FILED
United States Court of Appeals
Tenth Circuit

October 4, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES WELLS HORSEY,

Petitioner - Appellant,

v.

WILLIAM RANKINS,

Respondent - Appellee.

No. 23-6083
(D.C. No. 5:22-CV-01021-J)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.

James Wells Horsey, an Oklahoma state prisoner proceeding pro se,[1] seeks a certificate of appealability ("COA") regarding his jury conviction for possession of child pornography. After being denied relief in the Oklahoma Court of Criminal Appeals ("OCCA"), Mr. Horsey filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied his petition and denied him a COA. Mr. Horsey timely filed an application for a COA.

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Horsey is pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

We deny Mr. Horsey's application for a COA and dismiss this matter. We also deny Mr. Horsey's motion to proceed in forma pauperis ("IFP") because we conclude that he advances no non-frivolous arguments in this matter.

I. BACKGROUND

A grand jury charged Mr. Horsey with one count of lewd or indecent acts to a child under twelve years old, in violation of Section 1123(A)(2) of Title 21 of the Oklahoma Statutes, and one count of possession of child pornography, in violation of Section 1021.2 of Title 21 of the Oklahoma Statutes. One evening around May 2018, Mr. Horsey's seven-year-old neighbor shared with her mother that, among other actions, Mr. Horsey had shown her pornographic imagery on his phone. The child's mother immediately drove the child to the police station so they could report the incident. Upon learning this information, two officers drove out to Mr. Horsey's home, and Mr. Horsey came outside after the officers knocked on his door. After they read him his *Miranda*[2] rights, he agreed to speak with the officers. The two officers did not seize the phone from him during this visit but returned to the house shortly thereafter to ask for the phone, which Mr. Horsey provided. A digital forensics specialist at the Lawton Police Department reviewed the contents of the phone and found three photos that he suspected were child pornography. Prior to trial, defense counsel filed a motion to suppress and to dismiss the child pornography possession count, asserting that the police had obtained the

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

phone under false pretenses.[3] Mr. Horsey later withdrew the motion. During his jury trial, Mr. Horsey took the stand and testified that the phone was a "house phone" available to anyone in his household to use, but he admitted on cross-examination that he had significant control over the phone. ROA Vol. IV at 22–23.

The jury acquitted Mr. Horsey of lewd or indecent acts to a child under twelve but convicted him of possession of child pornography. The trial court then entered a judgment and sentence, which it subsequently amended *nunc pro tunc* because the original judgment erroneously declared Mr. Horsey ineligible to vote under count one, rather than count two. The trial court sentenced Mr. Horsey to fifteen years' imprisonment.

In his direct appeal before the OCCA, Mr. Horsey argued that (1) he was given an excessive sentence because he chose to proceed to trial rather than plead guilty; (2) a Lawton police officer made an improper comment on Mr. Horsey's right to remain silent on the stand; and (3) an order *nunc pro tunc* must be entered to correct his judgment and sentence, because the original judgment and sentence incorrectly stated that he lost his right to vote under a conviction for count one, the charge for which he was acquitted,

[3] The motion specifically asserted "[t]hat under the pretense of being unable to see the serial number [of the phone] on the porch of Defendant's home, law enforcement told Defendant that the phone was being taken to a patrol vehicle to obtain the phone's serial number" and "while law enforcement had Defendant's cellular telephone in the patrol vehicle, law enforcement illegally searched the contents of Defendant's phone." ROA Vol. III at 209. Ultimately, the motion argued "the scope of Defendant's consent related to the search of his cellular telephone was limited to obtaining the serial number from the exterior of the telephone" and that the search was otherwise unlawful under the Fourth Amendment. *Id.* at 210.

rather than count two. The OCCA affirmed the judgment and sentence, but remanded the matter to the district court solely to ensure that a corrected judgment and sentence was made part of the record on appeal.

Around this time, Mr. Horsey contacted the Lawton Police Department seeking their records as to his arrest. He learned through correspondence dated April 6, 2021, that the city had dashcam footage of his conversation with police. There is no evidence in the record that Mr. Horsey ever obtained a copy of this footage.

In his motion for state postconviction relief before the trial court, Mr. Horsey argued six claims for relief: (1) the police used deceptive practices and procedures in obtaining a second statement from him and searching his cell phone; (2) the prosecution withheld favorable evidence; (3) the trial court gave an improper jury instruction, lowering the burden of proof in the case and changing the nature of the charge; (4) the jury had insufficient evidence to convict him on count two because he was acquitted on count one; (5) given the totality of the circumstances, the trial court imposed an unreasonably excessive sentence; and (6) ineffective assistance of trial and appellate counsel. The trial court denied Mr. Horsey's motion on May 10, 2021, concluding he should have raised the first five issues and his ineffective assistance of trial counsel claim on direct appeal, and he did not suffer ineffective assistance of appellate counsel under the Sixth and Fourteenth Amendments.

Mr. Horsey appealed the trial court's determination to the OCCA, raising the same arguments. On January 21, 2022, the OCCA affirmed the trial court's decision and concluded Mr. Horsey's claims were procedurally barred aside from his claim of

ineffective assistance of appellate counsel, then held he did not suffer constitutionally ineffective assistance of appellate counsel. Mr. Horsey filed a petition for writ of certiorari before the U.S. Supreme Court regarding the OCCA's ruling on his petition for postconviction relief. The Supreme Court denied the petition.

Mr. Horsey filed a petition for writ of habeas corpus. He asserted (1) the OCCA erred by failing to address the difference between his charge for possession of juvenile pornography and conviction for possession of child pornography; (2) prosecutors committed a *Brady*[4] violation by failing to turn over dashcam footage that Mr. Horsey learned about in 2021; (3) the trial court gave improper jury instructions lowering the burden of proof for the prosecution from willing possession to knowing possession; and (4) there was insufficient evidence for his conviction. Mr. Horsey attributed his failure to raise grounds one, three, and four to ineffective assistance of appellate counsel, and he argued he was unable to raise ground two on direct appeal because he did not learn about the dashcam footage until after he exhausted his direct appeals.

The district court referred Mr. Horsey's petition to a magistrate judge, who recognized in a Report and Recommendation that each claim was procedurally barred from review under Oklahoma's rule requiring claims be raised for the first time on direct appeal to be cognizable on postconviction review. The magistrate judge also explained that Mr. Horsey could not overcome this procedural bar through a showing of cause and prejudice on any of his claims. As to grounds one, three, and four, the magistrate judge

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

recommended concluding that the OCCA did not unreasonably apply *Strickland*[5] in holding that Mr. Horsey could not show cause and prejudice for failing to raise these claims on direct appeal. As to ground two, the magistrate judge recommended holding that Mr. Horsey could not show cause and prejudice under *Brady* to overcome his procedural bar because he had not argued that the dashcam footage would be material evidence. The magistrate judge also noted that denying review of his claims would not result in a fundamental miscarriage of justice since Mr. Horsey made no assertion of factual innocence.

Mr. Horsey objected to the magistrate judge's conclusions on each of his asserted grounds for relief, while also claiming that the state forfeited exhaustion and procedural default claims by not responding to his petition for writ of certiorari. The district court adopted the Report and Recommendation and denied a COA.

Mr. Horsey petitions this court for a COA, alleging the same grounds for error brought in the district court, while also generally challenging the district court's conclusions regarding exhaustion in state court, denial of habeas relief, and denial of a COA.

II. DISCUSSION

A. Legal Standards

An appeal from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" shall be taken to

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

the court of appeals only if "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). For a circuit judge to issue a COA, the applicant must have "made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). District courts may deny habeas petitions based on the merits of the petitioner's claims or based solely on a procedural bar. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a "district court has rejected the constitutional claims on the merits, the showing required . . . is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* When a district court denies a habeas petition based on a procedural bar, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a state court has adjudicated a federal claim on the merits, a federal court can grant habeas relief only if the petitioner establishes the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). Pursuant to § 2254(d)(1), a state-court decision is "contrary to" the Supreme Court's clearly established precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and

nevertheless arrives at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A state-court decision is an "unreasonable application" of Supreme Court law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08. A federal court may not grant relief simply because it concludes in its "independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly," *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004) (quoting *Williams*, 529 U.S. at 411), but may grant relief only where "the ruling [is] 'objectively unreasonable, not merely wrong; even clear error will not suffice,'" *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam) (quoting *Woods v. Donald*, 575 U.S. 312, 316 (2015)).

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To satisfy the exhaustion requirement, a state prisoner must fairly present his claims to the state's highest court—either by direct review or in a postconviction attack—before asserting them in federal court. *See Fairchild v. Workman*, 579 F.3d 1134, 1151 (10th Cir. 2009). "Fair presentation of a prisoner's claim to the state courts means that the substance of the claim must be raised there." *Patton v. Mullin*, 425 F.3d 788, 809 n.7 (10th Cir. 2005) (internal quotation marks omitted). The "petitioner bears the burden of demonstrating that he has exhausted his available state remedies." *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) (internal quotation marks omitted).

If the federal court determines that an applicant's claims are not exhausted, it may, among other things, deny the claims on the merits, *see* 28 U.S.C. § 2254(b)(2), or dismiss the unexhausted claims without prejudice to allow the applicant to return to state court to exhaust the claims, *see Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006). However, permitting the applicant to return to state court is not appropriate if the applicant's claims are subject to an anticipatory procedural bar. *See id.*; *Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002) ("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." (internal quotation marks omitted)). When a federal court applies an anticipatory procedural bar to a habeas applicant's claims, the applicant's claims are procedurally defaulted for purposes of federal habeas relief. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that "there is a procedural default for purposes of federal habeas" if "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred").

There are two circumstances where a federal court may consider claims subject to a procedural bar: (1) if the prisoner has alleged sufficient "cause" for failing to raise the claim and resulting "actual prejudice," *id.* at 750, or (2) if denying review would result in "a fundamental miscarriage of justice," *id.*, because the applicant has made a "credible showing of actual innocence," *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

B. Ground One

In his first claim for relief, Mr. Horsey alleges that the trial court violated his due process rights under the Fifth and Fourteenth Amendments by convicting him of possession of child pornography, when his Information stated that he was charged with possession of juvenile pornography, and that this issue was not raised on direct appeal due to the ineffective assistance of appellate counsel. The district court recognized that Mr. Horsey defaulted on this claim in state court and deferred to the OCCA's conclusion that he could not establish cause and prejudice to overcome this default under *Strickland*. We hold that the district court's resolution of this claim is not reasonably subject to debate and accordingly deny a COA as to this claim.

The district court recognized that this claim was procedurally barred because, under Oklahoma law, Mr. Horsey failed to present this claim on direct appeal and accordingly waived it. This court has repeatedly determined that Title 22 § 1086 of the Oklahoma Statutes is an adequate procedural bar under state law. *See Ellis v. Hargett*, 302 F.3d 1182, 1186 (10th Cir. 2002); *Hale v. Gibson*, 227 F.3d 1298, 1330 n.15 (10th Cir. 2000) (collecting cases). No reasonable jurist would find it debatable or wrong that the district court correctly recognized this claim as procedurally barred.

We also conclude that reasonable jurists would agree that the district court correctly deferred to the OCCA's application of *Strickland* to Mr. Horsey's claim of ineffective assistance of appellate counsel. Constitutionally ineffective assistance of counsel may be sufficient to establish cause for a default. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish an ineffective assistance of counsel claim, Mr. Horsey

must show that his attorney's performance was deficient and that he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Performance is deficient when "counsel's representation f[alls] below an objective standard of reasonableness." *Id.* at 688. When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue, however, we look to the merits of the omitted issue, and "[i]f the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." *Hooks v. Ward*, 184 F.3d 1206, 1221 (10th Cir. 1999) (quotation marks omitted). When a state court analyzes appellate counsel ineffectiveness as an excuse for procedural default, as the OCCA did here, we must afford AEDPA deference to that analysis. *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 746 (10th Cir. 2016).

Mr. Horsey has repeatedly asserted that he was convicted of a different criminal offense than that charged because he was charged with possession of *juvenile* pornography but convicted of *child* pornography. As the district court correctly explained, this is merely a semantic distinction. The Information, Amended Information, and Judgment and Sentence each clearly state that the offense at issue is a violation of Title 21, Section 1021.2 of the Oklahoma Statutes, and the jury instructions correctly outline the relevant elements of this criminal offense.[6] Neither the language of the statute

[6] Title 21, Section 1021.2 of the Oklahoma Statutes states as follows: "Any person who shall procure or cause the participation of any minor under the age of eighteen (18) years in any child pornography or who knowingly possesses, procures, or manufactures, or causes to be sold or distributed any child pornography shall be guilty, upon conviction, of a felony."

nor Oklahoma case law present any basis for a reasonable jurist to believe there could be a legal or factual distinction between "child pornography" and "juvenile pornography." Because there is no merit to the underlying claim, we decline to issue a COA.

C. Ground Two

In his second claim for relief, Mr. Horsey argues the prosecution committed a *Brady* violation by failing to disclose the existence of a dashcam video capturing his second encounter with police—when he turned over his cell phone. Because Mr. Horsey never presented this claim on direct appeal, the district court concluded it is procedurally barred. The district court further held that Mr. Horsey cannot show cause and prejudice to overcome the default because he cannot demonstrate this evidence is material.

"[P]rejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes." *Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018) (alteration in original) (quoting *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). "[E]vidence is material *only* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Banks v. Reynolds*, 54 F.3d 1508, 1518 (10th Cir. 1995) (quoting *US v. Bagley*, 473 U.S. 667, 682 (1985) (alteration in original)). "In evaluating the materiality of withheld evidence, we do not consider each piece of withheld evidence in isolation. Rather, we review the cumulative impact of the withheld evidence; its utility to the defense as well as its potentially damaging impact on the prosecution's case." *Id.*

Mr. Horsey claims that, because he has not seen the dashcam footage and he did not know he was being recorded when he was interviewed by police, he is unable to

argue that the dashcam footage would be material evidence. Accordingly, Mr. Horsey does not contend the dashcam footage would include any exculpatory material, advance his case before the trial court, or contain information not otherwise presented at trial. He simply claims he did not know he was being recorded, and therefore he should be able to seek relief based on the existence of the recording. This argument is purely speculative. "Our materiality review [under *Brady*] does not include speculation." *Reynolds*, 54 F.3d at 1519. All reasonable jurists would agree with the district court's conclusion that Mr. Horsey has not shown cause and prejudice under *Brady* to excuse his procedural bar. We deny his request for a COA on this issue.

D. Ground Three

In his third claim for relief, Mr. Horsey argues the trial court violated his due process rights by lowering the prosecution's burden in its jury instructions and asserts that he failed to raise this claim on direct appeal because of the ineffective assistance of appellate counsel. In making this claim, Mr. Horsey cites the distinction between the language in the Information and the language in the jury instructions regarding his possession of child pornography charge. The district court recognized this claim was procedurally barred, and thus held the OCCA did not unreasonably apply *Strickland* in resolving Mr. Horsey's ineffective assistance of appellate counsel claim. The district court's conclusion on this issue is not debatable or wrong.

An Information charged Mr. Horsey with "*willfully* possessing child pornography, to wit, naked pictures of adults and juveniles performing fellatio, when the defendant knew the nature and character of the contents of said child pornography." ROA Vol. III at

202–03 (emphasis added). In contrast, the jury instruction stated that the *mens rea* for possession was "knowing[]." ROA Vol. IV at 201. The underlying statute prohibits "knowing[] possess[ion]." Okla. Stat. tit. 21, § 1021.2.

"A charging instrument may violate the Sixth Amendment by failing to provide a defendant with adequate notice of the nature and cause of the accusations filed against him." *Johnson v. Gibson*, 169 F.3d 1239, 1252 (10th Cir. 1999). Absent a finding of a constitutional violation, however, "[a] challenge to the adequacy of the Information under Oklahoma law is a question of state law, which this court has no power to correct." *Carter v. Gibson*, 27 F. App'x 934, 941 (10th Cir. 2001) (unpublished) (citing *Johnson*, 169 F.3d at 1252). Mr. Horsey is correct that a *mens rea* of "knowing" criminalizes a wider array of conduct than a *mens rea* of "willing." *See United States v. Benton*, 988 F.3d 1231, 1238 (10th Cir. 2021). But here, even if the *mens rea* set forth in the Information encompassed narrower conduct than that covered under the statute, the Information did not violate the Sixth Amendment. Mr. Horsey was on notice that he was charged with possession of child pornography, and the Information cited the correct statute. No arguments were made during trial distinguishing between willful possession and knowing possession and the jury was correctly instructed on the statutory *mens rea*—knowing.

Even if we could conclude that Mr. Horsey's claim had merit, and that his appellate counsel performed deficiently, Mr. Horsey makes no colorable argument as to any prejudice that resulted from this discrepancy between the Information and jury instructions. He does not argue that this discrepancy changed how his trial counsel

prepared for trial. Mr. Horsey asserts in his petition that this discrepancy "violated [his] right to a presumption of innocence[]." Pet. at 13. But the jury instruction still explicitly required the jury to find that "the State has proved beyond a reasonable doubt each element of the crime." ROA Vol. IV at 201. We conclude the district court's determination that there was no constitutional violation here is not debatable or wrong and accordingly decline to issue a COA on the third cause of action.

E. Ground Four

Finally, Mr. Horsey contends the evidence at trial was legally insufficient for a jury to convict him of possession of child pornography because he had been acquitted of the charge of lewd or indecent acts to a child under twelve, and he asserts that this claim was not raised on direct appeal due to the ineffective assistance of appellate counsel.[7] Specifically, Mr. Horsey argued the evidence was insufficient to show he was responsible for the pornographic images found on the phone.

The district court recognized that the claim is procedurally barred and deferred to the OCCA's application of *Strickland*. This conclusion is not reasonably subject to

[7] Mr. Horsey continues to assert that he was convicted of an uncharged offense because he was convicted of possession of child pornography, not juvenile pornography. We refer Mr. Horsey to our earlier conversation concerning ground one.

Mr. Horsey also refers to several federal statutes in making his argument. But Mr. Horsey was convicted under Oklahoma law. And in any event, the district court's conclusion that any such claims are procedurally defaulted under the anticipatory procedural bar is not reasonably subject to debate. Furthermore, given the irrelevance of the arguments based on federal statutes, the anticipatory procedural bar cannot be set aside for cause and prejudice on this issue.

debate. Even if Mr. Horsey had raised this claim on direct appeal, the OCCA would have likely rejected the argument, because there was conflicting evidence at trial concerning possession of the phone and, under Oklahoma law, the jury is responsible for resolving such discrepancies in the evidence. *See Mitchell v. State*, 424 P.3d 677, 682 (Okla. Crim. App. 2018) ("This Court does not reweigh conflicting evidence or second-guess the fact-finding decisions of the jury; we accept all reasonable inferences and credibility choices that tend to support the verdict."). Accordingly, no reasonable jurist could debate the district court's deference to the OCCA here because his ineffective assistance of appellate counsel claim is without merit. We deny Mr. Horsey's request for a COA on ground four.

F. Motion to Proceed In Forma Pauperis

Lastly, Mr. Horsey has filed a motion to proceed IFP. To succeed on this motion, Mr. Horsey "must show a financial inability to pay the required filing fees and the existence of 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); *see also* Fed. R. App. P. 24(a)(3)(A) (providing an exception for allowing an appellant to proceed IFP when the appeal is not taken in good faith); *United States v. Ballieu*, 480 F. App'x 494, 498 (10th Cir. 2012) (unpublished) (defining "good faith" as presenting a nonfrivolous issue); *Felvey v. Long*, 800 F. App'x 642, 646 (10th Cir. 2020) (unpublished) (applying the IFP standard when reviewing an application for a COA for a § 2254 petition). Mr. Horsey's claims are frivolous. His strongest argument before us is his argument concerning the discrepancy between the "willing" *mens rea* in his Information and the "knowing" *mens rea* in the jury instructions. But since this claim is

nevertheless procedurally barred and the OCCA reasonably applied *Strickland* in denying cause and prejudice for the procedural bar, this court obviously could not resolve this claim in his favor. *See Olson v. Coleman,* 997 F.2d 726, 728 (10th Cir. 1993) ("An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." (internal quotation marks omitted)). Because we hold that Mr. Horsey advanced no nonfrivolous arguments in this appeal, we deny Mr. Horsey's motion to proceed IFP.

Mr. Horsey is reminded that denial of the COA "does not relieve him of the responsibility to pay the . . . filing fee in full." *Kinnell v. Graves*, 265 F.3d 1125, 1129 (10th Cir. 2001); *see also Kincaid v. Bear*, 687 F. App'x 676, 679 (10th Cir. 2017) (unpublished) (ordering the petitioner to pay the filing fee after denying a COA to appeal the dismissal of the § 2254 petition and denying a motion for leave to proceed IFP).

III. CONCLUSION

Because Mr. Horsey fails to demonstrate that the district court's holdings are debatable or wrong, we DENY his request for a COA and DISMISS this matter. We also DENY his motion to proceed IFP.

Entered for the Court

Carolyn B. McHugh
Circuit Judge