No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTUNEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

APPENDIX

I

Gregory P. Bartunek

29948-047

Federal Correctional Institution

P.O. Box 9000

Seagoville, TX 75159

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-3523

Gregory Bartunek

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:21-cv-00467-RFR)

JUDGMENT

Before COLLOTON, KELLY, and GRASZ, Circuit Judges.

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

The motion to supplement the record is denied.

This appeal is dismissed.

February 14, 2023

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 DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY BARTUNEK, Defendant.	**8:17CR28** **MEMORANDUM AND ORDER**

This matter is before the Court for further review of defendant Gregory Bartunek's ("Bartunek") pro se Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 468). *See* 28 U.S.C. § 2255, Rule 4(b). Having carefully reviewed the parties' submissions and the balance of the record in this case, the Court finds Bartunek is not entitled to any relief. *See id.* § 2255(b).

I. BACKGROUND

On January 19, 2017, a grand jury indicted Bartunek for one count of knowingly distributing and attempting to distribute child pornography, in violation of 18 U.S.C. § 2252A(a)(2) ("Count I"), and one count of knowingly possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) ("Count II"). Bartunek was arrested and arraigned on the charges. A magistrate judge appointed the Federal Public Defender for the District of Nebraska ("public defender") to represent Bartunek (Filing No. 10).

On the government's motion, the Court ultimately ordered Bartunek detained pending trial. Although a magistrate judge originally ordered Bartunek released on bond, the Court determined Bartunek presented a danger to the community and revoked the release order. Bartunek appealed, but the Eighth Circuit summarily affirmed.

Bothered by his counsel's failure to secure his release, Bartunek moved to appoint new counsel (Filing Nos. 29 and 33). When that effort failed because Bartunek did not

meet the standard, he voluntarily and knowingly waived his right to counsel and elected to proceed pro se, with the public defender standing by (Filing Nos. 36 and 41). Bartunek led a very active motion practice. He filed more than forty-eight largely repetitive pro se motions regarding detention, discovery, dismissal, speedy trial, suppression, and other matters and participated in multiple hearings. Bartunek actively represented himself for around eleven months.

About a week before trial was to commence, Bartunek asked the Court to appoint counsel to represent him (Filing No. 298). With Bartunek's consent, the Court reappointed the public defender and continued the trial. Bartunek then had a change of heart; he asked for new counsel and objected to any delay (Filing No. 305).

On March 20, 2018, after a hearing, the Court appointed (Filing No. 309) Andrew J. Wilson ("Wilson") to represent Bartunek pursuant to the Criminal Justice Act of 1964, as amended, 18 U.S.C. § 3006A. Before trial, Wilson contacted the government about a possible plea deal. According to Bartunek, the government offered him a binding plea agreement, *see* Fed. R. Crim. P. 11(c)(1)(C), under which Bartunek would plead guilty to Count II and face a sentencing range of 4 to 7 years. Count I would be dismissed.

Bartunek states Wilson estimated that if Bartunek went to trial and was convicted, he would receive 75 months for each count for a total of 150 months. Although Wilson advised Bartunek "it was a reasonable plea agreement," Bartunek rejected the plea offer and went to trial. He now claims Wilson failed to apprise him of all the risks.

Bartunek's trial began on October 29, 2018. It lasted three days. The jury found Bartunek guilty on both counts (Filing No. 349) after deliberating for one hour and thirty-two minutes. After the verdict, Bartunek requested new appointed counsel (Filing No. 353). The Court denied the motion after a hearing. Shortly before sentencing, the Court likewise denied (Filing No. 370) Bartunek's renewed motion for new counsel (Filing

No. 367), finding Bartunek "failed to show sufficient justifiable dissatisfaction with Wilson to merit substitute counsel at this stage."

At sentencing on March 8, 2019, the Court sustained some of Bartunek's objections to the revised presentence investigation report ("RPSR") (Filing No. 365) and partially granted his motion for a downward variance (Filing No. 366). The Court sentenced him to 204 months in prison on Count I, followed by 15 years of supervised release. Although the Court originally granted the government's oral motion to defer sentencing on Count II, the Court reconsidered and sentenced Bartunek to 120 months in prison on Count II, to run concurrently with Count I, again followed by 15 years of supervised release.

Bartunek appealed, challenging two of the Court's evidentiary rulings and the denial of his motion for a mistrial. *See United States v. Bartunek*, 969 F.3d 860, 861 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1439 (2021). The Eighth Circuit affirmed, finding no reversible error. *Id.*

On December 14, 2021, Bartunek filed a 100-page § 2255 motion (Filing No. 446) that contained more than 28 grounds for relief purportedly supported by more than 500 pages of briefing (Filing Nos. 448-455 and 458). Upon initial review, the Court concluded (Filing No. 457) Bartunek's motion was "deeply flawed yet not so flawed as to require summary dismissal" of all his claims. The Court granted leave to amend but cautioned Bartunek to avoid "the prolixity and repetition that mar[red] his first effort."

On April 4, 2022, Bartunek amended his motion, increasing his asserted grounds for relief from 28 to 44 (Filing No. 468). After thoroughly reviewing Bartunek's amended motion and brief (Filing No. 469), the Court dismissed with prejudice Bartunek's claims in Grounds 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 38, 41, and 42 (Filing No. 470). *See United States v. Bartunek*, No. 8:17CR28, 2022 WL 1443658, at *1-2 (D. Neb. May 6, 2022). The Court ordered the government to respond to the claims asserted in Grounds 8, 17, 18, 28, 33, 34, 35, 36, 37,

39, 40, 43, and 44, *see id.*, which it has done (Filing No. 474). As the government notes, those grounds primarily claim prosecutorial misconduct (Grounds 8 and 40) and ineffective assistance of counsel (Grounds 17, 18, 28, 33, 34, 35, 36, 37, 39, 43, and 44).

II. DISCUSSION

A. Standard of Review

Section 2255(a) authorizes federal prisoners to seek post-conviction relief if their "sentence was imposed in violation of the Constitution or laws of the United States, or . . . is otherwise subject to collateral attack." *See also Langford v. United States*, 993 F.3d 633, 636 (8th Cir 2021). "The remedy provided by § 2255 'does not encompass all claimed errors in conviction and sentencing.'" *Meirovitz v. United States*, 688 F.3d 369, 370 (8th Cir. 2012) (quoting *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc)).

An alleged error of law "must be 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Gray v. United States*, 833 F.3d 919, 923 (8th Cir. 2016) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). "Anything less is not cognizable under § 2255." *Id.* "Similar limitations apply with respect to claimed errors of fact." *United States v. Addonizio*, 442 U.S. 178, 185 (1979).

Bartunek "bears the burden of showing that he is entitled to relief under § 2255." *Langford*, 993 F.3d at 633 (quoting *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018)). He ordinarily would be entitled to an evidentiary hearing on his cognizable claims, but a hearing is unnecessary when, as here, the motion, files, "and records of the case conclusively show" he is not entitled to any relief. 28 U.S.C. § 2255(b); *accord Love v. United States*, 949 F.3d 406, 411 (8th Cir. 2020) ("A § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." (quoting *Ford v. United States*, 917 F.3d 1015, 1026 (8th Cir. 2019))).

B. Supplemental Information and Ground 45

In a document filed after the Court's initial ruling on his § 2255 motion, Bartunek proposes to submit "corrections/additions" to his motion (Filing No. 471). In particular, he provides a "replacement page" for Ground 40 and tries to assert a new ground for relief (Ground 45) that he labels "Unintelligent Waiver of Counsel/Denial of Counsel During Pretrial." Stating he argued the point in his brief but didn't assert it in his motion, Bartunek claims, "Wilson was ineffective for not raising this issue in the district court or on appeal."

The Court has considered Bartunek's supplemental information but finds no merit to Ground 45. The Court has already thoroughly addressed any claims Bartunek has raised based on an alleged failure to appoint alternate counsel. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."). And any claim based on a purported lack of knowledge of "'the traditional benefits associated with the right to counsel' and 'of the dangers and disadvantages of self-representation'" is flatly contradicted by the record. *United States v. Bartunek*, No. 8:17CR28, 2018 WL 1178267, at *1 (D. Neb. Mar. 6, 2018) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)); *see also United States v. Bartunek*, No. 8:17CR28, 2017 WL 4564724, at *4 (D. Neb. Oct. 11, 2017); *United States v. Bartunek*, No. 8:17CR28, 2017 WL 1956882, at *2-3 (D. Neb. May 10, 2017). Counsel is not ineffective for failing to raise such claims. *See United States v. Davis*, 406 F.3d 505, 511 (8th Cir. 2005).

C. Allegations of Vindictive Prosecution

Bartunek contends his convictions are the result of improper and unprofessional conduct by Assistant United States Attorney Michael P. Norris ("Norris"). In Bartunek's view, Norris denied him discovery required by Federal Rule of Criminal Procedure 16(a)(1)(E) and violated his "due process rights through vindictive prosecution and other misconduct." *See United States v. Williams*, 793 F.3d 957, 963 (8th Cir. 2015) ("Vindictive prosecution occurs when a prosecutor seeks to punish a defendant solely for exercising a valid legal right."). More specifically, Bartunek contends Norris

> 1) used perjured testimony before the Grand Jury; 2) conspired with the State of Nebraska to circumvent Bartunek's rights; 3) violated court rules and federal statutes; 4) withheld material evidence causing extreme delays in bringing Bartunek to trial; 5) made false and misleading allegations against Bartunek for exercising his constitutional rights; 6) punished Bartunek for exercising his right to trial; 7) misconduct during sentencing; 8) misconduct during the voir dire of the jury; 9) made improper statements during opening and closing; 10) violated Bartunek's right to silence and presumption of innocence; and 11) used false testimony to obtain a tainted conviction.

As Bartunek sees it, Norris's pervasive misconduct and vindictiveness tainted his prosecution from beginning to end.

Proving such claims is no easy task, *see, e.g.*, *Williams*, 793 F.3d at 963, particularly when they involve pretrial charging decisions, *see United States v. Goodwin*, 457 U.S. 368, 381 (1982). Prosecutors "may take action to punish a defendant for committing a crime," *United States v. Campbell*, 410 F.3d 456, 461 (8th Cir. 2005), and have broad discretion "in performing their duties," *Williams*, 793 F.3d at 963. As "long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

To prove prosecutorial misconduct, Bartunek must show Norris's "remarks or conduct were improper" and prejudicially affected Bartunek's "substantial rights so as to deprive him a fair trial." *United States v. Ziesman*, 409 F.3d 941, 953 (8th Cir. 2005) (quoting *United States v. Beckman*, 222 F.3d 512, 526 (8th Cir. 2000)). At the second step, the Court considers "1) the cumulative effect of the misconduct; 2) the strength of the properly admitted evidence of the defendant's guilt; and 3) any curative actions taken by the trial court." *Beckman*, 222 F.3d at 526.

To prove vindictiveness, Bartunek bears the "heavy" burden of demonstrating that Norris prosecuted him to punish Bartunek for exercising his legal rights. *Id.* As Bartunek

points out, "[a] defendant can establish prosecutorial vindictiveness through two methods." *Id.* (quoting *United States v. Chappell*, 779 F.3d 872, 879 (8th Cir. 2015)). For one, he can present "objective evidence of the prosecutor's vindictive or improper motive in" bringing and prosecuting the charges. *Id.* (quoting *Chappell*, 779 F.3d at 879). "An example of objective evidence of a vindictive motive would be a prosecutor's statement that he or she is bringing a new charge in order to dissuade the defendant from exercising his or her legal rights." *Campbell*, 410 F.3d at 462.

Absent such objective evidence, "a defendant may, in *rare* instances, rely upon a presumption of vindictiveness, if he provides sufficient evidence to show a reasonable likelihood of vindictiveness exists." *Williams*, 793 F.3d at 963 (quoting *Chappell*, 779 F.3d at 879). "A presumption does not arise just because action detrimental to the defendant was taken after the exercise of the defendant's legal rights; the context must also present a reasonable likelihood of vindictiveness." *Campbell*, 410 F.3d at 462; *see also Williams*, 793 F.3d at 963 ("[T]iming alone is insufficient to trigger the presumption of vindictiveness.").

> Because a vindictive prosecution claim asks a court to exercise judicial power over a 'special province' of the [President and his delegates to enforce the law]," *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)), "'[t]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties,'" *id.* (alteration in original) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

Chappell, 779 F.3d at 880 (alterations in original).

Bartunek's misconduct and vindictiveness claims suffer multiple deficiencies. First, many (if not most) were not properly preserved. "Claims not made during district court proceedings or on direct appeal are procedurally defaulted and may not be raised for the first time in a § 2255 motion." *United States v. Hamilton*, 604 F.3d 572, 574 (8th Cir. 2010); *see also Sun Bear*, 644 F.3d at 702 n.3 (explaining that failing to raise an issue on

direct appeal requires the defendant "to avoid that procedural default using the cause and prejudice analysis mandated by *United States v. Frady*, 456 U.S. 152, 165-69 (1982)").

Bartunek contends he can show cause and prejudice for his claims because he raised them "on his direct appeal, but the Court of Appeals . . . refused to review them." (Footnote omitted). He further argues "claims not raised in the district court or on appeal were due to ineffective counsel, not Bartunek." The arguments are unavailing.

On initial review, the Court advised Bartunek that in showing cause based on such ineffective-assistance claims, he would have to fairly account for the eleven months he represented himself. *See United States v. Bartunek*, No. 8:17CR28, 2022 WL 137869, at *2 (D. Neb. Jan. 14, 2022) ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" (alteration in original) (quoting *Faretta*, 422 U.S. at 834 n.46). He has not done that.

The Court also warned Bartunek that his "cursory claims of ineffective assistance without any actual analysis" did not carry his burden of proving "both deficiency and prejudice" as required by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Bartunek*, 2022 WL 137869, at *2. Despite those warnings, Bartunek still offers little more than stark conclusions of cause and prejudice unsupported by any pertinent analysis.

Bartunek's scattered allegations of prejudice inevitably morph into claims the Court has repeatedly rejected, such as detention, delay, denial of access to the courts, a lack of equal resources, and the denial of counsel of his choosing. *See Bartunek*, 2022 WL 1443658, at *2. His suggestion that the charges against him would have been dismissed or that he would have accepted a plea deal or been found not guilty if only he had different counsel are wholly at odds with the extensive record in this case. Bartunek also completely ignores the Court's reasoned rejection of his claim of actual innocence. *Id.*

Even if the Court were to overlook or excuse Bartunek's procedural defaults, his prosecutorial-misconduct and vindictiveness claims fail on the merits. In Ground 8, Bartunek alleges violations of Rule 16(a)(1)(e) and other discovery abuses. The claims do not withstand scrutiny. Bartunek's circumstances, including his decision to represent himself and his ability to serve—in effect—as his own computer expert, certainly complicated discovery in this case and may have led to some delays, but the Court closely monitored and addressed those issues with the parties as the case progressed.

Bartunek received unprecedented access to the jail library to review discovery and prepare his defense. When Bartunek again requested counsel before trial, his appointed counsel retained the services of an independent computer expert to review the forensic evidence and be present at trial. The Court is satisfied Bartunek received access to and copies of the evidence to which he was entitled in a reasonably timely manner.

Bartunek's list of allegations in Ground 40 fares no better. Each claim fails under its own weight. Bartunek accuses Norris of lying to the Court; withholding evidence; using false and perjured testimony; making false, misleading, and improper statements; and violating Court rules and federal statutes. His arguments—which again frequently rehash definitively resolved issues—are long on accusations and short on details that actually support his grand claims.

Bartunek's most serious accusations invariably depend on misunderstandings of the law, misleading descriptions of Norris's statements and conduct during the case, and other mischaracterizations of the record. Take Bartunek's claim that Norris used perjury and false testimony throughout this case. "To prove use of false testimony, [Bartunek] must show that '(1) the prosecution used perjured testimony; (2) the prosecution should have known or actually knew of the perjury; and (3) there was a reasonable likelihood that the perjured testimony could have affected the jury's verdict.'" *United States v. West*, 612

F.3d 993, 996 (8th Cir. 2010) (quoting *United States v. Bass*, 478 F.3d 948, 951 (8th Cir. 2007)). Bartunek does not do that.

Instead, his accusations often just reflect his own interpretation of the evidence. For example, Bartunek complains Norris falsely "painted a picture of [witness] S.P. as an innocent boy, whose morals were corrupted by Bartunek" when "[t]he facts show that S.P. was a manipulative lier [sic], who abused drugs and molested children well before he met Bartunek." To Bartunek, "S.P.'s testimony was inconsistent with other evidence." Whether S.P. was lying about the abuse he suffered at Bartunek's hands and whether his testimony was consistent were questions for the jury. *See United States v. Perkins*, 94 F.3d 429, 433 (8th Cir. 1996) ("[I]t is not improper to put on a witness whose testimony may be impeached. Truth determination is still the traditional jury function.").

Bartunek is correct "that a prosecutor may not knowingly, recklessly, or negligently introduce perjured testimony," *see United States v. Albanese*, 195 F.3d 389, 393 (8th Cir. 1999), but he fails to establish that the government's witnesses committed perjury, let alone that Norris knowingly solicited "false testimony to obtain a tainted conviction" to punish Bartunek for exercising his constitutional rights.

Not every misstatement, variance, or perceived error in a witness's testimony is perjury. *See, e.g.*, *West*, 612 F.3d at 996 ("Merely inconsistent statements do not establish use of false testimony."). Even fewer constitute prosecutorial misconduct or materially affect the jury's verdict. *See United States v. Moore*, 639 F.3d 443, 446 (8th Cir. 2011); *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995). None did here.

Another example of Bartunek attempting to build a misconduct claim on a stunted understanding of the law and a shaky view of the facts relates to his pretrial detention. Bartunek contends Norris violated 18 U.S.C. § 3142(f) and Nebraska Criminal Rule 46.2 by challenging the magistrate judge's initial release order. For Bartunek, Norris's decision set off a cascade of constitutional violations. But Norris was well within his rights to ask

this Court to review the magistrate judge's pretrial release order. *See* 18 U.S.C. § 3145(a) (authorizing the government to file a motion to revoke or amend a release order); NECrimR 46.2 (appeal of release and detention orders). And it was not a "false accusation" for Norris to argue Bartunek was a danger to the community under the circumstances of this case. Indeed, Bartunek faced a statutory presumption under 18 U.S.C. § 3142(e) that he was a danger based on the nature of the charges against him.

Bartunek next complains about an illicit conspiracy between Norris and the State of Nebraska ("State") to punish him for past state crimes and retaliate against him for suing the State and others. He claims the State "used the federal government as a tool to circumvent the Law and Constitutions of the federal and state governments." Bartunek's conspiracy claim is again rife with speculation and devoid of evidence.

"Referrals and cooperation between federal and state officials not only do not offend the Constitution but are commonplace and welcome." *United States v. Leathers*, 354 F.3d 955, 960 (8th Cir. 2004). And evidence of past criminal conduct frequently plays a role in federal prosecutions—both at trial and sentencing. Norris's prosecutorial decisions in this case and interactions with State law-enforcement officers are entitled to a presumption of regularity. *See Chappell*, 779 F.3d at 880. Bartunek has not presented any objective evidence to rebut that presumption or otherwise show that Norris's relatively routine actions in this case were driven by a desire to retaliate against Bartunek or any other "impermissible motive." *Leathers*, 354 F.3d at 962.

One last claim bears discussion. Bartunek asserts, "Further objective evidence that Norris punished Bartunek for exercising his right to trial is the large discrepancy between his plea agreement and Norris' sentencing recommendation after Bartunek's trial . . . ." According to Bartunek, during plea negotiations, Norris offered a binding plea agreement under which Bartunek would have faced 4 to 7 years on Count II and had Count I dismissed. Bartunek rejected that plea offer, went to trial, and was found guilty of both counts. At

sentencing, Norris recommended a sentence of 20 years on Count I and asked the Court to defer sentencing on Count II.

By Bartunek's account, Norris claimed at sentencing "that Bartunek deserved a much harsher punishment because he exercised his constitutional right to go to trial, and refused to give up his right against self-incrimination." Bartunek is again mistaken. He not only grossly mischaracterizes Norris's sentencing recommendations (Filing Nos. 371 and 416) but also misunderstands the plea process.

A plea offer is an exercise of leniency and prosecutorial economy. *See Brady v. United States*, 397 U.S. 742, 752 (1970); *United States v. Haynes*, 958 F.3d 709, 717 (8th Cir. 2020). "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher*, 434 U.S. at 363 (quoting *Brady*, 397 U.S. at 752). The defendant avoids trial and reduces his exposure; the government preserves limited resources and eliminates the risk of acquittal. *See Brady*, 397 U.S. at 752.

But a rejected plea offer does not cabin the prosecutor's broad discretion or bind the government in any way. *See Bordenkircher*, 434 U.S. at 363. The government also does not violate the constitution by declining to seek a reduced sentence when the defendant does not accept responsibility. *See McKune v. Lile*, 536 U.S. 24, 47 (2002) ("Acceptance of responsibility is the beginning of rehabilitation. And a recognition that there are rewards for those who attempt to reform is a vital and necessary step toward completion."); U.S.S.G. § 3E1.1 (acceptance of responsibility). If warranted by the evidence, the government can add charges or seek sentencing enhancements. *See id.* at 364-65 (additional charges); *United States v. Hunt*, 812 F. App'x 390, 393 (8th Cir. 2020) (unpublished per curiam) (sentencing enhancements).

By rejecting a binding plea agreement, Bartunek accepted "the possibility of a greater penalty upon conviction after a trial." *Bordenkircher*, 434 U.S. at 363. "[A]fter

trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Alabama v. Smith*, 490 U.S. 794, 801 (1989). Both the judge and the prosecutor may have "a fuller appreciation of the nature and extent of the crimes charged" and some insight into the defendant's "moral character and suitability for rehabilitation." *Id.*

Here, Norris has explained that in preparing for trial the government obtained additional information about the "extent of Bartunek's child exploitative nature" and the danger he presented to the community as compared with "run-of-the-mill child pornography offenders." Norris's explanation echoes his sentencing memorandum and arguments at sentencing based on Bartunek's RPSR. As it did then, the Court "discern[s] no element of retaliation or vindictiveness against [Bartunek] for going to trial," and Bartunek fails to show otherwise.

The Court has carefully examined the rest of Bartunek's misconduct and vindictiveness claims and finds they too lack merit. The mere fact that Bartunek was prosecuted, convicted, and sentenced after exercising his legal rights does not prove Norris improperly tried to punish him for exercising those rights. *See Williams*, 793 F.3d at 963.

Defendants are expected to invoke their substantive and procedural rights before and during trial and routinely do. *See Goodwin*, 457 U.S. at 381. That "is an integral part of the adversary process in which our criminal justice system operates." *Id.* "It is unrealistic to assume that a prosecutor's probable response to such" efforts "is to seek to penalize and to deter." *Id.*; *see also Campbell*, 410 F.3d at 462 (finding no prosecutorial vindictiveness when the prosecutor's decisions are based on "some objective reason other than to punish the defendant for exercising his legal rights").

The Court observed Norris throughout this case and saw no evidence of prosecutorial misconduct or vindictiveness. Vigorous advocacy is not improper; it is expected on both sides. *See United States v. Bussey*, 942 F.2d 1241, 1253 (8th Cir. 1991).

Criminal proceedings are never perfect, but Bartunek received fair treatment and a full and fair trial. *See id.*

D. Allegations of Ineffective Assistance of Counsel

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel at all critical stages of a criminal proceeding, including plea negotiations, trial, sentencing, and appeal. U.S. Const. amend. VI; *Lee v. United States*, 582 U.S. ___, ___, 137 S. Ct. 1958, 1964 (2017). Bartunek's remaining claims assert that Wilson made mistakes in this case that deprived Bartunek of the assistance of effective counsel. The Court has separately considered "each claim, mindful that 'the numerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief,'" *Winters v. United States*, 716 F.3d 1098, 1103 (8th Cir. 2013) (quoting *United States v. Robinson*, 301 F.3d 923, 925 n. 3 (8th Cir. 2002)), and that *Strickland* does not require a "cumulative performance inquiry," *Forrest v. Steele*, 764 F.3d 848, 860 (8th Cir. 2014).

As noted above, to prevail on his ineffective-assistance claims, Bartunek must show Wilson's performance was both "deficient"—that is, that Wilson "made errors so serious that [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"—and prejudicial—that is, his "errors were so serious as to deprive [Bartunek] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *accord Collins v. United States*, 28 F.4th 903, 906 (8th Cir. 2022). "Failure to establish either prong is fatal." *Morelos v. United States*, 709 F.3d 1246, 1250 (8th Cir. 2013).

Counsel's performance is deficient when it falls "below an objective standard of reasonableness" judged "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 688, 690. The Court's review of counsel's performance is highly deferential. *Id.* at 689. In evaluating counsel's performance, the Court applies "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *id.*, and avoids "making judgments based on hindsight," *Fields v. United States*, 201 F.3d 1025, 1027 (8th Cir. 2000).

To prove prejudice, Bartunek "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "It is not sufficient for [him] to show that the error had some 'conceivable effect' on the result of the proceeding because not every error that influences a proceeding undermines the reliability of the outcome of the proceeding." *Odem v. Hopkins*, 382 F.3d 846, 851 (8th Cir. 2004) (quoting *Strickland*, 466 U.S. at 693).

1. Plea Process and Sentencing Advice

Bartunek contends Wilson provided "gross misadvice regarding the plea agreement." According to Bartunek, had he "been made aware of all the facts regarding pleas, his trial, and sentencing, he would have accepted the plea." The Court's review of Bartunek's own account of his plea discussions with Wilson reveals his real issue is not as much about Wilson's advice as it is about Bartunek's post hoc regrets about his decision not to take it.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). When he began representing Bartunek, Wilson sought and obtained a plea offer with relatively favorable terms.

Although Bartunek was advised he faced 5 to 20 years if convicted of Count I and up to 10 years if convicted of Count II, Wilson obtained a binding Rule 11(c)(1)(C) plea offer under which Bartunek would plead guilty to Count II and face 4 to 7 years and would have Count I dismissed. According to Bartunek, Wilson discussed the terms of the plea agreement with Bartunek and told him "it was a reasonable plea agreement." He also reasonably advised Bartunek of the possible consequences of not taking it.

Wilson's handling of the plea offer—as recounted by Bartunek himself—falls "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

2. Alleged Trial Errors

Bartunek next raises a long list of mistakes he alleges Wilson made before and during trial, including failing to (1) effectively communicate; (2) account to Bartunek for his time; (3) submit a trial brief; (4) investigate an alibi defense; (5) object to certain evidence; (6) effectively cross-examine and impeach S.P. and other government witnesses; (7) investigate, interview, or call lay witnesses; (8) call an expert; and (9) present evidence of Bartunek's innocence. Bartunek also claims Wilson completely abandoned him during trial by sitting next to the defense's computer expert at a different table for part of the government's case. According to Bartunek, Wilson's conduct was unreasonable because Bartunek is more qualified than his expert.

Bartunek's arguments do little—if anything—to overcome the "strong presumption" of reasonableness that applies to Wilson's performance at trial. *See Strickland*, 466 U.S. at 689 (noting "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence"). Ignoring the eleven months he represented himself and the extensive motion practice in this case, Bartunek lays all the blame for his convictions on Wilson.

Yet without evidence to the contrary, the Court presumes Wilson "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 689); *accord Barnes v. Hammer*, 765 F.3d 810, 814 (8th Cir. 2014) (presuming tactical decisions rather than neglect). Bartunek fails to rebut that presumption as to any of his alleged trial errors.

For example, Bartunek faults Wilson for failing to adequately investigate Bartunek's "alibi" defense—i.e., that "someone other than Bartunek was using the tower computer" on March 26, 2016, (the day of the alleged distribution of child pornography as charged in Count II) because Bartunek had dinner at Ameristar with a "friend" about a half-an-hour after the alleged distribution. But Bartunek's purported alibi hinges on a dubious

timeline that only applies to Count II. Bartunek acknowledges that Wilson explained why he believed Bartunek's alibi defense would not be effective.

What's more, Bartunek has yet to identify his "friend" or give any details as to what evidence they could give if called to testify. On this record, Bartunek's dinner companion is far from the airtight alibi he envisions, and Wilson's tactical decision to focus the defense elsewhere was reasonable.

Bartunek's attempt to show ineffective assistance by analyzing the proportion of direct testimony to cross-examination similarly falls short. *See, e.g., United States v. Villalpando*, 259 F.3d 934, 939 (8th Cir. 2001) ("We generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel."). According to Bartunek's estimate based on his review of the duration of testimony in the trial transcripts, the government examined nine witnesses for a total of 470 minutes. Wilson only cross-examined them for twenty minutes. For Bartunek, his estimated disparity in the testimony demonstrates Wilson was ineffective. The Court disagrees.

Leaving aside the government's sagacious questions about the validity and reliability of Bartunek's duration-of-testimony analysis, it is fairly common for direct examination to take longer than cross-examination—often by a good margin. Even if accurate, Bartunek's rough comparison of time is not an effective way to evaluate counsel's performance. A devastating cross can take just a few questions; a bad one can take hours.

Bartunek's list of alleged trial errors is long, but none establish that Wilson's trial performance was deficient. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). And given the strong evidence of Bartunek's guilt, he does not even come close to establishing "a reasonable probability that" a different defense or argument or additional questions or witnesses would have led to his acquittal. *Strickland*, 466 U.S. at 694; *see also United States v. Cronic*, 466 U.S. 648, 658 (1984) ("Absent some effect of

challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."); *Morelos*, 709 F.3d at 1250 (concluding a defendant cannot show prejudice based on a "theory of cross-examination prejudice" that "is merely speculative").

3. Alleged Sentencing Errors

In his motion and supporting briefs, Bartunek occasionally questions the advice and effort Wilson gave regarding sentencing. For instance, Bartunek contends Wilson failed to effectively discuss the RPSR, objections, and the logistics of sentencing when they met before the sentencing hearing. Bartunek further argues Wilson was ineffective because he did not explain the supervised-release conditions Bartunek faced until shortly before sentencing and failed to object to those conditions at the hearing. Bartunek's arguments are without merit.

After trial, the Court closely watched Wilson's performance because both he and Bartunek had alerted the Court to potential communication issues. Working through those issues, Wilson objected (Filing No. 363) to key parts of the RPSR, challenged the sufficiency of the evidence for certain enhancements, moved to dismiss the lesser-included offense in Count I, and moved for a downward departure or variance (Filing No. 366).

At sentencing, the Court acknowledged (Filing No. 416) that Wilson may not have "done everything that Mr. Bartunek has asked him or demanded of him, including more face-to-face meetings" and other things. Yet the Court concluded Wilson "more than competently represented Mr. Bartunek." Turning to the sentencing arguments, the Court sustained some of Wilson's objections and overruled others. The Court granted Wilson's request for a variance in part and sentenced Bartunek to concurrent sentences of 204 months on Count I and 120 months on Count II.

The Court has carefully reviewed Bartunek's ineffective-assistance claims and finds nothing to persuade the Court to alter its decision that Wilson "more than competently

represented Mr. Bartunek." Nor is there any reasonable chance that, absent the alleged errors, Bartunek would have received a lighter sentence or different supervised-release conditions. *See Strickland*, 466 U.S. at 694; *Palmer v. Clarke*, 408 F.3d 423, 445 (8th Cir. 2005).

4. Alleged Appellate Errors

The Court reaches a similar conclusion with respect to Bartunek's claims that Wilson (and his associate) were unconstitutionally ineffective on appeal. Bartunek's appellate claims generally fall into two categories. First, Bartunek argues Wilson failed to support the evidentiary issues he raised on appeal "with sufficient facts and argument to convince the [appeals court] to reverse Bartunek's conviction." Second, Bartunek contends, "Wilson failed to raise issues that were both obvious and stronger than the issues he raised, including his own ineffectiveness." Neither argument is persuasive.

Taking Bartunek's last point first, the Court notes the Eighth Circuit does not normally consider ineffective-assistance claims on direct appeal. *See Davis*, 406 F.3d at 510 ("[I]neffective assistance claims are generally not raised on direct appeal."). Because those claims are often best evaluated in "a collateral postconviction action under 28 U.S.C. § 2255" like this one, appellate counsel is not ineffective for not raising them on appeal. *Villalpando*, 259 F.3d at 938.

In reviewing Bartunek's claims that his counsel was ineffective on appeal, the Court applies a strong presumption that his counsel "rendered adequate assistance and made all significant decisions for tactical reasons rather than through neglect." *See Walker v. United States*, 810 F.3d 568, 579 (8th Cir. 2016) (quoting *Barnes*, 765 F.3d at 814). That presumption of reasonableness is difficult to overcome. *Id.*; *Link v. Luebbers*, 469 F.3d 1197, 1205 (8th Cir. 2006).

The Court's "review is particularly deferential when reviewing a claim that appellate counsel failed to raise an additional issue on direct appeal." *Walker*, 810 F.3d at

579 (quoting *Charboneau v. United States*, 702 F.3d 1132, 1136 (8th Cir. 2013)). "[A]bsent contrary evidence, [the Court] assume[s] that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *New v. United States*, 652 F.3d 949, 953 (8th Cir. 2011) (first alteration in original) (quoting *United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008)). Appellate counsel is not ineffective for failing to raise meritless claims. *See Polk County v. Dodson*, 454 U.S. 312, 323 (1981) (explaining lawyers should not "clog the courts with frivolous motions or appeals"); *Davis*, 406 F.3d at 511 (deciding appellate counsel was not ineffective for not raising a nonviable claim).

In an attempt to overcome *Strickland*'s presumption of reasonableness, Bartunek points to a host of issues he now says "were both obvious and clearly stronger than the issues that [his counsel] raised." His effort is crippled by the fundamental infirmity of his alternative arguments. *See Walker*, 810 F.3d at 579-80 (concluding the defendant failed to cast "doubt on her counsel's strategic decision not to raise" a particular claim on appeal).

Bartunek's argument rings especially hollow here where his counsel raised claims on appeal that Bartunek wanted them to raise. Indeed, Bartunek still presses those claims. He just thinks his counsel should have made better arguments—though he too has failed to make any argument that would have turned the tide on appeal. The mere fact that his counsel did not succeed where Bartunek thinks he could have does not make their performance deficient nor make his alternative arguments comparatively stronger. *See Strickland*, 466 U.S. at 699 (finding "little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment"); *Walker*, 810 F.3d at 579 (concluding a failure of persuasion was not ineffective assistance).

As to Bartunek's list of other issues, "[t]he Sixth Amendment does not require that counsel raise every colorable or non-frivolous claim on appeal." *New*, 652 F.3d at 953. And Bartunek had no right to attorneys "who w[ould] docilely do as" they were told "or advance meritless legal theories." *United States v. Rodriguez*, 612 F.3d 1049, 1055 (8th

Cir. 2010) (quoting *Hunter v. Delo*, 62 F.3d 271, 275 (8th Cir. 1995)). The process of selecting claims and "'winnowing out weaker arguments on appeal'" to focus on "those more likely to prevail . . . is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)); *accord Gray v. Norman*, 739 F.3d 1113, 1118 (8th Cir. 2014).

Bartunek's counsel effectively performed those functions in this case and capably argued viable claims on his behalf. Bartunek has shown neither deficient performance nor prejudice. *Strickland*, 466 U.S. at 687.

E. Recusal

On March 2, 2022, the Court denied (Filing No. 462) Bartunek's pro se Motion to Recuse (Filing No. 461). In the conclusion of his § 2255 brief, Bartunek states, "Because this § 2255 motion raises issues of judicial misconduct by the same judge ruling on this motion, it would be unreasonable to believe that he would rule against himself." To the extent Bartunek is asking the Court to revisit the question of recusal, his request is denied.

F. No Certificate of Appealability

Before Bartunek can appeal the Court's adverse rulings on his § 2255 motion, he must have a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). But the Court cannot issue such a certificate unless Bartunek "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do that, he must demonstrate that a "reasonable jurist" would find this Court's rulings on his various "claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Bartunek has not made that showing, the Court will not issue a certificate of appealability.

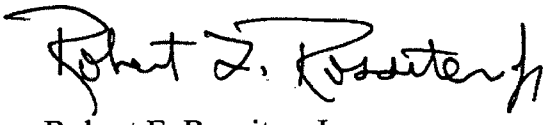
For the reasons stated above and in the Court's prior orders regarding Bartunek's request for postconviction relief,

IT IS ORDERED:

1. Defendant Gregory Bartunek's Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 468) is denied.
2. No certificate of appealability will issue.
3. A separate judgment will be entered in accordance with this Memorandum and Order.
4. The Clerk of Court is directed to mail a copy of this Memorandum and Order and the Judgment to Bartunek at his address of record.

Dated this 4th day of October 2022.

BY THE COURT:



Robert F. Rossiter, Jr.
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY BARTUNEK, Defendant.	**8:17CR28** **JUDGMENT**

In accordance with the Memorandum and Order entered today (Filing No. 482), judgment is entered in favor of the United States of America and against Gregory Bartunek.

Dated this 4th day of October 2022.

BY THE COURT:

Robert F. Rossiter, Jr.
Chief United States District Judge

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FOR THE DISTRICT OF NEBRASKA

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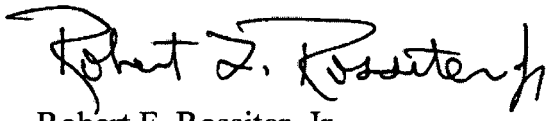

Robert F. Rossiter, Jr.
Chief United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-3523

Gregory Bartunek

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:21-cv-00467-RFR)

ORDER

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

April 12, 2023

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

/s/ Michael E. Gans

Additional material from this filing is available in the Clerk's Office.