

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEC 17 1998

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNY TAYLOR,

Defendant-Appellant.

No. 98-6187
(D.C. No. CIV-97-1821-R)
(W.D. Okla.)

ORDER AND JUDGMENT *

Before **BRORBY** , **BRISCOE** , and **LUCERO** , Circuit Judges.

After examining the briefs and 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)(2); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Petitioner Kenny Taylor seeks to appeal from the district court's denial of his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. The district court denied the § 2255 motion as untimely filed, applying United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997). The district court also denied petitioner's request for a certificate of appealability, required by 28 U.S.C. § 2253 before this court can consider his appeal. Petitioner reurges his request before this court. He also seeks to proceed in forma pauperis, and moves this court to appoint him counsel on appeal.

After review of petitioner's motion and supporting documents, we grant his request to proceed on appeal in forma pauperis. However, after careful consideration of petitioner's arguments on appeal, we conclude that he has not made a substantial showing that the district court's decision denied him a constitutional right. See id. Accordingly, petitioner's request for a certificate of appealability is denied, and this appeal is dismissed. Petitioner's request for appointment of counsel is denied as moot. The mandate shall issue forthwith.

Entered for the Court

Wade Brorby
Circuit Judge