

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

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

**April 18, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

O'NEAL SMITH, III,  
Petitioner - Appellant,

v.

CARRIE BRIDGES,  
Respondent - Appellee.

No. 23-6002  
(D.C. No. 5:22-CV-00048-HE)  
(W.D. Okla.)

**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

Before **BACHARACH, KELLY, and MORITZ**, Circuit Judges.

Petitioner-Appellant O’Neal Smith, III, a state inmate proceeding pro se, appeals from the district court’s denial of habeas relief on his double jeopardy claim, 28 U.S.C. § 2254. Smith v. Bridges, No. CIV-22-0048 (W.D. Okla. Jan. 25, 2023); Smith v. Bridges, No. CIV-22-0048, 2022 WL 17976797 (W.D. Okla. Dec. 28, 2022). Mr. Smith argues that counts one and two of his indictment (robbery with a dangerous weapon and assault and battery with a dangerous weapon) violate his right against double jeopardy under 21 Okla. Stat. tit. 21, § 11. A certificate of appealability (COA) is a jurisdictional

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\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

prerequisite to our appellate review. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

We deny a COA and dismiss the appeal.

### **Background**

Mr. Smith has already been granted habeas relief, conditionally limited to a new trial, on the grounds that a state trial judge had an undisclosed sexual relationship with the prosecuting attorney during the prosecution. II R. 128–29. He appeals only the denial of his double jeopardy claim, arguing that complete dismissal of the charges is appropriate. Aplt. Br. at 4. On direct appeal, the Oklahoma Court of Criminal Appeals determined there was no double jeopardy because each crime required proof of facts which the other did not. I R. 357. It also determined that Okla. Stat. tit. 21, § 11 was not violated because the convictions were for separate and distinct crimes. Id.

In his federal habeas petition, Mr. Smith stated Oklahoma statutory law is the basis for his double jeopardy claim, not constitutional law. I R. 13. The magistrate judge recommended relief on one ground of the petition and did not rule on other issues raised. II R. 11–12. After Mr. Smith objected to the magistrate judge’s report, the district court denied relief on both constitutional double jeopardy and Oklahoma state law grounds, adopting the magistrate judge’s report. Id. 129–30. Mr. Smith appealed, and the district court denied a COA. Id. 136–37.

## Discussion

State-court decisions on the merits are subject to deferential review. Unless the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court”; or, was “based on an unreasonable determination of the facts” in view of the evidence presented in the state court proceeding, a federal court may not grant an application. 28 U.S.C. § 2254(d)(1)–(2). A state court decision unreasonably applies Supreme Court law if it “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.” Williams v. Taylor, 529 U.S. 362, 407–08 (2000).

A COA may issue only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To obtain a COA when the district court rejected the claim on the merits, petitioner must show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). COAs are claim specific. 28 U.S.C. § 2253(c)(3). Federal habeas corpus relief requires that the state prisoner is in custody upon violation of the Constitution or laws or treaties of the United States, not upon an error of state law. Swarthout v. Cooke, 562 U.S. 216, 219 (2011). Thus, Mr. Smith’s double punishment claim under Oklahoma law is not cognizable on federal habeas review. To the extent the federal habeas petition can be construed as raising a question of federal double jeopardy, the two counts require proof of distinct facts: robbery requires something to be stolen while assault and battery does not. Thus, reasonable jurists would not debate the district court’s resolution. See Blockburger v.

United States, 284 U.S. 299, 304 (1932); see also Foreman v. Franklin, 211 F. App'x 745, 747 (10th Cir. 2007) (unpublished).

We deny the COA, dismiss the appeal, and deny Mr. Smith's motion to proceed in forma pauperis, as he has not provided "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." DeBardeleben v. Quinlan, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge