

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 16, 2017

Elisabeth A. Shumaker  
Clerk of Court

PAUL CAIN,

Petitioner - Appellant,

v.

JAMES FRAWNER; HECTOR H.  
BALDERAS,

Respondents - Appellees.

No. 17-2074

D.C. No. 2:15-CV-00755-WJ-KK  
(D. N.M.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY**

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Before **BRISCOE**, **HARTZ**, and **BACHARACH**, Circuit Judges.

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In state court, Mr. Paul Cain was convicted of third-degree criminal sexual penetration. After unsuccessfully pursuing state-court remedies, Mr. Cain sought federal habeas relief. The federal district court found that Mr. Cain had not exhausted some of his claims and allowed Mr. Cain a specified time-period to withdraw his unexhausted claims. Mr. Cain did not respond within the designated time-period, and the district court ordered dismissal without prejudice on the ground that Mr. Cain had failed to

exhaust some of his habeas claims. Mr. Cain wants to appeal. But to appeal, he needs a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A).

For the certificate of appealability, Mr. Cain must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Mr. Cain would meet this standard only if reasonable jurists could “disagree with the district court's resolution of his constitutional claims or . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003).

A federal district court could grant habeas relief only if Mr. Cain exhausted all of his habeas claims. *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982). Mr. Cain does not deny that some of the habeas claims are unexhausted. But he argues that the court should have stayed the proceedings because any subsequent habeas petition would be procedurally barred. But the district court reasoned that Mr. Cain had failed to show

- the presence of good cause for the failure to exhaust the claims or
- the absence of dilatory tactics.

Mr. Cain has not presented a valid reason to disturb the district court’s determination. As a result, we conclude that reasonable jurists could not debate the district court’s decision to order dismissal rather than to stay

the proceedings. Based on this conclusion, we (1) deny Mr. Cain's request for a certificate of appealability and (2) dismiss the appeal.

Entered for the Court

Robert E. Bacharach  
Circuit Judge