

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAR 24 1997

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CLARENCE EDWARD CODY,

Defendant-Appellant.

No. 96-7092
(D.C. No. 96-CV-264)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before BRORBY, EBEL, and KELLY, Circuit Judges.**

Mr. Cody seeks a certificate of appealability from the district court's denial of his motion to vacate, set aside or correct his sentence. 28 U.S.C. § 2255; see 28 U.S.C. § 2253(c)(1)(B) & (2). Despite a similar claim rejected on direct appeal, See United States v. Cody, 7 F.3d 1523, 1527 (10th Cir. 1993), Mr. Cody again challenges the marijuana plant count (1,028 plants) that resulted in a 10-year mandatory minimum

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

sentence under 21 U.S.C. § 841(b)(1)(A)(vii) . The premise of his argument is that 37 drying plants are not properly counted as plants, an argument foreclosed by United States v. Silvers, 84 F.3d 1317, 1325 (10th Cir. 1996), cert. denied, 117 S. Ct. 742 (1997). That said, arguments about the applicability of Sentencing Guideline Amendment 516, U.S.S.G. § 1B1.10(c) (retroactivity) & App. C, amend. 516, are unavailing because the amendment cannot be applied to bring the sentence below the statutory mandatory minimum for 1,000 or more marijuana plants. Silvers, 84 F.3d at 1325. We thus conclude that Mr. Cody has not made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

The Application for a Certificate of Appealability is DENIED and the appeal is DISMISSED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge