

APPENDIX

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

No: 21-2439

Keith Carr

Appellant

v.

Warden Steve Kallis

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-00721-NEB)

ORDER

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

September 22, 2021

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEITH CARR,

Case No. 20-CV-721 (NEB/TNL)

Petitioner,

v.

ORDER ACCEPTING REPORT AND
RECOMMENDATION

WARDEN S. KALLIS,

Respondent.

Keith Carr, currently incarcerated at Federal Medical Center—Rochester, filed a petition for writ of habeas corpus under 28 U.S.C. Section 2241, seeking his release from custody. (ECF No. 1 (“Pet.”).) In a Report and Recommendation, United States Magistrate Judge Tony N. Leung recommends dismissing the petition without prejudice for lack of jurisdiction. (ECF No. 19 (“R&R”) at 21.) Carr objected. (ECF Nos. 22, 24.) For the following reasons, the Court overrules Carr’s objection, accepts the R&R, and dismisses the Petition without prejudice.

BACKGROUND

The R&R details the factual and procedural history of the case, (R&R at 2–5), but the Court briefly lays out the facts necessary to understand the Petition’s context.¹

¹ In so doing, the Court cites to the R&R and incorporates the citations it contains.

Initial Conviction. In 2011, Carr was indicted on drug trafficking charges in the Northern District of Illinois. (R&R at 2.) The government filed an Information under 21 U.S.C. Section 851, stating its intent to enhance based on Carr's 2002 conviction for possession of a controlled substance in violation of 720 Ill. Comp. Stat. 570/402(c) ("Section 402(c)"). (Id.) The government, through electronic filing, served the Information on Carr's counsel and Carr's counsel received it. (Id. at 2-3 n.1.) Due to a clerical error, however, the Information was removed from the docket and the government did not discover the error until after a jury had found Carr guilty. The court sentenced Carr to 240 months' imprisonment, the mandatory minimum because of his 2002 conviction. (Id.)

Appeal and Section 2255 Petition. Carr appealed his conviction, arguing that the Information's absence from the docket rendered his sentence enhancement unlawful. (Id. at 3-4); *United States v. Carr*, 695 F. App'x 953, 955-56 (7th Cir. 2017). The Seventh Circuit affirmed his conviction, specifically rejecting Carr's argument that the Information was defective. (R&R at 4); *Carr*, 695 F. App'x at 957. Carr then filed a postconviction motion challenging his conviction under 28 U.S.C. Section 2255, again challenging the Information. (R&R at 4.) The district court denied the motion. (Id.) In 2018, Carr sought permission from the Seventh Circuit to file a second Section 2255 motion, arguing that a 2016 Supreme Court case had established that Section 402(c) was not a valid statute for enhancing his conviction. (Id. at 4-5.) The Seventh Circuit denied the request because the

request relied on cases that did not announce a new rule of constitutional law and therefore was procedurally improper. (*Id.* at 5.)

Section 2241 Petition. Carr now brings a Petition under Section 2241, again arguing that, based on an intervening change in the law, Section 402(c) is an improper predicate offense for enhancement under 21 U.S.C. Section 851 and that his 240-month sentence is therefore unlawful. (*Id.* at 5–6; Pet.)

ANALYSIS

The Court reviews the portions of the R&R to which Carr objects *de novo*. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). It reviews the remaining portions of the R&R for clear error. Fed. R. Civ. P. 72(b); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (per curiam). Because Carr is proceeding *pro se*, the Court construes his objections liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Section 2241 Petitions. The government concedes that Seventh Circuit has held that a conviction under Section 402(c) is insufficient, standing alone, to merit the enhancement Carr received. (ECF No. 10 at 8.) The government accordingly concedes that, if the Court reaches the merits of Carr’s claims, granting Carr’s petition would be appropriate. (*Id.*) The government argues, however, that Section 2255’s procedural limits bar granting Carr relief.

The Court has the power to grant petitions for writs of habeas corpus when a petitioner is “in custody in violation of the Constitution or law or treaties of the United

States.” 28 U.S.C. § 2241(c). The Court may not entertain such a petition, however, if that petitioner “has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). This is known as the “Savings Clause.” The petitioner has the burden to show that Section 2255 is inadequate or ineffective. *Abdullah v. Hedrick*, 392 F.3d 957, 959 (8th Cir. 2004). Because of the Savings Clause, the Court may grant Carr relief only if Section 2255 is “inadequate or ineffective” to challenge his incarceration.

Carr argues that the Court should apply the Seventh Circuit’s Savings Clause jurisprudence (where Carr committed the offenses leading to his imprisonment), rather than the Eighth Circuit’s (where Carr is incarcerated and has filed the Petition). The result is the same under either test: Carr cannot obtain relief.

The Eighth Circuit. In the Eighth Circuit, to establish that Section 2255 is inadequate or ineffective, the petitioner must show that there is more than a procedural barrier. *United States v. Lurie*, 207 F.3d 1075, 1077 (8th Cir. 2000). Nor is a Section 2255 motion inadequate or ineffective simply because a court has already denied a previous Section 2255 petition, the court of appeals has denied permission to file a second Section 2255 petition, or Section 2255’s grace period has expired. *Hill v. Morrison*, 349 F.3d 1089, 1091 (8th Cir. 2003). If the petitioner “had any opportunity to bring his claim beforehand,” Section 2255 is not ineffective or inadequate. *Abdullah*, 392 F.3d at 963. And if the prisoner

could have or did raise an issue in a Section 2255 petition, he cannot then raise that issue in a Section 2241 motion. *Hill*, 349 F.3d at 1092. The bottom line is that if a petitioner had “one unobstructed procedural opportunity to challenge his conviction” through Section 2255, Section 2255 is not inadequate or ineffective. *Abdullah*, 392 F.3d at 963. The petitioner need not have taken the opportunity, or even recognized its existence—it need only have existed. *Id.*

In his Section 2255 motion, Carr had an opportunity to raise the issues he raises now, and he did so. Therefore, he cannot show that Section 2255 is inadequate or ineffective. He raised his challenge to the Information on direct appeal. *Carr*, 695 F. App’x at 957. And his challenge to Section 402(c) relies upon *Mathis v. United States*, 136 S. Ct. 2243 (2016), a case the Supreme Court decided several months before Carr filed his appellate brief and nearly two years before he filed his initial Section 2255 motion. (R&R at 12; ECF No. 3 at 3.) Carr could have raised his *Mathis* argument in either context but failed to do so. He had his “one unobstructed procedural opportunity” and did not take it. *Abdullah*, 392 F.3d at 963. Carr has not met his burden to show that Section 2255 is inadequate or ineffective to challenge his incarceration under Eighth Circuit law.

Carr argues that the R&R overlooks the “essential [p]urpose” of Section 2241, which, in his view, is “to provide a petitioner with an opportunity to correct a fundamental [m]iscarriage of justice.” (ECF No. 22 at 2.) Section 2255(e), however, specifically limits the Court’s ability to grant Section 2241 petitioners relief if they could

have brought their claims in prior proceedings. 28 U.S.C. § 2255; *Abdullah*, 392 F.3d at 963. Regardless of the merits of such a petition, so long as Section 2255 is not “inadequate or ineffective,” the Court cannot grant relief.

The *Seventh Circuit*. Nor does Carr fare any better under the *Seventh Circuit*’s law. Under the *Seventh Circuit*’s test, the petitioner must show three things: (1) the Section 2241 claim relies upon a retroactive statutory interpretation case, not a constitutional one; (2) the petitioner could not have raised the issue in his first Section 2255 motion; and (3) the error rises to the level of a miscarriage of justice. *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019). Even assuming that Carr has met the first element, he cannot meet the second—he could have (and did) raise these issues in prior litigation. (See R&R at 4–5 (detailing Carr’s request to file a second Section 2255 petition).) Carr is therefore not entitled to relief under Section 2241.

Remaining Claims and Certificate of Appealability. The R&R recommends denying any remaining claims Carr has brought in the Petition. (R&R at 18–19.) Carr’s objection does not provide any specific refutation of the R&R’s conclusions, and the Court finds no clear error in the R&R’s conclusions. Carr does not explain how he could not have raised these issues either on direct appeal or previous postconviction litigation and Section 2255(e) therefore bars them in this context.

To appeal an adverse determination on a petition for habeas corpus, the petitioner must obtain a certificate of appealability from either a circuit judge or from the Court. 28

U.S.C. § 2253(c). To obtain a certificate of appealability, the petitioner must make “a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). To make this showing, a petitioner must demonstrate that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Carr has not made such a showing and the Court therefore declines to issue a certificate of appealability.

The Court has reviewed the remaining portions of the R&R for clear error. *Fed. R. Civ. P. 72(b); Grinder*, 73 F.3d at 795. Finding no clear error, the Court accepts those portions of the R&R.

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS
HEREBY ORDERED THAT:

1. Carr’s objections to the R&R (ECF Nos. 22, 24) are OVERRULED;
2. The R&R (ECF No. 19) is ACCEPTED;
3. The Petition (ECF No. 1) is DISMISSED WITHOUT PREJUDICE for lack of jurisdiction; and
4. No Certificate of Appealability be issued.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 7, 2021

BY THE COURT:

s/Nancy E. Brasel

Nancy E. Brasel

United States District Judge

UNITED STATES DISTRICT COURT
District of Minnesota

Keith Carr

JUDGMENT IN A CIVIL CASE

Petitioner,

v.

Case Number: 20-cv-00721-NEB-TNL

Warden S. Kallis

Respondent.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Carr's objections to the R&R (ECF Nos. 22, 24) are OVERRRULED;
2. The R&R (ECF No. 19) is ACCEPTED;
3. The Petition (ECF No. 1) is DISMISSED WITHOUT PREJUDICE for lack of jurisdiction; and
4. No Certificate of Appealability be issued.

Date: 5/10/2021

KATE M. FOGARTY, CLERK



**UNITED STATES DISTRICT COURT
District of Minnesota**

Warren E. Burger Federal Building and U.S. Courthouse 316 North Robert Street Suite 100 St. Paul, MN 55101 (651) 848-1100	U.S. Courthouse 300 South Fourth Street Suite 202 Minneapolis, MN 55415 (612) 664-5000	Gerald W. Heaney Federal Building and U.S. Courthouse 515 West First Street Suite 417 Duluth, MN 55802 (218) 529-3500	Edward J. Devitt U.S. Courthouse and Federal Building 118 South Mill Street Suite 212 Fergus Falls, MN 56537 (218) 739-5758
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CIVIL NOTICE

The appeal filing fee is \$505.00. If you are indigent, you can apply for leave to proceed in forma pauperis, ("IFP").

The purpose of this notice is to summarize the time limits for filing with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeals from a final decision of the District Court in a civil case.

This is a summary only. For specific information on the time limits for filing a Notice of Appeal, review the applicable federal civil and appellate procedure rules and statutes.

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. App. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "entry of the judgment or order appealed from;" or
2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion for a new trial under Fed. R. Civ. P. 59; or
3. Thirty days (60 days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50(b), to amend or make additional findings of fact under Fed. R. Civ. P. 52(b), and/or to alter or amend the judgment under Fed. R. Civ. P. 59; or
4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed, a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be filed no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if excusable neglect or good cause is shown for failing to file a timely Notice of Appeal.



Prisoner Appeals

The Court has four different guides concerning prisoner litigation, one for each of the following: civil rights (Section 1983/Bivens); Section 2254 habeas petition for persons in state custody; Section 2255 motion to vacate, set aside or correct sentence for persons in federal custody; and Section 2241 habeas petition for persons in federal custody and state pre-trial detainees. For more information on your specific type of case, please consult the applicable guide. You may obtain a copy of the guides by contacting the Clerk's Office using the contact information provided at the end of this document.

When can I file an appeal in a prisoner case?

Generally, you may file an appeal after you have obtained the final judgment in your case. Federal Rule of Appellate Procedure 4(a) governs when a notice of appeal in a civil case must be filed. Notices of appeal must be filed with the district court within 30 days of when the judgment or order appealed from is entered. See Rule 4(a)(1)(A), Rules of Appellate Procedure. When the United States or its officer or agency is a party, such as in a 2255 motion, the notice of appeal may be filed within 60 days after the judgment or order appealed from is entered. See Rule 4(a)(1)(B), Rules of Appellate Procedure.

There is an exception to this rule, however, if your case concerns a habeas corpus petition under 28 U.S.C. §§ 2254 or 2255. To file an appeal in a habeas corpus action, you must first receive: (1) a final order that is adverse to you; and (2) a certificate of appealability from the district judge in the final order of your case. See Rule 11, Rules Governing § 2254 Cases and Rule 11, Rules Governing § 2255 Proceedings. If the district court denies the certificate, you must seek a certificate of appealability from the Court of Appeals under Federal Rule of Appellate Procedure 22 when filing your appeal.

What do I need to do to file an appeal?

1. File a Notice of Appeal with the district court; and
2. Pay the \$505.00 filing fee **OR** request to waive the filing fee by submitting a completed "Prisoner Affidavit Accompanying Motion for Permission To Appeal" In Forma Pauperis."

§§ 2241 and 2254 Cases: If you were granted IFP status by the district court in your habeas case, you do not need to submit another IFP application with your notice of appeal.



§ 2255 Cases: If you were represented by appointed counsel at the end of your criminal case, you do not need to submit an IFP application on appeal because the filing fee for your appeal will automatically be waived, unless the judge specifically rules otherwise.

Prisoner Civil Rights Cases: You must submit another IFP application with your notice of appeal because the Court must determine the initial partial filing fee and subsequent installment payments required under the Prison Litigation Reform Act. See 28 U.S.C. § 1915(b).

You may contact the Clerk's Office to obtain a Notice of Appeal form. For information on filing a notice of appeal, review Rules 3 and 4 of the Federal Rules of Appellate Procedure.

If the district court denies your IFP application on appeal, you may appeal this determination to the Eighth Circuit Court of Appeals by filing a Motion and Affidavit for Permission to Appeal in Forma Pauperis. You may obtain a copy of this form by contacting the Clerk of Court for the Eighth Circuit Court of Appeals at the following address and phone number:

Eighth Circuit Court of Appeals Clerk's Office
Thomas F. Eagleton Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102

Phone: (314) 244-2400

How do I contact the District Court Clerk's Office?

United States District Court, District of Minnesota Clerk's Office
U.S. Courthouse
300 South Fourth Street, Suite 202
Minneapolis, MN 55415

Phone: (612) 664-5000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Plaintiff(s),

vs.

Case No.

Defendant(s).

NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3(c)(1) and 4(a), notice is hereby given that the following parties (provide the names of all parties who are filing an appeal):

in the above-named case appeal to the United States Court of Appeals for the Eighth Circuit.

The above-named parties appeal from the (indicate whether the appeal is from a *judgment* or an *order* of the District Court) of the U.S. District Court for the District of Minnesota that was entered on (date judgment or order was entered) that:

(If the appeal is from an *order*, provide brief explanation, below, of the District Court's decision in the order. If you are appealing only a portion of the judgment or order, indicate below which part of the judgment or order you are appealing).

Signed this _____ day of

Signature of Party _____

Mailing Address

Telephone Number

Note: All parties filing the appeal must date and sign the Notice of Appeal and provide his/her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his/her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

**CERTIFICATE OF
SERVICE FOR
SERVICE BY MAIL**

vs.

Plaintiff(s),

Case No.

Defendant(s).

(Enter the full name(s) of ALL plaintiffs
and defendants in this lawsuit. Please
attach additional pages, if necessary.)

I hereby certify that on _____ (mm/dd/yyyy), I caused the following
documents: [List the documents you are going to file and serve.]

[Check the box, below, that applies to how you served the above documents.]

to be filed electronically with the Clerk of Court through ECF and/or
 that I caused a copy of the foregoing documents (and the notice of electronic
filing, if filed electronically) to be mailed by first class mail, postage paid, to the
following: [List names and addresses of those served by U.S. Mail.]

Date:

s/

Signature of filing party

Filer's Typed Name

**United States Court of Appeals
For The Eighth Circuit**
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

**VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov**

July 20, 2021

Mr. Keith Carr
U.S. MEDICAL CENTER FOR FEDERAL PRISONERS
44065-424
P.O. Box 4000
Rochester, MN 55903-4000

RE: 21-2439 Keith Carr v. Steve Kallis

Dear Mr. Carr:

Enclosed is a copy of the dispositive order entered today in the referenced case.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the time set by FRAP 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Pro se petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Michael E. Gans
Clerk of Court

JPP

Enclosure(s)

cc: Ms. Ann M. Bildtsen
Ms. Kate M. Fogarty
Ms. Lisa D. Kirkpatrick
Ms. Ana H. Voss

District Court/Agency Case Number(s): 0:20-cv-00721-NEB

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

No: 21-2439

Keith Carr

Petitioner - Appellant

v.

Warden Steve Kallis

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-00721-NEB)

JUDGMENT

Before COLLTON, KELLY, and GRASZ, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

July 20, 2021

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

/s/ Michael E. Gans