UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8301
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMY LYNN BRANCH,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(W-92-CV-005 (W-87-CR-37))

(December 9, 1992)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Tommy Lynn Branch, proceeding pro se, appeals the denial as abusive of his motion for postconviction relief under 28 U.S.C. § 2255. Finding no error, we affirm.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Branch was sentenced to 45 years imprisonment, $300 in special assessments, and two years special parole after conviction in 1987 on a nine-count indictment charging conspiracy to possess and possession of methamphetamine with intent to distribute; attempted manufacture of methamphetamine; attempted witness tampering; and obstruction of justice. We affirmed that conviction on direct appeal.[1] Branch filed unsuccessful petitions for postconviction relief under 28 U.S.C. § 2241 in 1989[2] and 1990.[3] and he invoked section 2255 in 1990.[4] Branch then filed the instant section 2255

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[1]**United States v. Branch**, 850 F.2d 1080 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989). On direct appeal, Branch assigned as error (1) the admission at trial of a methamphetamine formula in violation of collateral estoppel; (2) that 18 U.S.C. § 1503, the obstruction of justice statute, did not prohibit witness tampering; (3) that the indictment against him cited incorrect statutory sections; (4) variance between the conspiracy charged and that proved; (5) denial of his motion for recusal of the trial judge; and (6) erroneous jury instructions.

[2]In the 1989 petition, Branch sought habeas corpus relief under 28 U.S.C. § 2244 in the Western District of Wisconsin. The Wisconsin court construed that action as a petition under 28 U.S.C. § 2255, and therefore transferred it to the Western District of Texas. The Texas court then denied the petition.

[3]In the 1989 petition, exactly as he did on appeal, Branch argued that use of the amphetamine formula at trial violated collateral estoppel, and that 18 U.S.C. § 1503 does not permit conviction for witness tampering. Because it found that Branch had failed to assert all available grounds for relief, the court dismissed that petition without prejudice. The 1990 petition raised confrontation clause, double jeopardy, ineffective assistance of counsel, prosecutorial misconduct, and fourth amendment claims.

[4]In that petition, Branch claimed ineffective assistance of counsel at trial and on direct appeal; denial of due process resulting from the trial court's failure to subpoena a witness; prosecutorial misconduct; violation of double jeopardy resulting from use as evidence of the methamphetamine formula found during

petition which the trial court dismissed as abusive under Rule 9(b) of the Rules Governing Section 2255 Proceedings. Branch timely appealed.

Analysis

Branch raises two points on appeal: (1) procedural infirmities in the 1971 action reclassifying methamphetamine as a schedule II controlled substance,[5] and (2) Congress is without authority to criminalize and empower the federal courts to hear prosecutions for drug trafficking not occurring on federal property.[6] These arguments patently are without merit and we need not decide whether Branch's failure to raise them on direct appeal or in earlier petitions for postconviction relief bars their assertion here.

1. Validity of Methamphetamine Rescheduling

Branch contends that the Attorney General never requested and the Department of Health, Education and Welfare (now Health and

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the search of his home; defects in the warrant authorizing the search of his home; prejudice from late filing of the sentencing transcript of a co-defendant; vindictiveness in sentencing; and that methamphetamine no longer constituted a controlled substance.

[5]The trial court rejected Branch's challenge to the statutes granting the Attorney General authority to classify controlled substances. As Branch claims no error in that ruling, we do not consider it.

[6]We assume arguendo that Branch raises arguments of jurisdictional dimension. See **United States v. Drobny**, 955 F.2d 990, 994 (5th Cir. 1992) (defendant may attack conviction under 28 U.S.C. § 2255 only on jurisdictional or constitutional grounds).

Human Services) never provided a sufficient written evaluation recommending rescheduling of methamphetamine as a Schedule II controlled substance. He therefore argues that the 1971 rescheduling of that compound was inconsistent with the procedures required by 21 U.S.C. § 811(a)-(c) and therefore lacks legal effect. The record reflects that before the rescheduling Elliot Richardson, then the Secretary of HEW, sent a letter to then Attorney General John Mitchell, responding to a request for the required evaluation, stating:

> I have considered [methamphetamines] as provided in [21 U.S.C. § 811(b)] giving specific attention to the factors listed in paragraphs (2), (3), (6), (7) and (8) of subsection (c) of that Section, and the scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. I find that the . . . methamphetamines have a high potential for abuse and are being widely abused; that the drugs have currently accepted medical uses in treatment in the United States; and that abuse of the drugs may led to severe psychological and physical dependence and has lead to such severe dependence. Accordingly, I recommend that the . . . methamphetamines be placed in Schedule II under the provisions of [21 U.S.C. § 812] . . . .

Two of our sister circuits recently held that this letter, albeit sparse in its analysis, satisfies the evaluation by HEW as required by 21 U.S.C. § 811(b).[7] We agree.

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[7] **United States v. Sullivan**, 967 F.2d 370 (10th Cir. 1992); **United States v. Casey**, 788 F. Supp. 725 (S.D.N.Y. 1991), aff'd sub nom. **United States v. Alexander**, 962 F.2d 199 (2d Cir. 1992). While we have not previously ruled on this specific question, we have previously held, in accord with other courts of appeals, that the 1971 rescheduling of methamphetamine satisfied all procedural requirements. See, e.g., **United States v. Allison**, 953 F.2d 870 (5th Cir. 1992); **United States v. Lane**, 931 F.2d 40 (11th Cir. 1991); **United States v. Roark**, 924 F.2d 1426 (8th Cir. 1991); **United States v. Kendall**, 887 F.2d 240 (9th Cir. 1989).

2. Federal Authority and Jurisdiction

Branch raises, for the first time on appeal, the arguments that Congress lacks authority to criminalize and to empower the federal courts to hear prosecutions for drug trafficking occurring off federal property. Two decades ago we held that Congress properly enacted 21 U.S.C. §§ 841, 846 pursuant to its commerce clause authority.[8] Further, federal courts have jurisdiction over any criminal prosecution charging a violation of federal law.[9] Branch's arguments are without merit.

The judgment of the district court is AFFIRMED. Branch's request for en banc rehearing of his motion for bail pending resolution of this petition is DENIED as moot.

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[8]**United States v. Lopez**, 459 F.2d 949 (5th Cir. 1972). The commerce clause permits Congress to regulate activity taking place outside of federally-owned land. See John E. Nowak & Ronald D. Rotunda, Constitutional Law § 4.10(c), at 165 (4th ed. 1991) (commerce clause provides independent basis for enactment of federal criminal laws).

[9]18 U.S.C. § 3231; **Drobny**, 955 F.2d at 997; **United States v. Desurra**, 865 F.2d 651, 654 (5th Cir. 1989) (citing **United States v. Sardelli**, 813 F.2d 654 (5th Cir. 1987)).