

No.-_____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDEEP SINGH MANN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth
Circuit

VOLUME ONE
OF APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

JOHN WILLIAM SIMON*

****Counsel of Record***

Constitutional Advocacy LLC

7201 Delmar Blvd. # 201

St. Louis, Missouri 63130

(314) 604-6982

simonjw1@yahoo.com

Attorney for Petitioner

April 27, 2018

Index

Volume I

Order summarily denying motion for certificate of appealability (Oct. 31, 2017)	1a
Order of the United States District Court for the Eastern District of Arkansas denying motion for protective order and directing trial–direct–appeal counsel to collaborate with respondent’s counsel (Apr. 22, 2015)	2a
Order of the United States District Court for the Eastern District of Arkansas denying leave to proceed with discovery (June 3, 2015)	5a
Order of the United States District Court for the Eastern District of Arkansas denying section 2255 relief without discovery or an evidentiary hearing and denying a certificate of appealability (Aug. 16, 2016)	16a
Order of the United States Court of Appeals for the Eighth Circuit denying rehearing and rehearing en banc (Dec. 28, 2017)	59a
U.S. Const. art. I, § 9, cl. 2 (Suspension Clause) ..	60a
U.S. Const. amend. V (Due Process Clause)	60a
U.S. Const. amend. VI (Assistance of Counsel Clause)	60a
28 U.S.C. § 2253(c)	61a

28 U.S.C. § 2255	61a
------------------------	-----

Local Rules of the United States District Court for the Eastern and Western Districts of Arkan- sas, Appendix: Model Federal Rules of Disci- plinary Enforcement, Rule IV.B	64a
--	-----

Ark. R. Prof. Cond. 1-6(b)(5)	65a
-------------------------------------	-----

Rinke-Kimbell Testimony from Volume VI of Trial Transcript in <i>United States v. Mann</i> , No. 09- CR-00099 (U.S. Dist. Ct. E.D. Ark. July 19, 2010) (ECF#240).....	65a
--	-----

Volume II

Body of Soil Scientist Dr. Larry I. West Declaration (ECF#395 at ECF pages 62-65) (PCR/Habeas Exhibit 1)	95a
--	-----

Body of Botanist Prof. Frederick Spiegel Declaration (ECF#395 at ECF pages 81-85) (PCR/Habeas Exhibit 2)	101a
--	------

Body of Photogrammetrist Prof. Ming-Chih Hung Declaration (ECF#445-2 at ECF pages 1-6*) (PCR/Habeas Exhibit 3)	109a
--	------

*Per Order of April 29, 2015 (ECF#449), color digital ver-
sion filed for use in lieu of monochrome scan trial-court clerk
was uploaded instead of the initially-filed color hard copy origi-
nal.

Prof. Hung Affidavit (ECF#491-3) (PCR/Habeas Exhibit 104)	118a
---	------

Updated Annotated Bibliography of Orders Relating to Formal Opinion 10-456 Reported on Westlaw®, Lexis®, and/or Fastcase® (Doc. No. 497-1) (Sept. 23, 2016) (PCR/Habeas Exhibit 127)	161a
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Order summarily denying motion for certificate of appealability:

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-2038

Randeep Mann
Petitioner - Appellant

v.

United States of America
Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock (4:14-cv-00614-BSM)

JUDGMENT

Before LOKEN, BOWMAN and KELLY, 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.

October 31, 2017

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

/s/ Michael E. Gans

**Order of the United States District Court for
the Eastern District of Arkansas denying mo-
tion for protective order and directing trial-di-
rect-appeal counsel to collaborate with re-
spondent's counsel:**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RANDEEP SINGH MANN PETITIONER

v. CASE NO. 4:09CR00099 BSM
 CASE NO. 4:14CV00614 BSM

UNITED STATES OF AMERICA RESPONDENT

ORDER

Petitioner Randeep Mann's motion for protective order [Doc. No. 431] is denied, and the United States's motion to produce [Doc. No. 433] is granted for the following reasons.

On October 20, 2014, Mann filed a motion to vacate, set aside, or correct his sentence [Doc. No. 395] pursuant to 28 U.S.C. § 2255. Most of Mann's motion is premised on claims of ineffective assistance of trial and appellate counsel, J. "Blake" Hendrix, Jack Lassiter, Erin Cassinelli, John Wesley Hall, Jr., and Peter "Drake" Mann. On March 27, 2015, Mann filed a motion for protective order [Doc. No. 431], seeking to prevent respondent, the United States, from communicating with Mann's former counsel without judicial

supervision. On April 6, 2015, the United States filed a motion to produce [Doc. No. 433], seeking to obtain client communications made to Mann's former trial and appellate counsel, thus enabling the United States to properly respond to Mann's § 2255 motion. The motion to produce is limited to communications and documents related to Mann's attorney-client relationship with Hendrix, Lassiter, and Cassinelli.

A client may waive protection of the attorney-client privilege either expressly or impliedly. *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974)(cert. denied, 419 U.S. 1125 (1975)). A client implicitly waives the privilege when he "attacks his attorney's competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence." *Id.* Simply put, when a client publicly challenges the competence of his attorney, the privilege is waived. *Id.*

Mann argues that because his former trial and appellate lawyers are not parties to the post-conviction relief action, it is not reasonably necessary for them to disclose privileged information. In support of his motion, Mann relies primarily on an opinion from the American Bar Association that advises lawyers not to disclose information protected by the attorney-client privilege unless the former client provides informed consent. See ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 10-456 (2010)(Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim). Not only is this opinion non-binding, but it is also contrary to precedent and counter-intuitive.

Mann cannot use the attorney-client privilege “as both a shield and a sword.” *United States v. Davis*, 583 F.3d 1081, 1090 (8th Cir. 2009)(quoting *United States v. Workman*, 138 F.3d 1261, 1264 (8th Cir. 1998)). Indeed, when Mann filed his motion claiming ineffective assistance of counsel, he waived the attorney-client privilege as to any topics directly implicated by his ineffective assistance claims.

Accordingly, his motion for a protective order [Doc. No. 431] is denied, the government’s motion to produce [Doc. No. 433] is granted, and the government is authorized to obtain client communications, affidavits, and documentation relevant to Mann’s claims of ineffective assistance of counsel contained in his § 2255 motion.

IT IS SO ORDERED this 22nd day of April 2015.

s/Brian S. Miller
UNITED STATES DISTRICT JUDGE

**Order of the United States District Court for
the Eastern District of Arkansas denying leave
to proceed with discovery:**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. CASE NO. 4:09CR00099 BSM

(4a)

RANDEEP SINGH MANN, M.D. DEFENDANT
ORDER

Petitioner's motion for discovery [Doc. No. 426] is denied.

I. FACTUAL BACKGROUND

On August 9, 2010, a jury found petitioner Randeep Mann guilty on seven counts of an eight-count indictment. See Jury Verdicts, Doc. Nos. 154–61. He was later sentenced to life imprisonment. See Judgments, Doc. Nos. 222 & 369. His judgment became final on October 30, 2013, pursuant to an order entered by the U.S. Supreme Court denying certiorari. Doc. No. 376; see also *United States v. Mann*, 134 S.Ct. 470 (2013) (Mem.). On October 20, 2014, Mann filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. Pet'r's Mot. to Vacate, Doc. No. 395. Mann now seeks to conduct discovery under the Rules Governing 2255 Proceedings for the United States District Courts. Pet'r's Mot. for Disc., Doc. No. 426.

II. LEGAL STANDARD

“A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of course.” *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) of the Rules Governing Section 2255 Proceedings, however, provides that “[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law.” To show good cause under Rule

6(a), a petitioner must provide “specific allegations [that] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief .” *Bracy*, 520 U.S. at 908–09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). If the petitioner makes a sufficient showing to establish good cause, a court must then provide “the necessary facilities and procedures for an adequate inquiry.” *Id.* at 909.

In *Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004) (citations omitted), the Eighth Circuit divided the *Bracy* approach into three steps: (1) the habeas court must first identify the essential elements of the petitioner’s substantive claim, (2) the habeas court must then evaluate whether specific allegations show reason to believe the petitioner may be able to demonstrate that he is entitled to relief, and (3) if the petitioner has met his burden, then the habeas court must provide an evidentiary hearing. In order to justify discovery, the petitioner’s factual allegations must be specific, as opposed to merely speculative or conclusory. See *West v. Johnson*, 92 F.3d 1385, 1399–1400 (5th Cir. 1996).

III. DISCUSSION

Mann seeks discovery based on four claims listed in his section 2255 motion: Ground 12 (failure to disclose results of forensic testing of grenades, or, in the alternative, failure to conduct independent testing of grenades); Ground 13 (failure to conduct independent forensic testing of grenade launchers); Ground 14 (failure to investigate and call additional witnesses); and Ground 16 (failure to pay attention to information and ideas from Mann). Pet’r’s Mot. to Vacate 40–49.

Mann asserts he has good cause to conduct discovery because his case “involves several forensics and explosives issues that trial counsel did not pursue despite his requests to do so.” Pet’r’s Mot. for Disc. 1. Further, Mann states that he has hired an explosives–forensics expert who has reviewed the transcript and other trial materials and concluded that “there were major departures from the standard of care for both the police–prosecution team and trial counsel.” Pet’r’s Mot. for Disc. 2. For the following reasons, Mann’s motion for discovery is denied.

A. Ground 12

1. *Failure to produce exculpatory evidence*

In Ground 12 of his motion to vacate, Mann argues the United States failed to produce exculpatory evidence in violation of the Due Process Clause of the Fifth Amendment. Specifically, he claims the police–prosecution team failed to “disclose to the defense any evidence that they had tested [the M406 40 mm high-explosive] grenades.” Pet’r’s Mot. to Vacate 40.

The government must disclose evidence favorable to an accused where it is “material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To show a *Brady* violation, the defendant must establish that the evidence was favorable to the defendant, the evidence was material to guilt, and the government suppressed the evidence. *United States v. Barraza Cazares*, 465 F.3d 327, 333 (8th Cir. 2006) (citing *United States v. Thomas*, 940 F.2d 391, 392 (8th Cir. 1991)).

Mann’s *Brady* theory is unpersuasive. In his motion for discovery, Mann provides no factual support

for this allegation, and, in his reply to the government's response, he seems to drop the theory altogether. Mann does not so much as hint at how discovery of the forensic testing on the grenades would have been favorable or material to his guilt or innocence. Further, Mann fails to identify what evidence of forensic testing the government might have withheld from the defense. At trial, an expert witness with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") testified that he tested 98 grenades found near Mann's home and determined them to be live devices based on x-ray images. Trial Tr. 1311–13, Doc. No. 244 [hereinafter TT]. Mann does not indicate a separate testing method or alternative test result the government suppressed from him. As a result, discovery on this basis is not warranted.

2. Failure to seek independent forensic testing of grenades

Mann alternatively asserts that trial counsel were ineffective by failing to seek independent forensic testing of the grenades. Mann seeks to have his explosives–forensics expert inspect the 40 mm high–explosive grenades “for the purposes of determining whether they are live now or were live in March 2009.” Pet'r's Reply to Gov. Resp. 1., Doc. No. 430 [hereinafter Pet'r's Reply]. He claims he would be entitled to relief if these facts are fully developed because he will be able to demonstrate that “the testimony of the respondent's expert witness on these grenades' status was incomplete and misleading.” Pet'r's Reply 1.

The Sixth Amendment guarantees the right to effective assistance of counsel in criminal prosecutions. *Gideon v. Wainwright*, 372 U.S. 335 (1963). To prove

a claim of ineffective assistance, a defendant must demonstrate both that counsels' performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A lawyer's performance is deficient when, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A lawyer's performance is prejudicial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Staple*, 410 F.3d 484, 488 (8th Cir. 2005) (quoting *Strickland*, 466 U.S. at 689). Failure to establish either prong is fatal to an ineffective-assistance claim. *Worthington v. Roper*, 631 F.3d 487, 498 (8th Cir. 2011) (citing *Strickland*, 466 U.S. at 697).

Mann's allegations in support of this theory of discovery hinge on a string of speculation. His success depends on the assumption that trial counsels' failure to conduct an independent testing of the grenades prejudiced his case; however, whether the grenades were live or "junk" does not change the fact that they were unregistered and illegal. Thus, the suggestion that his trial counsel "assumed the worst for [him], rather than having a test conducted at a firing range or other safe location" misses the applicable standard. Pet'r's Reply 2. Indeed, rather than point to concrete deficiencies or prejudice, Mann's arguments on this basis amount to untenable declarations.

Further, even if the operability of the grenades was material, Mann does not identify a testing method—

short of detonation—that could have been ordered by trial counsel, nor does he explain how the failure to conduct additional testing prejudiced his case. Mann states his expert is prepared to testify that “it is standard operating procedure for explosives-related law-enforcement experts to take the same explosive device hypothesized to have been used at a crime scene and try to recreate the explosion.” Pet’r’s Reply 3. Again, Mann’s argument misses the mark. The evidence offered at trial to prove Mann possessed the grenades was distinct from the evidence offered to support the actual bombing charges. *See United States v. Mann*, 701 F.3d 274, 293 (8th Cir. 2012). It would be pointless, therefore, to try to recreate the crime scene explosion with the 40 mm highexplosive grenades when the underlying grenade conviction concerned possession, not detonation. Accordingly, discovery is not warranted on this basis.

B. Ground 13

In Ground 13 of his motion to vacate, Mann argues that “trial counsel failed to obtain independent forensic testing of the M203 40 mm grenade launchers to determine whether they had ever fired a live round.” Pet’r’s Mot. to Vacate 43. Mann claims discovery is appropriate on this ground in order to show he was “substantially less likely—and not likely at all. . . to have ever possessed the illegal 40 mm grenades.” Pet’r’s Reply 6. Specifically, Mann seeks to have the launchers produced to his expert to test for “residue that would indicate whether they had ever been fired.” Pet’r’s Reply 6.

As mentioned above, a claim of ineffective assistance of counsel depends upon a showing of both

deficient performance and prejudice. If a petitioner fails to establish prejudice, the ineffective-assistance-of-counsel claim may be disposed of without consideration of counsel's performance. *See United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996); *see also Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.").

Trial counsels' failure to test the grenade launchers to determine if they had ever been used is irrelevant to Mann's guilt. This is because Mann's possession of the grenade launchers was neither criminal nor illegal; they were simply used as evidence in support of Mann's possession of the grenades. *See Mann*, 701 F.3d at 291 (including the grenade launchers in the list of overwhelming evidence of guilt as to Mann's possession of the unregistered grenades). Since Mann cannot demonstrate prejudice under *Strickland*, discovery is not warranted on this basis.

C. Ground 14

In Ground 14 of his motion to vacate, Mann alleges his counsel were ineffective because they "failed to investigate and, if appropriate, call the workers who went to [his] home with Jeff Kimbrough to bring out the weaknesses in his testimony regarding what he said he thought he saw in the home." Pet'r's Mot. to Vacate 43. In particular, Mann seeks the names and addresses of the employees or former employees of Kimbrough who accompanied him on trips to the Mann residence to work on the alarm system. Pet'r's Reply 10. Mann claims if these facts are fully developed, he will be able to show there is a reasonable probability that investigation of these additional

witnesses would have substantially impeached Kimbrough's testimony. See Pet'r's Reply 11.

Again, a successful ineffective-assistance-of-counsel claim requires a defendant to establish both prongs of the *Strickland* test. Although counsel has a duty to make reasonable investigations in support of the defendant's case, "a particular decision not to investigate must be directly assessed for reasonableness in the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are 'virtually unchallengeable'" in a later habeas action. *Id.* at 689. It is not enough to show that alleged errors had some conceivable effect on the outcome of the proceeding. See *Strickland*, 466 U.S. at 693.

Discovery is inappropriate on this basis because Mann cannot show that the failure to investigate Kimbrough's employees prejudiced his case. The additional witnesses would not have changed Kimbrough's testimony about the "large bullets" he observed in Mann's residence, which, in his opinion, looked similar to a 40 mm grenade. TT 2057–58, Doc. No. 245. Further, Mann's counsel cross-examined Kimbrough at length about what he may or may not have seen at Mann's residence. TT 2063–93, Doc. No. 245. Finally, Mann's lawyers called a construction worker to rebut Kimbrough's observations, who testified that during his work on construction and landscaping projects at Mann's house, he never saw anything that looked like a 40 mm grenade. TT 3052–56, Doc. No. 252.

That the jury might have heard conflicting observations from Kimbrough's employees and that such

testimony might have had an effect on the jury's decision is wishful thinking and simply too speculative to permit discovery on this basis. Moreover, it is clear from the trial record that Mann's lawyers performed and presented a thorough investigation of his case. If they left any stone unturned, it is presumed to have been in conjunction with a purposeful trial strategy as Mann has failed to supply an otherwise unreasonable decision or mistake. *See Thomas v. United States*, 737 F.3d 1202, 1207 (8th Cir. 2013) ("The defendant bears the burden to overcome the strong presumption that counsel's performance was reasonable."). Accordingly, discovery is not warranted on this basis.

D. Ground 16

In Ground 16 of his motion to vacate, Mann claims that his trial counsel were ineffective because they "failed to pay attention to information and ideas from [him] without investigating or even considering them." Pet'r's Mot. to Vacate 47. In particular, Mann points to counsels' failure to obtain, pursuant to his request, "expert evidence of the planting of the 40 mm grenades near his home." Pet'r's Mot. to Vacate 47. He also claims trial counsel ignored his request to get "official" copies of recordings transcribed in PCR/Exhibit 10. Pet'r's Mot. to Vacate 48.

Mann adds new allegations to this ground for relief in his motion for discovery, claiming his trial counsel failed to listen to his request for "expert consultation on the causation of the damage to Dr. Pierce's Lexus SUV." Pet'r's Mot. for Disc. 3. That claim of ineffective assistance of counsel, however, is unrelated to the instance complained of in his original habeas petition. *See Dodd v. United States*, 614 F.3d 512, 515 (8th Cir.

2010)(noting allegations of ineffective assistance must be of the same time and type as those in the original motion in order to relate back to an original claim). Although both claims relate to pretrial conduct by counsel, Mann targets separate episodes—failure to hire an expert to testify on the age and size of the holes in which the grenades were found and failure to hire an expert to assess the proximate cause of damage to the victim’s SUV at the time of the bombing. *See Mayle v. Felix*, 545 U.S. 644, 660 (2005) (concluding claims in an amended petition did not relate back to the original petition where petitioner targeted separate episodes of ineffective assistance of counsel). The claim alleged in Mann’s discovery request based on Ground 16 is thus limited to the allegations of ineffectiveness complained of in Ground 16 of his original motion to vacate, set aside, or correct his sentence.

Again, under Strickland, Mann must establish both prongs of the standard in order to establish ineffective assistance of counsel and demonstrate that discovery is appropriate on this ground. As mentioned previously, “there is a strong presumption that counsel’s conduct falls within the range of reasonable professional assistance.” *Winters v. United States*, 716 F.3d 1098, 1105 (8th Cir. 2013) (citations omitted). The defendant has “the ultimate uthority to make certain fundamental decisions” affecting his case, but counsel has the “responsibility of making tactical decisions of trial strategy.” *Thomas*, 737 F.3d at 1207. A defendant always has the right to make four fundamental decisions: whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *See id.* at 1208.

Mann does not demonstrate how counsels' failure to hire a hole expert or obtain official copies of a transcript amounted to deficient performance or prejudiced his case. Instead, he claims that because trial counsel did not listen to his ideas, they did not subject the prosecution's case to "the crucible of meaningful adversarial testing on which the Bill of Rights and our legal culture generally relies for the protection of the rights of everyone in this Country whether they arrived last week or their ancestors came over on the Mayflower." Pet'r's Mot. to Vacate 47 (emphasis in original). This grandiose characterization of his claim is not persuasive.

Trial counsel were not obliged to listen to and carry out each of Mann's requests; to require otherwise would be unduly cumbersome. See *United States v. Boyd*, 86 F.3d 719, 723 (7th Cir. 1996). Further, Mann's assertion that a hole expert would have prevented the jury from finding him guilty of possessing the illegal grenades is pure speculation. He fails to provide specific allegations about how an investigation into the age and size of the holes in which the grenades were found would have altered the jury's verdict and entitled him to relief. As a result, discovery into this matter is not appropriate. As for the PCR/Exhibit 10 copies, Mann provides no reasoning for why the failure to supply more "official" copies of that exhibit affected the outcome of his case. He makes no attempt to distinguish between copies of the transcribed recordings and the "more official" transcripts he seeks.

For these reasons, Mann cannot establish he was prejudiced by counsels' strategic decisions to the extent there is a reasonable probability that the results

of his trial would have been different. Discovery is, therefore, not warranted on this basis.

IV. CONCLUSION

Mann fails to demonstrate a sufficient basis to conduct discovery in his § 2255 case; therefore, his motion for discovery [Doc. No. 426] is denied.

IT IS SO ORDERED this 3rd day of June 2015.

s/Brian S. Miller
UNITED STATES DISTRICT JUDGE

Order of the United States District Court for the Eastern District of Arkansas denying section 2255 relief without discovery or an evidentiary hearing and denying a certificate of appealability:

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RANDEEP SINGH MANN PETITIONER

v. CASE NO. 4:09CR00099 BSM

UNITED STATES OF AMERICA RESPONDENT

ORDER

Petitioner Randeep Mann's motion to vacate, set aside or correct sentence under [28 U.S.C. § 2255](#) [Doc.

No. 395] and his motion for hearing on motion for post-conviction relief [Doc. No. 406] are denied.

I. BACKGROUND

On the morning of February 4, 2009, Dr. Trent Pierce, Chairman of the Arkansas State Medical Board, found a spare tire leaning against his vehicle at his home in West Memphis, Arkansas. When Pierce moved the tire, a grenade taped to the underside of the tire exploded, leaving him severely injured. As officials began their investigation into the bombing, they obtained a list of all doctors who had been disciplined by the medical board within the past five years. One of the doctors on this list was petitioner Randeep Mann, who had a history before the board. The night of the bombing, an agent of the Bureau of Alcohol, Tobacco and Firearms and a special agent with the Arkansas State Police interviewed Mann and his wife at their home. During the interview, Mann showed the two officials his extensive gun collection, which included machine guns and grenade launchers.

On March 3, 2009, two city workers discovered a canister filled with ninety-eight grenades buried in a wooded area approximately 875 feet from Mann's home. The next day, agents obtained a search warrant for Mann's residence to search for evidence related to the buried grenades. Mann was arrested because the ninety-eight grenades and at least two other firearms were not registered to Mann in violation of federal firearms laws. On March 5, 2009, officials obtained a search warrant for Mann's residence to search for evidence related to the February 4, 2009, bombing of Dr. Pierce. Ultimately, eight charges were brought

against Mann in relation to the Pierce bombing and the possession of unregistered firearms.

On August 9, 2010, a jury convicted Mann of seven of the eight charges: Count 1, conspiring to use and aiding and abetting in the use of a weapon of mass destruction in violation of [18 U.S.C. § 2332a](#); Count 2, causing the damage or destruction of a vehicle by means of an explosive resulting in personal injury in violation of [18 U.S.C. § 844\(I\)](#); Count 3, possession of unregistered grenades in violation of [26 U.S.C. § 5861\(d\)](#); Count 5, possession of an unregistered machinegun in violation of [26 U.S.C. § 5861\(d\)](#); Count 6, possession of a machinegun in violation of [18 U.S.C. § 922\(o\)](#); Count 7, conspiring to corruptly obstruct an official proceeding in violation of [18 U.S.C. § 1512](#); and Count 8, aiding and abetting in the corrupt concealment of documents with the intent to impair the use of the documents in an official proceeding in violation of [18 U.S.C. § 1512](#).

On February 28, 2011, Mann was sentenced as follows: life imprisonment for Count 1; 360 months imprisonment for Count 2; 120 months imprisonment for Counts 2, 5, and 6; and 60 months imprisonment for Counts 7 and 8, with all sentences to run concurrently; five years of supervised release; a \$100,000 fine; and \$700 in special assessments. On appeal, the Eighth Circuit Court of Appeals affirmed Mann's convictions as to Counts 1, 2, 3, 7, and 8, and remanded Counts 5 and 6 with instructions to set one of the two convictions aside. The Eighth Circuit also affirmed the sentences as to Counts 7 and 8 but remanded Counts 1, 2, 3, and 5 or 6 for resentencing. [*United States v. Mann*, 701 F.3d 274, 311 \(8th Cir. 2012\)](#). On May 1,

2013, Count 5 was vacated, and Mann was resentenced as follows: life imprisonment for Count 1; 360 months imprisonment for Count 2; 120 months imprisonment for Counts 3 and 6, with all sentences to run concurrently; five years of supervised release; a \$100,000 fine; and \$600 in special assessments.

On October 20, 2014, Mann filed this motion to vacate, set aside or correct sentence under [28 U.S.C. § 2255](#). *See* Doc. No. 395. On December 3, 2014, Mann filed a motion for hearing on motion for post-conviction relief. *See* Doc. No. 406. Mann has presented twenty grounds for relief, including multiple claims of the ineffective assistance of counsel, *Brady* violations, and other miscellaneous grounds. The parties have thoroughly briefed the issues, with Mann submitting numerous memoranda, briefs, and a reply, and the government submitting a response to Mann's motion.

II. LEGAL STANDARDS

A prisoner in custody under sentence of a federal court “may move the court which imposed the sentence to vacate, set aside or correct the sentence” on any of the following bases: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) is otherwise subject to collateral attack. [28 U.S.C. § 2255\(a\)](#). “Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ or that he is ‘actually innocent.’” [Jennings v. United States](#), 696 F.3d 759, 763 (8th Cir.

2012) (quoting [*Bousely v. United States*, 523 U.S. 614, 622 \(1998\)](#)). Two of the most common issues raised in [section 2255](#) motions involve claims for the ineffective assistance of counsel and violations under [*Brady v. Maryland*, 373 U.S. 83 \(1963\)](#). Ineffective assistance of counsel claims may be brought for the first time in a [section 2255](#) motion. [*Massaro v. United States*, 538 U.S. 500, 504 \(2003\)](#). Moreover, proof of a *Brady* violation will usually run parallel to proving cause and prejudice. See [*Banks v. Dretke*, 540 U.S. 668, 671 \(2004\)](#).

A. Ineffective Assistance of Counsel

An ineffective assistance of counsel claim is considered according to the framework provided by the Supreme Court in [*Strickland v. Washington*, 466 U.S. 668 \(1984\)](#). According to *Strickland*, an ineffective assistance of counsel claim has two prongs: deficient performance and prejudice. As for deficient performance, the defendant must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” [Id. at 687](#). This first prong considers whether a lawyer’s representation “fell below an objective standard of reasonableness.” [Id. at 688](#). “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* There is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” [Id. at 689](#). “Judicial scrutiny of counsel’s performance must be highly deferential.” *Id.*

Consideration of deficient performance does not extend to strategic decisions made by counsel. “Even

the best criminal defense attorneys would not defend a particular client in the same way.” [Id. at 689](#).

When reviewing a strategic decision made by counsel, “the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” [Id. at 690](#). Before making a strategic decision, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” [Id. at 691](#). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” [Id. at 690](#).

As for prejudice, the defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” [Id. at 687](#). Even if a defendant shows that particular errors of counsel were unreasonable, he must show that the errors had an adverse effect on his defense. [Id. at 693](#). “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding” because “[v]irtually every act or omission of counsel would meet that test.” *Id.* Instead, to establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [Id. at 694](#). “The likelihood of a different result must be substantial, not just conceivable.” [Harrington v. Richter, 562 U.S. 86, 112 \(2011\)](#). When considering prejudice,

“a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.” [*Strickland*, 466 U.S. at 694](#). “*Strickland* prejudice is a rigorous standard.” [*Rodela-Aguilar v. United States*, 596 F.3d 457, 463 \(8th Cir. 2010\)](#).

A court may address the *Strickland* prongs in either order, and a court does not need “to address both components of the inquiry if the defendant makes an insufficient showing on one.” [*Strickland*, 466 U.S. at 697](#). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.*

B. [*Brady* Violations](#)

When the government suppresses material evidence favorable to the accused, due process is violated, notwithstanding the government’s good or bad faith.

[*Brady v. Maryland*, 373 U.S. 83, 87 \(1963\)](#). To prove a *Brady* violation, the defendant must show that: (1) the evidence was favorable to the defendant, either because it was exculpatory or impeaching; (2) the government suppressed the evidence willfully or inadvertently; and (3) the defendant was prejudiced by the suppression. [*Strickler v. Greene*, 527 U.S. 263, 281-82 \(1999\)](#).

Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” [*United States v. Bagley*, 473 U.S. 667, 682 \(1999\)](#). The government has a duty to disclose such evidence, even when it has not been requested by the accused, [*United States v. Agurs*, 427 U.S. 97, 107](#)

(1976), and “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.” [*Kyles v. Whitley*, 514 U.S. 419, 437 \(1995\)](#). But, there is no duty to disclose evidence that is neutral, speculative, inculpatory, or available to the defense from other sources. [*United States v. Flores-Mireles*, 112 F.3d 337, 340 \(8th Cir. 1997\)](#). As for prejudice, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” [*Kyles*, 514 U.S. at 434](#).

III. DISCUSSION

At the outset, it must be emphasized that the purpose of a [section 2255](#) motion is not to relitigate what happened back in 2009 and 2010 or to determine Dr. Mann’s guilt or innocence. The parties and the jury have already performed these functions. “The guilt or innocence of the defendant is not in issue in a [§ 2255](#) proceeding, but rather the validity and the fairness of the proceedings against him.” [3 Charles Alan Wright et al., Federal Practice and Procedure § 625 \(4th ed.\)](#); see also [*Strickland*, 466 U.S. at 689](#) (“The purpose is simply to ensure that criminal defendants receive a fair trial.”). Thus, the sole purpose of Mann’s [section 2255](#) motion is to ensure that his proceedings were fair, and principally in this case, that his right to the effective assistance of counsel under the Sixth Amendment was not abridged, and that the government did not violate Mann’s Fifth Amendment rights. With this

in mind, Mann's twenty grounds for relief will be addressed.

Ground 1: Due Process Rights Based on Conspiracy

Mann's first three grounds involve Mann's allegations that local officials conspired against him by planting a canister of grenades near his home, fabricating a story about finding these grenades, and using this information to obtain a search warrant for Mann's residence. The evidence presented to the jury was that, on March 3, 2009, Mark Rinke, a local city worker, stepped into the woods to urinate, when he tripped over a box wrapped in black plastic that was buried in the ground. Rinke mentioned the box to a coworker, Ryan Kimbell, and the two men returned to the box later that afternoon. The two men removed the box from the ground and discovered that the box was a military-style canister. It was full of ninety-eight grenades, which were capable of being launched by an M203 grenade launcher like one owned by Mann. Rinke and Kimbell alerted local authorities, and a search warrant was obtained the following day for Mann's residence. During the execution of the warrant, officials found an assortment of grenades, grenade launchers, firearms, ammunition, and a spare tire in a shower. As a result of this search, Mann was arrested for possessing the ninety-eight unregistered grenades and other unregistered firearms. This initial search and arrest led to additional searches and an investigation into Mann's role in the bombing of Dr. Pierce.

According to Mann, this story about accidentally stumbling upon the grenade-filled canister is a

complete sham. Mann has now retained experts who opine that the canister could not have fit in the hole in question, and Mann believes the pictures introduced at trial were of an old hole that could not have held the canister. Mann has also submitted an affidavit from Will Elkins, in which Elkins states that in March 2009 he saw two local city workers carry a canister like the one found by Rinke to the area where the canister was eventually found. *See* Elkins Suppl. Decl., Doc. No. 491, Ex. 4. Mann believes other facts make the government's story suspect: Rinke has stated that he was told not to talk about finding the canister. Additionally, Rinke told reporters the canister was half buried, yet his original story was that he tripped on a corner of a completely buried box. Rinke also stated that he was in the area to check out potential leaks in water lines at a pool, yet the property owner testified that she was home that day and never saw a city worker inspect her pool. Trial Tr. Vol. 15, 3080-82.

Ground 1 is denied. In ground 1, Mann argues that his Fifth Amendment due process rights were violated by the fabrication and planting of ninety-eight grenades near his home for the purpose of obtaining a search warrant. Mann also seems to bring a Fourth Amendment search and seizure challenge. Ground 1 is denied because it is procedurally defaulted.

A claim brought for the first time in a [section 2255](#) motion is procedurally defaulted if the issue was not presented on direct appeal, unless the petitioner can demonstrate cause and prejudice, or actual innocence. [Jennings, 696 F.3d at 762](#). Mann's Fourth and Fifth Amendment claims were not raised on direct appeal and Mann has not shown that he meets the cause and

prejudice standards, or that he can satisfy the actual innocence standard. Instead, Mann offers affidavits from scientists, purporting to show that the canister found by Mark Rinke could not have fit in the hole in question.

According to Mann, the hole was not deep enough, wide enough, or freshly dug enough to support the government's story that the hole was accidentally stumbled upon. Mann also seems to argue that an evidentiary hearing regarding the search warrant should have been held according to [*Franks v. Delaware*, 438 U.S. 154 \(1978\)](#), because the warrant was supported by deliberately or recklessly included false statements. Ultimately, Mann argues that this is one big conspiracy by the government to get him and that the real perpetrator is still out there somewhere. The purpose of a [section 2255](#) motion, however, is to correct unconstitutional procedures inflicted upon a defendant, not to consider substantive arguments attempting to re-litigate the case. Accordingly, ground 1 is denied.

Ground 20: Failure to Disclose Evidence of Conspiracy

Ground 20 is denied. In ground 20, which was timely filed and is addressed immediately after ground 1 because it involves similar facts, Mann argues that the government violated his Fifth Amendment right to due process under [*Brady v. Maryland*, 373 U.S. 83 \(1963\)](#), by failing to produce exculpatory evidence. In support of this, Mann argues two points. First, Mann argues that the government did not turn over exculpatory evidence to his trial counsel, or in the alternative, that Kimbell and Rinke possessed

exculpatory information that should have been turned over to Mann's trial counsel. *Brady* applies not only to evidence actually known by the prosecution, but it also imposes on the individual prosecutor a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." [*Kyles*, 514 U.S. at 437](#). This rule even extends to exculpatory evidence "known only to police investigators and not to the prosecutor." [*Id.* at 438](#). "*Brady* thus applies to relevant evidence in the hands of the police, whether the prosecutors knew about it or not, whether they suppressed it intentionally or not, and whether the accused asked for it or not." [*Harris v. Lafler*, 553 F.3d 1028, 1033 \(6th Cir. 2009\)](#) (citations omitted). Although Mann has not produced a single piece of exculpatory evidence that was not given to his trial counsel, he asserts there may be information known by Kimbell and Rinke that should have been given to him.

Mann also argues that if his lawyers were not ineffective for failing to investigate whether the canister was placed in the hole by local officials, it is because "the police-prosecution team failed to disclose enough evidence soon enough for the defense team to hire experts for pretrial motions and trial testimony as Dr. Mann has hired experts on post-conviction relief." Doc No. 408, at 15. To prove a *Brady* violation, however, Mann is required to identify evidence that is material to either guilt or punishment. *Brady*, 373 U.S. at 81. Mann fails to identify a single piece of evidence that the government withheld. Moreover, he has not presented evidence that was withheld by Kimbell, Rinke, or any other local official acting on behalf of the government. Mann's entire argument hinges on his belief

that Kimbell and Rinke are lying about accidentally finding the canister and that their testimony throughout the case was false. The government cannot be held responsible for failing to turn over evidence that it does not possess.

Second, Mann cites [*Geders v. United States*, 425 U.S. 80 \(1976\)](#), and [*Herring v. New York*, 422 U.S. 853 \(1975\)](#), for the proposition that the government's failure to turn over exculpatory information rendered his lawyers ineffective. In *Geders*, the Supreme Court held that a trial judge's order preventing a criminal defendant from consulting his lawyer during an overnight recess violated the defendant's right to the assistance of counsel. [425 U.S. at 91](#). In *Herring*, the Supreme Court held that a New York statute allowing a judge to deny counsel the opportunity to make a closing argument violated the defendant's right to the assistance of counsel. 422 U.S. 864-65. Mann asks that this line of cases, holding that the judiciary's actions can render a defendant's counsel ineffective, be read to hold that the government's actions can render Mann's counsel ineffective.

Mann's argument fails because he has not shown how he was prejudiced by the government's actions. See [*Strickler*, 527 U.S. at 282](#) (requiring prejudice to prove a *Brady* violation); see also [*Harrington*, 562 U.S. at 112](#) (holding that the likelihood of a different result when considering ineffective assistance of counsel "must be substantial, not just conceivable"). *Geders* and *Herring* stand for the proposition that a defendant can be prejudiced by a judge's decision. The defendant in *Geders* was prejudiced when he denied the right to speak with his lawyer, and the defendant in *Herring*

was prejudiced when he was denied the right to have his lawyer sum up the evidence at the end of trial. Here, however, Mann has failed to show how the government prejudiced him, and there can be no prejudice when Mann is unable to point to any individual action or evidence that prejudiced him.

Ground 2: Failure to Consult with Experts About Conspiracy

Ground 2 is denied. In ground 2, Mann argues that his lawyers were ineffective because they failed to consult with experts and to present expert testimony to show that the evidence used to obtain the search warrant was perjured. Again, Mann asserts that Rinke and Kimbell did not accidentally stumble upon the grenade-filled canister and that the hole was too small for the canister. He also states that counsel should have retained experts to provide scientific opinions about the size of the hole and that there is no strategic reason for failing to investigate whether the canister was truly found by accident. In support of this argument, Mann has provided a declaration from William Elkins, who testifies that he saw two city workers with shovels drag “an odd-shaped box with black material looking like trash bags wrapped around it” to a spot about 900 feet from Mann’s home. *See* Elkins Decl., Doc. No. 395, Ex. 4.

Ground 2 fails because Mann’s counsel’s decisions regarding the hole were strategic, and therefore not deficient. [*Sanders v. Trickey*, 875 F.2d 205, 207 \(8th Cir. 1989\)](#) (“A court must avoid second-guessing trial strategy.”). Mann makes two arguments in support of his position that counsels’ decisions were ineffective, not strategic. First, Mann contends that a decision is

not strategic if counsel does not properly research the issue. Although Mann is correct that lawyers have a duty to conduct a reasonable investigation, [Strickland](#), 466 U.S. at 691; see also [Thomas v. United States](#), 737 F.3d 1202, 1207 (8th Cir. 2013), this argument still fails. Mann's expert witnesses base their opinions on pictures taken at the scene. Even if Mann's experts could prove to a degree of scientific certainty that the canister could not fit in the hole, this evidence does not relieve Mann of proving to the jury that government officials conspired to frame an innocent person. Indeed, after researching and considering these issues, Mann's trial counsel made the strategic decision not to present this argument to the jury. The thought process behind this decision is best explained by one of his lawyers:

We thoroughly considered, among ourselves and with Dr. Mann, the options to argue a conspiracy between municipal workers, the local government, local law enforcement, and federal law enforcement to plant the grenades. We considered whether that strategy could succeed or whether the jury would view that strategy, in light of all the evidence, as so ridiculous that we would lose all credibility in defending against the bombing and regulatory offenses. We made this strategic decision: an overly stated conspiracy theory would cause us to lose credibility with the jury on the bombing and gun counts, which, we believed, were more defensible than the grenade counts. We concluded that a vast law enforcement

conspiracy to set Dr. Mann up would make the total defense appear ridiculous to the jury. So, we decided to not emphatically state it as a theory, but, rather, to drop hints of that theory throughout the trial so an acquittal-prone juror might latch on to it.

Affidavit of J. Blake Hendrix. 3-4, Doc. No. 483, Ex. 16. These words clearly indicate that these issues were studied and that a strategic decision was made. Further, another member of Mann's trial team, Erin Cassinelli, decided not to present a conspiracy theory to the jury because she was "without any evidence to present them to factually support it." Cassinelli Aff. 3, Doc. No. 483, Ex. 17. In response to Will Elkins's declaration that he saw two city workers planting the canister, Cassinelli now says, "I have never heard of Will Elkins. Our team interviewed neighbors and were not advised that anyone had been in the area at the relevant time who could have witnessed the planting of the canister." Cassinelli Aff. 3. Mann's counsel diligently investigated this purported conspiracy. Ultimately, Mann's trial counsel determined that setting a conspiracy theory before the jury would be "ridiculous." Because this decision was a strategic one, the inquiry into deficient performance ends there.

Mann's second argument is that his lawyers were deficient because they used a layman's opinion to support the theory that the canister was too large to fit in the hole. This, too, was a strategic decision. Hendrix explained the rationale:

We discussed trying to find an expert witness who could contradict the government's theory that Mann buried the canister within days of it being found. I remember we talked about a geology professor from, I think, the University of Arkansas who could look at the pictures of the scene and give an opinion that the hole was not freshly dug. But, we concluded that a "hole" expert likely wouldn't survive a *Daubert* challenge and that our best strategy was to appeal to the common sense of the jury. We decided the best strategy was to show the jury the pictures and have a lay witness, who we believed the jury could relate to, testify the hole did not appear to have been freshly dug.

Hendrix Aff. 3. Mann's second ground for relief is completely results based, not process based. It is very easy to view his counsels' actions in hindsight now that the trial is over and the outcome was not favorable. A poor result, however, is not the benchmark of an ineffective assistance of counsel claim. Because counsel did not believe that a jury would buy the notion of a conspiracy to plant the canister to frame Mann, they chose to poke holes in the government's proof by using a lay witness to challenge the evidence. Mann's trial team made the strategic decision to proceed in this fashion.

Ground 3: Due Process Violation for Perjured Testimony

Ground 3 is denied because it is procedurally barred. In ground 3, Mann argues that the use of Hamis Alshareqi's grand jury testimony violated the

due process clause of the Fifth Amendment because it was perjured and based on the government's coercion. Further, he argues that law enforcement threatened Phil Barthelme, another government witness, with arrest, which caused Barthelme to commit perjury before the grand jury.

As Mann's petition makes clear, he was aware of these circumstances before and during trial, but this is the first time Mann raises the argument. "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 at 574 (8th Cir. 2010); *see also* [Houser v. United States](#), 508 F.2d 509, 514-15 (8th Cir. 1974) (holding that defects in the indictment are generally not permissible [Section 2255](#) claims).

Even if he could make the argument now, the argument fails on the merits. First, despite Barthelme's fear of arrest, he testified that he told the truth and that ATF agents did not put words in his mouth. *See, e.g.*, Trial Tr. vol. 11, 2160:14–2167:8, 2165:11-16. Second, even without Alshareqi's testimony, the government had probable cause to prosecute, as demonstrated by the government obtaining a guilty verdict beyond a reasonable doubt without putting Alshareqi on the stand at trial. *See* [United States v. Mechanik](#), 475 U.S. 66, 67 (1985) ("[G]uilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendant[] with the offenses for which [he was] convicted."); *see also* [United States v. Alonzo](#), 147 Fed.Appx. 617, 619 (8th Cir. 2005).

Grounds 4 and 5: Failure to Move to Quash the Indictment and Investigate Alshareqi's Recantation

Grounds 4 and 5 are denied. Mann argues that his lawyers were ineffective because they failed to pursue Alshareqi's allegedly false grand jury testimony. In ground 4, Mann argues that his lawyers should have called Alshareqi as a witness, presumably to either attack the indictment or to introduce his recantation at trial. In ground 5, Mann argues that his lawyers should have called Alshareqi's lawyers to confirm whether the grand jury testimony was improperly obtained. Both grounds fail because Mann cannot satisfy either of the *Strickland* prongs.

The first *Strickland* prong requires Mann to demonstrate that his lawyers' representation fell below the range of competency demanded by lawyers in criminal cases. [*Strickland*, 466 U.S. at 688](#). Although he argues that his lawyers failed to use Alshareqi's recantation, investigate his statements, call him as a witness, or call his lawyers as witnesses, the record does not support these allegations, nor would those failures rise to the level of deficient conduct.

Defense counsel had Alshareqi ready to testify, but made a strategic decision not to call him because of how the testimony might harm Mann's defense. *See* Hendrix Aff. 5. After Alshareqi assaulted another government witness in jail, Mann's lawyers were concerned that the government might introduce correspondence suggesting Mann's complicity in that assault if Alshareqi testified. Cassinelli Aff. 4. Mann's complicity in the assault could have also been inferred by Mann sharing case discovery with Alshareqi, which could have been elicited on cross-examination. Cassinelli Aff. 4-5. The defense team attended Alshareqi's sentencing hearing after he pleaded guilty, and

considering everything counsel had learned, they decided not to have Alshareqi testify for three reasons: he made inconsistent statements, he had mental health issues, and Mann could be implicated in the assault. Hendrix Aff. 5.

Counsel also considered a claim Alshareqi made about government coercion. Drake Mann was one of Mann's lawyers. Drake Mann was in contact with Alshareqi and had discussed Alshareqi's allegations with Alshareqi's lawyer, Omar Greene. Cassinelli Aff. 3. Greene, who was present during Alshareqi's interview with government investigators when it is alleged the coercion occurred, reported to Drake Mann that Alshareqi's allegations were false. Greene Aff. 3, Doc. No. 483, Ex. 24. Drake Mann, however, met with Alshareqi and had a positive impression of Alshareqi's credibility. *See* Drake Mann Aff. 3, Doc. No. 491, Ex. 8 (describing a consistent story but not stating opinion on credibility). Defense counsel clearly investigated Alshareqi's stories and made a strategic decision that Alshareqi could not be trusted or, alternatively, may harm Mann's defense. Under the circumstances, it cannot be said that the trial strategy was unreasonable. *See* [*Johnson v. Lockhart*, 921 F.2d 796, 799 \(8th Cir. 1990\)](#) (explaining that, with knowledge of a witness's background, not calling witness is trial strategy that should not be second guessed.).

Although Mann wanted his lawyers to do more, the Constitution does not require perfect performance, but only reasonably effective assistance. [*Strickland*, 466 U.S. at 688](#). Under these circumstances, defense counsel was not constitutionally deficient. Counsel did not ignore Alshareqi; indeed, they considered

Alshareqi and made strategic decisions not to push the issue considering the inconsistent statements, assault, communications between Alshareqi and Mann, and the concern for implicating Mann in Alshareqi's jailhouse assault. Counsel considered moving to dismiss the indictment, but felt that such a motion was not warranted. *Cassinelli Aff.* 5; *Hendrix Aff.* 6 ("Knowing that [Alshareqi] was not the only basis for Mann's indictment, a motion to dismiss would have been frivolous."). Counsel was not expected to file frivolous motions, especially when counsel investigated Alshareqi's allegations and discovered that Alshareqi's own lawyer denied Alshareqi's version of the events. See [*Rodriguez v. United States*, 17 F.3d 225, 226 \(8th Cir. 1994\)](#). Considering there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," [*Strickland*, 466 U.S. at 689](#), Mann has failed to point to any deficient conduct.

Even if counsel's work fell below constitutional minimums, Mann cannot satisfy *Strickland's* prejudice prong. [*Id.* at 694](#). Mann concludes that presenting Alshareqi's recantation would have resulted in the indictment's dismissal. His argument does little more than question Alshareqi's reliability, and the Constitution does not require mini-trials on the competency of evidence before the grand jury so long as the indictment is valid on its face. See [*Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 \(1988\)](#). Additionally, the government obtained a conviction beyond a reasonable doubt without relying on Alshareqi's testimony, which reinforces the argument that probable

cause existed for the grand jury to return an indictment. See [*Mechanik*, 475 U.S. at 67](#).

Therefore, the defense team's failure to produce the affidavit, call Alshareqi as a witness, or interview and call Alshareqi's lawyer as witness was not constitutionally deficient and was not prejudicial.

Ground 6: Expert on Hindu Ceremonial Practices

Ground 6 is denied. In ground 6, Mann asserts that his lawyers were ineffective because they failed to present expert testimony regarding Mann's Hindu practices. About a week after the medical board sent Mann a letter denying his request to have his DEA permit reinstated, Mann sent an email to his brother in India that contained a picture of Dr. Pierce. At trial, the government presented this evidence to the jury. Mann's counsel called Mann's daughter to testify that some Hindus in northern India use pictures of those they are praying for in their worship services. Mann claims that his counsel was ineffective for calling his daughter instead of an expert to testify on Hindu ceremonial practices. Mann contends that an expert would have proved that Mann's real purpose for using the picture of Dr. Pierce was for religious practices, and he further contends that the jury discounted his daughter's testimony because she is his daughter.

Contrary to Mann's contention, counsel's decision was the result of a reasonable professional judgment and therefore not deficient. Indeed, defense counsel has testified that they looked for an expert to testify that sending the picture was consistent with Hindu practices, but one potential expert flatly contradicted Mann's position. Accordingly, counsel did not pursue this strategy because they believed it would have been

too damaging. Hendrix Aff. 6; Cassinelli Aff. 5-6; Lasiter Aff. 2. Because Mann's daughter was a "well-spoken, very Americanized young lady," who had attended similar ceremonial Hindu practices with her family, counsel believed she would be an efficient witness in providing "the necessary explanation and context" for the religious practices at issue. Cassinelli Aff. 6. As such, counsel's decision was sound trial strategy. See [*Thomas*, 737 F.3d at 1207 \(8th Cir. 2013\)](#) ("An attorney is not incompetent in exercising reasonable professional judgment even when, in hindsight, the decision may have been a mistake.").

Even if counsels' performance was deficient, Mann has failed to show there is a reasonable probability that, but for counsel's decision to call his daughter instead of an expert, the outcome of the trial would have been different. To show prejudice, Mann must make more than a showing of some conceivable effect on the outcome of the case. [*Strickland*, 466 U.S. at 693](#). Simply arguing that Mann's purported expert's testimony (which would have been virtually the same as the testimony of Mann's daughter) would have resulted in a different outcome simply because the jury would viewed him as an expert is merely speculative and therefore not sufficient to show prejudice. See [*Scott v. Guntharp*, No. 4:07CV00032, 2010 WL 2985886, at *8 \(E.D. Ark. Mar. 31, 2010\)](#) (explaining that absent an affirmative showing that relevant testimony by an expert would have exculpated him, a petitioner cannot show the prejudice required for an ineffective assistance of counsel claim).

Ground 7: Failure to Investigate Amsterdam Scam

Ground 7 is denied. In ground 7, Mann argues that he was a victim of a scam perpetrated against him in Amsterdam in 2005. According to Mann, local and federal law enforcement officials prevented Interpol from investigating the scam, and Mann was unable to recover the lost money. He argues that this prior incident was the motivation for his instruction to his wife to remove documents from his office prior to his office being searched by law enforcement officials. Mann argues that his lawyers were ineffective because they failed to investigate and pursue this alternative theory regarding the motivation for removing the documents, including unsigned checks.

At trial, Mann's lawyers presented theories regarding his motivations for removing the documents. Counsel chose not to pursue Mann's proposed theory regarding the Amsterdam scam because it would confuse the jury and possibly present him to the jury in an unfavorable light. Hendrix Aff. 6-7; Cassinelli Aff. 7; Lassiter Aff. 2. Counsel also considered the possibility that the jury would not find Mann's explanation credible, so they pursued a simpler, more relatable theory of his motivation: unsigned checks could be filled out and cashed, so the checks were removed for safety reasons. Unquestionably, this was a strategic decision on the part of Mann's counsel and falls well within the bounds of what a reasonable attorney might do during the course of representation.

Although this argument fails at the first prong of the *Strickland* test, Mann has also failed to demonstrate that any prejudice resulted from the jury not hearing this alternate story. If Mann's lawyers had presented evidence of the Amsterdam scam, there is

no indication that the jury would have ruled differently. See [Williams v. Roper](#), 695 F.3d 825, 831 (8th Cir. 2012) (explaining that to satisfy *Strickland*’s prejudice prong, the likelihood of a different result must be “substantial, not just conceivable” (citing [Harrington](#), 562 U.S. at 112)).

Ground 8: Failure to Sever

Ground 8 is denied. In ground 8, Mann argues that the denial of his motion to sever forced defense counsel not to introduce certain evidence, which had the effect of causing constitutionally ineffective assistance of counsel. To the extent that his argument challenges the appropriateness of severance, the Eighth Circuit has already affirmed that issue, and it is improper to collaterally attack it. See [Mann](#), 701 F.3d at 289–94; see also [United States v. Shabazz](#), 657 F.2d 189, 190 (8th Cir. 1981). To the extent that the argument claims an independent ineffective assistance of counsel claim, the claim fails.

Mann again uses the *Geders* and *Herring* cases to argue that a judge’s actions can render counsel ineffective, see *supra* ground 20, this time arguing that the failure to sever placed restrictions on defense counsel that forced them to be ineffective. Mann’s argument is again distinguishable from *Herring* and *Geders* because the severance denial did not control counsel’s actions. In *de la Garza v. Fabian*, the Eighth Circuit recognized that a key component of *Geders* (and a similar case, [Perry v. Leeke](#), 488 U.S. 272 (1989)), was that a court order prevented counsel from carrying out a vital function. [574 F.3d 998, 1002 \(8th Cir. 2009\)](#). Mann does not argue that a court order directed his attorneys from presenting this evidence, only that

counsel made strategic decisions because the motion to sever was denied. *See, e.g.*, Pet'r's Mot. 29, Doc. No. 395 ("If counsel had not been or at least felt trammelled by the threat of harming their client's chances of acquittal on counts 1 and 2 by presenting the motives of rogue agents"). Mann's argument could be made for virtually any court decision – whether on severance, on suppression, in limine, or for admitting hearsay evidence – that causes counsel to adjust trial strategy as a result. The fact that evidence was not presented because of trial strategy and not a court order makes Mann's theory inapplicable. *See [de la Garza, 574 F.3d at 1002](#)* (distinguishing the orders prohibiting the claimed deficiencies in *Geders* and *Perry* with *de la Garza*'s claim caused by an order from a prison guard).

Ground 9: Failure to Preserve Issue

Ground 9 is denied. In ground 9, Mann argues that his trial and appellate lawyers were ineffective because they failed to preserve Mann's grievance that the severance denial violated his right to testify on the non-severed counts.

Mann's lawyers were not deficient. At trial, counsel properly objected to Mann's inability to testify, stating that "we need to make a record on the defendant's desire to testify and not testify as it pertains to that motion." Trial Tr. vol. 15, 3091:6-7. Indeed, counsel specifically argued that Mann's inability to testify "infringes his right to choose whether or not he's going to testify in his own defense." Trial Tr. vol. 15, 3094:5-6. Counsel went on to proffer what Mann would have testified about, namely that law enforcement had been harassing him and speaking to his friends and patients; his connections to Dr. Pierce and the medical

board; when he received a weapon; that he was unaware he had to register it; and that he would “corroborate everything else we presented in our defense” of another firearm. *See* Trial Tr. vol. 15, 3093:4-3094:8. Although Mann asserts the Eighth Circuit held that it was not properly preserved, he points to no language in the opinion that supports such a holding.

As for appellate counsel, the record is less clear, but still demonstrates reasonable performance. On appeal, the Eighth Circuit referenced in a footnote that “Mann did not state in his brief what reason he had for refraining from testifying on the arson and bombing grounds, nor did his brief indicate what argument he made to the district court in this matter or if he made them at all.... Accordingly, we are in no position to evaluate Mann’s proffer as to his need for separate trials based on the Fifth Amendment.” [*Mann*, 701 F.3d at 291 n.9](#). Although the Eighth Circuit indicates that appellate counsel did not bring that issue on appeal, appellate counsel filed a petition for rehearing, referencing portions of the record in which the issue had in fact been raised. *Mann v. United States*, Petition for Rehearing 11, 8th Cir. Case No. 11-1500, Feb. 7, 2013. Even after pointing out the error, the Eighth Circuit summarily denied the petition. Thus, it appears the argument was raised on appeal and rejected.

Even if counsel did not properly raise the issue on appeal, Mann has not shown prejudice because the inability to testify would have no impact on the underlying convictions. As an initial matter, Mann’s affidavits, declarations, and other filings suggest disagreement with trial counsel about whether he should

testify. Mann states that he wanted to testify, Mann Decl. ¶ 4, Doc. No. 421, Ex. 35 (“At trial I had wanted to take the stand and testify in my defense.”), but his lead defense lawyer states that the decision to testify was Mann’s decision. Hendrix Aff. 7 (“I cannot ever remember a time in my career I told a client not to testify if that was his or her wish.”). Although not critical to the prejudice prong, one must consider whether Mann’s true intention was to testify or whether it was an after-thought to create a constitutional issue. “When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant’s conduct. Waiver is presumed from the defendant’s failure to testify or notify the trial court of the desire to do so now.” [*United States v. Webber*, 208 F.3d 545, 551 \(8th Cir. 2000\)](#); *see also id.* (“Although the ultimate decision whether to testify rests with the defendant, when a tactical decision is made not to have the defendant testify, the defendant’s assent is presumed.... A defendant who wants to testify can reject defense counsel’s advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel.”). Mann’s counsel rested Mann’s defense without calling him. Mann did not insist on calling another witness when he rested, he did not communicate an intent to testify to the court, and he did not discharge counsel. Thus, to the extent that Mann implies error for him not testifying – apart from counsel’s ineffectiveness – the argument is meritless.

Mann was only concerned about testifying regarding the regulatory and obstruction counts, presumably counts three through eight. *See* Cassinelli Aff. 10;

Pet'r's Mot. 38, Doc. No. 395 (“[T]rial and direct-appeal counsel (who were also trial counsel) failed to raise in this Court and advance on appeal the grievance that the denial of severance prejudiced Dr. Mann by effectively precluding him from testifying on the firearms counts and asserting his right not to testify on the ‘weapons of mass destruction’ counts.”). Mann states that this testimony would have helped him on these charges, yet he provides no argument for how any of his testimony relates to an element of any crime. For example, Mann proffered testimony that he was not aware of the need to register firearms. *See* Trial Tr. 3093:24–3094:25 (“[H]e didn’t receive the letter telling him that he should have registered it, that he was unaware of that.”). Ignorance of the law, however, is not an excuse. [*Lambert v. California*, 355 U.S. 225, 228 \(1957\)](#); [*United States v. Miller*, 646 F.3d 1128, 1131–1134 \(8th Cir. 2011\)](#). Mann also states that he wanted to present testimony to explain why he amassed a cache of weapons. Mann Decl. ¶ 4, Doc. No. 421, Ex. 35 This has no relevance to the elements for knowingly possessing one or more unregistered firearms (counts 3, 4, and 5), *see* [26 U.S.C. 5861\(d\)](#), or knowingly possessing a machine gun (count 6). *See* [18 U.S.C. 922\(o\)\(1\)](#).

As a final example, he argues that his testimony would have been persuasive to the jury because he convinced health care workers during his incarceration why they should not be prejudiced against him. Mann has failed to explain how the jury’s prejudice had any impact on his verdicts. The jury was specifically instructed “not [to] allow sympathy or prejudice to influence you. The law demands of you a just

verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.” Jury Instruction 2, Doc. No. 165. Mann has presented nothing to indicate that the jury rejected these instructions or that prejudice crept into the jury room. See [*Richardson v. Marsh*, 481 U.S. 200, 211 \(1987\)](#) (“[J]uries are presumed to follow their instructions.”).

Grounds 10-11: Failure to Strike Testimony or Move for a Mental Examination of Lloyd Hahn

Grounds 10 and 11 are denied. In grounds 10 and 11, Mann contends that his lawyers were ineffective because they did not move to strike the testimony of Lloyd Hahn and because they did not request that Hahn undergo a mental examination. Mann argues that Hahn’s testimony was internally inconsistent and that Hahn was not competent to testify due to medication that Mann reasons he must have been taking for [cancer](#). Mann believes that Hahn was not competent to testify and that a mental examination of Hahn would have revealed his incompetence.

Mann’s arguments are unpersuasive. First, Mann argues that Hahn was unreliable and not a credible witness. Credibility determinations are within the province of the jury. Mann insists that his lawyers should have been alerted to Hahn’s incompetence due to inconsistencies in his testimony and his illness. Every person, however, is presumed competent to be a witness, see [Fed. R. Evid. 601](#), and Mann has provided no evidence, aside from his own speculation, that supports his argument that Hahn was incompetent. Hahn was cross-examined by Mann’s lawyers, who attempted to discredit Hahn. Second, the decision to move to strike testimony rests within the

professional judgment of the lawyer, and Mann's lawyers determined that such a motion was not necessary or prudent. Third, Mann's lawyers interviewed Hahn and found no strategic basis to challenge his competency. Hendrix Aff. 8; Cassinelli Aff. 10-11.

Beyond this, Mann cannot show that he suffered any prejudice from counsel's decision not to strike Hahn's testimony or move to obtain a mental evaluation of Hahn. As stated above, both of these motions would have been meritless, and counsel is not required to make such motions. See [*Gray v. Bowersox*, 281 F.3d 749, 756 n.3 \(8th Cir. 2002\)](#) (explaining that a claim of ineffective assistance of counsel is not viable if the desired action would have been without merit).

Ground 12: Failure to Disclose Evidence of Grenade Testing

Ground 12 is denied. In ground 12, Mann asserts that the government suppressed evidence by failing to disclose that it conducted additional testing of the 40mm HE grenades. This argument is rooted in testimony from an explosives enforcement officer from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, who testified that the grenades were "live." The government denies that it or any of its agents conducted any additional testing, and it asserts that all of its evidence related to the grenades was available to Mann. Mann has produced no evidence that such additional testing was conducted and cannot show that the results of such testing, if it did occur, would have aided in his defense.

Mann additionally argues that his lawyers were ineffective because they failed to conduct independent tests of the same grenades. The decision whether to

test the grenades was one that clearly fell within the strategic purview of defense counsel. Mann's lawyers have testified that the results of such tests were not important to the overall trial strategy. Importantly, counsel considered that a positive test result would only harm Mann's defense. They chose not to seek additional testing so that the functionality of the grenades could be questioned. Hendrix Aff. 8-9; Cassinelli Aff. 11.

Ground 13: Failure to Independently Test Grenade Launcher

Ground 13 is denied. In ground 13, Mann argues that his lawyers were ineffective because they did not conduct independent tests of the M203 40mm grenade launchers to determine whether they had ever fired a live round.

Mann's lawyers had no strategic reason to test the launchers. Mann's possession of the grenade launchers was not illegal, and he was not charged with any offense that required a showing that he had fired a grenade launcher. Instead, the grenade launchers were offered as proof that the grenades found near Mann's property belonged to him. Thus, a negative test result would not advance his defense. See [*Hood v. United States*, 342 F.3d 861, 865 \(8th Cir. 2003\)](#) (holding that counsel is not deficient for failing to take an action that is "devoid of legal merit"). Additionally, Mann's lawyers considered the possibility of a positive test result, which would only harm his defense. This second point also illustrates that Mann cannot show that any prejudice resulted from a lack of testing on the launchers. He cannot show that the tests would have produced favorable results. Further, the

government had no reason and made no effort to prove that Mann ever fired the launchers. For these reasons, ground 13 satisfies neither prong of the *Strickland* test.

Ground 14: Failure to Investigate Jeff Kimbrough Witnesses

Ground 14 is denied. In ground 14, Mann argues that his lawyers were ineffective because they did not talk to, and potentially call as witnesses, the workers who went to Mann's home with Jeff Kimbrough to determine the weaknesses in Kimbrough's testimony. Kimbrough owned an alarm system company and was personally involved in installing an alarm system at Mann's home in 2003-2004. At trial, Kimbrough testified that he saw "large shells" at Mann's home that looked similar to the grenades introduced during trial. Trial Tr. vol. 10, 2057-58, 2061-62. Mann now argues that counsel should have investigated and potentially examined Kimbrough's employees who were with him to challenge Kimbrough's credibility. Mann's trial counsel described its actions in relation to Kimbrough as follows:

We discussed our approach to Kimbrough in many of our strategy sessions. I think Kimbrough refused to talk to us, so we couldn't find out who were his employees that could have been at the house with him. The discovery material gave us no leads on who the employees were. I remember discussing the likely futility of getting anything productive from his employees, because they wouldn't want to contradict their boss. We decided the best strategy was to cross Kimbrough with his inability to recall specifics. I remember Kimbrough was not able to identify with any

degree of certainty what was alleged to be the grenades in the Mann home. The other part of our strategy was to call a disinterested witness who had greater access to the house than Kimbrough. We called Wayne Henry who testified he never saw any such devices in the home, despite having greater access to Mann's residence. Hendrix Affidavit 9.

Mann's lawyers considered the possibility of calling Kimbrough's employees to testify, but they decided on a different course of action. Instead of engaging in what might have been a futile endeavor (finding Kimbrough's employees and convincing them to testify against their boss), defense counsel decided to call Wayne Henry to testify. Henry was a construction worker who had worked at Mann's home for approximately six months in 2003. He had seen much more of Mann's home than Kimbrough had seen, and he contradicted Kimbrough's testimony.

The reasonableness of this strategy will not be reconsidered. Mann's conclusory statement that "[a]ssuming that they testified truthfully, these workers' testimony would have impeached that of Mr. Kimbrough" is not sufficient to show deficient performance. Pet'r's Mot. 44, Doc. No. 395. Even if these potential witnesses "might have provided some benefits," it was not unreasonable for Mann's trial lawyers "to decide that the potential costs of calling the witnesses outweighed the potential benefits." [*United States v. Staples*, 410 F.3d 484, 488-89 \(8th Cir. 2005\)](#).

Additionally, Mann has failed to show how he was prejudiced by the failure to call Kimbrough's employees to testify. This is the case because, as held by the Eighth Circuit, there was "overwhelming" evidence of

guilt on count 3, possession of unregistered grenades. See [Mann, 701 F.3d at 291](#). Simply arguing that these potential witnesses could have potentially affected the outcome of the trial, does not meet the “rigorous standard” of *Strickland*’s prejudice prong. [Rodela-Aguilar, 596 F.3d at 463](#).

Alternatively, Mann asserts that if his lawyers were not ineffective, it is because the government committed a *Brady* violation because it failed to turn over all of the evidence it had about the other men on the scene with Kimbrough. This is merely conclusory. There is no evidence that the government hid anything from Mann, nor is there evidence that the government even possessed this information. It is implicit that there can be no *Brady* violation without specifically identifying the evidence withheld. See [Brady, 373 U.S. at 87-88](#).

Ground 15: Failure to Disclose Arkansas State Medical Board Complaint

Ground 15 is denied. In ground 15, Mann argues that the government committed a *Brady* violation by failing to disclose a complaint made about Mann to the medical board, and in the alternative, that counsel was ineffective for failing to investigate the circumstances of the complaint. The complaint to the medical board involved Rita Barthelme, one of Mann’s patients. Barthelme overdosed on pain pills twice while under Mann’s care. After the second overdose, Barthelme’s sister, Jeanice Brown, contacted the medical board about Mann. An investigation began to determine whether Mann’s license should be revoked.

There is no *Brady* violation because Mann does not state what piece of evidence the government withheld.

United States v. Barraza Cezares, 465 F.3d 327, 333 (8th Cir. 2006) (requiring three steps to proceed on a *Brady* claim). The United States contends that it turned over all of the medical board records in its possessions, including records pertaining to an investigation regarding Barthelme. Mann’s trial counsel possessed this information, and the United States attached this information to its response under seal. See Cassinelli Aff. 12 (“We had the complaint Jeanice Brown sent to the medical board; the government provided the ASMB file regarding the complaint in discovery.”). Mann also alleges that the government committed misconduct by coercing testimony from Rita Barthelme and failing to provide evidence of this coercion. Mann’s allegations seems to be based on a card sent from Barthelme to Mann, in which Barthelme writes, “The fed’s [sic] wont leave us alone.” Doc. No. 483, Ex. 33. It is true that federal authorities met with Barthelme, but there is no evidence that the government improperly coerced Barthelme, or that the government withheld evidence of coercion. Without stating what additional piece of evidence the government withheld, Mann’s *Brady* claim must fail.

Mann’s ineffective assistance of counsel claim fails for similar reasons. It was not ineffective for counsel to decline to investigate Brown’s complaint to the medical board when they already possessed this information. Further, Mann’s counsel argued to the jury that he did not receive official notification from the board about the investigation until after the Pierce bombing. Thus, it is unclear what further actions Mann believes his counsel should have taken, or how this investigation is relevant to the bombing itself.

Finally, Mann has not shown that he was prejudiced by his lawyers' failure to further investigate the Brown complaint. He has not shown 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](#).

Ground 16: Ignoring Mann's Ideas

Ground 16 is denied. In ground 16, Mann argues that his lawyers were ineffective because they failed to consider and/or investigate information he provided them and because they did not consider his ideas. Such ideas include obtaining a hole expert and obtaining "more official" copies of the PCR/Exhibit 10 transcripts. According to Mann, this constitutes a disparagement of the client as a source of information, leading to a breakdown of the attorney-client relationship.

As discussed above, counsel was not ineffective for failing to retain a hole expert. Further, counsel's mere failure to transcribe the PCR/Exhibit 10 transcripts in a "more official way than Dr. Mann" would have done does not amount to deficient performance. Therefore, even if counsel had ignored Mann on these issues, they would not have been ineffective. Importantly, ground 16 asserts that counsel was ineffective because counsel erroneously refused to consider Mann's suggestions regarding a series of claims, which led to a breakdown in communication. As the government has correctly noted, this seems to be an attempt to group several errors together, which does not constitute a proper ground for habeas relief. See [*Scott v. Jones*, 915 F.2d 1188, 1191 \(8th Cir. 1990\)](#) ("[C]umulative error does not call for habeas relief, as each habeas claim must stand or fall on its own.").

Moreover, aside from the four fundamental decisions, “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal,” all other trial decisions are strategic decisions reserved for counsel. [*Thomas*, 737 F.3d at 1208](#). Neither the ideas nor the information on which Mann alleges counsel failed to consider his input is related to one of these fundamental decisions. Therefore, counsel was not deficient, as they were not required to follow Mann’s suggestions, although they assert they did so. See [*Thomas*, 737 F.3d at 1209](#) (holding that counsel may properly make strategic decisions without client’s input).

Ground 17: Objections to Prejudicial Matters Presented to the Jury

Ground 17 is denied. In ground 17, Mann argues that his lawyers were ineffective for failing to object to photographs depicting the Confederate and Nazi flags and the audio recording in which Mann used the word “fag.” Mann contends that his lawyers were ineffective because they failed to seek a protective order regarding these prejudicial matters, which were displayed to the jury.

Mann’s lawyers have testified that they chose not to address the flags because there was no reason to believe anyone could conclude that a man of Indian descent was a “neo-Nazi American skinhead” or a “racist.” Hendrix Aff. 11. Making an objection would have been more damaging, as it would have brought unnecessary attention to the flags. Cassinelli Aff. 13. Also, counsel believed that in light of the probative value of the photographs, which purpose was to show the entrance of Mann’s gun-safe room, and the non-prejudicial nature of the flags, an objection would not have

been successful. Hendrix Aff. 11; Cassinelli Aff. 13. Moreover, counsel testified that they needed the recording with the word “fag” for the defense of entrapment by estoppel and also did not believe the court would grant an objection given the context in which it was presented. Cassinelli Aff. 14.

Counsel’s decision not to object to the photographs or the recording was reasonable trial strategy and therefore not deficient. [Thomas, 737 F.3d at 1208](#). Even if counsel was incompetent, Mann cannot show there is a reasonable probability that, but for counsel’s decision not to object to the photographs and recording, the outcome of the proceeding would have been different. See [Strickland, 466 U.S. at 694](#). Importantly, the flags and the “fags” comment were never emphasized by anyone during the trial, and Mann presents no evidence that the jury considered or even noticed them.

Ground 18: Accountant’s Testimony

Ground 18 is denied. In ground 18, Mann argues that his lawyers were ineffective because they failed to object to Pam Faulkner’s accounting conclusions and because they failed to hire an expert to counter Faulkner’s testimony. To convict Mann on count 1, the government had to prove that the offense affected interstate commerce. See [Mann, 701 F.3d at 294](#). The Eighth Circuit held that because Mann’s attack on Dr. Pierce resulted in a depletion of the assets of Dr. Pierce’s clinic, there was ample evidence to support the jury’s finding that the interstate commerce requirement was met. [Id. at 295](#). Mann contends Faulkner erroneously concluded that Dr. Pierce’s clinic suffered a gross loss of income in 2009. According to

Mann, there was no depletion of assets because the clinic actually made money in Dr. Pierce's absence.

Defense counsel chose not to counter the government on the depletion of assets theory because counsel believed an objection would have been futile. Counsel determined this was only one of several theories the government could have used to prove the interstate commerce requirement. *Hendrix Aff.* 12. As such, counsel's decision not to expend time and resources to counter Faulkner's conclusions was a reasonable professional judgment. See [*New v. United States*, 652 F.3d 949, 953 \(8th Cir. 2011\)](#) (explaining that the Sixth Amendment does not require attorneys to make meritless arguments or futile objections).

Even if counsel was deficient for not challenging Faulkner's conclusions, Mann cannot show prejudice. The government needed to prove only a minimal effect on commerce. [*United States v. Williams*, 308 F.3d 833, 838 \(8th Cir. 2002\)](#). The fact that Dr. Pierce's clinic had to close for three days was by itself sufficient to prove the interstate commerce requirement. See [*United States v. Quigley*, 53 F.3d 909, 910 \(8th Cir. 1995\)](#) (citing [*United States v. Davis*, 30 F.3d 613, 615 \(5th Cir. 1994\)](#)). Importantly, the Eighth Circuit held that Dr. Pierce's absence likely caused the clinic to lose business opportunities. [*Mann*, 701 F.3d at 296](#). Accordingly, Mann cannot show that hiring an expert to attack Faulkner's theory would have changed the outcome.

Ground 19: Cumulative Ineffective Assistance of Counsel

Ground 19 is denied. In ground 19, Mann contends that his lawyers were ineffective because their

combined acts and omissions listed throughout Mann's motion violated his constitutional rights. The Eighth Circuit, however, does not recognize a cumulative error test in support of habeas relief based on ineffective assistance of counsel. See [*Girtman v. Lockhart*, 942 F.2d 468, 475 \(8th Cir. 1991\)](#) (rejecting a habeas petitioner's cumulative error claim). As discussed above, none of Mann's claims of ineffective assistance of counsel are granted. Accordingly, this ground fails.

IV. WHETHER TO HAVE A HEARING

After much contemplation, Mann's motion for a hearing is denied. When considering a [section 2255](#) motion, "the judge must review the answer, any transcripts and records or prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Rule 8(a), Rules Governing [Section 2255](#) Proceedings for the United States District Court. I am absolutely aware that a hearing should be held "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," [28 U.S.C. § 2255\(b\)](#), and that "[e]videntiary hearings on [28 U.S.C. § 2255](#) motions are preferred, and the general rule is that a hearing is necessary prior to the motion's disposition if a factual dispute exists." [Thomas](#), 737 F.3d at 1206. "In the context of a motion under [28 U.S.C. § 2255](#), an evidentiary hearing is designed to flesh out details not apparent in the record. [Taylor v. United States](#), 792 F.3d 865, 871 (8th Cir. 2015) (Kelly, J., concurring). A hearing is not required, however, 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.” [*Tinajero-Ortiz v. United States*, 635 F.3d 1100, 1105 \(8th Cir. 2011\)](#) (quoting [*Sanders v. United States*, 341 F.3d 720, 722 \(8th Cir. 2003\)](#)). Importantly, an evidentiary hearing is not warranted when there is second guessing of tactical decisions of trial strategy. See [*Thomas*, 737 F.3d at 1209](#).

The present case is not one in which a hearing is needed to make a factual determination. See [*Witthar v. United States*, 793 F.3d 920, 923 \(8th Cir. 2015\)](#) (holding that an evidentiary hearing was needed when a defendant instructed her attorney to appeal, yet he did not do so); [*United States v. Sellner*, 773 F.3d 927, 932 \(8th Cir. 2014\)](#) (same). Instead, this is primarily a case challenging counsel’s strategic decisions. Mann’s trial lawyers have provided extensive and reasoned analysis about the decisions they made and why they made them, not to defend their own actions, but to provide a straightforward analysis of their decision-making during investigation of the case and throughout trial. Hendrix Aff. 2. Counsel’s decisions may not have been perfect, especially in hindsight, but incorrect strategic decisions do not make counsel ineffective. [*Thomas*, 737 F.3d at 1207](#). A hearing to rehash the strategic decisions made by counsel is not required.

The remaining grounds (excluding those involving strategic decisions by counsel) do not warrant an evidentiary hearing either, as they are conclusory, contradicted by the record, or inherently incredible. For example, Mann asserts multiple *Brady* violations but has identified no actual evidence that the government failed to turn over. There is no reason to conduct a

hearing on such conclusory assertions that are refuted by the record. The thorough record in this case has been reviewed and carefully considered, and these documents “conclusively show that the prisoner is entitled to no relief.” [28 U.S.C. § 2255\(b\)](#). Therefore, a hearing is not required.

V. CERTIFICATE OF APPEALABILITY

Finally, when entering a final order adverse to a petitioner, a certificate of appealability must be issued or denied. *See* Rule 11, Rules Governing [Section 2255](#) Proceedings for the United States District Court. A certificate of appealability may issue only if the petitioner “has made a substantial showing of the denial of a constitutional right.” [28 U.S.C. § 2253\(c\)](#); [Slack v. McDaniel](#), 529 U.S. 473, 483-84 (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).

Mann has not made such a showing. All twenty of the grounds presented in Mann’s [Section 2255](#) motion are unfounded. The record is filled with strategic decisions made by Mann’s counsel throughout their representation, and the record further provides zero evidence of any misconduct by the government. Mann has not identified a single piece of evidence withheld by the government, and his motion contains numerous conclusory allegations. Unfounded speculation cannot form the basis for relief. Based on the analysis set forth above of all 20 grounds in Mann’s motion, Mann has not made a substantial showing of the denial of a constitutional right, and a certificate of appealability is denied.

VI. CONCLUSION

For the reasons set forth herein, Petitioner Randeep Mann's motion to vacate, set aside or correct sentence under [28 U.S.C. § 2255](#) [Doc. No. 395] and his motion for hearing on motion for post-conviction relief [Doc. No. 406] are denied.

IT IS SO ORDERED this 26th day of August 2016.

s/Brian S. Miller

UNITED STATES DISTRICT JUDGE

**Order of the United States Court of Appeals for
the Eighth Circuit denying rehearing and re-
hearing en banc:**

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 17-2038

Randeep Mann

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Eastern Dis-
trict of Arkansas - Little Rock (4:14-cv-00614-BSM)

(59a)

ORDER

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

December 28, 2017

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

/s/ Michael E. Gans

Legal Authority Required by Subparagraphs 1(f) or 1(g)(i):

U.S. Const. art. I, § 9, cl. 2 (Suspension Clause):

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

U.S. Const. amend. V (Due Process Clause):

No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

U.S. Const. amend. VI (Assistance of Counsel Clause):

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(c):

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

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

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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

28 U.S.C. § 2255:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by

law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

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

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

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

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed

to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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

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

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

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

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

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as

provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18

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

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

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

Local Rules of the United States District Court for the Eastern and Western Districts of Arkansas, Appendix: Model Federal Rules of Disciplinary Enforcement, Rule IV.B

<http://www.arwd.uscourts.gov/sites/arwd/files/Appendix.pdf> (last visited Mar. 21, 2018):

Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an

attorney-client relationship. The Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court is the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state.

Ark. R. Prof. Cond. 1-6(b)(5), <https://courts.arkansas.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct> (last visited Mar. 21, 2018):

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . .to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client[.]

Rinke-Kimbell Testimony from Volume VI of Trial Transcript in *United States v. Mann*, No. 09-CR-00099 (U.S. Dist. Ct. E.D. Ark. July 19, 2010) (ECF#240):

***1069 MARK RINKE, GOVERNMENT'S
WITNESS, PREVIOUSLY SWORN**

(65a)

DIRECT EXAMINATION

BY MS. WHATLEY

Q Mr. Rinke, let me make sure, you have already been sworn, correct?

A Yes, ma'am.

Q Would you please state your name?

A Mark Rinke.

Q And you have to speak up. ***1070**

A Mark Andrew Rinke.

Q And spell your last name.

A R-I-N-K-E.

Q Where are you employed?

A City of London.

Q How long have you worked for the city of London?

A Four years.

Q What do you do for them?

A I work for the street and water department.

Q And were you working on March 3, 2009?

A Yes, ma'am.

Q And what were you doing that day?

A I was looking at the water lines to see if there were any leaks that day.

Q And where were you doing that?

A It was Star Harbor, Milky Way Lane, up in that region.

Q And was there any other reason you were in that area that day other than just looking at water lines?

A I had a friend tell me about a swimming pool I went and looked at that way -- when I was up that way looking at the water lines. ***1071**

Q What color is that vehicle?

A It's white with City of London on the door.

Q With what?

A City of London on the door.

Q And do all city vehicles have City of London on the door?

A Yes, ma'am. Except for our newest one. It doesn't have

City of London on it.

Q And what color are the vehicles?

A It's white.

Q Are you familiar with the area around Galaxy Lane?

A Just from the water lines. Just, that's not a very -- we don't go up there very often. We just go up there and check the water lines every now and then.

Q Why don't you go up there very often?

A We don't usually have a lot of problems up there. We go up there temporarily to check to see-if we have any problems arise.

Q Do you have a lot of customers up there?

A I think we have four houses up there.

Q And you said there was Star Harbor, Milky Way, and Galaxy Lane?

A Star Harbor is the region down there off of Blackwood, and Milky Way and Galaxy Lane are the ones that are on top of the mountain, I believe.

Q You said, and -- I guess it's officially in London?

A Yes, ma'am.

Q Where was that swimming pool located?

A I think it's Galaxy Lane up there. The house is off that.

Q What vehicle were you in?

A I was in a City of London work truck. ***1072**

Q Is it near Lake Dardanelle?

A Yes, ma'am.

MR. GORDON: May I approach?

THE COURT: Yes.

BY MR. GORDON

Q I'm showing you what has been introduced as Government Exhibit 101-A. Is this a picture of that region?

A Yes, ma'am.

Q And is this where you were that day?

A Yes, ma'am.

MR. GORDON: May I approach again?

THE COURT: You may.

BY MR. GORDON

Q I am showing you what has been introduced as Government Exhibit 101-B. Is this a closer-in version?

A Yes; ma'am.

Q And can you tell us where the house was that you looked at the swimming pool?

A The house is right here.

Q And when you say "right here," are you pointing almost in the middle of the picture?

A Yes, ma'am.

Q Off of Galaxy Lane?

A Yes, ma'am.

Q Is that house visible from Milky Way Lane? * 1073

A Yes, ma'am. The back side of it is.

Q Tell me what you did after you left the house on Galaxy Lane that day.

A After I left the house, I went and had lunch, and I came back that afternoon.

Q Okay. Well, did you do anything before you had lunch after you left looking at the swimming pool?

A Yes, ma'am. I drove at the end of Galaxy Lane. I stopped, got out briefly, and that was when I found a box that was covered. I seen it in the ground, partially dug around it. I had seen that it was covered up, and I -- I seen that it was a box that was wrapped in black plastic. I uncovered the top of it. I figured it was nothing, none of my business. I left for lunch that day and that was it. I came back in the afternoon with the employee that I work with.

Q Back up a little bit.

A Okay.

Q Might as well go ahead and tell the jury, why did you get out of your car that day?

A I took a restroom break, and I stepped less than -- it was less than 60 feet off the road. As I was walking out there to take care of my business, I stepped in a slight depression and, when I did, I kind of -- it kind of tripped me up. I turned around and seen something unusual in the ground. I went to uncover it. I started to pull the object out of the ground and *1074 that was -- that was it. I realized that it was none of my business. I left for lunch that day. I told the employee that I work with about what I found, and we went back that afternoon to look at it.

Q Okay. How well was the box buried?

A It was almost completely covered. There was a slight corner that was exposed, and I think that was exposed after I stepped on it, dragging my foot across it.

Q You said the box was wrapped in black plastic. Can you describe that for us?

A It was pretty heavy-duty black plastic. It was wrapped very well. It looked like it was wrapped more than once to keep out the elements, and it was duct taped to keep it completely exposure -- it was to keep it from being exposed to the elements.

Q Were there any tears on the black plastic?

A No, ma'am. It looked clean. It looked brand new, the plastic did.

Q Describe the dirt around the box.

A It was fresh. You could see where the ground had settled a little bit. It looked fairly recently disturbed. It wasn't -- it wasn't hard or anything like that.

Q You said you left it there?

A Yes, ma'am.

Q And then you went and talked to the guy you work with? ***1075**

A Yes, ma'am.

Q What's his name?

A Ryan Kimbell.

Q Did you ever go back to the box?

A No, ma'am. I left it all day. We went back that afternoon at 4:30, right before we got off.

Q And who is we?

A Myself and Ryan Kimbell, my other employee.

Q When you returned to the area that afternoon around 4:30, did the box appear to be in the same condition it had been in earlier that day when you saw it around lunch?

A Yes, ma'am.

Q Tell the jury what you did then.

A Myself and Ryan Kimbell opened -- we tore the plastic open. After we removed the box from the ground, we opened up the plastic and opened up a --

it was a green military-grade container. It was duct taped around the lid. Opened it up and we found -- I guess they were grenades.

Q You didn't know what they were?

A I didn't. The gentleman I worked with did.

Q You keep pointing. Does that mean he is sitting out there somewhere?

A Yes, ma'am.

Q Other than -- was there anything else in the box?

A It was just grenades, and they were in a sleeve, like four *1076 or five per belt. It looked like a belt.

MS. WHATLEY: Your Honor, may I approach?

THE COURT: You may.

BY MR. GORDON

Q Does this appear to be the box that you saw that day?

A Yes, ma'am.

Q And for the record, I am showing you Government Exhibit 99-A. Are these the belts that you saw that day?

A Yes, ma'am.

Q And for the record, that is Government Exhibit 99-A1. How full was the box?

A Completely full.

Q Did you touch any of the belts?

A Yes, ma'am.

Q Did you touch anything that was inside the belts?

A Yes, ma'am, I believe.

Q What about the box?

A Yes, ma'am. When we was opening it up.

Q After you opened the box, did you or Mr. Kimbell call anyone?

A Yes, ma'am. We called our boss, the mayor of the City of London.

Q After that --

A Just told him what we found.

Q After that, did anyone else appear on the scene?

***1077**

A Yes, ma'am. A county sheriff from the sheriff's department, Pope County Sheriff's Department, showed up.

Q And what happened after he arrived?

A He arrived, we told him who we were, asked him who he was, and he told us that he was with the Pope County sheriff's department. And he was there to look at what we found. We took him over there and he took several pictures and after that we asked him if he needed us for anything else. He took our information, and we left.

MS. WHATLEY: If we can look at Government Exhibit 98-A.

BY MS. WHATLEY

Q Is this what the box looked like when you pulled it out of the ground?

A Yes, ma'am.

Q And did you pull the black plastic off?

A Yes, ma'am.

Q And what about the duct tape?

A We cut the duct tape.

Q Who is we?

A Me and Ryan Kimbell.

Q And if we can look at Government Exhibit 98-J, is this what the area looks like where you found the box?

A Yes, ma'am.

Q And approximately how far off the road was it?
***1078**

A I am just guessing. Less than 60 feet.

MS. WHATLEY: Your Honor, may I have a moment?

THE COURT: Yes.

MS. WHATLEY: No further questions.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. HENDRIX

Q Good afternoon. You work for the City of London?

A Yes, sir.

Q Doing what now?

A I work for the street and water department.

Q What do you-all do?

A Take care of the streets, fix water leaks, put in main lines.

Q Is that a part-time job for you?

A Yes, sir.

Q What's your full-time?

A I work for the Russellville Fire Department.

Q And back in March of '09, were you working full time also at the fire department?

A Yes, sir.

Q And as firemen, I assume y'all work with and know, for instance, Russellville police department officers, Pope County sheriffs, that sort of thing?

A Oh, yes, sir. ***1079**

Q Okay. Let's go through that day. You go out to this area on Galaxy Lane in the morning; is that right?

A It was before lunch.

Q Do you remember what time?

A I believe it was around 11:00.

Q And your purpose to go out there was to do what?

A I had a friend tell me about a pool. I was checking the water lines that day. I went up there to just look at the pool while I was up in that area. It's not a very -- we don't go up in that area very often. I got out with the pool, maintain the cul-de-sac. That's when I got out and I did what I did.

Q Sure.

A And that was pretty much it.

Q Was it your friend's pool?

A It was a friend that I know. He was actually putting the pool in.

Q And I take it it's at that house on Galaxy Lane?

That's, I guess, the only house on Galaxy Lane?

A Yes, sir.

Q And that's the pool you were checking out?

A Yes, sir.

Q And do you -- it was your friend that had installed it, so was the swimming pool in construction at that time?

A Yes, sir.

Q And you wanted to go out to check the city water lines? *1080

A Yes, sir. I was checking the water lines.

Q And so did you go actually to the pool?

A Yes, sir.

Q And that's in this person's backyard, right?

A Yes, sir.

Q And do you know the owner, Lynn -- I am going to butcher this pronunciation. I think it's Blunier, B-L-U-N-I-E-R.

A No, I do not.

Q And you drove your white City of London truck out there?

A Yes, sir.

Q And how long were you out there?

A I walked up there and looked at it. Less than five minutes.

Q Okay.

A I just took a look at it.

Q Did you see the owners of the home?

A No, sir.

Q Was anybody home?

A Not that I knew, sir.

Q Are you aware that she does not work and stays home?

A No, sir.

Q Are you aware that she has said that she doesn't believe anybody could come up and look at her pool without her being aware of it?

A No, sir. *1081

Q And are you aware she said , " I have never seen a City of London truck in this neighborhood"?

A No, sir.

Q So how long then are you checking out the pool and the water line before going down to the end of Galaxy lane?

A I got out, viewed the pool, less than five minutes. Drove down there to the end of the cul-de-sac. I was there for -- it wasn't a very long amount of time. Found that and I did what -- I used the bathroom and I just -- I left after I discovered that in the ground.

Q And you testified t h a t you thought it was about 60 feet and I think we have already seen pictures of

this, but I gather that that area is sort of a -- a new-ish subdivision, right?

A I don't know how long it's been there. It's fairly new homes up there.

Q And I gather there was -- there is construction that's been going on on new homes here for a little bit in that area?

A I don't know of any new homes that's been put up there recently .

Q Okay. So you go down. It's a cul-de-sac, but it's not developed enough where there are curbs at the end of the cul-de-sac?

A There are vacant lots at the end of the cul-de-sac.

Q There is no curb?

A No. *1082

Q Almost gets gravelly and then you step off into non-gravel, right?

A Yes, sir.

Q And you said 60 feet and is it that -- that's, that's 20 yards and I am -- I gather you are sort of guessing that it's 60 feet?

A Yes, sir. That's a guess.

Q Do you feel like you took about 20 steps to get out there?

A Yes, sir.

Q And it's in a clearing, right? I'm starting to be clear.

Then you tripped over something that's sticking up in the ground, right?

A It was a depression in the ground, kind of a slight depression. You could tell where the ground had kind of settled, and when I stepped I caught the heel of my

boot. I didn't really fall, just kind of stumbled a little bit and I turned around to see what it was.

MR. HENDRIX: And if we could, could we pull up that series of Government's Exhibits 98.

BY MR. HENDRIX

Q All right. That's 98-A, and that's what -- you now have pulled it out of the ground. You are by yourself, right?

A I -- when I initially found it, I could not pull it out of the ground. I just uncovered the top and dug my fingers around the lid of the box, and I left for lunch. It wasn't -- at first *1083 I -- it was none of my business. I left it.

Q And let me get a better sense from you on that. So when you are out there that morning around 11:00 and you stumble, you realize it and what exactly do you do? Do you pull it out of the ground? Just sort of feel around it and see what it is or --

A I felt around the lid of the box, just uncovered the top of it and felt around the lip of it and left it in the ground.

Q How much did you uncover of it before you left?

A Just the -- enough that the top -- I could feel the lip of the top of the box.

Q Sort of dusted off the top?

A Basically, yes, sir.

Q And obviously it's not buried deeply at all, right?

A The whole box was in the ground. I just uncovered the lid.

Q Okay. You had said that part of it was exposed. That's what I was trying to get at. Is that right?

A I believe it was exposed after I stepped on it. When I stepped and I jerked my foot, I think that's what uncovered partially the corner of it. And I turned and looked and seen black plastic in the ground.

Q Say that one more time.

A When I was walking, I stepped on it, and I think when I stepped, I drug my foot. And I think that's what uncovered the corner of the box. *1084

Q I got you, and you turned around and saw --

A Saw the black plastic sticking out of the ground, right.

Q So I get the sense that not only was it not buried deeply, but it was obvious that it was a minimal amount of dirt or whatever at the top, right?

A Yes, sir.

Q Okay. And you leave it in that state, is that right, when you leave?

A Yes, sir.

Q It's still in the hole?

A Yes, sir.

Q You sort of dust it off the top, and at that point did you see the parameters of what you were dealing with? Did you see that it was a box?

A Yes, sir.

Q And you leave and you do what --

A I went to lunch, did my daily work for the day. I told Ryan Kimbell, the other employee about it. And I went back that afternoon at 4:30 to look -- to take a look to see what it was.

Q On direct you were motioning, and that was in reference to Ryan Kimbell. Is he in the courtroom?

A No, sir.

Q He is out back? He is in the witness room out there?

A Yes, sir.

Q Okay. Got you. ***1085** So you go back and do your regular business. Do you contact anybody other than Mr. Kimbell about this?

A No, sir.

Q And what time do you remember telling Mr. Kimbell about it?

A I think it was around 4:00.

Q Around 4:00. And what do you tell him?

A I just told him that I was out there checking the waterlines. I discovered a box in the ground. I asked if he would go up there and take a look at it to see what it was with me.

Q Why?

A I can't tell you that. I just, I guess, thinking it was something for the worst. I don't know. I didn't have any idea what it would be.

Q I note that -- isn't Mr. Kimbell in the National Guard?

A Yes, sir.

Q Was that why you went to Mr. Kimbell, because of some military issue?

A I had no idea what was in the box. I had -- I didn't know of anything that would be in there. I just wanted him there to be a witness when we opened it up.

Q So you guys get there, and how do you get there? One car? Two cars?

A We took his city employee truck.

Q Say that again. ***1086**

A We took his city employee truck.

Q City of London?

A Yes.

Q So that would be twice then that day that this white City of London truck was out in that neighborhood?

A Yes, sir.

Q Give me a sense of this. The second time when you and Mr. Kimbell were out there, how long were you out there?

A Probably about an hour.

Q How long of that hour was it before you guys contacted any law enforcement?

A After we found it, I figure we was there 20 minutes. It took us that long to get it up, dig it out of the ground. We contacted our boss, which is the mayor. He contacted Pope County, and it took them several minutes to get out there.

Q And that's when Joseph Smith with Pope County sheriff's office comes out?

A Yes, sir.

Q So was he the only one?

A Yes, sir.

Q And so it was the three of y'all?

A Yes, sir.

Q And it was Officer Smith who took photographs?

A Yes, sir.

Q Did you-all take any photographs of your own?

***1087**

A No, sir.

Q Any measurements, were they taken?

A Not by us, sir.

Q Okay.

MR. HENDRIX: Can I look at 98 again?

BY MR. HENDRIX

Q Now, where the point of the story is, I guess, in this picture what has happened is Officer Smith has arrived. He is the one that's taking this photograph. This is what you-all had done. You removed it from that depression, right?

A Yes, sir.

Q And unwrapped it and looked in?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q And so that's the hole that it was in?

A Yeah. To the left.

Q And there is leaves all around it, right?

A Yes, sir.

Q All right. And so the hole, the depression is on the left, right?

A Yes, sir.

Q And that's looking in the hole?

A Yes, sir.

Q With the leaves in it? *1088

A Yes, sir.

Q And you have got -- that's the duct tape. So we are seeing the very side of the ammo can, right?

A Yes, sir.

Q Same deal, hole behind the ammo can, correct?

A Yes, sir.

Q Okay. How deep do you figure that hole was?

A It was deep enough for the box to be completely buried.

Q But with little room to spare, I gather?

A Yes. Very limited.

Q And it's pretty rocky soil, isn't it?

A I don't believe so, sir.

Q I have been to that area and it's -- in that part of the state, isn't this all sort of hard, rocky soil? It's not delta earth, is it?

A I am not that much digging out there, sir. I couldn't tell you.

Q Fair enough.

MR. HENDRIX: All right. And that's the next one, and I think at 98-J, is that where we are? Is there one more?

BY MR. HENDRIX

Q Okay. And this is a -- a bigger view. Can you on this picture tell us where the can was, where the hole is?

A Directly in the middle where that stick is, just to the left. *1089

Q And can you mark on this ? Do you see what I just did? You can put your finger --

A I think it's on the other side right there.

Q So that's the hole?

A Yes, sir.

Q Okay. Now, that is a clearing from, if I were looking at this, I would be standing on Galaxy Lane right now looking out; is that correct?

A Yes , sir.

8 Okay. And that is a fairly large clearing, right?

A Y e s , sir.

Q Now, what we don't have is a picture -- what is surrounded -- woods surround that entire area, right?

A Yes, sir.

Q And they get pretty thick, right?

A Yes, sir.

Q And we see the tree lines in this area on that part , right?

A Yes, sir.

Q And how far did you figure that from the hole to that tree line is?

A Probably another 20 feet.

Q Okay. And the tree line then comes back around, right?

And extends all the way back around, right?

A Yes, sir.

Q In fact, that whole area, except where you access it off *1090 Galaxy Lane to this little clearing, is surrounded, right?

A Yes, sir.

Q Did you find it odd that it wasn't buried in the woods instead of out in the open?

A I didn't really find anything odd. I didn't plan on finding anything that day.

Q Yeah. When you and I were looking at those pictures, what made you think that it -- on your direct you said something about it looked fresh. What made you think that?

A It looked fresh?

Q Yeah.

A Just the dirt looked fresh. You could tell it was discolored. It looked like it had been recently buried.

MR. HENDRIX: Can we look at 98-B again?

BY MR. HENDRIX

Q Is there anything in that picture that indicates to you that it was freshly buried? And maybe that's not a good one.

A You can see that the dirt up here to the left, how it's kind of discolored, it's kind of got orange color to it. That was the way the dirt was around it, kind of fresh looking.

Q Okay. Does it strike you odd that the leaves are in the hole?

A No, sir.

Q Why?

A There was leaves all around. ***1091**

Q Yeah. Are you seeing something in these photographs that indicates to you that this was freshly dug within the past day or two or had possibly been there for quite some time?

A I couldn't say whether it was a day or two, but this looks like fresh dirt here to me.

Q Would you point to it again?

A To the right here, that looks like fresh dirt.

Q But that's not the hole, right?

A The hole is right here, yeah.

Q So you are pointing at something?

A But the way the dirt looked right here to the right is the way that it looked around the box.

Q So it was something that didn't involve the hole that made you think that this had been freshly dug?

A Yes, sir.

Q Okay.

MR. HENDRIX: Your Honor, may I have a minute?

THE COURT: Yes.

MR. HENDRIX: I will pass the witness.

Thank you, Mr. Rinke.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MS. WHATLEY

Q Prior to that day, had you ever personally met
Randeep Mann? ***1092**

A No, ma'am.

MS. WHATLEY: No questions.

THE COURT: Okay. You can stand down.

How long will your next witness be? Is it one that we
can get on before lunch?

MS. WHATLEY: Direct will probably be less than ten
minutes.

THE COURT: Let's see if we can push through and --
because we have five witnesses we swore in for this
morning.

MS. WHATLEY: Ryan Kimbell.

RYAN KIMBELL, GOVERNMENT'S WITNESS,
PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MS. WHATLEY

Q Good afternoon.

A Good afternoon.

Q Would you please state your name?

A Ryan Kimbell.

Q Spell your name for us.

A K-I-M-B-E-L-L.

Q Where are you employed?

A The City of London, Arkansas.

Q And how long have you been employed by the City
of London?

A Almost 11 years.

Q What do you do for them?

A I work for the water department, wastewater, and anything ***1093** they might need working on streets or things like that.

Q Were you working on March 3, 2009?

A Yes, ma'am.

Q Do you know Mark Rinke?

A I do.

Q Who is he?

A He is a part-time employee of the city for the street department.

Q Did the two of you go anywhere together that day?

A We did.

Q Where did you go?

A That afternoon we went up to the -- we call it Star Harbor, Galaxy Lane area of London.

Q And why did you go there?

A I went there because Mr. Rinke had told me that he had found something in that area but did not know what it was. He told me this around lunchtime and I told him when I was not busy, I will go up there and take a look at it with you. And so around 4:30 in the afternoon, we went up there and took a look.

Q Were you with Mr. Rinke when you went up there?

A Yes, ma'am.

Q When you got to the location, what did you see?

A There was a -- it was a cleared out area with just trees and grass and dirt and there was some kind of black box -- a box with black plastic on it sticking up out of the ground. ***1094**

Q When you got there, you said the black plastic was still around the box?

A It was, yes.

Q And describe the plastic for us.

A It was just a thick black plastic and duct tape had been used to seal around the case.

Q Were there any tears or deterioration on the black plastic?

A No, ma'am. It looked fairly new. There was not a lot of dirt or deterioration to it.

Q And was it -- you said it was still buried when you got there?

A It was still in the ground. I believe Mr. Rinke had kind of moved some dirt around from the edges to identify it as a box of some sort.

Q And describe the dirt that was around the box.

A The box didn't look like it had been there that long. I mean, the dirt was freshly put around it, and it just had enough scattered out to where you could see that it was a box.

Q So you said the dirt was loose?

A Yes, ma'am.

Q Was the box fully covered with the plastic and the duct tape?

A Yes, ma'am. On my recollection, it was.

Q And by being wrapped that way, was it protected from the elements? ***1095**

A It would have been, yes.

Q Did you pull the box out of the ground?

A I believe it was Mr. Rinke that actually pulled it up out of the ground. I may have helped him pull it up out of the ground. It was still in the ground when I got there. It was just the top was uncovered.

Q And what did you do after you pulled it out of the ground?

A We proceeded to remove the plastic to see what was actually in the box.

Q Did you have to cut through any duct tape to get --

A We did. We had to cut or tear the duct tape and plastic to get in the box.

Q Once you removed the plastic from the box, did you know what it was?

A Yes. Once I opened the box, I knew exactly what it was.

Q How do you know that?

A I am a ex-Marine and also a Army Reservist, and so I have been familiar with the case and the contents of the case.

Q Why don't you tell the jury about your military experience.

How long have you been in the Army Reserves?

A Almost 11 years, ma'am.

Q Have you ever been in combat?

A I have, ma' am.

Q When was that?

A I deployed to Iraq from 2005, 2006, where I was exposed to ***1096** the 40-millimeter grenades that were found. I have actually carried them on myself when I was in the combat zone.

Q Did you bring any back with you?

A No, ma'am.

Q Is that allowed?

A No, ma'am, it's not.

Q You said you were in the Marine Corps as well. When was that?

A That was in '95 to '99.

Q Have you ever been an instructor?

A I am currently a chemical instructor for the unit here in Little Rock, Arkansas.

Q With your military experience, have you ever seen ammunition canisters before?

A I have.

Q And did you open the canister that day?

A Yes, ma'am.

Q And what was in it?

A Inside there were cloth bandoleers that contained 40-millimeter grenades.

Q And when you saw them, you knew they were 40-millimeters?

A Yes, ma'am, I did.

Q Based on your prior service?

A That's correct.

Q Have you ever shot 40-millimeter grenades? ***1097**

A I have shot practice rounds, ma'am, not the real thing.

Q When did you do that?

A That would have been prior to my deployment to Iraq when I was at Fort Polk, Louisiana.

MS. WHATLEY: Your Honor, may I approach?

THE COURT: You may.

BY MS. WHATLEY

Q I am showing you what has been introduced as Government

Exhibit 99-A. Does that appear to be the canister you saw that day?

A Yes, ma'am, it does.

Q There is writing on the outside of this canister?

A Yes, ma'am.

Q Can you please tell us what each line means?

A Oh, I don't know if I could break down what each line does mean. What I identify with is the 7.62-millimeter, which is -- we call it an M-249 or a saw round, a fairly large bullet. And then the lot number would designate where, what lot that batch of ammunition came from.

Q Okay. So when you saw 7.62-millimeter on the top right-hand corner of this box, what did that tell you?

A Without opening the can, you would assume that it contained the 7.62-millimeter rounds.

Q And based on your experience in the military, is that why these markings are placed on the canister?

***1098**

A Yes, ma'am. To identify the contents.

Q Once you opened the canister, did the ammunition inside the canister match what is stated on the outside?

A No, ma'am, it did not.

Q Did you think that the rounds were live rounds?

A Yes, ma'am, I did.

Q Why?

A They -- well, I have seen them before. The HE rounds have gold, what I would call gold colored tops to them. It identifies them as highly explosive.

Q Was there anything in the box besides live rounds?

A Yes, ma'am. I did notice a -- one training round that was on top. It's identified with a blue top instead of the gold.

MS. WHATLEY: If we can look at Government Exhibit 98-G.

BY MS. WHATLEY

Q You see that on the screen in front of you?

A Yes, ma'am.

Q Can you please touch the screen and show us what was the live round?

A This gold colored top right here.

Q You can touch the screen.

A Oh, okay.

Q And the one lying beside it, what did you believe that one to be? ***1099**

A That's a practice round.

Q Have you seen practice rounds before?

A Yes, ma'am.

Q Have you seen live rounds before?

A Yes, ma'am.

Q Have you ever seen 40-millimeter grenades outside of the military setting?

A No, ma'am, I had not.

Q Did you take any of the rounds out of the bands?

A To look at them, yes, ma'am.

Q What did you do after that?

A At that time, once we identified what they were, I set them back in the canister, proceeded to contact my boss, the mayor of London, and asked him how to proceed. And at that time he called the sheriff's department, and we waited on site until the sheriff's department arrived.

Q And someone from the sheriff's office did show up?

A Yes, ma'am.

Q And what happened once that person got there?

A We showed him what we had found. He brought a camera and proceeded to take some pictures. We identified ourselves to him, and at that time he told us we could leave the area and that's what we did, leaving it in his possession.

Q Did you touch the canister or the grenades after the person from the sheriff's office got there? ***1100**

A Not after he arrived, no, ma'am.

MS. WHATLEY: Your Honor, may I have a moment?

THE COURT: Yes.

MS. WHATLEY: No further questions.

CROSS-EXAMINATION

BY MR. HENDRIX

Q Mr. Kimbell, excuse me.

A Yes, sir.

Q Just a few quick areas. The -- you and Mr. Rinke work together for the city?

A Yes, sir, we do.

Q It is a part-time job for him?

A Yes, sir.

Q You are full time?

A Correct.

Q Are you also friends or is it a coworker?

A We're friends at work. We don't really have much dealings outside of work.

Q Does he know your military background?

A Yes, sir, he does.

Q Is that why he came to you to say, Can you come out and look at this thing?

A Oh, no, sir. He had no idea, until we broke the plastic, what kind of container it was. So there is no reason he would have looked at a military person for that kind of information. ***1101**

Q So it was -- it then just ended up being fortuitous that he picked you, who does have a military background and some familiarity with 40-millimeter --

A Yes, sir. That was just a consequence (sic). There was only one other person there at the city that he could have chosen to go up there with him.

Q I was just curious because both of you-all have stated an opinion in that it was that this ammo can did not appear to have been buried there very long. And Mr. Rinke and I went through those pictures. Can you tell me what you base your opinion on?

A I guess on things that I have seen that have been buried in the ground for a time. They are going to have some deterioration and look dirtier than what that canister and plastic appeared to be.

Q Well, since you gave an opinion, let me ask. In your opinion could it have been buried as long as a week?

A That's possible, sir. I couldn't say.

Q A month?

A Possibly.

Q Six months?

A I am not an expert, sir.

Q A year?

A No, sir. In my opinion, no, sir, absolutely not. But that's just my opinion.

Q An investigator that works for us is an old state police ***1102** officer, a guy named Jim Keen. And Jim came out to talk to you during this, and you refused to talk to him. Can you tell me why --

A I didn't feel it was pertinent prior to this case, sir.

Q It was after Dr. Mann had been charged.

A It was my understanding that this would all be talked about at trial, not prior to that.

Q You talked to members of law enforcement, didn't you?

A Just ATF when I have been interviewed.

Q And you have been interviewed by ATF, correct?

A Correct.

Q But you didn't want to be interviewed by our side?

A Law enforcement, I would have no problem, sir, but he was a private investigator. With his agenda, I felt that was different.

Q You talked to law enforcement, but you won't talk to the other side is what I am hearing?

A I see a difference between a private investigator and law enforcement, sir.

Q Even though he is former state police?

A Former is not a police officer, sir.

Q Okay. Were you told not to talk to us?

A No, sir, I was not.

Q Okay. That's all I have got.

THE COURT: Any follow-up? ***1103**

MS. WHATLEY: No, Your Honor.

THE COURT: Okay. You can stand down.