

UNITED STATES COURT OF APPEALS

JAN 22 1998

TENTH CIRCUIT

PATRICK FISHER
Clerk

JOHNNY HAMILTON O'BRYAN,

Petitioner-Appellant,

v.

KENNETH KLINGER,

Respondent-Appellee.

No. 97-5090

(D.C. No. 96-CV-106-B)

(N.D. Okla.)

ORDER AND JUDGMENT*

Before **ANDERSON, McKAY**, and **LUCERO**, Circuit Judges.

After examining Petitioner-Appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner, a state prisoner appearing *pro se*, appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Petitioner claims that a prison

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

disciplinary action withdrawing earned good-time credits followed by a subsequent criminal conviction for the same behavior violated the doctrine of double jeopardy. Petitioner also contends that he was denied effective assistance of counsel by the failure of counsel to discover the double jeopardy violation and the failure of counsel to advise him of, and assist him with, an appeal of his guilty plea convictions.

In its Order filed April 7, 1997, denying Petitioner's writ of habeas corpus, the district court correctly set forth and properly analyzed the facts and the law. After Petitioner filed his notice of appeal, the district court issued an order denying him a certificate of appealability.

To appeal the denial of habeas corpus relief by the district court, Petitioner must obtain a certificate of appealability. We may issue a certificate "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). We have carefully reviewed the district court's order of dismissal, Petitioner's brief and application for a certificate of appealability, and the record before us. We conclude that Petitioner has failed to make the required showing. See United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997). Consequently, we DENY Petitioner's application for a certificate of appealability and DISMISS the appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge