

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**KELLY A. THIRTLE,**

**Petitioner,**

**v.**

**JOHN DAHM,**

**Respondent.**

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**CASE NO. 8:11CV23**

**MEMORANDUM  
AND ORDER**

This matter is before the court on Petitioner's Motion for Leave to Appeal In Forma Pauperis ("IFP") (Filing No. [24](#)) and Motion for Certificate of Appealability (Filing No. [26](#)). On November 9, 2011, the court dismissed Petitioner's habeas corpus claims and entered Judgment against her. (Filing Nos. [21](#) and [22](#).) Petitioner thereafter filed a timely Notice of Appeal. (Filing No. [23](#).)

***I. Motion for Leave to Appeal In Forma Pauperis***

Petitioner is a prisoner who has not previously been granted leave to proceed IFP.

[Federal Rule of Appellate Procedure 24\(a\)](#) provides:

Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

*Id.* Petitioner's Motion includes an "Affidavit in Support" in which she asserts that she is indigent and is unable to pay the costs of litigation. (Filing No. [24](#) at CM/ECF p. 2.)

However, the Affidavit does not describe the details of Petitioner's inability to pay. (*Id.*)

Moreover, Petitioner's Motion does not claim an entitlement to redress or state the issues that she intends to appeal. (*Id.*) Pursuant to [Fed. R. App. P. 24](#), the court will deny Petitioner's Motion for Leave to Appeal IFP as insufficient and without prejudice to reassertion before the Eighth Circuit.

## ***II. Motion for Certificate of Appealability***

On December 8, 2011, the court entered a Memorandum and Order giving Petitioner until January 9, 2012, to file a motion for Certificate of Appealability and brief in support. (Filing No. [25](#).) Petitioner mailed her Motion for Certificate of Appealability along with a Brief in Support on January 9, 2012. (Filing Nos. [26](#) and [27](#).)

Before a petitioner may appeal the dismissal of a petition for writ of habeas corpus, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;  
...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).<sup>1</sup>

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<sup>1</sup>Similarly, [Fed. R. App. P. 22\(b\)](#), as amended by AEDPA, indicates that in an action pursuant to [28 U.S.C. § 2254](#), a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. See generally [Tiedeman v. Benson, 122 F.3d 518, 521 \(8th Cir. 1997\)](#).

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See [28 U.S.C. § 2253\(c\)\(2\)](#). Such a showing requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#) (internal quotation marks omitted) (citing [Barefoot v. Estelle, 463 U.S. 894 \(1983\)](#) (defining pre-AEDPA standard for a certificate of probable cause to appeal)).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” [Slack, 529 U.S. at 484](#). Similarly, if the district court denies a petition for writ of habeas corpus on procedural grounds without reaching the underlying constitutional claims on the merits:

[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 . . . would find it debatable whether the district court was correct in its procedural ruling . . . . Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

[\*Id.\*](#)

The court has carefully reviewed the record and Petitioner’s Motion and Brief. (Filing Nos. [26](#) and [27](#).) Petitioner has failed to demonstrate that reasonable jurists would

find this court's ruling debatable or wrong. For the reasons stated in its November 9, 2011, Memorandum and Order (Filing No. [21](#)), the court declines to issue a Certificate of Appealability.

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion for Leave to Appeal IFP (Filing No. [24](#)), and Motion for Certificate of Appealability (Filing No. [26](#)) are denied without prejudice to reassertion before the Eighth Circuit; and
2. The Clerk of the court shall provide the Court of Appeals a copy of this Memorandum and Order.

DATED this 24<sup>th</sup> day of January, 2012.

BY THE COURT:

s/Laurie Smith Camp  
Chief United States District Judge

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