

UNITED STATES COURT OF APPEALS

NOV 25 1997

TENTH CIRCUIT

PATRICK FISHER
Clerk

RALPH KEMPER,

Petitioner-Appellant,

v.

GREG CAMP,

Respondent-Appellee.

No. 97-6211

(D.C. No. CIV-96-1393-L)

(W.D. Okla.)

ORDER AND JUDGMENT*

Before BALDOCK, 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 filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 claiming his sentence was unconstitutional because the jury instructions were based on an *ex post facto* application of a penal statute.

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

We grant the certificate of appealability required by 28 U.S.C. § 2253. However, we affirm for the reasons given by the magistrate judge in his Report and Recommendation filed February 10, 1997, and adopted by the district court in its Order filed May 16, 1997. To the extent that Petitioner claims his due process rights were substantially affected by what he terms “*ex parte* communications,” we hold that this argument has no merit.

AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge