No._____

IN THE

SUPREME COURT OF THE UNITED STATES

Ryan William Buchheim —PETITIONER

(Your Name)

VS.

United States of America —RESPONDENT(S)

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2933

Ryan William Buchheim

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cv-00085-LRR)

JUDGMENT

Before COLLOTON, SHEPHERD, 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.

November 07, 2022

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

/s/ Michael E. Gans

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

RYAN WILLIAM BUCHHEIM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 19-CV-85-LRR
No. 17-CR-84-LRR

ORDER

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I. INTRODUCTION

The matters before the court are Petitioner Ryan William Buchheim's ("the movant") pro se Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 ("Motion"), which was filed on August 8, 2019 (civil docket no. 1). On the same date, the movant also filed a pro se Motion to Recuse (civil docket no. 2). Additionally, on November 8, 2021, the movant filed a pro se Motion to Correct Docket (civil docket no. 35), and, on November 29, 2021, the movant filed a second pro se Motion to Correct Docket (civil docket no. 39).

On October 15, 2020, the court directed the government to brief the claims of ineffective assistance of counsel that the movant asserted in the motion (civil docket no. 7). The court also directed trial counsel to file with the court an affidavit responding only to the movant's specific allegations of ineffective assistance of counsel (*id.*).[1] After receiving an extension, *see* civil docket no. 15, trial counsel timely filed the affidavit on December 22, 2020 (civil docket no. 17). On February 18, 2021, the movant filed a pro se resistance to trial counsel's affidavit (civil docket no. 20). The government timely filed a responsive brief on March 15, 2021 (civil docket no. 21). On October 26, 2021, the movant filed a pro se reply (civil docket no. 33).

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On October 18, 2017, a grand jury returned a single-count Indictment charging the movant with possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 851 (Count 1) (criminal docket no. 2). At

[1] The movant's appellate counsel died in October 2019. On November 12, 2020, United States Magistrate Judge Mark A. Roberts held a scheduling and status conference to discuss discovery related to appellate counsels' representation (civil docket nos. 10 & 11). The parties decided that a representative of appellate counsel's firm would provide trial counsel with appellate counsel's file and trial counsel would prepare an affidavit addressing the issues related to both trial counsel and appellate counsel in this matter (civil docket no. 11).

arraignment, the movant appeared with retained counsel and entered his plea of not guilty (criminal docket nos. 6 & 8). On November 28, 2017, the movant filed a Motion to Suppress Evidence (criminal docket no. 16). On December 18, 2017, the magistrate judge filed a Report and Recommendation to deny the Motion to Suppress (criminal docket no. 28). On December 19, 2017, the movant appeared before the magistrate judge and entered a conditional plea of guilty to Count 1 of the Indictment (criminal docket no. 30). The magistrate judge entered a Report and Recommendation that a United States District Court Judge accept the movant's conditional plea of guilty to Count 1 of the Indictment (criminal docket no. 32). On January 4, 2018, the court entered an order accepting the report and recommendation concerning the movant's conditional guilty plea and finding him guilty of the crime charged in Count 1 of the Indictment (criminal docket no. 39). On February 9, 2018, the magistrate judge held a hearing on the movant's Motion to Re-open Suppression Hearing for Further Evidence (criminal docket nos. 44 & 53). On February 13, 2018, the magistrate judge filed a Supplemental Report and Recommendation to deny the movant's motion to suppress (criminal docket no. 57). On April 12, 2018, the court entered an order accepting the report and recommendation and supplemental report and recommendation concerning the movant's motion to suppress and denied the motion to suppress (criminal docket no. 65).

A final presentence report was filed on March 27, 2018 (criminal docket no. 63). The presentence report calculated the movant's total offense level as 29 (*id.* at 6, ¶ 19). This calculation included a three-level reduction for acceptance of responsibility (*id.*, ¶¶ 17-18). *See* U.S.S.G. § 3E1.1. With a total offense level of 29 and a criminal history category of II, the movant's advisory Guidelines range was 97 to 121 months' imprisonment (*id.* at 18, ¶ 69). However, because the statutorily required 20-year minimum sentence was greater than the maximum applicable guidelines range, the guidelines term of imprisonment was 240 months' imprisonment (*id.* at 18, ¶¶ 68 & 69). A sentencing hearing was held on May 23, 2018 (criminal docket no. 69). The court imposed a sentence of 240 months' imprisonment on Count 1 of the Indictment (criminal

docket nos. 69 & 70). In addition, the court imposed 10 years of supervised release, a $15,000 fine and a $100 special assessment (criminal docket no. 70).

On June 6, 2018, the movant filed a Notice of Appeal (criminal docket no. 73). On August 2, 2018, the Eighth Circuit Court of Appeals filed a Judgment (criminal docket no. 79), granting the movant's motion to dismiss the appeal and dismissing the appeal in accordance with Federal Rule of Appellate Procedure 42(b).

In the motion, the court understands the movant is asserting nine claims. First, the movant claims that the court improperly asserted itself into the plea-bargaining process and that the court was biased against the movant (Claims 1-3) (civil docket no. 1 at 5-9, 11-15, 18-23). Second, the movant claims that trial counsel was ineffective because trial counsel failed to investigate the traffic stop associated with his criminal case (Claim 4) (*id.* at 25-38). Third, the movant claims that trial counsel was ineffective because trial counsel failed to challenge the district court's interference in his case as set out in Claims 1-3 (Claim 5) (*id.* at 41-45). Fourth, the movant claims that appellate counsel was ineffective for advising him to dismiss his direct appeal (Claim 6) (*id.* at 47-50). Fifth, the movant claims that the government failed to meet its obligations in prosecuting his case (Claims 7-8) (*id.* at 52, 54). Finally, the movant claims that his Fourth Amendment rights were violated (Claim 9) (*id.* at 56-57); *see also* Supplement (civil docket no. 35 at 25-36).

III. MOTIONS TO CORRECT DOCKET

In the first Motion to Correct Docket, the movant requests that the Clerk's Office be directed to "correct the Title and Type of Docket Entry No. 3, to better reflect the filing as an 'Appendix of Exhibits'" (civil docket no. 35 at 2). Similarly, in the second Motion to Correct Docket, the movant requests that the Clerk's Office be directed to correct the docket entry relating to the first Motion to Correct Docket "to properly reflect" all the filings in that docket entry (civil docket no. 39 at 1). "Federal courts need not apply the label that a pro se litigant attaches to a pleading and may instead recharacterize the pleading in order to place it within a different legal category." *See*

United States v. Saeugling, 826 F. App'x 577 (8th Cir. 2020) (citing *Castro v. United States*, 540 U.S. 375, 381 (2003)). Furthermore, regardless of how the documents were filed, the court has considered each, and every claim presented in the movant's filings. Accordingly, both motions to correct docket (docket nos. 35 & 39) are denied.

Additionally, in the first Motion to Correct Docket, the movant also attaches a Motion to Amend his § 2255 motion (civil docket no. 35 at 5-36). Essentially, the movant wishes to include additional statements and allegations relating to Claim 9, the alleged violations of his Fourth Amendment rights (*id.* at 25-36). It appears that the movant is simply expanding on the claim in his original motion, but, even to the extent that he is attempting to add a related claim, the additional statements and allegations clearly relate back to the original motion; and, therefore, the motion to amend is granted. *See* Federal Rule of Civil Procedure 15(c); *see also United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999).

IV. MOTION TO RECUSE

First, the court will address the movant's Motion to Recuse the undersigned from this habeas proceeding (civil docket no. 2). In the Motion to Recuse, the movant asserts that Claims 1-3 of his § 2255 motion "raise the specter of judicial bias in [his] pretrial and plea process [in the criminal case]." Motion to Recuse at 1. The movant maintains that the undersigned "was responsible for, aware of—or reasonably should have been aware of—the actions of [the] Magistrate Judge . . . in applying coercion to overborn [the movant's] will regarding pleading the criminal case out." *Id.* at 1-2. The movant claims that the foregoing assertions create "an appearance of impropriety by giving the judge a motive to favor the interests of the [government] in the [instant] action." *Id.* at 2.

28 U.S.C. § 455(a) provides that "[a]ny . . . judge . . . of the United States shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." *Id.* "Under § 455(a), [the consideration is] whether the judge's impartiality might reasonably be questioned by the average person on the street

who knows all the relevant facts of a case." *In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1358 (8th Cir. 1996). Further, 28 U.S.C. § 455(b) provides:

> [The judge] shall . . . disqualify himself [or herself] in the following circumstances:
>
> Where he [or she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

28 U.S.C. § 455(b)(1). "When a party seeks to establish bias or prejudice from court conduct, the party must show 'that the judge had a disposition "so extreme as to display clear inability to render fair judgment."'" *United States v. Melton*, 738 F.3d 903, 905 (8th Cir. 2013) (quoting *United States v. Sypolt*, 346 F.3d 838, 839 (8th Cir. 2003), in turn quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). "Judges have an obligation to litigants and their colleagues not to remove themselves needlessly[.]" *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa.*, 839 F.2d 1226, 1229 (8th Cir. 1988).

As evidence for recusal, the movant asserts that the undersigned is biased because the undersigned was aware of the Criminal Trial Management Order (criminal docket no. 10) entered by the magistrate judge, setting the trial date, and, noting that, in order to receive the one-level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1(b), the movant must sign his plea agreement at least 21 days in advance of the trial date and must enter a guilty plea at least 14 days before the trial (civil docket no. 2 at 1; criminal docket no. 10 at 3). The movant claims that the undersigned's knowledge of the Criminal Trial Management Order is a form of inserting the court into the plea negotiation process (civil docket no. 2 at 7). The movant also asserts that bias is implied because the undersigned was aware that the magistrate judge set the motion to suppress hearing three days after the movant could receive the acceptance of responsibility benefits under U.S.S.G. § 3E1.1(b) (*id.* at 12). Finally, the movant contends that the undersigned's impartiality is compromised because the court denied a motion to continue

the trial (*id.* at 20). The court entered the standard Criminal Trial Management Order for the Northern District of Iowa. The movant's guilty plea was conditional on the outcome of the motions to suppress. Thus, the fact that the motion to suppress hearing was three days after his deadline to plea and receive acceptance of responsibility benefits is irrelevant. The court's denial of a motion to continue trial is within the court's discretion and does not demonstrate impartiality. Based on all of the foregoing, not only is the movant's Motion to Recuse absolutely frivolous, but significantly, the movant offers no evidence that the average person on the street who knows all the relevant facts of the case would even remotely or reasonably question the undersigned's impartiality. Moreover, the movant offers absolutely no evidence that the undersigned is unable to render fair judgment. Accordingly, the movant's Motion to Recuse (civil docket no. 2) is denied.

V. LEGAL STANDARDS

A. Standards Applicable to Motion Pursuant to 28 U.S.C. § 2255

A prisoner in custody under sentence of a federal court is able to move the sentencing court to vacate, set aside or correct a sentence. *See* 28 U.S.C. § 2255(a). To obtain relief pursuant to 28 U.S.C. § 2255, a federal prisoner must establish: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction to impose such sentence"; (3) "that the sentence was in excess of the maximum authorized by law"; or (4) "[that the judgment or sentence] is otherwise subject to collateral attack." *Id.*; *see also Hill v. United States*, 368 U.S. 424, 426-27 (1962) (listing four grounds upon which relief under 28 U.S.C. § 2255 may be claimed); *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007) (same); *Lee v. United States*, 501 F.2d 494, 499-500 (8th Cir. 1974) (clarifying that subject matter jurisdiction exists over enumerated grounds within the statute); Rule 1 of the Rules Governing Section 2255 Proceedings (specifying scope of 28 U.S.C. § 2255). If any one of the four grounds is established, the court is required "to vacate and set aside

the judgment and [it is required to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

When enacting 28 U.S.C. § 2255, Congress "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)) (internal quotation mark omitted). Although it appears to be broad, 28 U.S.C. § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). Rather, 28 U.S.C. § 2255 is intended to redress constitutional and jurisdictional errors and, apart from those errors, only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Sun Bear*, 644 F.3d at 704 (clarifying that the scope of 28 U.S.C. § 2255 is severely limited and quoting *Hill*, 368 U.S. at 428); *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987))). A collateral challenge under 28 U.S.C. § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) (making clear that a motion pursuant to 28 U.S.C. § 2255 will not be allowed to do service for an appeal). Consequently, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (quoting *Addonizio*, 442 U.S. at 184).

The law of the case doctrine has two branches. *See Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). The first branch involves the "mandate rule (which, with only a few exceptions, forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case)." *Id.* The second branch, which is somewhat more

flexible, provides that "a court ordinarily ought to respect and follow its own rulings" throughout subsequent stages of the same litigation. *Id.*; *see also United States v. Bloate*, 655 F.3d 750, 755 (8th Cir. 2011) ("The [law of the case] doctrine applies only to actual decisions—not dicta—in prior stages of the case."); *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995) ("Law of the case applies only to issues actually decided, either implicitly or explicitly, in the prior stages of a case."). "[R]ulings are the law of the case and will not be disturbed absent an intervening change in controlling authority." *Baranski v. United States*, 515 F.3d 857, 861 (8th Cir. 2008); *see also Davis*, 417 U.S. at 342 (observing that law of the case did not preclude relief under 28 U.S.C. § 2255 because of intervening change in the law).

Hence, in collateral proceedings based on 28 U.S.C. § 2255, "[i]ssues raised and decided on direct appeal cannot ordinarily be relitigated." *United States v. Wiley*, 245 F.3d 750, 751 (8th Cir. 2001) (citing *United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000)); *see also Lefkowitz v. United States*, 446 F.3d 788, 790-91 (8th Cir. 2006) (concluding that the same issues that have been raised in a new trial motion and decided by the district court cannot be reconsidered in a subsequent collateral attack); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003) ("It is well settled that claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." (quoting *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981))); *Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (per curiam) (concluding that claims already addressed on direct appeal could not be raised); *United States v. Kraemer*, 810 F.2d 173, 177 (8th Cir. 1987) (concluding that a movant could not "raise the same issues . . . that have been decided on direct appeal or in a new trial motion"); *Butler v. United States*, 340 F.2d 63, 64 (8th Cir. 1965) (concluding that a movant was not entitled to another review of his question). With respect to a claim that has already been conclusively resolved on direct appeal, the court may only consider the same claim in a collateral action if "convincing new evidence of actual innocence" exists. *Wiley*, 245 F.3d at 752 (citing cases and emphasizing the narrowness of the exception).

Further, movants ordinarily are precluded from asserting claims that they failed to raise on direct appeal. *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001); *see also Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam) (citing *Frady*, 456 U.S. at 167-68, for the proposition that a movant is not able to rely on 28 U.S.C. § 2255 to correct errors that could have been raised at trial or on direct appeal); *United States v. Samuelson*, 722 F.2d 425, 427 (8th Cir. 1983) (concluding that a collateral proceeding is not a substitute for a direct appeal and refusing to consider matters that could have been raised on direct appeal). "A [movant] who has procedurally defaulted a claim by failing to raise it on direct review may raise that claim in a [28 U.S.C. §] 2255 proceeding only by demonstrating cause for the default and prejudice or actual innocence." *McNeal*, 249 F.3d at 749 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)); *see also Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the [movant] shows cause and prejudice."). "'[C]ause' under the cause and prejudice test must be something *external* to the [movant], something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). If a movant fails to show cause, a court need not consider whether actual prejudice exists. *See McCleskey v. Zant*, 499 U.S. 467, 501 (1991). Actual innocence under the actual innocence test "means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623; *see also McNeal*, 249 F.3d at 749 ("[A movant] must show factual innocence, not simply legal insufficiency of evidence to support a conviction."). To establish actual innocence, a movant "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation omitted) (internal quotation marks omitted).[2]

[2] The procedural default rule applies to a conviction obtained through trial or through the entry of a guilty plea. *See, e.g., Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997); *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997); *Reid v. United States*, 976 F.2d 446, 448 (8th Cir. 1992).

B. Standards Applicable to Constitutional Right to Counsel

The Sixth Amendment to the United States Constitution provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defen[s]e." U.S. Const., amend. VI. Thus, a criminal defendant is constitutionally entitled to the effective assistance of counsel both at trial and on direct appeal. *See Evitts v. Lucey*, 469 U.S. 387, 393-96 (1985); *Bear Stops*, 339 F.3d at 780. By the same token, "ineffective assistance of counsel" could result in the imposition of a sentence in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255; *Bear Stops*, 339 F.3d at 781 ("To prevail on a § 2255 motion, the [movant] must demonstrate a violation of the Constitution or the laws of the United States.").

The Sixth Amendment right to effective counsel is clearly established. *See Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court explained that a violation of that right has two components:

> First, [a movant] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [movant] by the Sixth Amendment. Second, [a movant] must show that the deficient performance prejudiced the defense.

Id. at 687; *see also Williams v. Taylor*, 529 U.S. 362, 390 (2000) (reasserting *Strickland* standard). Thus, *Strickland* requires a showing of both deficient performance and prejudice. However, "a court deciding an ineffective assistance claim [need not] address both components of the inquiry if the [movant] makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed." *Id.*; *see also Apfel*, 97 F.3d at 1076 ("[A court] need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice.").

The "deficient performance" prong requires the movant to show that his or her "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the [movant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That showing can be made by demonstrating that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. There are two substantial impediments to making such a showing, however. First, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Second, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689)); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland*, 466 U.S. at 694). The "reasonableness of counsel's challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. In sum, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.*

Even if counsel's performance was "deficient," the movant must also establish "prejudice." *See id.* at 692. To satisfy this "prejudice" prong, the movant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Thus, "[i]t is not enough for the [movant] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693; *Pfau v. Ault*, 409 F.3d 933, 939 (8th Cir. 2005) (same).

VI. ANALYSIS

A. Request for Evidentiary Hearing

A district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the alleged facts, if true, entitle the movant to relief. *See Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). Accordingly, a district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing "if (1) the . . . allegations, accepted as true, would not entitle the [movant] to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted); *see also Delgado v. United States*, 162 F.3d 981, 983 (8th Cir. 1998) (stating that an evidentiary hearing is unnecessary where allegations, even if true, do not warrant relief or allegations cannot be accepted as true because they are contradicted by the record or lack factual evidence and rely on conclusive statements); *United States v. Hester*, 489 F.2d 48, 50 (8th Cir. 1973) (stating that no evidentiary hearing is necessary where the files and records of the case demonstrate that relief is unavailable or where the motion is based on a question of law). Stated differently, the court can dismiss a 28 U.S.C. § 2255 motion without a hearing where "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *accord Adejumo v. United States*, 908 F.3d 357, 361 (8th Cir. 2018); *Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court concludes that it is able to resolve the movant's claims from the record. *See Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (holding that "[a]ll of the information that the court needed to make its decision with regard to [the movant's] claims was included in the record" and, therefore, the court "was not required to hold an evidentiary hearing" (citing Rule Governing Section 2255 Proceedings 8(a) and *United*

States v. Raddatz, 447 U.S. 667, 674 (1980))). The evidence of record conclusively demonstrates that the movant is not entitled to the relief sought. Specifically, it indicates that the movant's assertions are without merit. As such, the court finds that there is no need for an evidentiary hearing.

B. The Movant's Arguments

With respect to the merits of the movant's claims, the court deems it appropriate to deny the motion for the reasons that are stated in the government's resistance because it adequately applied the law to the facts in the case. Specifically, the government correctly concluded that trial counsel provided professional and effective assistance to the movant and that he suffered no prejudice as a result of counsel's actions.

1. Claims 1-3 & 6

As discussed above in the movant's Motion to Recuse, in Claims 1-3 of his § 2255 motion, the movant alleges that the court demonstrated bias and impartiality by improperly injecting itself into the plea-bargaining process by: (1) entering the Northern District of Iowa's standard Criminal Trial Management Order, *see* criminal docket no. 10, which notes that, in order to receive the one-level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1(b), a defendant must sign his or her plea agreement at least 21 days in advance of the trial date and must enter a guilty plea at least 14 days before the trial, *see id.* at 3; (2) setting the movant's motion to suppress hearing three days after the movant could receive the acceptance of responsibility benefits under U.S.S.G. § 3E1.1(b); and (3) denying the movant's motion to continue the trial. *See generally* civil docket no. 1 at 5-9, 11-15, 18-23.

In Claim 6, the movant alleges that he received ineffective assistance of appellate counsel because appellate counsel advised him "to dismiss his direct appeal" and appellate counsel's representation "was inadequate . . . because—as detailed in [Claims] One, Two, and Three—there w[ere] obvious structural . . . errors present on the record" (civil docket no. 1 at 47). The movant claims that he would not have withdrawn his appeal, "but for the advice of his appellate counsel" (*id.* at 48). The movant maintains that appellate

counsel should have raised arguments relating to the court's impartiality and bias, particularly with regard to the plea process. *See generally id.* at 48-50.

The court will address Claim 6 first, as it supports finding Claims 1-3 procedurally defaulted. On June 6, 2018, a Notice of Appeal (criminal docket no. 73) was timely filed. On August 1, 2018, a Motion to Dismiss Appeal was filed. *See* Eighth Circuit Entry ID 4689027 in Eight Circuit Case No. 18-2258 at 1. In the Motion to Dismiss Appeal, appellate counsel stated that he had "reviewed all potential appellate issues and thoroughly discussed the matter with the [movant] in writing and in person before he was transferred to FCI Sandstone." *Id.* Further, in the Motion to Dismiss Appeal, appellate counsel stated that the movant "wishes to dismiss this Appeal and a signed consent to dismiss appeal is attached hereto." *Id.* The movant's "Written Consent to Dismissal of Appeal" attached to the Motion to Dismiss Appeal states that the movant, "having thoroughly discussed this matter with my attorney . . . hereby gives my written permission for [my attorney] to file a Motion to Dismiss my Appeal No. 18-2258." *Id.* at 3.

In order to show ineffective assistance of appellate counsel, the movant must demonstrate that counsel's performance was deficient and that the movant was prejudiced by counsel's deficient performance. *See United States v. Brown*, 528 F.3d 1030, 1032-33 (8th Cir. 2008). "The deficient performance standard is rigorous. 'Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal.'" *Id.* at 1033 (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Absent contrary evidence, courts "assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *Brown*, 528 F.3d at 1033 (quoting *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998)). The prejudice standard is also rigorous, and a movant must show that "'the result of the proceeding would have been different' had he [or she] raised the . . . issue on direct appeal." *Brown*, 528 F.3d at 1033 (quoting *Becht v. United States*, 403 F.3d 541, 546 (8th Cir. 2005)).

It is clear from the record that, after filing the Notice of Appeal, appellate counsel reviewed the potential appealable issues that could be raised and determined that there were no appealable issues. Appellate counsel discussed his determination that there were no appealable issues with the movant and the movant agreed, including the movant giving his written permission to dismiss the appeal. To the extent the movant asserts that appellate counsel was ineffective for failing to raise issues of the court's impartiality and bias on appeal, the movant's assertion is misplaced. As will be discussed more fully below, the movant's claims of the court's impartiality and bias are wholly without merit and frivolous. Appellate counsel's determination not to raise such issues on appeal was sound appellate strategy. Indeed, as discussed above, the movant offers absolutely no evidence that the average person on the street who knows all the relevant facts of the case would reasonably question the court's impartiality or that the court failed to render fair judgment. Thus, the court finds that appellate counsel was not deficient. Moreover, the movant cannot show prejudice. Here, the outcome of this case would not have been different had appellate counsel raised the frivolous and unmeritorious claims related to the court's impartiality and bias, as articulated by the movant in his § 2255 motion, on appeal. Accordingly, Claim 6 of the movant's § 2255 motion is denied.

Turning to Claims 1-3, all three of these claims are procedurally defaulted. The movant could have and should have raised all three of these claims on direct appeal. *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001) (providing that a movant is ordinarily precluded from asserting claims that he or she failed to raise on direct appeal). The movant cannot show cause for not raising these claims on direct appeal. First, the movant provided his written consent to dismiss his appeal. Specifically, the movant acknowledged that he had "thoroughly discussed" his appeal with appellate counsel and gave his permission to dismiss the appeal. *See* Eighth Circuit Entry ID 4689027 in Eight Circuit Case No. 18-2258 at 3. Second, as discussed above, appellate counsel's determination not to raise issues related to Claims 1-3 on appeal was sound appellate strategy, as Claims 1-3 are frivolous and wholly without merit. Third, the movant cannot

show prejudice. Indeed, there is absolutely nothing in Claims 1-3 to support, let alone demonstrate a substantial likelihood, that the outcome of the movant's case would have been different, as there is no evidence that a reasonable person would find the court to have been partial or unable to render fair judgment. Specifically, the court's use of the standard Criminal Trial Management Order, setting a motion to suppress hearing and denying a motion to continue trial are all well within the court's discretion and do not demonstrate, let alone even hint at impartiality or bias.

Moreover, with regard to the movant's specific claim of the court's impartiality, bias and improper injection of itself in the plea-bargaining process, the record demonstrates that the movant freely and voluntarily entered into the plea agreement. In the plea agreement the movant acknowledged that he was:

> entering into this plea agreement and is pleading guilty freely and voluntarily because [the movant] is guilty and for no other reason. [The movant] further acknowledges [the movant] is entering into this agreement without reliance upon any discussions between the government and [the movant] (other than those specifically described in this plea agreement), without promise of benefit of any kind (other than any matters contained in this plea agreement), and without threats of force, intimidation, or coercion of any kind.

(criminal docket no. 31 at 10, ¶ 28). At the plea change hearing, held on December 19, 2017, the movant again confirmed the voluntariness of his plea, acknowledging that his "decision to plead guilty [was] a voluntary decision" and stating that no one "forced or pressured [him] in any way to plead guilty" (criminal docket no. 84 at 24). Additionally, in the Report and Recommendation to Accept Conditional Guilty Plea, it states that the movant "confirmed that the decision to plead guilty was voluntary and not the result of any promises other than plea agreement promises; and the decision to plead guilty was not the result of any threats, force, or anyone pressuring [him] to plead guilty" (criminal docket no. 32 at 5). Thus, based on all the foregoing, the court finds that Claims 1-3 of the movant's § 2255 motion are frivolous, wholly lack merit and are procedurally defaulted. Accordingly, Claims 1-3 are denied.

2. Claim 4

In Claim 4, the movant alleges that trial counsel provided ineffective assistance of counsel by failing to properly investigate the traffic stop in this case (civil docket no. 1 at 25). Specifically, the movant asserts that, if trial counsel had properly investigated the traffic stop by, for example, obtaining cell phone records, obtaining video and other information related to the average time it takes to issue a traffic citation, conducting background checks of all officers involved in the traffic stop, researching pacing techniques and obtaining training records, trial counsel would have been able to raise additional defense theories and would have been able to answer questions raised by the court at the suppression hearing (civil docket no. 1 at 26-30).

Here, trial counsel filed a motion to suppress (criminal docket no. 16). In the Brief in Support of the Motion to Suppress, trial counsel argued, among other things, that "[l]aw enforcement prolonged the traffic stop—beyond the time reasonably required to complete the mission of issuing a traffic citation—for the purpose of conducting the open air dog sniff" (criminal docket no. 16-3 at 2). At the suppression hearing held on December 15, 2017, trial counsel argued that the stop of the movant's vehicle was "unreasonably prolonged for an open-air sniff without any specific reasonable suspicion" (criminal docket no. 36 at 66). Also at the December 15, 2017 hearing, trial counsel directed the court to case law regarding the time necessary to issue a traffic citation (*id.* at 69). On December 18, 2017, the magistrate judge issued a Report and Recommendation which recommended that the motion to suppress be denied (criminal docket no. 28). On January 1, 2018, trial counsel filed nine objections to the December 18, 2017 Report and Recommendation (criminal docket no. 38). On January 12, 2018, trial counsel filed a Motion to Reopen the Suppression Hearing for Further Evidence (criminal docket no. 44). Trial counsel argued that newly discovered evidence concerning dispatch records, time stamps and the formation of the traffic citation conflicted with law enforcement testimony at the initial hearing which required clarification of the evidentiary record (*id.* at 2). A supplemental hearing was held on

February 9, 2018 (criminal docket no. 53). At the supplemental hearing trial counsel filed the "Calls for Service Report," the "Background Event Chronology" and information on law enforcement's criminal traffic software (criminal docket nos. 55, 55-1, 55-2 & 55-3). On February 13, 2018, the magistrate judge issued a Supplemental Report and Recommendation to deny the motion to suppress (criminal docket no. 57). On February 27, 2018, trial counsel filed objections to the Supplemental Report and Recommendation (criminal docket no. 62).

"Counsel is required to make a reasonable investigation in preparing [the] defense, including reasonably deciding when to cut off further investigation." *Winfield v. Roper*, 460 F.3d 1026, 1034 (8th Cir. 2006). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690.

Here, trial counsel's representation was not outside the range of professional competent assistance. Trial counsel made a reasonable investigation and filed a motion to suppress which thoroughly addressed the primary issue in the traffic stop—the length of the stop. After filing objections to the magistrate judge's report and recommendation, trial counsel raised additional issues relating to the traffic stop based on newly discovered evidence, which was argued at a hearing. Again, it is clear that trial counsel made reasonable investigation in this case. The movant also cannot show prejudice, as there is no evidence that further investigation would have changed the outcome of the motion to suppress. Indeed, the generic-type evidence the movant suggests his attorneys should have pursued in the motion to suppress is irrelevant to what the court, in its order adopting the magistrate's report and recommendation, described as a narrow issue of whether law enforcement extended the traffic stop for purposes of conducting a free-air dog sniff. *See* criminal docket no. 65 at 5-6. The court found that "[t]here is nothing in the record to suggest that the free-air sniff interfered with the traffic stop in any way, nor that Investigator Magill slowed the processing of the ticket to allow more time for the free-air sniff." *Id.* at 8-9. Accordingly, based on the foregoing, because the movant cannot

show deficient performance or prejudice, the movant's Claim 4 of ineffective assistance of counsel is denied.

3. Claim 5

The movant alleges that trial counsel provided ineffective assistance of counsel by failing to "take steps to challenge the District Court's willful interference in [the movant's] case as detailed in Ground[s] One, Two, and Three [of his § 2255 motion]" (civil docket no. 1 at 41). Specifically, the movant asserts that trial counsel should have moved for recusal and misconduct charges against the undersigned and the magistrate judge in his criminal case (*id.* at 43-44).

As discussed above, Claims 1-3 of the movant's § 2255 motion are wholly without merit and frivolous. Furthermore, also as discussed above, the movant offers no evidence that the average person on the street who knows all the relevant facts of the case would even remotely or reasonably question the undersigned's impartiality or the magistrate judge's impartiality in his criminal case. Moreover, the movant offers absolutely no evidence that the undersigned or the magistrate judge were unable to render fair judgment in his criminal case.

To the extent the movant is suggesting that his guilty plea was involuntary, such a suggestion is belied by the record. Indeed, the movant: (1) acknowledged in his plea agreement that his plea was free and voluntary and without threats of force, intimidation or coercion of any kind (criminal docket no. 31 at 10, ¶ 28); (2) confirmed at the plea change hearing that his plea was voluntary and acknowledged that his "decision to plead guilty [was] a voluntary decision" and stated that no one "forced or pressured [him] in any way to plead guilty" (criminal docket no. 84 at 24); and (3) according to the Report and Recommendation to Accept Conditional Guilty Plea, "confirmed that [his] decision to plead guilty was voluntary and not the result of any promises other than plea agreement promises; and the decision to plead guilty was not the result of any threats, force, or anyone pressuring [him] to plead guilty" (criminal docket no. 32 at 5). Furthermore, trial counsel, in the affidavit, points out that trial counsel was "fully aware and had

numerous discussions with [the movant] that the Motion to Suppress was central to the defense in this case" (civil docket no. 17 at 4, ¶ 22). Trial counsel explained that, "[b]ecause the Motion to Suppress was so important, [trial counsel] filed a Motion to Continue Trial" for purposes of allowing "resolution of the Motion to Suppress before the deadline to make a decision as to whether to enter a plea of guilty and receive the benefit of acceptance of responsibility" (*id.* at 5, ¶ 23). Ultimately, the motion to continue was denied and trial counsel procured "an agreement with the [g]overnment to consent to a conditional guilty plea," which allowed the movant to "only be entering a guilty plea if his Motion to Suppress was denied" and "to still receive a reduction pursuant to the federal sentencing guidelines for timely acceptance of responsibility" (*id.* at 5, ¶¶ 25 & 26). Not only did the court not interject itself into the plea negotiation process, but the movant's trial counsel effectively procured a conditional plea to preserve the movant's acceptance of responsibility when the court denied the movant's motion to continue trial. Accordingly, trial counsel was not ineffective and there is absolutely no reason for trial counsel to have filed a motion to recuse or charges of misconduct against the court. *See United States v. Cronic*, 466 U.S. 648, 657 n.19 (1984) ("Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical"); *Hale v. Lockhart*, 903 F.2d 545, 549-50 (8th Cir. 1990) (holding that counsel cannot be found ineffective for failing to file a futile motion and there is no prejudice to a movant for counsel's failure to file a futile motion). Based on the foregoing, because the movant cannot show deficient performance or prejudice, the movant's Claim 5 of ineffective assistance of counsel is denied.

4. Claims 7 & 8

In Claims 7 and 8, the movant alleges that the government failed to meet its obligations in prosecuting his case (civil docket no. 1 at 52, 54). In Claim 7, the movant contends that he believes "there are significant material records being suppressed by the prosecution, or a member of their extended team" (*id.* at 52). In Claim 8, the movant asserts that, "[b]ecause the prosecution, or a member of its team, has suppressed records

and documents requested or required to be provided . . . [the movant] is unable to properly . . . raise specific acts of perjury he believes occurred in the officer's [(Investigator Magill's] testimony at both the first and second suppression hearing" (*id.* at 54).

Claims 7 and 8 are procedurally defaulted. The movant could have and should have raised these two claims on direct appeal. *See McNeal*, 249 F.3d at 749 (providing that a movant is ordinarily precluded from asserting claims that he or she failed to raise on direct appeal). The movant cannot show cause for not raising these claims on direct appeal. As discussed above, the movant provided his written consent to dismiss his appeal, acknowledging that he had "thoroughly discussed" his appeal with appellate counsel and gave his permission to dismiss the appeal. *See* Eighth Circuit Entry ID 4689027 in Eight Circuit Case No. 18-2258 at 3. Further, the movant offers no evidence to support Claims 7 and 8. Indeed, the movant raised the Claim 8 issue in his objections to the magistrate judge's report and recommendation on the motion to suppress. In ruling on the movant's objections, the court specifically addressed Investigator Magill's, testimony and found the testimony credible. *See* criminal docket no. 65 at 9. As for Claim 7, the movant offers no evidence and bases his argument on nothing more than his own belief. Thus, he cannot show prejudice, as there is absolutely nothing in Claims 7 and 8 to suggest, let alone demonstrate a substantial likelihood, that the outcome of the movant's case would have been different had these issues been raised on appeal. Accordingly, Claims 7 and 8 of the movant's § 2255 motion are denied.

5. Claim 9

In Claim 9, the movant alleges his Fourth Amendment rights were violated (civil docket no. 1 at 56-57); *see also* Supplement (civil docket no. 35 at 25-36). This claim is wholly related to the traffic stop, which was fully litigated in the motion to suppress and fully relates to issues raised in Claim 4 above.

Claim 9 is procedurally defaulted. The movant could have and should have raised this claim on direct appeal. *See McNeal*, 249 F.3d at 749 (providing that a movant is

ordinarily precluded from asserting claims that he or she failed to raise on direct appeal). The movant cannot show cause for not raising this claim on direct appeal. As discussed above, the movant provided his written consent to dismiss his appeal, acknowledging that he had "thoroughly discussed" his appeal with appellate counsel and gave his permission to dismiss the appeal. *See* Eighth Circuit Entry ID 4689027 in Eight Circuit Case No. 18-2258 at 3. Further, the evidence offered by the movant is of no avail. As discussed in Claim 4 above—essentially the same claim as alleged here in Claim 9—the court found that "[t]here is nothing in the record to suggest that the free-air sniff interfered with the traffic stop in any way, nor that Investigator Magill slowed the processing of the ticket to allow more time for the free-air sniff." *Id.* at 8-9. Thus, the movant cannot show prejudice, as there is absolutely nothing in Claim 9 to suggest, let alone demonstrate a substantial likelihood, that the outcome of the movant's case would have been different had this issue been raised on appeal. Accordingly, Claim 9 of the movant's § 2255 motion is denied.

6. Summary

In addition to fully addressing and considering the nine claims raised in the movant's § 2255 motion, the court has thoroughly reviewed the record and finds that dismissing the movant's claims comports with the Constitution, results in no "miscarriage of justice" and is consistent with the "rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Apfel*, 97 F.3d at 1076 ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder*, 810 F.2d at 821)). The court concludes that the movant knowingly and voluntarily pleaded guilty. *See Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on conviction unless 'on the face of the record the court had no power to enter the conviction or impose the sentence.'"); *United States v. Jennings*, 12 F.3d 836, 839 (8th Cir. 1994) (a voluntary and unconditional guilty plea waives all defects

except those related to jurisdiction). Further, it is apparent that the conduct of trial counsel and appellate counsel fell within a wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, and any deficiencies in their performance did not prejudice the movant's defense, *id.* at 692-94, or result in the imposition of a sentence in violation of the Constitution or laws of the United States, *Bear Stops*, 339 F.3d at 781. Considering all the circumstances and refraining from engaging in hindsight or second-guessing trial counsel's and appellate counsel's strategic decisions, the court finds that the record belies the movant's claims and no violation of the movant's constitutional right to counsel occurred.

VII. CONCLUSION

In sum, the alleged errors that are asserted by the movant warrant no relief under 28 U.S.C. § 2255. The movant's claims are meritless. Based on the foregoing, the movant's 28 U.S.C. § 2255 motion shall be denied.

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F. 3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16

F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds that the movant failed to make the requisite "substantial showing" with respect to the claims that he raised in his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his 28 U.S.C. § 2255 motion, the movant may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

IT IS THEREFORE ORDERED:

(1) The movant's Motions to Correct Docket (civil docket nos. 35 & 39) are **DENIED**.

(2) The movant's Motion to Amend (attached to civil docket no. 35 at 5-36) is **GRANTED**.

(3) The Movant's Motion to Recuse (civil docket no. 2) is **DENIED**.

(4) The movant's 28 U.S.C. § 2255 motion (civil docket no. 1) is **DENIED**.

(5) A certificate of appealability is **DENIED**.

(6) This case is **DISMISSED**, and the Clerk of Court is **DIRECTED** to **CLOSE** this case.

DATED this 13th day of June, 2022.

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2933

Ryan William Buchheim

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:19-cv-00085-LRR)

ORDER

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

January 10, 2023

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

/s/ Michael E. Gans

CONSTITUTION OF THE UNITED STATES

Table of Contents

ARTICLE I. LEGISLATIVE DEPARTMENT.

Sec. 9.

Cl 2. Habeas corpus.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment 4 Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 Rights of the accused.

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

UNITED STATES CODE SERVICE

First Session of the 117th Congress (Public Laws 116-1 to 117-167)

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

Part VI. PARTICULAR PROCEEDINGS

CHAPTER 153. HABEAS CORPUS

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has

made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2255. Federal custody; remedies on motion attacking sentence

(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 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.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

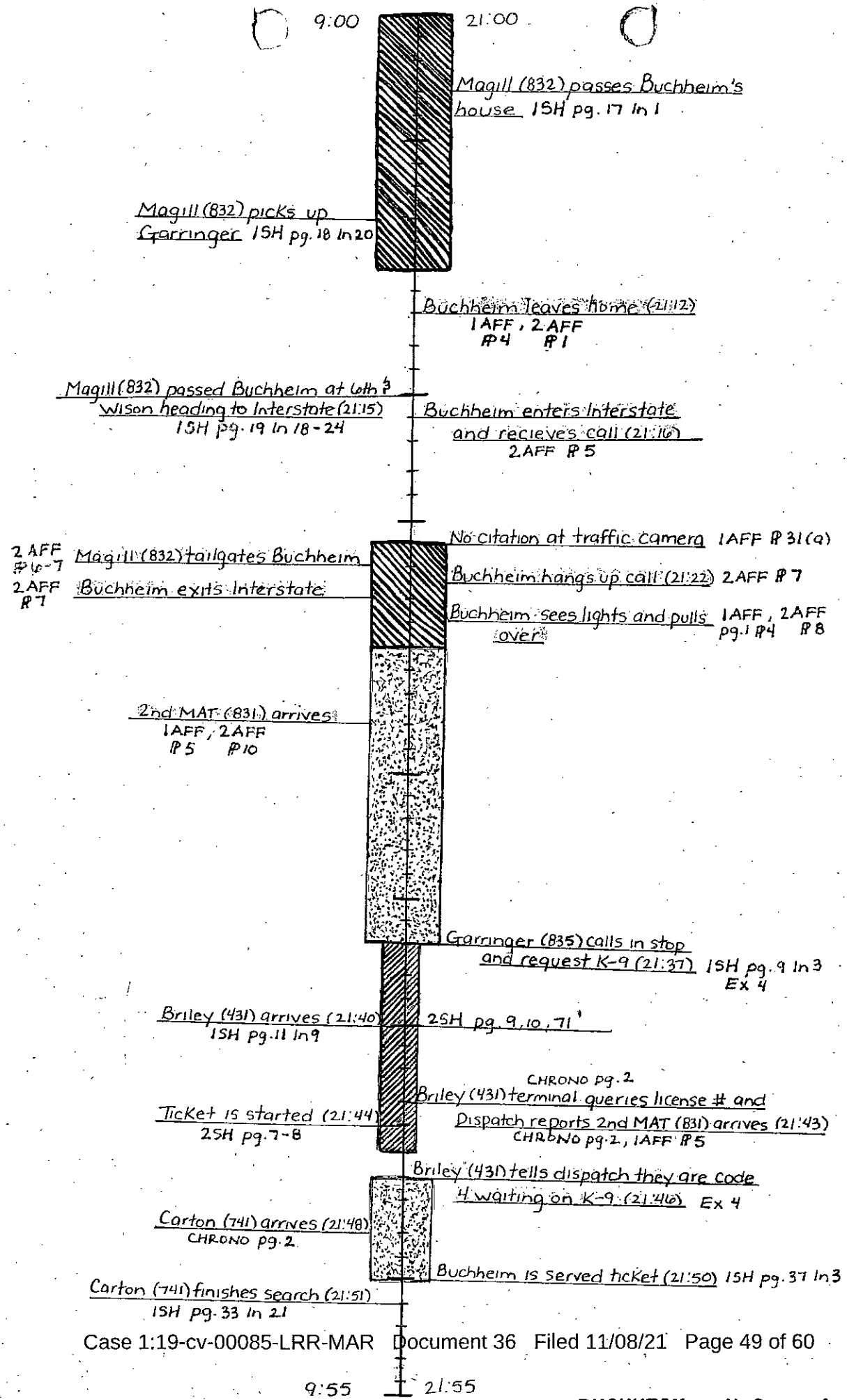
(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

March 16, 2017 Traffic Stop Timeline

Exhibit 11



1 OF 2

SEE PAGE 2 FOR SOURCE LEGEND

SOURCE LEGEND

- | - 5 minute mark
- | - 1 minute mark
- ▨ - range of time
- ▩ - dilligence error
- 1SH - first suppression hearing on 12/15/2017, Doc. 36
- 2SH - transcription of second suppression hearing on 02/09/2018, Doc. 59
- Ex - 2255 proceeding exhibit
- CHRONO - second suppression hearing Defendant's Exhibit C, Doc. 55-2
- 1AFF - exhibit 1
- 2AFF - exhibit 6
- highlighted text - new evidence not presented at either suppression hearing
- ▨ - time to complete a ticket with a paper citation

See Exhibit 6, P 11 for Certification of Authenticity pursuant to FRE 1006

CITATIONS AND COMPLAINT TICKET BOOKS ISSUED

DATE ISSUED	TIME ISSUED	OFFICER	OFFICER PIN	CITATION TYPE	TICKET NUMBER SEQUENCE	ISSUING RECORD TECH/PIN
01-07-16	1700	C. Carton	1024	Citation	CR823649 - CR823659	M Forsyth [illegible]
01-07-16	1700	C. Carton	1024	Complaint	CR442163 - CR442169	M Forsyth 891
01-07-16	950	Chief Jayler	577	Complaint	CR443536 - CR443549	M Forsyth
1/8/2016	1515	LT C. McGarvey	693	Complaint	CR439125 - CR43139	M. OKonek 375
1/8/2016	1515	LT C. McGarvey	693	Citation	CR907265 - CR907278	M OKonek 375
1-8-16	1520	Deutmeyer	786	complaint	CR 420896 - 420899	M Forsyth
1-10-16	2140	LIGHTNER	1102	Complaint	CR890940 - 890954	EVANS 891
↓	↓	↓	↓	CITATION	PD 024503 - 024525	EVANS 891
→	2210	Garringer	1051	Citation	CR880365 - CR880379	Collins 1018 ←
1-14-16	0045	A. Whitaker	918	Citation	CR906964 - CR906978	KDesenuno 1038
1-14-16	0045	A. Whitaker	918	Complaint	CR444045 - CR444059	KDesenuno 1038
1-15-16	0650	Jeffery	442	Citation	CR906514 - CR906528	A. Collins 1018
1-15-16	0650	Jeffery	442	Complaint	CR438390 - CR438404	A. Collins 1018
1-15-16	1245	Zamer	457	citation	CR905014 - CR905028	J. English 1071
1-15-16	1725	Joecken	781	Complaint	CR 888379 - CR888389	Evans 891
1-15-16	1725	Joecken	781	Complaint	CR 437956 - 437969	Evans 891
~~1-15-16~~	~~2255~~	~~Berzen~~	~~1117~~	~~Citation~~	~~CR905029 - 905043~~	Evans 891
~~1-15-16~~	~~2255~~	~~Berzen~~		~~Complaint~~	~~CR 439755 - 439769~~	Evans 891
1-18-16	1845	M. Bieher	900	Citation	CR 881250 - CR881264	Rehber 516

10-16

BUCHHEIM 2255 EXHIBIT

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CEDAR RAPIDS POLICE
Incident/Investigation Report

Case No: 2017-04009

Agency: CRPD
Date: 4/7/2017 12:47:48

Supplement Information

Supplement Date	Supplement Type	Supplement Officer
03/17/2017 01:44:09	SUPPLEMENT	(21100) BRILEY, JACOB P
Contact Name		Supervising Officer
		(20689) FAIRCLOTH, LAURA L

Supplement Narrative

Offense: Narcotics Investigation
Victim: State of Iowa
Suspect: Ryan Buchheim, DOB 8/3/69
Date: 3/16/17
Status: Open

On 3/16/17 at approximately 2137 hours I, Officer Briley, unit 431 was on routine patrol when I overheard the MAT unit Investigators Magill and Garringer go out on a traffic stop at H Ave and Center Point Rd. NE with Iowa license plate EVB040. I was close to the area and as a result I went to the stop in order to provide backup. Upon my arrival there Investigators Brand and Hepke were standing by at the front of the stopped vehicle while Investigators Magill and Garringer were at their squad car parked immediately behind the vehicle. As a result I stood by their car, which was an unmarked vehicle, while Investigators Brand and Hepke stood by with the vehicle. I did not interact with the vehicle or the subject at the stop at any point during this time and stood by watching the vehicle and the surrounding scene providing cover for my fellow officers. While I was standing by Investigator Magill asked to use my squad car in order to write the individual a speeding ticket for the violation that they had witnessed. I continued to stand by and it was about this time that K9 arrived on scene. The K9 Officer walked up to the second squad car in line and Investigator Brand had the individual who had been identified as Ryan Buccheim step out of the vehicle which is routine for a K9 to conduct an open air sniff of the vehicle. After Buccheim and stepped out of the vehicle and stepped to the rear Investigator Magill walked up to him and provided him a citation for speed. I then stood by Buccheim while the K9 conducted a sniff of the vehicle. Please see their supplements for further on the results of the K9 sniff and the subsequent search of the vehicle. During the search of the vehicle, when officers opened up the trunk of the vehicle, I noted that there was a backpack inside. As officers grabbed the backpack Buccheim went from watching the bag, to dropping his head and taking a long sigh out. At this point Investigator Garringer came up to Buccheim and detained him in handcuffs and escorted him to the rear of my squad car. I again stood by with Buccheim in the rear of my squad car until Investigator Garringer came back up to me and asked me to transport Buccheim to the CRPD. I then transported him to CRPD where he was placed in the interview room. Once there I stood by with him until I was relieved at 0135 hours by Investigator Officer Barnhart. I then returned to service. This concludes my involvement in the matter.

BRILEY 1100 / JME 1071

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

UNITED STATES OF AMERICA, Plaintiff, vs. RYAN WILLIAM BUCHHEIM, Defendant.	No. 17-CR-84-LRR **ORDER**

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I. INTRODUCTION

The matters before the court are Defendant Ryan William Buchheim's Objections (docket no. 38) to United States Chief Magistrate Judge C.J. Williams's Report and Recommendation (docket no. 28) and Defendant's Supplemental Objections ("Supplemental Objections") (docket no. 62) to Judge Williams's Supplemental Report and Recommendation (docket no. 57). In both the Report and Recommendation and the Supplemental Report and Recommendation, Judge Williams recommends that the court deny Defendant's "Motion to Suppress Evidence" ("Motion") (docket no. 16).

II. RELEVANT PROCEDURAL BACKGROUND

On October 18, 2017, a grand jury returned an Indictment (docket no. 2) charging Defendant with one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 851. On November 28, 2017, Defendant filed the Motion. On December 5, 2017, the government filed a Resistance (docket no. 20). On December 15, 2017, Judge Williams held a hearing ("Hearing") on the Motion. *See* December 15, 2017 Minute Entry (docket no. 26). Defendant appeared in court with his attorneys, Alfred Willett and Dillon Besser. Assistant United States Attorneys Drew Inman and Patrick Reinert represented the government. On December 18, 2018, Judge Williams issued the Report and Recommendation, which recommends that the court deny the Motion. On January 1, 2018, Defendant filed the Objections. On January 8, 2018, the government filed a Response (docket no. 41). On January 9, 2018, Defendant filed a Reply (docket no. 42).

On January 12, 2018, Defendant filed a Motion to Reopen the Suppression Hearing (docket no. 44), citing newly discovered evidence. On January 19, 2018, the government filed a Resistance (docket no. 46). On January 22, 2018, Defendant filed a Reply (docket no. 48). On February 9, 2018, Judge Williams held a supplemental hearing ("Supplemental Hearing") on the Motion to consider the newly discovered evidence. *See*

February 9, 2018 Minute Entry (docket no. 53). Defendant appeared in court with his attorneys, Alfred Willett and Dillon Besser. Assistant United States Attorney Emily Nydle represented the government. On February 13, 2018, Judge Williams issued the Supplemental Report and Recommendation, which recommends that the court deny the Motion. On February 27, 2018, Defendant filed the Supplemental Objections. The matter is fully submitted and ready for decision.

III. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, a "judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge must consider de novo any objection to the magistrate judge's recommendation."); *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (noting that a district judge must "undertake[] a de novo review of the disputed portions of a magistrate judge's report and recommendations"). "A judge of the court may 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); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."). It is reversible error for a district court to fail to engage in a de novo review of a magistrate judge's report when such review is required. *Lothridge*, 324 F.3d at 600. Accordingly, the court reviews the disputed portions of the Report and Recommendation and the Supplemental Report and Recommendation de novo.

IV. RELEVANT FACTUAL BACKGROUND[1]

On March 16, 2017, at approximately 9:37 p.m., Cedar Rapids Police Department ("CRPD") Investigator Mitchell Magill observed Defendant speeding and initiated a traffic stop. Investigator Magill was on patrol in an unmarked unit, along with CRPD Investigator Bryan Garringer. Investigator Magill detained Defendant at approximately 9:37 p.m. Investigator Magill was able to perform most of the routine duties involved in a traffic stop using Investigator Garringer's computer, but was unable to create the speeding ticket because the computer was not equipped with TraCS, the program that generates tickets. CRPD Officer Jacob Briley, who was on patrol in the area, subsequently arrived on the scene as a backup unit. Officer Briley's police car was equipped with TraCS. Investigator Magill used Officer Briley's computer to create the ticket.

TraCS is a computer program that aids police officers in creating traffic tickets. By scanning a motorist's driver's license, an officer can connect to a statewide database and receive the driver's information. TraCS automatically fills out a large portion of the traffic ticket for the officer so that he or she need not manually fill out each field. Some of the automatically-generated information, such as the time of the offense, can be changed by the officer before the ticket is finalized. TraCS also creates a time stamp when an officer begins writing a ticket. This time stamp cannot be changed by the officer. Investigator Magill has had limited experience with TraCS because his duties do not frequently involve the issuance of traffic tickets. At the Hearing, Investigator Magill testified that he began writing the ticket at 9:40 p.m., which is listed as the time of offense on the ticket. At the

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[1] After reviewing the Hearing Transcript (docket no. 36) and the Supplemental Hearing Transcript (docket no. 59), the court finds that Judge Williams accurately and thoroughly set forth the relevant facts in the Report and Recommendation and the Supplemental Report and Recommendation. *See* Report and Recommendation at 2-5; Supplemental Report and Recommendation at 2-11. Therefore, the court shall only briefly summarize the facts here. When relevant, the court relies on and discusses additional facts in conjunction with its legal analysis.

Supplemental Hearing, Investigator Magill testified that he began writing the ticket at 9:44 p.m., as indicated by the automatically-generated time stamp, but manually entered 9:40 p.m. on the ticket as an estimate of when the violation had occurred.

While Investigator Magill was conducting the routine procedures of a traffic stop, Investigator Garringer called for a canine unit to perform a free-air sniff of Defendant's vehicle. CRPD Officer Chris Carton began the free-air sniff with his canine partner at 9:49 p.m. and concluded it by 9:51 p.m. While the free-air sniff was underway, Investigator Magill was completing the traffic ticket and explaining the ticket to Defendant. While explaining the traffic ticket, Investigator Magill was advised that the canine had alerted to the presence of narcotics in Defendant's vehicle. Thereupon, Defendant was further detained while officers searched his vehicle. Officers found packages of methamphetamine in the trunk of Defendant's vehicle.

V. ANALYSIS

Judge Williams correctly noted that the scope of the issue in the Motion is narrow. *See* Report and Recommendation at 5. Defendant admits that Investigator Magill had probable cause to believe that Defendant had committed a speeding violation and, therefore, does not challenge the legality of the traffic stop. *See* Brief in Support of Motion (docket no. 16-3) at 5. The government does not contend that law enforcement had any legal grounds to detain Defendant other than the speeding violation. *See* Resistance at 4-7. The United States Supreme Court has established that law enforcement may conduct a free-air canine sniff during a routine traffic stop provided that doing so does not extend or prolong the detention of the motorist. *See Rodriguez v. United States*, 575 U.S. __, __, 135 S. Ct. 1609, 1615-16 (2015) (noting that the critical issue is whether conducting the free-air sniff prolongs the stop). Neither party contests this legal principle. *See* Motion at 2; Resistance at 5-6. Thus, the sole issue in the Motion is whether law enforcement extended the detention of Defendant during the traffic stop in order to conduct

the free-air sniff. In both the Report and Recommendation and the Supplemental Report and Recommendation, Judge Williams found that they did not and, therefore, he recommends that the court deny the Motion. *See* Report and Recommendation at 9; Supplemental Report and Recommendation at 11. The court now conducts a de novo review of the disputed portions of Judge Williams's recommendations.

A. Report and Recommendation

Defendant raises nine objections to the Report and Recommendation. Defendant objects generally to Judge Williams's recommendation that the court deny the Motion. Objections at 3-4. Defendant objects to Judge Williams's finding that Investigator Magill diligently pursued the purpose of the traffic stop. *Id.* at 4-5. Defendant objects to Judge Williams's finding that the free-air sniff did not unreasonably delay the issuance of the speeding ticket. *Id.* at 5-6. Defendant objects to Judge Williams's finding that Investigator Magill was a credible witness. *Id.* at 6-7. Defendant objects to Judge Williams's finding that nothing in the record suggests that the free-air sniff delayed the processing of the speeding ticket. *Id.* at 8. Defendant objects to Judge Williams's finding that Defendant was unable to point to any evidence contradicting Investigator Magill's testimony regarding the average time it takes to process a speeding ticket. *Id.* at 8. Defendant objects to Judge Williams's finding that Investigator Magill was a credible witness, even taking into account a possible motive on his part to delay processing the speeding ticket. *Id.* at 9-10. Defendant objects to Judge Williams's finding that nothing in the record demonstrates that Investigator Magill was unreasonably slow in processing the speeding ticket. *Id.* at 10. Finally, Defendant again objects generally to Judge Williams's recommendation that the court deny the Motion. *Id.* at 12-13. The court shall address each objection in turn.

1. Objection 1: Judge Williams's recommendation

Defendant objects generally to Judge Williams's recommendation that the court deny the Motion. *Id.* at 3-4. Defendant offers no specific argument in support of his objection, but instead states that the Motion should be granted "[b]ased upon the subsequent objections, facts, and legal authorities" contained elsewhere in the Objections. *Id.* at 4. By failing to make a specific objection, and by failing to brief and argue the objection, Defendant has waived his right to a de novo review of this objection. *See Thompson v. Nix*, 897 F.2d 356, 357-58 (8th Cir. 1990) (noting that "objections must be timely and specific to trigger de novo review by the District Court of any portion of the magistrate's report and recommendation"); *see also Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) ("Frivolous, conclusive or general objections need not be considered by the district court." (quotation omitted)). The court shall overrule this objection for the reasons it shall overrule Defendant's subsequent objections.

2. Objection 2: Diligent pursuit

Defendant objects to Judge Williams's finding that "Investigator Magill diligently pursued the purpose of the traffic stop—that is, the issuance of a speeding ticket." Report and Recommendation at 6. Defendant provides no specific argument as to how Investigator Magill failed to diligently pursue the purpose of the traffic stop, but instead merely recites the timeline of the traffic stop as it was testified to at the Hearing. *See* Objections at 4-5. Defendant notes that "Investigator Magill had no idea what time it was when he presented the ticket to [Defendant]." *Id.* at 4.

Upon a de novo review of the Hearing Transcript and the Supplemental Hearing Transcript, the court finds that Investigator Magill did diligently pursue the purpose of the traffic stop. Investigator Magill testified that, in his experience, it takes fifteen to twenty minutes to issue a speeding ticket. Hearing Transcript at 12-13. The CRPD report of

Investigator Garringer's call for a canine unit establishes that law enforcement stopped Defendant's vehicle at 9:37 p.m. *See* Exhibit B (docket no. 27-2). Investigator Magill lacked the necessary equipment to issue the ticket and had to wait for Officer Briley to arrive. *See* Hearing Transcript at 11. Investigator Magill began writing the ticket at 9:44 p.m. *See* Supplemental Hearing Transcript at 2. Officer Carton had completed the free-air sniff by 9:51 p.m., at which time Investigator Magill was still in the process of issuing the ticket. *See* Hearing Transcript at 41. Nothing in the record indicates that Investigator Magill did anything to delay the issuance of the speeding ticket or that he worked unusually slowly. Officer Carton and his canine partner completed the free-air sniff approximately fourteen minutes after the stop began, within the typical length of a traffic stop. Therefore, the court shall overrule this objection.

3. Objection 3: Unreasonable delay

Defendant objects to Judge Williams's finding that "the canine search did not unreasonably delay the issuance of th[e] speeding ticket." Report and Recommendation at 6-7. Defendant further objects to Judge Williams's finding that "the canine search had no impact whatsoever on Investigator Magill's processing of the speeding ticket." *Id.* at 7. Defendant offers no specific argument as to how the canine search unreasonably delayed the traffic stop, nor to how the canine search impacted the processing of the speeding ticket. *See* Objections at 5-6. Instead, Defendant merely recites elements of the timeline as it was testified to at the Hearing. *See id.*

The court finds that the canine search did not unreasonably delay the traffic stop, nor did it impact the processing of the speeding ticket in any way. As stated previously, no evidence indicates that Investigator Magill did anything to delay his processing of the speeding ticket. *See supra* Section V(A)(2). Officer Carton conducted and concluded the free-air sniff while Investigator Magill was processing the speeding ticket and explaining the citation to Defendant. Hearing Transcript at 41. There is nothing in the record to

suggest that the free-air sniff interfered with the traffic stop in any way, nor that Investigator Magill slowed the processing of the ticket to allow more time for the free-air sniff. Therefore, the court shall overrule this objection.

4. Objection 4: Investigator Magill's credibility

Defendant objects to Judge Williams's finding that "[I]nvestigator Magill [was] a credible witness." Report and Recommendation at 7. Defendant, however, makes no specific argument in support of this objection. Objections at 6-7. Instead, Defendant points out that Investigator Magill could not offer specific time frames for the surveillance of Defendant prior to the traffic stop and the investigation of Defendant prior to March 16, 2017. *Id.* at 7. Defendant also notes that the canine unit was called for before Investigator Magill issued the ticket and that nothing during the traffic stop motivated him to call the canine unit. *Id.* Finally, Defendant points out that Investigator Magill testified that he could not remember specifically what he was going to discuss with Defendant when he stated to him, "we can discuss that over here," as heard on the video from Officer Carton's police car. *Id.*

The portions of Investigator Magill's testimony that Defendant cites do not undermine Investigator Magill's credibility. The court finds nothing surprising or suspicious about the fact that Investigator Magill could not remember the specific time he began surveilling Defendant or how long Defendant had been under investigation. Neither of these facts were relevant to the Hearing. The fact that the canine unit was called immediately upon initiating the traffic stop is irrelevant to Investigator Magill's credibility because Investigator Garringer called for it. *See* Hearing Transcript at 10-11. Finally, Defendant's assertion that Investigator Magill could not remember what he was going to discuss with Defendant is slightly misleading. Investigator Magill testified that he could not remember specifically what he was going to discuss with Defendant, but had earlier testified that it would have been about the issuance of the ticket. *Compare* Hearing

Transcript at 41 *with* Hearing Transcript at 43. Therefore, the court shall overrule this objection.

Defendant also makes a sub-objection specifically to Judge Williams's finding that Investigator Magill was "credible when he directly testified that he did not delay the processing of the ticket to allow time for a canine search." Report and Recommendation at 7. Defendant offers no new argument for this objection, but instead "adopts his 'objections to Objection Number 2 and incorporates them as though fully set forth herein." Objections at 7. The court shall overrule this objection for the reasons that it shall overrule Objection 2. *See supra* Section V(A)(2).

5. Objection 5: Delaying the speeding ticket

Defendant objects to Judge Williams's finding that "[n]othing in the record suggests that the canine search in any way delayed the processing of the speeding ticket." Report and Recommendation at 7. Defendant offers no new argument for this objection, but instead "adopts his objections to Objection Number 2 and Objection Number 3 and incorporates them as though fully set forth herein." Objections at 8. Defendant also states that he "incorporates his arguments summarizing the evidence as though fully set forth herein." *Id.* (citing Hearing Transcript at 67-68). To the extent that this objection rests on arguments made outside of the Objections, the arguments have been waived. *See Thompson*, 897 F.2d at 357-58. To the extent that this objection relies on arguments made in previous objections, the court shall overrule it for the reasons previously stated. *See supra* Section V(A)(2) and Section V(A)(3).

6. Objection 6: Processing the speeding ticket

Defendant objects to Judge Williams's finding that "[D]efendant was unable to point to any evidence that contradicted Investigator Magill's testimony regarding the average length of time it takes to process a speeding ticket, or to show that Investigator Magill did anything to delay the processing of the ticket in this instance." Report and

Recommendation at 7-8. Defendant offers no new argument for this objection, but instead "adopts his objections to Objection Number 2 and incorporates them as though fully set forth herein." Objections at 8. Defendant also states that he "incorporates his arguments summarizing the evidence as though fully set forth herein." *Id.* (citing Hearing Transcript at 66-67, 69). To the extent that this objection rests on arguments made outside of the Objections, the arguments have been waived. *See Thompson*, 897 F.2d at 357-58. To the extent that this objection relies on arguments made in Objection 2, the court shall overrule it for the reasons previously stated. *See supra* Section V(A)(2).

*7. **Objection 7: Investigator Magill's motive***

Defendant objects to Judge Williams's finding that Investigator Magill was a credible witness, "even taking into account a possible motive on his part to delay the processing of the speeding ticket." Report and Recommendation at 8. As argument for this objection, "Defendant adopts his objections to Objection Number 4 and incorporates them as though fully set forth herein." Objections at 9. Additionally, Defendant points to a number of facts adduced during the Hearing that he contends establish that the traffic stop was a pretext to execute the canine search, and that the canine search was requested based on the investigators' prior knowledge, not on reasonable suspicion gathered during the traffic stop.

To the extent that this objection relies on arguments made in Objection 4, the court shall overrule this objection for the reasons it shall overrule Objection 4. *See supra* Section V(A)(4). The additional issues raised by Defendant do not undermine Investigator Magill's credibility because they are all lawful police actions. The subjective intentions of a police officer are irrelevant to a Fourth Amendment analysis, and pretextual traffic stops are valid as long as officers have probable cause that a traffic infraction has occurred. *See Whren v. United States*, 517 U.S. 806, 813 (1996). A suspicionless free-air sniff conducted during an otherwise valid traffic stop is lawful as long as it does not extend

or prolong the traffic stop. *See Rodriguez*, 135 S. Ct. at 1615-16. Defendant has offered no evidence that Investigator Magill testified untruthfully. The court maintains its previous finding that Investigator Magill was a credible witness. *See supra* Section V(A)(4). Accordingly, the court shall overrule this objection.

8. Objection 8: Unreasonably slow

Defendant objects to Judge Williams's finding that "[t]here is nothing in this record that demonstrates that Investigator Magill was unreasonably slow in processing the speeding ticket." Report and Recommendation at 8. Defendant offers no new argument for this objection, but instead "adopts his objections to Objections Number 2 and Number 3 and incorporates them as though fully set forth herein." Objection at 8. The court shall overrule this objection for the reasons it shall overrule Objection 2 and Objection 3. *See supra* Section V(A)(2) and Section V(A)(3).

9. Objection 9: Judge Williams's conclusion

Defendant again objects generally to Judge Williams's recommendation that the court deny the Motion. *Id.* at 10. Defendant again offers no specific argument in support of his objection, but states that he "adopts his closing arguments summarizing the evidence at the . . . Hearing as though fully set forth herein." Objections at 10 (citing Hearing Transcript at 66-70). Defendant also states, "It is interesting to note that the [c]ourt found an unusual circumstance in the sense that this was an unmarked car without the computer program necessary to write a citation." *Id.* at 11 (citing Hearing Transcript at 75-76).

To the extent that this objection rests on arguments made outside of the Objections, the arguments have been waived. *See Thompson*, 897 F.2d at 357-58. To the extent that this objection relies on arguments made in previous objections, the court shall overrule it for the reasons previously stated. Defendant offers no argument as to why the "unusual circumstance" of Investigator Magill lacking a computer program supports the Motion. Judge Williams cited it as a reason that the traffic stop could reasonably have taken longer

than a typical traffic stop. *See* Hearing Transcript at 75-76. Upon de novo review, the court concurs with Judge Williams's analysis. Accordingly, the court shall overrule this objection.

B. Supplemental Report and Recommendation

Defendant raises five objections to the Supplemental Report and Recommendation. Defendant objects to Judge Williams's finding that Investigator Magill diligently performed routine traffic stop inquiries. Supplemental Objections at 4-5. Defendant objects to Judge Williams's finding that Investigator Magill testified truthfully, to the best of his knowledge and understanding, at both hearings. *Id.* at 5-7. Defendant objects to Judge Williams's finding that the TraCS system for tickets would be slower than alternatives. *Id.* at 7-8. Defendant objects to Judge Williams's finding that Investigator Magill lacked any motivation to falsify the citation. *Id.* at 8-9. Finally, Defendant objects generally to Judge Williams's recommendation that the court deny the Motion. *Id.* at 9. The court shall address each objection in turn.

1. Objection 1: Diligent performance

Defendant objects to Judge Williams's finding that "Investigator Magill diligently pursued the purpose of the traffic stop—that is, the issuance of a speeding citation." Supplemental Report and Recommendation at 11. Defendant states that "Investigator Magill's inability to explain the purpose of actions in the first eight minutes of the stop show a lack of reasonableness and diverges from the . . . mission of the initial seizure—the traffic stop." Supplemental Objections at 5 (quotation omitted). Defendant points to two facts as "unexplained" in support of his assertion that Investigator Magill was not diligent. First, Defendant states that Investigator Magill ran a query through dispatch, using Investigator Garringer's computer, for an incorrect license plate tag number and never ran a correct one. *Id.* at 4. Second, Defendant states that Investigator Magill unnecessarily

repeated the process of running Defendant's information once he began writing the traffic ticket using Officer Briley's computer. *Id.* at 5.

The court finds that Investigator Magill was diligent in conducting the traffic stop and did nothing to intentionally prolong the stop. The two issues Defendant raises are both well explained in the record. CRPD computer-aided dispatch records from March 16, 2017 indicate that when Investigator Magill initially queried dispatch for Defendant's vehicle information, he gave the tag number of EVB040 instead of the correct number of EVB048. *See* Exhibit C (docket no. 55-2), at 1-2; *see also* Supplemental Hearing Transcript at 16. Defendant notes that no additional query came from Officer Garringer's computer for the correct tag number, but this is easily explained by the fact that once Officer Briley arrived, Investigator Magill began using his computer to write the traffic ticket. The additional query from Officer Magill's computer was not a needlessly duplicative search, but rather a correction of an earlier mistake. The court finds that the search of the erroneous tag number was a genuine mistake, as it was a reasonable error and off by only one digit. This conclusion is supported by the additional evidence that another query for the same incorrect tag number was run at 12:09 a.m. and had to be corrected by a subsequent search, hours after any alleged motive to improperly delay the traffic stop would have dissipated. *See* Supplemental Hearing Transcript at 12; Exhibit C at 3-4. Therefore, the court shall overrule this objection.

2. Objection 2: Investigator Magill's truthfulness

Defendant objects to Judge Williams's finding that "Investigator Magill testified truthfully, to the best of his knowledge and understanding, in both hearings." Supplemental Report and Recommendation at 8. The sole basis for Defendant's assertion that Investigator Magill did not testify truthfully is the inconsistent testimony he gave regarding the time stamp on the traffic ticket. *See* Supplemental Objections at 5-7. At the Hearing, Investigator Magill testified that the traffic ticket contained a time stamp

indicating that he began writing it at 9:40 p.m. Hearing Transcript at 29. He further testified that this time was automatically generated by TraCS and that this was the only time stamp on the document. *Id.* at 29, 41-42. Investigator Magill corrected this testimony at the Supplemental Hearing, stating that the automatically-generated time was 9:44 p.m. and that, although he could not specifically remember doing so, he must have manually entered the time of 9:40 p.m. to better reflect the time of the traffic offense. Supplemental Hearing Transcript at 2-4. Defendant asserts that "Investigator Magill's inconsistencies leave much unanswered." Supplemental Objections at 7.

The court finds that Investigator Magill did testify truthfully, to the best of his knowledge and understanding, at the Hearing and the Supplemental Hearing. Investigator Magill does not use the TraCS program frequently, having written only three tickets in the past year. *See* Supplemental Hearing Transcript at 3. It is understandable that he might make a good-faith error in his testimony regarding how the program works. The court finds nothing suspicious or indicative of deception in Investigator Magill's error. Nor does the court find suspicious the disparity between the two times on the ticket. Clearly, Investigator Magill began writing the ticket at 9:44 p.m., and the court accepts his explanation that he must have altered the manually-entered time to 9:40 p.m. to better reflect the time of the traffic violation.

Moreover, the suggestion that Investigator Magill doctored the ticket and falsified his testimony to cover up his efforts to prolong the traffic stop is illogical. Although the court would still have found that Investigator Magill diligently performed the traffic stop if he had begun writing the ticket at 9:40 p.m., the fact that he began at 9:44 p.m. indicates that he completed processing the ticket even more efficiently. The court finds that Investigator Magill made an honest mistake in his Hearing testimony. Investigator Magill was forthright about the mistake he made once he was alerted to it, and the court finds him to be a credible witness. Therefore, the court shall overrule this objection.

3. *Objection 3: The TraCS system*

Defendant states that he "objects to the finding that the TraCS system . . . would be slower" than alternatives. Supplemental Objections at 7. He states that the court should discount testimony regarding inefficiencies in TraCS because "it does not comport with the system's purpose." *Id.* Defendant cites Exhibit D (docket no. 55-3), a description of TraCS from the Iowa Department of Transportation, for his assertion that TraCS is "designed for quick response and accurate data, providing more efficient completion of the mission of a traffic stop." *Id.* Defendant argues that "Investigator Magill's lack of understanding of a system that has been in place for at least five years should not be held against the Defendant" and that it is not "reasonable for Investigator Magill not to utilize the efficient system that is in place." *Id.* Finally, Defendant argues that "Investigator Magill's inability to adapt to better technology is not reasonable and lacks diligence." *Id.*

Initially, the court notes that Judge Williams did not find that the TraCS system would have been slower than the alternatives. Rather, Judge Williams noted that the testimony indicated that "using the [TraCS] program is not necessarily faster than running criminal history checks through other databases, and, in some cases, may be slower." Supplemental Report and Recommendation at 10. Judge Williams's finding is correct. Investigator Magill and Officer Carton both testified that the TraCS system is not necessarily faster than the alternatives and in some cases can be slower. Supplemental Hearing Transcript at 3, 19. The court credits and accepts their testimony and Judge Williams's finding. Defendant's reliance on Exhibit D is unpersuasive. Exhibit D describes how TraCS was designed to work, not how well it actually works. TraCS would not be the first computer program to work less efficiently than it was designed to. The court is inclined to rely on the testimony of officers who have actually used the program in the field.

Defendant's additional arguments are misplaced. There is nothing in the record to suggest that Investigator Magill does not understand the TraCS system, merely that he has limited experience with it. Nor was there any testimony to support the position that Investigator Magill was unable or unwilling to use TraCS. Clearly he did use the program to create the ticket, but he used an alternative method to run Defendant's criminal history that he believed would be equally efficient. Defendant's objection relies on the premise that TraCS is substantially faster than alternatives and that Investigator Magill knew this and deliberately chose not to use TraCS in order to prolong the traffic stop. The record is devoid of any evidence to support this position. Therefore, the court shall overrule this objection.

4. Objection 4: Investigator Magill's motive

Defendant objects to Judge Williams's finding "a lack of motive for Investigator Magill to falsify the citation." Supplemental Report and Recommendation at 8. Defendant cites several factors that he argues make it "reasonable to conclude the stop was prolonged for a purpose separate from a speeding violation." Supplemental Objections at 8. Defendant points to the fact that Investigator Magill had been surveilling Defendant for some time before initiating the traffic stop and that a canine unit was called immediately upon detaining Defendant. *Id.* Defendant again argues that Investigator Magill needlessly ran Defendant's information through the system on Officer Briley's computer despite having already done so on Investigator Garringer's. *Id.* Finally, Defendant cites to several portions of the testimony of Joseph McCarville, a CRPD civilian employee who oversees the dispatch center, in which Mr. McCarville was unable to provide answers as to the meaning of certain entries in Exhibit B and Exhibit C. *Id.*

The court finds that Investigator Magill did not have a motive to falsify the citation. The court does so for two reasons. First, as previously discussed, Investigator Magill had no need to prolong the traffic stop because Officer Carton was able to complete the canine

search well within the time of an average traffic stop. *See supra* Section V(A)(2). Second, Investigator Magill would not have a motive to make it appear that he began writing the ticket later than he actually did. *See supra* Section V(B)(2). Investigator Magill's prior surveillance of Defendant and the fact that Investigator Garringer immediately called for a canine unit are not relevant. *See supra* Section V(A)(7). Running Defendant's information again on Officer Briley's computer was not a waste of time, but rather was necessary to fix a reasonable mistake. *See supra* Section V(B)(1). Finally, the court notes that Exhibit B and Exhibit C were Defendant's exhibits, and Mr. McCarville was Defendant's witness. The inability of Defendant's witness to explain all of the entries in Defendant's exhibits does not generate an issue warranting suppression of evidence, particularly when, as here, the court is otherwise convinced that the search in question was lawful. Therefore, the court shall overrule this objection.

5. Objection 5: Judge Williams's conclusion

Defendant objects generally to Judge Williams's recommendation that the court deny the Motion. *See* Supplemental Objections at 9. In support of the objection, "Defendant reiterates his arguments made in . . . his Motion to Suppress, the briefs in support, and the arguments for why the record of the suppression hearing needed to be reopened." *Id.* To the extent that this objection rests on arguments made outside of the Supplemental Objections, the arguments have been waived. *See Thompson*, 897 F.2d at 357-58. To the extent that this objection relies on arguments made in previous objections, the court shall overrule it for the reasons previously stated.

VI. CONCLUSION

In light of the foregoing, the court **ORDERS**:

(1) The Objections (docket no. 38) are **OVERRULED**;

(2) The Supplemental Objections (docket no. 62) are **OVERRULED**;

(3) The Report and Recommendation (docket no. 28) is **ADOPTED**;

(4) The Supplemental Report and Recommendation (docket no. 57) is **ADOPTED**; and

(5) The Motion to Suppress (docket no. 16) is **DENIED**.

IT IS SO ORDERED.

DATED this 11th day of April, 2018.

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