

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

**NOV 6 1997**

**PATRICK FISHER**  
Clerk

JOHN T. BOOZ,

Petitioner - Appellant,

v.

JOHN SHANKS and ATTORNEY  
GENERAL OF THE STATE OF NEW  
MEXICO,

Respondents - Appellees.

No. 97-2120  
(D.C. No. CIV-93-1297-M)  
(District of New Mexico)

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**ORDER AND JUDGMENT\***

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Before **BALDOCK, MCKAY** and **LUCERO**, Circuit Judges.

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We have considered the record, the briefs of the parties, the district court's order, and the applicable law. We grant a certificate of appealability to consider the issues raised in appellant's brief, including specifically whether the alleged failure of counsel to notify defendant of the adverse ruling of the Court of Appeals of the State of New Mexico, denying him the option of electing to file an

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\*The case is unanimously ordered submitted without oral argument pursuant to Fed. R. App. P. 34(a) and 10th Cir. R. 34.1.9. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The 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.

application for writ of certiorari to the New Mexico Supreme Court on a pro se basis or seek other assistance, constitutes ineffective assistance of counsel.

For purposes of our disposition we note that it is undisputed that counsel did not notify the defendant of such adverse ruling until after the time to file a petition for certiorari had run. While the applicant cannot assert ineffective assistance of counsel as to any failure on the part of his lawyer to file a petition for certiorari to the New Mexico Supreme Court on his behalf, Wainwright v. Torna, 455 U.S. 586, 588 (1982) (per curiam), here, where applicant was not even notified of the adverse ruling and thus was denied the opportunity to take any action himself, we presume prejudice and deem any procedural default to be waived. Turning to the merits of appellant's remaining claims of ineffective assistance of counsel, we find no actual prejudice under Strickland v. Washington, 466 U.S. 668 (1984). We AFFIRM for substantially the reasons stated in the Proposed Findings and Recommended Disposition of United States Magistrate Judge filed on January 27, 1997 and the district court's order adopting same. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Carlos F. Lucero  
Circuit Judge