof with regard to each ground for relief rests upon the petitioner." *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969).

Claims alleging ineffective assistance of counsel are governed by the standard set forth in *Strickland*. "This standard requires [the applicant] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," *Strickland*, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. *Id*. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different.'"

Lawrence, 961 F.2d at 115 (quoting *Strickland*, 466 U.S. at 694).

Failure to satisfy both prongs is fatal to the claim. *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness"); *see also DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000).

To prove prejudice, a movant must show that the outcome would have been different had alleged defect been corrected. This showing must include an analysis of the probability that the relief would have been granted by the court. *See DeRoo*, 223 F.3d at 925 (if there is no reasonable probability that the motion would have been successful, movant cannot prove prejudice); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (stating that resolution of the

prejudice inquiry will depend largely on the likelihood of success if the alleged error were corrected).

In evaluating counsel's conduct, the court should avoid "the distorting effects of hindsight," *Strickland*, 466 U.S. at 689; and "try to evaluate counsel's conduct by looking at the circumstances as they must have appeared to counsel at the time." *Rodela-Aguilar v. United States*, 596 F.3d 457, 461 (8th Cir. 2010) (quotation omitted). A court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. (quoting *Strickland*, 466 U.S. at 689).

The claims raised by a movant must go beyond mere allegations and must not be so incredulous as to be unbelievable. "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985); *see also Carpenter v. United States*, 720 F.2d 546, 548 (8th Cir. 1983) (conclusory allegations are insufficient to rebut the presumption of competency granted to defense counsel); *United States v. Bryson*, 268 F.3d 560, 562 (8th Cir. 2001) (conclusory allegations are insufficient to establish ineffective assistance of counsel).

B. Individual Claims of Ineffective Assistance Are Without Merit

1. Defense Counsel Was Not Ineffective For Failing to Seek New Trial

In his first claim, Borders contends that defense counsel was ineffective for failing to seek a new trial based on events involving juror partiality. Borders seems to allege that the statement presuming guilt made in the elevator, admitted to by a male juror, was

inherently prejudicial. Borders contends that his defense counsel failed to file relevant objections to the statement and the corrective actions taken by this Court. Essentially, Borders requests a trial in front of a different jury.

The record contradicts this claim. The record demonstrates that defense counsel sought a mistrial – a different trial in front of a new jury – at the end of the first day of evidence. That request was unanimously agreed to by the other defense counsel and co-defendants. (Tr. 367-73.) This Court denied the request. (Tr. 373-74.)

Borders has failed to demonstrate "a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different," as required by *Strickland*. Borders cannot demonstrate that a written motion for a new trial would have produced a different result than the oral motion for a mistrial. Indeed, the record demonstrates that a request for a new trial would have been rejected, because this Court rejected the nearly identical request for a mistrial.

Borders's current claim is not truly a claim of ineffectiveness, but rather an attempt to seek reconsideration of this Court's earlier disposition of the issue of juror bias. Essentially, Borders takes issue with this Court's handling of the issue. Defense counsel also took issue with the handling of that matter and requested a mistrial. That request was denied.

The Eighth Circuit case *United States v. Needham*, 852 F.3d 830, 839-40 (8th Cir. 2017), is instructive on this issue. *Needham* holds that to obtain a new trial based on juror responses, the moving party must establish that (1) the juror "answered dishonestly, not just inaccurately"; (2) the juror was "motivated by partiality"; and (3) "the true facts, if

known, would have supported striking [the juror] for cause." *Needham*, 952 F.3d at 839 (quoting *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998). "Absent a juror's profession of the inability to be impartial, juror bias may be implied [only] in certain egregious situations." *Needham*, *id*. at 840 (internal quotations omitted) (discussing such "egregious situations").

The record establishes that this Court specifically inquired of the remaining jurors about statements overheard and potential bias. The jurors denied making or hearing any statements presuming guilt. (Tr. 147-48.) Borders has failed to provide any evidence that would contradict the statements. Borders has not met that burden. Borders starts his analysis by presuming that the jurors should have been discharged. Borders does not point to any evidence which defense counsel failed to present to this Court. Without providing evidence of actual juror bias, that claim is simply a conclusory allegation.

Borders citation to *Parker v. Gladden*, 385 U.S. 363 (1966), is of no assistance. There, a bailiff made statements of guilt in the presence of one regular juror and an alternate. *Id*. at 363-64. One of the jurors testified that she was prejudiced by the statements. *Id.* at 365. The Supreme Court found that the statements coming from the bailiff carried "great weight with the jury." *Id.* Since one of the jurors was prejudiced by the statement, despite the statement from ten of the jurors who said they had not heard the statements, the right to a fair trial by an impartial jury was compromised. *Id.* at 365-66.

Borders's citation to *Parker* is an attempt to relitigate the claim decided by this Court, rather than to raise a valid ineffectiveness claim. But the facts in *Parker* do not comport with the facts in this case. In Borders's case, all of the jurors denied hearing the

biased statement. In Borders's case, all of the jurors held that they could be impartial for the trial. As noted above, Borders has failed to provide any evidence establishing the contrary. Thus, the attempt to relitigate this Court's resolution of the claim should be denied. If Borders desired to seek review of the denial of the mistrial, he was required to do that on direct appeal.[1]

Finally, the jury's failure to find a verdict regarding defendant Carr, full acquittal of defendant Tidwell, and acquittal of Borders as to Count Sixteen clearly shows the jury properly considered all the evidence, Borders was not prejudiced, and therefore the actions of Borders's counsel were not prejudicial.

Borders has failed to prove his claim. The relief Borders contends defense counsel should have sought – a new trial in front of a different jury – was requested by defense counsel and denied by this Court. The claim is therefore contrary to the record. Borders does not point to any true failure by defense counsel. At heart, Borders simply desires to relitigate the ruling issued by this Court. Borders provides no evidence of juror bias that defense counsel failed to raise.

This Court should therefore deny this claim.

2. *Defense Counsel Was Not Ineffective During Sentencing*

In his second claim, Borders contends that defense counsel failed to challenge the loss amount, which was used when calculating the total offense level. Borders contends

[1]"Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal citation omitted); *see also United States v. Frady*, 456 U.S. 152, 165 (1982) ("a collateral challenge may not do service for an appeal").

that he should have not been held accountable for the loss related to the alteration of VINs. Borders contends that the failure to object led to the imposition of the 262-month sentence.

The underlying substance of this claim was raised on appeal. Borders specifically appealed the total loss amount utilized by this Court for sentencing. *Borders*, 829 F.3d at 567-68. The Eighth Circuit noted that the issue had not been preserved, and was subject to plain error review, but held that this Court did not err in calculating the loss amount. *Id*. at 568. The Eighth Circuit determined that Borders should be held liable for any loss reasonably foreseeable within the scope and in furtherance of the conspiracy, and that losses related to the alteration of vehicle identification numbers (VINs) was properly included. *Id.*

"It is well-settled that claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981); *Dall v. United States*, 957 F.2d 571, 572 (8th Cir. 1992) (per curiam); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003). The law of the case doctrine requires that the decisions by the Eighth Circuit, handed down on direct appeal, remain undisturbed in subsequent proceedings. *Baranski v. United States*, 515 F.3d 857, 861 (8th Cir. 2008).

Framing the claim as ineffective assistance of counsel, rather than challenging the underlying district court ruling, is of no assistance to Borders. Since the Eighth Circuit determined the loss amount was properly calculated, Borders cannot demonstrate prejudice. Borders cannot demonstrate "a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different" – that this

Court would have sustained the objection, in light of the Eighth Circuit's ruling that the loss amount was properly calculated.

This Court should deny this claim.

C. An Evidentiary Hearing Is Not Required To Resolve the Claims, and this Court Should Deny A Certificate of Appealability

"A petitioner is entitled to an evidentiary hearing on a [§] 2255 motion unless the motion and the files and records of the case conclusively show that he is entitled to no relief." *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008) (internal quotation marks omitted). "No hearing is required, however, 'where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.'" *Id*. (quoting *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007)); *see also Sanders v. United States*, 347 F.3d 720, 721 (8th Cir. 2003) (a § 2255 motion can be dismissed without a hearing if (1) a petitioner's allegations, accepted as true, would not entitle him 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).

As the preceding discussion makes clear, Borders's allegations are contrary to the record and conclusory allegations. Borders has failed to demonstrate prejudice as to either claim. Rather than presenting true claims of ineffective assistance of counsel, Borders seeks to relitigate this Court's underlying rulings. Borders has not demonstrated the rulings were erroneous. Indeed, one of the two rulings was determined to be correct by the Eighth Circuit Court of Appeals. This Court should deny the claims without holding an evidentiary hearing.

Should the court deny Borders's § 2255 motion, he can appeal that decision to the court of appeals only if this Court issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability should be issued only if Borders can make a substantial showing of the denial of a constitutional right or raise an issue that is debatable among jurists of reason or deserving of further proceedings. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Each of Borders's claims fails as a matter of law, and the merits of those claims are not debatable among reasonable jurists or deserving of further consideration. The Government respectfully urges this Court not only to deny Borders's § 2255 motion, but to also deny a certificate of appealability.

IV. Conclusion

Accordingly, for all of the reasons previously outlined, the Government respectfully requests that this Court deny the motion filed by Borders seeking to vacate his conviction and sentence.

Respectfully submitted,

THOMAS M. LARSON
Acting United States Attorney

By ***/s/ Gregg R. Coonrod***
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Attorneys for the Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on August 21, 2017, to the CM-ECF system of the U.S. District Court for the Western District of Missouri for electronic delivery to all counsel of record, and mailed to:

Kenneth Ray Borders
Reg. No. 15702-045
MCFP Springfield
P.O. Box 4000
Springfield, Missouri 65801

/s/ Gregg R. Coonrod
Gregg R. Coonrod
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KENNETH RAY BORDERS,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 17-0589-CV-W-DGK-P
	)	(Crim. No. 12-00386-01-CR-W-DGK)
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255

Movant filed this case *pro se* pursuant to 28 U.S.C. § 2255, seeking to vacate his sentence in the above-cited criminal case. For the reasons set out below, Movant's request for § 2255 relief is **DENIED**.

Background

A jury convicted Movant of conspiracy and aiding and abetting the transportation of stolen goods and vehicles, and the Court sentenced him to serve a total of 262 months' imprisonment. Crim. Doc. 351 (judgment).[1] Movant appealed, and the Court of Appeals affirmed this Court's judgment. *United States v. Borders*, 829 F.3d 558 (8th Cir. 2016).

As grounds for § 2255 relief, Movant claims he suffered ineffective assistance of counsel for four reasons: His attorney failed to (1) "object to juror misconduct and properly preserve the issue for appeal," (2) "introduce readily available evidence to rebut the loss amount and . . . preserve the issue for [more than plain-error] review," (3) "properly investigate and present the

1 "Crim. Doc." designates documents filed in Movant's criminal case (12-00386-01-CR-W-DGK), and "Doc." designates documents filed in this civil case.

evidence presented to him by [Movant]," and (4) preserve and raise issues for appeal. Doc. 17, pp. 2-4 (Movant's statement/summary of claims in response to the Court's order).

Standard

The Court must grant relief if "the sentence was imposed in violation of the Constitution or laws of the United States[.]" § 2255(a). Based on Movant's claims, in order to prevail in this case, he must show that the performance of his attorney was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Additionally, Movant has the burden of proving his claims. *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969).

Discussion

Ground (1) concerns pretrial statements made by one juror and attributed to another juror regarding the guilt of Movant and his co-defendants. The Court conducted inquiries, removed the two jurors, and admonished the remaining jurors as to their responsibilities. Doc. 332, pp. 10-69 (transcript). Having done so, and being satisfied that the jury would decide the case based on the evidence and in accordance with the Court's instructions, the Court denied Movant's motion for a mistrial. *Id*. at 367-74. Movant argues that his attorney was ineffective for not taking an interlocutory appeal from the denial of a mistrial. Doc. 17, p. 2 (statement/summary of claims). The Court finds that an interlocutory appeal would have been futile. Ultimately, the Court agrees with Respondent's assessment that the jury's "acquittal of Borders as to Count Sixteen clearly shows the jury properly considered all the evidence [and that] Borders was not prejudiced[.]" Therefore, relief is denied on Ground (1).

In Ground (2), Movant argues that his attorney was ineffective for failing to "introduce readily available evidence to rebut the loss amount and . . . preserve the issue for [more than

plain-error] review[.]" Doc. 17, p. 2 (statement/summary of claims). However, the Court of Appeals affirmed that "Borders can be held liable for any loss from activities reasonably foreseeable, within the scope and in furtherance of, the criminal activity." *Borders*, 829 F.3d at 568 (citation omitted). "Ineffective assistance claims cannot be based on counsel's alleged failure to raise a meritless argument." *Nelson v. United States*, 97 F. Supp. 3d 1131, 1162 (W.D. Mo. 2015). Therefore, relief is denied on Ground (2).

In Ground (3), Movant faults his attorney for not sufficiently calling to the jury's attention that a witness for the Government, Jaccard Fears, testified falsely regarding the conspiracy for which Movant was convicted. Doc. 17, p. 3 (statement/summary of claims); Doc. 11, pp. 5-9 (reply). Respondent argues: "Putting aside the complained-of Fears testimony, numerous other lay witnesses . . . and dozens of law enforcement officers testified about the truck and trailer conspiracy and Border's various levels of involvement. Even removing Fears' testimony, this is a level of evidence that cannot be overcome." Doc. 9, p. 3 (response). The Court agrees, and finds that Movant cannot prove ineffective assistance based on his complaints about the Fears testimony. *See Reed v. Norris*, 195 F.3d 1004, 1006 (8th Cir. 1999) (overwhelming evidence of guilt at trial makes it impossible to show prejudice under *Strickland*). Therefore, relief is denied on Ground (3).

In Ground (4), Movant argues that due to the "lack of rebuttal evidence presented at trial by defense counsel, and the failure to preserve objections, there were few areas of possible successful appeal." Doc. 17, p. 4 (statement/summary of claims). However, ineffective assistance of counsel cannot be based on cumulative errors. *Becker v. Luebbers*, 578 F.3d 907, 914 n.5 (8th Cir. 2009), *cert. denied*, 561 U.S. 1032 (2010). Therefore, relief is denied on Ground (4).

Conclusion

For the reasons set out above, Movant's motion for relief pursuant to 28 U.S.C. § 2255 is denied, and this case is dismissed. Additionally, the Court finds it unnecessary to conduct an evidentiary hearing and declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right"). The Clerk of the Court shall enter judgment accordingly.

So **ORDERED**.

/s/ Greg Kays
GREG KAYS
CHIEF UNITED STATES DISTRICT JUDGE

Dated: January 23, 2018.

APPENDIX E

N0. 18-1451

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

KENNETH RAY BORDERS,

Movant/Appellant,

v.

UNITED STATES OF AMERICA,

Respondent/Appellee.

REQUEST FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS AND COROPRATE DISCLOSURE STATEMENT

Kenneth Ray Borders v. United States of America
Case No. 18-1451

Petitioner/Appellant Kenneth Ray Borders files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 8th Cir. 26.1:

Brown, James E. (Counsel for Co-Defendant Carr)

Carr, Verdi, Jr. (Co-Defendant)

Coonrod, Greg Robert (Assistant United States Attorney)

Dickerson, Jon (Co-Defendant)

Dickerson, Kyle Wayne (Co-Defendant)

Foster, Michael O'Neal (Co-Defendant)

Fredrick, Ryonell Eugene (Co-Defendant)

Hays, Sarah W. (Magistrate Judge)

Johnson, David H. (Counsel for Co-Defendant Tidwell)

Kays, Greg (Chief District Court District Judge)

Maughmer John T. (Magistrate Judge)

McCauley, Alex Scott (Defense Counsel)

Meiners, William L. (Assistant United States Attorney)

Piggie, Myron (Co-Defendant)

Robertson, Harold (Co-Defendant)

Tidwell, Reginald Shawn (Co-Defendant)

Turner, Christopher Dwight (Co-Defendant)

White, Patrick F. (Counsel for Co-Defendant J. Dickerson)

White, Ryan M. (Counsel for Co-defendant K. Dickerson)

Woolery, Lucinda (Assistant United States Attorney)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 18-1451

KENNETH RAY BORDERS

Movant/Appellant,

v.

UNITED STATES OF AMERICA,

Respondent/Appellee.

_____/

REQUEST FOR CERTIFICATE OF APPELABILITY

Petitioner, Kenneth Ray Borders (hereinafter "Borders"), by and through undersigned counsel, respectfully moves, pursuant to 28 U.S.C. § 2253(c) and Rule 22(b), *Fed. R. App. P.*, for issuance of a certificate of appealabililty from the denial of his claims under 28 U.S.C. § 2255 as to the following issues:

1. Whether the district court erred in denying Petitioner's Motion to Vacate Petitioner's conviction, where trial counsel was constitutionally ineffective for failing to seek an interlocutory appeal from the denial of motion for mistrial predicated on "Juror Taint".

2. Whether the district court utilized the wrong legal standard in deciding the claim of ineffective assistance of counsel for failing to file an appeal from the denial of the motion for mistrial, by analyzing prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984), instead of under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).
3. Whether the district court erred in denying Petitioner's claim of ineffective assistance of counsel predicated on counsel's failure to bring to the court's and jury's attention that a prosecution witness had testified falsely in violation of *Giglio v. United States*, 450 U.S. 150 (1972).

I. INTRODUCTION

In this pleading, Border conclusively makes a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), thereby warranting the issuance of a Certificate of Appealability (COA) for appellate review of the district court's denial of appellant's § 2255 motion.

II. PROCEDURAL HISTORY

On December 14, 2012, an indictment was returned in the Western District of Missouri charging Borders with 15 violations of federal law for his involvement in a conspiracy to possess stolen goods in interstate commerce. (D.E. 1.) After indictment, the Government moved to dismiss seven counts of the indictment,

leaving eight counts (D.E. 148, 150). On February 18, 2014, a nine-day jury trial began (D.E. 187).

At the start of the second day of trial, an allegation that one of the jurors was biased against the defendants was raised. (Tr. 87-148.) The allegation was that one of the jurors stated that the defendants were "all guilty." (Tr. 87-88.) A witness to the alleged statement was sworn. (Tr. 90-91.) The witness stated that he was present for moral support for codefendant Reginald Tidwell. (Tr. 91.) The witness stated he addressed two jurors on the elevator and offered congratulations for being selected for the jury. (Tr. 91-92.) One of the jurors allegedly responded with the statement that "they're all guilty." (Tr. 92.) The second juror did not respond to the comment and "rushed off the elevator." (Tr. 94.) The witness stated that the conversation took place at the end of the day. (Tr. 95.)

The court brought the jurors to the courtroom so the witness could identify the jurors present in the elevator. (Tr. 100.) Afterwards, the witness identified the juror who allegedly made the statement they're "all guilty." (Tr. 100-01.) The witness also expanded his testimony and included allegations regarding a third juror. (Tr. 101-02.) The court further inquired about the witness's past criminal history before excusing him. (Tr. 102-03.) After hearing the testimony, another individual related to another one of the defendants confirmed the second

allegation. (Tr. 104.) The court developed a plan of inquiry of the jurors. (Tr. 104-14.)

A juror was questioned by the court and admitted that he made the statement "they're all guilty of something." (Tr. 114-15.) After discussion and further questioning, the juror was dismissed. (Tr. 115-23.) A female juror alleged to have made a statement about guilt denied the allegation, and denied hearing anyone else make statements concerning guilt. (Tr. 123-24.) There was further discussion regarding the female juror. (Tr. 124-27.) The defense attorneys requested a mistrial, based upon the statement of the first juror and that it was purportedly made in front of additional jurors. (Tr. 127.) Defense counsel for Borders joined in the request for mistrial, while other counsel reserved the right to request a mistrial at a later time. (Tr. 127-30.) A separate request for an inquiry of all the jurors individually was also sought. (Tr. 128.)

The court inquired of another defendant's wife for inquiry (Tr. 132-137), dismissed the female juror as a precaution (Tr. 144-45), and admonished the gallery not to have any contact with the jurors. (Tr. 145-46.) The court further questioned the jurors as a group (Tr. 139-40), provided them information about the issues raised (Tr. 146-47), and inquired about statements overheard and the impartiality

of the jurors. The remaining jurors denied making or hearing any statements presuming guilt. (Tr. 147-48.) The jury was then impaneled. (Tr. 148.)

After opening statements, and hearing evidence on the first day of trial, the court again took up the matter regarding the jurors. (Tr. 367-74.) Counsel for Borders requested a mistrial and for the case to be tried in front of a different jury. That request was joined in by the other co-defendants. (Tr. 367-73.) The court denied the request for a mistrial. (Tr. 373-74.) At the conclusion of the nine-day jury trial, Borders was convicted of seven of the eight counts charged. (D.E. 209.) He was found not guilty on Count Sixteen (transportation of stolen goods in interstate commerce). (D.E. 209, 218.) The jury could not reach a verdict regarding defendant Verdie Carr. Reginald Tidwell was found not guilty on all counts. (D.E. 208, 212, 220.) Carr later pled to an information. (D.E. 240- 42.)

On July 31, 2014, a revised presentence investigation report (PSR) was issued. The PSR summarized the offense conduct. (PSR 4-13, ¶¶ 2-26.) The offense conduct included a total loss amount calculation and a list of restitution victims resulting from the crimes. (PSR 10-13, ¶¶ 25-26.) The PSR calculated a base offense level of 6 under United States Sentencing Guidelines (U.S.S.G.) § 2B1.1. (PSR 14, ¶ 33.) The PSR applied a 16-level increase under § 2B1.1(b)(1), based on a loss amount of more than $1 million; a two-level increase under § 2B1.1(b)(2)(A)

because the offense involved more than 10 victims; a two-level increase under § 2B1.1(b)(4) because Borders was in the business of receiving and selling stolen property; a two-level increase under § 2B1.1(b)(10)(C) because the offense involved sophisticated means; a two-level increase under § 2B1.1(b)(13) because the offense involved stealing vehicles or parts, or stealing goods or chattels that are part of a cargo shipment; and a four level increase under § 3B1.1(a), because Borders was an organizer or leader of a criminal activity that involved five or more participants (PSR 14, ¶¶ 34-43.) for a total offense level of 34. (PSR 15, ¶ 45.)

Borders was assessed eight criminal history points, yielding a criminal history category of IV. (PSR 15-20, ¶¶ 48-71.) The advisory Sentencing Guidelines range equaled 210 to 262 months' imprisonment. (PSR 23, ¶¶ 100-101.) Borders objected to the enhancements for sophisticated means and for being an organizer or leader. (PSR Adden. July 31, 2014.) Borders filed a sentencing memorandum, seeking a variance from the advisory Sentencing Guidelines to a range of 77 to 96 months' imprisonment. (D.E. 335.) The sentencing memorandum outlined the factors under 18 U.S.C. § 3553(a) that Borders argued supported the basis for the variance. (D.E. 335.) Borders also filed *pro se* objections to the PSR. (D.E. 349.)

The sentencing memorandum asserted that a cooperating co-defendant lied during the trial, set-forth several objections to portions of the offense conduct, and

requested that the court dismiss the case or order a new trial. (D.E. 349.) On December 8, 2014, Borders appeared before the court for sentencing. (D.E. 350.) The court first took up the objections to the PSR. (Sent. Tr. 4-8, 15-18.) The court overruled Borders' objections, finding that the sophisticated means enhancement applied (Sent. Tr. 5-7), as well as that for an organizer or leader. (Sent. Tr. 7-8.) The court next addressed the *pro se* objections, and agreed with the Government that a defendant is accountable for acts done as part of a conspiracy while incarcerated. (Sent. Tr. 15-18.) The court adopted the Sentencing Guidelines calculations in the PSR and found an advisory Sentencing Guidelines range of 210 to 262 months. (Sent. Tr. 18.)

The Government sought a sentence within the Sentencing Guidelines range. (Sent. Tr. 19.) Defense counsel argued that the § 3553(a) facts that warranted a variance and requested leniency. (Sent. Tr. 19-22.) Borders denied participating in a conspiracy and reasserted his allegations from the *pro se* PSR objections - *i.e.*, that the cooperating witnesses lied during testimony and that he had been incarcerated during specific acts of the conspiracy. (Sent. Tr. 21-22.) The court addressed the § 3553(a) factors it found affected the sentence. (Sent. Tr. 22-25.) The court sentenced Borders to 60 months' imprisonment on count one, 120 months on counts three, four, fourteen, fifteen, and seventeen, concurrent to each

other but consecutive to count one, and 82 months on count twenty-five, consecutive to all other counts, calculating an aggregate sentence of 262 months' imprisonment. (Sent. Tr. 25; D.E. 351.)

Borders requested that a notice of appeal be filed on his behalf, expressing that he desired new counsel for appeal. (Sent. Tr. 27-29.) Borders' appeal raised numerous claims of trial and sentencing error. *United States v. Borders*, 829 F.3d 558 (8th Cir. 2016). As part of that appeal, Borders specifically appealed the total loss amount calculated by the court for sentencing. *Borders,* 829 F.3d at 567-68. This Court noted that this issue had not been properly preserved, and was subject to plain error review, but held that the district court did not err in calculating the loss amount. *Id.* at 568. This Court determined that Borders should be held responsible for any loss reasonably foreseeable, within the scope and in furtherance of the conspiracy, and that losses related to the alteration of vehicle identification numbers (VINs) was properly included. *Id.*

Borders then filed a motion for relief under § 2255 seeking to vacate his conviction and sentence. On January 23, 2018, the district court denied Borders' 28 U.S.C. § 2255 and dismissed the case. (Civ. D.E. 18). The court further declined to issue a certificate of appealability. *Id*.

MEMORANDUM OF LAW

A. Legal Standard

i. Standard of review for certificate of appealibility

A Petitioner must seek a COA if he wishes to appeal to this Court. *See,* Fed. R. App. P. 22(b). Courts will not grant a COA unless the habeas petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also*, *Tiedeman v. Benson,* 122 F.3d 518, 522 (8th Cir. 1997). A COA will not necessarily be granted simply because an appeal is pursued in good faith and raises a non-frivolous issue. *Kramer v. Kemna*, 21 F.3d 305, 307 (8th Cir. 1994) ("[g]ood faith and lack of frivolousness, without more, do not serve as sufficient bases for issuance of a certificate"). Instead, the movant must satisfy a higher standard; he must show that the issues to be raised on appeal are "debatable among reasonable jurists," that different courts "could resolve the issues differently," or that the issues otherwise "deserve further proceedings." *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir.), *cert. denied*, 513 U.S. 946, 115 S. Ct. 355, 130 L. Ed. 2d 309 (1994) (citing *Lozada v. Deeds, 498 U.S. 430,* 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991) (per curiam)).

When a district court grants a COA, it is "inform[ing] the Court of Appeals that the petitioner presents a colorable issue worthy of an appeal." *Kruger v. Erickson*, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam). *See also, Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (granting a COA signifies that the issues raised "'deserve encouragement to proceed further"')(quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n. 4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)[reversed on other grounds]). *Barefoot* summarizes the standard as follows:

> "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"

Id. 463 U.S. at 893 (citations omitted).

Borders has met the governing standard.

ii. The legal standard under *Strickland v. Washington*

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-part test for establishing ineffective assistance of counsel: (1) "that counsel's performance was deficient," defined as "representation [that] fell below an objective standard of reasonableness," and (2) "that the deficient performance

prejudiced the defense" in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668 at 687-88. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

"[I]t is sufficient that a petitioner must show only a reasonable probability that the outcome would have been different; he 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" *Brownlee v. Haley*, 306 F.3d 1043, 1059-60 (11th Cir. 2002)(quoting *Strickland*, 466 U.S. at, 693); see *DeLuca v. Lord*, 77 F.3d 578, 590 (2nd Cir. 1996)("The *Strickland* test does not require certainty that the result would have been different."). "When evaluating this probability, 'a court hearing an ineffectiveness claim must consider the totality of the evidence.'" *Brownlee*, 306 F.3d at 1060 (quoting *Strickland*, 466 U.S. at 695).

iii. The legal standard under *Roe v. Flores-Ortega*

In *Roe v. Flores-Ortega*, the Supreme Court held that *Strickland's* two-prong test for evaluating ineffective assistance of counsel claims provides the appropriate framework for determining whether counsel's failure to file a notice of appeal violates a criminal defendant's Sixth Amendment right to counsel. *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Under the first

prong, requiring the defendant to show that counsel's representation was below the standard of objectively reasonable professional performance, counsel's assistance is unconstitutionally deficient where [he] fails to consult with the defendant about an appeal and there is reason to believe either "(1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* 528 U.S. at 480.

The second prong of the *Strickland* test, requiring actual prejudice, is presumptively satisfied where counsel fails to file an appeal contrary to the express instructions from the defendant to do so, irrespective of whether the defendant has legitimate grounds for an appeal. *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007) (citing *Barger v. United States*, 204 F.3d 1180, 1182 (8th Cir. 2000)); *Flores-Ortega*, 528 U.S. at 485-86; *cf. Peguero v. United States*, 526 U.S. 23, 28, 119 S. Ct. 961, 143 L. Ed. 2d 18 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit.") (internal citation omitted).

B. The district court erred in denying appellant's claim of ineffective assistance of counsel for failing to file an interlocutory appeal where it erroneously analyzed prejudice under *Strickland v. Washington*, 448 U.S. 668 (1984), rather than under *Roe v. Flores-Ortega,* 528 U.S. 470 (200).

The record in this case clearly shows that Borders' trial was tainted by biased jurors who disavowed his presumption of innocence. Prior to opening statements, several jurors expressed opinions regarding the guilt or innocence of Borders and his co-defendants. Prior to hearing any evidence in the case one juror, juror #59:15 stated in an elevator with approximately 7 members of the juror "**They are all guilty of something!"** (Tr. 114-15) (emphasis added). Another juror, in front of all the other jurors, stated **"when they put me on the jury they're all guilty!"** ('Tr. 134) (emphasis added).

These statements were highly incendiary, prejudicial and poisoned the entire jury panel. The jurors who made the statements were dismissed by the court, however, the damage had already been done. There was also a complaint of improper conduct by a third juror who was not identified. When queried by the court regarding the opinions of the rogue jurors, the remaining jurors twice indicated that they did not hear the comments. The truth of the matter is, all the jurors, or at least 7 of them, heard the comments laughed about them and lied to the court about hearing the statements (Tr. 147-149). This means that Borders had

a jury that had at least 7 jurors who were so intimidated by the court they concealed that they had overheard the remarks and who did not come forward when instructed.

In his § 2255 motion, Borders raised the claim that counsel was ineffective for failing to seek interlocutory appeal from the denial of the motion for mistrial based on "Jury Taint". In responding and addressing Borders' claim, the district court adopted the government's position and evaluated the claim under the wrong standard. The court found that counsel was not ineffective because the seeking of an interlocutory appeal would have been futile. (DE#18). By examining whether or not the appeal would have been successful (had counsel pursued it as instructed by appellant), the court engaged in a *Strickland* prejudice analysis. This is contrary to the Supreme Court's ruling in *Flores-Ortega*, which holds that a defendant in Borders' position is not required to show that the appeal would have ultimately prevailed.

In any event, Borders' claim for an interlocutory appeal was not meritless. At least 7 members of the jury were poisoned by the inflammatory and prejudicial statement concerning Borders' guilt and did not come forward as the district court instructed when the jury was impaneled. When questioned by the district court about the inappropriate statements, the jurors denied hearing the statements. Be

it intimidation or fear, the result is the same, the rest of the jury concealed the truth from the court about hearing the statements since the dismissed juror admitted to making the statements while he was standing in a close group with them on the elevator (Tr. 135). Reasonable jurists could debate whether the jurors were truthful with the court about not hearing the statements (when the record suggests that they did), and whether Borders' right to a fair trial was denied based on a tainted jury. Reasonable jurists could further debate whether the district court incorrectly evaluated prejudice under *Strickland*, or whether prejudice should have been presumed under *Flores-Ortega*.

This Court should grant a COA.

C. Whether the district court erred in denying Borders' claim of ineffective assistance of counsel for counsel's failure to make the court aware of a *Giglio* violation.

In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with" due process. *Id*. 405 U.S. at 153. "*Giglio* error, a species of *Brady* error, occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Martin,* 59 F.3d 767, 770

(8th Cir. 1995), quoting *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992), *cert. denied*, 506 U.S. 903, 121 L. Ed. 2d 217, 113 S. Ct. 293 (1992).

In its case in chief, the government called Jacarrd Fears as its key witness against Borders. Fears' testimony was used to tie Borders directly to the conspiracy, thefts and individual crimes. Fears testified that from December 18, 2006, thru July 11, 2007, Borders committed numerous crimes and overt acts in aid of the conspiracy. Fears testified that Borders was at specific locations committing crimes and on particular days when in fact Borders was incarcerated, making it impossible for him to do what Fears testified he did. The government knew that Borders was incarcerated and that Fears was lying.

In denying Borders § 2255 motion, the district court simply adopted the rationale of the government, which was that "[p]utting aside the complained-of Fears testimony, numerous other lay witnesses [. D]ozens of law enforcement officers testified about the truck and trailer conspiracy and Border's various levels of involvement." (DE#18, p.3). However, lay witnesses did not testify against Borders. Witnesses, such as Gary Pipe and John Straus, were called to testify against co-defendant Jon Dickerson. Witness Tommy Eison testified against Borders, but offered no damaging testimony. As a matter of fact, Eison admitted Borders never

sold him any goods. Witnesses Harold Robertson and Myron Pigie also testified against Borders, but their testimony was not substantial.

As to the numerous law enforcement officers, they testified about what they did as part of the investigation and provided "fluff" for the government's case. The officers did not testify as to anything which would profoundly incriminate Borders in the counts of conviction. Without the testimony of Fears, Borders would not have been convicted. Fears' testimony about Borders being present when he was not, was material and central to the jury finding Borders guilty and denied Borders his right to due process under the Fifth Amendment and his right to a fair trial under the Sixth Amendment.

To be entitled to relief on a *Giglio* claim, a finding of materiality is required pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Giglio*, 405 U.S. at 154. This means the defendant must show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. In order to prove a due process violation based on the government's use of false testimony, Borders must show: 1) the government used perjured testimony; 2) the government should have known or knew that the testimony was perjured; and 3) the verdict was reasonably likely

affected by the perjured testimony. *United States v. Bass,* 478 F.3d 948, 950 (8th Cir. 2007). Borders met these requirements in his § 2255 motion.

The record shows that the government in fact knew that Fears' testimony was false and that this testimony was material to Borders' guilt and that the jury credited Fears testimony. Accordingly, Borders was entitled to relief. *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490(1995). Borders has been denied a substantial constitutional right 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *Dansby v. Hobbs*, 766 F.3d 809, 825 (8th Cir. 2014).

Fears was an integral part of the prosecution's case, had his testimony been revealed as false or discredited, more likely than not, Borders would have been acquitted. Borders has shown that he was denied a substantial constitutional right and that reasonable jurists could debate the issue - *i.e.*, that had it been brought to the attention of the jury that Fears had in fact committed perjury and that the government knew about it, Borders, more likely than not, would have been acquitted.

CONCLUSION

Based on the facts, arguments and authorities, Borders has demonstrated that he was denied a substantial constitutional right and that reasonable jurists could further debate the issues.

WHEREFORE, Borders respectfully request that this Court grant him a certificate of appealability on the two issues as outlined in this Request for COA.

Respectfully submitted,

/s/ Robert David Malove
Robert David Malove, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was electronically filed via this Court's CM/ECF filing system on this 26th day of March, 2018, and all parties were effectively served thereby.

/s/ Robert David Malove
Robert David Malove, Esq.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 18-1451

KENNETH RAY BORDERS
Movant/Appellant

v.

UNITED STATES OF AMERICA,
Respondent/Appellee.
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PETITION FOR PANEL REHEARING

Petitioner, Kenneth Ray Borders (hereinafter "Borders"), by and through undersigned counsel, respectfully moves, pursuant to Rule 40, *Fed. R. App. P.*, for a panel rehearing of his denial for a certificate of appealability for his claims under 28 U.S.C.§2255. Petitioner offers the following in support thereof:

FRAP RULE 40 STATEMENT

Pursuant to Fed. R. App. P. 40, the Movant-Appellant Kenneth Ray Borders respectfully petitions this Court for rehearing.

First, rehearing is warranted under FRAP 40 because the panel decision conflicts with decisions of the Supreme Court. In his 28 U.S.C. § 2255 pleading, Border conclusively made a substantial showing of the denial of a constitutional right, 28 U.S.C. § 2253(c)(2), thereby warranting the appellate review of the

district court's denial of appellant's § 2255 motion.

The panel should review their decision because they have either overlooked or misapprehended facts or points of law before allowing the decision to become final, which, if allowed to stand, would be contrary to established law as determined by the United States Supreme Court.

INTRODUCTION

On December 14, 2012, an indictment was returned in the Western District of Missouri charging Borders with 15 violations of federal law for his involvement in a conspiracy to possess stolen goods in interstate commerce. (D.E. 1). After leaving eight counts (D.E. 148, 150). On February 18, 2014, a nine-day jury trial began (D.E. 187).

At the start of the second day of trial, an allegation that one of the jurors was biased against the defendants was raised. (Tr. 87-148.) The allegation was that one of the jurors stated that the defendants were "all guilty." (Tr. 87-88.) A witness to the alleged statement was sworn. (Tr. 90-91.) The witness stated that he was present for moral support for codefendant Reginald Tidwell. (Tr. 91.) The witness stated he addressed two jurors on the elevator and offered congratulations for being selected for the jury. (Tr. 91-92.) One of the jurors allegedly responded with the statement that "they're all guilty." (Tr. 92.) The second juror did not respond to the comment and "rushed off the elevator." (Tr. 94.) The witness stated that the

conversation took place at the end of the day. (Tr. 95.)

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individually was also sought. (Tr. 128.)

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On July 31, 2014, a revised presentence investigation report (PSR) was issued. The PSR summarized the offense conduct. (PSR 4-13, ¶¶ 2-26.) The

offense conduct included a total loss amount calculation and a list of restitution victims resulting from the crimes. (PSR 10-13, ¶¶ 25-26.) The PSR calculated a base offense level of 6 under United States Sentencing Guidelines (U.S.S.G.) § 2B1.1. (PSR 14, ¶ 33.) The PSR applied a 16-level increase under § 2B1.1(b)(1), based on a loss amount of more than $1 million; a two-level increase under § 2B1.1(b)(2)(A) because the offense involved more than 10 victims; a two-level increase under §2B1.1(b)(4) because Borders was in the business of receiving and selling stolen property; a two-level increase under § 2B1.1(b)(10)(C) because the offense involved sophisticated means; a two-level increase under § 2B1.1(b)(13) because the offense involved stealing vehicles or parts, or stealing goods or chattels that are part of a cargo shipment; and a four level increase under § 3B1.1(a), because Borders was an organizer or leader of a criminal activity that involved five or more participants (PSR 14, ¶¶ 34-43.) for a total offense level of 34. (PSR 15, ¶ 45.)

Borders was assessed eight criminal history points, yielding a criminal history category of IV. (PSR 15-20, ¶¶ 48-71.) The advisory Sentencing Guidelines range equaled 210 to 262 months' imprisonment. (PSR 23, ¶¶ 100-101.) Borders objected to the enhancements for sophisticated means and for being an organizer or leader. (PSR Adden. July 31, 2014.) Borders filed a sentencing memorandum, seeking a variance from the advisory Sentencing Guidelines to a range of 77 to 96

months' imprisonment. (D.E. 335.) The sentencing memorandum outlined the factors under 18 U.S.C. § 3553(a) that Borders argued supported the basis for the variance. (D.E. 335.) Borders also filed pro se objections to the PSR. (D.E. 349.)

The sentencing memorandum asserted that a cooperating co-defendant lied during the trial, set-forth several objections to portions of the offense conduct, and requested that the court dismiss the case or order a new trial. (D.E. 349.) On December 8, 2014, Borders appeared before the court for sentencing. (D.E. 350.) The court first took up the objections to the PSR. (Sent. Tr. 4-8, 15-18.) The court overruled Borders' objections, finding that the sophisticated means enhancement applied (Sent. Tr. 5-7), as well as that for an organizer or leader. (Sent. Tr. 7-8.) The court next addressed the pro se objections, and agreed with the Government that a defendant is accountable for acts done as part of a conspiracy while incarcerated.(Sent. Tr. 15-18.) The court adopted the Sentencing Guidelines calculations in the PSR and found an advisory Sentencing Guidelines range of 210 to 262 months.(Sent. Tr. 18.)

The Government sought a sentence within the Sentencing Guidelines range. (Sent. Tr. 19.) Defense counsel argued that the § 3553(a) facts that warranted a variance and requested leniency. (Sent. Tr. 19-22.) Borders denied participating in a conspiracy and reasserted his allegations from the pro se PSR objections - i.e., that the cooperating witnesses lied during testimony and that he had been

incarcerated during specific acts of the conspiracy. (Sent. Tr. 21-22.) The court addressed the § 3553(a) factors it found affected the sentence. (Sent. Tr. 22-25.) The court sentenced Borders to 60 months' imprisonment on count one, 120 months on counts three, four, fourteen, fifteen, and seventeen, concurrent to each other but consecutive to count one, and 82 months on count twenty-five, consecutive to all other counts, calculating an aggregate sentence of 262 months' imprisonment. (Sent. Tr. 25; D.E. 351.)

Borders requested that a notice of appeal be filed on his behalf, expressing that he desired new counsel for appeal. (Sent. Tr. 27-29.) Borders' appeal raised numerous claims of trial and sentencing error. *United States v. Borders*, 829 F.3d 558 (8th Cir. 2016). As part of that appeal, Borders specifically appealed the total loss amount calculated by the court for sentencing. *Borders*, 829 F.3d at 567-68. This Court noted that this issue had not been properly preserved, and was subject to plain error review, but held that the district court did not err in calculating the loss amount. Id. at 568. This Court determined that Borders should be held responsible for any loss reasonably foreseeable, within the scope and in furtherance of the conspiracy, and that losses related to the alteration of vehicle identification numbers (VINs) was properly included. Id.

Borders then filed a motion for relief under § 2255 seeking to vacate his conviction and sentence. On January 23, 2018, the district court denied Borders's

U.S.C. § 2255 and dismissed the case. (Civ. D.E. 18). The court further declined to issue a certificate of appealability. Id. Borders file petition for a certificate of appealability on March 26, 2018 that was ultimately denied by this court on May 31, 2018.

ARGUMENT

Issues 1 & 2

The circuit court has either misapprehended facts and or overlooked points of law contained in Border's claim that counsel failed to file an interlocutory appeal from the denial of a motion for mistrial predicated on "Juror Taint" and the proper standard in which to evaluate that claim. As claimed in his 28 U.S.C. § 2255 motion and his petition for a certificate of appealability. Petitioner averred that the proper standard to determine prejudice was *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Roe v. Flores-Ortega*, the Supreme Court held that *Strickland's* two-prong test for evaluating ineffective assistance of counsel claims provides the appropriate framework for determining whether counsel's failure to file a notice of appeal violates a criminal defendant's Sixth Amendment right to counsel. *Roe v. Flores-Ortega*, 528 U.S. 470,477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).Under the first prong, requiring the defendant to show that counsel's representation was below the standard of objectively reasonable professional performance, counsel's assistance is unconstitutionally deficient where [he] fails to

consult with the defendant about an appeal and there is reason to believe either "(1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interestedinappealing."*Id.*528 U.S.at 480.

The second prong of the *Strickland* test, requiring actual prejudice, is presumptively satisfied where counsel fails to file an appeal contrary to the express instructions from the defendant to do so, irrespective of whether the defendant has legitimate grounds for an appeal. *Watson v. United States*, 493 F.3d960, 964 (8th Cir. 2007)(citing *Barger v. United States*, 204 F.3d 1180, 1182 (8th Cir. 2000));*Flores-Ortega*, 528 U.S. at 485-86; *cf. Peguero v. United States*, 526 U.S. 23, 28, 119 S. Ct. 961, 143 L. Ed. 2d 18 (1999)("[W]hen counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit.") (internal citation omitted).

The lack of any written opinion addressing the denial of this claim insinuates that the presumption of prejudice holding in *Flores-Vega* was not applied in determining the outcome of this proceeding. Therefore, the court has misapprehended facts or completely overlooked a point of law as determined by the United States Supreme Court. A rehearing by the panel is warranted.

Issue 3

The circuit court has either misapprehended facts and or overlooked points of law contained in Border's claim that counsel failed to bring to the court's and jury's attention that a prosecution witness had testified falsely in violation of *Giglio*. In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with" due process. Id. 405 U.S. at 153. "*Giglio* error, a species of Brady error, occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Martin*, 59 F.3d 767, 770 (8th Cir. 1995), quoting *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992), cert. denied, 506 U.S. 903, 121 L. Ed. 2d 217, 113 S. Ct. 293 (1992).

In its case in chief, the government called Jacarrd Fears as its key witness against Borders. Fears' testimony was used to tie Borders directly to the conspiracy, thefts and individual crimes. Fears testified that from December 18, 2006, thru July 11, 2007, Borders committed numerous crimes and overt acts in aid of the conspiracy. Fears testified that Borders was at specific locations committing crimes and on particular days when in fact Borders was incarcerated, making it impossible for him to do what Fears testified he did. The government knew that Borders was incarcerated and that Fears was lying.

The issue was addressed by the district when Borders filed his § 2255 motion by simply adopting the rationale of the government, which was that "[p]utting aside the complained-of Fears testimony, numerous other lay witnesses [D]ozens of law enforcement officers testified about the truck and trailer conspiracy and Border's various levels of involvement." (DE#18, p.3). However, lay witnesses did not testify against Borders. Witnesses, such as Gary Pipe and John Straus, were called to testify against co-defendant Jon Dickerson. Witness Tommy Eison testified against Borders, but offered no damaging testimony. As a matter of fact, Eison admitted Borders never sold him any goods. Witnesses Harold Robertson and Myron Pigie also testified against Borders, but their testimony was not substantial.

As to the numerous law enforcement officers, they testified about what they did as part of the investigation and provided "fluff" for the government's case. The officers did not testify as to anything which would profoundly incriminate Borders in the counts of conviction. Without the testimony of Fears, Borders would not have been convicted. Fears' testimony about Borders being present when he was not was material and central to the jury finding Borders guilty and denied Borders his right to due process under the Fifth Amendment and his right to a fair trial under the Sixth Amendment. Fears was an integral part of the prosecution's case, had his testimony been revealed as false or discredited, more likely than not,

Borders would have been acquitted. Borders has shown that he was denied a substantial constitutional right and that reasonable jurists could debate the issue - i.e., that had it been brought to the attention of the jury that Fears had in fact committed perjury and that the government knew about it, Borders, more likely than not, would have been Acquitted. The lack of any written opinion addressing the denial of this claim demonstrates that the prongs to determine a *Giglio* violation were not applied or that the fact, Fears was the cause of the guilty verdict, was misapprehended.

CONCLUSION

WHEREFORE, Borders respectfully request that this Court grant this Petition for Rehearing and any other relief as deemed necessary by this court in the interest of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was electronically filed via this Court's CM/ECF filing system on this 13th day of July, 2018, and all parties were effectively served thereby.

/s/ Robert David Malove
Robert David Malove, Esq.

No. 18-1451

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

KENNETH RAY BORDERS

Movant-Appellant

v.

UNITED STATES OF AMERICA

Respondent-Appellee

On Appeal from the United States District Court

For the Western District of Missouri

PETITION FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS
AND COROPRATE DISCLOSURE STATEMENT

Kenneth Ray Borders v. United States of America
Case No. 18-1451

Petitioner/Appellant Kenneth Ray Borders files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 8TH Cir. 26.1:

Brown, James E. (Counsel for Co-Defendant Carr)

Carr, Verdi, Jr. (Co-Defendant)

Coonrod, Greg Robert (Assistant United States Attorney)

Dickerson, Jon (Co-Defendant)

Dickerson, Kyle Wayne (Co-Defendant)

Foster, Michael O'Neal (Co-Defendant)

Fredrick, Ryonell Eugene (Co-Defendant)

Hays, Sarah W.(Magistrate Judge)

Johnson, David H. (Counsel for Co-Defendant Tidwell)

Kays, Greg (Chief District Court District Judge)

Maughmer John T. (Magistrate Judge)

McCauley, Alex Scott (Defense Counsel)

Meiners, William L. (Assistant United States Attorney)

Piggie, Myron (Co-Defendant)

Robertson, Harold (Co-Defendant)

Tidwell, Reginald Shawn (Co-Defendant)

Turner, Christopher Dwight (Co-Defendant)

White, Patrick F. (Counsel for Co-Defendant J. Dickerson)

White, Ryan M. (Counsel for Co-defendant K. Dickerson)

Woolery, Lucinda (Assistant United States Attorney)