

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
PINE BLUFF DIVISION

KENDALL C. NICHOLSON

PETITIONER

v.

CASE NO. 5:16-cv-00137-SWW-JTK

WENDY KELLEY, *Director*  
Arkansas Department of Correction, and  
GAYLON LAY, *Warden*, Cummins Unit

RESPONDENTS

**ORDER**

The Court has received proposed findings and recommendations from United States Magistrate Judge Jerome T. Kearney. After careful review of the findings and recommendations and the timely objections thereto, as well as a de novo review of the record, the Court concludes that the findings and recommendations should be, and are hereby, approved and adopted as this Court's findings in all respects in their entirety. Accordingly, the Court dismisses this habeas corpus action with prejudice. The Court will enter judgment accordingly.

Because petitioner has not made a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability.<sup>1</sup>

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<sup>1</sup> A certificate of appealability certifies that the applicant has made a substantial showing of the denial of a constitutional right, that is, a showing that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. See, e.g., *Carson v. Director of the Iowa Dept. of Correctional Services*, 150 F.3d 973, 975 (8<sup>th</sup> Cir. 1998). With respect to claims that are procedurally barred, the Eighth Circuit has summarized the factors to consider when determining whether a certificate of appealability should issue when a habeas claim is denied on procedural grounds: "(1) if the claim is clearly procedurally defaulted, the certificate should not be issued; (2) even if the procedural default is not clear, if there is no merit to the substantive constitutional claims,

SO ORDERED this 29<sup>th</sup> day of September, 2016.

/s/Susan Webber Wright  
UNITED STATES DISTRICT JUDGE

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the certificate should not be issued; but, (3) if the procedural default is not clear and the substantive constitutional claims are debatable among jurists of reason, the certificate should be granted.” *Khaimov v. Crist*, 297 F.3d 783, 786 (8<sup>th</sup> Cir. 2002) (citing *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000)).