

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS **October 4, 2021**

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

EARNEST EUGENE WALKER, JR.,

Petitioner - Appellant,

v.

STATE OF KANSAS,

Respondent - Appellee.

No. 21-3137
(D.C. No. 5:21-CV-03150-SAC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON, BRISCOE, and PHILLIPS**, Circuit Judges.

Petitioner Earnest Eugene Walker, Jr., a former Oklahoma state prisoner appearing pro se, requests a certificate of appealability (COA) so that he may appeal the district court's order dismissing his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 for lack of jurisdiction. Because Walker has failed to satisfy the standards for issuance of a COA, we deny his request and dismiss the matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

On June 24, 2021, Walker initiated these federal habeas proceedings by filing a pro se petition for writ of habeas corpus and supporting materials. *See* ROA at 3. Walker asserted claims for (1) denial of Fourteenth Amendment due process rights; (2) denial of Thirteenth Amendment rights to be free from involuntary servitude; (3) denial of Fifth Amendment due process and double jeopardy rights; (4) denial of Sixth Amendment rights to effective assistance of counsel; and (5) denial of Eighth Amendment rights against cruel and unusual punishment. *Id.* at 7–14. The petition did not allege that Walker is in custody.

On July 1, 2021, the district court issued an order directing Walker to show cause why his petition should not be dismissed because he is no longer in custody on the challenged convictions, and to articulate any relief he seeks. ROA at 77–80. Walker responded on July 14, 2021, but did not show cause why his case should not be dismissed. *See* ROA at 81–83. Instead, he stated: “petitioner is no longer in custody but has a legal question to be answered by the next highest court for which the Kansas supreme court denied the petition for review.” *Id.* at 82. His questions were “whether the sentences served were illegal or not” and, “if the federal habeas corpus is not the appropriate venue for resolution that the court consider the merits of the case for seeking a resolution at the federal court level.” *Id.* at 82–83.

Apparently, Walker seeks either to appeal Kansas state court determinations regarding the legality of his sentences or else to request an advisory opinion from the district court on the legality of his sentences. *See id.*

II

“A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). “Federal law requires that he first obtain a COA from a circuit justice or judge.” *Id.* (citing 28 U.S.C. § 2253(c)(1)). To obtain a COA, a state prisoner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires the prisoner to “sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In other words, the prisoner must show that the district court’s resolution of the claims was “debatable or wrong.” *Slack*, 529 U.S. at 484. When a district court dismisses a § 2254 claim on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and debatable whether the district court’s procedural ruling was correct. *Id.* at 484–85.

Relief through section 2254 is only available to “a person in custody.” 28 U.S.C. § 2254. “The custody requirement is jurisdictional.” *Mays v. Dinwiddie*, 580 F.3d 1136, 1139 (10th Cir. 2009).

III

Walker is not entitled to a COA because reasonable jurists could not debate that the district court lacked jurisdiction. Walker did not allege that he was in custody. *See*

ROA at 92. Moreover, the district court gave Walker an opportunity to show that he was in custody and he admitted that he was not. *See* ROA at 82. Even when liberally construed, nothing in Walker’s combined opening brief and application for a COA indicates he alleged he was in custody. Walker asserts that someone in the district court clerk’s office indicated he could file a petition under Section 2254 whether he was in custody or not; makes vague assertions that an adverse ruling shows that the district court was biased against him; and asks this court to liberally construe his petition “as a motion to correct the illegal sentence.” Aplt. Br. and Ap. for COA at 5–6. None of these arguments can overcome the fact that the district court had no jurisdiction to hear Walker’s habeas petition when he was not in custody. *See Mays*, 580 F.3d at 1139. And no matter how liberally it is construed, Walker’s petition is clearly for a writ of habeas corpus, not a correction of his sentence. *See* ROA at 3. Consequently, we conclude he has failed to establish that reasonable jurists would find the district court’s analysis debatable.

The application for COA is therefore DENIED and the matter is DISMISSED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge