APPENDIX

A

SHAWN RUSSELL SORENSEN, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION
2023 U.S. Dist. LEXIS 17676; 2023 LX 46535
4:19-CV-04190-KES
February 1, 2023, Decided
February 1, 2023, Filed

Editorial Information: Subsequent History

Affirmed by Sorensen v. United States, 2025 U.S. App. LEXIS 13319 (June 2, 2025)

Editorial Information: Prior History

Sorensen v. United States, 2021 U.S. Dist. LEXIS 263684, 2021 WL 10330388 (D.S.D., Oct. 19, 2021)

Counsel {2023 U.S. Dist. LEXIS 1}For **Shawn Russell Sorensen**, Petitioner: Molly C. Quinn, LEAD ATTORNEY, Federal Public Defender's Office, Sioux Falls, SD.
For United States of America, Respondent: Kevin Koliner, LEAD ATTORNEY, U.S. Attorney's Office (Sioux Falls, SD), Sioux Falls, SD.

Judges: KAREN E. SCHREIER, UNITED STATES DISTRICT JUDGE.

CASE SUMMARY District court properly granted defendant motion to dismiss because the marginal increase in information about the loan-when compared to the significant amount of evidence that plaintiff faced that was separate from money officers found on his person at the time of his arrest-was insufficient to establish prejudice.

OVERVIEW: HOLDINGS: [1]-The district court properly granted defendant motion to dismiss because the marginal increase in information about the loan-when compared to the significant amount of evidence that plaintiff faced that was separate from the money officers found on his person at the time of his arrest-was insufficient to establish prejudice. Defendant had a substantial amount of evidence against plaintiff, independent of the cash officers found on his person. The plaintiff could not meet his burden showing there was a reasonable probability that his lawyers' failure to investigate and call potential witness to the stand would have changed the jury's verdict. Thus, the court overruled plaintiff's objection to the Report and Recommendation's finding that plaintiff could not establish prejudice. Plaintiff could not meet his burden in showing prejudice under Strickland.

OUTCOME: Motion to dismiss granted.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

The court's review of a magistrate judge's report and recommendation is governed by 28 U.S.C.S. § 636 and Fed. R. Civ. P. 72. The court reviews de novo any objections to the magistrate judge's recommendations as to dispositive matters that are timely made and specific. 28 U.S.C.S. § 636(b)(1); Fed. R. Civ. P. 72(b). In conducting its de novo review, the district court may then accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C.S.

§ 636(b)(1).

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Sentencing

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Surmounting Strickland's high bar is never an easy task.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Generally, counsel enjoys a strong presumption that his conduct falls within the wide range of reasonable profession assistance. While strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. The court must consider whether the known evidence would lead a reasonable attorney to investigate further. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. A trial counsel's decision not to investigate potential witnesses may be reasonable if counsel determined that any potential information an investigation might uncover would have limited value and could be easily attacked on cross-examination. There need only be a reasonable basis for counsel's strategic decision not to interview a witness.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Trial counsel cannot reasonably decline to interview or investigate a potential witness based solely on the belief that the witness would be a bad witness or an uncredible one. A complete failure to investigate generally constitutes ineffective assistance of counsel. Counsel has a duty to investigate all witnesses who allegedly possessed knowledge concerning the defendant's guilt or innocence. Failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. The complete failure to investigate potentially corroborating witnesses can hardly be considered a tactical decision.

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Trials

Even if trial counsel performed deficiently, Strickland requires the court to conduct a further analysis: whether there is a reasonable probability that but for counsel's errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. At the same time, this burden is lower than a more likely than not standard. The court must consider the totality of the evidence before the jury. A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability
Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

When a district court denies a petitioner's 28 U.S.C.S. § 2255 motion, the petitioner must first obtain a certificate of appealability before an appeal of that denial may be entertained. 28 U.S.C.S. § 2253(c)(1)(B). This certificate may be issued only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C.S. § 2253(c)(2). A substantial showing is one that proves reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Stated differently, a substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

The court's inquiry into counsel's performance is limited to what the Constitution requires, rather than what may have been ideal representation. Strickland requires attorneys to be reasonably competent using an objective standard.

Opinion

Opinion by: KAREN E. SCHREIER

Opinion

ORDER DISMISSING PETITION

Shawn Russell Sorensen filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Docket 1.1 The government moved to dismiss, and the court dismissed all of Sorensen's claims except one: Sorensen's ineffective assistance of counsel claim for failure to investigate potential witness Larry Kuhnert. *See* Docket 51 at 28. Magistrate Judge Duffy held an evidentiary hearing on this surviving matter. *See* Docket 58. Magistrate Judge Duffy issued a Report and Recommendation, recommending that the court dismiss Sorensen's remaining claim because he could not meet his burden of showing his lawyers provided deficient representation, nor could he show prejudice. Docket 60 at 14-18. Sorensen filed several factual and legal objections. Docket 64. The court now reviews Sorensen's final claim.

STANDARD OF REVIEW

The court's review of**{2023 U.S. Dist. LEXIS 2}** a magistrate judge's report and recommendation is governed by 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. The court reviews de novo any objections to the magistrate judge's recommendations as to dispositive matters that are timely made and specific. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In conducting its de novo review, this court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

FACTUAL BACKGROUND

Sorensen does not object to the Report and Recommendation's discussion about his underlying 2016 criminal trial, and thus the court adopts that discussion in full. *See* Docket 60 at 2-9. The court further adopts the Report and Recommendation's factual recitation of the evidentiary hearing, except as specifically modified below after considering Sorensen's numerous objections to the Report's factual findings. *See* Docket 64 at 1-11.

Sorensen first objects to the Report and Recommendation's "failure to discuss the lack of pretrial investigation of Larry Kuhnert as a potential witness, including investigation into Kuhnert's background, financial situation, and credibility." Docket 64 at 1. The record shows that Sorensen's counsel failed to hire an investigator, never investigated Kuhnert's background,**{2023 U.S. Dist. LEXIS 3}** including Kuhnhert's financial situation and social background with Sorensen, and failed to conduct a criminal background check on Kuhnert. *See* Docket 59 at 40, 44-45, 59-61. Although it did so briefly, the Report and Recommendation acknowledged the fact that Sorensen's trial counsel failed to document their pretrial interviews with Kuhnert, failed to hire an investigator, and failed to conduct a criminal background check on Kuhnert. *See* Docket 60 at 15. Thus, the court overrules Sorensen's objection to the Report and Recommendation's failure "to discuss the lack of pretrial investigation of Larry Kuhnert as a potential witness" to the extent the objection argues the Report and Recommendation failed to consider these facts entirely. *See* Docket 64 at 1. The court finds, however, that this failure to investigate Kuhnert necessarily includes a failure to fully evaluate Kuhnert's financial situation, credibility, and relationship with Sorensen, which the Report and Recommendation did not explicitly state. *See* Docket 60 at 15.

Sorensen next objects to the Report and Recommendation's finding-to the extent it was definitive-that Kuhnert talked to Sorensen's lawyers over the phone before trial.**{2023 U.S. Dist. LEXIS 4}** *See* Docket 64 at 4. The record is ambiguous as to whether defense counsel interviewed Kuhnert before trial. Kuhnert himself testified his memory was "a little fuzzy" about the details and extent of his conversations with Sorensen's lawyers. *See* Docket 59 at 27. He testified that he "thinks" he talked to some lawyers from Minneapolis over the phone about him loaning money to Sorensen but could not remember the name of the person with whom he spoke and could not remember which day he spoke with them. *See id.* at 18-19, 27-28.

Similarly, counselor Grostyan repeatedly indicated that he "[could not] say for certain" whether he spoke with Kuhnert prior to Sorensen's trial. *See id.* at 33-34, 34, 40-41, 45. Grostyan testified he had a "foggy recollection of maybe speaking to Mr. Kuhnert" and further testified that his attempts at looking through cell phone records and trial notes to refresh his memory failed because he was unable to find any records about any conversations he may have had with Kuhnert. *See id.* at 33-34. Relatedly, Sorensen objects to the Report and Recommendation's finding that Grostyan's phone company told Grostyan that they did not have records on his phone dating back to**{2023 U.S. Dist. LEXIS 5}** the relevant investigation period. *See* Docket 64 at 7. The court sustains this objection, because Grostyan testified only that he did not *think* his cell phone carrier maintained records that far back, not that his cell phone carrier actually told him that information. *See* Docket 59 at 41.

Counselor Rivers also testified that he could not recall one way or the other whether Grostyan had made contact with Kuhnert prior to trial. *Id.* at 61. He said that Grostyan "might" have contacted Kuhnert because Rivers and Grostyan had a conversation about Kuhnert's potential testimony. *See id.* at 61-62.

Given the ambiguous record, the court finds that, at most, Sorensen's lawyers might have talked with Kuhnert prior to Sorensen's trial. It is undisputed that neither Grostyan nor Rivers could find concrete records confirming this possible telephone meeting, and Kuhnert's testimony was inconclusive too. *See id.* at 16-19, 27-28, 40-41, 51-52. Thus, the court sustains Sorensen's objection to the Report and Recommendation's findings, to the extent they were definitive, that Sorensen's lawyers talked with Kuhnert prior to Sorensen's trial. *See* Docket 64 at 4.

For purposes of providing additional context,**{2023 U.S. Dist. LEXIS 6}** Sorensen also objects to the Report and Recommendation's finding that "Kuhnert testified that he met with trial counsel once during trial at the courthouse." *Id.* at 8 (citing Docket 60 at 10). Sorensen points out that although Kuhnert did in fact testify about a few-minute conversation Kuhnert had with Sorensen's lawyers the day of trial at the courthouse, neither of Sorensen's lawyers remembered having this conversation. *See* Docket 59 at 16-18, 36, 46-47, 66. The court overrules Sorensen's objection to the extent it suggests the Report and Recommendation's finding regarding Kuhnert's testimony about him meeting with Sorensen's lawyers the day of the trial was incorrect, but does note the additional context Sorensen provides.

Relatedly, Sorensen objects to the Report and Recommendation's finding that Kuhnert testified that he told Sorensen's lawyers "on both occasions" that he loaned Sorensen cash to pay for work on Sorensen's car, but that he could not remember the amount. *See* Docket 60 at 10; Docket 64 at 8 n. 1. Sorensen contends that Kuhnert "only testified that he did not recall the amount during his courthouse conversations with the attorneys" and did not testify about whether**{2023 U.S. Dist. LEXIS 7}** he could recall the loan amount during any potential phone call with Sorensen's lawyer before trial. *See* Docket 64 at 8 n. 1. This contention appears to be accurate because Kuhnert did not testify whether he could remember the loan amount during any phone conversation with Sorensen's lawyers. *See* Docket 59 at 18-19. The court sustains this objection.

Next, Sorensen objects to the Report and Recommendation's findings regarding the reasons why Grostyan and Rivers decided to not call Kuhnert to testify. Docket 64 at 2, 13. Specifically, Sorensen objects to the Report and Recommendation's finding that they "did not reject [Kuhnert's] testimony because they feared the jury would not find him credible," but because his testimony was "marginal at best given the mountain of the government's evidence against Mr. Sorensen." *See* Docket 60 at 15-16. Both lawyers gave various reasons why they chose to not call Kuhnert as a witness. Grostyan testified about two main reasons he decided not to call Sorensen. *See* Docket 59 at 34-36. He testified the following:

> Q: Was there a reason why you didn't go further on that information or call him as a witness?
>
> A: I don't know for sure. I know my view of the case**{2023 U.S. Dist. LEXIS 8}** it was a difficult case and that the money was certainly relevant, it was into evidence. But it wasn't -- *it wasn't damning evidence or evidence we needed to focus on to try to prevent the jury from finding him guilty*. . . So whether he had -- my thought was -- and again, I'm trying to harken back to five years ago, but minimal relevance given the nature of the case and the other evidence in the case.

I also didn't know if there was -- if this -- if this checked out. It sounded questionable to me, but that's just, you know, trying to remember back to my internal thought process on it.*Id.* at 34-35. (emphasis added). He continued discussing the "risk" that Kuhnert's proposed testimony would make his client's case worse. *Id.* at 35-36. He testified:

> A feeling of, you know, *uncertainty of the veracity of what was happening*, whether it really mattered, *whether we gave the jury the impression that there was - we were grasping at straws, chasing shiny objects* when we should have been focused on, you know, the evidence that really mattered that the Government used and weighed heavily on to prosecute Mr. Sorensen.*Id.* (emphasis added). Taken as a whole, Grostyan testified that he was both worried**{2023 U.S. Dist. LEXIS 9}** about whether Kuhnert's testimony would be credible, as well as whether Kuhnert's testimony would help Sorensen's case. *See id.* at 34-36. Rivers mostly testified about the second of these reasons. *See id.* at 55-56. He testified that he was worried that Kuhnert's testimony "didn't shed any light or move the ball down the field with respect to the underlying facts." *Id.* at 56. He also testified about the worry that the jury might think that Sorensen was manipulating Kuhnert into giving him money, which is something that, to Rivers, "didn't . . . ma[ke] a whole lot of sense to highlight []." *Id.* at 56-57.

Although both attorneys' testimonies are relevant, Grostyan's testimony deserves special weight. At the hearing, Grostyan testified he acted as lead counsel in the case. *Id.* at 38. Additionally, Rivers testified that Grostyan was mainly responsible for handling Kuhnert's potential testimony. *See id.* at 61. Thus, while the court does not discredit Rivers's testimony in any way, it finds Grostyan's testimony particularly relevant. And here, Grostyan testified that he rejected Kuhnert's testimony in part because he was skeptical of the credibility and veracity of Kuhnert's testimony. *See**{2023 U.S. Dist. LEXIS 10}** id.* at 35-36.

The court sustains Sorensen's objection to the Report and Recommendation's finding that "the lawyers did not reject [Kuhnert's] testimony because they feared the jury would not find him credible. Rather they felt evidence of the loan was marginal at best given the mountain of the governments evidence against Mr. Sorensen." *See* Docket 60 at 15. The court finds that while Sorensen's lawyers were in part concerned about whether Kuhnhert's testimony, even if true, would help Sorensen's case, they were also concerned about the reliability and veracity of Kuhnert.

Sorensen next makes two objections relating to the Report and Recommendation's findings about Rivers's testimony. Sorensen first objects to the Report and Recommendation's use of the term "double-edged sword" in describing Rivers's testimony to clarify that Rivers did not actually use that term in his testimony. *See* Docket 64 at 9. The court sustains the objection to the extent that the Report and Recommendation attributed this term to Rivers given that Rivers did not use this exact phrase. *See* Docket 59 at 56-58. But the court agrees with the Report and Recommendation that Rivers did in fact testify about how he believed**{2023 U.S. Dist. LEXIS 11}** there would be a risk of the jury misconstruing Kuhnert's testimony-specifically, the risk that the jury could see Sorensen as manipulating Kuhnert by taking Kuhnert's money and using it for drugs rather than for a car repair payment. *See id.*

Sorensen next objects to the Report and Recommendation's finding that "Mr. Rivers testified he and Mr. Grostyan discussed [Kuhnert's testimony] with Mr. Sorensen, and Mr. Sorensen was in agreement with the lawyers' decision not to call Mr. Kuhnert to testify." *See* Docket 64 at 9; Docket 60 at 12. While Sorensen acknowledges Rivers did in fact testify to this effect, Sorensen argues that other testimony contradicts Rivers's testimony. *See* Docket 64 at 9. Sorensen cites his own testimony that as far as he knew, his lawyers had never contacted Kuhnert. *See id.;* Docket 59 at 6. Sorensen also cites Grostyan's testimony about Kuhnert's potential testimony and points out that

Grostyan never testified that Sorensen agreed to not call Kuhnert. *See* Docket 64 at 9; Docket 59 at 31-32, 47-49. But neither Sorensen's nor Grostyan's testimony directly contradicts Rivers's testimony. It is consistent, for example, that Sorensen did know whether his lawyers had**{2023 U.S. Dist. LEXIS 12}** contacted Kuhnert and at the same time agreed not to call Kuhnert to the stand during the trial. Grostyan's testimony does not say either way, and his silence on the matter does not directly contradict Rivers's affirmative testimony that Sorensen agreed to this strategy. Without a more solid basis to refute Rivers's testimony, the court declines to do so and overrules Sorensen's objection on this matter.

Finally, Sorensen objects to the Report and Recommendation's "fail[ure] to discuss counsel's acknowledgement of the potential importance and benefits of Kuhnert's testimony." *See* Docket 64 at 10. In support, Sorensen correctly recites Grostyan's and Rivers's testimony at the hearing about the potential benefits of Kuhnert's testimony. *See id.* at 10-11. Although the Report and Recommendation did not explicitly mention this testimony, the Report and Recommendation did discuss the potential impact the testimony might have in the event the jury credited Kuhnert's testimony. *See* Docket 60 at 15-18. The court overrules the objection but does note the testimony both Grostyan and Rivers gave concerning the potential benefit of Kuhnert's testimony.

DISCUSSION

"A convicted defendant's claim that**{2023 U.S. Dist. LEXIS 13}** counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

I. Deficient

Generally, counsel enjoys a "strong presumption that [his] conduct falls within the wide range of reasonable profession assistance[.]" *Strickland*, 466 U.S. at 689. While "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,]" "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The court must consider "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness**{2023 U.S. Dist. LEXIS 14}** in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

A trial counsel's decision not to investigate potential witnesses may be reasonable if counsel "determine[d] that any potential information an investigation might uncover would have limited . . . value [and] could be easily attacked on cross-examination." *United States v. Ngombwa*, 893 F.3d 546, 552 (8th Cir. 2018) (alterations in original) (quoting *United States v. Mohammed*, 863 F.3d 885, 890, 430 U.S. App. D.C. 315 (D.C. Cir. 2017)). There need only be a "'reasonable basis for [counsel's] strategic decision' not to [interview a witness]." *Id.* (quoting *Burger v.* Kemp, 483 U.S. 776, 795, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)).

At the same time, trial counsel cannot reasonably decline to interview or investigate a potential witness based solely on the belief that the witness would be a bad witness or an uncredible one. *See*

Johnson v. Bagley, 544 F.3d 592, 600 (6th Cir. 2008) ("That someone may make a bad witness is no explanation for not interviewing her first."); *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) (rejecting argument that "a failure to interview witnesses is excusable as 'a strategic decision' if the witnesses would not have been credible" because "[w]ithout so much as contacting a witness, much less speaking with him, counsel is 'ill-equipped to assess his credibility or persuasiveness as a witness.'" (quoting *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994))). A complete failure to investigate generally constitutes ineffective assistance**{2023 U.S. Dist. LEXIS 15}** of counsel. *See Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991) ("Counsel has 'a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence.'")(omission and alteration in original) (quoting *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1990)); *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984) (investigation consisting solely of reviewing prosecutor's file "fell short of what a reasonably competent attorney would have done"); *United States v. Gray*, 878 F.2d 702, 711 (8th Cir. 1989) ("[F]ailure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness."); *United States v. Debango*, 780 F.2d 81, 85, 250 U.S. App. D.C. 419 (D.C. Cir. 1986) ("The complete failure to investigate potentially corroborating witnesses . . . can hardly be considered a tactical decision.").

Here, Grostyan and Rivers conducted a minimal, if any, investigation into Kuhnert. As discussed above, the record is less than clear whether Grostyan actually spoke with Kuhnert prior to Sorensen's trial, but it is undisputed that neither Grostyan nor Rivers could find concrete records confirming this possible telephone meeting, and Kuhnert's testimony was inconclusive too. *See* Docket 59 at 16-19, 27-28, 40-41, 51-52. But even if Grostyan did have a telephone call with Kuhnert, there is no evidence to suggest that he or Rivers followed up in any meaningful way. They failed to hire an investigator, never investigated**{2023 U.S. Dist. LEXIS 16}** Kuhnert's background, including Kuhnert's financial situation and social background with Sorensen, and failed to conduct a criminal background check on Kuhnert. *See* Docket 59 at 40, 44-45, 59-60. They did not interview other potential witnesses who knew Kuhnert. They did not interview Kuhnert's brother-the person whom Sorensen was supposed to pay for the car work using Kuhnert's money.

This case does not involve Sorensen's counsel merely failing to identify potential impeachment evidence on Kuhnert. *See McLaughlin v. Precythe*, 9 F.4th 819, 828 (8th Cir. 2021). In *McLaughlin*, the Eighth Circuit considered whether the defendant's sentencing counsel acted ineffectively by failing to investigate whether its expert had prior allegations of dishonest conduct. *See id.* at 829-30. There, the defendant had hired a mitigation expert witness who would give testimony about the defendant's extreme emotional disturbance and mental illness at the time the defendant committed the criminal acts. *See id.* at 825-26. A mitigation specialist had recommended the expert to defense counsel after seeing the expert give a presentation at a death penalty legal education program, and the defense had reviewed the expert's curriculum vitae. *Id.* at 826. The defense team planned on calling the expert to testify at**{2023 U.S. Dist. LEXIS 17}** the sentencing phase. *Id.*

While the jury deliberated during the guilty phase of the trial, the expert disclosed to the defense team that he had falsified data in a lab report seventeen years ago. *See id.* The defense ultimately decided not to call the expert. *See id.* The Eighth Circuit held that the defendant failed to overcome the presumption that defense counsel performed reasonably. *See id.* at 830. In doing so, however, the court stressed its narrow inquiry, and observed that the case did not "concern the failure to investigate a potential defense or inquire into the *substance* of the expert witness's testimony." *See id.* at 828. Indeed, the court recognized that sometimes, trial counsel's failure to investigate an expert's credentials could be constitutionally deficient. *See id.* at 828. But because the defense team had reasonably relied on the mitigation specialist's recommendation and review of the expert's curriculum vitae, they did not provide constitutionally deficient representation by failing to search for potential impeachment evidence of the expert. *See id.* at 829-30.

Unlike in *McLaughlin*, here, Kuhnert provided potential testimony that could have helped explained why Sorensen had a significant amount of cash on his person at**{2023 U.S. Dist. LEXIS 18}** the time of his arrest. By failing to meaningfully investigate Kuhnert, Sorensen's lawyers did not just fail to identify possible impeachment evidence of Kuhnert-they failed to identify any real information on Kuhnert at all. Thus, *McLaughlin* is distinguishable.

Furthermore, even if Sorensen agreed with his lawyers not to investigate or call Kuhnhert to the stand, which he denies doing, that alone does not relieve counsel from investigating. *See* Docket 64 at 10; *Cf.* ABA Standards for Criminal Justice 4-4.1(a) (3d ed. 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore *all avenues leading to facts relevant to the merits of the case* . . . . The duty to investigate exists *regardless of* the . . . accused's stated desire to plead guilty." (emphasis added)); *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (citing with approval substantially similar version of ABA guideline for purposes of conducting *Strickland* analysis). Grostyan and Rivers-not Sorensen-were responsible for mounting an effective defense of Sorensen, and a defendant's agreement to not interview a witness does not automatically justify a lawyer's decision to not investigate. Nor does this case involve Sorensen actively preventing his lawyers from investigating. *See Ortiz v. United States* 664 F.3d 1151, 1171-72 (8th Cir. 2011) (emphasizing**{2023 U.S. Dist. LEXIS 19}** defendant's refusal to cooperate in investigative efforts as relevant to determining counsel's reasonableness).

In sum, the court finds Sorensen's lawyers performed minimal, if any, investigation. The court must now determine whether they acted reasonably in not performing such investigation, which turns on their reason for why they failed to investigate. *See Ngombwa*, 893 F.3d at 552. So long as counsel had a reasonable basis for their decision not to investigate, they provided constitutionally effective representation. *See id; see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary*." (emphasis added)).

Here, Grostyan served as the lead counsel and was responsible for investigating and handling what to do with Kuhnert's potential testimony. *See* Docket 59 at 38, 60-61. Grostyan testified that there were two main reasons he elected to not fully investigate Kuhnhert: first, because we thought the evidence was minor relative to the rest of the evidence in the case, and second, because he thought Kuhnert's testimony "sounded questionable" and was concerned with its "veracity" and whether it really "checked out." *See id.***{2023 U.S. Dist. LEXIS 20}** at 34-35.

The second reason Grostyan gave for failing to investigate Kuhnert is insufficient: a trial lawyer's decision to not investigate a potential witness because of a suspicion that the witness is uncredible does not relieve the lawyer from actually investigating the witness. *See Johnson*, 544 F.3d at 600; *Anderson*, 338 F.3d at 392. A major part of any investigation into a witness is to gather more information in order to make a credibility determination. Thus, had this rationale been the only one that Sorensen's trial counsel relied on, the court would be inclined to find that his lawyers acted deficiently.

But Grostyan also explained that he decided not to investigate Kuhnhert because of the "minimal relevance given the nature of the case and the other evidence in the case" and out of fear that the jury would perceive the defense as "gasping at straws" rather than focusing on "the evidence that really mattered that the Government used and weighed heavily on to prosecute Mr. Sorensen." *See* Docket 59 at 35-36. Rivers confirmed this reasoning and testified that he did not think Kuhnert's testimony would "move the ball down the field with respect to the underlying facts" given that it "wasn't an essential part of the case[.]" Rivers**{2023 U.S. Dist. LEXIS 21}** further explained that the jury could construe Kuhnert's testimony against Sorensen because they could view Sorensen as "manipulating" Kuhnert to get money for something else, and thus Rivers felt that it didn't make a whole lot of sense to "highlight" this loan. *See id.* at 56-58.

The court finds Sorensen's lawyers' first reason not to investigate Kuhnert-that Kuhnert's testimony, if true, would not assist Sorensen's defense and would instead have a potential to backfire-to be a reasonable determination under the circumstances. The Report and Recommendation recounted the weight of the evidence against Sorensen, which was unrelated to the money officers found on his person. *See* Docket 60 at 14-15; Docket 64 at 14. This evidence includes, but is not limited to: (1) testimony that Sorensen's co-defendant, Hartz, received a package that contained cocaine and methamphetamine from Arizona with a return label of Dave Beckman that she was to give to Sorensen; (2) text messages between Sorensen and Hartz indicating Sorensen knew Hartz had a package for Sorensen; (3) testimony that Sorensen went to Hartz's home to pick up the package; (4) evidence that Sorensen called the USPS hotline to check**{2023 U.S. Dist. LEXIS 22}** on the status of the package; (5) evidence that officers discovered Sorensen's home and found methamphetamine, drug paraphernalia, and a USPS mailing label that appeared to be from a different package that Sorensen had mailed to Hartz with the same return label of Dave Beckham; and (6) evidence that multiple packages were sent from Arizona to Sioux Falls addressed to Hartz and flight records showing Sorensen flew from Sioux Falls to Arizona on corresponding delivery dates of many of these packages. *See United States v. Sorensen*, 893 F.3d 1060, 1063-64 (8th Cir. 2018).

The court also finds that Sorensen's lawyers' worries that the jury would construe Kuhnert's testimony as evidence of Sorensen's manipulative character were reasonable. Sorensen argues that investigating Kuhnert's background would have helped explain some of the questions raised by his testimony. *See* Docket 64 at 15. But this argument goes more towards the attorneys' hesitancy to believe the veracity of Kuhnert's testimony, rather than whether a jury might reasonably be skeptical of this explanation. The latter concern is one that does not rely on whether the *lawyers* believed Kuhnert's credibility, but instead whether a jury would believe Kuhnert. And ultimately, Sorensen's counsel**{2023 U.S. Dist. LEXIS 23}** needed to persuade a jury, not themselves. They acted reasonably in concluding a jury might construe Kuhnert's testimony against Sorensen.

Given the mountain of evidence against Sorensen unrelated to the money officers found on Sorensen, Grostyan and Rivers reasonably concluded that interviewing Kuhnert about Sorensen's loan would not have been worthwhile. Kuhnert's testimony would not have explained any of the above evidence, and as Rivers reasonably concluded, may have led a jury to think Sorensen manipulated Kuhnert into giving Sorensen money for drugs under the guise of car repairs. *See* Docket 59 at 56-58.

Sorensen argues that this reason is "belied by the trial court record" because of the cross-examination Rivers conducted on Sorensen's wife, asking whether she believed Kuhnert had enough money to loan to Sorensen and whether Kuhnert knew Sorensen well enough such that Kuhnert would loan Sorensen money. *See* Docket 64 at 14; CR Docket 137-1 at 182-83. According to Sorensen, "[t]rial counsel's current claim that evidence of Kuhnert's cash loan to Sorensen was too risky to present is not credible in light of the decisions they made at the time of trial." Docket 64 at 15. But this**{2023 U.S. Dist. LEXIS 24}** argument fails to recognize that counsel could reasonably choose to cross-examine a government witness to poke holes in the Government's theory and simultaneously choose not to draw attention to the loan by "highlight[ing]" it in Sorensen's own case in chief by calling Kuhnert. *See* Docket 59 at 57. This strategic choice is reasonable considering the facts of this case.

The court overrules Sorensen's objection to the Report and Recommendation's legal conclusion that

Sorensen's trial counsel's representation was constitutionally effective. *See* Docket 60 at 14; Docket 64 at 11.

II. Prejudice

Even if trial counsel performed deficiently, *Strickland* requires the court to conduct a further analysis: whether "there is a reasonable probability that but for counsel's errors, the result would have been different." *United States v. Orr*, 636 F.3d 944, 950 (8th Cir. 2011) (cleaned up). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466. U.S. at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. At the same time, this burden is lower than a "more likely than not" standard. *Id.* at 693-94. The court must consider the "totality of the evidence before the . . . jury." *Id.* at 695.**{2023 U.S. Dist. LEXIS 25}** "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. In the context of a lawyer's decision not to call a witness, the court must "add the expected testimony of [Kuhnert] to the totality of evidence that was actually presented at trial." *Armstrong v. Kemna*, 534 F.3d 857, 866 (8th Cir. 2008).

Here, Sorensen argues that there is a reasonable probability that Kuhnert's testimony would have changed the outcome of the case because the cash was "a significant part of the government's case." Docket 64 at 16. In support of his argument, Sorensen accurately cites the multiple witnesses that testified about the cash, as well as the government's opening and rebuttal argument in closing that discussed the amount of cash found on Sorensen. *See id.*

But unlike in other cases, which sometimes require difficult judgment calls about how brand-new evidence may have impacted a jury's decision, the testimony at issue in this case would have been supplementary, rather than new: the jury already heard about a potential loan from Kuhnert to Sorensen. *See* CR Docket 137-1 at 182-83. Sorensen's counsel cross-examined Sorensen's wife about whether she knew if Kuhnert**{2023 U.S. Dist. LEXIS 26}** had enough money to lend to Sorensen to repair Sorensen's truck and whether Kuhnert knew Sorensen well enough to give out a loan. *See id.* Although Kuhnert's testimony might have provided the jury a more concrete picture about this loan, it is not the case that the jury had no evidence about such a loan.

The marginal increase in information about the loan-when compared to the significant amount of evidence Sorensen faced that was separate from the money officers found on his person at the time of his arrest-is insufficient to establish prejudice. As discussed above and recounted by the Report and Recommendation, the government had a substantial amount of evidence against Sorensen, independent of the cash officers found on his person. *See* Docket 60 at 14-15, 17-18. Although Kuhnert's testimony about the potential innocent source of money may have helped Sorensen, as both Grostyan and Rivers admitted during the evidentiary hearing, the jury already considered and rejected a version of this potential theory, given that it heard Sorensen's wife's testimony during cross-examination. *See* Docket 59 at 50-51. Kuhnert's testimony would have potentially bolstered this theory, but it would not**{2023 U.S. Dist. LEXIS 27}** have presented a brand-new theory of defense. Sorensen cannot meet his burden showing there is a reasonable probability that his lawyers' failure to investigate and call Kuhnert to the stand would have changed the jury's verdict. Thus, the court overrules Sorensen's objection to the Report and Recommendation's finding that Sorensen cannot establish prejudice. *See* Docket 64 at 15. Sorensen cannot meet his burden in showing prejudice under *Strickland*.

III. Certificate of Appealability

When a district court denies a petitioner's § 2255 motion, the petitioner must first obtain a certificate of appealability before an appeal of that denial may be entertained. 28 U.S.C. § 2253(c)(1)(B); *see also Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). This certificate may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" is one that proves "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Stated differently, "[a] substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Sorensen has not made a substantial showing that his**{2023 U.S. Dist. LEXIS 28}** claims are debatable among reasonable jurists, that another court could resolve the issues raised in his claims differently, or that a question raised by his claims deserves additional proceedings. Thus, a certificate of appealability is not issued.

CONCLUSION

Sorensen cannot meet his burden in showing Grostyan and Rivers fell below the minimum performance threshold the Constitution requires. The court's inquiry into counsel's performance is limited to what the Constitution requires, rather than what may have been ideal representation. *See Armstrong*, 534 F.3d at 863 (noting *Strickland* requires attorneys to be "reasonably competent" using an objective standard). But even if Grostyan and Rivers acted deficiently, Sorensen cannot meet his burden in showing that their failure to investigate and call Kuhnert as a witness prejudiced him.

The court adopts Magistrate Judge Duffy's recommendation as modified and grants the Government's motion to dismiss with prejudice. Thus, it is ORDERED that the Report and Recommendation (Docket 60) is adopted as modified by this opinion. The government's motion to dismiss Sorensen's claim for Ineffective Assistance of Counsel for Failure to Investigate Potential Witness Larry Kuhnert (Docket**{2023 U.S. Dist. LEXIS 29}** 26) is granted;

It is FURTHER ORDERED that a certificate of appealability is denied.

DATED February 1, 2023

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

JUDGEMENT

Based on the court's order dismissing Sorensen's ineffective assistance of counsel claim, it is

ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of defendant, United State of America, and against plaintiff, Shawn Sorensen.

DATED February 1, 2023.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE

Footnotes

1

Within this opinion the court cites to documents in Sorensen's civil habeas case by citing the court's docket number for that document. The court will cite to "CR" when citing to documents filed in Sorensen's criminal case found at *United States v. Sorensen*, 4:16-CR-40062-KES.

APPENDIX

B

Shawn Russell Sorensen, Petitioner - Appellant v. United States of America, Respondent - Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
138 F.4th 1096; 2025 U.S. App. LEXIS 13319; 2025 LX 137748
No. 23-1593
October 24, 2024, Submitted
June 2, 2025, Filed

Editorial Information: Subsequent History

Rehearing denied by, En banc, Rehearing denied by Sorensen v. United States, 2025 U.S. App. LEXIS 20744 (8th Cir. S.D., Aug. 13, 2025)

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Appeal from United States District Court for the District of South Dakota - Southern.Sorensen v. United States, 2023 U.S. Dist. LEXIS 17676, 2023 WL 1433434 (Feb. 1, 2023)

Counsel For Shawn Russell Sorensen, Petitioner - Appellant: Molly C. Quinn, Assistant Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, Sioux Falls, SD.

Shawn Russell Sorensen, Petitioner - Appellant, Pro se, Florence, CO.

For United States of America, Respondent - Appellee: Kevin Koliner, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Sioux Falls, SD.

Judges: Before SHEPHERD, KELLY, and STRAS, Circuit Judges.

CASE SUMMARY For the Arizona conviction, the court relied on a recent Arizona Supreme Court decision holding that the drug possession statute is divisible by drug type, allowing the modified categorical approach. Applying that approach, Sorensen's conviction for methamphetamine possession qualified as a felony drug offense.

OVERVIEW:

Key Legal Holdings

Material Facts

Controlling Law

Court Rationale

OUTCOME:

Procedural Outcome

LexisNexis Headnotes

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Sentences

A district court's denial of 28 U.S.C.S. § 2255 relief is reviewed de novo. 28 U.S.C.S. § 2255 grants courts authority to vacate, set aside or correct a federal sentence where the sentence was imposed in violation of the Constitution. 28 U.S.C.S. § 2255(a).

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Trials

The U.S. Const. AMEND. 6 guarantees criminal defendants the right to effective assistance of counsel. When raising claims of ineffective assistance of counsel, a movant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services outside the wide range of professionally competent assistance sufficient to satisfy the U.S. Const. AMEND. 6.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

Courts apply the modified categorical approach only when statutes are divisible-that is when statutes list elements in the alternative, and thereby define multiple crimes. When applying the modified categorical approach, the sentencing court examines a limited class of documents to determine what crime, with what elements, a defendant was convicted of. The court will then compare the defendant's prior crime of conviction with the generic offense to determine whether the prior crime serves as a predicate for a sentencing enhancement.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

To establish prejudice in an ineffective assistance claim, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

To determine whether prior state convictions qualify as felony drug offenses for purposes of imposing an enhanced sentence, courts apply the categorical approach, looking to the statutory definition of the prior offense, not to the facts underlying a defendant's prior convictions. If the state offense sweeps more broadly, or punishes more conduct than the federal definition, the conviction does not qualify as a predicate offense. Where the state statutes are overbroad and indivisible, the analysis ends, and a conviction under those statutes cannot qualify as a categorical match to the federal definition. If, on the other hand, the state statutes are divisible, courts apply the modified categorical approach to determine which of the divisible elements provided the basis for the conviction.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Substance Schedules > Methamphetamines
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Simple Possession > Elements

The Arizona Supreme Court has determined that the specific identity of an alleged narcotic drug is an element of Ariz. Rev. Stat. § 13-3408 and that jury unanimity regarding the identity of a specific drug is required for a conviction under § 13-3408. Section 13-3408 is, therefore, divisible as to drug type. The relevant portions of Ariz. Rev. Stat. §§ 13-3407 and 13-3408 are nearly identical in wording and structure. The only meaningful difference is that the latter applies to "narcotics," while the former applies to "dangerous drugs," including methamphetamine.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Simple Possession

In the context of applying the categorical approach to determine whether prior state convictions qualify as felony drug offenses for purposes of imposing an enhanced sentence, Ariz. Rev. Stat. § 13-3407, while overbroad, is divisible.

Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

In the context of applying the categorical approach to determine whether prior state convictions qualify as felony drug offenses for purposes of imposing an enhanced sentence, courts have recognized that where a phrase is defined in a separate statutory section, that provides textual support that the definition is a list of means by which an element may be committed. However, a separate listing of drug type is not dispositive of whether a statute is divisible.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Simple Possession
Criminal Law & Procedure > Sentencing > Criminal History > Prior Felonies

The South Dakota Supreme Court has long recognized that a defendant can be charged with multiple counts under S.D. Codified Laws § 22-42-5 when they possess different controlled substances at one time. And, though charged under the same statute, those counts do not function as a single act of possession. S.D. Codified Laws § 22-42-5 is divisible.

Opinion

Opinion by: KELLY

Opinion

KELLY, Circuit Judge.

Shawn Russell Sorensen was convicted of drug and firearm offenses and sentenced to mandatory life imprisonment. He later filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. The district court1 dismissed the motion. We granted a certificate of appealability on one issue: whether counsel provided ineffective assistance by failing to argue that Sorensen's prior state convictions did not qualify as "felony drug offense[s]" for purposes of 21 U.S.C. § 841's sentencing enhancement scheme. We affirm.

I.

In 2016, a jury convicted Sorensen of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Before trial, the government**{2025 U.S. App. LEXIS 2}** filed notice of its intent to seek increased punishment based on Sorensen's prior state convictions for two "felony drug offense[s]": possession of a controlled substance in violation of South Dakota Codified Laws § 22-42-5, and possession of dangerous drugs (methamphetamine) in violation of Arizona Revised Statutes § 13-3407 (2008). See 21 U.S.C. §§ 802(44), 841(b), 851(a). Relying on these two prior convictions, the district court imposed a mandatory sentence of life imprisonment. See 21 U.S.C. § 841(b)(1)(A)(viii) (2010) (mandating that a person who commits a violation of § 841(a) "after two or more prior convictions for a felony drug offense have become final . . . shall be sentenced to a mandatory term of life imprisonment").2

Sorensen filed a timely motion under § 2255. As relevant here, he alleged that counsel was ineffective for failing to argue that one or both of his prior convictions did not qualify as a felony drug offense for purposes of enhancing his sentence to mandatory life imprisonment. The district court denied relief.

II.

We review a district court's denial of § 2255 relief de novo. Ragland v. United States, 756 F.3d 597, 598-99 (8th Cir. 2014). Section 2255 grants courts authority to "vacate, set aside or correct" a federal sentence where "the sentence was imposed in violation of the Constitution." 28 U.S.C. § 2255(a). Courts have long recognized that the Sixth Amendment guarantees criminal defendants the**{2025 U.S. App. LEXIS 3}** right to effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970) (citing authority dating to 1932). When raising claims of ineffective assistance of counsel, a movant "must prove (1) 'that counsel's performance was deficient' and (2) 'that the deficient performance prejudiced the defense.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The district court determined that Sorensen had not established that his prior counsel's performance was deficient. Sorensen asserted that his counsel's assistance fell below the level of competent representation because his lawyers failed to argue that the categorical approach precluded his two prior convictions from qualifying as felony drug offenses. But the district court found that, at the time of sentencing, any such argument was novel. And "failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." Basham v. United States, 811 F.3d 1026, 1029 (8th Cir. 2016) (quoting New v. United States, 652 F.3d 949, 952 (8th Cir. 2011)).

On appeal, Sorensen disputes the district court's conclusion that the argument was novel. According to Sorensen, at the time of his prosecution and sentencing, Eighth Circuit and United States

Supreme Court authority supported{2025 U.S. App. LEXIS 4} the argument that his two prior state convictions were "overbroad" and, therefore, not a categorical match to the definition of a felony drug offense. See 21 U.S.C. § 802(44) (2016). It is true that courts were regularly applying the categorical approach when Sorensen was sentenced, but its use was evolving in scope and application. See United States v. Brown, 598 F.3d 1013, 1017-18 (8th Cir. 2010) (using version of categorical approach in assessing whether an Iowa statute qualified as a felony drug offense under 21 U.S.C. §§ 841(b)(1)(A) and 802(44) of the Controlled Substances Act); Mellouli v. Lynch, 575 U.S. 798, 801, 806, 135 S. Ct. 1980, 192 L. Ed. 2d 60 (2015) (applying the categorical approach "to assess whether a state drug conviction triggers removal under the [Immigration and Nationality Act]" and determining that because the state statute was overbroad, it could not serve as a predicate offense for purposes of the federal deportation provision); Mathis v. United States, 579 U.S. 500, 503-07, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016) (clarifying and applying the modified categorical approach to determine whether an Iowa burglary conviction served as a predicate felony offense for purposes of enhancing a sentence under the Armed Career Criminal Act). As the government points out, there was no Eighth Circuit precedent recognizing the particular argument Sorensen makes here: that his prior convictions do not qualify as felony drug offenses for purposes of § 841 because (1) the state statutes on which they are predicated{2025 U.S. App. LEXIS 5} are overbroad as a result of the corresponding state drug schedules, which include substances that are not included in the federal drug schedules, and (2) the statutes are indivisible, meaning the modified categorical approach does not apply.3 See Basham, 811 F.3d at 1029. When an area of the law is evolving, determining what constitutes a novel argument can sometimes be challenging.

But we need not decide what constitutes a novel argument here. Even assuming that counsel's performance was deficient, Sorensen has failed to show prejudice; there is no reasonable probability of a different outcome at sentencing, because under § 802(44) both of his prior convictions qualified as felony drug offenses. See Strickland, 466 U.S. at 694 (explaining that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

To determine whether Sorensen's prior state convictions qualified as felony drug offenses4 for purposes of imposing an enhanced sentence, we apply the categorical approach, "look[ing] to the statutory definition of the prior offense, not to the facts underlying a defendant's prior convictions." See United States v. Boleyn, 929 F.3d 932, 936 (8th Cir. 2019). The parties do{2025 U.S. App. LEXIS 6} not dispute that both the Arizona and South Dakota statutes are overbroad, meaning both statutes criminalize the possession of substances that the federal statute does not. See United States v. Oliver, 987 F.3d 794, 806 (8th Cir. 2021) ("If the state offense sweeps more broadly, or punishes more conduct than the federal definition, the conviction does not qualify as a predicate offense." (quoting United States v. Vanoy, 957 F.3d 865, 867 (8th Cir. 2020))). Thus, the issue here turns on whether the statutes are divisible or indivisible. Id. at 807. Where the state statutes are overbroad and indivisible, the analysis ends, and a conviction under those statutes cannot qualify as a categorical match to the federal definition. See United States v. Kinney, 888 F.3d 360, 365 (8th Cir. 2018). If, on the other hand, the state statutes *are* divisible, we apply the modified categorical approach to determine which of the divisible elements provided the basis for the conviction. Oliver, 987 F.3d at 807.

We start with Sorensen's Arizona state conviction for possession of dangerous drugs. Since Sorensen's conviction and sentencing, the Arizona Supreme Court has addressed whether, in a prosecution under the state's statute prohibiting the possession of a *narcotic* drug, a jury must unanimously identify the specific drug in a prosecution. Romero-Millan v. Barr, 253 Ariz. 24, 507 P.3d 999, 1003 (Ariz. 2022) (interpreting Ariz. Rev. Stat. § 13-3408). The court determined that the specific{2025 U.S. App. LEXIS 7} "identity of an alleged narcotic drug is an element of § 13-3408" and that "jury unanimity regarding the identity of a specific drug is required for a conviction under § 13-3408." Id. at 1003-04. Section 13-3408 is, therefore, "divisible as to drug type." Romero-Millan v. Garland, 46 F.4th 1032, 1043 (9th Cir. 2022).

Sorensen was convicted under Arizona § 13-3407, not § 13-3408. But the relevant portions of the two sections are nearly identical in wording and structure. The only meaningful difference is that the latter applies to "narcotics," while the former applies to "dangerous drugs," including methamphetamine. Compare Ariz. Rev. Stat. § 13-3407(A), with id. § 13-3408(A). Like § 13-3408, § 13-3407 also has different conviction and sentencing schemes based on the underlying "dangerous drug." Compare id. § 13-3408(A), with id. § 13-3407(A)-(B). And, as with § 13-3408, defendants in the past have been convicted of multiple separate crimes under § 13-3407. See, e.g., State v. Tavasci, No. 1 CA-CR 07-0643, 2008 Ariz. App. Unpub. LEXIS 173, 2008 WL 2315690, at *2 (Ariz. Ct. App. June 3, 2008) (upholding convictions on two counts of possessing two different types of dangerous drugs for sale under § 13-3407(A)(2)); see also United States v. Ortega, No. 22-50895, 2023 U.S. App. LEXIS 26398, 2023 WL 6458642, at *4 (5th Cir. Oct. 4, 2023) (per curiam) (explaining that "§ 13-3407 provides for harsher sentences for certain drugs" and concluding that § 13-3407(A)(2) is divisible by drug type).

Neither the parties nor the district court had the benefit of the Arizona Supreme Court's decision in Romero-Millan at the time of Sorensen's sentencing. But as the Arizona Supreme Court explained, Arizona had{2025 U.S. App. LEXIS 8} "long-standing precedent of allowing multiple convictions for contemporaneous violations of § 13-3408 involving multiple narcotic drugs." Romero-Millan, 507 P.3d at 1003. That "there may be multiple convictions under § 13-3408 for a single event that involves different narcotic drugs" was a strong indication that the statute was comprised of multiple distinct crimes, depending on the type of drug. Id. at 1003-04. Given the analysis of the state's highest court, and the nearly identical structure of §§ 13-3407 and 13-3408, we conclude that the Arizona statute underlying Sorensen's conviction, while overbroad, is divisible. Applying the modified categorical approach, Sorensen's relevant Arizona court documents5 show that he was convicted of possession of methamphetamine, a federally controlled substance and predicate felony drug offense under 21 U.S.C. §§ 841(b)(1)(A) and 802(44). See also 21 U.S.C. § 812(c), Schedules II(c), III(a)(3). Because Sorensen's Arizona conviction qualifies as a felony drug offense, he is unable to show that counsel's failure to object was prejudicial.

We turn next to Sorensen's conviction for possession of a controlled substance under South Dakota Codified Laws § 22-42-5. Sorensen argues that because "controlled drug or substance" is defined in a separate statute, § 22-42-1, the type of drug constitutes alternative means of violating the statute, not alternative{2025 U.S. App. LEXIS 9} elements. According to Sorensen, the statute is therefore indivisible. "We have recognized that where 'a phrase is defined in a separate statutory section, that provides textual support that the definition is a list of means by which [an] element may be committed.'" Rendon v. Barr, 952 F.3d 963, 969 (8th Cir. 2020) (quoting United States v. McFee, 842 F.3d 572, 575 (8th Cir. 2016)). We have clarified, however, that a separate listing of drug type is not dispositive. Id. ("[T]here is no universal rule that listings in a separate section automatically are means rather than elements." (quoting Martinez v. Sessions, 893 F.3d 1067, 1072 (8th Cir. 2018))).

As Sorensen concedes, the South Dakota Supreme Court has long recognized a defendant can be charged with multiple counts under § 22-42-5 when they possess different controlled substances at one time. And, though charged under the same statute, those counts do not function as a single act of possession. See State v. Burkman, 281 N.W.2d 436, 439, 441 (S.D. 1979) (affirming conviction where defendant charged with four separate counts under § 22-42-5 based on single possession transaction of four different controlled substances and holding that "[e]ach count is treated as if it were separate").6 Based on guidance from the South Dakota Supreme Court, in effect today as well as at the time of Sorensen's sentencing, we conclude that § 22-42-5 is divisible. Applying the modified categorical{2025 U.S. App. LEXIS 10} approach, the relevant documents7 show that Sorensen was convicted in South Dakota for possession of methamphetamine. As a result, his conviction qualified as a felony drug offense under 18 U.S.C. §§ 841(b)(1)(A) and 802(44), and he was not prejudiced by counsel's failure to argue otherwise.

III.

The judgment of the district court is affirmed.

Footnotes

1

The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

2

The statutory language of § 841 has since changed to impose a 25-year statutory minimum sentence for defendants convicted of violating § 841(a) after having sustained two "serious drug felony" convictions. See 21 U.S.C. § 841(b)(1)(A)(viii) (2022).

3

Courts apply the modified categorical approach only when statutes are divisible-that is when statutes "list elements in the alternative, and thereby define multiple crimes." Mathis, 579 U.S. at 505. When applying the modified categorical approach, the sentencing court examines "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." Id. at 505-06. The court will then compare the defendant's prior crime of conviction with the generic offense to determine whether the prior crime serves as a predicate for a sentencing enhancement. Id. at 506.

4

At the time of Sorensen's sentence, a "felony drug offense" was defined as "an offense . . . punishable by imprisonment for more than one year under any law of the United States or of a State . . . that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (2016).

5

The parties do not dispute what documents the court may review if the modified categorical approach applies. See Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

6

State v. Schrempp, 2016 SD 79, 887 N.W.2d 744 (S.D. 2016), on which Sorensen relies, is not to the contrary. There, the South Dakota Supreme Court considered whether changing the name of the drug charged in the indictment was an impermissible amendment that amounted to reversible error. Schrempp, 887 N.W.2d at 746-47. The court concluded it was not, as the drug names used in the original and amended indictment were used interchangeably during trial to identify a single controlled substance. Id. at 749. Whether the drug was described by its technical name-as originally charged-or by its chemical compound-as amended-the drug was the same. Id. Moreover, Schrempp provides further support for the conclusion that § 22-42-5 is divisible, because there, like in Burkman, the defendant was charged with multiple counts under § 22-42-5 for different drugs possessed at the same time. Id. at 746.

7

As with the Arizona conviction, the parties do not dispute what documents the court may review if the modified categorical approach applies.

APPENDIX

C

Shawn Russell Sorensen, Appellant v. United States of America, Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2025 U.S. App. LEXIS 20744; 2025 LX 392134
No: 23-1593
August 13, 2025, Decided

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Appeal from U.S. District Court for the District of South Dakota - Southern. (4:19-cv-04190-KES).Sorensen v. United States, 138 F.4th 1096, 2025 U.S. App. LEXIS 13319, 2025 WL 1552805 (June 2, 2025)

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For United States of America, Respondent - Appellee: Kevin Koliner, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Sioux Falls, SD.

Opinion

ORDER

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

August 13, 2025