

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DEC 17 2002

PATRICK FISHER
Clerk

DAVID WAYNE ELLIS,

Petitioner-Appellant,

v.

DAYTON J. POPPELL, Warden,

Respondent-Appellee.

No. 02-5048
(Northern District of Oklahoma)
(D.C. No. 01-CV-465-K)

ORDER AND JUDGMENT*

Before **KELLY, McKAY**, and **MURPHY**, 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(G). 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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel.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.

Proceeding *pro se*, petitioner David Wayne Ellis seeks a certificate of appealability (“COA”) to enable him to appeal the district court’s denial of his 28 U.S.C. § 2254 petition. See 28 U.S.C. § 2253(c)(1)(A) (providing that no appeal may be taken from the denial of a § 2254 petition unless the petitioner first obtains a COA). The district court dismissed Ellis’ petition because it was untimely under the Antiterrorism and Effective Death Penalty Act of 1996. See 28 U.S.C. § 2244(d)(1) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court.”). Ellis is not entitled to a COA unless he can make a “substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). Ellis can make this showing by demonstrating that the issues raised are debatable among jurists, a court could resolve the issues differently, or that the questions presented deserve further proceedings. See *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

This court has read Ellis’ request for a COA and accompanying brief and has conducted a *de novo* review of the district court’s order and the entire record on appeal. That *de novo* review clearly demonstrates the district court’s dismissal of Ellis’ § 2254 petition as untimely is not deserving of further proceedings or subject to a different resolution on appeal. Accordingly, this

court **denies** Ellis' request for a COA for substantially those reasons set forth in the district court's order filed April 1, 2002, and **dismisses** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge