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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANTONE LEE,

Petitioner,

No. C 08-1200 PJH (PR)

vs.

DERRAL G. ADAMS, Warden,

Respondent.

**ORDER DENYING MOTIONS  
FOR CERTIFICATE OF  
APPEALABILITY AND FOR  
LEAVE TO PROCEED IN  
FORMA PAUPERIS**

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This is a habeas case under 28 U.S.C. § 2254 filed pro se by a state prisoner. Petitioner has filed a notice of appeal, a motion to proceed in forma pauperis (“IFP”) on appeal, and a motion for a certificate of appealability (“COA”)

**DISCUSSION**

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural question antecedent to the merits, for instance a dismissal on statute of limitations grounds, as here. See *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

“Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court’s procedural holding.” *Id.* at 484-85. “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, 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

1 whether the district court was correct in its procedural ruling.” *Id.* at 484. As each of these  
2 components is a “threshold inquiry,” the federal court “may find that it can dispose of the  
3 application in a fair and prompt manner if it proceeds first to resolve the issue whose  
4 answer is more apparent from the record and arguments.” *Id.* at 485. Supreme Court  
5 jurisprudence “allows and encourages” federal courts to first resolve the procedural issue,  
6 as was done here. *See id.*

7 For the reasons set out in the order denying the petition, the court concludes that  
8 reasonable jurists would not find the court’s assessment of the constitutional claims  
9 debatable or wrong. The request for a certificate of appealability (document number 29 on  
10 the docket) is **DENIED**. Petitioner’s motion for leave to proceed IFP on appeal (document  
11 31) is **DENIED** without prejudice to renewing it if the Court of Appeals grants a COA.

12 The clerk shall transmit the file, including a copy of this order, to the Court of  
13 Appeals. *See* Fed. R.App.P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir.  
14 1997). Petitioner may then ask the Court of Appeals to issue the certificate, *see* R.App.P.  
15 22(b)(1), or if he does not, the notice of appeal will be construed as such a request, *see*  
16 R.App.P. 22(b)(2).

17 **IT IS SO ORDERED.**

18 Dated: March 2, 2010.

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22 PHYLLIS J. HAMILTON  
23 United States District Judge  
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