

UNITED STATES COURT OF APPEALS

Filed 8/15/96

TENTH CIRCUIT

DONALD LEE ROGERS,

Petitioner-Appellant,

v.

JACK COWLEY,

Respondent-Appellee.

No. 96-6071
(D.C. No. CIV-95-995-A)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **KELLY** and **LUCERO**, Circuit Judges.

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 cause is therefore ordered submitted without oral argument.

Mr. Donald L. Rogers filed this pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising five claims as grounds for relief. The

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 10th Cir. R. 36.3.

petition was referred to a magistrate judge who recommended that the court find Mr. Rogers' first two claims procedurally barred, and all claims, including the first two, insufficient on the merits. After de novo review, the district court adopted the magistrate's report and recommendation in its entirety and denied Mr. Rogers' petition. The district court also denied Mr. Rogers' motion to proceed *in forma pauperis* and his application for certificate of probable cause. Mr. Rogers appeals.

In order to succeed on his motion for leave to proceed *in forma pauperis*, Mr. Rogers must show: (1) a financial inability to pay the required filing fees and (2) the existence of a nonfrivolous argument on the law and facts in support of the issues raised on appeal. See 28 U.S.C. § 1915(a); Coppedge v. United States, 369 U.S. 438 (1962); DeBardleben v. Quinlan, 937 F.2d 502 (10th Cir. 1991). As noted by the district court, and as shown on the application for *in forma pauperis* status, Mr. Rogers has \$448.23 in his prison savings account. Because Mr. Rogers failed to establish his inability to pay the filing fee, we deny his motion to proceed on appeal without prepayment of costs or fees.

ENTERED FOR THE COURT

Stephanie K. Seymour
Chief Judge