# Appendix A

# TED STATES COURT OF AI ALS
# FOR THE EIGHTH CIRCUIT

No: 20-1174

Curtis Lee Dale

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:19-cv-00199-JAJ)

## JUDGMENT

Before BENTON, WOLLMAN, 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 29, 2020

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

/s/ Michael E. Gans

# Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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| CURTIS LEE DALE,<br><br>Petitioner,<br><br>vs.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | No. 4:19cv00199-JAJ<br><br>**ORDER** |

This matter comes before the court pursuant to petitioner's July 1, 2019 Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. [Dkt. No. 1] Pursuant to Rule 4 of the Rules Governing § 2255 Proceedings, the court conducts the following initial review to determine whether any of the claims in the petition have arguable merit. Finding that they do not, the court summarily dismisses the petition and denies a certificate of appealability.

## I. Procedural History

On June 22, 2016, the grand jury for the Southern District of Iowa returned a three count Indictment charging the petitioner in Count 1 with a conspiracy to manufacture, distribute and possess with intent to distribute cocaine base, cocaine hydrochloride and heroin. In Count 2, he was charged with possession with intent to distribute cocaine base, cocaine hydrochloride and heroin. Finally, in Count 3, he was charged with being a felon in possession of a firearm on June 2, 2016. *United States v. Curtis Lee Dale,* 3:16cr0033 (S.D. Iowa) at Dkt. 13. The case arose from an investigation by DEA Special Agent Jay Bump. Bump conducted surveillance of two storage units rented in the names of associates of the petitioner and used by the petitioner to store controlled substances and a firearm. Bump used a GPS tracker on the petitioner's automobile to determine that the

petitioner traveled to Chicago and stayed only twenty minutes before returning to the storage locker in Davenport, Iowa. From this and other information available to Agent Bump, he believed that the petitioner had just gone to Chicago to purchase controlled substances and then went to the storage locker in Davenport to store them prior to distribution. Bump secured search warrants for the storage lockers and the petitioner's residence. Upon seizing controlled substances and a firearm from a storage locker, Bump and others arrested the petitioner and searched his residence.

The petitioner represented himself at trial with an assistant federal public defender serving as standby counsel. The petitioner was convicted at trial of all three counts. [Dkt. 75] At sentencing, the petitioner was found to have a base offense level of 36 and a criminal history category of IV under the United States Sentencing Guidelines. His sentencing guideline range of incarceration was 262 to 327 months. He received a 300 month sentence of incarceration on Counts 1 and 2 of the Indictment and 120 months on Count 3, all sentences to run concurrently.

The petitioner appealed and his appeal was denied on March 19, 2018. [Dkt. 136] On appeal, he challenged the denial of an evidentiary hearing on his motion to suppress evidence as well as the court's drug quantity calculation at sentencing. The Court of Appeals found that the petitioner failed to establish standing to search the rental units at issue and noted that this court gave the petitioner an opportunity at trial to supplement his earlier motion to suppress evidence. The motion was supplemented with the testimony of the manager of the storage rental unit company. This witness, Sue Kramer, initially made statements suggesting that DEA agents may have entered the storage units prior to securing the search warrants. The hearing on this issue can be found in the trial transcript. [Dkt. 130 beginning at p. 463] The court found that Ms. Kramer's testimony concerning the date on which she first saw locks on the storage units having been cut was not credible. She was exceedingly confused on this issue.

## II. § 2255 Petition

### A. The § 2255 Petition

In his petition, petitioner makes many claims. In Ground 1, he alleges that his attorney rendered ineffective assistance of counsel for failure to file a motion for pretrial discovery, for failing to move to suppress evidence and for requesting a continuance of the trial date against the petitioner's instructions. He contends that his attorney waived a preliminary hearing and detention hearing at which testimony of witnesses could have been "locked in" for trial. Finally, he contends that his attorney rendered ineffective assistance of counsel for failing to object to the government's request for an upward variance at sentencing and failed to address his allegations of prosecutorial misconduct.

In his second ground for relief, petitioner contends that his appellate attorney rendered ineffective assistance of counsel for failing to raise a discovery issue, a challenge the search warrants at issue in the case and alleged perjury by law enforcement officers. Finally, he alleges misconduct by the law enforcement officers in the handling of controlled substances seized pursuant to the warrants.

In Ground 3, he contends that his appellate attorney failed to properly argue that he had standing to object to the searches of the rental units. He contends that because he had keys to the units, that he had standing to object to the searches. Finally, he contends that he has newly discovered evidence in that the renter of one of the storage units, Michael Wills, now states that the petitioner had complete control over the storage unit at issue.

In Ground 4, the petitioner contends that the jury was not properly instructed on the felon in possession of a firearm charge that the petitioner had to "knowingly" possessed the firearm.

**B. Standards for Relief Pursuant to Section 2255**

Title 28, of the United States Code, section 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. Section 2255 does not provide a remedy for "all claims errors in conviction and sentencing." *United State v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, § 2255 is intended to redress only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.") (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987)). A § 2255 claim is a collateral challenge and not interchangeable for a direct appeal, *see United States v. Frady*, 456 U.S. 152, 165 (1982), and an error that could be reversed on direct appeal "will not necessarily support a collateral attack on a final judgment." *Id.*

**C. Ineffective Assistance of Counsel Standard**

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The United States Supreme Court reformulated the *Strickland* test for constitutionally ineffective assistance of counsel in *Lockhart v. Fretwell*:

> [T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

506 U.S. 364, 369 (1993) (*quoting United States v. Cronic*, 466 U.S. 648, 658 (1984)). The Eighth Circuit Court of Appeals applies the *Lockhart* test:

> Counsel is constitutionally ineffective . . when: (1) counsel's representation falls below an objective standard of reasonableness; and (2) the errors are so prejudicial that the adversarial balance between defense and prosecution is upset, and the verdict is rendered suspect.

*English v. United States*, 998 F.2d 609, 613 (8th Cir. 1993) (citing *Lockhart*, 506 U.S. at 364). Where conduct has not prejudiced the movant, the court need not address the reasonableness of that conduct. *United States v. Williams*, 994 F.2d 1287, 1291 (8th Cir. 1993); *Siers v. Weber*, 259 F.3d 969, 984 (8th Cir. 2001) (citing *Strickland*, 466 U.S. at 697) (courts need not reach the effectiveness of counsel if it is determined "that no prejudice resulted from counsel's alleged deficiencies."). To determine whether there is prejudice, the court examines whether the result has been rendered "fundamentally unfair or unreliable" as the result of counsel's performance. *Lockhart*, 506 U.S. at 369. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural rights to which the law entitles him. *Id.* at 372. Prejudice does not exist unless "there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Williams*, 994 F.2d at 1291.

**D. Analysis**

The petitioner's first claim fails to state an arguable claim for relief. He alleges that his attorney improperly waived a preliminary and detention hearing for him and moved for a continuance of the trial from August until October 2016 without his consent.

However, he does not allege any cognizable prejudice from these alleged errors. Meaning, he does not allege that the outcome of his proceedings would have been different with a preliminary/detention hearing or without the two month continuance. It should be noted that even with the continuance, he was convicted three and one half months after the grand jury returned the Indictment.

With respect to the allegation concerning the failure to file a motion to suppress, it should be noted that the petitioner filed a motion to suppress that was denied by the court without a hearing. The court then granted a hearing at trial based on the allegation that law enforcement officers entered the storage locker prior to the issuance of the search warrant. These issues were appealed to the Court of Appeals and the appeal was denied.

The search warrants at issue for the defendant's automobile, his residence and the storage lockers were admitted into evidence at trial. They can also be found at the Southern District of Iowa's electronic filing system at cases 3:16mj0038-41. The affidavit attached to each of these warrants are ten pages of single spaced allegations by Agent Bump. In the affidavit, he meticulously detailed the status of his investigation and unquestionably provided probable cause for the searches requested.

Because the evidence sought to be suppressed was gathered pursuant to a search warrant, the court employs the standard set forth in *Illinois v. Gates*, 462 U.S. 213 (1983), to determine the existence of probable cause. It is well established that a warrant affidavit must show particular facts and circumstances in support of the existence of probable cause sufficient to allow the issuing judicial officer to make an independent evaluation of the application for a search warrant. The duty of the judicial officer issuing a search warrant is to make a "practical, commonsense decision" whether a reasonable person would have reason to suspect that evidence would be discovered, based on the totality of the circumstances. *United States v. Peterson*, 867 F.2d 1110, 1113 (8th Cir. 1989).

Sufficient information must be presented to the issuing judge to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusion of others. *Gates*, *supra*, at 239. However, it is clear that only the probability, and not a prima facie showing, of criminal activity is required to establish probable cause. *Gates*, *supra*, at 235.

This court does not review the sufficiency of an affidavit de novo. An issuing judge's determination of probable cause should be paid great deference by reviewing courts. *Gates*, *supra*, at 236. The duty of the reviewing court is simply to ensure that the issuing judge had a substantial basis for concluding that probable cause existed, *Gates*, *supra*, at 238-39.

Even where probable cause is lacking, the court's inquiry does not end. Pursuant to *United States v. Leon*, 468 U.S. 897 (1984), in the absence of an allegation that the issuing judge abandoned a neutral and detached role, suppression is appropriate only if the affiant was dishonest or reckless in preparing the affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. In *Leon*, the United States Supreme Court noted the strong preference for search warrants and stated that in a doubtful or marginal case a search under a warrant may be sustainable where without one, it would fall. *Leon*, *supra*, at 914.

> Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, . . . for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search. . . . Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable,
> . . . and it is clear in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Leon, *supra*, at 922-23.

Pursuant to *Leon*, suppression remains an appropriate remedy: (1) where the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth, *Franks v. Delaware*, 438 U.S. 154 (1978); (2) where the issuing magistrate wholly abandons the judicial role and becomes a "rubber stamp" for the government; (3) where the officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid. In *Leon*, the remedy of suppression was not ordered despite the fact that the affidavit in that case did not establish probable cause to search the residence in question. Further, the information was fatally stale and failed to properly establish the informant's credibility. The standard announced in *Leon* is an objective standard.

Pursuant to the standards set forth above, the petitioner would lose a suppression hearing even if he were to establish that he had standing to object to the searches. The affidavits unquestionably demonstrate probable cause for the searches. And even if some court were to find that probable cause did not exist, the evidence seized pursuant to the warrants would obviously be saved from suppression by the good faith exception to the exclusionary rule found in *Leon*.

Finally, the petitioner contends in Ground 1 of his petition that his attorney failed to object to the government's motion for an upward variance at sentencing and failed to address alleged prosecutorial misconduct and witness tampering. The simple answer to the first question is that his attorney did object to the upward variance, he objected to the base offense level and enhancements under the sentencing guidelines and requested a sentence at the mandatory minimum. [Dkt. 111]

The claims of prosecutorial misconduct are based on the petitioner's allegations of witness tampering. In turn, these are based on the vigorous cross-examination of witness Sue Kramer and a convincing demonstration that Ms. Kramer was completely uncertain and confused as to the date on which she observed the locks on the storage units as having been cut. The record affirmatively demonstrates that there was no prosecutorial misconduct in this regard and that Ms. Kramer's testimony in the particular described above was completely unreliable.

In his second ground for relief, the petitioner contends that his appellate attorney was ineffective for failing to claim prosecutorial misconduct in the withholding of evidence, perjury by law enforcement officers and the witness tampering issue alleged above. He also contends that appellate counsel was ineffective for failing to properly raise his standing to object to the search of the storage units.

The petitioner cannot demonstrate that either his attorney was ineffective or that he suffered prejudice in this regard. The reasons for this are adequately discussed above. Finally, the petitioner's chain of custody issue found at page 20 of his brief is unavailing. He contends that the agents seized controlled substances on June 2, 2016 and then placed them in an evidence locker in Rock Island for four days before further processing them. He does not allege facts demonstrating that there was a failure of chain of custody. This ground is summarily dismissed.

In Ground 3 of his petition, the petitioner contends again that his appellate attorney rendered ineffective assistance of counsel for failing to properly demonstrate his standing to object to the searches at issue. Those issues have been refuted with evidence from the record set forth above. He also contends that his appellate attorney was ineffective for failing to challenge the fact that he was sentenced for more controlled substances than found by the jury. In its verdict rendered October 5, 2016 [Dkt. 75], the jury unanimously determined that the petitioner was responsible for more than 28 grams of cocaine base, more than 500 grams of cocaine hydrochloride and more than 100 grams of heroin. This

was sufficient to establish a mandatory minimum term of incarceration of at least 120 months. Pursuant to the sentencing guidelines, the court had an independent obligation to find by a preponderance of the evidence the relevant conduct associated with his offenses. The petitioner has already challenged this issue on appeal and has now failed to allege facts demonstrating an arguable claim for relief.

At the end of his allegations in Ground 3, the petitioner alleges that the renter of one of the storage units, Michael Wills, has stated that the petitioner had total control over that storage unit, thereby allegedly giving the petitioner standing to object to its search. The issues concerning standing to search the rental unit have been adequately addressed above.

Finally, in Ground 3, the petitioner appears to allege that he was taken to his residence when arrested for the purpose of searching the residence incident to his arrest. However, law enforcement officers had a warrant to search that residence. *See* 3:16mj0038.

Ground 4 alleges that the jury was not properly instructed on the petitioner's "knowing" possession of a firearm in Count 3. The simple answer is that the final jury instructions correctly stated that the petitioner had to have been found to knowingly possess the firearm before he could be convicted of Count 3. [Dkt. 70] The instructions further defined the knowledge requirement to require that the government prove that the petitioner be aware of the act and not act through mistake, accident or other innocent reason. The court further defined actual and constructive as well as sole and joint possession for the jury.

## III. Certificate of Appealability

Before a petitioner can appeal to the court of appeals from a final order in a habeas corpus proceeding, the district court judge must issue a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). Such certificate may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and indicates "which specific issue or issues satisfy the [substantial] showing." *Id.* § 2253(c)(3).

To meet the "substantial showing" standard, the petitioner must demonstrate that a reasonable jurist would find the district court ruling on the constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke,* 542 U.S. 274, 276, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)); *see also Randolph v. Kemna*, 276 F.3d 401, 403 (8th Cir. 2002) ("the petitioner must 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'" (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)) (alteration in original)). A "substantial showing" must be made for each issue presented. *See Parkus v. Bowersox*, 157 F.3d 1136, 1140 (8th Cir. 1998). The certificate of appeal will then contain "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-el v. Cockrellu*, 537 U.S. 322, 336 (2003). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* Thus, a district court may issue a certificate of appeal even if the court is not certain that "the appeal will succeed . . . [because a certificate of appealability] will issue in some instances where there is no certainty of ultimate relief." *Id.* at 336-37 (citing *Slack v. McDaniel*, 539 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)).

Here, petitioner cannot show that reasonable jurists would disagree or debate whether the issues presented should have had a different outcome, and whether the issues are adequate to deserve encouragement to proceed further. *See Barefoot*, 463 U.S. at 893 n.4. The court denies a certificate of appealability.

## IV. Conclusion

The court finds that petitioner is not entitled to relief pursuant to 28 U.S.C. § 2255.

Upon the foregoing,

**IT IS ORDERED** that the petitioner's July 1, 2019 Petition for Writ of Habeas

Other Orders/Judgments
4:19-cv-00199-JAJ Dale v. United States of America

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**U.S. District Court**

**Southern District of Iowa**

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**Filer:**
**Document Number:** 6

**Docket Text:**
ORDER Dismissing [1] Motion to Vacate/Set Aside/Correct Sentence (2255) filed by Curtis Lee Dale. The clerk shall enter judgment in favor of the respondent. No certificate of appealability shall issue. Signed by Chief Judge John A. Jarvey on 11/20/2019. (mem)

**4:19-cv-00199-JAJ Notice has been electronically mailed to:**

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Corpus [Dkt. No. 1] is dismissed in its entirety. The Clerk of Court shall enter judgment in favor of the respondent.

**IT IS FURTHER ORDERED** that a certificate of appealability will not issue.

**DATED** this 20th day of November, 2019.

JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

# Appendix C

# U ED STATES COURT OF APl LS
# FOR THE EIGHTH CIRCUIT

No: 20-1174

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Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:19-cv-00199-JAJ)

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**ORDER**

The petition for rehearing by the panel is denied.

July 29, 2020

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

/s/ Michael E. Gans