

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

**JUL 14 1997**

**PATRICK FISHER**  
Clerk

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CODY ROBERT JUDY,

Petitioner - Appellant,

vs.

STATE OF UTAH,

Respondent - Appellee.

No. 96-4196  
(D.C. No. 95-CV-989)  
(D. Utah)

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ORDER AND JUDGMENT\*

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Before BRORBY, EBEL, and KELLY, Circuit Judges.\*\*

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Mr. Judy, appearing pro se, appeals from the district court's dismissal of his habeas corpus petition, 28 U.S.C. § 2254, pursuant to the recommendation of the magistrate judge. He also seeks a certificate of appealability. 28 U.S.C. § 2253(c)(2).

As we understand the petition, Mr. Judy contends that (1) his guilty plea was not knowing and voluntary, (2) he received ineffective assistance of counsel in connection

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

\*\* After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

with his plea and was denied the right to an appeal due to ineffective assistance of counsel, and (3) his conviction violates the First Amendment. The state responded that the petition should be dismissed because of failure to exhaust state remedies and procedural bar. We agree with the magistrate judge that the possibility of state post-conviction relief on some or all of the claims has not been exhausted, and exhaustion is a necessary prerequisite to bringing this action. 28 U.S.C. § 2254(b)(1)(A). We express no opinion on whether such claims are procedurally barred. Because Mr. Judy may be able to obtain relief on his federal claims in state court, he has not at this point made “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2).

Therefore, we DENY Mr. Judy’s application for a certificate of appealability and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge