APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1175

Cesar Alexis Gonzalez

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:16-cv-00458-JAJ)

ORDER

The petition for rehearing by the panel is denied.

July 10, 2017

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1175

Cesar Alexis Gonzalez

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:16-cv-00458-JAJ)

JUDGMENT

Before COLLOTON, ARNOLD and GRUENDER, 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 08, 2017

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

CESAR ALEXIS GONZALEZ, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 4:16cv0458-JAJ **ORDER**

This matter comes before the court pursuant to petitioner's August 15, 2016 Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. [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.

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I. Procedural History

On May 15, 2012, the grand jury for the Southern District of Iowa returned a one count indictment charging the petitioner and others with a conspiracy to distribute 500 grams or more of a mixture containing methamphetamine and 50 grams of actual methamphetamine between November 2011 and April 10, 2012. *See United States v. Cesar Alexis Gonzalez*, 3:12cr0048 (S.D. Iowa) at Dkt. 36. The case arises out of the seizure of a suspicious package that was ultimately determined to contain methamphetamine and another that contained approximately $6,000 in cash. The petitioner was convicted of shipping the methamphetamine from his residence in Yuma, Arizona to Wellman, Iowa. The facts of this matter are set forth in great detail in this court's order dated July 9, 2013 in the criminal case (3:12cr0048 at Dkt. 286).

The petitioner brought a motion to suppress evidence which was denied by the court in its July 9, 2013 order. The two primary issues in the motion centered around the reliability of a dog sniff of the package and whether there was any police involvement in the private search of the package conducted by United Parcel Service ("UPS").

After the court denied the suppression hearing from the bench, the petitioner entered into a plea agreement with the United States. He agreed to plead guilty to Count 1 of the indictment, admitted a sufficient factual basis for that plea and he preserved his right to appeal the court's ruling on the motion to suppress evidence. [Dkt. 282]

On February 14, 2014, the petitioner was sentenced to a term of incarceration of 168 months. [Dkt. 363] That sentence was reduced on August 5, 2015 to 135 months. [Dkt. 400] In the meantime, the Court of Appeals denied the appeal from the court's suppression decision in a thirteen page decision dated March 23, 2015. [Dkt. 391]

II. <u>§ 2255 Petition</u>

A. The § 2255 Petition

Petitioner makes eighteen claims in support of his petition.

<u>Claim 1</u>. Petitioner contends that a drug dog sniff does not provide probable cause to search a container for controlled substances where there is the possibility that the dog will alert to the presence or absence of a non-contraband item.

<u>Claim 2</u>. Petitioner contends that his initial arrest on state charges in Arizona was "bogus" and a ruse for detention by the federal government. He contends he should have been indicted within thirty days of his initial detention in Arizona on state court charges.

<u>Claim 3</u>. Petitioner contends that UPS supervisor Mark Steffen failed to produce notes pursuant to the Jencks Act and that the notes might have helped determine that there was police involvement in the private UPS search. At the hearing, no witness recalled who had counted the $6,000 that was intercepted by UPS and destined for the petitioner.

From the inability to recall who counted the cash, the petitioner contends that his attorney failed to "investigate what really took place in this case."

Claim 4. Petitioner makes vague and conclusory allegations concerning a failure to investigate lies and police reports, perjured testimony and again raises the issue concerning the failure of a witness to testify as to who counted the $6,000 in the package destined to the petitioner.

Claim 5. Petitioner contends that his attorney failed to object to drug quantity at the time of sentencing.

Claim 6. Petitioner contends that his attorney failed to inspect grand jury minutes and "documents/reports" for these proceedings.

Claim 7. Petitioner contends that his attorney failed to explain the plea agreement to him. He contends that he told his attorney that he did not want to plead guilty and only did so because he had "no faith in or trust in" his attorney. He contends that he was harassed by his attorney to hurry up and sign the plea agreement and that he did not fully understand it.

Claim 8. Petitioner contends that his attorney rendered ineffective assistance of counsel by failing to discover when field notes concerning the drug sniffing dog had been destroyed.

Claim 9. This claim is a repeat of the earlier claim in which the petitioner contends that a positive alert from a drug sniffing dog cannot provide probable cause to search a package for controlled substances.

Claim 10. Petitioner contends that his attorney failed to properly cross examine witnesses at the suppression hearing and failed to conduct a thorough and effective investigation into the UPS and law enforcement relationship. Again, these are extremely vague allegations with no suggestion as to what a better investigation would have revealed.

Claim 11. Petitioner contends that his attorney failed to seek a photograph of the

$6,000 in cash delivered to him in Yuma, Arizona. He contends that the source of the photograph, the photographer, the date of the photo, the location of the photo and why the photo was taken should have been developed.

Claim 12. Petitioner contends that his attorney failed to investigate the UPS policy that forbids the shipment of cash.

Claim 13. Petitioner contends that his attorney failed to secure evidence from the UPS employees in Arizona. He does not state what reports were available or what they would show but contends there was ineffective assistance of counsel here.

Claim 14. Petitioner contends that his attorney should have brought a separate motion to suppress every warrantless seizure by UPS in Iowa and Arizona as well as the controlled delivery of these packages.

Claim 15. Petitioner contends that Agent Eric Weber's affidavit in support of a search warrant was "faulty" because it "showed a date that was weeks before March 21, 2012."

Claim 16. Petitioner again contends that the records concerning the drug sniffing dog used in this case were not sufficient to demonstrate the dog's reliability.

Claim 17. Petitioner contends that he was unable to inspect UPS policies to determine if there was government involvement in the search at UPS done in this case.

Claim 18. Petitioner contends that his attorney failed to request a minor role reduction to the base offense level at sentencing.

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

Claims 10, 12, 14 and 17 all relate again to the suppression hearing held in this matter. At the suppression hearing, the petitioner's attorney worked diligently to attempt to show a relationship between UPS and law enforcement that would suggest that the private search conducted by UPS in this matter was assisted, counseled, or instigated by law enforcement. He came up with nothing to support these allegations because there was no involvement of law enforcement with this search. The petitioner cites no new evidence and nothing else that has the potential to change the outcome of this important finding from the suppression decision.

The petitioner simply regurgitates the evidence regarding the reliability of the drug dog presented at the hearing. The court weighed that evidence and found the drug dog to be reliable. The Court of Appeals reviewed the matter and affirmed this court's decision. In this court's order, it politely invited the reader to run their own Westlaw check on the petitioner's expert. This court joined a number of other courts in rejecting the expert's novel contentions.

The petitioner suggests a number of things his attorney might have done differently. These contentions fail for two reasons. First, petitioner cannot show that had his attorney done something different, the result of the hearing would have changed. Second, the arguments ignore the rule that prohibits a finding of ineffective assistance of counsel where the attorney employs a reasonable trial strategy. Here, Mr. Taylor discovered and analyzed the appropriate records. He cross-examined the government witnesses vigorously. He employed an expert who has testified against the government in numerous similar suppression hearings. The simple fact is that the hearing showed that although a dog's handling and training can always be criticized, the dog in this case was well qualified to produce reliable results. Accordingly, these claims relating to the reliability of the dog sniff are rejected because they have already been fully and fairly litigated and the petitioner cannot show that any alleged deficiency by his attorney would have changed the outcome of the hearing.

Claims 3, 4, 6, 11, 13 and 18 all suffer from the same deficiency. That is, these claims identify things that he claims were not done in the course of this case. However, the petitioner cannot show what the results of further investigation would have been or that conducting those efforts would have changed the outcome of the suppression hearing or his sentencing. For example, in Claim 3 the petitioner suggests that his attorney should have more vigorously pursued production of a relatively inconsequential witness's (Mark Steffen) notes. The petitioner makes repeated claims about the fact that no witness at the hearing recalled being the person who counted the approximately $6,000 being sent via UPS to the petitioner in Arizona. From this, the petitioner suggests that there was no $6,000 package of currency. Of course, the court found that there was such a package and that it did not matter who counted it or to know the precise amount of cash involved. There is no question but that it was a large quantity of currency, approximately $6,000.

In Claim 6, the petitioner contends that his attorney failed to inspect grand jury minutes but does not suggest what this inspection would have revealed. In Claim 11, he seeks a photograph of the $6,000 cash delivered to him in Yuma, Arizona. But there is no suggestion that a photograph of the cash would have assisted him in prevailing at the suppression hearing. Similarly, he contends that his attorney should have sought more information concerning UPS employees in Arizona. But these people did almost nothing other than to refuse to deliver the $6,000 package at the police's request.

Finally, in Claim 18, petitioner contends that his attorney should have sought a minor role reduction at sentencing. The petitioner was the source of the drugs in this case. He was the most culpable person. A role reduction would not have been granted.

In Claim 2, the petitioner contends that his initial arrest on Arizona state drug charges was "bogus" and simply a ruse for the initiation of federal court proceedings. Accordingly, he contends that the Speedy Trial Act requirement of an indictment within thirty days of the petitioner's initial appearance was violated in this case. He appears to contend that the state court charges were "bogus" because there was no evidence to support them. However, the evidence known to the police at that point was the exact same evidence that caused the petitioner ultimately to plead guilty. Finally, he cannot show that a dismissal of his indictment would have been a dismissal with prejudice. In fact, that is completely unlikely under the circumstances alleged by the petitioner.

In Claim 5, petitioner contends that his attorney failed to object to drug quantity at sentencing. But his attorney did that. *See* Dkt. 302.

In Claim 7, petitioner contends that he did not understand his plea agreement and that he was unjustifiably rushed into it by his attorney. This claim has already been litigated. *See* Dkt. 349. In this court's order denying the petitioner's motion to withdraw his guilty plea, the court noted two things of importance. First, the situation giving rise to the petitioner's abrupt decision to plead guilty was all completely of his own making. Second, the claims in his motion to withdraw his guilty plea and now Claim 7 of his § 2255 petition, directly contradict the testimony that he gave under oath at the time he entered his guilty plea. Nothing about the allegations made give the court any reason to reject that testimony that was given under oath.

In Claim 15, the petitioner offers one page of a search warrant affidavit as proof that the search warrant for one of the packages in this case was invalid. He contends that the affidavit in support of a March 21 search warrant was signed on March 13, long before police allegedly knew of the existence of packages at UPS going to and from the petitioner. The petitioner submits only the last page of the affidavit because the affidavit supports a search other than the ones at issue in the petitioner's suppression hearing.

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 15, 2016 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 9th day of January, 2017.

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

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