

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

**JUL 29 1997**

**PATRICK FISHER**  
Clerk

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDY LUCERO,

Defendant-Appellant.

No. 96-2263  
(D.C. No. CIV-96-801-HB)  
(District of New Mexico)

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**ORDER**

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Before **SEYMOUR**, Chief Judge, **PORFILIO** and **MURPHY**, Circuit Judges.

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Randy Lucero seeks a certificate of appealability to contest the denial of his pro se motion filed under 28 U.S.C. § 2255. We have examined the record and considered the arguments raised in Mr. Lucero's motion and conclude the district court did not err in its disposition. Mr. Lucero attempts to raise a double jeopardy argument in this court that apparently was not presented to the district court, but we will not consider issues raised for the first time on appeal.

His argument is meritless nevertheless because it is premised on a contention Mr. Lucero was convicted twice for the same conduct. He argues one of the crimes of conviction is the lesser included of the other. That contention is faulty because the crimes

of conviction are conspiracy to distribute cocaine and possession with intent to distribute cocaine. Neither of those offenses is included within the other.

Principally for the reasons given in the recommendations of the magistrate judge, we conclude Mr. Lucero has failed to demonstrate the denial of a constitutional right by showing the issues raised in his appeal are debateable among jurists; that a court could resolve the issues differently; or that the questions deserve further proceedings. The certificate of appealability is **DENIED** and the appeal is **DISMISSED**. 28 U.S.C. § 2253(c)(2); *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996). The motion for leave to proceed without payment of fees is **GRANTED**.

ENTERED FOR THE COURT

John C. Porfilio  
Circuit Judge