

November 15, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TRISTIN T. CHEADLE,

Defendant-Appellant.

No. 10-6133

(D.C. Nos. 5:08-CV-01115-R and

5:07-CR-00062-R-1)

(W.D. Okla.)

ORDER*

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

Mr. Cheadle, a pro se federal prisoner, seeks a Certificate of Appealability (“COA”) with no ascertainable § 2255 claim from which to appeal. We denied Mr. Cheadle’s most recent § 2255 claim, which was based on claims different than those presented in his current COA request, in 2009. Because Mr. Cheadle proceeds pro se, we construe his filings liberally, *see Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003); however, given the absence of an underlying § 2255 motion, we must deny his present request.

In 2007, Mr. Cheadle pled guilty to being a felon in possession of a

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

firearm. As part of his plea agreement, Mr. Cheadle waived his right to appeal or collaterally challenge his conviction and sentence.

In 2008, Mr. Cheadle filed a timely motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, alleging his sentence was incorrectly calculated based on the district court's misapplication of the Sentencing Guidelines. The district court denied the motion, finding his claim was barred by the waiver in his plea agreement. We then denied Mr. Cheadle's request for a COA. *See United States v. Cheadle*, 336 F. App'x 779, 781 (10th Cir. 2009).

On May 19, 2010, Mr. Cheadle filed another request for a COA, this time with the district court, asserting (1) that he received ineffective assistance of counsel in connection with his guilty plea, and (2) that the evidence against him was insufficient to support his conviction. On May 20, 2010, the district court denied his request, stating “[t]he Tenth Circuit has already entered an Order denying a certificate of appealability in connection with Defendant’s Notice of Appeal from this Court’s dismissal of Defendant’s § 2255 motion.” (Doc. 71 at 1 (citation omitted).) On June 7, 2010, Mr. Cheadle filed a “Notice of Appeal” with the district court, asserting the district court’s order failed to consider his ineffective assistance of counsel claim. The district court construed Mr. Cheadle’s Notice of Appeal as a third COA request, and—citing its previous order—denied the request as moot. Mr. Cheadle then filed this COA request, which presents claims and arguments identical to his May 19, 2010 COA request

before the district court.

Judgment has already been entered on Mr. Cheadle's original § 2255 motion, and Mr. Cheadle has no other § 2255 motion under which to appeal. *See* 28 U.S.C. § 2253(c)(1). Accordingly, we DENY Mr. Cheadle's request for a certificate of appealability. We GRANT his motion to proceed *in forma pauperis*.

Entered for the Court

Monroe G. McKay
Circuit Judge