

UNITED STATES COURT OF APPEALS March 5, 2013
TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

JERRY L. MAYS,
Petitioner - Appellant,

v.

TERRY MARTIN, Warden,
Respondent - Appellee.

No. 12-5219
(D.C. No. 12-CV-00520-CVE-PJC)
(N.D. Okla.)

**ORDER
DENYING CERTIFICATE OF APPEALABILITY**

Before **KELLY, HOLMES, and MATHESON**, Circuit Judges.

Petitioner Jerry L. Mays, an Oklahoma state prisoner proceeding pro se, seeks a certificate of appealability (“COA”) to appeal the district court’s dismissal of his petition for writ of habeas corpus, 28 U.S.C. § 2254, without prejudice. Mays v. Martin, 12-cv-00520-CVE-PJC (N.D. Okla. Dec. 12, 2012). We deny his request and dismiss the appeal.

On September 17, 2012, Mr. Mays filed a § 2254 petition in the district court. R. 3–15. On September 27, the court issued a show cause order directing Mr. Mays to either pay the \$5.00 filing fee or file a motion to proceed in forma pauperis (“IFP”). Id. at 16–18. The court also ordered Mr. Mays to show cause why the petition should not be dismissed as a second or successive habeas

petition. Id. Although Mr. Mays filed a response, he did not pay the filing fee or file an IFP motion. Id. at 19–29. The court dismissed the petition for failure to comply with the court’s order. Id. at 30–32.

We will only issue a COA if Mr. Mays makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Where, as here, the petition was dismissed on procedural grounds, without a merits determination, Mr. Mays must show that reasonable jurists would find it debatable not only whether the petition states a valid constitutional claim, but also whether the district court’s procedural ruling was correct. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Mr. Mays has made no such showing. We conclude that reasonable jurists could not debate that the district court properly dismissed the petition on procedural grounds. In its September 27 order, the district court warned Mr. Mays that “[f]ailure to comply . . . may result in the dismissal of this action without prejudice and without further notice.” R. 18. Mr. Mays did not pay the required fee or file for IFP despite the district court’s order to do so.

Accordingly, we DENY a COA, DENY IFP status, and DISMISS the appeal.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge