

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-2137

Luciano Camberos-Villapuda

Plaintiff - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:17-cv-04161-KES)

JUDGMENT

Before BENTON, WOLLMAN, and KOBES, Circuit Judges.

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

October 31, 2019

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

/s/ Michael E. Gans

United States Court of Appeals

For The Eighth Circuit

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October 31, 2019

Mr. Luciano Camberos-Villapuda
U.S. PENITENTIARY
13550-273
AUSP Thomson
P.O. Box 1002
Thomson, IL 61285

RE: 19-2137 Luciano Camberos-Villapuda v. United States

Dear Mr. Camberos-Villapuda:

Enclosed is a copy of the dispositive order entered today in the referenced case.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the time set by FRAP 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Pro se petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Michael E. Gans
Clerk of Court

JPP

Enclosure(s)

cc: Ms. Stephanie Carlson Bengford
Mr. Kevin Koliner
Mr. Matthew W. Thelen

District Court/Agency Case Number(s): 4:17-cv-04161-KES

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

LUCIANO CAMBEROS-VILLAPUDA,
Movant,
vs.
UNITED STATES OF AMERICA,
Respondent.

4:17-CV-04161-KES

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DISMISSING MOTION

Movant, Luciano Camberos-Villapuda, filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Docket 1.¹ The government now moves to dismiss the petition for failure to state a claim. Docket 8. The matter was referred to United States Magistrate Judge Veronica L. Duffy under 28 U.S.C. § 636(b)(1)(B) and this court's October 16, 2014 standing order. Magistrate Judge Duffy recommends that Camberos-Villapuda's motion be dismissed. Docket 15. Because Camberos-Villapuda did not timely file his objections, the court issued an order that adopted the report and recommendation, granted the motion to dismiss, and entered judgment in favor of the United States. Dockets 19, 20. After the court entered its judgment, Camberos-Villapuda filed his objections to the report and recommendation. Docket 21. The court will now consider these objections.

¹ Within this opinion the court cites to documents in Camberos-Villapuda's civil habeas case by simply citing the court's docket number for that document. The court will cite to "Cr." when citing to documents filed in Camberos-Villapuda's criminal case found at 4:13-40104-01-KES.

FACTUAL BACKGROUND

A full factual background was provided by the magistrate judge in her report and recommendation. Docket 15. Therefore, this court will only give a simple explanation and points to the magistrate judge's report and recommendation for the full background.

A jury found Camberos-Villapuda guilty of conspiracy to distribute methamphetamine. *See United States v. Camberos-Villapuda*, Cr. 13-40104-01-KES, Docket 80. The district court sentenced him to a life imprisonment. Cr. Docket 112. Camberos-Villapuda appealed, and the Eighth Circuit Court of Appeals affirmed his conviction. *See United States v. Camberos-Villapuda*, 832 F.3d 948 (8th Cir. 2016). Michael Butler represented Camberos-Villapuda during the motion to suppress hearing but withdrew after the hearing. Cr. Dockets 16, 29, 35. Cesar Juarez represented Camberos-Villapuda at trial, sentencing, and during his appeal. Cr. Dockets 48, 72, 111, 117.

On November 20, 2017, Camberos-Villapuda filed a *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Docket 1. First, Camberos-Villapuda alleged that his trial counsel was ineffective in failing to preserve a record of jury selection strikes and for-cause challenges, and Camberos-Villapuda demonstrated that he had a legitimate expectation of privacy in the searched location. *Id.* at 4. Second, Camberos-Villapuda alleged that the district court erred in denying his motion to suppress the physical evidence. *Id.* Third, Camberos-Villapuda alleged that the district court committed plain error when it relied on the facts recited in the Presentence

Investigation Report. *Id.* Last, Camberos-Villapuda alleged that “the district court imposed a procedurally and substantively unreasonable sentence in violation of 18 U.S.C. § 3553.” *Id.* at 5.

STANDARD OF REVIEW

The court’s review of a magistrate judge’s report and recommendation is governed by 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. The court reviews *de novo* any objections to the magistrate judge’s recommendations with respect to dispositive matters that are timely made and specific. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). In conducting its *de novo* review, this court may then “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1); *United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

DISCUSSION

I. Ineffective Assistance of Counsel

A. Legal Standard

Camberos-Villapuda’s first claim involves his Sixth Amendment right to effective assistance of counsel. Docket 1. In order to establish ineffective assistance of counsel, a petitioner must meet the two-pronged standard articulated by the United States Supreme Court in *Strickland v. Washington*. See 466 U.S. 668, 687 (1984). “First, the [petitioner] must show that counsel’s performance was deficient.” *Id.* This “performance prong” requires a petitioner to show that counsel’s representation was deficient and “fell below an objective standard of reasonableness.” *Id.* at 687-88. To show deficiency, a petitioner

must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Ragland v. United States*, 756 F.3d 597, 599-600 (8th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687). This court must assess “whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland*, 466 U.S. at 688.

There is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). “Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. Ordinarily, the Eighth Circuit Court of Appeals “consider[s] strategic decisions to be virtually unchallengeable unless they are based on deficient investigation.” *Worthington v. Roper*, 631 F.3d 487, 500 (8th Cir. 2011) (quoting *Link v. Luebbers*, 469 F.3d 1197, 1204 (8th Cir. 2006)). The court “generally entrust[s] cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel.” *United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2011) (quoting *United States v. Villalpando*, 259 F.3d 934, 939 (8th Cir. 2001)).

“Second, the [petitioner] must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. This “prejudice prong”

requires the petitioner to “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.* In other words, “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Thus, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691.

B. Camberos-Villapuda’s Objections and New Allegations

In his original motion, Camberos-Villapuda alleged that his counsel was ineffective because “Camberos[] demonstrated that he possessed a legitimate expectation [sic] of privacy in the location searched, he never abandoned the interest of his home or expedition and/or the circumstances.” Docket 1 at 4. Magistrate Judge Duffy found Camberos-Villapuda did not establish *Strickland* prejudice because the Eighth Circuit Court of Appeals set aside Camberos-Villapuda’s argument—unlawful entry of the curtilage—in favor of an alternative holding that Camberos-Villapuda did not have a legitimate expectation of privacy in the home or the SUV. Docket 15 at 17. She reasoned that the curtilage issue was considered moot because “[e]ven if errors were made, the Eighth Circuit held Mr. Camberos-Villapuda had no right to complain about the errors.” *Id.*

In his objections to Magistrate Judge Duffy’s report and recommendation, Camberos-Villapuda states Magistrate Judge Duffy erred

because she failed to consider whether the officer's entrance into the curtilage was lawful. Docket 21 at 1. Camberos-Villapuda's objection is based on two new allegations of counsel's errors. Camberos-Villapuda alleges his counsel erred by: (1) failing to preserve an issue during the pretrial suppression hearing, and (2) failing to object to the magistrate judge's report and recommendation for his motion to suppress. *Id.* at 2.

Camberos-Villapuda argues that counsel's inaction prejudiced him in four ways: (1) it allowed the court to overlook whether law enforcement's entry into the curtilage was unlawful; (2) the record is silent as to what constitutes exigent circumstances; (3) only his expectation of privacy was analyzed; and (4) if the Fourth Amendment issue would have fully been adjudicated, then the firearm would have been suppressed and he would not have received the two-point firearm enhancement at his sentencing. *Id.* at 2, 7.

"If the defendant cannot prove prejudice, [the court] need not address whether counsel's performance was deficient." *DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000). Here, Camberos-Villapuda cannot establish actual prejudice as required for an ineffective assistance of counsel claim.

First, counsel's failure to preserve the issue and to object to the motion to suppress report and recommendation did not lead the court to "overlook" the curtilage argument, as alleged by Camberos-Villapuda. Docket 21 at 2. All three courts—the Eighth Circuit, the district court, and the magistrate court—considered or analyzed Camberos-Villapuda's argument about the lawfulness of the officer's entry into the curtilage. See *Camberos-Villapuda*, 832

F.3d at 952; Cr. Docket 40 at 5-9; Cr. Docket 50; Docket 15 at 16. The Eighth Circuit considered the curtilage issue on appeal and chose not to determine the issue. *See Camberos-Villapuda*, 832 F.3d at 952.

Second, Camberos-Villapuda alleges he was prejudiced because the record is silent as to what constitutes exigent circumstances. Docket 21 at 2. But such prejudice does not exist because the record contains this analysis. In denying his motion to suppress, the district court adopted the magistrate judge's report and recommendation that held the search of the home was justified by the exigent circumstances exception. Cr. Docket 50 (adopting Cr. Docket 40). The magistrate judge listed two facts to support the application of the exigent circumstances exception. *See* Cr. Docket 40 at 10-11. Magistrate Judge Duffy also discussed the district court's analysis on this issue in her report and recommendation for Camberos-Villapuda's § 2255 case. Docket 15 at 15. Magistrate Judge Duffy did not have to provide an independent analysis of the curtilage in her report and recommendation because the Eighth Circuit had already rejected that argument in Camberos-Villapuda's appeal. *See Camberos-Villapuda*, 832 F.3d at 952.

Third, Camberos-Villapuda alleges that he was prejudiced because his claim was reviewed "under partial conclusion." Docket 21 at 2. He contends his expectation of privacy was the only argument analyzed. *Id.* The record does not support this objection. The magistrate judge discussed the curtilage issue in its report and recommendation for the motion to suppress. Cr. Docket 40 at 10-11. Also, the Eighth Circuit discussed the curtilage issue, although they did

not determine whether the officer's entry into the curtilage was lawful. *See Camberos-Villapuda*, 832 F.3d at 952. The Eighth Circuit reasoned that Camberos-Villapuda's abandonment of the property, and therefore, lack of an expectation of privacy, "independently legitimated" the subsequent searches." *Id.* (quoting *United States v. Liu*, 180 F.3d 957, 961 (8th Cir. 1999)).

Additionally, in her habeas report and recommendation, Magistrate Judge Duffy did not limit her analysis to Camberos-Villapuda's expectation of privacy; she also discussed his curtilage argument. *See* Docket 15 at 16-17. She stated the curtilage issue was irrelevant because the Eighth Circuit rejected that argument and made an alternative holding. *Id.* at 17. Because the Eighth Circuit based its holding on Camberos-Villapuda's lack of an expectation of privacy, Magistrate Judge Duffy reiterated the Eighth Circuit's holding that Camberos-Villapuda did not have standing to complain of any errors, like the lawfulness of the entry onto the curtilage. *Id.* Thus, the analysis by Magistrate Judge Duffy was in line with the Eighth Circuit's decision on this issue. Any additional analysis by her would have been unnecessary because the court is bound by the Eighth Circuit's decision.

Camberos-Villapuda's final alleged prejudice is that he received a two-level firearm enhancement in his advisory guideline range based on the firearm found in the vehicle. Docket 21 at 7. Camberos-Villapuda alleges that had the Fourth Amendment issue been fully adjudicated, the firearm would have been suppressed and would not have been used to enhance his sentence. *Id.* There is no actual prejudice because the two-point firearm enhancement had no

implication on Camberos-Villapuda's sentence of life imprisonment. He received a life sentence based on 21 U.S.C. § 841(b)(1)(A) that mandates a life sentence if the defendant has two or more prior convictions for felony drug offenses. Here, the government filed the required information about the two prior convictions, and at the sentencing hearing, Camberos-Villapuda admitted to them. Cr. Docket 118 at 4-5 (sentencing hearing transcript). Thus, even if the firearm was suppressed, Camberos-Villapuda cannot establish actual prejudice because there is no probability that the outcome would have been different because Camberos-Villapuda still faced a mandatory life sentence.

Additionally, Camberos-Villapuda's ineffective assistance of counsel claims are based on an issue decided on appeal by the Eighth Circuit. See *Camberos-Villapuda*, 832 F.3d at 952. Camberos-Villapuda does not expressly state what issue counsel failed to preserve or which sections of the report and recommendation counsel should have objected to, but rather refers the court to a paragraph contained in the report and recommendation where Magistrate Judge Duffy summarizes the Eighth Circuit's opinion. See Docket 15 at 16. The court assumes that Camberos-Villapuda seeks to challenge the same evidence in this motion, specifically, the physical evidence found in the home and vehicle. *McNeill v. United States*, 2002 WL 1764000, at *3 (D. Minn. July 26, 2002) (citing *English v. United States*, 998 F.2d 609, 613 (8th Cir. 1993)). In its opinion, the Eighth Circuit adopted part of the district court's analysis and upheld the admission of the evidence and set aside Camberos-Villapuda's curtilage argument. *Camberos-Villapuda*, 832 F.3d at 952. Because this issue

has already been addressed on direct appeal, it cannot be raised again in this motion. *Sun Bear v. United States*, 644 F.3d 700, 702 (8th Cir. 2011) (stating § 2255 cannot be used to relitigate matters decided on direct appeal).

Overall, all of Camberos-Villapuda's objections and allegations pertain to the Fourth Amendment issue that was decided by the Eighth Circuit. Additionally, because Camberos-Villapuda cannot show actual prejudice, he is not able to establish a claim for ineffective assistance of counsel. Thus, the court overrules Camberos-Villapuda's objections. His ineffective assistance of counsel claim is dismissed.

II. Fourth Amendment Argument

Camberos-Villapuda objects to Magistrate Judge Duffy's report and recommendation as it pertains to the Fourth Amendment issue. Camberos-Villapuda argues that the issue about the warrantless entry into the curtilage under the exigent circumstances exception was not fully adjudicated. Docket 21 at 2. Camberos-Villapuda makes two objections to the report and recommendation. First, Camberos-Villapuda alleges the Eighth Circuit failed to provide what facts constituted exigent circumstances. *Id.* at 2-3. Second, Camberos-Villapuda alleges Magistrate Judge Duffy failed to consider whether the officers' entry onto the curtilage was lawful under *Collins v. Virginia*, 138 S. Ct. 1663 (2018). *Id.* at 1-2.

A. Legal Standard

A § 2255 motion is the "statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir.

1987). A federal prisoner may seek relief from his sentence on the grounds that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255; *see also Hill v. United States*, 368 U.S. 424, 426-27 (1962). Relief may be granted under § 2255 only for “transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.” *Walking Eagle v. United States*, 742 F.3d 1079, 1082-83 (8th Cir. 2014) (internal quotation omitted).

“With rare exceptions, § 2255 may not be used to relitigate matters decided on direct appeal.” *Sun Bear*, 644 F.3d at 702. One of these rare exceptions is when the error constitutes a “a fundamental defect which inherently results in a complete miscarriage of justice[.]” *Davis v. United States*, 417 U.S. 333, 346 (1974) (quoting *Hill*, 368 U.S. at 428). Another exception exists when the petitioner provides convincing new evidence of actual innocence. *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001).

B. Eighth Circuit Opinion

In his objections to Magistrate Judge Duffy’s report and recommendation, Camberos-Villapuda argues the Eighth Circuit erred in its opinion because the court did not state what constituted exigent circumstances. Docket 21 at 2. Camberos-Villapuda discusses a section of the Eighth Circuit’s opinion where the court summarizes the district court’s

holding. *See Camberos-Villapuda*, 832 F.3d at 951. Camberos-Villapuda states the Eighth Circuit was silent on whether the officers' actions were permissible under the Fourth Amendment. Docket 21 at 3. He states that Magistrate Judge Duffy "admitted" that the Eighth Circuit did not apply a test or address the curtilage argument. *Id.* at 6.

Camberos-Villapuda is correct that the Eighth Circuit did not determine whether the entry of the curtilage was lawful. *See Camberos-Villapuda*, 832 F.3d at 952. Instead, the Eighth Circuit affirmed the district court's denial of Camberos-Villapuda's motion to suppress based on Camberos-Villapuda's abandonment of the house and vehicle and concluded he had no expectation of privacy. *Id.* (citing *Liu*, 180 F.3d at 960 ("When a person abandons his [property], his expectation of privacy in the property is so eroded that he no longer has standing to challenge a search of the luggage on Fourth Amendment grounds.")).

Camberos-Villapuda is arguing that the Eighth Circuit erred in its opinion. Camberos-Villapuda's alleged error is an error this court cannot correct. If Camberos-Villapuda did not like the outcome of his appeal to the Eighth Circuit, he could have asked the Supreme Court of the United States to grant a petition for review by writ of certiorari. The court overrules this objection.

C. Magistrate Judge's Report and Recommendation

Camberos-Villapuda objects to Magistrate Judge Duffy's discussion on the Fourth Amendment issue, specifically the entry of the curtilage. Docket 21

at 1-4. He makes three objections to the report and recommendation. First, he contends that Magistrate Judge Duffy erred when she did not identify what constituted exigent circumstances. Docket 21 at 2. Second, he contends that Magistrate Judge Duffy failed to consider whether the officers' entry into the curtilage was lawful under *Collins v. Virginia*, 138 S. Ct. 1663 (2018). *Id.* at 1. Third, he contends that Magistrate Judge Duffy erroneously used "after-the-facts" events to justify the entry of the curtilage under the exigent circumstances exception. *Id.* at 4.

When the court looks at all of Camberos-Villapuda's objections, the court views them as an attempt by Camberos-Villapuda to have the court readdress the Fourth Amendment issue that was raised and decided on Camberos-Villapuda's direct appeal to the Eighth Circuit. *See Camberos-Villapuda*, 832 F.3d at 952. All three of these objections relate to the curtilage entry issue, the exact issue the Eighth Circuit specifically stated it would not determine. *See id.* ("But we need not determine whether the entry was lawful[.]"). Instead, the Eighth Circuit based its decision on the holding that Camberos-Villapuda's disavowal of any interest in the property, legitimized any subsequent searches. *Id.* Because his claims were already raised on direct appeal, they cannot be reasserted in his § 2255 petition. *Wiley*, 245 F.3d at 752; *United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000).

The Eighth Circuit's holding had a "trickle down" effect. Magistrate Judge Duffy's report and recommendation encompasses that decision; her statement that the curtilage argument was moot is in line with the Eighth Circuit's setting

aside of the argument. Therefore, all these objections to the report and recommendation, as it relates to the curtilage issue, are really an attack on the Eighth Circuit's decision. Camberos-Villapuda cannot use his § 2255 motion as a brief to provide new arguments to address the curtilage issue or as an appeal of the Eighth Circuit's decision.

Additionally, Camberos-Villapuda cannot overcome the procedural bar because neither of the two exceptions are applicable. First, Camberos-Villapuda's "constitutional claim is not so different from other constitutional claims that the miscarriage-of-justice exception to the finality rule ought to be extended to him." *Wiley*, 245 F.3d at 752. Second, Camberos-Villapuda has presented no new evidence that he is actually innocent. *See id.* Thus, this claim is procedurally barred.

Even if this claim was not barred, it would fail on the merits. His first objection to the report and recommendation is that Magistrate Judge Duffy did not consider the curtilage issue. But, as discussed in greater detail above, Magistrate Judge Duffy considered and discussed the curtilage issue as it related to the ineffective assistance of counsel claim. Docket 15 at 15-17. Magistrate Judge Duffy did not have to provide a detailed analysis on whether exigent circumstances justified the entry of the curtilage because the Eighth Circuit had already set aside that argument. *See Camberos-Villapuda*, 832 F.3d at 952. The court overrules this objection.

Camberos-Villapuda's second objection alleges that Magistrate Judge Duffy erred when she did not analyze the curtilage issue under *Collins v.*

Virginia, 138 S. Ct. 1663 (2018). Docket 21 at 1. In his objections, Camberos-Villapuda discusses how *Collins* controls the search conducted in this case. *Id.* at 5-6. A petitioner may be entitled to a new hearing on his § 2255 motion, even when a “prior determination was made on direct appeal from the applicant’s conviction . . . ‘if new law has been made . . . since the trial and appeal.’” *Davis*, 417 U.S. at 342 (quoting *Kaufman v. United States*, 394 U.S. 217, 230 (1969)).

Here, Camberos-Villapuda’s reliance on *Collins* is misplaced. In *Collins*, the Supreme Court of the United States held “that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein.” *Collins*, 138 S. Ct. at 1675. Though “new law,” *Collins* is distinguishable from the present case. Here, the Eighth Circuit’s decision was based on abandonment of property and expectation of privacy, not the automobile exception. Thus, *Collins* does not control. See *Reddest v. United States*, No. 5:14-CV-05077-KES, 2015 WL 5577197, at *5 (D.S.D. Sept. 22, 2015) (holding the petitioner’s “new law” dealt with a restitution issue that had no relevance to any of the petitioner’s complaints); *Chantharath v. United States*, No. 4:13-CV-04117-KES, 2014 WL 6680660, at *4 (D.S.D. Nov. 25, 2014) (holding the petitioner’s claim was procedurally defaulted and “based solely on legal authority that does not apply to his situation and consequently would not entitle him to relief.”). Overall, Magistrate Judge Duffy did not err when she did not discuss *Collins* in her report and recommendation. The court overrules Camberos-Villapuda’s objection.



Third, Camberos-Villapuda objects to the report and recommendation because he argues that “after the facts” events were erroneously used to justify the exigent circumstances exception. Docket 21 at 4. Camberos-Villapuda argues the court improperly used the officer’s initial observations and the knock and talk exception, and therefore, the exigent circumstance exception cannot apply here. *Id.* Camberos-Villapuda attempts to attribute this alleged error to Magistrate Judge Duffy’s report and recommendation; however, the section cited by Camberos-Villapuda is Magistrate Judge Duffy’s summary of the district court’s holding in its motion to suppress order. Docket 21 at 4 (citing Docket 15 at 15). The court construes this objection to be an alleged error of the district court’s opinion when it denied Camberos-Villapuda’s motion to suppress (Cr. Docket 40). In her report and recommendation, Magistrate Judge Duffy did not provide an analysis of the exigent circumstances except in her summary of the district court’s holding. Nor did she provide any case law to bolster the district court’s original motion to suppress holding that was based on the exigent circumstances. *See* Docket 15 at 16-19, 22. The court overrules this objection.

Overall, all of Camberos-Villapuda’s Fourth Amendment claims are procedurally barred as they were raised and decided on a direct appeal. Camberos-Villapuda’s objections are overruled.

III. Firearm Enhancement

In his objections to the report and recommendation, Camberos-Villapuda included a new complaint. He contends that he should not have received a two-

level increase to his base offense level during sentencing for the firearm found in the vehicle. Docket 21 at 7-8 (referencing Cr. Docket 96 at 11). In his presentence investigation report (PSR) (Cr. Docket 96), Camberos-Villapuda received a two-level increase to his base offense under the “Specific Offense Characteristic” section. (*Id.* ¶ 39). The PSR stated the two-level increase was applied because law enforcement located a .380 handgun in the vehicle on which Camberos-Villapuda was working. *Id.* (citing U.S.S.G. § 2D1.1(b)(1)).

Camberos-Villapuda alleges that the district court erroneously applied a preponderance of the evidence standard in finding the firearm was found in the vehicle. Docket 21 at 8. He states an *Alleyne* issue should have been raised, but was not, because the firearm’s presence was a fact that increased the penalty of the crime beyond the “mandatory minimum” and needed to be submitted to the jury. *Id.* at 7-8 (citing *Alleyne v. United States*, 570 U.S. 99, 111-12 (2013)).

“A § 2255 petition is not a second direct appeal and issues raised for the first time in a § 2255 petition are procedurally defaulted.” *Meeks v. United States*, 742 F.3d 841, 844 (8th Cir. 2014). When a petitioner asserts a claim that is procedurally defaulted, the claim can only proceed if the petitioner can show either that the procedural default should be excused because (1) there was both cause for the default and actual prejudice to the petitioner or (2) because the petitioner can show actual innocence. *McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)).

Camberos-Villapuda already appealed the constitutionality of his life sentence under the Eighth Amendment. *Camberos-Villapuda*, 832 F.3d at 952-53. The Eighth Circuit upheld his sentence as constitutional. *Id.* On appeal, Camberos-Villapuda did not make an *Alleyne* argument. Because he failed to raise this issue on direct appeal, his complaint is procedurally defaulted. See *Auman v. United States*, 67 F.3d 157, 160-61 (8th Cir. 1995); *Melendez-Rocha v. United States*, No. 4:13-CV-04102-LLP, 2014 WL 10968207, at *10 (D.S.D. Nov. 24, 2014), report and recommendation adopted, 2016 WL 67694 (D.S.D. Jan. 5, 2016).

Also, Camberos-Villapuda cannot overcome the procedural default because neither of the exceptions apply. Camberos-Villapuda has not alleged actual innocence in his motion or objections. See Dockets 1, 21. As to the other exception, Camberos-Villapuda alleges that there is cause for the default and actual prejudice. Docket 21 at 7. He states he “could should [sic] have, but fail [sic] to raise an *Alleyne* [sic] issue.” *Id.* The court, however, does not find any prejudice occurred as there was no *Alleyne* violation. *Alleyne* is not applicable to Camberos-Villapuda’s sentence because the firearm enhancement did not increase his sentence’s maximum or minimum. As discussed in the ineffective assistance of counsel analysis, the two-point firearm enhancement had no impact on Camberos-Villapuda’s sentencing. He was already facing a mandatory life sentence based on his two prior convictions. Because Camberos-Villapuda cannot show actual innocence or cause and prejudice, the court finds that Camberos-Villapuda’s claim is procedurally defaulted.

Even if his claim was not procedurally defaulted, it would still fail on its merits. “A district court can ‘take account of factual matters not determined by a jury and . . . increase the sentence in consequence.’” *United States v. Cordy*, 560 F.3d 808, 817 (8th Cir. 2009) (quoting *Rita v. United States*, 551 U.S. 338, 352 (2007)). For example, “[a] district court can give a two-level sentence enhancement if it finds, by a preponderance of the evidence, that the defendant possessed or used a weapon during the commission of an offense.” *United States v. Fladten*, 230 F.3d 1083, 1086 (8th Cir. 2000) (citing U.S.S.G. § 2D1.1(b)(1)). But if a fact, other than a prior conviction, raises the statutory minimum and maximum penalty, it must be proven by a jury beyond a reasonable doubt. *Alleyne*, 570 U.S. at 111-12 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 484, 490 (2000)).

Here, the district court properly used the preponderance of the evidence standard in determining the presence of the firearm because the firearm did not increase the minimum or maximum sentence. Then, based on that finding, the court correctly gave Camberos-Villapuda a two-level increase under the advisory Sentencing Guidelines. U.S.S.G. § 2D1.1(b)(1). As noted above, there was no *Alleyne* violation because the firearm’s presence did not increase the statutory minimum or maximum penalty Camberos-Villapuda faced, as he was already facing a mandatory life sentence.

There are two facts that increased Camberos-Villapuda’s sentence. First, the quantity of methamphetamine increased his mandatory minimum; it was submitted to the jury and proven beyond a reasonable doubt. See Cr. Docket

80 (jury verdict) (finding 500 grams or more of a mixture or substance containing methamphetamine was involved in the conspiracy). Second, his two prior convictions increased his sentence to a mandatory life imprisonment. 21 U.S.C. § 841(b)(1)(A). *See Alleyne* and *Apprendi* do not require that prior convictions be submitted to the jury. *Alleyne*, 570 U.S. at 111-12; *Apprendi*, 530 U.S. at 490. Based on the information filed by the government, Camberos-Villapuda admitted to the two prior convictions of felony drug offenses at his sentencing hearing. Cr. Docket 58; Cr. Docket 118 at 4-5; 21 U.S.C. § 851(a). Thus, there was no *Alleyne* violation by the district court. The court dismisses Camberos-Villapuda's claim that the district court violated his constitutional rights when it applied the firearm enhancement.

IV. Evidentiary Hearing

A court must order an evidentiary hearing “[u]nless the motion and files and records of the case conclusively show that the [petitioner] is entitled to no relief[.]” 28 U.S.C. § 2255(b); *see also Thomas v. United States*, 737 F.3d 1202, 1206 (8th Cir. 2013) (“Evidentiary hearings . . . are preferred, and the general rule is that a hearing is necessary prior to the motion’s disposition if a factual dispute exists.”). Affidavits of a petitioner’s trial counsel can be included as part of the files and records of the case. *Thomas*, 737 F.3d at 1207. But a petition may be denied without a hearing if “(1) the petitioner’s allegations, accepted as true, would not entitle the petitioner 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 (8th Cir. 1995) (citations omitted).

The government contends that Camberos-Villapuda’s petition should be dismissed without first holding a hearing. Docket 9 at 14. Camberos-Villapuda disagrees. Docket 21 at 9. The court finds that it can dismiss Camberos-Villapuda’s petition without a hearing because Camberos-Villapuda’s allegations, even if accepted as true, would not entitle him to relief. Here, the “files and records . . . conclusively show that [Camberos-Villapuda] is entitled to no relief” for his claims. 28 U.S.C. § 2255(b). Thus, because the file and records of this case conclusively show that Camberos-Villapuda is not entitled to § 2255 relief, the request for an evidentiary hearing is denied.

CERTIFICATE OF APPEALABILITY

When a district court denies a petitioner’s § 2255 motion, the petitioner must first obtain a certificate of appealability before an appeal of that denial may be entertained. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). This certificate may be issued “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(2). A “substantial showing” is one that demonstrates “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Stated differently, “[a] substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Camberos-Villapuda has not made a

substantial showing that his claims are debatable among reasonable jurists, that another court could resolve the issues raised in his claims differently, or that a question raised by his claims deserves additional proceedings. Thus, a certificate of appealability is not issued.

CONCLUSION

Thus, it is ORDERED

1. Camberos-Villapuda's objections to the report and recommendation (Docket 21) are overruled.
2. The report and recommendation (Docket 15) is adopted in full as supplemented herein.
3. Respondent's motion to dismiss (Docket 8) is granted.
4. Camberos-Villapuda's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Docket 1) is dismissed without an evidentiary hearing.
5. The court's previous order (Docket 19) and judgment (Docket 20) are replaced by this order and accompanying judgment.
6. A certificate of appealability is denied.

DATED May 7, 2019.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

LUCIANO CAMBEROS-VILLAPUDA,
Movant,
vs.
UNITED STATES OF AMERICA,
Respondent.

4:17-CV-04161-KES

REPORT & RECOMMENDATION

INTRODUCTION

Movant, Luciano Camberos-Villapuda, has filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. See Docket No. 1.¹ Now pending is a motion by respondent the United States of America (“government”) to dismiss all of Mr. Camberos-Villapuda’s claims. See Docket No. 8. Mr. Camberos-Villapuda resists the motion. See Docket No. 14. This matter has been referred to this magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) and the October 16, 2014, standing order of the Honorable Karen E. Schreier, United States District Judge. The following is this court’s recommended disposition of the government’s motion.

¹ Within this opinion the court cites to documents in Mr. Camberos-Villapuda’s civil habeas case by simply citing the court’s docket number for that document. Documents filed in his criminal case will be cited “CR” followed by the docket number from the criminal case.

FACTS

A. Background

Mr. Camberos-Villapuda was charged in an indictment with conspiracy to distribute a controlled substance. See United States v. Camberos-Villapuda, CR No. 13-40104 (hereinafter “CR”), Docket No. 1. He made his initial appearance on December 2, 2013, at which time Patrick Schroeder was appointed as counsel for Mr. Camberos-Villapuda. See CR Docket No. 7. Upon receiving discovery, Mr. Schroeder discovered a conflict of interest and moved to withdraw from the case. CR Docket 15. Attorney Michael Butler was appointed as substitute counsel on January 8, 2014. CR Docket 16.

Mr. Butler filed a motion to suppress certain physical evidence and statements on July 23, 2014. CR Docket 23. An evidentiary hearing was held on August 5, 2014, and a report and recommendation to partially grant the motion was submitted to the district court. CR Docket 29-30, 33 & 40. On September 11, 2014, the district court adopted the report and recommendation, granted the motion in part, and denied the balance of the motion. CR Docket 50.

On August 14, 2014, attorney Michael Butler filed a motion to withdraw based on a conflict of interest. CR Docket 35. The motion was granted and attorney Cesar Juarez was appointed as substitute counsel on August 19, 2014. CR Docket 48.

A jury trial was held March 23-26, 2015. CR Docket 72-81. The jury found Mr. Camberos-Villapuda guilty of conspiracy to distribute 500 grams or

more of a mixture or substance containing a detectable amount of methamphetamine. CR Docket 80.

A presentence investigation report was prepared and defense counsel filed objections on behalf of Mr. Camberos-Villapuda. CR Docket 86, 95-97 & 109-110. A sentencing memorandum was also submitted to the court. CR Docket 98. The government filed its notice of intent to seek increased punishment based upon Mr. Camberos-Villapuda's prior convictions for felony drug offenses. CR Docket 58, 104. Sentencing occurred on October 5, 2015. Mr. Camberos-Villapuda was sentenced to life imprisonment. CR Docket 111-114.

Mr. Camberos-Villapuda filed a direct appeal. CR Docket 114. On appeal, Mr. Camberos-Villapuda raised two issues: (1) whether the district court erred in denying his motion to suppress physical evidence from the Denver, Colorado, search; and (2) whether the imposition of a life sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. United States v. Camberos-Villapuda, 832 F.3d 948, 949 (8th Cir. 2016). The Eighth Circuit affirmed his conviction on August 12, 2016. Id.

B. Mr. Camberos-Villapuda's § 2255 Motion

Mr. Camberos-Villapuda filed his current motion to vacate, correct or set aside his sentence on November 20, 2017. See Docket No. 1. In his motion Mr. Camberos-Villapuda alleges four grounds for relief:

1. His trial counsel was cumulatively ineffective;
2. The district court erred in denying his motion to suppress physical evidence as a result of illegal seizure of person and property.

3. The district court committed plain error when it relied solely on the facts recited in the presentence investigation report.
4. The district court imposed a procedurally and substantively unreasonable sentence in violation of 18 U.S.C. § 3553.

The government now moves to dismiss each of Mr. Camberos-Villapuda's claims for relief. See Docket Nos. 8 & 9. Mr. Camberos-Villapuda resists the motion. See Docket No. 14.

DISCUSSION

A. Scope and Procedure Applicable to a § 2255 Motion

Section 2255 of Title 28 of the United States Code provides, in relevant part, as follows:

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

28 U.S.C. § 2255(a).

Section 2255 of Title 28 of the United States Code was enacted to supersede habeas corpus practice for federal prisoners. Davis v. United States, 417 U.S. 333, 343-44 (1974). Prior to the enactment of § 2255, habeas claims had to be brought in the district where the prisoner was confined, resulting in overburdening those districts where federal correctional institutions were located and presenting logistical issues because the record in the underlying criminal case was often in a distant location. United States v. Hayman, 342

U.S. 205, 212-16 (1952). The enactment of § 2255 resolved these issues by requiring that the motion be filed in the sentencing court. Id.

The scope of a § 2255 motion is seemingly broader than the scope of a habeas petition, the latter of which is typically limited to allegations of a constitutional dimension. Section 2255 allows a federal prisoner to “vacate, set aside or correct” a federal sentence on the ground that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” See 28 U.S.C. § 2255. Where the allegation for relief is *not* based on a violation of a Constitutional right or an assertion that the court was without jurisdiction, the Supreme Court has read a “fundamentality” requirement into § 2255--relief is available for only those errors which constitute a “fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962); see Peguero v. United States, 526 U.S. 23, 27-30 (1999).

Generally, petitioners are precluded from asserting claims pursuant to § 2255 that they failed to raise on direct appeal. United States v. Frady, 456 U.S. 152, 167-68 (1982); McNeal v. United States, 249 F.3d 747, 749 (8th Cir. 2001). When a § 2255 petitioner asserts a claim that is procedurally defaulted because it was not raised on direct appeal, the claim can only proceed after the petitioner has shown either: (1) actual innocence or (2) that the procedural default should be excused because there was both cause for the default and

actual prejudice to the petitioner. Bousley v. United States, 523 U.S. 614, 621-22 (1998); McNeal, 249 F.3d at 749. Therefore, barring a claim of actual innocence, a petitioner must show both cause for why he failed to raise an issue on direct appeal as well as actual prejudice caused by the alleged errors.

Appellate courts generally refuse to review claims of ineffective assistance of counsel on direct appeal; such claims are, therefore, properly addressed for the first time in a § 2255 motion such as the one here. See United States v. Campbell, 764 F.3d 880, 892-93 (8th Cir. 2014) (ineffective assistance of counsel claims are not generally cognizable on direct appeal and will be heard only to prevent a miscarriage of justice or in cases where the district court has developed a record on the issue). Therefore, no procedural default analysis is required before examining a claim of constitutionally-deficient counsel.

In addition, when a defendant *has* raised an issue on appeal, that issue cannot be relitigated in a § 2255 proceeding. “With rare exceptions, § 2255 may not be used to relitigate matters decided on direct appeal.” Sun Bear v. United States, 644 F.3d 700, 702 (8th Cir. 2011) (*en banc*) (citing Davis v. United States, 417 U.S. 333, 346-47 (1974)); United States v. Wiley, 245 F.3d 750, 752 (8th Cir. 2001); United States v. McGee, 201 F.3d 1022, 1023 (8th Cir. 2000) (*per curiam*). Issues may be relitigated in a § 2255 motion if the error constitutes “a fundamental defect which inherently results in a complete miscarriage of justice.” Davis, 417 U.S. at 346-47; Sun Bear, 644 F.3d at 704. Or where the petitioner presents convincing new evidence of actual innocence. Wiley, 245 F.3d at 752 (citing Weeks v. Bowersox, 119 F.3d 1342, 1350-51 (8th Cir. 1997) (*en banc*)).

Finally, motions pursuant to § 2255 are also subject to a one-year statute of limitations pursuant to § 2255(f). The Eighth Circuit issued its mandate in Mr. Camberos-Villapuda's case on September 19, 2016. CR Docket No. 128. Mr. Camberos-Villapuda had 90 days thereafter to seek review before the United States Supreme Court. Clay v. United States, 537 U.S. 522, 525 (2003). His statute of limitations on his § 2255 motion began to run only after this 90-day period expired. Clay, 537 U.S. at 527 (for the purpose of starting § 2255's one-year limitation period, “[f]inality attaches when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.”). Mr. Camberos-Villapuda filed his instant § 2255 motion on November 20, 2017, approximately 30 days before the expiration of the limitations period, so the motion is timely.

B. Claims of Ineffective Assistance of Counsel

1. The Strickland Standard

Mr. Camberos-Villapuda alleges his defense counsel was cumulatively deficient in representing him. The Sixth Amendment of the Constitution of the United States affords a criminal defendant with the right to assistance of counsel. The Supreme Court “has recognized that ‘the right to counsel is the right to effective assistance of counsel.’” Strickland v. Washington, 466 U.S. 668, 698 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). Strickland is the benchmark case for determining if counsel’s assistance was so defective as to violate a criminal defendant’s Sixth Amendment rights and require reversal of a conviction. Id. at 687. “When a

convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. The defendant must also show that counsel's unreasonable errors or deficiencies prejudiced the defense and affected the judgment. Id. at 691. The defendant must show "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695. In sum, a defendant must satisfy the following two-prong test:

First, the defendant 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 defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

"There is a presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002). It is the petitioner's burden to overcome this presumption, and a "petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Id. Judicial scrutiny of attorney performance is highly deferential, with a strong presumption that counsel's conduct falls within the range of reasonable professional conduct. Strickland, 466 U.S. at 698.

2. Application of the Standard to Mr. Camberos-Villapuda's Claim

Mr. Camberos-Villapuda asserts two deficiencies of trial counsel:

(1) counsel failed to preserve a record of jury selection strikes and for-cause challenges; and (2) "Camberos has demonstrated he possessed a legitimate expectation of privacy in the location searched, he never abandoned the interest of his home or expedition and/or the circumstances." The court addresses these two allegations in turn.

a. Failure to Preserve Record as to Jury Selection

The government moves to dismiss this claim as Mr. Camberos-Villapuda never explains what evidence relative to jury selection counsel should have preserved, how that failure to preserve was deficient representation, what the significance of any such evidence might have been, and how Mr. Camberos-Villapuda was prejudiced by counsel's conduct. In his response in opposition to the government's motion to dismiss, Mr. Camberos-Villapuda never addresses this argument and never supplies any additional details. The court concludes he has abandoned this argument as a grounds for obtaining § 2255 relief.

Even if the claim is not abandoned, Mr. Camberos-Villapuda cannot succeed on the claim. Under Strickland, it is his burden to show both deficient representation by counsel and prejudice resulting from that deficient representation. Strickland, 466 U.S. at 687. He has not carried his burden to articulate facts in support of either prong. Accordingly, this court recommends this claim for relief be denied and the government's motion to dismiss this claim be granted.

b. Failure to Effectively Litigate Suppression

In his petition, Mr. Camberos-Villapuda asserted trial counsel was ineffective in regards to the motion to suppress because “Camberos demonstrated that he possessed a legitimate expectation of privacy in the location searched, he never abandoned the interest of his home or expedition and/or the circumstances.” See Docket No. 1 at p. 4. In Mr. Camberos-Villapuda’s response in opposition to the government’s motion to dismiss, he further elaborates on his claim. See Docket No. 14. He asserts counsel should have challenged whether a legitimate law enforcement objective existed when the police began their investigation; counsel should have challenged the anonymous tip as a basis for the investigation; counsel should have challenged the basis for the warrantless search due to exigent circumstances (specifically, counsel should have argued there was no probable cause from the anonymous tip); counsel failed to challenge Detective Baughman’s statement that defendant acted like he was looking for someone; counsel failed to establish that police never asked defendant if he lived at the Alameda Avenue house; and counsel should have established the name of the person who owned the Ford Expedition.

The government’s motion to dismiss is based on the vague and conclusory nature of Mr. Camberos-Villapuda’s original articulation of this claim in his petition. Even though Mr. Camberos-Villapuda explained the grounds for this claim further in his response in opposition to the government’s motion to dismiss, and even though it has been more than a month since Mr. Camberos-Villapuda filed his response in opposition, the government has

not addressed the merits of Mr. Camberos-Villapuda's claim. In order to understand Mr. Camberos-Villapuda's claim in context, the court sets forth a more detailed account of the suppression proceedings.

i. The District Court's Decision

Trial counsel moved to suppress any physical evidence seized from a home on Alameda Avenue in Denver, Colorado; from a 1997 maroon Ford Expedition with Nebraska license plates; and any statements made by Mr. Camberos-Villapuda while seized by Denver law enforcement. See CR Docket No. 23. Counsel alleged the searches and seizures resulting in the discovery of said evidence violated the Fourth and Fifth Amendments to the United States Constitution. Id.

An evidentiary hearing was held at which only one witness testified—Denver Police Department Detective Matthew Baughman. See CR Docket No. 40 at p. 1. The detective testified that he received an anonymous tip on May 30, 2013, that a shipment of narcotics would be arriving at a home near the intersection of Holly and Alameda in a vehicle with out-of-state license plates. Id. at p. 2. The detective and his partner conducted surveillance in the area the night of May 30 carrying over to the early morning hours of May 31. Id. At 3 a.m., the detective walked around the neighborhood, walking down an alley. As he approached the house on Alameda involved in this matter, “the subject house,” he observed a garage facing the alley, a fence with an open gate, and a portion of the fence which had been removed. Id. The detective observed a vehicle parked on the east side of the subject house which had not been there earlier when the detective had previously walked down the alley. Id.

The detective observed the vehicle to be an SUV with out-of-state (Nebraska) license plates. Id. Mr. Camberos-Villapuda was under the vehicle shining a flashlight on it and apparently working on it. Id. The detective found it suspicious that someone would be working on a vehicle in the dark at 4 a.m. in a residential neighborhood. Id. Looking through gaps in the fence, the detective heard grinding noises and could see defendant grinding on the frame underneath the vehicle. Id. Mr. Camberos-Villapuda was not wearing work (mechanic's) clothes. Id. Eventually, defendant emerged from beneath the vehicle and looked around as if watching for someone to arrive. Id. Then defendant entered the subject house through the back door. Id.

The detective contacted his partner. Id. A few moments later, defendant came back out of the house and went to work under the vehicle again. Id. at p. 3. The detective and his partner watched defendant from outside the fence for about 15 minutes. Id. The vehicle did not appear to be operable. Id. The detective suspected defendant was working on a "vehicle hide." Id. The detective asked for assistance and 3 more police officers arrived. Id.

Once the 3 new officers arrived, the officers entered the yard of the subject house and made contact with Mr. Camberos-Villapuda. Id. At first, defendant denied he was working on the vehicle. Id. He then stated he was working on the wheel bearings, but the wheel bearings were not located on the vehicle in the area defendant had been working. Id. Furthermore, Mr. Camberos-Villapuda appeared very nervous. Id. Inside the yard, the detective observed Mr. Camberos-Villapuda had been using a hacksaw, screwdriver, grinder blade, pliers, hammer, and body putty, all tools the detective knew are

used to create a “vehicle hide.” Id. The detective looked under the SUV and saw a rectangular tube running the length of the vehicle with a hole cut in part of the frame in order to hide items. Id. Drug cartel operations ordinarily use “vehicle hides” to transport guns, drugs, and large amounts of currency across the country. Id. The detective told his partner about the hidden tube. Id.

Mr. Camberos-Villapuda gave inconsistent accounts of who owned the vehicle. Id. First, he disclaimed ownership of it. Id. The officers then ran a computer inquiry and discovered the name of the registered owner. Id. The officers asked defendant if he knew how to contact the owner. Id. at p. 4. The officers cleared the house then secured the house and vehicle while a search warrant was applied for. Id. Police handcuffed Mr. Camberos-Villapuda and advised him of his Miranda rights. Id. Defendant then stated he owned the vehicle, but he’d registered it in someone else’s name because he did not have a driver’s license. Id.

As to the house, Mr. Camberos-Villapuda first denied having entered the house. Id. Then he told officers he had entered but there was no one home. Id. Finally, he admitted there were other people in the house and that he had been staying there. Id.

The officers suspected the house was being used by a drug cartel. Id. As it was beginning to become light out, they worried the officers would be in danger when the people in the house awoke and discovered several officers in the yard. Id. For these reasons, they decided to secure the house while a search warrant was sought. Id.

The officers knocked on the door; when no one answered, they entered.

Id. They found a man in one room and a woman in a different room and drugs and drug paraphernalia in plain view. Id. A search warrant was obtained. Id. When the search warrant was executed, a large amount of currency and methamphetamine were discovered. Id. When the vehicle was searched, two hidden compartments were found with a gun and money in them. Id. at p. 5. The area where Mr. Camberos-Villapuda was working had fresh putty. Id. Another vehicle was discovered in the garage which was in the process of having hidden compartments installed. Id.

The district court suppressed Mr. Camberos-Villapuda's statements made between the discovery of the hidden compartment by Detective Baughman and the time he was advised of his Miranda warnings, but did not suppress any of the physical evidence. See CR Docket No. 40 at p. 14; Docket No. 50. The court found the area where Mr. Camberos-Villapuda was working on the SUV was part of the curtilage of the subject home, but that the area from where the detective observed him working initially was outside the curtilage. See Docket No. 40 at pp. 7-8. Thus, the officer's initial observations did not violate the Fourth Amendment. Id.

Based on the anonymous tip and the detective's own observations corroborating the tip (seeing defendant apparently working on installing a hidden compartment in an SUV with out of state plates at the approximate location identified by the tipster), the court held the officer had a legitimate law enforcement objective and did not violate the Fourth Amendment when he entered the curtilage to make contact with Mr. Camberos-Villapuda. Id. at

pp. 8-9 (citing United States v. Weston, 443 F.3d 661, 667 (8th Cir. 2006); Alvarez v. Montgomery County, 147 F.3d 354, 359 (4th Cir. 1998)).

The court further held that the entry into the home in order to secure it while a search warrant was obtained was justified by the exigent circumstances exception to the warrant requirement. Id. at pp. 10-11. The court justified this entry based on the detective's credible testimony that (1) there was a distinct chance that evidence would be destroyed and (2) the officers' lives might be in danger if daybreak revealed the officers' presence to persons inside the home.

Id.

Finally, as an alternative holding, the court denied Mr. Camberos-Villapuda's motion to suppress because he had no legitimate expectation of privacy. Id. at pp. 11-12. In support of this holding, the court relied on Mr. Camberos-Villapuda's statements to police that he did not own the SUV, had not been in the house, there was no one in the house, and he did not know who lived there. Id. at p. 12.

ii. The Eighth Circuit Opinion

Mr. Camberos-Villapuda appealed the district court's denial of his suppression motion. Camberos-Villapuda, 832 F.3d at 951. The Eighth Circuit noted that ordinarily, as an overnight guest at the subject house and as the owner and possessor of the SUV, Mr. Camberos-Villapuda would have had a legitimate expectation of privacy sufficient to confer Fourth Amendment rights. Id. at 951-52. However, a person may voluntarily abandon an interest in property. Id. The determination whether abandonment has occurred requires evaluation of the totality of the circumstances. Id. at 952. The court

evaluates the totality of the circumstances based on the objective facts available to the investigating officers at the time the challenged search took place. Id. The test does not depend on the subjective knowledge or intent of the defendant. Id.

Looking at the facts available to the officers on the night of May 31, 2013, the court held they were justified in determining Mr. Camberos-Villapuda had abandoned his interest in the house and SUV. Id. Not only did he verbally repudiate any ownership of either property, but when officers ran an inquiry regarding ownership of the SUV, it confirmed that Mr. Camberos-Villapuda was *not* the registered owner. Id.

The court also rejected defense counsel's argument that the officers were not warranted in entering upon the curtilage and that illegal entry "tainted" all the other searches which occurred. Id. The court declined to address whether the entry onto the curtilage was valid under the Fourth Amendment, but noted Mr. Camberos-Villapuda's voluntary abandonment of the property came *after* the allegedly illegal entry. Id. The court held this "voluntary act of free will . . . 'independently legitimated' the subsequent searches." Id.

iii. Analysis of Mr. Camberos-Villapuda's Allegations

The court discerns 6 separate allegations of ineffective representation by counsel in connection with the suppression hearing. Allegations 1-4 have to do with whether a legitimate law enforcement objective existed, whether the anonymous tip was sufficient to give rise to the investigation, whether the search was supported due to exigent circumstances and whether defendant's own behavior in looking around as if waiting for someone was suspicious. See

Docket No. 14. None of these allegations are relevant. Each of these elements discussed by the district court in its opinion were set aside by the Eighth Circuit in favor of the alternative holding—i.e. that Mr. Camberos-Villapuda had no legitimate expectation of privacy in the home or the SUV.

In order to have standing, a defendant must show that, under the totality of circumstances, he or she possessed a legitimate expectation of privacy in the area searched. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). “[T]he person challenging the search has the burden of showing both a subjective expectation of privacy and that the expectation is objectively reasonable; that is, one that society is willing to accept.” United States v. Mendoza, 281 F.3d 712, 715 (8th Cir. 2002) (quoting United States v. McCaster, 193 F.3d 930, 933 (8th Cir. 1999)). If a defendant cannot carry his burden to show standing, he simply does not have the right to contest a search. The district court, in its alternative holding, and the Eighth Circuit concluded just that—Mr. Camberos-Villapuda did not have the right to challenge the searches of the SUV or the subject home because he did not have a legitimate expectation of privacy. Thus, all the other issues concerning whether the law enforcement objective was legitimate, whether the anonymous tip bore sufficient indicia of reliability, and whether the officers erred by entering the curtilage without a warrant, are rendered moot. Even if errors were made, the Eighth Circuit held Mr. Camberos-Villapuda had no right to complain about the errors. Thus, as to these allegations of counsel’s errors, the court finds Mr. Camberos-Villapuda has not established Strickland prejudice.

Mr. Camberos-Villapuda's fifth allegation is that counsel was ineffective for failing to establish that police *never asked him* in the early morning hours of May 31, 2013, whether he lived at the subject home. This is relevant to the issue of legitimate expectation of privacy and the totality of the circumstances test.

At the suppression hearing, defense counsel asked the detective if Mr. Camberos-Villapuda had told police he was staying at the home. See CR Docket No. 33, Suppression Hearing transcript ("SH") at p. 38, lines 6-7.² The detective agreed the defendant made this statement. Id. at line 8. Counsel also established that Mr. Camberos-Villapuda told police that he had paid for the SUV, but titled it in someone else's name. Id. at lines 9-13, & 16-23; page 39, lines 17-19. The detective agreed Mr. Camberos-Villapuda made this statement. SH at p. 39, lines 20-24. In closing remarks at the conclusion of the evidentiary hearing on the suppression motion, defense counsel asserted "It's unrebuted that he was staying at the home. That standing requirement was met. It's unrebuted. They entered onto private property of the home where he was staying." Id. at p. 59, line 25; p. 60, lines 1-3.

Thus, defense counsel did not ask the detective if Mr. Camberos-Villapuda said he *lived* at the subject house, but he did establish that defendant told police he was *staying* at the subject house. For purposes of the

² The transcript was filed in the court's electronic docket, CM/ECF. That electronic system assigned page numbers which are, unfortunately, not the same as the actual page numbers of the transcript itself. The court in this opinion cites to the actual page numbers of the transcript itself rather than to the CM/ECF-assigned page numbers.

Fourth Amendment, either living or staying at a house overnight gives rise to standing to challenge a search. See Carter v. Minnesota, 525 U.S. 83, 90 (1998). Therefore, the difference between the two questions is immaterial. Mr. Camberos-Villapuda cannot establish Strickland prejudice for this alleged deficiency because counsel did the necessary questioning to elicit the best evidence in support of Fourth Amendment standing. That the courts viewed the evidence differently cannot be chalked up to deficient performance by counsel.

The sixth and final allegation of ineffective representation Mr. Camberos-Villapuda makes is that counsel should have established the name of the person who owned the Ford Expedition. As this may have some tangential bearing on the issue of Fourth Amendment standing, the court addresses it.

It is true counsel did not establish the *name* of the person to whom the SUV was registered. But the name of that person was established.

The court asked the detective to clarify the timeline and the owner with regard to the SUV. SH at pp. 41-43. The detective testified initially, defendant was asked if the SUV was his and he said it was not. Id. at p. 42, lines 10-12. Furthermore, defendant was asked if he knew who the owner was and he said he did not. Id. at lines 12-13. Police only learned the name of the SUV's owner after running an inquiry in the Department of Motor Vehicles database. Id. at lines 13-16. Police then asked Mr. Camberos-Villapuda whether he knew the owner or if he knew how to contact the owner. Id. at lines 17-19. Mr. Camberos-Villapuda said he did not know either. Id. at lines 19-22. The registered owner was someone named "Callie." Id. at lines 21-22.

Mr. Camberos-Villapuda only later—some two hours later—told police that he had paid for the SUV but registered it in someone else’s name because he did not have a driver’s license. Id. at lines 23-25; p. 43, lines 2-17.

In closing remarks, defense counsel argued the name on the title of a vehicle is not the sole test as to expectation of privacy. Id. at p. 60, lines 4-25. Instead, counsel argued the court should rely on Mr. Camberos-Villapuda’s statement to police later on that he had been driving the vehicle. Id. If one is traveling in a vehicle, one has a legitimate expectation of privacy in it counsel argued. Id.

Here, assuming the name of the registered owner of the SUV is somehow relevant, the court finds no Strickland prejudice because the name was established in the record. The court accordingly recommends this claim for relief be denied.

c. Cumulative Errors of Counsel

Finally, the court addresses Mr. Camberos-Villapuda’s allegation that trial counsel was “cumulatively ineffective.” See Docket No. 1 at p. 4. The court interprets Mr. Camberos-Villapuda to be arguing that all of the alleged errors he attributes to counsel created Strickland prejudice. The Eighth Circuit does not recognize as grounds for habeas relief the cumulation of all of a petitioner’s claims. Henderson v. Norris, 118 F.3d 1283, 1288 (8th Cir. 1997); Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990). Accordingly, the court recommends this claim for § 2255 relief be denied.

C. Claims Which Were Previously Raised or Should Have Been Raised on Direct Appeal

As indicated above, if a claim can be raised on direct appeal, a defendant must raise it or it is procedurally defaulted in a § 2255 motion. United States v. Frady, 456 U.S. at 167-68; McNeal, 249 F.3d at 749. When a § 2255 petitioner asserts a claim that is procedurally defaulted because it was not raised on direct appeal, the claim can only proceed after the petitioner has shown either: (1) actual innocence or (2) that the procedural default should be excused because there was both cause for the default and actual prejudice to the petitioner. Bousley, 523 U.S. at 621-22; McNeal, 249 F.3d at 749.

The mirror image of the procedural default rule is that if an issue is raised on direct appeal, it cannot be relitigated in a § 2255 motion. Sun Bear, 644 F.3d at 702; Wiley, 245 F.3d at 752; McGee, 201 F.3d at 1023. Issues may be relitigated in a § 2255 motion if the error constitutes “a fundamental defect which inherently results in a complete miscarriage of justice.” Davis, 417 U.S. at 346-47; Sun Bear, 644 F.3d at 704. Or where the petitioner presents convincing new evidence of actual innocence. Wiley, 245 F.3d at 752 (citing Weeks, 119 F.3d at 1350-51. The harmonizing principle for both of these doctrines is that a § 2255 motion is not a substitute for an appeal; the appeal must do the proper work of an appeal. All of Mr. Camberos-Villapuda’s remaining claims are extinguished by these two doctrines.

Mr. Camberos-Villapuda argues in ground two of his § 2255 motion that the district court erred in denying his motion to suppress. This issue was

appealed and decided by the Eighth Circuit. See Camberos-Villapuda, 832 F.3d at 952. Therefore, it cannot be relitigated on a § 2255 motion.

Mr. Camberos-Villapuda never asserts a fundamental defect or actual innocence.

Mr. Camberos-Villapuda argues in ground three of his § 2255 motion that the district court erred at sentencing by relying only on the facts recited in the presentence investigation report. This issue could have been raised in Mr. Camberos-Villapuda's appeal, but it was not raised therein. The issue is therefore procedurally defaulted. Even though the government explained the law and facts in regard to this issue in its motion to dismiss, Mr. Camberos-Villapuda never addressed the issue in his response in opposition to the government's motion. See Docket No. 14. He did not, then, establish the necessary cause and prejudice which would allow this court to address the merits of this claim. The court accordingly recommends dismissal of this ground for relief.

Mr. Camberos-Villapuda argues in ground four of his § 2255 motion that his life sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment. This issue was raised on appeal and has already been decided adversely by the Eighth Circuit. See Camberos-Villapuda, 832 F.3d at 952-53. Therefore, Mr. Camberos-Villapuda cannot relitigate the same issue in his § 2255 motion. Mr. Camberos-Villapuda never asserts a fundamental defect or actual innocence.

Because grounds two, three and four in Mr. Camberos-Villapuda's § 2255 motion were either already litigated on appeal, or should have been and

were not, the court finds it cannot address the merits of those claims in the context of this action. Therefore, the court recommends denying relief on these grounds.

D. No Evidentiary Hearing is Warranted

"While '[a] petitioner is entitled to an evidentiary hearing on a section 2255 motion unless the motion and the files and the records of the case conclusively show that [he] is entitled to no relief,' no hearing is required 'where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.' " New v. United States, 652 F.3d 949, 954 (8th Cir. 2011) (quoting Anjulo-Lopez v. United States, 541 F.3d 814, 817 (8th Cir. 2008)).

"A district court may deny an evidentiary hearing where (1) accepting the petitioner's allegations as true, the petitioner is not entitled 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.' " Guzman-Ortiz v. United States, 849 F.3d 708, 715 (8th Cir. 2017) (quoting United States v. Sellner, 773 F.3d 927, 929-30 (8th Cir. 2014)).

Here, no evidentiary issue is warranted. Mr. Camberos-Villapuda's claims all fail on the merits given the settled record before the court, or are procedurally inaccessible. There are no issues of fact or credibility to be determined. Accordingly, the court recommends no evidentiary hearing be held.

CONCLUSION

Based on the foregoing law, facts and analysis, this magistrate judge respectfully recommends that the government's motion to dismiss [Docket No. 8] be granted and that all of Mr. Camberos-Villapuda's claims for relief be dismissed.

NOTICE OF RIGHT TO APPEAL

The parties have fourteen (14) days after service of this report and recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. See FED. R. CIV. P. 72; 28 U.S.C. § 636(b)(1)(B). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Id. Objections must be timely and specific in order to require *de novo* review by the district court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED June 14, 2018.

BY THE COURT:



VERONICA L. DUFFY
United States Magistrate Judge