

APPENDIX -A

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 19-1170

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Jason L. Clark

Movant - Appellant

v.

United States of America

Respondent - Appellee

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:18-cv-00585-GAF)

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**JUDGMENT**

Before COLLTON, BOWMAN, and KOBES, Circuit Judges.

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

May 09, 2019

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

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/s/ Michael E. Gans

APPENDIX-B

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No: 19-1170

Jason L. Clark

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Western District of Missouri - Kansas City  
(4:18-cv-00585-GAF)

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**ORDER**

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

July 17, 2019

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

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/s/ Michael E. Gans

APPENDIX-C

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

**ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255**

Movant pled guilty to conspiracy to distribute cocaine and being a felon in possession of a firearm, and the Court imposed a below-Guidelines sentence of 235 months' imprisonment. Crim. Doc. 58.<sup>1</sup> Movant appealed, and the Court of Appeals dismissed the appeal, enforcing Movant's appeal waiver. Crim. Doc. 69-1. Movant now seeks to vacate his sentence pursuant to 28 U.S.C. § 2255. For the reasons explained below, the motion is **DENIED**.

Movant claims four grounds for relief: (1) “21 U.S.C. 851(e) (proceedings to establish prior convictions) violates the doctrine of the separation of powers and conflicts with . . . § 2255,” (2) “Determining whether state offenses qualify as prior conviction to be used as grounds for sentencing enhancement,” (3) “924(e)(2)(A)(ii) at Title 18 (definition of serious drug offense) is unconstitutionally vague and allows for arbitrary enforcement of the law,” and (4) ineffective

<sup>1</sup>“Crim. Doc.” refers to filings in Movant’s criminal case. “Doc.” refers to filings in this § 2255 case.

assistance of counsel. Doc. 1, pp. 4, 5, 7, and 8.

In exchange for the dismissal of certain charges, Movant pled guilty to the crimes for which he is now imprisoned, “expressly waiv[ing] his right to appeal his sentence, directly or collaterally, on any ground except claims of ineffective assistance of counsel, prosecutorial misconduct, or an illegal sentence.” Crim. Doc. 37, p. 11 (plea agreement) (enumeration omitted). Based on this valid waiver, relief is denied on grounds (1)-(3).

In ground (4), Movant claims he was denied effective assistance of counsel because his attorney “knowingly and willfully misinformed and misled [Movant] with a promise that he would receive a 15 year sentence.” Doc. 1, p. 8. In order to prevail on this claim, Movant must show that the performance of counsel was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (*Strickland* standard applies to the performance of plea counsel); *see Kress v. United States*, 411 F.2d 16, 20 (8<sup>th</sup> Cir. 1969) (burden of proof is on the § 2255 movant). Respondent argues:

If Clark had not entered into a plea with the Government, he would have been facing a total minimum sentence of 20 years’ imprisonment. While Clark did not receive the 15-year sentence he requested at sentencing, he still received less than 20 years. Clark cannot meet the standard under *Strickland*[.]

Doc. 10, p. 10. Respondent’s argument is correct, and relief is denied on ground (4).

The Court finds that an evidentiary hearing is not required to resolve Movant’s claims, and, for the reasons set out above, the Court denies Movant relief pursuant to 28 U.S.C. § 2255. Further, the Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a constitutional right”). The Clerk of the Court shall enter judgment dismissing this

case.

So ORDERED.

/s/ Gary A. Fenner  
GARY A. FENNER  
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,

Dated: December 17, 2018.

## **AMENDMENT 6**

### **Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(e) (1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS § 922(g)].

(2) As used in this subsection--

(A) the term "serious drug offense" means--

- (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.], for which a maximum term of imprisonment of ten years or more is prescribed by law; or
- (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felon

(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 [21 USCS § 848], 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 [28 USCS § 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.

§ 2253.      Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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 [28 USCS § 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).

(June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch 655, § 52, 65 Stat. 727; April 24, 1996, P. L. 104-132, Title I, § 102, 110 Stat. 1217.)