

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

**January 17, 2012**

**Elisabeth A. Shumaker**  
Clerk of Court

DAVID ROBIN WHITMORE,

Petitioner - Appellant,

v.

JUSTIN JONES; THE ATTORNEY  
GENERAL OF THE STATE OF  
OKLAHOMA,

Respondents - Appellees.

No. 11-6261  
(D.C. No. 5:10-CV-01346-M)  
W.D. Oklahoma

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**ORDER DENYING CERTIFICATE  
OF APPEALABILITY**

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Before **BRISCOE**, Chief Judge, **MURPHY**, and **MATHESON**, Circuit Judges.

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David Robin Whitmore, a state prisoner appearing *pro se*, seeks to appeal the district court's denial of his 28 U.S.C. § 2241 petition. The matter is before this court on Whitmore's request for a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" unless the petitioner first obtains a COA); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) (holding that the requirements of § 2253(c)(1)(A) apply when the state habeas petitioner is proceeding under § 2241). Because Whitmore has not made a "substantial showing of the denial of

a constitutional right,” this court **denies** his request for a COA and dismisses this appeal. 28 U.S.C. § 2253(c)(2) (providing that a COA “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right”).

In his § 2241 petition, Whitmore challenged a prison disciplinary conviction for menacing a member of the prison staff. The matter was referred to a magistrate judge for initial proceedings pursuant to 28 U.S.C. § 636(b)(1). The magistrate judge issued a thorough report and recommendation, recommending that the district court deny Whitmore’s § 2241 habeas petition. In particular, the magistrate judge concluded Whitmore’s prison disciplinary proceeding complied with the applicable due process requirements set out in *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974), and *Superintendent v. Hill*, 472 U.S. 445, 454 (1985). The magistrate judge further concluded the disciplinary decision was supported by “some evidence.” *Hill*, 472 U.S. at 457. Upon de novo review, the district judge adopted the report and recommendation and denied Whitmore’s petition.

A COA may issue if Whitmore “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing, Whitmore must demonstrate “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) (quotation omitted). In evaluating a request for a COA, it is not the role of this court to

engage in a “full consideration of the factual or legal bases adduced in support of the claims.” *Id.* Instead, this court undertakes “a preliminary, though not definitive, consideration of the [legal] framework” applicable to each claim. *Id.* at 338. Whitmore is not required to demonstrate that his appeal will succeed to be entitled to a COA. He must, however, “prove something more than the absence of frivolity or the existence of mere good faith.” *Id.* (quotations omitted).

This court has reviewed Whitmore’s Combined Opening Brief and Application for a COA, the magistrate judge’s report and recommendation, the district court’s order, and the entire record on appeal pursuant to the framework set out by the Supreme Court in *Miller-El*. That comprehensive review demonstrates Whitmore is not entitled to a COA. The district court’s resolution of Whitmore’s petition is not reasonably subject to debate and the claims he seeks to raise on appeal are not adequate to deserve further proceedings. Accordingly, Whitmore has not “made a substantial showing of the denial of a constitutional right” and is not entitled to a COA. 28 U.S.C. § 2253(c)(2).

This court **DENIES** Whitmore’s request for a COA and **DISMISSES** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy  
Circuit Judge