

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

FIDENCIO VERDIN-GARCIA,

Defendant.

**Case No. 05-20017
09-2492**

MEMORANDUM AND ORDER

Defendant Fidencio Verdin-Garcia has filed a motion for a certificate of appealability (doc. 328). A district court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Tenth Circuit has interpreted this standard to require a petitioner to demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)).

In his application, Mr. Verdin-Garcia asserts that in resolving his § 2255 motion, the court merely accepted his attorney’s affidavit over his own. Mr. Verdin-Garcia argues that the court should have instead held an evidentiary hearing. The court is confident, however, that it gave proper weight to Mr. Verdin-Garcia’s sworn affidavit. Many times, the affidavit of Mr. Verdin-Garcia’s attorney did not in fact directly

contradict his own, and so the court was able to rely on both sworn statements. Other times, the court resolved Mr. Verdin-Garcia's claims without resolving any factual dispute presented by the affidavits or by relying only on Mr. Verdin-Garcia's affidavits. As such, the court was able to resolve Mr. Verdin-Garcia's § 2255 motion without holding an evidentiary hearing. Mr. Verdin-Garcia does not explain how reasonable jurists would disagree.

Accordingly, Mr. Verdin-Garcia has failed to meet the standard for the issuance of a certificate of appealability.

IT IS THEREFORE ORDERED BY THE COURT that defendant's motion for a certificate of appealability (doc. 328) is denied.

IT IS SO ORDERED this 8th day of June, 2010.

s/ John W. Lungstrum

John W. Lungstrum
United States District Judge