FILED
United States Court of Appeals
Tenth Circuit

January 31, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff–Appellee, v. ROBERT SEDILLO GUTIERREZ, Defendant–Appellant.	No. 11-2157 (D.C. Nos. 1:08-CV-00711-RB-LFG & 2:05-CR-00217-RB-1) (D. New Mexico)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **O'BRIEN**, **McKAY**, and **TYMKOVICH**, Circuit Judges.

Defendant, a pro se federal prisoner, seeks a certificate of appealability to appeal the district court's denial of his § 2255 habeas petition. A federal jury found Defendant guilty of possession with intent to distribute 500 grams and more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. The district court sentenced him to 360 months in prison. This court confirmed his conviction and sentence on direct appeal. *See United States v. Sedillo-Gutierrez*, 263 F. App'x 659 (10th Cir. 2008). In this § 2255 habeas

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

petition, Defendant claims ineffective assistance of counsel prior to trial, at trial, at sentencing, and on appeal.

In denying Defendant's habeas petition, the magistrate judge concluded, after conducting a full evidentiary hearing, that Defendant failed to show his attorneys' conduct fell below the objective standard of reasonableness required by *Strickland v. Washington*, 466 U.S. 668 (1984). After conducting a de novo review, the district court adopted the magistrate judge's findings and dismissed Defendant's petition. The district court did not address whether Defendant is entitled to a COA. Thus, Defendant must obtain a COA from this court to appeal the denial of his habeas petition. *See* 28 U.S.C. § 2253(c)(1); *United States v. Kennedy*, 225 F.3d 1187, 1193 n.3 (10th Cir. 2000) ("Under our Emergency General Order of October 1, 1996, we deem the district court's failure to issue a [COA] within thirty days after filing the notice of appeal as a denial of the certificate.").

After carefully reviewing Defendant's brief and the record on appeal, we conclude that reasonable jurists would not debate whether the district court erred in dismissing the petition. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Like the district court, we agree with the magistrate judge's findings and have nothing to add to his thorough analysis. We therefore **DENY** the application for a certificate of appealability and **DISMISS** the appeal. We have reviewed Defendant's supplementary materials and they do not affect our analysis. We therefore **DENY** his motion to supplement the record as moot. We **GRANT**

Defendant's motion to proceed *in forma pauperis* on appeal pursuant to Rule 24(a)(3) of the Federal Rules of Appellate Procedure.

ENTERED FOR THE COURT

Monroe G. McKay
Circuit Judge