

**UNITED STATES COURT OF APPEALS**  
**TENTH CIRCUIT**

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**JUN 24 1997**

**PATRICK FISHER**  
Clerk

TYRONE PETER DARKS,  
Petitioner-Appellant,

v.

RON WARD, Warden, Oklahoma  
State Penitentiary; and DREW  
EDMONDSON, Attorney General of  
the State of Oklahoma,

Respondents-Appellees.

No. 96-6086  
(D.C. No. CIV-96-268-T)  
(W.D. Okla.)

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**ORDER AND JUDGMENT\***

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Before **BRORBY**, **EBEL** and **KELLY**, Circuit Judges.

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Petitioner-Appellant Tyrone Peter Darks was convicted of first degree murder on November 20, 1995 in Cleveland County, Oklahoma, District Court.

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\*After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

Darks was subsequently sentenced to death by lethal injection. Three months after his conviction, on February 21, 1996, Darks filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma. In the petition, Darks raised various constitutional and evidentiary objections to the state court conviction. However, because Darks' state court direct appeal was still pending, the district court dismissed the petition without prejudice for failure to exhaust state remedies. Darks filed a notice of appeal on March 6, 1996, and filed an application for a certificate of probable cause on March 26, 1996. Under the amended version of 28 U.S.C. § 2254, we treat Darks' application for a certificate of probable cause as a motion for a certificate of appealability. Lennox v. Evans, 87 F.3d 431, 434 (10th Cir. 1996), cert. denied, 117 S. Ct. 746.

The district court correctly concluded that Darks failed to exhaust state remedies before pursuing this habeas action, and that it thus lacked jurisdiction to consider the merits of Darks' petition. 28 U.S.C. § 2254(b). In his petition, Darks concedes that his appeal to the Oklahoma Court of Criminal Appeals was filed on December 29, 1995. That court had not reached a decision on Darks' appeal by the time his petition was filed, and we take judicial notice that it still has not done so. Thus, the district court properly dismissed Darks' petition sua sponte. Odum v. Boone, 62 F.3d 327, 332-33 n.2 (10th Cir. 1995).

Accordingly, Darks' motion for a certificate of appealability is DENIED and his appeal is DISMISSED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

David M. Ebel  
Circuit Judge