

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

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**JUN 9 1998**

**PATRICK FISHER**  
Clerk

HAROLD GENE WEATHERLY,

Petitioner-Appellant,

v.

STATE OF OKLAHOMA;  
JACK COWLEY,

Respondents-Appellees.

No. 97-6160  
(D.C. No. 96-CV-1848)  
(W.D. Okla.)

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**ORDER AND JUDGMENT** \*

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Before **BALDOCK** , **EBEL** , and **MURPHY** , Circuit Judges.

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After examining petitioner's brief and the appellate record, this panel has determined unanimously to grant petitioner's request for a decision without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Petitioner appeals from the district court's denial of habeas corpus relief. See 28 U.S.C. § 2254. The district court also denied petitioner's request for a certificate of appealability. See id. § 2253(c)(1). Before petitioner may proceed on appeal, he must secure a certificate of appealability from this court. See id. Petitioner argues that this court should grant a certificate of appealability on the following grounds: (1) the Oklahoma Court of Criminal Appeals improperly imposed a procedural bar to the substantive claims raised; and (2) if the substantive claims were procedurally defaulted, the default should be excused because there was cause for the default and actual prejudice, or a failure to consider his claims will result in a fundamental miscarriage of justice.

Upon consideration of the record and petitioner's brief, we conclude petitioner has failed to make a substantial showing of a denial of a constitutional right. See id. § 2253(c)(2). We DENY petitioner's request for a certificate of appealability for substantially the reasons stated by the magistrate judge in his findings and recommendation filed December 26, 1996, and supplemental findings and recommendation filed March 6, 1997, which were adopted by the

district court on April 14, 1997. The appeal is DISMISSED. Petitioner's motion to proceed on the record is GRANTED.

Entered for the Court

Michael R. Murphy  
Circuit Judge