

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

No: 17-2512

Hector Manuel Avila-Luna

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:17-cv-00101-JAJ)

JUDGMENT

Before BENTON, MURPHY and SHEPHERD, 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. Appellant's motion for appointment of counsel is denied as moot.

November 16, 2017

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

/s/ Michael E. Gans

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

HECTOR MANUEL AVILA-LUNA, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 4:17cv0101-JAJ ORDER
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This matter comes before the court pursuant to petitioner's March 17, 2017 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 March 27, 2009, the petitioner was sentenced to a mandatory life sentence of incarceration for conspiracy to distribute methamphetamine and marijuana. *United States v. Hector Manuel Avila-Luna*, No. 4:07cr0238 (S.D. Iowa) at Dkt. 115. He received the life sentence because of two prior felony drug convictions and because of the drug quantity involved in his offense. 21 U.S.C. §§ 841(b)(1)(A), 851. His appeal was denied by the Eighth Circuit Court of Appeals on August 2, 2010. [Dkt. 134]

The petitioner brought his first § 2255 petition in 2011. *Avila-Luna v. United States*, 4:11cv0557 (S.D. Iowa). That petition was dismissed.

In his current § 2255 petition, the petitioner cites a 2013 decision from the Honorable Mark W. Bennett, United States District Judge, Northern District of Iowa, in

which Judge Bennett notes the relatively high rate of notices filed by the prosecution in Iowa pursuant to 21 U.S.C. § 851. The petitioner contends that he is a member of the recognizable, distinct class that was prosecuted more severely than others. The distinct class is persons prosecuted in Iowa for drug crimes.

The petitioner's conviction became final many years ago. None of the exceptions to the one year statute of limitations found in § 2255(f) save this matter from dismissal. In addition, it is a second petition for which the petitioner has not received certification from the Court of Appeals to bring. 28 U.S.C. § 2255(h). Finally, nothing in Judge Bennett's opinion gives any arguable right to relief to this petitioner. Assuming that somehow the petitioner were able to overcome the procedural bars noted above, there is no arguable claim for relief here.

II. 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. Cockrell*, 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.

III. 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 March 17, 2017 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 18th day of May, 2017.


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