APPENDIX A: ORDER, Petition for Rehearing

Attached ***

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2484

Robert C. Caldwell

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00303-BP)

JUDGMENT

Before COLLOTON, WOLLMAN, and SHEPHERD, 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.

December 03, 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
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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December 03, 2019

Mr. Robert C. Caldwell
U.S. PENITENTIARY
27526-045
P.O. Box 1000
Lewisburg, PA 17837-0000

RE: 19-2484 Robert Caldwell v. United States

Dear Mr. Caldwell:

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

BNW

Enclosure(s)

cc: Mr. David M. Ketchmark
Ms. Paige A. Wymore-Wynn

District Court/Agency Case Number(s): 4:19-cv-00303-BP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

ROBERT C. CALDWELL,

Movant,

v. Case No. 19-00303-CV-W-BP-P

UNITED STATES OF AMERICA,

Respondent.

O **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **DECISION OF THE COURT.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that: (1) Movant's motion pursuant to 28 U.S.C. § 2255 is DENIED, (2) a certificate of appealability is DENIED, and (3) this case is DISMISSED.

Entered on: June 24, 2019

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ K. Willis
(By) Deputy Clerk

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

ROBERT C. CALDWELL,	)	
	)	
Movant,	)	
	)	Civil No. 4:19-cv-00303-BP-P
vs.	)	Crim. No. 4:15-cr-00043-BP-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Movant Robert Caldwell pleaded guilty to (one count each): conspiracy to commit kidnapping; kidnapping; carjacking; using, carrying, or brandishing a firearm during a crime of violence; and felon in possession of firearm. Now before the Court is Movant's *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Doc. 1. For the reasons explained below, the Court finds the motion, files, and record conclusively show Movant is not entitled to relief. Accordingly, Movant's motion is denied without an evidentiary hearing, a certificate of appealability is denied, and this case is dismissed.

I. Background

On April 15, 2015, Movant was charged by superseding indictment with five counts: Counts One and Two—conspiracy to commit kidnapping and kidnapping, in violation of 18 U.S.C. § 1201(a)(1), (c); Count Three—carjacking, in violation of 18 U.S.C. § 2119(2); Count Four—using, carrying, or brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and Count Five—felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Crim. Doc. 20.[1] On February 4, 2016, Movant appeared before the Court,

[1] "Crim. Doc." refers to the docket number entries in Movant's criminal case, Case No. 4:15-cr-00043-BP-1. "Doc." refers to the docket number entries in Movant's civil case, Case No. 4:19-cv-00303-BP-P.

with counsel, to enter a guilty plea without a plea agreement, as to all five counts. Crim. Doc. 38. After finding Movant competent and that he voluntarily sought to enter a plea of guilty, the Court accepted Movant's guilty plea for all five counts of the superseding indictment. *Id.*

On June 17, 2016, the probation office issued its Presentence Investigation Report ("PSR"). Crim. Doc. 42. Based on the applicable Sentencing Guidelines, the PSR grouped Counts One, Two, Three, and Five (conspiracy to commit kidnapping, kidnapping, carjacking, and felon in possession of a firearm, respectively), while excluding from the grouping rules Count Four (using, carrying, or brandishing a firearm during a crime of violence), all pursuant to U.S.S.G. §§ 2K2.4, 3D1.1(b), 3D1.2, and 5G1.2(a). Crim. Doc. 42, p. 100, ¶¶ 25-27. Accordingly, as to the grouped counts, the PSR calculated an adjusted offense level of 40, based upon a base offense level of 32 with two-level enhancements each for: serious bodily injury to a victim, having a leadership role, using an accomplice under the age of 18, and obstruction of justice, pursuant to U.S.S.G. §§ 2A4.1(b)(2)(B), 3B1.1(c), 3B1.4, and 3C1.2, respectively. Crim. Doc. 42, pp. 10-11, ¶¶ 28-32.

Next, the PSR applied U.S.S.G. § 4B1.1's career offender designation after finding, in relevant part, Movant's instant conviction qualifies as a crime of violence and that Movant had at least two prior felony convictions for crimes of violence. Crim. Doc. 42, pp. 11-12, ¶ 34. Specifically, the PSR cited as qualifying convictions Movant's prior convictions for Missouri second-degree robbery (two separate convictions), Missouri attempted first-degree robbery, and Kentucky first-degree fleeing from police (creating a substantial risk of serious injury). *Id.*; *see id.* at 13-15, ¶¶ 40-41.

With a criminal history category score of 13 (including Movant's career offender designation), the PSR calculated Movant's criminal history category at VI. Crim. Doc. 42, p. 16,

¶¶ 44-47. As a result, the PSR calculated a Guidelines range of 444 months' imprisonment to life imprisonment.[2]

Movant, through counsel, objected to the PSR's application of § 4B1.1's enhancement, arguing that Movant is not a career offender. Crim. Doc. 42, p. 27. Movant argued his prior Kentucky conviction for first-degree fleeing from police does not qualify as a crime of violence under U.S.S.G. § 4B1.2(a)(2) as an enumerated offense or under the residual clause (following *Johnson v. United States*, 135 S. Ct. 2552 (2015), invalidating the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii)), or § 4B1.2(a)(1)'s force clause. Crim. Doc. 42, pp. 27-30. Additionally, Movant, through counsel, argued the PSR erred in calculating Movant's criminal history score by attributing criminal history points for Movant's three prior Missouri robbery convictions (two second-degree, one first-degree). *Id.* at 30. Movant argued that Missouri robbery is not a crime of violence because it is not an enumerated offense (although enumerated in the Commentary to the Guidelines), does not satisfy the force clause, and, following *Johnson*'s invalidation of the ACCA's residual clause, the residual clause in the Guidelines is similarly invalid. *Id.* at 30-33.

On June 30, 2016, at the conclusion of Movant's sentencing hearing, the Court sentenced Movant to a term of imprisonment: 456 months each for Counts One and Two, 300 months for Count Three, and 120 months for Count Five, each to run concurrently, and a term of 84 months' imprisonment for Count Four, to run consecutively, for a total term of 540 months' imprisonment. Crim. Doc. 51. In doing so, the Court expressly did not consider the armed career offender

[2] Specifically, the PSR calculated a statutory maximum term of imprisonment for Counts One and Two at life imprisonment, Count Three at twenty-five years' imprisonment, Count Five at a maximum term of ten years' imprisonment, each to run concurrently, and Count Four at a range of seven years to life imprisonment, to run consecutively. Doc. 42, p. 21, ¶ 70. Pursuant to U.S.S.G. § 4B1.1(c)(2), the PSR noted, because Movant has a conviction other than under 18 U.S.C. § 924(c) and is also classified as a career offender, the Guidelines range in this instance must be 444 months' imprisonment to life, pursuant to U.S.S.G. § 4B1.1(c)(2)(A). Doc. 42, p. 21, ¶ 70; *see id.* at 12, ¶ 35.

enhancement, finding a reduced total offense level of 37[3] and a criminal history category of VI, resulting in a Guidelines range of 360 months' imprisonment to life on Counts One, Two, Three, and Five (to run concurrently) and a minimum of 84 months' imprisonment to run consecutively as to Count Four, for a total guidelines range of 444 months' imprisonment to life. Crim. Doc. 59, p. 41.

On appeal, the United States Court of Appeals for the Eighth Circuit granted the United States' unopposed motion to vacate Movant's sentence, remanding to this Court for resentencing in light of *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016). Crim. Doc. 61.

After remand, the probation office issued a third addendum to the PSR for purposes of resentencing. Crim. Doc. 66. Importantly, the new PSR calculation included the Eighth Circuit's holding in *Bell*—that Missouri second-degree robbery is not a crime of violence under the Guidelines. *Id.* Although the amended PSR ultimately found that *Bell* did not impact the Guidelines calculation because the Court had previously sustained Movant's objection to the PSR's career offender designation (and did not consider it in Movant's initial sentencing), the PSR did re-assess Movant's criminal history score to not include a criminal history point (under U.S.S.G. § 4A1.1(e)) for a prior conviction of a "crime of violence" regarding Movant's prior Missouri second-degree robbery conviction. Crim. Doc. 66. This calculation reduced Movant's criminal history category to V. *Id.* As a result, Movant's new Guidelines range, with a total offense level of 37 and criminal history category of V, was calculated at 324 to 405 months' imprisonment

[3] In making this calculation, the Court sustained Movant's objection to the armed career offender enhancement, after the Government conceded the career offender enhancement should not be applied, *see* Crim. Docs. 59, p. 5, 41; 44, p. 6 n.2, but did apply the two-level enhancement for being an organizer, leader, or manager, as well as a two-level enhancement for using a person less than 18 years old. Crim. Doc. 59, p. 37-38. Additionally, the Court overruled the Government's objection to the PSR's failure to include a two-level enhancement for a "vulnerable victim." *Id.* at 40.

on Counts One, Two, Three, and Five, to run concurrently, and 84 months' imprisonment on Count Four, to run consecutively. *Id.*

However, the Government objected to the Third Addendum to the PSR, arguing that under § 4B1.2(a)(2)'s residual clause, as upheld in *Beckles v. United States*, 137 S.Ct. 886 (2017), Movant's convictions for second-degree robbery under Missouri law did qualify as crimes of violence. Crim. Doc. 68. The probation officer agreed and, in light of *Beckles*, re-instated the "guideline calculations at the time of the initial sentencing." *Id.*

On March 17, 2017, the Court re-sentenced Movant to the same sentence as previously imposed: 456 months each as to Counts One and Two, 300 months as to Count Three, 120 months as to Count Five, each to run concurrently, and 84 months for Count Five, to run consecutively, for a total term of 540 months' imprisonment. Crim. Doc. 51. The Court did so after finding that Missouri second-degree robbery "is considered a violent felony" under both the residual clause and the force clause of the applicable Guidelines, and therefore that Movant's criminal history category is VI, as originally calculated. *Id.* at 8-13.

On March 31, 2017, Movant appealed his resentencing to the Eighth Circuit. Crim. Doc. 75. On appeal, Movant argued (1) the sentencing court erred as a procedural matter by allowing the Government to introduce evidence of Movant's prior robbery convictions at resentencing where it had failed to do so at Movant's original sentencing, (2) the sentencing court improperly considered "uncharged crimes without requiring the Government to prove them by a preponderance of the evidence," and (3) the 45-year sentence imposed on resentencing was substantively unreasonable. Crim. Doc. 80-1, pp. 4-6; *United States v. Caldwell*, 726 Fed. App'x 495, 497-98 (8th Cir. 2018) (per curiam). The Eighth Circuit affirmed Movant's 45-year sentence, finding no merit in Movant's arguments. *Id.*; Crim. Doc. 80-1, pp. 4-6.

II. Legal Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence. A motion under this statute "is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted). Ultimately, § 2255 provides a statutory avenue through which to address only constitutional or jurisdictional errors and errors of law that "constitute[] a fundamental defect which inherently results in a complete miscarriage of justice." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

"A § 2255 motion can be dismissed 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." *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003) (citation and quotation marks omitted). Additionally, a petition that consists only of "conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible," is insufficient to overcome the barrier to an evidentiary hearing on a § 2255 motion. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

III. Analysis

In this § 2255 motion, to the best the Court can discern, Movant seeks collateral relief on the basis of various claims of ineffective assistance of defense counsel and appellate counsel. Doc. 1, pp. 4-6, 14-23.[4] To the best the Court can discern, Movant raises the following grounds for § 2255 relief, alleging ineffective assistance of counsel by:

[4] To the extent Movant attempts to raise a claim of "Insufficient Evidence" generally, *see* Doc. 1, p. 6, the Court notes that "an alleged insufficiency of the evidence is not a ground for relief under § 2255." *United States v.*

(1) failing to "advers[el]y challenge the government[']s case" by not interviewing or investigating witnesses, possible alibi witnesses, the crime scene, chain of custody, and chain of evidence, as well as failing to challenge the prosecution's evidence generally, including witness testimony and "exculpatory, impeachable" evidence;

(2) failing to "challenge Indictment or Grant Jury," "where possible exculpatory information was available that counsel failed to look for, gather, or suppress for defense purposes";

(3) failing to object to the PSR at "original sentencing" (concerning Movant's criminal history calculation), "allowing the (PSR) report to go unchallenged," and failing to challenge PSR's use of "uncharged, uncorroborated, he[arsay] allegations of unindicted, illicit, illegal claims";

(4) failing to contest the factual existence of Movant's prior convictions at the original sentencing hearing thereby allowing the Government to introduce evidence of Movant's convictions at re-sentencing;

(5) failing to use or rely upon *Johnson v. United States* (invalidating ACCA's residual clause as void for vagueness) and not challenging § 924(c), 922(g) "enhancements" under *Johnson*;

(6) failing to "protect movant from an 8th Amendment violation" because counsel failed to "recognize [Movant']s open court plea was detr[i]mental to his defense, exposing movant to harsher punishment," ultimately failing to "protect movant from oversentencing" [sic];

(7) "having too many cumulative errors"; and, finally,

(8) by appellate counsel failing to "recognize defense counsel[']s numerous cumulative failures" on appeal.

Id.

Johnson, 582 F.2d 1186, 1188 (8th Cir. 1978); *Anderson*, 25 F.3d at 707 ("[a] claim that all of a crime's statutory elements were not proven is not a constitutional claim for the purposes of collateral attack"). Additionally, to the extent Movant attempts to challenge his sentence on the basis of "deficient evidence" at re-sentencing concerning the "unsubstantiated, uncorroborated, challenged charges not applicable to his re-sentencing or present case" as well as the Court's decision to allow the Government to present evidence of Movant's prior convictions at resentencing, *see* Doc. 1, pp. 6, 18-22, "[c]laims that were raised and decided on direct appeal cannot be relitigated on a motion to vacate" under § 2255. *United States v. Lee*, 715 F.3d 215, 224 (8th Cir. 2013) (quotation and citation omitted); *see Matthew v. United States*, 114 F.3d 112, 113 (8th Cir. 1997) (same rule applies when conviction is entered by guilty plea). On direct appeal, the Eighth Circuit Court of Appeals held (1) the District Court did not err in considering Movant's "uncharged conduct" under the statutory sentencing scheme, and (2) the District Court did not err by admitting into evidence certified copies of Movant's prior convictions. Crim. Doc. 80-1, pp. 4-5; *Caldwell*, 726 Fed. App'x at 497. Therefore, to the extent Movant raises these claims outside the context of a claim of ineffective assistance of counsel, the Court finds these claims are without merit and are denied.

Respondent argues that each allegation of ineffective assistance of counsel is conclusory, without merit, and contrary to the record. *See* Doc. 5.

A claim of ineffective assistance of counsel may be sufficient to attack a sentence under § 2255; however, the "movant faces a heavy burden." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996); *see DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000). To establish that counsel was ineffective, a movant must satisfy the *Strickland* test, that is Movant must "show that his '[] 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)); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the *Strickland* test must be established to be entitled to § 2255 relief; failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. 697; *DeRoo*, 223 F.3d at 925 ("[i]f the defendant cannot prove prejudice, we need not address whether counsel's performance was deficient"); *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997).

Under the first prong of deficient performance, Movant must overcome a "strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance and sound trial strategy." *Garrett v. United States*, 78 F.3d 1296, 1301 (8th Cir. 1996) (citation omitted). Second, to establish prejudice, Movant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see Palmer v. Clarke*, 408 F.3d 423, 444-45 (8th Cir. 2005) (citation omitted). In the context of a guilty plea, *Strickland*'s prejudice prong requires a showing of a "reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *see Hill v. Lockhart*, 474 U.S. 52, 59 (1985), while in

a sentencing context, a § 2255 movant must show a "reasonable probability that his sentence would have been different but for the deficient performance." *Jeffries v. United States*, 721 F.3d 1008, 1014 (8th Cir. 2013). However, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, a reasonable probability requires a "probability sufficient to undermine confidence in the outcome." *Jeffries*, 721 F.3d at 1014 (citing *Strickland*, 466 U.S. at 694); *see King v. United States*, 595 F.3d 844, 852-53 (8th Cir. 2010) (finding "little doubt" of prejudice where defendant "likely would have received a much shorter sentence" had counsel challenged the sentencing court's application of § 4B1.1).

A. Defense Counsel Failed to Investigate and Challenge the Government's Evidence

First, Movant claims counsel provided constitutionally ineffective assistance of counsel by failing to adversely challenge the Government's evidence. Specifically, Movant alleges counsel failed to interview or investigate potential witnesses, alibi witnesses, the crime scene, chain of custody and evidence, or to discover "exculpatory, impeachable" evidence. Doc. 1, pp. 4, 14-15. Additionally, Movant alleges counsel failed to challenge the Indictment "where possible exculpatory information was available that counsel failed to look for, gather, or suppress for defense purposes." *Id.* at 16-17.

Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Whitmore v. Lockhart*, 8 F.3d 614, 618 (8th Cir. 1993) (quoting *Strickland*, 466 U.S. at 691). In fact, the Eighth Circuit has specifically recognized that "failing to interview witnesses or discover mitigating evidence may be a basis for finding counsel ineffective within the meaning of the Sixth Amendment right to counsel." *Kramer v. Kemna*, 21 F.3d 305, 309 (8th Cir. 1994) (citation omitted). However, failing to articulate with

specificity "what exculpatory evidence could possibly have been produced" is fatal to a claim of ineffective assistance of counsel under *Strickland*'s prejudice prong. *Id.* (this is so even when a § 2255 movant identifies a specific witness that defense counsel could have, but failed, to interview); *see United States v. Vazzquez-Garcia*, 211 Fed. App'x 544, 546 (8th Cir. 2007) (§ 2255 movant failed to show prejudice because he failed to provide "independent evidence to the court" showing what the specific witness would have said had counsel interviewed the witness). Simply, vague and conclusory allegations are subject to summary dismissal on a § 2255 claim for relief, *Smith v. United States*, 677 F.2d 39, 41 (8th Cir. 1982), and are insufficient to raise a claim of ineffective assistance of counsel for generally failing to investigate or challenge the Government's evidence.

Thus, even if the Court assumes defense counsel was deficient for failing to fully investigate and challenge the Government's evidence in the manner Movant asserts, Movant fails to meet his burden to demonstrate prejudice. Movant relies only on general conclusory statements and fails to identify any witnesses defense counsel failed to interview or what evidence, exculpatory or otherwise, counsel could have discovered. Therefore, Movant has failed to meet his burden to satisfy *Strickland*'s prejudice prong. Additionally, because Movant fails to provide any details or specifics concerning the alleged evidence or testimony counsel could have discovered, Movant cannot rebut the "strong presumption" that counsel's representation was within the wide range of professional assistance. *Cantrell v. United States*, No. 12-3126-CV-S-RED, 2012 WL 2994284, at *2 (W.D. Mo. July 20, 2012) (citing *Close v. United States*, 679 F.3d 714 (8th Cir. 2012)); *see Saunders v. United States*, 236 F.3d 950, 952-53 (8th Cir. 2001) (claim of ineffective assistance of counsel for failure to investigate fails where movant does not identify specific witnesses, testimony, or evidence that would have resulted).

Moreover, a "defendant's representations during the plea-taking carry a strong presumption of verity and pose a formidable barrier in any subsequent collateral proceedings." *Nguyen v. United States*, 114 F.3d 699, 703 (8th Cir. 1997) (citations omitted). In this case, at the change of plea hearing, Movant acknowledged, under oath, that Movant was satisfied with the advice and representation of counsel, that counsel had done everything Movant asked of counsel, and that Movant did not have any concerns regarding the advice and representation of defense counsel. Crim. Doc. 57, pp. 9-10. Accordingly, Movant's claims are contrary to the record and Movant fails to overcome the barrier of his prior acknowledgments under oath. Movant's claims regarding ineffective assistance of counsel in failing to investigate or interview witnesses and generally challenge the Government's evidence are without merit. Therefore, for both reasons, Movant's claims are denied.

B. Defense Counsel Failed to Object to PSR

Next, Movant alleges counsel provided constitutionally ineffective counsel when counsel failed to object to the PSR at the "original sentencing" concerning Movant's criminal history calculation, allowing the PSR report to go "unchallenged," and also when counsel failed to challenge the PSR's use of "uncharged, uncorroborated, he[arsay] allegations of unindicted, illicit, [and] illegal claims." Doc. 1, pp. 4, 15-16.

These claims are contrary to the record. The record shows that defense counsel specifically objected to the PSR, including Movant's criminal history calculation and the use of uncharged and uncorroborated allegations of unindicted claims by: filing objections in the PSR, *see* Crim. Doc. 42, pp. 30-35; making these arguments in a sentencing memorandum, *see* Crim. Doc. 45, pp. 1-2; and raising these same arguments again at Movant's original sentencing hearing. *See* Crim. Doc.

59, pp. 4-16. Because these claims are contrary to the record and defense counsel did object to the PSR as to both Movant's general and specific allegations here, Ground Two is denied.

C. Defense Counsel Failed to Object to the Fact of Movant's Prior Convictions

Third, Movant seeks § 2255 collateral relief on the basis that defense counsel violated Movant's Sixth Amendment rights by failing to object to the fact of Movant's prior conviction at the original sentencing hearing. Doc. 1, pp. 17-19. Specifically, Movant alleges that if counsel had objected to the fact of Movant's prior convictions at sentencing, the Government "would have been Restricted to Re-Submitting evidence at the Re-Sentencing hearing" and thus "if the objection was made, the entire outcome of [Movant's] sentencing, direct Appeal, and Re-sentencing would have been entirely different." *Id.*

Movant is correct in his observations that (1) "if [counsel] had contested [the fact of Movant's prior convictions] at original sentencing, the Government would have been required to present evidence at the sentencing hearing to prove the existence of the disputed fact," and (2) under Federal Rules of Criminal Procedure 32(i)(3), by not objecting to the fact of Movant's prior conviction, it was deemed admitted. *Id.* at pp. 18-19 (internal quotations omitted).

However, on appeal of Movant's resentencing, the Eighth Circuit specifically held that the District Court did not err in permitting the Government to introduce into evidence certified copies of Movant's conviction establishing the fact of Movant's prior convictions, notwithstanding defense counsel's failure to object to the fact of these convictions, because the "remand order did not place any restrictions on the introduction of evidence." Crim. Doc. 80-1, p. 4; *Caldwell*, 726 Fed. App'x at 497. Accordingly, even if the Court assumes counsel was deficient for failing to object to the fact of Movant's prior convictions, Movant has failed to show prejudice—

specifically, a reasonable probability that but for counsel's unprofessional error, Movant would have received a lesser sentence. Therefore, this claim for § 2255 relief is denied.

D. Defense Counsel Failed to Raise a Challenge Under *Johnson*

Movant alleges counsel violated his Sixth Amendment rights by failing to raise a claim or bring a challenge under *Johnson v. United States*, 135 S. Ct. 2551 (2015). Doc. 1, pp. 5, 8, 15-16, 20-21. Movant argues counsel should have raised a claim under *Johnson*, along with various other cases applying *Johnson*, after the Supreme Court held the residual clause within 18 U.S.C. § 924(c) was constitutionally void for vagueness, and that counsel should have challenged the sentencing enhancements under §§ 924(c) and 922(g) as applied to Movant.

As argued by Respondent, *Johnson* did not decriminalize any acts. Rather, *Johnson* limited the type of convictions that could be used to enhance the statutory penalties under the Armed Career Criminal Act ("ACCA") by excising the residual clause of § 924(e). However, here, Movant was not sentenced as an armed career criminal. Movant did not plead guilty to nor was Movant sentenced under the ACCA's violent felony enhancement contained with § 924(e), but rather was subject to the enhanced sentence contained within § 924(a)(2)—imposing a maximum sentence of ten years' imprisonment for a knowing violation of 18 U.S.C. § 922(g)(1). Moreover, Movant pleaded guilty to an entirely separate offense under § 924(c)(1)(A)(ii), imposing a minimum sentence of seven years' imprisonment for brandishing a firearm "during and in relation to any crime of violence" using, carrying, or possessing a firearm. Thus, *Johnson* has no impact on Movant's sentences under § 922(g) and § 924(c). Furthermore, neither the U.S. Supreme Court nor the Eighth Circuit Court of Appeals have yet held § 924(c)(3)(B) specifically unconstitutional under *Johnson* or otherwise.[5]

[5] In fact, the Eighth Circuit has held that § 924(c)(3)(B) is specifically *not* unconstitutional after *Johnson* or under the Fifth Amendment's Due Process Clause, *see United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016),

Additionally, to the extent Movant seeks § 2255 relief on the basis that counsel was constitutionally ineffective by failing to challenge Movant's sentence under § 924(c), this claim also fails. The question here is whether counsel was deficient at the time of Movant's sentencing. It is well-settled that "[c]ounsel is not accountable for unknown future changes in the law," and therefore counsel's performance must be evaluated "in light of the facts and circumstances at the time of [sentencing]," rather than "using 'the clarity of hindsight.'" *Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) (quoting *Carter v. Hopkins*, 92 F.3d 666, 669 (8th Cir. 1996); other citations omitted). In other words, "failure [to anticipate a change in the law] does not constitute ineffective assistance." *Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999) (citations omitted).

Movant was sentenced first on June 30, 2016, and then after remand on March 17, 2017. Although the Supreme Court had decided *Johnson* at the time Movant was sentenced, neither the U.S. Supreme Court nor the Eighth Circuit had held § 924(c)(3)(B) unconstitutional under *Johnson* or otherwise. Therefore, Movant cannot overcome the presumption that counsel's conduct is professionally reasonable and not constitutionally deficient where *Johnson* did not directly impact Movant's conviction under § 924(c) and this issue has not yet been decided by the Eighth Circuit or the Supreme Court.

Therefore, Ground Five is without merit and is denied.

E. Defense Counsel Failed to Protect Movant from Cruel and Unusual Punishment and "Oversentencing"

Movant also asserts a claim of ineffective assistance of counsel insofar as counsel "fail[ed] to recognize [Movant']s open court plea . . . expos[ed] Movant to harsher punishment" and, in

cert. denied, 138 S. Ct. 1976 (2018), while the U.S. Supreme Court did recently grant cert. in *United States v. Davis*, 139 S. Ct. 782 (Jan. 4, 2019) (mem.), 903 F.3d 483 (5th Cir. 2018), to determine precisely this question: whether the residual clause of § 924(c)(3)(B) is unconstitutional under *Sessions v. Dimaya*, 584 U.S.—, 138 S.Ct. 1204 (2018) and *Johnson*.

addition, failed to "protect Movant from oversentencing in conjunction with the Fair Sentencing Act, 18 U.S.C. [§] 3553" [sic]. Doc. 1, pp. 14-15. However, Movant fails to satisfy *Strickland*'s prejudice prong as to either claim here.

To the extent Movant claims ineffective assistance of counsel regarding Movant's guilty plea, to satisfy *Strickland*'s prejudice prong in this context requires Movant to demonstrate a "reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Movant does not allege any acts by counsel upon which Movant can establish he would have insisted going to trial rather than pleading guilty. The record demonstrates that Movant had previously rejected a plea deal, Crim. Doc. 57 at 30, and therefore Movant cannot claim the absence of a plea deal is dispositive here. Moreover, at the change of plea hearing, the Court inquired into the discussions between Movant and defense counsel leading up to the change of plea hearing, the five charges contained in the superseding indictment (including the applicable statutory range of punishment for each charge), the numerous trial rights Movant was giving up by pleading guilty, the process for sentencing (including the advisory guidelines and the statutory factors the Court must weigh), and a factual basis for Movant's guilty plea. *Id.* at 2-14, 26-30. Movant has provided no argument other than conclusory allegations to overcome the "formidable barrier" of his representations during plea taking to show his guilty plea was not made knowingly or voluntarily. *Nguyen*, 114 F.3d at 703. Accordingly, Movant has failed to satisfy his burden under *Strickland* to show prejudice, even assuming counsel's representation was somehow deficient regarding Movant's guilty plea.

Additionally, Movant has failed to demonstrate prejudice regarding his sentence. The record shows that defense counsel advocated on Movant's behalf regarding sentencing in the PSR, with sentencing memorandums, and at the sentencing hearings. *See* Crim. Docs. 42, pp. 27-34; 45;

59; 69; 78. Even assuming counsel was deficient under *Strickland*, Movant has set forth no argument to meet his burden to show *Strickland*'s prejudice prong—in this context, a reasonable probability that but for counsel's deficiencies, Movant would have received a lesser sentence. Because Movant's sentence was within the guidelines range and it is the Court's responsibility to weigh the statutory factors under 18 U.S.C. § 3553 (for which defense counsel did present arguments in written and oral form), Movant has failed to demonstrate prejudice.

Therefore, these claims are denied.

F. Ineffective Assistance of Counsel Based Upon Defense Counsel's "Cumulative Errors"

Movant's last claim of ineffective assistance of defense counsel rests on an allegation of counsel's "numerous cumulative errors" that prejudiced Movant's "opportunity at a fair court, [and] fair outcome in Movant's court proceedings." Doc. 1, p. 9. However, simply, "the cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief." *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006); *see United States v. Brown*, 528 F.3d 1030, 1034 (8th Cir. 2008) (rejecting § 2255 claim of ineffective assistance of counsel under a cumulative error theory under *Middleton*). Instead, each separate claim of ineffective assistance of counsel must "rise or fall on its own merits." *Salcedo v. United States*, No. 05-0523-CV-WODS, 2005 WL 2898008, at *4 (W.D. Mo. Nov. 2, 2005) (citing *Pryor*, 103 F.3d at 714 n.6; *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994)). Therefore, this claim is without merit and is denied.

G. Ineffective Assistance of Appellate Counsel

Finally, Movant attempts to raise a claim of ineffective assistance as to Movant's counsel on appeal. Specifically, Movant asserts appellate counsel "failed to also protect, recognize defense counsel[']s numerous cumulative failures" on appeal. Doc. 1, p. 14.

Generally, the right to effective counsel, and an ineffective assistance of counsel claim under *Strickland*, extends or applies to appellate counsel. *See Anderson v. United States*, 393 F.3d 749, 753 (8th Cir. 2005) (quotation and citations omitted); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). As applied in the appellate context, to show deficient performance under the *Strickland* standard, Movant must show appellate counsel's decision to not argue an issue on appeal "was an unreasonable [decision] which only an incompetent attorney would adopt." *Garrett v. United States*, 78 F.3d 1296, 1305 (8th Cir. 1996) (quoting *Stokes v. Armontrout*, 851 F.2d 1085, 1092 (8th Cir. 1988) (internal quotation omitted)). Practically, then, appellate counsel is not constitutionally deficient for failing to raise a meritless issue on appeal. *Id.* (quotation omitted); *see also Anderson*, 393 F.3d at 754 ("Counsel is not required to raise every potential issue on appeal."). Moreover, appellate counsel's failure to raise a meritless issue or argument simply does not prejudice a defendant on appeal. *Gordon v. United States*, 27 F.3d 571 (Table), 1994 WL 285772, at *1 (8th Cir. June 29, 1994) (per curiam).

Accordingly, Movant's claim for § 2255 relief on the basis of ineffective assistance of appellate counsel is without merit. Even if appellate counsel could have somehow raised an issue of ineffective assistance of defense counsel on appeal of Movant's sentence—which is generally not a cognizable claim on appeal, *see, e.g.*, *United States v. Pherigo*, 327 F.3d 690, 696 (8th Cir. 2003) (declining to hear ineffective assistance of counsel claims on direct appeal); *United States v. Dubray*, 727 F.2d 771, 772 (8th Cir. 1984) (same)—because a claim of ineffective assistance of defense counsel based upon counsel's alleged cumulative errors is without merit, as explained above, Movant has failed to satisfy either prong of the *Strickland* analysis. This claim is denied.

IV. Evidentiary Hearing and Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, Movant must show that reasonable jurists debate whether the issues should have been resolved in a different manner or that the issues deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) ("A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief."). Because Movant has made no such showing and the motion conclusively shows he is not entitled to relief, the Court declines to issue a certificate of appealability.

V. Conclusion

Accordingly, for the reasons explained above, it is ORDERED that:

(1) Movant's motion pursuant to 28 U.S.C. § 2255 is DENIED,

(2) a certificate of appealability is DENIED, and

(3) this case is dismissed.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: June 24, 2019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2484

Robert C. Caldwell

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00303-BP)

ORDER

The petition for rehearing by the panel is denied.

February 07, 2020

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

/s/ Michael E. Gans