

APR 22 1997

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GILBERT DEAN DAVIS,

Petitioner-Appellant,

v.

JUSTINE JONES,

Respondent-Appellee.

No. 96-6152
(W. Dist. of Oklahoma)
(D.C. No. CIV-95-1845-W)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **PORFILIO**, and **MURPHY**, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause 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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel.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.

This matter is before the court on Petitioner Gilbert Dean Davis' application for a certificate of appealability to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Because Mr. Davis has not made a "substantial showing of the denial of a constitutional right," and this petition constitutes an abuse of the writ, we deny his application and dismiss the appeal. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2253(c)(2).

Mr. Davis filed a petition for a writ of habeas corpus with the district court contending that he was denied his Sixth Amendment right to effective assistance of counsel and his due process right to a post-examination competency hearing. The magistrate judge reviewed Mr. Davis' petition and recommended that it be dismissed for abuse of the writ. *See* Rules Governing Section 2254 Cases 9(b). The district court agreed with the magistrate judge and dismissed Mr. Davis' petition April 15, 1996.

We have reviewed the magistrate judge's report and recommendation, the district court's order, Petitioner's application for a certificate of appealability, and the record before us. We conclude that Petitioner has failed to make a substantial showing of a denial of a constitutional right for substantially the reasons set forth in the report and recommendation of March 18, 1996.

Accordingly, we **DENY** Petitioner's application for a certificate of appealability and **DISMISS** the appeal.

ENTERED FOR THE COURT,

Michael R. Murphy
Circuit Judge