

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. 3:17-cr-00435-JO
)	
v.)	
)	
JODY TREMAYNE WAFER,)	JUDGMENT
)	
Defendant.)	

Based on the record, Defendant's Motion to Vacate, Set Aside or Correct his Sentence under 28 U.S.C. § 2255, ECF No. 258, is DENIED. The Court declines to issue a certificate of appealability because Defendant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED March 29, 2021.



 Robert E. Jones
 United States District Judge

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	No. 3:17-cr-00435-JO
)	
v.)	
)	
JODY TREMAYNE WAFER,)	OPINION AND ORDER
)	
)	
Defendant.)	

JONES, J.

Defendant Jody Tremayne Wafer pleaded guilty to conspiracy to distribute marijuana and to use of a firearm in furtherance of a drug trafficking crime. This court sentenced Defendant to no time in prison on the marijuana count and to 84 months in prison on the firearm count.

Defendant, representing himself, now moves to vacate his conviction under 28 U.S.C. § 2255, claiming that he received ineffective assistance of counsel. ECF No. 258. For the following reasons, I deny Defendant’s Motion.

LEGAL STANDARDS

I. Motions Under 28 U.S.C. § 2255

Under 28 U.S.C. § 2255, a federal prisoner may file a motion in the court that imposed the sentence to vacate, set aside, or correct the sentence because:

[T]he sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack

*Appendix B
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28 U.S.C. § 2255(a). To prevail on a motion under § 2255, a defendant must show that an error of constitutional magnitude occurred and that the error had a substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

II. Ineffective Assistance of Counsel

To prevail on a claim for ineffective assistance of counsel, the defendant must show both that his attorney's performance was unreasonable under prevailing professional standards and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984). If the defendant fails to show either incompetent performance or prejudice, the court "must dismiss the claim." *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672 (9th Cir. 2002). "Review of counsel's performance is highly deferential." *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1986). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

DISCUSSION

Defendant contends that his conviction should be vacated because Congress's decision to "proscrib[e] marijuana as a controlled dangerous substance in 1970 was political, arbitrary, unreasonable and unconstitutional contravening Amendments IV and V of the United States Constitution." Def.'s Mem. 3, ECF No. 259. Defendant further argues that his lawyer was ineffective for failing to challenge marijuana's legal status. Def.'s Mot. 4, ECF No. 258.

I. Strict Scrutiny Review Does Not Apply

Defendant argues that this court should use the strict scrutiny standard of review to evaluate his challenge to the federal prohibition of marijuana. Strict scrutiny review applies to

the denial of a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Due Process Clause “specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrifices.” *Id.* (internal quotation marks and citations omitted). “[T]he right must be carefully stated and narrowly identified before the ensuing analysis can proceed.” *Raich v. Gonzales*, 500 F.3d 850, 864 (9th Cir. 2007) (*Raich II*); *Glucksberg*, 521 U.S. at 721 (requiring “a ‘careful description’ of the asserted fundamental liberty interest”).

Here, Defendant contends he has been deprived of his fundamental right to be free from physical restraint. *See Chapman v. United States*, 500 U.S. 453, 465 (1991) (recognizing fundamental right to liberty “in the sense that the government may not punish” a person “unless and until it proves [the person’s] guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees”). However, Defendant’s description of the fundamental right at stake is too broad. For example, in *Raich II*, the Ninth Circuit addressed the claim of a plaintiff who sought to use marijuana medicinally, asserting a fundamental right to make medical decisions needed to preserve her bodily integrity, avoid intolerable physical pain, and preserve her life. *Id.* The court rejected the plaintiff’s “carefully crafted” asserted interest because it did not “narrowly and accurately reflect the right that she seeks to vindicate. Conspicuously missing from [the plaintiff’s] asserted fundamental right is its centerpiece: that she seeks the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life.” *Id.* (original italics) (footnote omitted). Similarly, here Defendant’s assertion of the fundamental right to liberty is based on his argument that the federal prohibition of marijuana is “unreasonable and unconstitutional.” Def.’s Reply 2, ECF No. 266. In effect, Defendant asks

this court “to determine whether he has a fundamental right to use, sell, or possess marijuana without facing incarceration.” *United States v. Green*, 14-cr-6038 (EAW), 2016 WL 11483508, at *3 (W.D.N.Y. June 27, 2016) (addressing similar claim). As Defendant acknowledges, “marijuana is not a fundamental right.” Def.’s Reply 2. Courts addressing challenges to the federal prohibition of marijuana have consistently rejected Defendant’s characterization of the fundamental right at stake. *United States v. Kiffer*, 477 F.2d 349, 352-53 (2d Cir. 1973); *United States v. Oakland Cannabis Buyers’ Co-op*, 259 F. App’x 936, 938 (9th Cir. 2007) (rational basis review applies to the defendants’ challenge to federal prohibition of medical marijuana).

In his reply brief at 2-3, Defendant quotes the following statement from the *Kiffer* opinion: “in the absence of compelling justification, the police power does not extend so far as to permit the Government to protect an individual against himself and that the concern for public health and safety is relevant only insofar as the actions of one individual may threaten the well-being of others.” 477 F.2d at 354. But the *Kiffer* opinion prefaces the quoted statement with the phrase, “An argument might perhaps be made,” so the quoted statement is not the court’s holding. *Id.* The *Kiffer* opinion distinguished between the federal prohibition on personal possession and use of marijuana, which was not at issue, versus the prohibition on the commercial distribution of marijuana to others, which was at issue. 477 F.2d at 355. Similarly, here the issue is the validity of the federal prohibition of possession of marijuana with intent to distribute, not the prohibition on the personal use or possession of marijuana.

II. Defendant’s Challenge Fails Under Rational Basis Review

Because there is no fundamental right to distribute marijuana, this court applies the rational basis standard of review, which requires that courts uphold a statutory classification “if there is any reasonably conceivable state of facts that could provide a rational basis for the

classification.” *Oakland Cannabis Buyers’ Co-op*, 259 F. App’x at 938 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 312, 320 (1993)). Under rational basis review, the Ninth Circuit has rejected due process challenges to the federal prohibition of marijuana. *United States v. Christie*, 825 F.3d 1048, 1066 (9th Cir. 2016) (rejecting Fifth Amendment due process challenge) (citing *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978) (rejecting challenge to federal classification of marijuana), *partially overruled on other grounds as recognized by United States v. Pineda-Moreno*, 688 F.3d 1087, 1090-91 (9th Cir. 2012)); *Sacramento Nonprofit Collective v. Holder*, 552 F. App’x 680, 683 (9th Cir. 2014); *see also Kiffer*, 477 F.2d at 355 (rejecting argument that “Congress acted irrationally in prohibiting the commercial distribution of marihuana”). In *Christie*, the Ninth Circuit explained that “while it may be true that marijuana’s legal status continues to evolve, as does its standing in the medical and scientific communities, those developments do not come close to demonstrating that changes since 1978 have left *Miroyan’s* ‘central holding obsolete.’” *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 860 (1992)); *see also James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir. 2012) (“Local decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana . . . continue to apply”) (original italics)). Defendant’s due process challenge to the federal prohibition of marijuana therefore fails. Similarly, to the extent Defendant relies on the right to equal protection, that challenge also fails. *See Chapman*, 500 U.S. at 465 (“an argument based on equal protection essentially duplicates an argument based on due process”).

Because a challenge to the federal prohibition of marijuana distribution would have been futile, Defendant cannot show that he was prejudiced by his counsel’s failure to raise the issue. Were this court to hold otherwise, defense counsel would be required to raise every conceivable issue despite controlling precedent to the contrary. Gov’t Resp. 6, ECF No. 264.

Defendant argues that he was deprived of a property interest without due process. Because marijuana is contraband *per se* under federal law, Defendant has no cognizable property interest at stake. *See Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“The [Controlled Substances Act] designates marijuana as contraband for any purpose.”); *United States v. Jeffers*, 342 U.S. 48, 54 (1951) (the defendant not entitled to return of illegally seized contraband).

Defendant also argues that he is a political prisoner and that he cannot be convicted of a victimless crime. These arguments have no basis in law or fact.

Here, “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). I therefore deny an evidentiary hearing.

CONCLUSION

Defendant’s Motion to Vacate, Set Aside or Correct his Sentence under 28 U.S.C. § 2255, ECF No. 258, is DENIED.

IT IS SO ORDERED.

DATED March 26, 2021.

/s/ Robert E. Jones

Robert E. Jones
United States District Judge

RECEIVED 12/15/2020

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District of Oregon	
Name (under which you were convicted): JODY TREMAYNE WAFER		Docket or Case No.: 3:17-CR-00435-JO-1	
Place of Confinement: FCI YAZOO CITY MEDIUM P.O. BOX 5000 YAZOO CITY, MS 39194		Prisoner No.: 80606-065	
UNITED STATES OF AMERICA		Movant (include name under which convicted)	
V.		JODY TREMAYNE WAFER	

MOTION

- (a) Name and location of court which entered the judgment of conviction you are challenging:
Mark O. Hatfield United States Courthouse
Room 1007
1000 Southwest Third Avenue
Portland, Oregon 97204-2946

(b) Criminal docket or case number (if you know): 3:17-CR-00435-JO-1
- (a) Date of the judgment of conviction (if you know): 1/8/2020

(b) Date of sentencing: 1/8/2020
- Length of sentence: Count 1: No time; Count 9: 7 years, 3years supervised release.
- Nature of crime (all counts):
COUNT 1: 21 U.S.C. §846 CONSPIRACY TO MANUFACTURE, POSSESS WITH INTENT TO
DISTRIBUTE AND DISTRIBUTE MARIJUANA AND MAINTAIN DRUG INVOLVED PREMISES
COUNT 9: 18 U.S.C. §§924(c)(1)(A)(i) and (ii) USING AND CARRYING A FIREARM DURING AND IN
RELATION TO A DRUG TRAFFICKING CRIME
- (a) What was your plea? (Check one)
 (1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
- If you went to trial, what kind of trial did you have? (Check one) Jury Judge only
- Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

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8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

- (a) Name of court: _____
- (b) Docket or case number (if you know): _____
- (c) Result: _____
- (d) Date of result (if you know): _____
- (e) Citation to the case (if you know): _____
- (f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

- (1) Docket or case number (if you know): _____
- (2) Result: _____
- (3) Date of result (if you know): _____
- (4) Citation to the case (if you know): _____
- (5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: _____
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): _____

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- 12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Mr. Wafer is in custody in violation of Amendments IV and V of the Constitution of the United States. He is being deprived of his liberty, without compelling reasons for Congress to proscribe marijuana, therefore without due process of law.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. There is no constitutional amendment proscribing marijuana.
2. The historical definition of a crime requires a victim.
3. Original meaning of liberty, freedom from physical restraint, IS a constitutional right.
4. Marijuana is NOT a constitutional right. It is property. To acquire property is a constitutional right.
5. The operation and effect of federal prosecution in the enforcement of 21 U.S.C. § 846, was the seizure of Mr. Wafer ' s person and deprivation of his constitutional right of liberty by the bounds of prison.
6. Marijuana does not meet all three criteria to be a controlled substance. It is safe to use without medical supervision.
7. A reasonable regulated interstate commerce of this property, marijuana, does not present a substantial threat to the rights of others, to public safety or health. requiring the use of federal police power.
8. Mr. Wafer plead guilty, was convicted, deprived of his liberty, without compelling government reasons for a victimless crime, a political crime.
9. Ground One is not about selective, arbitrary enforcement of the marijuana laws, violating due process of law.
10. Political police power, Mr. Wafer is a political prisoner.

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

- (2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

- (3) Did you receive a hearing on your motion, petition, or application?

Yes No

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Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Ground One has not been raised because of "ineffective assistance of counsel" that was prejudicial. Counsel believes criminal laws are not an Article III case or controversy ripe for adjudication by this court under strict scrutiny standard of review. Counsel believes the marijuana laws are constitutional because marijuana is not a fundamental right. Counsel treats laws that authorize the use of police power as a political question. Counsel violated solemn oath to uphold Amend IV limiting police power to be reasonable not rational. Counsel did not protect the right of Mr. Wafer to be secure against unreasonable deprivation of his constitutional right of liberty, freedom from physical restraint, and his right of property secured by Amendments IV and V.

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:

Barry W Engle

(b) At the arraignment and plea:

Barry W Engle

(c) At the trial:

(d) At sentencing:

Barry W Engle PC 12901 SE 97th Avenue Suite 395 Clackamas, OR 97015

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

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Therefore, movant asks that the Court grant the following relief:

To declare liberty is freedom from physical restraint and the U.S. Congress proscribing marijuana as a controlled substance was arbitrary and unreasonable regulation of property, depriving Mr. Wafer's liberty without compelling reasons, without due process of law violating Amends. IV, V of the U.S. Constitution thus vacating both convictions.

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on Dec. 7, 2020
(month, date, year)

Executed (signed) on Dec. 7, 2020 (date)



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES CODE

18 U.S. Code § 924 - Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or Drug trafficking crime . . . for which the person may be prosecuted in a court of the United States uses or carries a firearm or who, in furtherance of any such crime, possesses a firearm, in addition to the punishment provided for such . . . drug trafficking crime

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

21 U.S. Code SUBCHAPTER I—CONTROL AND ENFORCEMENT

21 U.S.C. § 846 Conspiracy to Distribute a Schedule I Controlled Substance

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S. Code § 2243

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice required.

IN THE
SUPREME COURT OF THE UNITED STATES
IN RE CHAD ANTHONY RAY

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS contains 1559 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

CERTIFICATE OF SERVICE

S.C.O.T.U.S. 29 (4)(a)

I certify that the following attached documents for

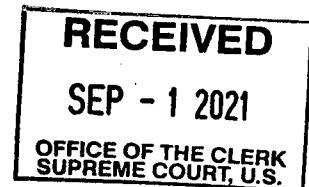
PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

were sent USPS 1st class mail, postage paid to:

The Warden.
FCI Yazoo City Medium
2255 Haley Barbour Parkway
Yazoo City, MS 39194

Solicitor General of the United States,
Room 5616, Department of Justice,
950 Pennsylvania Ave., N. W.,
Washington, DC 20530-001
(202) 514-2203

On the 27th of Augusta 2021.



/s/Jody Tremayne Wafer, Pro Se
BOP #80606-065
FCI Yazoo City Medium
P.O. BOX 5000
Yazoo City, MS 39194