

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KEVIN M. GIBBONS,

Petitioner,

v.

Case No. 08-11354

HUGH WOLFENBARGER,

Respondent.

**ORDER DENYING PETITIONER'S
MOTION FOR A CERTIFICATE OF APPEALABILITY**

Petitioner Kevin M. Gibbons has appealed the court's opinion and order dismissing his *pro se* habeas corpus petition as time-barred. Pending before the court is Petitioner's motion for a certificate of appealability. Although the court declined to issue a certificate of appealability in its opinion and order dismissing the habeas petition (4/23/09 Order at 7-8), Petitioner asserts that the court's ruling on the issue of a certificate of appealability was improper.

A petitioner must receive a certificate of appealability ("COA") in order to appeal the denial of a habeas petition for relief from either a state or federal conviction. 28 U.S.C. §§ 2253(c)(1)(A), (B). A district court, in its discretion, may decide whether to issue a COA at the time the court rules on a petition for a writ of habeas corpus or may wait until a notice of appeal is filed to make such a determination. See *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1072 (6th Cir. 1997), *overruled in part on other grounds by Lindh v. Murphy*, 521

U.S. 320 (1997). The court exercised its discretion in this matter, and determined that a clear procedural bar prevented the court from reviewing the substantive merits of Petitioner's claims, reasonable jurists would not debate whether the court's procedural ruling was correct or whether the habeas petition states a valid claim of the denial of a constitutional right, and thus that a certificate of appealability should not have issued. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court is not persuaded that its determination was incorrect.

Accordingly, IT IS ORDERED that Petitioner's motion for a certificate of appealability [Dkt. #23] is DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: June 8, 2009

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, June 8, 2009, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522