

**May 22, 2008**

**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

**Elisabeth A. Shumaker**  
**Clerk of Court**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY DELLIS SPENCER,

Defendant - Appellant.

No. 08-4008

(D. Utah)

(D.C. Nos. 2:07-CV-00955-DAK and  
2:03-CR-00616-DAK)

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**ORDER DENYING CERTIFICATE  
OF APPEALABILITY**

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Before **BRISCOE, MURPHY**, and **HARTZ**, Circuit Judges.

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This matter is before the court on Anthony Spencer's pro se request for a certificate of appealability ("COA"). Spencer seeks a COA so he can appeal the district court's denial of his 28 U.S.C. § 2255 motion. 28 U.S.C. § 2253(c)(1)(B). Because Spencer has not "made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), this court **denies** his request for a COA and **dismisses** this appeal.

As set out in this court's decision on direct appeal, Spencer pleaded guilty to conspiring to distribute methamphetamine in violation of 21 U.S.C. § 846.

*United States v. Spencer*, 192 F. App'x 718, 719 (10th Cir. 2006). He was

sentenced to 360 months' imprisonment. *Id.* at 719-20. This court affirmed his sentence on August 9, 2006. *Id.* at 718. Spencer's conviction and sentence thus became final on November 9, 2006, when the ninety-day period for filing a petition for a writ of certiorari passed without Spencer requesting Supreme Court review. *United States v. Burch*, 202 F.3d 1274, 1278 (10th Cir. 2000).

Spencer filed the instant § 2255 motion on December 10, 2007. The district court dismissed Spencer's motion on the ground that it was untimely. The district court noted that 28 U.S.C. § 2255(f)(1) provides for a one-year limitations period from the date on which a conviction becomes final. Because Spencer's conviction became final on November 9, 2006, under the terms of § 2255(f)(1) he had until November 9, 2007, to file his § 2255 motion. Because he did not file that motion until December 10, 2007, the district court concluded the motion was untimely unless Spencer was entitled to have the limitations period equitably tolled. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). Because Spencer had failed to demonstrate he had diligently pursued the claims in his § 2255 motion, the district court exercised its discretion and denied equitable tolling. *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (holding that equitable tolling is only available "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control").

The granting of a COA is a jurisdictional prerequisite to Spencer's appeal from the dismissal of his § 2255 motion. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To be entitled to a COA, Spencer must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the requisite showing, he must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* (quotations omitted). In evaluating whether Spencer has satisfied his burden, this court undertakes "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Id.* at 338. Although Spencer need not demonstrate his appeal will succeed to be entitled to a COA, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Id.* As an additional overlay, we review the district court's decision denying Spencer's request for equitable tolling for an abuse of discretion. *Burger v. Scott*, 317 F.3d 1133, 1138 (10th Cir. 2003).

Having undertaken a review of Spencer's appellate filings, the district court's order, and the entire record before this court pursuant to the framework set out by the Supreme Court in *Miller-El*, we conclude Spencer is not entitled to a COA. The district court's resolution of Spencer's § 2255 motion is not reasonably subject to debate and the issues he seeks to raise on appeal are not adequate to deserve further proceedings. In particular, we note that Spencer does

not even address the timeliness issue in his request for a COA. He instead asserts, with absolutely no explanation or discussion, that his § 2255 motion was timely filed in the district court. As set out in the district court's order, this assertion is flatly contradicted by the record. Accordingly, this court **DENIES** Spencer's request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

Elisabeth A. Shumaker, Clerk