

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-7316

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FERNANDO REYNOSO AVALOS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:10-cr-00134-AJT-1; 1:13-cv-00846-AJT)

Submitted: February 18, 2015

Decided: February 25, 2015

Before KING, GREGORY, and DUNCAN, Circuit Judges.

Dismissed in part; affirmed in part by unpublished per curiam opinion.

Alan Hideto Yamamoto, for Appellant. Cindy Chang, Scott Butler Nussbum, Jeffrey Michael Tharp, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Fernando Reynoso Avalos seeks to appeal the district court's order construing his 28 U.S.C. § 2255 (2012) motion as a motion for relief under § 2255 or, in the alternative, as a motion under Fed. R. Crim. P. 33 for a new trial and denying the motion.

The portion of the district court's order denying § 2255 relief to Avalos is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Avalos has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal, in part.

With respect to the portion of the district court's order denying relief under Rule 33, we have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order, in part, for the reasons stated by the district court. United States v. Avalos, Nos. 1:10-cr-00134-AJT-1; 1:13-cv-00846-AJT (E.D. Va. Aug. 19, 2014). We deny Avalos' motion to appoint counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED IN PART;
AFFIRMED IN PART