

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

**NOV 4 1998**

**PATRICK FISHER**  
Clerk

---

PHILLIP EUGENE GARDNER,

Petitioner - Appellant,  
vs.

RON CHAMPION,

Respondent - Appellee.

No. 98-5065  
(D.C. No. 97-CV-148-K)  
(N.D. Okla.)

---

**ORDER AND JUDGMENT\***

---

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

---

Petitioner-Appellant Phillip Eugene Gardner, an inmate appearing pro se, appeals from the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Mr. Gardner's habeas petition alleges: (1) disproportionate sentencing and (2) he was denied a direct appeal of his convictions through ineffective assistance of counsel. Upon recommendation of the magistrate judge,

---

\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

the district court dismissed the petition without prejudice for failure to exhaust state remedies. The district court also denied a certificate of appealability.

In reaching its ruling, the district court permitted supplemental briefing on the issue of futility of available state remedies. The court found that an available state remedy exists because the state court could hear Mr. Gardner's claims if he articulates "sufficient reason" for inadequately having raised his claim previously.

Before Mr. Gardner may proceed on appeal, he must secure a certificate of appealability from this court. See 28 U.S.C. §2253(c)(1)(A). Raising the same issues he raised in the district court, petitioner argues that this court should grant a certificate of appealability because the district court erred by: (1) not liberally construing his pro se pleadings, (2) finding that further state court litigation would not be futile, and (3) disposing of his habeas claims on non-exhaustion grounds without holding an evidentiary hearing.

Upon consideration of the record and petitioner's brief, we conclude that petitioner has failed to make "a substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253(c)(2). We DENY petitioner's request for a certificate of appealability. The appeal is DISMISSED.

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge