

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

RYAN KEITH MATHISON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C09-4045-MWB
(CR06-4030-MWB)

**MEMORANDUM OPINION AND
ORDER REGARDING
PETITIONER'S AMENDED § 2255
MOTION**

TABLE OF CONTENTS

| | |
|--|----|
| <i>I. INTRODUCTION AND BACKGROUND</i> | 2 |
| <i>A. The Petitioner's Charges, Sentence and Appeal</i> | 2 |
| <i>B. The Petitioner's § 2255 Motion and Amended Motion</i> | 4 |
| <i>II. PRELIMINARY MATTERS</i> | 6 |
| <i>III. LEGAL ANALYSIS</i> | 7 |
| <i>A. Standards For Relief Pursuant To § 2255</i> | 7 |
| <i>B. Ineffective Assistance Of Counsel</i> | 10 |
| <i>1. Applicable standards</i> | 10 |
| <i>2. Failure to withdraw</i> | 14 |
| <i>3. Failure to raise Gall at sentencing</i> | 17 |
| <i>4. Failure to seek a change of venue</i> | 20 |
| <i>C. Prosecutorial Misconduct Claim</i> | 25 |
| <i>D. Newly Discovered Evidence</i> | 27 |
| <i>E. Certificate Of Appealability</i> | 29 |
| <i>IV. CONCLUSION</i> | 30 |

This case is before me on petitioner Ryan Keith Mathison's Amended Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody. Mathison claims that his trial and appellate counsel provided him with ineffective assistance in various ways. The respondent denies that Mathison is entitled to any relief on his claims.

I. INTRODUCTION AND BACKGROUND

A. The Petitioner's Charges, Sentence and Appeal

On June 21, 2006, a grand jury returned a seven-count Second Superseding indictment (Crim. docket no. 185) charging Mathison with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. §§ 848(a) & (c) (Count 1); conspiracy to possess with intent to distribute marijuana, cocaine, methamphetamine, and anabolic steroids, in violation of 21 U.S.C. §§ 841(b)(1)(A) & 846 (Count 2); conspiracy to engage in money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), (B)(i), (B)(ii) and § 1956(h) (Count 3); and filing false tax returns, in violation of 26 U.S.C. § 7206(1) (Counts 4-7).

Trial in this case began on November 6, 2006.¹ Near the end of the trial, after all but one of the prosecution's witnesses had testified, Mathison voluntarily absconded, violating his pretrial release. Due to the potential danger of prejudice from publicity, I polled the jurors individually to see if they were aware of any pretrial publicity. If an individual juror had been exposed to pretrial publicity, I then proceeded to ascertain the

¹Mathison was tried jointly with two co-defendants: Robert O. Mathison, Sr., his father, and Ronald Mathison, his brother.

extent and effect of the exposure. One juror was ultimately excused and replaced with an alternate juror on partiality grounds. The remaining jurors indicated they could decide the case based on the facts introduced at trial and not on the nature of any publicity to which they had been exposed.

On November 15, 2006, the jury returned a guilty verdict on all counts. On November 20, 2006, although Mathison was still at large, his counsel timely filed a Motion for Judgment of Acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, or in the alternative, a Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. In his Motion for Judgment of Acquittal, Mathison contended the evidence produced at trial was insufficient to support a finding of guilt on each and every count. He alternatively argued he was entitled to a new trial because the evidence weighed heavily enough against the verdict to indicate a miscarriage of justice had occurred. He also contended a new trial was warranted in the interests of justice because he was unduly prejudiced by my failure to grant a mistrial due to the mid-trial publicity that resulted after he absconded. The prosecution timely resisted Mathison's post-trial motions. On November 27, 2007, Mathison was apprehended in Juarez, Mexico and returned to Iowa. On January 5, 2007, I denied Mathison's Motion for Judgment of Acquittal and Motion for New Trial.

On May 2, 2007, I sentenced Mathison to 372 months imprisonment on Count 1, 240 months imprisonment on Count 3, and 36 months on each of Counts 4 through 7, the sentences to be served concurrently, and 5 years of supervised release.² On May 15,

²I dismissed the conspiracy count, Count 2, as a lesser included offense of the continuing criminal enterprise count. *See United States v. Van Nguyen*, 602 F.3d 886, 900 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 897 (2011); *United States v. Jelinek*, 57 F.3d (continued...)

2007, Mathison appealed his sentence. On appeal, Mathison contended there was insufficient evidence to sustain the jury's verdict, and it was error to deny his motion for a mistrial based on the jurors' exposure to news and other information concerning his flight. After the case was submitted, Mathison filed a letter with the court of appeals, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, attempting to raise for the first time a sentencing argument based on the Supreme Court's decision in *Gall v. United States*, 552 U.S. 38 (2007). On March 11, 2008, the Eighth Circuit Court of Appeals denied Mathison's appeal. See *United States v. Mathison*, 518 F.3d 935, 942 (8th Cir.), *cert. denied*, 128 S. Ct. 2895 (2008). The court of appeals concluded substantial evidence supported Mathison's convictions for engaging in a continuing criminal enterprise, conspiracy to commit money laundering, and filing of false tax returns. *Id.* at 941. The court of appeals further determined I had "meticulously followed" this circuit's prescribed procedure for handling the jurors' possible exposure to adverse publicity or other outside influence concerning Mathison's flight and that I had not abused my discretion in deciding not to grant a new trial. *Id.* Finally, the court of appeals held Mathison could not raise a new argument in the Rule 28(j) letter, but added "that Mathison and his counsel argued unsuccessfully before the district court that Mathison should receive a variance from the Guidelines sentence, and there is no indication whatsoever that the district court misunderstood the extent of his discretion or erred in exercising it." *Id.* at 942.

On May 5, 2008, Mathison filed a petition for a writ of *certiorari* with the United States Supreme Court. On June 11, 2008, the Court denied Mathison's petition for a writ

²(...continued)
655, 660 (8th Cir. 1995).

of *certiorari*.

B. The Petitioner's § 2255 Motion and Amended Motion

On June 2, 2009, Mathison filed his Motion Under § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Civ. docket no. 2) (“Motion”). In his Motion, Mathison alleges his trial counsel provided ineffective assistance, in violation of the Sixth Amendment, by failing to request a change of venue, and in failing to withdraw when a conflict of interest between counsel and Mathison became apparent. Mathison also argues his Fifth and Fourteenth Amendment rights to equal protection were violated by the disparity in sentencing between himself and co-defendant Shad Derby, and his appellate counsel was ineffective in failing to raise this ground on direct appeal. In addition, Mathison contends that his trial counsel was ineffective in failing to raise a sentencing challenge pursuant to *Gall v. United States*, 552 U.S. 38 (2007), in order to preserve the issue for appeal. On July 14, 2009, Mathison filed a *pro se* Motion for Substitute Counsel (Civ. docket no. 8). Concurrently, Mathison’s counsel filed a Motion to Withdraw (Civ. docket no. 9). Both motions were granted (Civ. docket no. 10), and substitute counsel was appointed to represent Mathison on his Motion. On October 18, 2009, Mathison’s substitute counsel moved to withdraw and filed a brief under *Anders v. California*, 386 U.S. 738 (1967) (Civ. docket no. 21) challenging Mathison’s conviction and sentence. Mathison moved for appointment of new counsel. Mathison’s motion for new counsel was granted on November 2, 2009 (Civ. docket no. 27), and a second substitute attorney was appointed to represent Mathison on his Motion.

On January 28, 2010, Mathison sought leave to amend his Motion and to file an amended supporting brief. On this same date, Mathison’s Motion to Amend was granted. He then filed his Amended Motion Under § 2255 To Vacate, Set Aside, Or Correct

Sentence By A Person In Federal Custody (Civ. docket no. 36) (“Amended Motion”) and supporting brief. In his Amended Motion, Mathison alleges his trial counsel provided ineffective assistance in failing to withdraw when a per se conflict of interest between counsel and Mathison was created, in failing to raise a sentencing challenge pursuant to *Gall*, and for failing to request a change of venue. Mathison also argues respondent committed prosecutorial misconduct by using the unreliable testimony of Shad Derby during Mathison’s trial. In addition, Mathison contends newly discovered evidence, the unreliability of Shad Derby’s testimony, entitles him to a new trial. The respondent filed its Resistance (Civ. docket no. 41) on March 29, 2010. On May 3, 2010, Mathison filed Petitioner’s Reply Brief (Civ. docket no. 42) in support of his Amended Motion. On this same date, Mathison filed his Motion to View Presentence Investigation Report. On May 4, 2010, Mathison’s Motion to View Presentence Investigation Report was granted. Mathison has not supplemented his brief since being provided a copy of his Presentence Investigation Report.

II. PRELIMINARY MATTERS

“A district court does not err in dismissing a movant’s section 2255 motion without a hearing if (1) the movant’s ‘allegations, accepted as true, would not entitle’ the movant to relief, or ‘(2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’” *Buster v. United States*, 447 F.3d 1130, 1132 (8th Cir. 2006) (quoting *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003), with citation and quotation marks omitted); *see* 28 U.S.C. § 2255. In this case, I conclude that no evidentiary hearing is required on any issue, because the record conclusively shows that Mathison’s allegations, if accepted as true, would not entitle him to relief because he can demonstrate no prejudice and further

that Mathison's allegations cannot be accepted as true because they are contradicted by the record.

Claims are procedurally defaulted if not raised at trial or on direct appeal. *See Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) ("Section 2255 relief is not available to correct errors which could have been raised at trial or on direct appeal, absent a showing of cause and prejudice, or a showing that the alleged errors were fundamental defects resulting in a complete miscarriage of justice." (internal citations omitted)); *accord Johnson v. United States*, 278 F.3d 839, 844 (8th Cir. 2002) ("In order to obtain collateral review of a procedurally defaulted issue, [a § 2255 movant] must show 'either cause and actual prejudice, or that he is actually innocent.'" (quoting *Bousley*, 523 U.S. at 622, with citations omitted)). However, the "cause and prejudice" that must be shown to resuscitate a procedurally defaulted claim may include "ineffective assistance of counsel." *See Becht v. United States*, 403 F.3d 541, 545 (8th Cir. 2005). Where possible, I have construed otherwise potentially defaulted claims as claims of ineffective assistance of counsel, and have assumed, without deciding, that Mathison can show "cause and prejudice" to overcome defaulted claims, *inter alia*, as the result of "ineffective assistance" of trial and appellate counsel. Thus, I will pass on to the merits of Mathison's claims for § 2255 relief.

III. LEGAL ANALYSIS

A. Standards For Relief Pursuant To § 2255

Turning to the legal analysis of Mathison's claims, in light of the evidence in the record, I note § 2255 provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be

released upon the ground [1] that the sentence was imposed in violation of the Constitution or laws of the United States, or [2] that the court was without jurisdiction to impose such sentence, or [3] that the sentence was in excess of the maximum authorized by law, or [4] is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255; *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007) (“Under 28 U.S.C. § 2255 a defendant in federal custody may seek post conviction relief on the ground that his sentence was imposed in the absence of jurisdiction or in violation of the Constitution or laws of the United States, was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”); *Bear Stops v. United States*, 339 F.3d 777, 781 (8th Cir. 2003) (“To prevail on a § 2255 motion, the petitioner must demonstrate a violation of the Constitution or the laws of the United States.”). Thus, a motion pursuant to § 2255 “is ‘intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.’” *United States v. Wilson*, 997 F.2d 429, 431 (8th Cir. 1993) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)); accord *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995) (quoting *Wilson*).

One “well established principle” of § 2255 law is that “[i]ssues raised and decided on direct appeal cannot ordinarily be relitigated in a collateral proceeding based on 28 U.S.C. § 2255.” *Theus v. United States*, 611 F.3d 441, 449 (8th Cir. 2010) (quoting *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001)); *Bear Stops*, 339 F.3d at 780. One exception to that principle arises when there is a “miscarriage of justice,” although the Eighth Circuit Court of Appeals has “recognized such an exception only when petitioners have produced convincing new evidence of actual innocence,” and the Supreme Court has not extended the exception beyond situations involving actual innocence. *Wiley*, 245 F.3d at 752 (citing cases, and also noting that “the Court has emphasized the

narrowness of the exception and has expressed its desire that it remain ‘rare’ and available only in the ‘extraordinary case.’” (citations omitted)). Just as § 2255 may not be used to relitigate issues raised and decided on direct appeal, it also ordinarily “is not available to correct errors which could have been raised at trial or on direct appeal.” *Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (*per curiam*). “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.” *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal quotations and citations omitted).

“Cause and prejudice” to resuscitate a procedurally defaulted claim may include ineffective assistance of counsel, as defined by the *Strickland* test, discussed below. *Theus*, 611 F.3d at 449. Indeed, *Strickland* claims are not procedurally defaulted when brought for the first time pursuant to § 2255, because of the advantages of that form of proceeding for hearing such claims. *Massaro v. United States*, 538 U.S. 500 (2003). Otherwise, “[t]he Supreme Court recognized in *Bousley* that ‘a claim that “is so novel that its legal basis is not reasonably available to counsel” may constitute cause for a procedural default.’” *United States v. Moss*, 252 F.3d 993, 1001 (8th Cir. 2001) (quoting *Bousley*, 523 U.S. at 622, with emphasis added, in turn quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)). The “actual innocence” that may overcome either procedural default or allow relitigation of a claim that was raised and rejected on direct appeal is a demonstration “that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted [the petitioner].” *Johnson v. United States*, 278 F.3d 839, 844 (8th Cir. 2002) (quoting *Bousley*, 523 U.S. at 623); *see also House v. Bell*, 547 U.S. 518, 536-37 (2006). ““This is a strict standard; generally, a petitioner cannot show actual innocence where the evidence is sufficient to support a [conviction on the charged offense].” *Id.*

(quoting *McNeal v. United States*, 249 F.3d 747, 749-50 (8th Cir. 2001)).

The Eighth Circuit Court of Appeals will review the district court's decision on a § 2255 motion *de novo*, regardless of whether the district court's decision grants or denies the requested relief. Compare *United States v. Hilliard*, 392 F.3d 981, 986 (8th Cir. 2004) ("We review the district court's decision to grant or deny relief on a petitioner's ineffective assistance of counsel claim *de novo*.") (citing *United States v. White*, 341 F.3d 673, 677 (8th Cir. 2003)); with *United States v. Hernandez*, 436 F.3d 851, 854 (8th Cir. 2006) ("We review *de novo* the district court's denial of a section 2255 motion.") (quoting *Never Misses A Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005)). However, "[a]ny underlying fact-findings are reviewed for clear error." *Hernandez*, 436 F.3d at 855 (quoting *United States v. Davis*, 406 F.3d 505, 508 (8th Cir. 2005)). With these standards in mind, I turn to analysis of Mathison's claims for § 2255 relief.

B. Ineffective Assistance Of Counsel

1. Applicable standards

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI. Thus, a criminal defendant is constitutionally entitled to the effective assistance of counsel both at trial and on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003); see also *Steele v United States*, 518 F.3d 986, 988 (8th Cir. 2008). The Eighth Circuit Court of Appeals has recognized that, if a defendant was denied the effective assistance of counsel guaranteed by the Sixth Amendment, "then his sentence was imposed 'in violation of the Constitution,' . . . and he is entitled to relief" pursuant to § 2255(a). *King v. United States*, 595 F.3d 844, 852 (8th Cir. 2010). Both the

Supreme Court and the Eighth Circuit Court of Appeals have expressly recognized that a claim of ineffective assistance of counsel should be raised in a § 2255 proceeding, rather than on direct appeal, because such a claim often involves facts outside of the original record. *See Massaro*, 538 U.S. at 504-05 (2003); *United States v. Hughes*, 330 F.3d 1068, 1069 (8th Cir. 2003) (“When claims of ineffective assistance of trial counsel are asserted on direct appeal, we ordinarily defer them to 28 U.S.C. § 2255 proceedings.”).

The Supreme Court has reiterated that “‘the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial.’” *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1403 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). That being the case, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’” *Id.* (quoting *Strickland*, 466 U.S. at 686, with emphasis added). To assess counsel’s performance against this benchmark, the Supreme Court developed in *Strickland* a two-pronged test requiring the petitioner to show “both deficient performance by counsel and prejudice.” *See Strickland*, 466 U.S. at 687-88, 697; *see also Knowles v. Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411, 1419 (2009). “‘Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.’” *Gianakos v. United States*, 560 F.3d 817, 821 (8th Cir. 2009) (quoting *Strickland*, 466 U.S. at 687).

As to the deficient performance prong, “The Court acknowledged [in *Strickland*] that ‘[t]here are countless ways to provide effective assistance in any given case,’ and that ‘[e]ven the best criminal defense attorneys would not defend a particular client in the same way.’” *Pinholster*, ___ U.S. at ___, 131 S. Ct. at 1403 (quoting *Strickland*, 466 U.S. at

689). Moreover,

Recognizing the “tempt[ation] for a defendant to second-guess counsel’s assistance after conviction or adverse sentence,” [*Strickland*, 466 U.S. at 689], the Court established that counsel should be “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” *id.*, at 690, 104 S. Ct. 2052. To overcome that presumption, a defendant must show that counsel failed to act “reasonabl[y] considering all the circumstances.” *Id.*, at 688, 104 S. Ct. 2052. The Court cautioned that “[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.” *Id.*, at 690, 104 S. Ct. 2052.

Pinholster, ___ U.S. at ___, 131 S. Ct. at 1403. To put it another way,

To establish deficient performance, a person challenging a conviction must show that “counsel’s representation fell below an objective standard of reasonableness.” [*Strickland*,] 466 U.S. at 688, 104 S. Ct. 2052. . . . The challenger’s burden is to 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, 104 S. Ct. 2052.

Harrington v. Richter, ___ U.S. ___, ___, 131 S. Ct. 770, 787 (2011); *Premo v. Moore*, ___ U.S. ___, 131 S. Ct. 733, 739 (2011) (quoting *Richter*). There are two substantial impediments to making the required showing. First, “[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006) (quoting *Strickland*, 466 U.S. at 690). Second, “[t]here is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Id.* (quoting *Strickland*, 466 U.S. at 689); *Davis v. Norris*, 423 F.3d 868, 877 (8th Cir. 2005) (“To

satisfy this prong [the movant] must overcome the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance.”). Also, the court “‘must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.”’” *King*, 595 F.3d at 852-53 (quoting *Ruff v. Armontrout*, 77 F.3d 265, 268 (8th Cir. 1996), in turn quoting *Strickland*, 466 U.S. at 690).

The second prong of the *Strickland* analysis requires the challenger to prove prejudice. *Pinholster*, ___ U.S. at ___, 131 S. Ct. at 1403 (citing *Strickland*, 466 U.S. at 691-92). “‘An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.’” *Gianakos*, 560 F.3d at 821 (quoting *Strickland*, 466 U.S. at 691). As the Supreme Court has explained,

“The 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.” [*Strickland*, 466 U.S.] at 694, 104 S. Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Ibid*. That requires a “substantial,” not just “conceivable,” likelihood of a different result. *Richter*, 562 U.S., at ----, 131 S. Ct., at 791.

Pinholster, ___ U.S. at ___, 131 S. Ct. at 1403. Even where the petitioner “suffered prejudice from his lawyer’s error,” he is not entitled to § 2255 relief unless the lawyer’s error was also the result of conduct that was professionally unreasonable at the time. *King*, 595 F.3d at 852-53.

The two prongs of the “ineffective assistance” analysis are usually described as sequential. Thus, if the movant fails to show deficient performance by counsel, the court need proceed no further in its analysis of an “ineffective assistance” claim. *United States*

v. Walker, 324 F.3d 1032, 1040 (8th Cir. 2003). On the other hand, courts “do not . . . need to address the performance prong if petitioner does not affirmatively prove prejudice.” *Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710 (8th Cir. 1997)); accord *Gianakos*, 560 F.3d at 821 (“We need not inquire into the effectiveness of counsel, however, if we determine that no prejudice resulted from counsel’s alleged deficiencies.” *Hoon v. Iowa*, 313 F.3d 1058, 1061 (8th Cir. 2002) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. 2052).”).

2. Failure to withdraw

Mathison argues his trial counsel provided ineffective assistance by failing to withdraw after he created a per se conflict of interest by effectively advising Mathison to flee to Mexico. Mathison contends that on November 6, 2006, his counsel stated to him, “You must have pretty big balls. If I were you, I’d be in Mexico by now.”³ (Petitioner’s Amended Brief at 4, Civ. docket no. 36-2). Mathison alleges he construed this as legal advice and fled to Mexico on November 12, 2006. He argues if counsel had not advised him to flee, he would not have done so, and been prejudiced by a 2-level sentencing enhancement for obstruction of justice. He argues counsel’s failure to disclose this alleged statement to the court created a conflict of interest. Respondent disagrees that a conflict of interest existed and contends, even assuming a conflict did exist, Mathison was not prejudiced.

The United States Supreme Court has recognized that the Sixth Amendment right to counsel includes “a correlative right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981); see *Smith v. Lockhart*, 923 F.2d

³In his original Motion, Mathison alleged counsel told him: “If it was me, I’d be in Mexico by now.” (Motion at ¶ 12(a), Civ. docket no. 2).

1314, 1320 (8th Cir. 1991). Conflicts may arise due to an attorney’s serial or multiple representation of defendants. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980). In those instances, prejudice is presumed because, in such circumstances, the attorney is breaching one of the most basic of counsel’s duties, the duty of loyalty. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *Cuyler*, 446 U.S. at 345-50). To be entitled to such a presumption, a petitioner must “demonstrate[] that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Id.* (quoting *Cuyler*, 446 U.S. at 350, 348)); *see Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006) (quoting *Cuyler*, 446 U.S. at 348)); *see also Mickens v. Taylor*, 535 U.S. 162, 166-76 (2002).

Mathison argues that the standard announced in *Cuyler* is controlling. The Supreme Court has not extended the *Cuyler* standard that presumes prejudice to conflicts other than those arising from situations in which an attorney represents more than one defendant. *Mickens v. Taylor*, 535 U.S. 162, 174-75 (2002). Similarly, the Eighth Circuit Court of Appeals has not extended *Cuyler*’s presumed prejudice analysis beyond conflicts arising from multiple representation. *See Noe v. United States*, 601 F.3d 784, 790 (8th Cir. 2010); *Covey v. United States*, 377 F.3d 903, 907 (8th Cir. 2004); *Wemark v. Iowa*, 322 F.3d 1018, 1021(8th Cir. 2003). When the presumption of prejudice does not apply to a conflict of interest situation, the court determines whether the prejudice requirement of *Strickland* is satisfied. *See United States v. Young*, 315 F.3d 911, 914 n. 5 (8th Cir. 2003) (“where the alleged conflict involves ethical issues other than multiple or serial representation, this Circuit has held that *Strickland* is the appropriate standard”). To establish prejudice under *Strickland*, a petitioner must demonstrate “‘a reasonable probability that, but for counsel’s [conflict], the result of the proceeding would have been different.’” *Armstrong v. Kemna*, 590 F.3d 592, 595-96 (8th Cir. 2010) (quoting

McCauley-Bey v. Delo, 97 F.3d 1104, 1105 (8th Cir. 1996)), *cert. denied*, 130 S. Ct. 3369 (2010). “‘A reasonable probability is [a probability] sufficient to undermine confidence in the outcome.’” *Id.* at 596 (quoting *McCauley-Bey*, 97 F.3d at 1105); *accord Carroll v. Schriro*, 243 F.3d 1097, 1100 (8th Cir. 2001) (quoting *Strickland*, 466 U.S. at 694).

I need not decide whether *Cuyler* applies here, because Mathison’s ineffective assistance of counsel claim fails under either *Cuyler* or *Strickland*. See *Covey*, 377 F.3d at 907 (concluding that the petitioner would lose under either *Cuyler* or *Strickland* and declining to decide the applicability of *Cuyler*); *Caban v. United States*, 281 F.3d 778, 783-84 (8th Cir. 2002) (same). *Cuyler* established that “a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance.” *Cuyler*, 446 U.S. at 337, 348. This standard does not require an “inquiry into actual conflict as something separate and apart from adverse effect.” *Mickens*, 535 U.S. at 172 n.5. “An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.” *Id.* The effect must be actual and demonstrable, causing the attorney to choose to engage or not to engage in particular conduct. *Covey*, 377 F.3d at 908. To make such a showing, Mathison must “‘identify a plausible alternative defense strategy or tactic that defense counsel might have pursued, show that the alternative strategy was objectively reasonable under the facts of the case, and establish that the defense counsel’s failure to pursue that strategy or tactic was linked to the actual conflict.’” *Noe*, 601 F.3d at 790 (quoting *Winfield v. Roper*, 460 F.3d 1026, 1039 (8th Cir. 2006) (quoting in turn *Covey*, 377 F.3d at 908) (internal quotations omitted)).

Even accepting as true Mathison’s unsubstantiated contention that his attorney stated, “You must have pretty big balls. If I were you, I’d be in Mexico by now”, Mathison’s claim fails. The statement cannot reasonably be construed to be advice of

counsel to flee to Mexico.⁴ If the statement was made, it was clearly an unsolicited, off-hand comment by counsel. The Iowa Rules of Professional Conduct prohibit attorneys from advising clients to commit criminal acts.⁵ Moreover, Mathison can not establish he relied on his counsel's statement in good faith. Mathison knew it would be illegal for him to flee. He had specifically been warned of the illegality of absconding during his pretrial release. *See* Order Setting Conditions of Release, *United States v. Mathison*, 06-MJ0053-PAZ (docket no. 20). Reliance on his counsel's statement as legal advice to flee is objectively unreasonable under the facts here. Mathison's claim of ineffective assistance of counsel is denied.

3. Failure to raise *Gall* at sentencing

Mathison also argues his trial counsel provided ineffective assistance by failing to raise and preserve an argument based on the pending case of *United States v. Gall*, 552 U.S. 38 (2007). He reasons that had his trial counsel raised *Gall*, the court would have had to rule on Mathison's claim for a downward variance based on his withdrawal from the conspiracy which would have preserved the issue for appeal. Respondent contends Mathison's counsel's failure to anticipate a change in the law does not constitute ineffective

⁴Mathison's trial counsel disputes making the statement attributed to him.

⁵Iowa Rule of Professional Conduct 32:1.2(d) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

assistance of counsel.

In *Gall*, the defendant had participated in a conspiracy to distribute ecstasy while in college. *Id.* at 41. His role was limited to delivering drugs between conspirators. *Id.* The defendant stopped using drugs, and withdrew from the conspiracy seven months after joining it. *Id.* The defendant graduated from college and became a successful master carpenter. *Id.* at 41-42. Two years after withdrawing from the conspiracy, the defendant was questioned by law enforcement officers about it and admitted his participation. *Id.* at 42. Three and a half years after withdrawing from the conspiracy, the defendant was indicted for conspiracy to distribute illegal drugs. *Id.* When he received notice of the indictment, the defendant surrendered to the authorities. He then started his own successful construction business while free on his own recognizance. *Id.* He pleaded guilty. *Id.* His co-conspirators, who had not withdrawn from the conspiracy, received sentences ranging from 30 to 36 months. *Id.* at 54-55. The defendant's sentencing guidelines range was 30 to 37 months. *Id.* at 43. The district court varied downward from that range to a sentence of probation, based on the defendant's youth and immaturity when he committed the crime, that he had withdrawn from the conspiracy years before his indictment, and his post-offense conduct. *Id.* at 43-44. In response to the prosecution's argument for a guidelines range sentence on the ground that the three co-conspirators had received sentences in that range, the district court noted that, unlike the defendant, the other conspirators had continued with the conspiracy. *Id.* at 54-55. The Eighth Circuit Court of Appeals vacated the sentence as unreasonable, concluding the district court had erred by giving too much weight to the defendant's voluntary withdrawal, his age at the time of the offense, and his post-offense rehabilitation, and too little consideration to the need to avoid unwarranted sentence disparities. *Id.* at 45. The Supreme Court reversed after discussing "the unique facts of Gall's situation." *Id.* at 54. The Court rejected any

requirement that an outside-the-guidelines sentence must be justified by “extraordinary” circumstances, and rejected any “rigid mathematical formula” for determining a specific sentence. *Id.* at 47. The Court instructed that the sentencing court must give “serious consideration” to the extent of any departure from the guidelines, and must offer “sufficient justifications” for its conclusion that an unusually harsh or light sentence is appropriate. *Id.* at 46. The Court explained the justification for the deviation from the guidelines range must be “sufficiently compelling to support the degree of the variance.” *Id.* at 50. The court of appeals erred by giving “virtually no deference” to the district court’s decision that a significant variance from the guidelines was justified. *Id.* at 56. The Court decided that it was entirely reasonable for the district court to give substantial weight to the defendant’s voluntary withdrawal. Unlike all his co-defendants and “the vast majority of defendants convicted of conspiracy in federal court,” the defendant’s efforts at self-rehabilitation began long before he got caught, which provided “greater justification for believing Gall’s turnaround was genuine.” *Id.* at 56-57. It was also reasonable for the district court to conclude that a guidelines range sentence for Gall would have created unwarranted sentencing disparities, because his co-conspirators who were sentenced within the guidelines had not voluntarily withdrawn from the conspiracy and had not shown any comparable rehabilitation. *Id.* at 55-56. The district court reasonably concluded under the case’s unusual facts that the § 3553(a) factors “on the whole” justified the below-the-guidelines sentence. *Id.* at 59-60.

When Mathison was sentenced on May 2, 2007, the United States Supreme Court had not ruled on Gall’s petition for a writ of certiorari. The Court did not grant Gall’s petition until June 11, 2007, and did not hand down its decision until December 10, 2007. Mathison’s counsel was not ineffective for failing to anticipate later decisions or developments of the law. *Sasser v. Norris*, 553 F.3d 1121, 1127 (8th Cir. 2009); *Parker*

v. Bowersox, 188 F.3d 923, 928-29 (8th Cir. 1999). At the time Mathison was sentenced, the Eighth Circuit Court of Appeals’s decision in *Gall* was controlling precedent. Counsel’s decision not to raise an issue unsupported by then-existing precedent does not constitute ineffective assistance. *Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002). Mathison has not established that his counsel’s conduct fell outside the “wide range of reasonable professional assistance.” *United States v. Orr*, 636 F.3d 944, 950 (8th Cir. 2011) (quoting *Strickland*, 466 U.S. at 689); see *Noe v. United States*, 601 F.3d 784, 791 (8th Cir. 2010). If the petitioner fails to show deficient performance by counsel, the court need proceed no further in its analysis of an “ineffective assistance” claim. *United States v. Walker*, 324 F.3d 1032, 1040 (8th Cir. 2003). Nonetheless, Mathison has also not established he was prejudiced by his counsel’s failure to raise the *Gall* decision. An argument under *Gall* at sentencing would not have changed the outcome of Mathison’s sentencing, and therefore, Mathison cannot establish prejudice. The record in this case reflects that I did not consider myself bound by the Guideline range in sentencing Mathison, and I undertook an individualized analysis of the Section 3553(a) factors in denying Mathison’s Motion for Variance and imposing his sentence. See Sentencing Tr. at 37 (Crim. docket no. 498). Under these circumstances, Mathison cannot demonstrate his sentence would have been different had I considered *Gall*. Thus, Mathison’s claim on this ground fails.

4. Failure to seek a change of venue

Mathison further argues his trial counsel provided ineffective assistance by failing to seek a change of venue because of adverse pretrial publicity. Respondent argues Mathison cannot demonstrate his counsel was ineffective in not seeking a change of venue because he cannot establish he was prejudiced.

Federal Rule of Criminal Procedure 21(a) provides:

Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that *so great a prejudice* against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

FED. R. CRIM. P. (emphasis added). In order to determine if transfer is required by Rule 21(a), the Eighth Circuit Court of Appeals has established a two-tier analysis:

At the first tier, the question is whether pretrial publicity was so extensive and corrupting that a reviewing court is required to presume unfairness of constitutional magnitude. Because our democracy tolerates, even encourages, extensive media coverage of crimes such as murder and kidnapping, the presumption of inherent prejudice is reserved for rare and extreme cases. In all other cases, the change-of venue question turns on the second tier of our analysis, whether the voir dire testimony of those who became trial jurors demonstrated such actual prejudice that it was an abuse of discretion to deny a timely change-of-venue motion.

United States v. Blom, 242 F.3d 799, 804 (8th Cir. 2001) (internal citations and quotations omitted); accord *United States v. Gamboa*, 439 F.3d 796, 815 (8th Cir. 2006) (stating the same two-tiered analysis); *United States v. Nelson*, 347 F.3d 701, 707-08 (8th Cir. 2003) (same); *United States v. Allee*, 299 F.3d 996, 1000 (8th Cir. 2002) (same). The court of appeals has repeatedly explained that a district court's *denial* of a motion for change of venue is reviewed for abuse of discretion. See, e.g., *Gamboa*, 439 F.3d at 815; *Nelson*, 347 F.3d at 707; *Allee*, 299 F.3d at 999; *Blom*, 242 F.3d at 803.

Mathison argues pretrial publicity was so extensive and corrupting that I am required to presume unfairness of a constitutional magnitude and points to statements made by prospective jurors during voir dire. At this first tier of the analysis, a court must determine whether the pretrial publicity was "so extensive and corrupting" that the court

must presume “unfairness of constitutional magnitude.” *Nelson*, 347 F.3d at 707. A court must be mindful “that ‘the presumption of inherent prejudice is reserved for rare and extreme cases,’ [citation omitted,] and that a defendant ‘must satisfy a high threshold of proof in order to prove inherent prejudice.’” *Id.* at 707-08 (first quoting *Blom*, 242 F.3d at 803, then quoting *Pruett*, 153 F.3d at 585).

The Eighth Circuit Court of Appeals has considered the extent and nature of pretrial media coverage. In *Allee*, the court noted that “[t]he mere existence of press coverage, however, is not sufficient to create a presumption of inherent prejudice”; rather, “[t]o create a presumption, the coverage must be inflammatory and accusatory.” *Allee*, 299 F.3d at 1000; *accord Blom*, 242 F.3d at 804 (also considering whether the coverage was extensive and whether that coverage was “inflammatory or accusatory”); *Pruett*, 153 F.3d at 585 (merely documenting the quantum of media coverage is not enough). Even so, “[i]solated incidents of intemperate commentary about the crimes and perpetrators . . . do not rise to the level of inflammatory or accusatory [reports] where for the most part, the reporting appears to have been objective and unemotional.” *Id.*

A court must also consider “the time frames in which the bulk of the coverage occurred,” including such incidents as the crimes themselves, any arrests, periods encompassing a guilty plea, or periods encompassing an unusual event, such as a jailbreak, and the time of those events relative to the time of trial, *id.*; the extent to which the defendant had himself or herself invited the pretrial publicity, *see Pruet v. Norris*, 153 F.3d 579, 585 (8th Cir. 1998) (the defendant had made several statements to the media in which he implicated himself in the crimes and described himself as a “mad-dog killer”); and whether a “circus atmosphere” prevailed around the trial owing to the amount and nature of the media attention. *Id.* at 586 (finding that the media attention was “largely unexceptional, perhaps even less pervasive and inflammatory than publicity generated in

similar cases,” so that there was no such “circus atmosphere”); *Snell v. Lockhart*, 14 F.3d 1289, 1293 (8th Cir. 1994) (“Prejudice may be ‘presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.’”) (quoting *Coleman v. Kemna*, 778 F.2d 1487, 1490 (11th Cir. 1985)).

Mathison has not met the “high threshold of proof” to show that this is one of the “rare and extreme cases” in which the court can presume “inherent prejudice” based on pretrial publicity, such that a transfer pursuant to Rule 21(a) would have been appropriate. *Nelson*, 347 F.3d at 707-8. While there can be little doubt that there was pretrial publicity related Mathison’s trial, Mathison has not shown the pretrial publicity was sufficiently “corrupting” that I must presume “unfairness of constitutional magnitude.” *Id.* at 707. As the Eighth Circuit Court of Appeals explained, “[t]he mere existence of press coverage . . . is not sufficient to create a presumption of inherent prejudice,” and Mathison has not identified *any* individual press reports or series of press reports that could be characterized as “inflammatory and accusatory.” *Allee*, 299 F.3d at 1000; *Blom*, 242 F.3d at 804; *cf. Pruett*, 153 F.3d at 585 (merely documenting the quantum of media coverage is not enough). Although he claims the venue was saturated in pretrial publicity, he provides no copies of or citations to a single article about the case. Thus, Mathison provides no factual basis for his claim that he was the subject of prejudicial news coverage and has not demonstrated the existence of any prejudicial and inflammatory media publicity about his crimes.

Because the presumption of prejudice does not apply, I must next determine whether the jury panel selected was impartial. During jury selection, I questioned the prospective jurors regarding exposure to pretrial publicity. *See Jury Selection Tr.* at 38-60 (Crim. docket no. 555). Before doing so, I cautioned the prospective jurors not to say out loud

what they had read or heard about the case unless specifically instructed to do so. *See* Jury Selection Tr. at 22, 38. The panel was then asked:

I want to find out if any of you for whatever reason – and it doesn't make you a better person or a worse person or good or bad, but if there's anybody of the 31 of you who for whatever reason based on what you've read or heard can't set that aside, keep a totally open mind, and base your judgment solely on the evidence presented in the courtroom – is there anybody who cannot do that?

See Jury Selection Tr. at 40-41. Three prospective jurors responded positively to this question. After questioning each of these responding jurors, all were excused for cause. *See* Jury Selection Tr. at 41-46. A lone replacement prospective juror who also indicated he had heard pretrial publicity about the case and believed it would affect his ability to be fair and impartial was also excused for cause. *See* Jury Selection Tr. at 58-60. “To demonstrate actual prejudice, [a petitioner] must show that ‘the jurors demonstrated actual partiality or hostility that could not be laid aside.’” *Daniels v. Woodford*, 428 F.3d 1181, 1211 (9th Cir. 2005) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1363 (9th Cir. 1988)). Jurors “are presumed to be impartial, absent clear indications to the contrary.” *Wells v. Murray*, 831 F.2d 468, 472 (4th Cir. 1987); *see United States v. Wright*, 340 F.3d 724, 733 (8th Cir. 2003); *see also United States v. Tindal*, 357 Fed. App'x 436, 438 (3rd cir. 2009); *United States v. Guzman*, 450 F.3d 627, 629 (6th Cir. 2006); *United States v. Khoury*, 901 F.2d 948, 955 (11th Cir. 1990); *Poynter v. Ratcliff*, 874 F.2d 219, 221 (4th Cir. 1989). Even a juror's preconceived feeling of defendant's guilt will not, in and of itself, void the presumption of impartiality where that juror can put his or her feelings aside and determine the defendant's guilt or innocence based on the evidence presented at trial. *Irvin*, 366 U.S. at 723. Here, all of the seated jurors indicated that they could give Mathison the full benefit of the presumption of innocence. *See* Jury Selection Tr. at 77-81.

Mathison has not offered any evidence to indicate that the jurors exhibited any bias against him based on pretrial publicity. I find Mathison has failed to demonstrate that actual prejudice existed to support a request for a change in venue. Thus, his trial counsel provided adequate assistance when he did not make a motion for a change of venue, because there were no grounds to support such a request. In sum, Mathison has failed to satisfy both the incompetence prong and prejudice prong of *Strickland* and his ineffectiveness claim is denied.

C. Prosecutorial Misconduct Claim

Mathison also claims the prosecution committed prosecutorial misconduct “by using the unreliable testimony of Shad Derby during Mathison’s trial.” Petitioner’s Br. at 8 (docket no. 36-2). “The prosecution may not use or solicit false evidence, or allow it to go uncorrected.” *United States v. Marlin*, 59 F.3d 767, 770 (8th Cir. 1995) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972) and *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). To prove use of false testimony, Mathison must show:

“(1) the prosecution used perjured testimony; (2) the prosecution should have known or actually knew of the perjury; and (3) there was a reasonable likelihood that the perjured testimony could have affected the jury’s verdict.”

United States v. West, 612 F.3d 993, 996 (8th Cir. 2010) (quoting *United States v. Bass*, 478 F.3d 948, 951 (8th Cir. 2007)); see *Marlin*, 59 F.3d at 770; *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992). “Merely inconsistent statements do not establish use of false testimony.” *West*, 612 F.3d at 996; see *United States v. Moore*, 639 F.3d 443, 446 (8th Cir. 2011); *Martin*, 59 F.3d at 770; *Nelson*, 970 F.2d at 443.

The flaw in Mathison’s claim is that he does not point to any specific false testimony of Shad Derby in his trial. Instead, he argues Derby lied during his debriefing about the

quantity of marijuana Derby purchased from Edward Valenciano. The sole basis for Mathison's argument is a stipulated agreement between the prosecution and Valenciano regarding Valenciano's relevant drug quantity. Valenciano was the source for marijuana purchased as part of the charged drug conspiracy in this case. He was indicted separately on September 8, 2006. *See United States v. Valenciano*, CR06-4082-MWB (docket no. 1). Valenciano pleaded guilty to conspiracy to distribute 100 kilograms or more of marijuana and was sentenced on April 4, 2007, over four months after Mathison's trial was completed. Shad Derby stated during his debriefing that he had purchased approximately 907.2 kilograms of marijuana from Valenciano. *See Sentencing Tr. at 3, Valenciano*, CR06-4082-MWB (docket no. 56). Jason Derby, Shad's cousin and co-conspirator, placed the drug quantity 200 to 300 kilograms lower.⁶ *See Sentencing Tr. at 4, Valenciano*, CR06-4082-MWB. The discrepancies between Shad and Jason's statements led the prosecution and Valenciano to reach a compromise stipulated agreement which split the difference between Shad and Jason's representations. *See Sentencing Tr. at 4-5, Valenciano*, CR06-4082-MWB. The mere inconsistency between Shad and Jason's representations as to Valenciano's drug quantity does not establish that Shad perjured himself at Mathison's trial. *See Martin*, 59 F.3d at 770; *Nelson*, 970 F.2d at 443. "[A] challenge to evidence through another witness or prior inconsistent statements [is] insufficient to establish prosecutorial use of false testimony.'" *Martin*, 59 F.3d at 770 (quoting *United States v. White*, 724 F.2d 714, 717 (8th Cir. 1984)); *see United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir. 1994) ("We refuse to impute knowledge of falsity to the prosecutor where a key government witness'[s] testimony is in conflict with another's statement or testimony."). Although Mathison claims the prosecution admitted

⁶Jason did not testify at Mathison's trial.

at Valenciano’s sentencing that Shad had not been truthful in his prior testimony, a review of Valenciano’s sentencing reveals no such admission. Rather, the prosecution maintained its belief Shad “was 100 percent truthful” but made the compromise agreement with Valenciano as a “tactical decision.” *See* Sentencing Tr. at 6, *Valenciano*, CR06-4082-MWB. Mathison has not established that Shad Derby’s statement was perjurious and, further, has not established that the prosecution knew or should have known that the statements constituted perjury. Thus, Mathison is not entitled to relief on this claim.

D. Newly Discovered Evidence

Mathison also maintains Shad Derby’s perjurious statement regarding Valenciano constitutes newly discovered evidence entitling him to a new trial. The prosecution counters that Mathison does not cite to any evidence brought out in Valenciano’s sentencing that Shad Derby was untruthful. When newly discovered evidence is the basis for a § 2255 motion, the § 2255 motion is treated the same as a motion for a new trial under Federal Rule of Criminal Procedure 33. *Lindhorst v. United States*, 658 F.2d 598, 602 (8th Cir. 1981). For a new trial to be granted on the basis of newly-discovered evidence,

- (1) the evidence must have been discovered after the trial;
- (2) the failure to discover the evidence must not be attributable to a lack of diligence on the part of the petitioner;
- (3) the evidence must not be merely cumulative or impeaching;
- (4) the evidence must be material; and
- (5) the evidence must be likely to produce an acquittal if a new trial is granted.

United States v. Duke, 50 F.3d 571, 576-77 (8th Cir. 1995) (citing *English v. United States*, 998 F.2d 609, 611 (8th Cir. 1993)); *see United States v. Fuller*, 557 F.3d 859, 863-64 (8th Cir. 2009); *United States v. Yerkes*, 345 F.3d 558, 562 (8th Cir. 2003).

A different test is applied, however, if a *Brady* violation has occurred. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Brady*, the Supreme Court held that “the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* To establish a *Brady* violation, Mathison must demonstrate that the prosecution suppressed evidence, that the evidence was exculpatory, and that the evidence was material either to guilt or punishment. *See United States v. Jeanpierre*, 636 F.3d 416, 422 (8th Cir. 2011); *United States v. Tate*, 633 F.3d 624, 630 (8th Cir. 2011); *United States v. Shepard*, 462 F.3d 847, 870 (8th Cir. 2006); *United States v. Brown*, 360 F.3d 828, 833 (8th Cir. 2004); *Duke*, 50 F.3d at 577. “Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Jeanpierre*, 636 F.3d at 422 (quoting *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009)); *see Tate*, 633 F.3d at 630; *Shepard*, 462 F.3d at 870; *Duke*, 50 F.3d at 577. “A reasonable probability is a probability sufficient to undermine the reviewing court’s confidence in the outcome of the proceeding.” *Tate*, 633 F.3d at 630 (quoting *United States v. Keltner*, 147 F.3d 662, 673 (8th Cir. 1998)); *see Duke*, 50 F.3d at 577.

Under *Brady*, Mathison has made no showing of what, if any, evidence the prosecution failed to disclose to him and therefore, cannot show any prejudice by non-disclosure. “Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand . . . much less reversal for a new trial.” *United States v. Pou*, 953 F.2d 363, 366-67 (8th Cir. 1992).

Mathison also fails under the non-*Brady* new evidence standard. First, Mathison has not demonstrated that this evidence is “new”. He does not claim that Jason Derby’s statement which purports to conflict with Shad Derby’s testimony was unavailable to him

at the time of his trial. Second, the new evidence is not material. Rather, the new evidence could, at best, be used for impeachment purposes. Finally, Mathison must show that the new evidence would have altered the outcome of his trial. However, Mathison's new evidence is not likely to have produced an acquittal. Shad Derby was hardly the only witness to testify against Mathison. The prosecution presented substantial and overwhelming evidence against Mathison, on all of the charged counts. During his seven-day trial, the prosecution called 30 other witnesses, most of whom testified to their personal drug dealings and transactions with Mathison. This testimony was corroborated by the testimony of other witnesses and co-conspirators, as well as a plethora of documentary evidence including hotel records, phone records and recordings, border crossing records, credit card records, travel records, financial records, receipts and other physical evidence. Thus, Mathison is not entitled to relief on his newly discovered evidence claim.

E. Certificate Of Appealability

Denial of Mathison's § 2255 Motion raises the question of whether or not he should be issued a certificate of appealability for his claims therein. The requirement of a certificate of appealability is set out in 28 U.S.C. § 2253(c)(1), which provides, in pertinent part, as follows:

(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—

* * *

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

28 U.S.C. § 2253(c)(1)(B); *accord* FED. R. APP. P. 22(b). To obtain a certificate of appealability on claims for § 2255 relief, a defendant must make “a substantial showing

of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). “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*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that “[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El*, 537 U.S. Ct. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

I find Mathison has not made a substantial showing of the denial of a constitutional right on his § 2255 claims. See 28 U.S.C. § 2253(c)(2). Specifically, there is no showing that reasonable jurists would find this court’s assessment of Mathison’s claims debatable or wrong, *Miller-El*, 537 U.S. at 338; *Cox*, 133 F.3d at 569, or that any court would resolve those issues differently. *Cox*, 133 F.3d at 569. Thus, Mathison does not make the requisite showing to satisfy § 2253(c) on his claims for relief, and no certificate of appealability will issue in this case. See 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b).

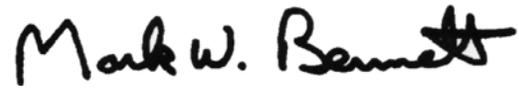
IV. CONCLUSION

THEREFORE, for the reasons discussed above, Mathison’s Amended Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody is **denied in its entirety**. This case is **dismissed in its entirety**. No

certificate of appealability will issue for any claim or contention in this case.

IT IS SO ORDERED.

DATED this 5th day of July, 2011.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line extending from the end of the name.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA