

APR 15 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff - Appellee,</p> <p style="text-align: center;">v.</p> <p>ANGEL PENA,</p> <p style="text-align: center;">Defendant - Appellant.</p>
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No. 08-56408

D.C. Nos. 2:08-cv-01337-DDP
2:04-cr-00837-DDP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Submitted April 5, 2010**

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

Federal prisoner Angel Pena appeals pro se from the district court's order dismissing his 28 U.S.C. § 2255 motion. We have jurisdiction pursuant to

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

28 U.S.C. § 2253, and we affirm.

Pena contends that his 120-month sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the drug quantity was not admitted or proven to a jury beyond a reasonable doubt.^{***} We previously addressed and rejected this contention in Pena’s direct appeal, *see United States v. Pena*, 223 Fed.Appx. 589, 590 (9th Cir. 2007), and therefore Pena may not re-litigate it in a § 2255 motion. *See United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000); *see also United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

To the extent that Pena is raising additional arguments, we construe them as a motion to expand the certificate of appealability. So construed, the motion is denied. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.

^{***} We note that on August 13, 2008, the district court issued an order granting a certificate of appealability (“COA”) on this issue, which it filed under docket # 04-cr-00837-DDP. Subsequently, on September 9, 2009, the district court issued a second order denying a COA on the same issue, filed under docket # 08-cv-01337-DDP. To the extent necessary, we sua sponte grant a COA with respect to the same issues set forth in the district court’s August 13, 2008, order. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).