

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

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**SEP 9 1998**

**PATRICK FISHER**  
Clerk

FRED ALAN MORGAN,

Petitioner-Appellant,

v.

H.N. "SONNY" SCOTT, Warden,

Respondent-Appellee.

No. 97-6338  
(D.C. No. CIV-97-271-T)  
(W.D. Okla.)

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**ORDER AND JUDGMENT** \*

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Before **BRORBY, McKAY,** and **BRISCOE**, Circuit Judges.

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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); 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\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 seeks a certificate of appealability, see 28 U.S.C. § 2253(c), that would enable him to appeal the district court's denial of habeas relief, see id. § 2254, from his Oklahoma conviction for first degree manslaughter. Issuance of a certificate of appealability is appropriate only if petitioner makes a substantial showing of the denial of a constitutional right. See id. § 2253(c)(2).

As grounds for habeas relief, petitioner argues that there was insufficient evidence to support his conviction, his life sentence was excessive, and the trial court erred in admitting into evidence a .25 caliber shell casing without adequate foundation and in refusing to instruct the jury on excusable homicide. We DENY the certificate of appealability for substantially the reasons stated in the magistrate judge's report and recommendation dated June 30, 1997, and the district court's September 24, 1997 order adopting the magistrate judge's recommendation, and we DISMISS this appeal.

The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe  
Circuit Judge