

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AUG 12 1998

PATRICK FISHER
Clerk

GREGORY ROCSHON LEWIS,

Petitioner - Appellant,

v.

H. N. "SONNY" SCOTT,

Respondent - Appellee.

No. 97-6380
(D.C. No. 97-CV-341)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **PORFILIO, KELLY, and HENRY**, Circuit Judges.**

Mr. Lewis seeks to appeal from the denial of his habeas petition, 28 U.S.C. § 2254. Upon recommendation of the magistrate judge, the district court denied the petition, in forma pauperis status for an appeal, and a certificate of appealability. We have reviewed the record, grant Mr. Lewis's motion for leave to proceed on appeal without prepayment of costs or fees, but conclude that he

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

** 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.

has not made “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and therefore deny his application for a certificate of appealability. The predicate of Mr. Lewis’s claims, ineffective assistance of counsel, was considered on the merits by the Oklahoma Court of Criminal Appeals, R. doc. 17, ex. A at 2, so the claim is not procedurally barred, see Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991), and there is no need to consider the issue of procedural bar in the context of Oklahoma’s direct appeal procedure, see English v. Cody, Nos. 97-5004 & 97-5132, 1998 WL 348019 (10th Cir. June 30, 1998). As to the merits, we are in substantial agreement with the Supplemental Report and Recommendation of the magistrate judge, see R. doc. 30 at 6-17.

APPEAL DISMISSED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge