

## Appendix B

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 21-3467

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Kevin Ray Smith

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

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Appeal from U.S. District Court for the Southern District of Iowa - Central  
(4:21-cv-00257-JAJ)

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**JUDGMENT**

Before GRUENDER, SHEPHERD, and STRAS, 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.

December 23, 2021

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  
SOUTHERN DISTRICT OF IOWA

Kevin Ray Smith

**CIVIL NUMBER: 4:21-cv-00257-JAJ**

Petitioner,

v.

**JUDGMENT IN A CIVIL CASE**

United States of America

Respondent,

**DECISION BY COURT.** This action came before the Court. The matter has been fully submitted and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED:**

Petitioner's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is dismissed. Judgment entered in favor of respondent against petitioner. Case closed. Certificate of appealability will not issue.

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Date: September 1, 2021

CLERK, U.S. DISTRICT COURT

/s/ K. Watson

By: Deputy Clerk

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

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KEVIN RAY SMITH,

Petitioner.

No. 4:21cv00257-JAJ

vs.

UNITED STATES OF AMERICA,

Respondent.

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**ORDER**

This matter comes before the court pursuant to petitioner's August 31, 2021 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 28, 2018, the grand jury for the Southern District of Iowa returned a five count Indictment charging the petitioner and another with a conspiracy to knowingly distribute methamphetamine between December 2017 and March 2018. *United States v. Kevin Ray Smith*, 4:18cr0137 (S.D. Iowa) at Dkt. 4. He was also charged with distribution of methamphetamine on January 29, 2018. On March 25, 2019, the petitioner entered into a plea agreement and pled guilty to Count 1 of the Indictment, the conspiracy charge. In the plea agreement, the petitioner waived his right to bring § 2255 allegations, other than ineffective assistance of counsel or prosecutorial misconduct claims. [Dkt. 58, ¶ 26]

**II. § 2255 Petition**

**A. The § 2255 Petition**

In his § 2255 petition, petitioner brings several claims. He contends that his

attorney rendered ineffective assistance of counsel for failure to move to dismiss his Indictment. More specifically, the petitioner contends that Congress did not have power pursuant to the Commerce Clause to enact the Controlled Substances Act. He further contends that criminal cases are not "cases or controversies" within the meaning of Article III of the United States Constitution. Finally, he contends that his attorney was ineffective for failing to claim equitable estoppel against the government for "affirmative misconduct demonstrated committed by United States."

#### **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 arguments advanced by the petitioner have been brought before and have never been successful. An attorney cannot be ineffective for failing to file a meritless motion. The United States Supreme Court has affirmed Congress’ use of the Commerce Clause to regulate controlled substances. *Gonzales v. Raich*, 545 U.S. 1 (2005).

#### 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 August 31, 2021 Petition for Writ of Habeas 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 31st day of August, 2021.

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

Appendix A

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

No: 21-3467

Kevin Ray Smith

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Southern District of Iowa - Central  
(4:21-cv-00257-JAJ)

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**ORDER**

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

February 28, 2022

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

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/s/ Michael E. Gans

**Additional material  
from this filing is  
available in the  
Clerk's Office.**