IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-41176

A True Copy
Certified order issued Dec 13, 2018

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FLAVIO TAMEZ,

Defendant-Appellant

Appeals from the United States District Court
for the Southern District of Texas

O R D E R:

Flavio Tamez, federal prisoner # 14812-379, moves this court for a certificate of appealability (COA). He wishes to appeal the district court's denial of his 28 U.S.C. § 2255 motion and his post judgment motion that challenged his convictions of conspiracy to possess with intent to distribute more than 1,000 kilograms of marijuana and aiding and abetting money laundering.

According to Tamez, the district court erred in concluding, without holding an evidentiary hearing, that his § 2255 motion is barred by the appeal waiver provision of his plea agreement and that the law of the case doctrine precluded review of the waiver's validity. Additionally, Tamez reurges his claims that his trial attorneys rendered ineffective assistance by misadvising him regarding his potential sentencing exposure and his appellate rights and

by failing to ensure that he retained the right to appeal as discussed at his sentencing hearing and further that his appellate attorney was ineffective in failing to overcome the Government's motion to dismiss his direct appeal. Finally, Tamez contends that the district court abused its discretion in denying his postjudgment motion filed pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure.

A COA 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). When the district court has denied the claims on their merits, the movant must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court has dismissed on procedural grounds, a movant must show that "jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Tamez has not made the required showing. Accordingly, his motion for a COA is DENIED. His motions for leave to proceed in forma pauperis and for the appointment of counsel also are DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

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Court for the Southern District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before JONES, ELROD and ENGELHARDT, Circuit Judges.

PER CURIAM:

(X) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones

UNITED STATES CIRCUIT JUDGE