

**UNITED STATES COURT OF APPEALS**

**JUN 25 2002**

**TENTH CIRCUIT**

**PATRICK FISHER**  
Clerk

FLOYD SMITH,

Petitioner - Appellant,

v.

RON WARD,

Respondent - Appellee.

No. 01-6417

(D.C. No. CIV-00-858-A)

(W.D. Oklahoma)

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**ORDER AND JUDGMENT\***

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Before **KELLY, McKAY, and MURPHY**, Circuit Judges.

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After examining the briefs 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)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This is a pro se § 2254 state prisoner appeal. Mr. Smith was convicted of first degree rape after former conviction of two felonies. He was sentenced to fifty years' imprisonment, and his conviction and sentence were affirmed on

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\*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

direct appeal. His state post-conviction action was unsuccessful, and his appeal of that action was dismissed as untimely.

In his federal habeas petition, Mr. Smith claimed erroneous admission of hearsay testimony, excessive sentence, ineffective assistance of trial counsel, false testimony, and conviction not supported by DNA evidence. The magistrate judge recommended that the first two claims be denied on the merits and the remaining three claims be dismissed as procedurally barred, absent cause or prejudice. After consideration of Mr. Smith's objections, the district court adopted the recommendation and denied the petition. Petitioner then applied to this court for a certificate of appealability.

In order for this court to grant a certificate of appealability, Petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, Petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotations omitted).

We have carefully reviewed Mr. Smith's brief, the district court's disposition, and the record on appeal. Nothing in the facts, the record on appeal, or Petitioner's brief raises an issue which meets our standards for the grant of a

certificate of appealability. For substantially the same reasons as set forth by the district court in its Order of October 30, 2001, we cannot say that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.” Id. We **DENY** Petitioner’s request for a certificate of appealability and **DISMISS** the appeal.

Petitioner’s motion to proceed in forma pauperis on appeal is **GRANTED**.

Entered for the Court

Monroe G. McKay  
Circuit Judge