UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2938

Jason Harriman

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:22-cv-02001-CJW)

ORDER

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

Judge Kelly did not participate in the consideration or decision of this matter.

February 03, 2023

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2938

Jason Harriman

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:22-cv-02001-CJW)

JUDGMENT

Before LOKEN, ERICKSON, and STRAS, Circuit Judges.

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

December 21, 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
EASTERN DIVISION

JASON TROY HARRIMAN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 22-CV-2001-CJW-MAR No. 18-CR-2033-CJW-MAR **ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

This matter is before the Court on petitioner's Motion to Vacate, Set Aside or Correct Sentence filed under Title 28, United States Code, Section 2255. (Doc. 1).[1] Under Rule 4(b) of the Rules Governing Section 2255 Proceedings, the Court conducted an initial review of petitioner's Section 2255 motion. The Court ordered petitioner's former counsel to file an affidavit responding to petitioner's claims of ineffective assistance of counsel, ordered the government to file a brief on the merits of petitioner's claims, and set a deadline for petitioner to file a responsive pleading. (Doc. 2). Petitioner's former counsel and the government timely complied with the Court's order. (Docs. 4, 9). After an extension of his deadline, petitioner filed a timely response. (Doc. 18). The Court has now conducted a full review of petitioner's motion on the merits. For the following reasons, petitioner's Section 2255 motion is **denied**, and this case is **dismissed**.

II. RELEVANT BACKGROUND

The Eighth Circuit Court of Appeals summarized the background leading to the conviction petitioner now challenges.

> In 1995, when he was 21 years old and she was 16 years old, Harriman met D.H. and began a romantic relationship with her. By the end of the year, they were living together. They had a tumultuous relationship; Harriman was jealous and controlling and began physically abusing D.H. In the summer of 1996, D.H. moved back in with her mother. Harriman then came to the house and kidnapped D.H. at knifepoint. He repeatedly hit her, yelled at her, and cursed her. At one point, Harriman again held the knife to her throat and said he was going to contact a friend to hurt her. Eventually they ended up at a hotel, where

[1] References to "Doc." are to docket entries in this case, 22-CV-2001-CJW-MAR. References to "MJ Doc." are to docket entries in the underlying magistrate judge docket while petitioner was charged by criminal complaint (18-mj-00194-CJW), and "Crim. Doc." are to docket entries in the underlying criminal case upon indictment (18-CR-2033-CJW-MAR).

law enforcement arrested Harriman.

Harriman pleaded guilty to kidnapping and burglary, and the state court sentenced him to prison. While in prison, Harriman and D.H. began talking again and they married in June 2000. After Harriman was released, they began living together again and Harriman resumed his physical abuse of D.H. In 2007, Harriman put his hands around D.H.'s neck and choked her, leaving bruises. He was convicted of simple domestic assault. After this incident, although they continued to have sex on occasion, Harriman and D.H. never fully resumed their relationship, and they divorced in 2009. They have two children together.

In 2011, Harriman was convicted in federal court of two counts of being a felon in possession of a firearm. The court sentenced him to a term of imprisonment, and he began serving his sentence in the federal prison in Terre Haute, Indiana. While there, Harriman often complained to a fellow inmate about D.H. On multiple occasions, Harriman told this inmate that he wanted to find someone to kill D.H. and her then-boyfriend. In one conversation, he referred to his children as "collateral damage."

Harriman and D.H. did not communicate for several years, until 2015 when a court ordered D.H. to allow Harriman to have visitation and phone calls with his children. At some point, the Bureau of Prisons transferred Harriman to the federal prison in Forrest City, Arkansas, and in 2017, while at Forrest City, Harriman and D.H. began to communicate more frequently. They spoke regularly over the phone and corresponded through email. Harriman often talked about getting back together, but in January 2018, D.H. began dating someone else. When Harriman found out, he frequently became angry with D.H., yelled at her, called her names, and threatened her. He accused her of putting him in prison. In frequently threatening her, he referred to "the path" she had chosen, and made statements such as, "This is the path you want us to go, well, let's get walking. Hope you enjoy the walk until the yotrail ends."

In March 2018, in a phone call with his son, Harriman said he wanted "to smash [D.H.] in the f*cking face." On the same call, he told D.H. that when he got out, "I'm going to f*cking kill you, b*tch." On another call, after his son noted that on the last three calls Harriman had threatened to kill D.H., Harriman responded that "it's not a threat." He further stated that, "The only thing I have in my heart now is revenge" and "I'm gonna act on my revenge." In following phone calls, he continued to tell D.H. and his son that he would beat D.H. and her boyfriend, that she was going to get hurt, and that she was "gonna be done." He once

asked her how precious her life was.

Throughout his time at Forrest City, Harriman spoke with William Risinger, a fellow inmate who met Harriman in October 2017. They spoke daily and Harriman often talked about his relationship with D.H. He frequently blamed D.H. for his prison sentence and Risinger would overhear Harriman yelling at D.H. on the phone. After these calls, Harriman would visit Risinger and curse D.H. and talk about hurting her, including disfiguring her to make her unattractive and paralyzing her so she could not have sex with anyone. In mid to late February of 2018, Harriman told Risinger, "I wish I knew somebody who would kill the b*tch." Risinger asked if he really wanted her dead, to which Harriman responded "yes." Harriman asked Risinger if he knew anyone and Risinger said he might and would need to make a call.

Risinger called his son and asked him to contact law enforcement. Special Agent Everett Wayland of the Bureau of Alcohol, Tobacco, Firearms and Explosives provided Risinger's son with a phone number to give to Harriman. The phone number belonged to Special Agent Wesley Williamson, an undercover agent with the ATF who posed as a hitman named William Johnson. Harriman first called Agent Williamson on February 28, 2018. From then until May 2018, Harriman called Williamson 13 times and exchanged many emails. In these calls and emails, they spoke in coded language, discussing "business" and "properties" when speaking of the murder of D.H. and her boyfriend, whom Harriman also wanted killed. In one email, Harriman sent Agent Williamson the address he had for D.H., a trailer park in Oelwein, Iowa, and told Agent Williamson that D.H. worked at the Dairy Queen in Oelwein. In another email, with the subject line "property," Harriman stated, "The one I know we will need to completely demolish, but the other we should be able to just hopefully do a little facial remodeling. Let it be known it's under ownership . . .."

In late March 2018, Agent Williamson traveled to Oelwein, Iowa, and emailed Harriman to let him know. While in Iowa, Agent Williamson spoke with Harriman on the phone, and told Harriman he had found one spot pretty easy, meaning he had found D.H., but had not found the other spot with which he was less familiar, meaning he had not seen D.H.'s boyfriend. Harriman told Agent Williamson he could follow one spot to the other, meaning he could follow D.H. to find her boyfriend. The next day, Agent Williamson returned to Oelwein and saw D.H. in town. He also went to the address Harriman provided and saw a red minivan that

Harriman said belonged to D.H. As he was leaving Oelwein, Agent Williamson spoke to Harriman and told him he had seen one but not the other, meaning he had seen D.H. but not her boyfriend.

During one of their conversations, Agent Williamson asked Harriman if he owned any cars, to which Harriman responded he had three cars stored at a friend's house including a 1969 Dodge Charger. Agent Williamson requested the Charger as a down payment, and Harriman agreed. Harriman then contacted his friend in Traer, Iowa, who was storing the car, and told him that two men would be coming to pick up the car. Harriman told his friend that he was using the car as a down payment on a body shop. In mid-April, ATF agents traveled to Traer and picked up the Charger. Agent Williamson spoke with Harriman about the pickup and Harriman called his friend to verify that the car had been picked up.

Through phone and email, Harriman and Agent Williamson made arrangements for Agent Williamson to visit Harriman in prison. Harriman obtained a visiting form and mailed it to Agent Williamson who filled it out and returned it. Harriman instructed Agent Williamson to put on the form that he had known Harriman for at least five years before incarceration. Agent Williamson did so, putting on the form that he had known Harriman for 20 years. At the beginning of April, Harriman let Agent Williamson know he could visit Harriman. Agent Williamson told Harriman the visit would be to confirm what Harriman wanted and that he would take $25,000 as a down payment, and another $25,000 when the person was killed. In another call, Harriman said he would like to grab both properties (meaning D.H. and her boyfriend), and if they could get both at the same time, it might result in a deal.

On April 21, 2018, Agent Williamson visited Harriman in prison. The visit in the prison visitation room was recorded by video and audio, and lasted nearly two hours. After some small talk, Agent Williamson asked Harriman, "What do you want me to do, man?" Harriman responded, "What you do, you know what I mean?" During the conversation, Harriman referred to "property 1" to which Agent Williamson replied that "property 1" was D.H. When Agent Williamson then referred to "property 2" as the boyfriend, Harriman said he did not know what he was talking about. Agent Williamson told Harriman, "I ain't here to start no business. I mean, if you think I'm here to start a business, I ain't here to start a business." He also said, "If there's a misunderstanding, there's a misunderstanding and I'll go on my way and you'll go on your way and we'll bid each other farewell, but that's not what

I understood I was supposed to be doing." Agent Williamson also told Harriman that when he finished a job, a person's heart did not beat any more and he did not do anything else.

Multiple times throughout the visit, Agent Williamson told Harriman that Harriman could walk away and that if he did so, Agent Williamson would "eat [his] expenses[.]" Harriman expressed concerns about looking guilty. Agent Williamson again reiterated, more than once, that Harriman could say no. He made statements such as "Dude, just say no," "Just say no, bro, and I'm out of here," and "You've got to decide. I mean, like I said, no is an easy no." When Harriman asked if Agent Williamson was wearing a wire, Agent Williamson lifted his pant leg and pulled down his shirt to show he was not. As the visit continued, Harriman said, "My main thing is I don't want anything coming back at me," and "With her, I want to do it."

Agent Williamson told Harriman that if he wanted to do it, it would be $25,000 if D.H. and her boyfriend were together. Agent Williamson said he would credit Harriman $5,000 for the Charger. If Agent Williamson murdered them separately, he said it would cost $50,000, but he would give Harriman a break and do the two murders separately for a total of $40,000. Agent Williamson told Harriman he would give Harriman five years after prison to pay it off. Harriman nodded his head in response and Agent Williamson confirmed, "Property 1 and Property 2? You want them both?" Agent Williamson then told Harriman he would send him a contract for $25,000 together or $45,000 separate and that if Harriman did not want to do it, then he should not sign the contract and should not send it back. Agent Williamson again stated, "It's up to you, bro. I mean, if you don't want to take the risk, don't take the risk. Just say no."

Agent Williamson told Harriman if he did them together, he would make it look like an accident and that she would "suffer." He said minivans were easy to burn. Harriman asked how it would work if he did "the minivan thing" and stated that he wanted D.H. to know why it was being done. Agent Williamson said, "Tell me exactly what you want me to tell her . . . What is something that—if I told her something that she would only know it came from you?" Harriman asked Agent Williamson to tell D.H., "This is the path you wanted." Harriman asked if the written contract was necessary, and Agent Williamson replied that the contract told him Harriman was serious. Harriman again asked if Agent Williamson was a cop, which Agent Williamson again denied. Harriman then said,

"You keep wanting me to say it and confirm sh*t out loud. Why can't I just shake my head and then you know it's good?" Harriman then nodded. The conversation continued with Agent Williamson further discussing that he understood Harriman to want the murder of both D.H. and her boyfriend, and Harriman continuing to nod his head in agreement. The visit concluded shortly thereafter.

After speaking with Harriman twice more, Agent Williamson sent him two contracts. One listed a price of $21,000 and stated it was for the purchase and complete demolition of Property 1 and 2, if completed together. The second listed a price of $41,000 and stated that it was for the purchase and complete demolition of Property 1 and 2, if completed separate and independent of each other. In mid-May 2018, Harriman called Agent Williamson and told him he had mailed the contract back.

Harriman also asked if Agent Williamson could record the murders so that when he got out of prison, he could see the "before and after." Agent Williamson said that was "pretty f*cked up" and laughed. Harriman laughed and said, "yeah." Williamson then said he would make sure the path was known.

Meanwhile, Risinger contacted the ATF and reported Harriman was going to have someone else sign the contract because it made him nervous to sign it himself. Harriman told Risinger he chose the option in the contract to have them both killed. Risinger also told the ATF that Harriman said he was going to write a seemingly exculpatory note on a separate piece of paper on top of the contract to create indentations on the contract, but he would not actually send the note. Then, if necessary, Harriman said he could claim law enforcement got rid of the note. Harriman also told Risinger that when he spoke with Agent Williamson, he referred to D.H. and her boyfriend as Property 1 and Property 2, and referred to what he wanted done as "demolished" and "remodeled." Harriman told Risinger how the killings would occur and that Agent Williamson wanted it to look like an accident, possibly through a car wreck and a fire. All that mattered to Harriman was that D.H. knew for sure that this was his doing and he told Risinger that he wanted Agent Williamson to say "this is the path you chose" as he killed her.

On May 22, 2018, Agent Williamson received one of the contracts back from Harriman, the $21,000 contract. The name "Jason Harriman" was both signed and printed on the second page, and no handwritten note was included with the contract. The ATF sent the signed contract for forensic testing. A forensic document analyst could not conclude whether

> the signature was Harriman's, but did find indented writing on the first page of the contract. The indented writing said Harriman just wanted to scare D.H. through a phone call or two, and not go as far as the contracts stated. A fingerprint specialist identified fingerprints on the contract matching Harriman's and those of another Forrest City inmate.
>
> On May 25, 2018, Harriman called Agent Williamson to ask if he had received the "package." Agent Williamson asked if there had been any change on Harriman's end and Harriman said no and reiterated his request for a recording or pictures. About a week later, Agent Wayland conducted a ruse interview with Harriman and told him that D.H. had been killed. Harriman was interested in the details.

United States v. Harriman, 970 F.3d 1048, 1051–55 (8th Cir. 2020).[2]

On May 30, 2018, the government charged petitioner by criminal complaint with Use of Interstate Commerce Facilities in the Commission of Murder for Hire, in violation of Title 18, United States Code, Section 1958. (MJ Doc. 2). On June 22, 2018, petitioner made his initial appearance on that charge, (MJ Doc. 8), and the Court appointed Assistant Federal Public Defender Chris Nathan to represent petitioner. (MJ Doc. 7). On July 10, 2018, a grand jury charged petitioner with two counts of murder for hire in violation of Title 18, United States Code, Section 1958. (Crim. Doc. 2). Trial was scheduled for September 10, 2018. (Crim. Doc. 6). Petitioner moved for and the Court granted him two continuances of the trial date. (Crim. Docs. 7, 8, 19, 20).

Before trial, petitioner filed two motions for new counsel. (Crim. Docs. 21, 68). At the hearing on his first motion, held in October 2018, after allowing petitioner to air his grievances, the Honorable Mark A. Roberts, United States Magistrate Judge, denied his motion for new counsel. (Crim. Doc. 23). Judge Roberts concluded that petitioner's complaints about his attorney did not relate to the case at issue, that his

[2] The Court omitted the footnotes from the Eighth Circuit opinion as they were not material to this Court's analysis.

attorney was doing a good job, and his attorney and petitioner continued to communicate. (Crim. Doc. 150). Judge Roberts explained to petitioner that although there were certain decisions petitioner gets to make, such as whether to plead guilty and whether to testify at trial, other decisions, i.e. what defenses to pursue, what motions to file, how to examine witnesses, his attorney gets to decide. (*Id.*).

At the hearing on his second motion for new counsel, held on January 17, 2019 (the week before trial), the Court denied petitioner's second motion for new counsel, finding that petitioner's attorney had done a substantial amount of work, had witnesses lined up for trial, and knew the case. (Crim. Docs. 74, 151). The Court again explained to petitioner that he had a right to make the decision about whether to plead guilty or go to trial, but all other decisions were to be made by his attorney, who has experience, training, and education in the law. (Crim. Doc. 151). The Court further stated that even if petitioner disagreed with his attorney on these decisions, "at the end of the day . . . it is [the] attorney's call to make on those instances . . . He needs to work with you, listen to you, hear you out. And then he makes the decision." (*Id.*, at 5–6).

Petitioner was tried by jury from January 22, 2019, to January 29, 2019. (Crim. Docs. 75, 79, 80, 82, 86, & 88). He claimed entrapment. After a six-day trial, the jury found petitioner guilty on both counts. (Crim. Doc. 90).

After trial, petitioner again moved for new counsel. (Crim. Doc. 93). The Court again denied the motion. (Crim. Doc. 97). Petitioner then moved to proceed pro se for purposes of sentencing. (Crim. Doc. 102). The Court granted his motion. (Crim. Doc. 106).

The final presentence investigation report ("PSR") calculated petitioner's base offense level to be 37 under each count, plus a 2-level enhancement for obstruction of justice, resulting in an adjusted offense level of 39. (Crim. Doc. 124, at 7–8). A

multiple-count adjustment resulted in a total offense level of 41. (*Id.*, at 8–9). With a criminal history category of V, (*Id.*, at 21), petitioner's advisory guidelines range of imprisonment would have been 360 months' to life imprisonment, but the statutory maximum sentence for each offense was 240 months, making the effective advisory guideline range of imprisonment 240 months' imprisonment. (*Id.*, at 28).

On July 23, 2019, the Court sentenced petitioner to 240 months' imprisonment. (Crim. Doc. 141).

Petitioner appealed his conviction. (Crim. Doc. 145). The Federal Public Defender's Office for the Northern and Southern District of Iowa was initially appointed to represent petitioner, (Crim. Doc. 148), however, after a motion for withdrawal, Wallace Taylor was appointed as a Criminal Justice Act attorney to appoint petitioner. (Crim. Doc. 149). On appeal, petitioner claimed insufficient evidence because he maintained that he was entrapped and alleged the Court erred in denying his motion for a new trial on that ground. *Harriman*, 970 F.3d at 1057–59. Petitioner also alleged the Court erred in denying his motions for new counsel. *Id.*, at 1059–60. The Eighth Circuit Court of Appeals rejected these arguments, affirmed his conviction, and found premature petitioner's argument that trial counsel was ineffective. *Id.*, at 1060–61.

On January 11, 2021, the United States Supreme Court denied petitioner's petition for a writ of certiorari. *Harriman v. United States*, 141 S. Ct. 1111 (2021).

III. STANDARDS FOR RELIEF

A. Section 2255 Standard

A federal prisoner seeking relief from a sentence under Title 28, United States Code, Section 2255 "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." 28 U.S.C. § 2255. To obtain relief under Section 2255, the movant must allege a violation constituting "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Gomez*, 326 F.3d 971, 974 (8th Cir. 2003) (quoting *United States v. Boone*, 869 F.2d 1089, 1091 n.4 (8th Cir. 1989)). An offender must file a motion under Section 2255 within the one-year statute of limitations. 28 U.S.C. § 2255.

Claims brought under Section 2255 may also be limited by procedural default. A movant "cannot raise a nonconstitutional or nonjurisdictional issue in a § 2255 motion if the issue could have been raised on direct appeal but was not." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (citing *Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992)). Also, even constitutional or jurisdictional claims not raised on direct appeal cannot be raised collaterally in a Section 2255 motion "unless a petitioner can demonstrate (1) cause for the default and actual prejudice or (2) actual innocence." *United States v. Moss*, 252 F.3d 993, 1001 (8th Cir. 2001) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)).

The Court must hold an evidentiary hearing to consider claims on a Section 2255 motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994) (alteration in original) (quoting 28 U.S.C. § 2255). Thus, a movant is entitled to an evidentiary hearing "when the facts alleged, if true, would entitle [the movant] to relief." *Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996) (quoting *Wade v. Armontrout*, 798 F.2d 304, 306 (8th Cir. 1986)). The Court may dismiss a claim "without an evidentiary hearing if the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." *Shaw*, 24 F.3d at 1043 (citing *Larson v. United States*, 905 F.2d 218, 220–21 (8th Cir. 1990)).

Here, petitioner filed his motion in a timely manner, within the one-year statute-

of-limitation. *Campa-Fabela v. United States*, 339 F.3d 993, 993-94 (8th Cir. 2003). Because the Court finds petitioner's claims inadequate on their face, no evidentiary hearing will be necessary.

B. Ineffective Assistance of Counsel Standard

The Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense." U.S. CONST. amend. VI. Thus, a claim of ineffective assistance of counsel necessarily gives rise to a constitutional issue. *See Evitts v. Lucey*, 469 U.S. 387, 395–96 (1985). Unlike other constitutional issues, however, claims of ineffective assistance of counsel are better suited for collateral attack under Section 2255 than direct appeal because the reviewing court is able to consider the entire record. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003). Accordingly, "a showing of ineffective assistance of counsel [generally] satisfies both cause and prejudice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

"To establish ineffective assistance of counsel within the context of section 2255, however, a movant faces a heavy burden[.]" *Id.* The petitioner must prove his counsel's representation was (1) deficient and (2) the deficient representation prejudiced petitioner's defense. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "Deficient" representation is representation that falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. It is conduct that fails to conform to the degree of skill, care, and diligence of a reasonably competent attorney. *Id.* at 687. In assessing the deficiency prong, courts presume "counsel's conduct falls within a wide range of reasonable professional assistance." *United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (quoting *Strickland*, 466 U.S. at 689). Counsel's deficient representation is, in turn, "prejudicial" if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Lafler v. Cooper, 566 U.S. 156, 163 (2012) (citation omitted). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Because a petitioner must show both deficient performance and prejudice, a court need only address one prong of the ineffective assistance analysis if either fails. *See Williams v. United States*, 452 F.3d 1009, 1014 (8th Cir. 2006). Further, each individual claim of ineffective assistance "must rise or fall on its own merits," meaning courts should not take into account "the cumulative effect of trial counsel's errors in determining *Strickland* prejudice." *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006).

IV. ANALYSIS

Petitioner raises 21 grounds in his motion. (Doc. 1). Petitioner first alleges that the government committed a *Brady* violation by suppressing and failing to disclose exculpatory evidence in the form of phone call recordings petitioner claims exist. (*Id.*, at 2–9). Petitioner then claims that his trial and appellate attorneys were ineffective in multiple ways. (*Id.*, at 9–20).[3] Petitioner also claims that the Court erred in (1) denying his motions for new counsel; (2) barring him from entering purportedly exculpatory evidence at trial; and (3) denying him discovery during his appeal. (*Id.*, at 20–22). The Court will address each of petitioner's claims in turn.

A. Alleged Brady *Violation*

Petitioner alleges that the government committed a *Brady* violation by suppressing

[3] Petitioner's motion lists many ways he claims his attorney failed, which the government has in turn identified as 17 grounds of ineffective assistance of counsel for failing to investigate the case. (Doc. 9, at 17–18). The Court finds many of petitioner's claims duplicative in the sense that they can be classed together in various categories, such as failure to investigate witnesses or failure to obtain evidence. Thus, the Court's listing of claims may not marry up precisely with the parties' attempt to identify petitioner's claims.

or failing to produce recordings of phone calls (and copies of emails) he asserts existed and were exculpatory. (Doc. 1, at 2–9).

Petitioner raised this issue before the Court in his motion for a new trial. (Crim. Doc. 183). The Court denied that motion. (Crim. Doc. 188). Petitioner did not raise this issue on direct appeal and therefore procedurally defaulted this claim. *See Massaro*, 538 U.S. at 504 ("The background of our discussion is the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice."). Thus, on this basis alone the Court denies petitioner's motion on this claim. Nevertheless, the Court will also address the claim on the merits.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The government "is not required to deliver [its] entire [discovery] file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675 (1985). "To prove a *Brady* violation, a defendant must show that the prosecution suppressed the evidence, the evidence was favorable to the accused, and the evidence was material to the issue of guilt or punishment." *United States v. Duke*, 50 F.3d 571, 577 (8th Cir. 1995) (citation omitted). Evidence is considered material under *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Duke*, 50 F.3d at 577. No *Brady* violation occurs when the defendant, with reasonable diligence, could have obtained the evidence independently. *United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998).

Here, petitioner alleges the government did not provide him with a number of phone records of calls made by petitioner on his prison phone, as well as calls made by petitioner on other inmates' phones. (Doc. 1, at 3). Petitioner claims that the government withheld evidence because the phone records he received from the government do not align completely with his recollection or with the phone records he independently obtained through the "Federal Bureau of Prisons Trulincs Account Transactions-Trufone Personal Inmate Information." (*Id.*, at 4). Petitioner also argues that he "has been denied constantly for his requests for his [d]iscovery[.]" (*Id.*). Last, petitioner asserts that the allegedly missing discovery would have been favorable because it would have lent credibility to his claim that he was working to open a body shop or children's recreation center. (*Id.*).

The government represents that it has complied with the Court's prior orders and provided petitioner all the required discovery, first to petitioner's attorney, then to petitioner. (Doc. 9, at 9). The government also argues that the Court heard and rejected an alleged *Brady* violation in petitioner's motion for a new trial and should therefore deny petitioner's request for relief. (*Id.*, at 8). Last, the government argues that there is no basis for believing that any alleged missing calls or emails[4] would be exculpatory. (*Id.*, at 9–10). In particular, the government contends that because all the evidence petitioner describes relates to a theory that the Court found "patently incredible," (Crim. Doc. 162, at 14), any additional evidence of this theory would not be exculpatory. (Doc. 9, at 9–10).

Here, the Court has no more reason to believe now than it did when petitioner raised an alleged *Brady* violation the first time, that the discovery file provided to petitioner was incomplete, much less materially incomplete, much less intentionally materially incomplete. Also, as made clear in the Court's order denying petitioner's

[4] In his motion, petitioner largely discusses missing phone calls.

motion for a new trial, petitioner could have, but did not, subpoena the Bureau of Prisons ("BOP") for call logs that he claims would have revealed missing calls. (Crim. Doc. 139, at 6). As such, the Court cannot conclude that there was a violation that constituted a "fundamental defect" and resulted in "a complete miscarriage of justice." *Gomez*, 326 F.3d at 974. In short, nothing changes the Court's prior conclusion that the government did not commit a *Brady* violation. (Crim. Doc. 139, at 4–7).

This claim, therefore, fails.

B. Failure to Obtain Phone Recordings

Petitioner argues that his trial counsel was ineffective for failing to obtain recordings of calls directly from the BOP. (Doc. 1, at 9–10). Petitioner claims it was necessary for defense counsel to do so because petitioner believed the government may have altered the recordings produced in discovery. (*Id.*).

Trial counsel stated that he found no reason to subpoena the same recordings from the BOP because the government produced the recordings and there was no basis for believing they had been altered or tampered with. (Doc. 4, at 2).

Defense counsel's performance was objectively reasonable. Under "prevailing professional norms," it is not unreasonable for counsel to fail to request independent and identical discovery provided by the government. *Strickland*, 466 U.S. at 688. Petitioner asserts that he made the request to counsel "bec[au]se of mistrust with the government and Federal Agents and their actions already concerning Mr. Harriman's case[.]" (Doc. 1, at 9–10). Counsel had no reason to independently request the discovery materials based on petitioner's paranoid, baseless, and conclusory suspicions.

Further, petitioner has failed to show how he was prejudiced because he merely speculates, that had his attorney obtained copies of recordings directly from the BOP, they would be somehow exculpatory. *See Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (holding that appellant who filed a Section 2255 motion but produced no

affidavit from the witness in question or any other independent support for his claim failed to show prejudice because he offered only speculation that he was prejudiced by his counsel's failure to interview the witness, which was not enough to undermine confidence in the outcome of the trial). At trial, petitioner asserted his theory about opening a number of businesses in conjunction with the cartel. (*See, e.g.* Crim. Doc. 160, at 134). Ira Sojka even testified that he was aware of petitioner's alleged business plans as well. (Crim. Doc. 159, at 12, 21–22). The jury rejected petitioner's attempt at a cover story, however, and at sentencing, the Court found this theory "patently incredible" and ultimately found an obstruction of justice enhancement appropriate on these grounds. (Crim. Doc. 162, at 14–15). Petitioner's conclusory allegations that these phone calls would have changed the result of the trial are not convincing.

This claim, therefore, fails.

C. Failure to Allow Viewing of Discovery

Petitioner also alleges that trial counsel was ineffective because he did not allow petitioner to review the discovery file.[5] (Doc. 1, at 10). Petitioner alleges that had he been allowed to review the file, he would have been able to draw attention to the allegedly missing phone records and potentially inform the jury during trial "that the [g]overnment withheld and suppressed evidence[.]" (*Id.*).

Trial counsel explained that although no one from his office brought the file to petitioner for his review, he did not refuse to let petitioner review it and instead met with him "dozens of times" and provided a summary of all the discovery. (Doc. 4, at 3).

Counsel's decision to go over the discovery with petitioner was objectively reasonable. Given the complex nature of discovery, counsel opting to review and

[5] Petitioner also asserts that his appellate counsel failed to provide him with a copy of his discovery file and, therefore, was ineffective. (Doc. 1, at 19). For the same reasons outlined in this section, the Court finds that claim to be without merit.

explain his findings alongside petitioner certainly qualifies as reasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 688.

Also, as previously explained, it is not evident that the phone calls petitioner alleges are missing are, in fact, missing and if missing, were any way exculpatory. Therefore, the prejudicial impact of counsel's decision is not evident.

This claim is without merit and fails.

D. Failure to Investigate

Petitioner alleges that his attorney was ineffective for failing to investigate in several different ways. (Doc. 1, at 10–19). Specifically, petitioner alleges his attorney failed to investigate by failing to: (1) interview certain witnesses; (2) obtain documents related to petitioner's ex-wife; (3) obtain a copy of a 1996 psychiatric evaluation; (4) conduct an independent fingerprint analysis of the contract at issue; (5) have petitioner evaluated by a psychologist; and (6) have video/audio recording independently examined for tampering or alteration. (*Id.*). Petitioner also alleges that his appellate counsel was ineffective for failing to investigate petitioner's evidence of the allegedly missing phone records. (*Id.*, at 19).

Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Whitmore v. Lockhart*, 8 F.3d 614, 618–19 (8th Cir. 1993) (quoting *Strickland*, 466 U.S. at 691); *see also Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) ("One of trial counsel's strategic decisions is that of 'reasonably deciding when to cut off further investigation.'"). As the Eighth Circuit Court of Appeals has also observed,

> "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). Indeed, *Strickland* itself presented a situation where "[c]ounsel's strategy . . . decision not to seek more character or psychological evidence than was

> already in hand was . . . reasonable." *Strickland*, 466 U.S. at 699. And . . . the Supreme Court again confirmed that "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam).

Forrest v. Steele, 764 F.3d 848, 859 (8th Cir. 2014) (additional and parallel citations omitted).

(1) Failure to Interview Witnesses

Petitioner claims counsel was ineffective for failing to interview multiple witnesses: Calvin Braswell, Jr. (federal prison Forest City); Steven Wendell (prison counselor from 1996); Charlene Smith (tied to the 1996 incident); two unnamed individuals imprisoned with petitioner at Terre Haute Penitentiary; and Mr. Bradshaw (prison counselor from Forest City). (Doc. 1, at 10–11, 13–15, 18). Again, petitioner asserts that these witnesses would have, among other things, demonstrated that he did not have a predisposition of violence towards D.H. and was working to open businesses. (*Id.*).

Petitioner's attorney addressed petitioner's allegations about each potential witness. First, counsel explained that he did not interview Calvin Braswell because petitioner did not request that he do so. (Doc. 4, at 3). In particular, counsel stated that petitioner only suggested one witness, Mark Pearcy, be interviewed, which counsel opted not to do because he believed Mark Pearcy would provide the same information as Steven Williams, who was interviewed and slotted to appear as a witness at trial. (*Id.*). Counsel conceded that he did not interview Mr. Wendell because, again, petitioner did not mention him to defense counsel. (*Id.*, at 4). Regarding Ms. Smith, counsel explained that petitioner first notified counsel of her potential during voir dire or the first day of the trial, when it was far too late to interview her. (*Id.*). Last, counsel stated that petitioner did not notify him about the two potential witnesses at Terra Haute, nor

about Mr. Bradshaw, therefore neither were interviewed. (*Id.*, at 4, 6).

First, attorneys cannot be found to be deficient in their performance for failing to interview witnesses they know nothing about. Petitioner is correct in his assertion that defense counsel must conduct a reasonable investigation, however, a reasonable investigation does not include knowing, without any indication from petitioner, that certain individuals like Calvin Braswell, Mr. Wendell, the two unnamed prisoners at Terra Haute, or Mr. Bradshaw, should be investigated. Although it is not necessary for petitioner to delineate every witness or avenue of investigation, in the same vein, counsel cannot be expected to pursue a line of investigation with no indication of its existence. Second, because counsel must also know when to cut off further investigation, *Ault*, 537 F.3d at 892, counsel's performance is not deficient for failing to interview a witness they were notified of at trial. Last, it was reasonable for counsel to elect to not interview Mark Pearcy because he believed he would provide the same information as Steven Williams, who was slotted to testify at trial. Prevailing professional norms do not suggest that counsel must have a backup witness to provide similar testimony in the event that the original witness is unable to testify.

Further, petitioner cannot show he was prejudiced. "To establish prejudice from counsel's failure to investigate a potential witness, a petitioner must show that the witness would have testified and that their testimony 'would have probably changed the outcome of the trial.'" *Hadley v. Groose*, 97 F.3d 1131, 1135 (8th Cir. 1996) (quoting *Stewart v. Nix*, 31 F.3d 741, 744 (8th Cir. 1994)). Also, vague and conclusory allegations are not sufficient to state a ground for relief under Title 28, United States Code, Section 2255. *See Hollis v. United States*, 796 F.2d 1043, 1046 (8th Cir. 1986); *see also Bryson v. United States*, 268 F.3d 560, 562 (8th Cir. 2001) (affirming district court's summary dismissal of ineffective assistance of counsel claim on grounds that it was "brief, conclusory and fail[ed] to cite to the record"); *Trickey*, 875 F.2d at 210 (finding that

petitioner who filed a Section 2254 motion but produced no affidavit from the witness in question or any other independent support for his claim failed to show prejudice because he offered only speculation that he was prejudiced by his counsel's failure to interview the witness, which was not enough to undermine confidence in the outcome of the trial, as required by *Strickland*). Here, petitioner did provide an affidavit from Calvin Braswell, (Doc. 1, at 39–43), but failed to do so for any other witness mentioned, instead making conclusory statements about their potential testimony. Thus, petitioner's vague and speculative claims fail to establish prejudice.

Petitioner's claim about Calvin Braswell does not sufficiently allege prejudice. Regarding Braswell, the submitted affidavit states that Risinger was the last person to handle the envelope containing the contract, that Risinger and petitioner spoke about opening businesses, that Risinger encouraged petitioner to provide and not pursue the return of his car, and that petitioner spoke with his ex-wife about opening a business. (Doc. 1, at 39–43). None of this shows prejudice because it would not have changed the outcome at trial. Who last handled the envelope containing the contract is irrelevant because the evidence showed petitioner's prints on the contract, and that petitioner had the contract mailed to the undercover agent and later discussed it with the undercover agent. Further, petitioner presented evidence of his attempted cover story—that he was trying to open a business—and this cumulative evidence of petitioner's cover story is no more convincing than his other evidence that the jury soundly rejected.

Last, failure to call Mark Pearcy, who would present evidence which would have been merely cumulative, does not meet the prejudice prong of *Strickland*. *See Winfield v. Roper*, 460 F.3d 1026, 1034 (8th Cir. 2006) (holding that failing to present cumulative evidence is insufficient to show prejudice for a claim of ineffective assistance of counsel).

Thus, the Court denies petitioner's motion on this ground.

(2) Failure to Obtain Documents Related To His Ex-Wife

Petitioner faults his attorney for failing to obtain from petitioner's belongings in prison documents that would allegedly show his ex-wife recanted her allegation that petitioner violently assaulted her in 1996. (Doc. 1, at 12–13).

Petitioner's attorney explained that he attempted to retrieve these documents through the court system, but was unsuccessful, and has no recollection of petitioner telling him he had copies of the documents in his belongings. (Doc. 4, at 3–4).

Counsel's performance was not deficient. "Trial counsel's strategic decisions are virtually unchallengeable unless they are based on deficient investigation, in which case the presumption of sound trial strategy . . . founders on the rocks of ignorance." *Ault*, 537 F.3d at 892 (quoting *Link v. Luebbers*, 469 F.3d 1197, 1204 (8th Cir. 2006) (internal quotation marks omitted)). Here, counsel's investigation was not deficient because he sought out and investigated the potential documents and attempted to obtain them.

Also, petitioner suffered no prejudice. Petitioner's ex-wife admitted in her testimony that she recanted her allegations that petitioner violently attacked her in 1996. (Crim. Doc. 158, at 286, 300). A failure to investigate evidence that would merely be cumulative fails to establish that counsel's performance prejudiced petitioner. *See Roper*, 460 F.3d at 1034 (holding that failing to present cumulative evidence is insufficient to show prejudice for a claim of ineffective assistance of counsel).

Thus, the Court denies petitioner's motion on this ground.

(3) Failure to Obtain Copy of 1996 Psychiatric Evaluation

Petitioner claims his attorney was ineffective for failing to obtain a copy of petitioner's 1996 psychiatric evaluation related to his state case. (Doc. 1, at 14–15). Petitioner asserts that this evaluation would have demonstrated that he has a propensity "to vent and say things, but not act on them." (*Id.*, at 14).

Petitioner's attorney avers that he did obtain the evaluation, reviewed it, and

consulted with two potential mental health experts who indicated that they could not assist in petitioner's defense. (Doc. 4, at 4).

Here, counsel's performance was not deficient because, again, he investigated and reviewed the document and concluded that it was not helpful for petitioner's defense. Again, "[t]rial counsel's strategic decisions are 'virtually unchallengeable unless they are based on deficient investigation[.]'" *Ault*, 537 F.3d at 892 (quoting *Luebbers*, 469 F.3d at 1204). Here, counsel conducted an adequate investigation into the psychiatric evaluation and made a strategic decision to not enter it.

Further, petitioner has not shown prejudice. Petitioner claims the documents contained a letter from a psychiatric doctor that allegedly said he did not believe petitioner was violent and that his "bark was much worse than his bite." (Doc. 1, at 14). By the time of trial, this evaluation was two decades old and therefore was of miniscule probative value. Further, it was inadmissible hearsay. FED. R. EVID. 801, 802. The psychiatrist's opinion could, at best, serve as a source document that might inform an expert's opinion about petitioner at the time of the offense. Petitioner's attorney attempted to use the evidence in that way, unsuccessfully. In any event, the evidence admitted at trial showed petitioner was not merely venting; the overwhelming evidence showed petitioner attempted to hire a hitman to kill his ex-wife.

Thus, the Court denies petitioner's motion on this ground.

(4) Failure to Obtain Documents Examined by Defense-Hired Expert

Petitioner claims his attorney was ineffective for failing to have the contract and the envelope independently examined by a defense expert to determine if Risinger's fingerprints were on it. (Doc. 1, at 15). Petitioner asserts that Risinger's fingerprints would have demonstrated that Risinger, being the last one to handle the documents, would have attempted to have the contract signed and destroy the letter accompanying the contract. (*Id.*).

Petitioner's counsel explained that he contacted the government to ensure they had Risinger's prints for comparison purposes. (Doc. 4, at 4). Relatedly, the government reasons that even if counsel had not done that, petitioner has not sufficiently alleged prejudice because evidence presented at trial made clear that Risinger was present when the documents were handled and signed, therefore it was possible his prints would be on them. (Doc. 9, at 24).

First, counsel's actions were reasonable. Counsel took steps to ensure that the government had Risinger's prints. Because Risinger's prints were not discovered on the envelope, (Crim. Doc. 158, 236–45), counsel had no reason to believe that an independent examination would have found latent prints the government examiner failed to find. As previously mentioned, counsel need not "scour the globe on the off-chance something will turn up." *Steele*, 764 F.3d at 859. Here, nothing more was required of counsel.

Regardless, petitioner cannot show prejudice. As the government argues, even if Risinger's prints were found on the documents it would not have exonerated petitioner. Trial testimony established that Risinger was often around petitioner and the documents and that petitioner spoke with Risinger about them. That Risinger would touch the documents under those circumstances and leave latent prints would not have negated all the evidence that showed that petitioner sent the contract to the agent.

Thus, the Court denies petitioner's motion on this ground.

(5) Failure to Have Petitioner Evaluated by a Psychologist

Petitioner claims his attorney was ineffective for failing to obtain a psychologist or specialist, which petitioner asserts would have demonstrated that the agent's actions were intended to coerce and induce petitioner to have his ex-wife killed. (Doc. 1, at 15–16).

Petitioner's attorney avers that he consulted with two psychological experts who

stated they could not say that petitioner was susceptible to coercion or manipulation. (Doc. 4, at 5).

Counsel's actions were objectively reasonable. Here, counsel adequately investigated the possibility of using an expert to support a claim that petitioner was manipulated. After counsel confirmed that the psychological experts would not be able to testify that petitioner was susceptible to coercion or manipulation, he was not required to continue looking for alternative experts. *See Ault*, 537 F.3d at 892 (holding that "[t]rial counsel is not required by the Sixth Amendment to continue shopping for a psychiatrist until a favorable opinion is obtained."). Counsel's performance was not, therefore, deficient.

Further, petitioner has failed to show prejudice. First, he has failed to show that had he undergone a psychiatric evaluation that a medical professional would render an opinion favorable to petitioner. Indeed, the information counsel received from the medical experts he consulted with would suggest that petitioner would not have received a favorable opinion. In order to show prejudice caused by counsel's failure to obtain a mental evaluation or diagnosis, "the evidence must do more than speculate that the petitioner may have been incompetent." *James v. State of Iowa*, 100 F.3d 586, 589 (8th Cir. 1996). Further, petitioner's argument is based on a false premise—that law enforcement agents were manipulating petitioner, in particular, by directing his ex-wife not to let their children visit petitioner in prison. There was no evidence at trial of manipulation and specifically no evidence that officers directed petitioner's ex-wife not to allow their children to visit petitioner.

Thus, the Court denies petitioner's motion on this ground.

(6) Failure to Have Video/Audio Recording Examined for Tampering

Petitioner claims his attorney was ineffective for failing to have the video and audio of the meeting he had with the undercover agent posing as a hitman examined for

tampering. (Doc. 1, at 16). Petitioner claims that an independent investigation would have revealed that portions of him speaking were removed and added in the video. (*Id.*).

Petitioner's attorney explained that he did not have it independently examined because he believed there was no basis to suspect it was tampered with. (Doc. 4, at 5).

When, as here, there was nothing about the recording to suggest that it had been altered, defense counsel's performance was not deficient for failing to have it independently examined. *See United States v. Valencia*, 188 Fed. App'x 395, 400-401 (6th Cir. 2006) (finding defense counsel's performance was not deficient for failing to have methamphetamine independently tested when there was no reason to believe the drugs were not methamphetamine). The Court cannot say that the performance of petitioner's counsel "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Further, petitioner has failed to show prejudice. In particular, petitioner has failed to allege what the allegedly missing or altered portions of the video contained. Instead, petitioner has solely made a conclusory allegation that the recording was altered and that counsel should have investigated that. Furthermore, petitioner testified at trial and did not claim at that time that the video and audio recordings were inaccurate or altered. Rather, petitioner accepted the video for what it said and attempted to convince the jury that he was either entrapped or that he was talking about destroying buildings. In no event did petitioner claim that the recording did not accurately reflect the conversation he had with the undercover agent. Furthermore, at one point during the trial, the undercover agent explained that the audio and video recordings were separate and that the sync of the two created a gap that did not result in a perfect sync. (Crim. Doc. 157, at 27). Petitioner has offered no evidence to refute that explanation, either at trial, or in his motion. In sum, petitioner has not sufficiently alleged prejudice.

Thus, the Court denies petitioner's motion on this ground.

(7) Failure to Investigate Alleged Missing Phone Records

Petitioner claims that his attorney was ineffective for failing to obtain records that would have shown allegedly missing phone calls that petitioner asserts would have supported his story that he was trying to open a business upon his release from prison and not hire someone to kill his wife. (Doc. 1, at 16-17). The Court finds defense counsel's performance was not deficient. As discussed above, petitioner's claim here is based on a faulty and unsupported supposition that there were phone calls that were not reflected in the records the BOP provided to the government, which it in turn provided to defense counsel. Petitioner offers nothing but speculation and conclusory assertions to support his position. Further, as the Court noted, even if additional phone records existed showing additional calls not reflected in the BOP records, it would not show the content of those calls. Last, even if additional calls existed reflecting conversations in which petitioner talked of starting a business when he got out of prison, that evidence would be merely cumulative. Petitioner presented evidence of that intent; it was his cover story for talking with the undercover agent and he spun that tale for the jury. The jury found it unconvincing and more of the same evidence would have made no difference.

Thus, the Court denies petitioner's motion on this ground.

E. Failure to Question Witnesses as Petitioner Believes Appropriate

Petitioner claims his attorney failed to question witnesses at trial about petitioner's alleged plans to open an automobile repair business once he was released from prison. (Doc. 1, at 16–17). Petitioner asserts that these conversations, particularly with his ex-wife and Ira Sojka, would have lent credibility to his assertion that he was planning on opening businesses. (*Id.*, at 17).

Counsel explained that he did not question Ira Sojka about petitioner's business plans because he was focused on the affirmative defense of entrapment and did not ask

D.H. because in the multiple interviews counsel conducted with her, she did not indicate any knowledge of petitioner's business plans. (Doc. 4, at 6).

Counsel's performance was not deficient. First, it is important to note that reasonable trial strategy does not amount to ineffective assistance of counsel solely because the strategy is not successful. *James*, 100 F.3d at 590 (citing *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986)). Had counsel elected to focus solely on an affirmative defense, as opposed to drawing evidence about petitioner's business plans, the Court would not find counsel's assistance deficient. Second, counsel did, in fact, solicit testimony both from D.H. and Ira Sojka about petitioner's business plans. (Crim. Doc. 160 at 85 and Crim. Doc. 159, at 12, 21–22). Not only are petitioner's assertions refuted by the record, but they are inadequate.

Petitioner has also failed to sufficiently allege prejudice. Particularly because evidence of petitioner's alleged business plans was presented at trial, petitioner has not sufficiently alleged prejudice.

Thus, the Court denies petitioner's motion on this ground.

F. Failure to Call Witness at Trial

Petitioner argues that his attorney was ineffective for failing to call Steven Williams to testify. (Doc. 1, at 17–18). In particular, petitioner asserts that counsel should have spoken with Williams to address why he was unable to testify. (*Id.*, at 18). Petitioner asserts that Williams' testimony would have demonstrated that petitioner was planning on opening a business before he began speaking with the undercover officer and that petitioner handed the contract to Risinger to put in the mail. (*Id.*). Last, petitioner claims that Williams would have testified that Risinger told Williams that he knew of a hitman if Williams wanted anyone killed. (*Id.*, at 18).

Petitioner's attorney explained that he arranged for Williams to testify at trial via VTC, but Williams refused to testify without another inmate present and the BOP would

not permit that arrangement. (Doc. 4, at 6). Petitioner's motion is consistent with this explanation. (Doc. 1, at 17–18). Defense counsel was also concerned, based on comments Williams made to counsel, that Williams' testimony would not be favorable to petitioner. (Doc. 4, at 6).

Here, counsel's performance was not deficient. "A defense counsel's decision not to call a witness is a virtually unchallengeable decision of trial strategy." *United States v. Orr*, 636 F.3d 944, 955 (8th Cir. 2011) (citations omitted, punctuation altered). A reasoned decision not to call a witness "is a virtually unchallengeable decision of trial strategy," in part because "there is considerable risk inherent in calling any witness because if the witness does not hold up well on cross-examination, the jurors might draw unfavorable inferences." *United States v. Staples*, 410 F.3d 484, 488–89 (8th Cir. 2005); *see also Williams v. Armontrout*, 912 F.2d 924, 934 (8th Cir. 1990) ("Decisions relating to witness selection are normally left to counsel's judgment, and 'this judgment will not be second-guessed by hindsight.'") (quoting *Frank v. Brookhart*, 877 F.2d 671, 674 (8th Cir. 1989))). Here, petitioner's attorney attempted to have Williams testify, but Williams refused to do so absent circumstances unacceptable to the BOP. This was no fault of defense counsel. Further, defense counsel had strategic reasons not to pursue the matter further to have Williams testify given the concern that the testimony would not be favorable to petitioner.

Nor has petitioner sufficiently alleged prejudice. When applying the prejudice prong of the *Strickland* analysis to a defense lawyer's decision not to call a witness, courts assess: "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution." *Woods v. Norman*, 825 F.3d 390, 395–96 (8th Cir. 2016) (quoting *McCauley-Bey v. Delo*, 97 F.3d at 1106). First, petitioner has not provided the Court

with an affidavit from Williams attesting that he would have testified as claimed. Further, none of that testimony would have exonerated petitioner or added materially to his defense. Petitioner could very well have been talking about starting a business when he got out of jail, which Ira Sojka even attested to, (Crim. Doc. 159, at 12, 21–22); that does not negate his intent to also have his ex-wife killed. And as previously noted, whether petitioner handed the envelope to Risinger to be mailed was not material to any issue at trial. Last, if Risinger approached Williams about having access to a hitman that does not erase the evidence that petitioner, in a recorded meeting with an undercover officer, asked the officer to kill petitioner's ex-wife.

Thus, the Court denies petitioner's motion on this ground.

G. Failure to Discuss and Argue Against Ruling on 2009 Charges

Petitioner also asserts that counsel was ineffective for failing to adequately discuss and argue against the Court's ruling that his 2009 attempted murder charges were inadmissible. (Doc. 1, at 16). Petitioner asserts that he did not see an order stating that this evidence could not be brought in, nor a motion filed by counsel outlining why it should be brought in. (*Id.*). Petitioner claims that evidence of the 2009 acquittal would have suggested that D.H. has a history of lying and that petitioner was not "pre-disposed to kill his ex-wife." (*Id.*).

Counsel explained that he cautioned petitioner against discussing the 2009 acquittal because it was not brought up by the government in their case in chief and he suggested petitioner not discuss it to ensure he did not introduce evidence that would weigh more heavily against their case. (Doc. 4, at 5).

Counsel's performance was not deficient. First, before trial, counsel filed a motion in limine to suppress evidence regarding petitioner's conduct in the 2009 attempted murder charge. (Crim. Doc. 48-1, at 4–5). Counsel argued that the government should not be able to offer evidence via D.H. to bolster these charges on the

basis of insufficiency. (*Id.*, at 5). Counsel contended that "evidence that the Defendant tried to kill his wife in 2009 carries too great a risk that the jury will treat the 'other crime' as improper propensity evidence." (*Id.*). The government sought only to elicit testimony from D.H. about petitioner's actions that day and did not intend to introduce evidence regarding the charges or court proceedings. (Crim. Doc. 53, at 5). The Court ultimately ruled that evidence of the conduct, which would not include the subsequent charges or court proceedings, would be admissible. (Crim. Doc. 70, at 4–5). At trial, counsel requested that evidence of the acquittal be admissible. (Crim. Doc. 160, at 38–39). The Court ruled that evidence about the acquittal would be inadmissible. (*Id.*, at 39). Therefore, counsel was not deficient for advising petitioner that he could not speak about the 2009 acquittal, in fact, quite the opposite is true, given that the Court explicitly ruled such evidence inadmissible. Furthermore, counsel's argumentation was not deficient.

Also, petitioner was not prejudiced by counsel's actions regarding his 2009 acquittal. To prove prejudice resulted from a failure to introduce evidence, the evidence must have been admissible. *See Gregg v. United States*, 683 F.3d 941, 944 (8th Cir. 2012) (holding that "in cases where the alleged prejudice arose from a failure to introduce evidence, we must also apply Rule 403 to determine if the evidence would have likely been admitted). Here, the Court made clear before trial and during trial that evidence of petitioner's 2009 acquittal was not admissible under the Federal Rules of Evidence. (Crim. Docs. 70 and 160, at 39–40). Therefore, there is no question that the evidence would not have been admitted and prejudice has not been proven.

Thus, petitioner's motion is denied on this ground.

H. Failure to Obtain Return of Petitioner's Vehicle

Petitioner claims that appellate counsel was ineffective for failing to obtain the return of the car he transferred to the alleged hitman as down payment. (Doc. 1, at 19–

20). Petitioner further claims that had the car been returned, the government would not have had a critical piece of evidence for their argument that the car served as a payment. (*Id.*).

The government, in turn, explained that the car was kept as evidence during the trial. (Doc. 9, at 30–31). As a result, the government contends that had the car been requested, it would not have been returned. (*Id.*, at 30). Also, the government explained that regardless of if the car was returned, "the government still would have argued it was the down payment between movant and the 'hitman.'" (*Id.*).

First, counsel's failure to request the return of the car was not unreasonable. Counsel's performance is not ineffective for failing to file a motion that is futile. *See Anderson v. United* States, 762 F.3d 787, 794 (8th Cir. 2014) (holding that counsel failing to file a motion to suppress was not ineffective because counsel reasonably believed it would be futile). Here, although the Court does not have an affidavit from appellate counsel, because the government makes clear that the car would not have been returned if requested, any motion for its return would have been futile and prevailing professional norms would suggest that evidence would not be returned during trial or appeal.

Second, petitioner was not prejudiced by his failure to have his car returned to him. Petitioner's argument that had the vehicle been returned it would have shown that it was not a down payment for the murders is ill-founded. Whether the car was maintained in evidence or returned to petitioner, it would not have negated the recordings and other evidence that clearly showed petitioner provided the car to the agent as a down payment for the murders.

Thus, the Court denies petitioner's motion on this ground.

I. Court's Denial of Petitioner's Motion for New Counsel

Petitioner claims the Court erred in denying his motions for appointment of new counsel. (Doc. 1, at 20–21). Furthermore, in his reply brief, petitioner contends that

his motion is cognizable on the ground that the decision of the prior courts, including the Eighth Circuit, "was just wrong."

The government argues that this claim is barred because it was raised on direct appeal and that the Court adequately considered the motion and ruled appropriately. (Doc. 9, at 11–13).

The government is correct in their assertion that petitioner's motions were raised on direct appeal and thus petitioner's attempt to relitigate this issue is without merit. "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." *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003) (quoting *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1982)). Here, on appeal, petitioner raised the Court's denial of his motions for new counsel. *Harriman*, 970 F.3d at 1051. The Eighth Circuit concluded that both motions were adequately reviewed and correctly decided. *Id.* at 1060. Therefore, this claim could be dismissed on this ground alone, but the Court will address the merits as well.

Given the Eighth Circuit's finding, the Court's ruling on petitioner's motions for new counsel cannot be considered a fundamental defect. Had the Court's ruling resulted in a fundamental miscarriage of justice, it would have been reversed on appeal.

The Court denies petitioner's motion on this ground.

J. Court's Ruling About Alleged Exculpatory Evidence

Petitioner alleges the Court abused its discretion in denying petitioner the opportunity to present evidence about his 2009 acquittal for attempted murder. (Doc. 1, at 21). Petitioner asserts that, had he been allowed to bring in his 2009 acquittal, he could have demonstrated that D.H. had a history of making false allegations. (*Id.*). Petitioner further asserts that such evidence would have shown that he did not have a predisposition towards killing D.H. (*Id.*).

In response, the government contends that the Court properly concluded that the evidence should not be allowed in and that because the government did not bring any evidence related to petitioner's 2009 acquittal in during their case-in-chief, any evidence petitioner would have wanted to introduce would not have been relevant. (Doc. 9, at 13).

First, petitioner's claim could have been raised on appeal but was not, so it is procedurally defaulted and could be dismissed on that ground alone. *See Anderson*, 25 F.3d at 706. However, the Court will address the merits of petitioner's claim as well.

Here, the Court's ruling was not a defect that resulted in a fundamental miscarriage of justice. *Gomez*, 326 F.3d at 974 (citation omitted). First, the district court has broad discretion in admitting evidence under Rule 404(b). *United States v. Thomas*, 398 F.3d 1058, 1062 (8th Cir. 2005). As previously mentioned, the Court allowed only evidence of petitioner's conduct, not the subsequent charges or case proceedings during his 2009 attempted murder charge. (Crim. Docs. 70 and 160, at 39–40). The Court found then, and continues to find, that this was a proper ruling given the balancing of the low probative value of the acquittal against the high likelihood that the jury would be confused and misled about the legal machinations of an unrelated and dated criminal case.

This claim, therefore, fails on this ground.

K. Court's Denial of Discovery on Appeal

Petitioner asserts that the Court's repeated denial of petitioner's access to discovery during his appeal process has prevented him from substantiating a number of his claims, namely his claims regarding the allegedly missing phone records. (Doc. 1, at 21).

The government contends that, when ordered to do so, they complied completely with discovery orders and that after sentencing, they were under no obligation to provide discovery. (Doc. 9, at 14).

Again, this claim could be dismissed solely on the ground that petitioner could have made this claim on appeal, *see Anderson*, 25 F.3d at 706, but the Court will address the merits as well.

Here, a denial of discovery, again, does not amount to "a fundamental defect[.]" *Gomez*, 326 F.3d at 974 (citation omitted). First, "[a] district court is not required to entertain pro se motions filed by a represented party." *United States v. Tollefson*, 853 F.3d 481, 485 (8th Cir. 2017) (quoting *Abdullah v. United States*, 240 F.3d 683, 686 (8th Cir. 2001) (internal quotation marks omitted). Second, when an appeal is filed, a district court generally loses jurisdiction. *Minnesota Voters Alliance v. Walz*, 494 F.Supp.3d 610, 611 (D. Minn. 2020) (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56. 58 (1982). As a result, a district court may not possess the authority to order discovery on a case pending appeal. Petitioner's first post-sentencing discovery motion was filed on November 30, 2020, (Crim. Doc. 173), when petitioner was represented by counsel, (Crim. Doc. 149), and had an appeal pending. (Crim. Doc. 172). As a result, petitioner's motion was denied. (Crim. Doc. 174). On January 26, 2021, petitioner's counsel filed a motion for discovery. (Crim. Doc. 175). Again, because there was a pending appeal and petitioner's case with the district court was ultimately closed, that motion was denied. (Crim. Doc. 179). Denying petitioner's motions for discovery was in no way a "fundamental defect."

Petitioner's motion is denied on this ground.

V. REQUEST FOR EVIDENTIARY HEARING

Section 2255 requires a hearing for the purposes of determining the issues and making findings of fact with respect thereto. *See* 28 U.S.C. § 2255. A hearing is not required, however, when the "motion and the files and records of the case conclusively show" that relief is not available. *Id.* Mere speculation and conclusions are not enough to warrant an evidentiary hearing, and no factual disputes that can only be resolved by

an evidentiary hearing are apparent as to any of these claims. *United States v. Sellner*, 773 F.3d 927, 929–30 (8th Cir. 2014). Because petitioner fails to show the requisite prejudice resulting from any of his claims, it is clear that relief is unavailable. Accordingly, a hearing is unnecessary.

VI. CERTIFICATE OF APPEALABILITY

Under Rule 11(a) of the Rules Governing Section 2255 Cases, the Court must determine whether to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2). Petitioner must make a substantial showing of the denial of a constitutional right to be granted a certificate of appealability in this case. *See Garrett v. United States*, 211 F.3d 1075, 1076–77 (8th Cir. 2000). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). The Court finds that it is undebatable that the record show that petitioner's Section 2255 motion is without merit. Consequently, a certificate of appealability is also denied. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (to satisfy Section 2253(c), a petitioner must show that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong).

VII. CONCLUSION

For these reasons, petitioner's Motion to Vacate, Set Aside or Correct Sentence (Doc. 1) is **denied**. Petitioner is entitled to no relief under Title 28, United States Code, Section 2255. A certificate of appealability is also **denied**. Thus, this case is **dismissed**, and judgment will enter in favor of the United States.

IT IS SO ORDERED this 25th day of August, 2022.

C.J. Williams
United States District Judge
Northern District of Iowa