FILED
United States Court of Appeals
Tenth Circuit

May 29, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HERBERT LEYBA, Petitioner-Appellant, v. WARDEN HARTLEY; ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents-Appellees.	No. 08-1086 (D.C. No. 06-cv-2381-LTB-CBS) (D. Colo)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **O'BRIEN**, **EBEL**, and **GORSUCH**, Circuit Judges.

Herbert Leyba was charged in Colorado with 284 separate counts of criminal conduct. He eventually pled guilty to three counts of aggravated robbery, *see* Colo. Rev. Stat. § 18-4-302(1)(b), in exchange for dismissal of the other 281 counts. Pursuant to his guilty plea, and after receiving some initial state post-conviction relief, Mr. Leyba was sentenced to two consecutive 20-year prison terms and a third, concurrent, 20-year term.

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel.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.

Proceeding *pro se*, Mr. Leyba filed a habeas petition pursuant to 28 U.S.C. § 2254 arguing, *inter alia*, that (1) his plea agreement required his sentences to be served concurrently, and (2) his sentence was aggravated in violation of his Sixth Amendment rights. Magistrate Judge Craig B. Shaffer issued a detailed 15-page report and recommendation concluding that Mr. Leyba's claims should be dismissed with prejudice. The district court adopted the magistrate judge's recommendation, dismissed Mr. Leyba's habeas petition, and subsequently denied his application for a certificate of appealability ("COA") and motion to proceed *in forma pauperis* ("IFP") before this court.

Mr. Leyba now seeks a COA from us, and also renews his request to proceed IFP. We may issue a COA only if Mr. Leyba makes "a substantial showing of the denial of a constitutional right," *see* 28 U.S.C. § 2253(c)(2), such that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Based on our independent review of the record in this case, and for substantially the same reasons given by the magistrate judge, we conclude that no reasonable jurist could debate the correctness of the district court's ruling. Accordingly, we deny Mr. Leyba's request for a COA and dismiss his appeal. We likewise agree with the district court that Mr. Leyba's appeal is not taken in good faith, and so deny his renewed motion for leave to proceed IFP. Mr. Leyba is

thus required to pay the filing fee immediately. *See Clark v. Oklahoma*, 468 F.3d 711, 714-15 (10th Cir. 2006).

ENTERED FOR THE COURT

Neil M. Gorsuch
Circuit Judge