

August 29, 2008

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

TRACY SPENCER,

Petitioner-Appellant,

v.

KEVIN MILYARD, and THE
ATTORNEY GENERAL OF THE
STATE OF COLORADO,

Respondent-Appellee.

No. 08-1172
(D.C. No. 06-cv-01892)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **O'BRIEN, EBEL, and GORSUCH**, Circuit Judges.

Petitioner-Appellant Tracy Spencer requests a certificate of appealability ("COA"), see 28 U.S.C. § 2253(c), that would enable him to appeal the district court's decision denying him habeas relief, see 28 U.S.C. § 2254, from his conviction for first-degree murder.

Spencer pled guilty to one count of first-degree murder and one count of second-degree murder for the deaths of two women, in exchange for withdrawal

* This order is not binding precedent except under the doctrines of law of the case, *res judicata* and *collateral estoppel*. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

of the death penalty. Spencer was sentenced to life imprisonment on the first-degree murder count and twenty-four years in prison on the second-degree murder count, the sentences to be served consecutively. In this action, Spencer only seeks habeas relief from the sentence of life imprisonment.

In his habeas petition, Spencer raises two issues with respect to his conviction: (1) whether he received ineffective assistance of counsel; and (2) whether the loss or destruction of trial counsel's case file, after his trial and appeal, violated his due process rights.

Spencer will be entitled to a COA if he can make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He can make such a showing by establishing that "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." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (quotations omitted).

For the reasons set forth in the magistrate judge's report and recommendation, as adopted by the district court, we conclude that Spencer has failed to make an adequate showing of the denial of a constitutional right in this case. We, therefore, DENY Spencer's motion for a COA and DISMISS this

appeal. Additionally, Spencer's motion to proceed in forma pauperis on appeal is DENIED.

ENTERED FOR THE COURT

David M. Ebel
Circuit Judge