APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2849

William Marcellus Campbell

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-02038-CJW)

JUDGMENT

Before LOKEN, STRAS, and KOBES, Circuit Judges.

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

November 30, 2023

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

/s/ Michael E. Gans

APPENDIX B

UNITED STATES DISTRICT COURT

for the

Northern District of Iowa

WILLIAM MARCELLUS CAMPBELL,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

Civil Action No. C22-2038-CJW-MAR

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____

☑ other: The Motion pursuant to 28 U.S.C. § 2255 is denied. A certifcate of appealability will not issue.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge CJ Williams on a motion for relief pursuant to 28 U.S.C. § 2255.

Date: 7/31/2023

CLERK OF COURT

/s/ mmc, deputy clerk
Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

WILLIAM MARCELLUS CAMPBELL, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 22-CV-2038 CJW-MAR (No. 17-CR-2045-CJW-MAR) **ORDER**

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This matter is before the Court on William Marcellus Campbell's ("petitioner") Pro Se Motion to Vacate, Set Aside or Correct Sentence under Title 28, United States Code, Section 2255. (Doc. 1).[1] Petitioner requests relief under Section 2255 due to alleged ineffective assistance of counsel based on (1) counsel's failure to investigate the law and facts of petitioner's case; (2) counsel's failure to challenge petitioner's career offender enhancement under United States Sentencing Guidelines ("Guidelines") Section 4B1.1; (3) counsel's failure to properly advise petitioner on whether to pursue a plea agreement, based on the career offender classification; (4) counsel's failure to request a *Daubert* hearing for a government witness, (5) counsel's failure to "properly argue" against the Court's application of the leadership role enhancement under Guidelines Section 3B1.1(a), and; (6) counsel's failure to timely object to testimony about an unintelligible portion of a recorded phone call. (Doc. 1-1).

For the following reasons, petitioner's motion is **denied**.

I. BACKGROUND AND PROCEDURAL HISTORY

On February 22, 2018, a grand jury returned a superseding indictment charging petitioner with one count of conspiracy to distribute 5 kilograms or more of cocaine and 280 grams or more of cocaine base following a prior felony drug conviction, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A), 846, and 851; one count of distribution of cocaine base following a prior felony drug conviction, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 851; and distribution of cocaine base following a prior felony drug conviction in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), and 851.[2] (Crim. Doc. 170).

[1] References to "Doc." are to docket entries in this case, Case No. 22-CV-2038 CJW-MAR. References to "Crim. Doc." are to docket entries in the underlying criminal case, Case. No. 17-CR-2045-CJW-MAR.

[2] The original indictment charged petitioner with the same underlying crimes but did not account

Petitioner pled not guilty to all counts. (Crim Doc. 181).

A jury trial for petitioner and two co-defendants, his father and brother, was held from April 20, 2018, through April 27, 2018. (Crim. Docs. 259, 262, 266, 269, 273, 275). The jury found petitioner guilty on all counts charged. (Doc. 277, at 9-12 (Count 1), 14 (Count 4), 15 (Count 12)).

Attorney Clemens Erdahl ("Mr. Erdahl" or "counsel") represented petitioner; Mr. Erdahl was first retained by petitioner as counsel, (*See* Crim. Doc. 45), and was later appointed as a Criminal Justice Act Panel attorney for petitioner. (Crim. Doc. 81). Mr. Erdahl filed several motions on petitioner's behalf, including a motion to suppress wiretap evidence (Crim. Doc. 117), which the Court denied (Crim. Doc. 183). After trial, Mr. Erdahl also filed a motion for acquittal or new trial (Crim. Doc. 306), which the Court also denied (Crim. Doc. 403). At sentencing, Mr. Erdahl made a motion for downward and/or lateral variance (Crim. Doc. 440) and another motion for downward variance (Crim. Doc. 441).

On March 20, 2019, the Court took evidence and received exhibits on petitioner's sentencing. (Crim. Doc. 520). The final presentence investigation report ("PSR") calculated petitioner's base and adjusted offense level to be 38. (Crim. Doc. 495, at 19). The PSR found petitioner qualified for a Chapter Four enhancement because he was a career offender. (*Id.*). The PSR, however, did not apply this enhancement in its offense level calculation because the offense level calculated under Chapters Two and Three was greater than the offense level if petitioner was categorized as a career offender; thus, the career offender enhancement did not actually enhance petitioner's offense level. (*Id.* (discussing career offender offense level of 37 and applicable offense level as 38, citing USSG §4B1.1(a)). The career offender enhancement does, however, call for a criminal history category of VI, which the PSR did apply. (*Id.*, at 31). Nevertheless, that also

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for petitioner's prior convictions. (*See* Crim. Doc. 8).

had no impact on petitioner's criminal history category because he scored 17 criminal history points and needed only 13 points to fall into criminal history category VI. (*Id.*). In short, petitioner was a criminal history category VI regardless of the career offender designation. At the sentencing hearing, Mr. Erdahl agreed that petitioner met the criteria of a career offender. (Crim. Doc. 539, at 2).

On April 10, 2019, when the Court concluded the sentencing hearing, it adopted probation's calculations, including the career offender enhancement. (Crim. Doc. 555, at 2–4). Mr. Erdahl noted: "[T]he career offender really doesn't have an effect at this point, the way that the Court has found the guidelines[.]" (*Id.*, at 4). The government similarly noted that petitioner "gets to th[e] guideline range of 360 to life multiple ways," only one of which being by virtue of his classification as a career offender. (*Id.*, at 5). The Court noted petitioner "got no jump up or bump up by being a career offender." (*Id.*, at 6). For these reasons, the Court found petitioner's guideline range was 360 months' to life imprisonment. (*Id.*, at 4). The Court sentenced petitioner to 360 months' imprisonment followed by ten years' supervised release. (Crim. Doc. 525).

Petitioner appealed his sentence, challenging both application and constitutionality of the Guidelines. (Crim. Docs. 531 & 533). The Eighth Circuit Court of Appeals affirmed the district court in full. (Crim. Docs. 615 & 627). Petitioner applied for writ of certiorari to the Supreme Court (Crim. Doc. 640), which the Supreme Court denied (Crim. Doc. 648). As petitioner's appeal was pending, he filed a motion for compassionate release (Crim. Doc. 591), which this Court denied (Crim. Doc. 592).

Petitioner requests relief under Section 2255 due to alleged ineffective assistance of counsel based on (1) counsel's failure to "investigate the law and facts" of petitioner's case; (2) counsel's failure to challenge petitioner's career offender enhancement; (3) counsel's failure to properly advise petitioner on whether to pursue a plea agreement, based on his classification as a career offender; (4) counsel's failure to request a *Daubert*

hearing for a government witness and related arguments; and, (5) counsel's failure to "properly argue" against the Court's application of the leadership role enhancement under United States Sentencing Guidelines Section 3B1.1(a). (Doc. 1-1, at 1-34). Appended to petitioner's argument on the leadership role enhancement is another argument of ineffective assistance, based on (6) counsel's failure to timely object to testimony from Officer Furman about the unintelligible portion of a recorded phone call between petitioner and Willie Carter. (Doc. 1-1, at 34-35 (discussing Gov't Trial Exh. 403)).

On October 13, 2022, after conducting an initial review of the petition, the Court ordered the government to respond.[3] (Doc. 2). On December 13, 2022, the government filed its response (Doc. 5) and supporting exhibits (Doc. 6). Petitioner timely replied. (Doc. 9).

II. STANDARD FOR RELIEF

A federal prisoner seeking relief from a sentence under 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)). Claims raised and decided on direct appeal cannot be relitigated on a Section 2255 motion. *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003).

[3] As mentioned in the Court's order, Mr. Erdahl died while petitioner's appeal was pending. Thus, the Court did not direct the Clerk of Court to provide a copy of the Court's order to petitioner's former counsel or direct him to file an affidavit with the Court.

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 movant can demonstrate (1) cause for the default and actual prejudice or (2) actual innocence."[4] *United States v. Moss*, 252 F.3d 993, 1001 (8th Cir. 2001) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). To show actual prejudice in the context of sentencing, a movant "must demonstrate a reasonable probability that [their] sentence would have been different but for the deficient performance." *Jeffries v. United States*, 721 F.3d 1008, 1014 (8th Cir. 2013) (citing *Puckett v. United States*, 556 U.S. 129, 142 n. 4 (2009)). "A reasonable probability 'is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

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

[4] Petitioner does not claim actual innocence here. Thus, the Court analyzes each of petitioner's claims under the cause-and-prejudice standard.

218, 220-21 (8th Cir. 1990)). Here, because the Court finds petitioner's claims inadequate on their face, no evidentiary hearing is necessary.

Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, provides:

> The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Claims brought under Section 2255 that fail for procedural reasons typically fail for one of three causes: unauthorized filing of a second or successive petition; failure to timely file; or, raising a claim that is inappropriate for collateral review. *See* 28 U.S.C. §§ 2244, 2255. Here, the Court finds it plainly appears from the motion and the record of prior proceedings that petitioner is not entitled to relief.

III. ANALYSIS

For the following reasons, the Court finds petitioner's claims are without merit and therefore denies petitioner's Section 2255 motion.

A. Career Offender Enhancement

Petitioner argues counsel was ineffective for failing to challenge petitioner's career offender enhancement.[5] (Doc. 1-1, at 11-14). Petitioner asserts his Iowa drug convictions did not qualify as controlled substance offenses as defined under Section 4B1.2(b), and required by Section 4B1.1—the career offender guideline. (*See, e.g., id.*, at 13-14, 20). Petitioner also asserts three of his prior convictions should not have been

[5] The Court first addresses petitioner's claim based on the career offender enhancement because petitioner's investigation claim and plea agreement claim are largely based on the same arguments. As indicated, the Court repurposes parts of its analysis within these sections.

separated for purposes of the career offender classification. (*Id.*, at 13). Finally, petitioner asserts he was not incarcerated for a certain offense during the 15-year period before he commenced the instant offense, and thus that prior offense should not have been considered a predicate offense under Sections 4A1.2(e)(1) and 4B1.1.[6] (*See, e.g.*, *id.*, at 21-22).

In light of petitioner's arguments, there are facts in dispute as to whether his arguments show cause. Accordingly, the Court first determines whether petitioner shows prejudice. *Strickland*, 466 U.S. at 697 (providing that a court may begin its analysis with either prong and need not examine the second prong if it finds the first deficient). For the following reasons, petitioner cannot show counsel's alleged failure would have prejudiced him; thus, his claim based on the career offender enhancement fails.

First, petitioner's classification as a career offender did not impact his guidelines range. Under the career offender guideline, petitioner's offense level was 37. (Crim. Doc. 495, at 19). Chapters Two and Three, however, called for an offense level of 38. (*Id.*). Because the applicable offense level was greater under Chapters Two and Three, that offense level governed. (*Id.*). *See also* USSG §4B1.1 ("[I]f the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply."). Accordingly, petitioner's career offender classification did not end up applying to his offense level. Likewise, petitioner was a criminal history category VI based on criminal history points, regardless of his designation as a career offender. In short, whether petitioner was a career offender was irrelevant for purposes of the advisory guidelines sentence and thus did not prejudice him.

Second, even if the classification did impact petitioner's guidelines range,

[6] The Court endeavors to analyze petitioner's arguments fully and therefore organizes petitioner's arguments according to their topic instead of strictly following the headings in his brief.

petitioner fails to show a reasonable probability that his sentence would have changed. Petitioner asserts that had he not been sentenced as a career offender, his base offense level would have been a 32, he would have received three levels subtracted from this level for acceptance of responsibility under Section 3E1.1, resulting in an adjusted offense level of 29, and his criminal history score would have been 14 points resulting in a level VI. (Doc. 1-1, at 11). Accordingly, petitioner asserts his guideline range would have been 151-188 months' imprisonment. (*Id.*). Indeed, an offense level of 29 and criminal history category of VI would result in a 151–188 month range. USSG Sentencing Table.

Petitioner's representations regarding his adjusted offense level, however, are incongruous with the realities of his case. If he did not qualify as a career offender and did not enter into a plea agreement with the government, petitioner's sentence would still be within the corresponding guidelines range. Petitioner's base offense level would be 32, based on drug quantity, just as it was at his actual sentencing. (Crim. Docs. 495, at 16; 555, at 44-45, 50). With the same evidence before it, the Court would applied a four-level enhancement for leadership role and a two-level enhancement for obstruction, bringing petitioner's adjusted offense level to 38. (Crim. Docs. 495, at 16; 555, at 44-45, 50). Even assuming petitioner's criminal history argument is correct, his criminal history category would still be VI. An adjusted offense level of 38 and a criminal history category VI results in a guidelines range of 360 months-life imprisonment. Given that petitioner's actual sentence was the bottom of this range, he does not show a reasonable probability that his sentence would have changed even if he had not qualified as a career offender.

Nor would the outcome change had petitioner accepted a plea. The plea notice deadline for the third level of acceptance passed five weeks before trial. (Crim. Doc. 91, at 2 (providing 5-week deadline and March 19, 2018, trial start date). Petitioner could have obtained a three-level reduction for acceptance of responsibility if he had

accepted the plea agreement between February 6, 2018, and February 12, 2018. (Doc. 6, at 2 (first proposed plea agreement made on February 6, 2018, and set to expire on February 16, 2018, with trial then slated to begin on March 19, 2018). Petitioner could not have obtained a three-level reduction if he had accepted the second and final plea agreement. (Doc. 6-3, at 2 (second and final proposed plea agreement made on March 29, 2018, and set to expire on April 6, 2018, with trial then slated to begin on April 20, 2018, per Crim. Doc. 217); Crim. Doc. 259 (providing first day of trial actually took place on April 23, 2018)). Instead, petitioner would have qualified at most for a two-level reduction. But whether petitioner had qualified for a two- or three-level reduction, government asserts that petitioner's obstruction "would have increased his guidelines two levels and voided [his] acceptance." (Doc. 5, at 28; Crim. Doc. 495, at 15). Also, the government's plea agreements required petitioner to agree that his base offense level was at least 34 and that a multiple-level enhancement applied for petitioner's role in the offense. (Doc. 6, at 9-10 (three-level enhancement for role as a manager or supervisor); 6-3, at 11 (four-level enhancement for role as an organizer or leader)).

Based on the terms of the first plea agreement alone,[7] petitioner's guideline range would have been lower if he had accepted that agreement between February 6, 2018, and February 12, 2018, and got the third level for cooperation. Petitioner would have ended up with an adjusted offense level of 34 and a criminal history VI, resulting in a sentencing range of 262-357 months imprisonment. If petitioner accepted the first plea agreement after February 12, 2018, then he would have ended up with an adjusted offense level of 35 and a criminal history category VI, resulting in a sentencing range of 292-365 months imprisonment. Finally, if petitioner accepted the second plea agreement at any time, he would have ended up with an adjusted offense level of 36 and a criminal history category VI, resulting in a sentencing range of 324–405 months imprisonment. Accordingly, only

[7] That is not accounting for other arguments made at sentencing.

if petitioner had accepted the first plea agreement within the first five days would his guideline range not include his actual sentence of 360 months. Still, petitioner does not show it is reasonably probable that his sentence would have changed had he accepted the first plea agreement during that time because the evidence before the Court supports that petitioner never would have accepted a plea under the terms offered by the government (*See* Doc. 6-2 & 6-4, at 1), and, as the Court will discuss next, the Court would have sentenced him to the same term of imprisonment regardless.

Third, and this point is dispositive, petitioner would have been sentenced to 360 months regardless, because the Court stated it would have sentenced petitioner to 360 months under the Section 3553(a) factors, even if his guideline range suggested another term. In his reply, petitioner asserts he "would challenge [the judge's] reasonableness" for imposing 360 months regardless, but does not assert how he would do so. (Doc. 9, at 21). The Court's finding it would have sentenced him to 360 months based on the Section 3553(a) factors means that it would have sentenced him to 360 months based on, in short, the nature and circumstances of the offense, petitioner's history and characteristics, the need for the sentence imposed, the kinds of sentences available, and petitioner's sentencing range. *See* 18 U. S. C. § 3553(a). This analysis would not change based on whether petitioner pled guilty or went to trial. Indeed, the Court's statement of reasons provides that petitioner's "sentence was imposed after considering all the factors set forth in 18 U.S.C. § 3553(a) as dictated into the record at the time of sentencing." (Crim. Doc. 526, at 2).

In short, petitioner fails to demonstrate prejudice as relates to his career-offender claim and the Court need not analyze whether petitioner demonstrates cause. Thus, petitioner's claim regarding the career offender enhancement fails.

B. Investigation of the Law and Facts

Petitioner argues counsel was ineffective for failing to investigate the law and facts

of his case. (Doc. 1-1, at 10-11). Specifically, petitioner argues counsel did not properly investigate whether he qualified as a career offender under Section 4B1.1, and relatedly "prompt[ed]" petitioner to forego a plea offer.[8] (*Id.*). Petitioner argues counsel did not investigate whether certain convictions qualify as controlled substance offenses as defined under Section 4B1.2(b), and incorporated in Section 4B1.1. (*See, e.g.*, *id.*, at 13-14, 20). Petitioner argues counsel did not investigate whether petitioner was incarcerated for a certain offense during the 15-year period before he commenced the instant offense. (*See, e.g.*, *id.*, at 21-22).

As above, the parties dispute certain facts about whether petitioner shows cause. Again, the Court first determines whether petitioner shows prejudice. *See Strickland*, 466 U.S. at 697.

For the reasons described in analyzing petitioner's career offender argument, the Court finds petitioner fails to demonstrate a reasonable probability that his sentence would have been different but for counsel's performance, assuming that performance was deficient. *See Jeffries*, 721 F.3d at 1014. Accordingly, petitioner does not show prejudice. Thus, petitioner's claim regarding investigation of the law and facts fails.

C. Plea Agreement

Petitioner argues counsel was ineffective for failing to properly advise his on whether to pursue a plea agreement, based on the career offender classification. (Doc. 1-1, at 14-22).

As described, petitioner cannot show prejudice based on the career offender classification and thus cannot show prejudice based on forgoing a plea agreement because of that classification. Further, the evidence supports neither agreement was a "10-year

[8] To the extent petitioner argues the cumulative effect of the alleged errors made by his counsel amount to ineffective assistance, the Court is not persuaded. *See Girtman v. Lockhart*, 942 F.2d 468, 475 (8th Cir. 1991) ("[C] umulative error does not call for habeas relief, as each habeas claim must stand or fall on its own.") (cleaned up).

plea deal," as petitioner asserts. (Doc. 1-1, at 18).

In any case, to show prejudice on this claim, petitioner would need to show: (1) the government formally offered him a plea agreement; (2) he would have accepted the plea agreement, (3) the plea agreement would have been entered, and (4) the resulting sentence would have been more favorable. *See Allen v. United States*, 854 F.3d 428, 432 (8th Cir. 2017); *Lafler v. Cooper,* 566 U.S. 156, 164 (2012); *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995). Petitioner cannot show two of these four elements and a third is doubtful.

First, petitioner rejected both plea offers on grounds other than career offender status, and suggested modifications in the offered plea agreement the government did not accept. (Doc. 6-2 & 6-4, at 1). Also, it is doubtful the second plea agreement would have been entered because the second plea agreement was a wired agreement. This meant the agreement was null and void if any participating co-defendant failed to sign it and comply with its terms. (Doc. 6-3, at 4). But at least one other co-defendant involved in the wired agreement had proposed modifications of his own (Doc. 6-6), suggesting that even if petitioner agreed to its terms, the second plea agreement would unlikely have been entered. Finally, as discussed, it is not reasonably likely that a sentence based on the plea agreement would have been more favorable.

For these reasons, petitioner fails to demonstrate prejudice as relates to his plea-agreement claim and the Court need not analyze whether petitioner demonstrates cause.[9] Thus, petitioner's claim based on counsel's advice regarding a plea agreement fails.

[9] The Court notes, however, that petitioner's arguments are also inconsistent with the facts presented. Defense counsel took no position on the plea agreement—thus, he did not advise petitioner not to take it. (*See* Doc. 6-7). In fact, counsel negotiated the plea according to petitioner's requests. (Docs. 6-2; 6-4). Counsel even attempted to persuade the government to remove the requirement that petitioner agree to be classified as a career offender. (Doc. 6-4).

D. Daubert *Hearing & Related Arguments*

Petitioner argues counsel was ineffective for failing to request a *Daubert* hearing for the government's expert witness Officer Bryan Furman and for not objecting at trial when the government "presented Furman as an expert on 'code' or 'coded talk,'" without laying a proper foundation. (Doc. 1-1, at 22-30). Petitioner also argues counsel was ineffective for failing to request "a written summary of testimony the government intended to use under Rules 702, 703, or 705, of the Federal Rules of Evidence." (*Id.*, at 25-26).[10] Petitioner asserts counsel's inaction prejudiced him because his "guideline range would have been significantly lower and hence his sentence considerable shorter" absent "the drug quantities" from Officer Furman's testimony. (*Id.*, at 30).

Petitioner's arguments are problematic for many reasons. For instance, the Court was not required to hold a *Daubert* hearing. *See United States v. Geddes*, 844 F.3d 983, 991 (8th Cir. 2017) (citing *United States v. Evans*, 272 F.3d 1069, 1094 (8th Cir. 2001)). Assuming a *Daubert* hearing would have been held, the Court was already aware of Officer Furman's experience and qualifications based on his wiretap affidavits, which the Court had authorized. (*See* Crim. Doc. 127-1, at 15-16; 127-2, at 17-18; 127-3, at 17-18). Additionally, the government gave counsel a written summary of testimony it intended to elicit from Officer Furman which included: "He will testify regarding drug

[10] In his reply, petitioner argues counsel was ineffective for failing to object to Officer Furman providing dual role testimony—that is, providing both lay opinion testimony and expert testimony in the same proceeding. (Doc. 9, at 13-16). Petitioner did not raise this argument in his brief; therefore, he has waived it. *Smith v. United States*, 256 Fed. App'x. 850, 852 (8th Cir. 2007) (citing *Hohn v. United States*, 193 F.3d 921, 923–24 n.2 (8th Cir. 1999) (declining to address claims raised for the first time in a § 2255 reply brief)). Had petitioner timely raised this argument, it would not have changed the outcome because the Court still would have found that petitioner cannot show prejudice. Likewise, petitioner waived the argument, raised for the first time in his reply, that Officer Furman's interpretations were "post-hoc assessments." (Doc. 9, at 13). Again, however, even if petitioner had timely raised this argument, it would not have changed the outcome because petitioner cannot show prejudice.

quantities associated with redistribution or personal use. Finally, he will offer interpretations based on text messages sent and received and phone calls made by the defendants and co-conspirators." (Doc. 6-8, at 31). The government was not required to disclose what words Officer Furman would interpret and how he would interpret them. The Federal Rules of Evidence do not require such a written summary of anticipated testimony. In sum, it is at best questionable whether petitioner can show cause.

But the Court need not analyze cause because petitioner fails to show prejudice. Even if Officer Furman's testimony was not admitted at trial, petitioner still would have had a base offense level of 32 based on drug quantity. At trial, witnesses testified to drug weights sold by petitioner and his co-conspirators. Officer Furman testified to calls and texts discussing certain quantities, but the bulk of his testimony focused on the structure of petitioner's conspiracy and relationships with other distributors and suppliers. (*See* Crim. Docs. 545, at 183-256; 546, at 14-68).

At sentencing, the Court adopted the base offense level of 32, as provided in the presentence investigation report.[11] (Crim. Doc. 555, at 44-45). This base offense level provided for a drug quantity between 840 grams to 2.8 kilos. (Crim. Doc. 495, at 16). Probation first described at length the drugs attributable to petitioner based on evidence at trial and proffers made following trial. (*Id.*, at 14-16). This included quantities attested to by Alexander Martin, Jerry Sallis, Edward Smart, Naiqondis Spates, and Willie Carter—not quantities based on Officer Furman's testimony alone.[12] Accordingly,

[11] Petitioner's sentencing hearing was held in two parts: one for evidence and arguments about guideline calculations (Crim. Doc. 539) and one for the parties' departure and variance motions and the Court's imposition of sentence (Crim. Doc. 555).

[12] Thus, even if petitioner were to make an ineffective assistance of a counsel claim based on how counsel's alleged errors affected the jury's verdict, the Court would not find petitioner shows probability sufficient to undermine confidence in the trial outcome because the evidence against petitioner was extensive. (*See also* Doc. 9, at 10 ("The likelihood of acquittal in this case was almost impossible.")).

evidence other than Officer Furman's testimony supports the drug quantities on which petitioner's sentence was founded. After detailing the quantities attributable to petitioner, probation recommended the Court find that petitioner was responsible for 1.65 kilos of crack cocaine. (*Id.*, at 16). The Court adopted probation's calculation and calculated petitioner's sentence based on a base offense level of 32.[13] (Crim. Doc. 555, at 2-3).

Because the admission of Officer Furman's testimony would not change petitioner's base offense level, Officer Furman's testimony did not change petitioner's sentence. Accordingly, petitioner cannot show prejudice. Thus, petitioner's claim regarding *Daubert* and related arguments fails.

E. Leadership Role Enhancement

Petitioner argues counsel was ineffective for failing to "properly argue" against the Court's application of the four-level enhancement for leadership role when sentencing petitioner. (Doc. 1-1, at 30-34 (citing Section 3B1.1(a))). Petitioner asserts he twice asked counsel "to contact the Waterloo Halfway House/work release to verify that he had been employing people there to work for him rehabbing houses" and that "[c]ounsel agreed to do so." (*Id.*, at 31-32).

When a movant claims that counsel was ineffective for failing to call a witness, they must show that the uncalled witness's testimony would have probably changed the outcome of the trial or sentencing. *Stewart v. Nix*, 31 F.3d 741, 744 (8th Cir. 1994). If counsel made the strategic decision to forgo calling a witness based on a "thorough investigation of law and facts relevant to plausible options," that decision is virtually unchallengeable. *Strickland*, U.S. at 690-91. If counsel made that decision "after less

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[13] The Court did not make a finding as to the exact quantity for which petitioner was responsible. The Court did state, however, that it agreed with the probation officer on her guidelines computations which included the quantity calculation. (Crim. Doc. 555, at 2-3). Because probation recommended a finding that petitioner was responsible for 1.65 kilos of crack cocaine, the Court based its sentence on an implied finding of that amount.

than complete investigation," then the decision is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). In essence, the Court must attempt to determine the cost-benefit analysis that counsel undertook when deciding whether to investigate further and, ultimately, whether to call a particular witness. *See United States v. Rodela-Aguilar*, 596 F.3d 457, 464 (8th Cir. 2010).

When analyzing whether a movant was prejudiced by counsel's failure to call a witness, the Court must assess "the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses, the interplay of the uncalled witnesses with the actual defense witnesses called, and the strength of the evidence actually presented by the prosecution." *Woods v. Norman*, 825 F.3d 390, 395-96 (8th Cir. 2016) (cleaned up). *See also Armstrong v. Kemna*, 534 F.3d 857, 866 (8th Cir. 2008). Accordingly, the Court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). For the Court to make these assessments, the movant must show the witnesses' identity and their expected testimony. *Saunders v. United States*, 236 F.3d 950, 952-53 (8th Cir. 2001). Of course, the movant "must show that the uncalled witnesses would have testified at [the proceeding] and that their testimony would have probably changed the outcome of the [proceeding]."[14] *Stewart v. Nix*, 31 F.3d 741, 744 (8th Cir. 1994). *See also United States v. Vazquez-Garcia*, 211 F. App'x 544, 546 (8th Cir. 2007). So long as the fact-

[14] The same analysis applies to ineffective assistance claims at both trial and sentencing. *Collins v. United States*, 28 F.4th 903, 906 (8th Cir. 2022).

finder had "sufficient objective evidence" to support its finding, a movant cannot show prejudice based on counsel's failure to call a certain witness. *Ford v. United States*, 917 F.3d 1015, 1021 (8th Cir. 2019).

A movant must be given "an adequate opportunity to present competent evidence of the . . . expected testimony." *Kemna*, 534 F.3d at 866. Still, an evidentiary hearing is appropriate only when the movant has shown what evidence would be introduced at a hearing and that evidence would demonstrate prejudice caused by counsel's representation. *See Jackson v. United States*, 956 F.3d 1001, 1007 (8th Cir. 2020). Thus, on initial review, a movant must show that the expected testimony would have "a reasonable probability that the trial outcome would have been different absent the alleged deficiency of counsel's performance.[15] *Strickland*, 466 U.S. at 694; *Dorsey v. Vandergriff*, 30 F.4th 752, 757 (8th Cir. 2022).

Petitioner's claim is rooted in two assertions: (1) effective counsel would have noted the contradictions between testimony at trial and testimony at sentencing as to petitioner's role and whether he employed people rehabbing houses, and (2) effective counsel would have investigated movant's rehabbing business and at sentencing would have called witnesses to testify to petitioner's business and his employment of people on work release. (*See* Doc. 1-1, at 31-34).

Here, petitioner neither provides identities of the witnesses he says counsel should have called, nor shows the testimony he expects they would provide. *Saunders*, 236 F.3d at 952-53. For instance, petitioner asserts that the leadership role enhancement was based on an intercepted conversation between petitioner and "an unknown man," who "identified himself as 'DC,'" in which DC inquired about a job with petitioner and

[15] Court opinions sometimes describe the requirement as a reasonable "possibility" of a different outcome. *See, e.g.*, *Jackson*, 956 F.3d at 1007. The correct standard is a reasonable "probability" of a different outcome—a different and somewhat higher burden.

petitioner told DC that he had "four of them niggas working for me already," and that his employees were making $800 to $900 dollars a week, after deducting child support. (*Id.*, at 31-32 (discussing Gov't Sent. Exh. 4)). Indeed, the government played this call for the Court during petitioner's sentencing hearing and examined Officer Furman about it. (Crim. Doc. 539, at 4). But petitioner does not identify DC, or any other person related to his alleged house rehabbing business that could testify about him employing people there.

Without this information, the Court cannot determine the credibility of all witnesses, or the interplay of the uncalled witnesses and actual defense witnesses called. *See Woods*, 825 F.3d at 395-96; *Kemna*, 534 F.3d at 866. Further, without identifying the witnesses' or providing information about their expected testimonies, petitioner cannot show they actually would have testified at his sentencing or that their testimony would have probably changed the outcome. *See Stewart*, 31 F.3d at 744; *Vazquez-Garcia*, 211 F. App'x at 546. Thus, even if counsel had investigated, petitioner provides no evidence supporting that he would have found any witness to testify to his rehabbing business and related employment.

Additionally, even if petitioner had provided the required information, it is reasonably likely that the evidence presented at trial still would have overcome the hypothetical witnesses who petitioner argues would show he was not a leader or organizer. Whether counsel investigated petitioner's house rehabilitation or not, the evidence does not support that it would have changed petitioner's sentence. *See Jeffries*, 721 F.3d at 1014. The government must prove that an aggravating role enhancement is warranted by a preponderance of the evidence.[16] *United States v. Bolden*, 622 F.3d 988,

[16] Petitioner asserts the clear and convincing standard applies. (Doc. 9, at 23 (citing *Bolden*, 622 F.3d at 990)). This case does not support petitioner's assertion. Rather, it asserts that an appellate court reviews the district court's factual findings for "clear error" and that the government must show by a preponderance of the evidence that an enhancement applies. *Bolden*,

990 (8th Cir. 2010)). Here, the government had considerable evidence of petitioner's role in the offense. The evidence at trial showed petitioner was involved in high-level decision-making in the drug enterprise, including out-of-state shipments, and his direction of other people in selling narcotics. (*See, e.g.*, Docs. 545, at 209-10, 213, 225, 228-30, 249, 266; 546, at 18-19). Accordingly, the Court finds that even if petitioner had provided the required information, the government nevertheless showed, based on objective evidence, that it was more likely than not that petitioner was an organizer or leader of criminal activity.[17] *See Bolden*, 622 F.3d at 990-91; *Ford*, 917 F.3d at 1021.

For these reasons, petitioner cannot show prejudice. Thus, petitioner's claim based on the leadership role enhancement fails.

F. Unintelligible Phone Call

At the end of his argument on the leadership role enhancement, petitioner makes an additional ineffective assistance claim based on counsel's failure to timely object to testimony from Officer Furman about the unintelligible portion of a recorded phone call between petitioner and Willie Carter. (Doc. 1-1, at 34-35 (discussing Gov't Trial Exh. 403)). At trial, counsel argued this recorded phone call—Government Trial Exhibit 403—"was partially unintelligible, and therefore the transcripts thereof were incorrect." Counsel argued the transcripts were inadmissible under Rule 702 of the Federal Rules of Evidence. (*Id.*, at 34). "The government entered into a stipulation with [petitioner]'s counsel, that they would not submit the transcripts, which contained the disputed portions, to the jury." (*Id.*). Petitioner asserts that "[a]t trial, the government not only

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622 F.3d at 990-91.

[17] For the same reason, petitioner also cannot obtain relief based on his assertion that Officer Furman's testimony at sentencing contradicted the testimony at trial that petitioner was "a low-level street dealer" and that officers "kn[e]w that [petitioner] was investing in properties, buying them up and then renovating those properties." (Doc. 1-1, at 31-33 (first quoting Crim. Doc. 543, at 4, second quoting Crim. Doc. 545, at 219)).

violated this stipulation by putting the disputed transcripts before the jury, the government also elicited testimony from [Officer] Furman, about what was said in the unintelligible portion." (*Id.*, at 34-35). Counsel objected, but the Court overruled the objection for being untimely and the Court also denied petitioner's related motion for mistrial. (*Id.*, at 35; Doc. 546, at 12).

Somewhat unsurprisingly, given its placement within another argument, the government did not address in its resistance petitioner's argument based on the allegedly unintelligible phone call.

Looking through its file, the Court finds that even though Government Trial Exhibit 403 was admitted at trial and went back with the jury, Government Trial Exhibits 403A and 403B—transcripts of 403—did not. (Doc. 281). (*See also* Crim. Docs. 275 & 275-1 (marking Gov't Trial Exhs. 403A and 403B as "ID only")). Accordingly, it appears the transcripts were not submitted to the jury, as petitioner asserts. Thus, petitioner cannot show cause based on his argument as written. Further, even if the transcripts were submitted to the jury, the Court would not find prejudice based on their admission.

Reviewing the court record and trial transcripts, however, it appears petitioner is actually referring to a somewhat different issue at trial. This is understandable, as only judges and attorneys are expected to understand the intricacies of how evidence is admitted in court and what the jury sees in its deliberations. Here, counsel knew that at trial the government would seek to admit Government Trial Exhibit 403, a phone call between petitioner and an unknown male. (Crim. Doc. 545, at 257-60). Government Trial Exhibit 403A, a transcript of the call, included the phrase "I need, uh . . . two (2)." (Crim. Doc. 545, at 257-60; Gov't Trial Exh. 403A). Where Exhibit 403A read "I need, uh . . . two (2)," Government Trial Exhibit 403B, another transcript of the same call, read "(U/I)." (Crim. Doc. 545, at 257-60; Gov't Trial. Exh. 403B). Counsel and the

government entered into an agreement that the government would use Exhibit 403B as the transcript to aid the jury when the government played Exhibit 403. (Crim. Doc. 545, at 257-60). On Day Three of trial, when Exhibit 403 was admitted, the government accidentally displayed the Exhibit 403A transcript, thereby showing the jury the transcription "I need, uh . . . two (2)" instead of "(U/I)." (*Id.*).

Perhaps more critical than the transcript—which the Court and the jury instructions told the jury was an aid and not evidence—was the interchange between the government attorney and the witness about Exhibit 403.

> Q. All right. And then Government's Exhibit 403 is an incoming call from Mr. Carter to William Campbell from December 30th of 2016, correct?
> A. Correct.
> Q. Let's go ahead and take a listen.
> (Whereupon, the recording was played.)
> Q. Do you have an opinion as to what he meant by "I need a 2"?
> A. Based on what we know about Mr. Carter, I would guess that's 2 ounces of crack cocaine.

(Crim. Docs. 545, at 247 (Officer Furman's testimony). Accordingly, though the parties and Court generally discussed the problem as focused on Officer Furman's answer, (*Id.*, at 257-260 (discussing transcript and testimony issue around Exhibit 403)), there was also an issue with the government's question which suggested that the words uttered were "I need a . . . two (2)," in keeping with Exhibit 403A.

Counsel raised the issue about Exhibits 403, 403A, and 403B outside the presence of the jury on Day Three of trial, and told the Court that he interpreted the parties' agreement as to transcripts to include that the government would not introduce evidence that the caller had said "2," which counsel took to include that Officer Furman would not testify that the caller had said "2," as in "2 ounces." (*Id.*). The government asserted it did not—and could not--stipulate as to what Officer Furman would testify. (*Id.*, at

260). After some discussion, the Court instructed the parties to think of a solution overnight. (*Id.*).

The next day, on Day Four of trial, the parties and Court discussed a plan to address the issue. (Crim. Doc. 546, at 4-13). When Officer Furman again took the stand for direct examination, the government clarified before the jury the wrong transcript was used the day before when Officer Furman and the jury listened to Exhibit 403. (*Id.*, at 14-16). After some renewed confusion about the extent to which the government would revisit the transcript issue (*Id.*, at 15-16), counsel cross-examined Officer Furman and made no mention of Exhibits 403, 403A, or 403B, (*Id.*, at 55-58).

As petitioner asserts, counsel could have objected on Day Three of trial when Officer Furman testified to the meaning of the alleged word "two," but counsel did not.[18] As counsel stated when discussing this predicament, "The problem with making an objection at that time, Your Honor, is the [transcript]'s on the screen. I'm calling more attention to it." (*Id.*, 11-12). The Court acknowledged the predicament but disagreed that it foreclosed objection because counsel could have objected at sidebar, out of the jury's hearing. (*Id.*, at 13). The Court also agreed that a mistrial was not warranted. (*Id.*, at 12). In light of the copious and detailed evidence presented at trial (*See* Docs. 543–546), the Court finds counsel's failure to object did not prejudice petitioner because there was no reasonable probability that the jury would not have found petitioner guilty.[19]

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[18] Counsel also could have cross-examined Officer Furman on the issue, but did not. To the extent that petitioner's 2255 motion could be interpreted to contain a claim based on counsel's failure to cross-examine Officer Furman on his interpretation here, that claim would be unavailing. Counsel's decision was strategic; as counsel discussed with the Court outside of the jury's presence, reminding the jury of Officer Furman's "2" interpretation would necessarily draw more attention to it. *See Rodela-Aguilar*, 596 F.3d 457 at 461. Thus, petitioner cannot show cause and an ineffective assistance claim on this ground would fail. *See Strickland*, 466 U.S. at 687.

[19] Petitioner himself states: "The likelihood of acquittal in this case was almost impossible." (Doc. 9, at 10).

For these reasons, counsel's failure to timely object is not a successful ground for ineffective assistance at trial.

Likewise, this ground is also unavailing in the sentencing context. Petitioner's sentence is based in part on the quantity of drugs for which he was found responsible. Again, the Court overruled petitioner's objection to drug quantity (Crim. Doc. 524), and adopted probation's calculations, including a base offense level of 32, founded on petitioner being responsible for 1.65 kilos of crack cocaine. (Crim. Docs. 495, at 16; 555, at 44-45). Assuming the Court based in part its calculation on the two ounces that Officer Furman testified were discussed in Exhibit 403, those two ounces would not change petitioner's base offense level.[20] Because petitioner's base offense level would not change, his sentence would not change, meaning petitioner cannot show prejudice based on this claim. Thus, petitioner's claim regarding the unintelligible phone call fails.

IV. 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 it is undebatable that the record shows petitioner's Section 2255 motion is without merit. Consequently, a certificate of appealability is denied. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (to satisfy Section 2253(c), a movant must show that

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[20] Two ounces is equal to approximately 56.68 grams. Petitioner was found responsible for 1.65 kilos, which equals 1,650 grams. 1,650 grams - 56.68 grams = 1,593.32 grams. The threshold for a base offense level of 32 was 840 grams.

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong).

V. CONCLUSION

For the reasons stated, petitioner's Motion to Vacate, Set Aside or Correct Sentence (Doc. 1) is **denied**. A certificate of appealability is also **denied.** This case is **dismissed**, and judgment will enter in favor of the United States.

IT IS SO ORDERED this 31st day of July, 2023.

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