

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William A. Foster,	:	
Petitioner	:	Civil Action 2:09-cv-00214
v.	:	Judge Holschuh
Warden, Lebanon Correctional Institution,	:	Magistrate Judge Abel
Respondent	:	

ORDER

Petitioner Foster has filed a notice of appeal from the Court's June 22, 2011 judgment dismissing his petition for writ of habeas corpus under 28 U.S.C. §2254. Before a petitioner can appeal a judgment dismissing a §2254 action, a certificate of appealability must issue. 28 U.S.C. §2253(c); Rule 22(b), Federal Rules of Appellate Procedure.

Here the Court has dismissed some claims on the merits and others on procedural grounds. When a claim has been denied on the merits, a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). This standard is a codification of *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). *Slack v. McDaniel*, 529 U.S.473, 483 (2000). To make a substantial showing of the denial of a constitutional right, a petitioner must show

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." *Barefoot*, 463 U.S., at 893, and n.4

529 U.S. at 484.

When the Court dismisses a claim on procedural grounds, a certificate of appealability

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 whether the district court was correct in its procedural ruling.

Id. Thus, there are two components to determining whether a certificate of appealability should issue when a claim is dismissed on procedural grounds: "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." The court may first "resolve the issue whose answer is more apparent from the record and arguments." *Id.*

For the reasons set out in the Court's June 22, 2011 Opinion and Order and the January 26, 2011 Report and Recommendation, the Court concludes with respect to Grounds One and Two that petitioner has failed to make a substantial showing that he has been denied a constitutional right and that with respect to Ground Three he has failed to demonstrate that reasonable jurists would find it debatable that the claim is procedurally barred.

Accordingly, petitioner's request for a certificate of appealability is DENIED. Petitioner's motion to proceed *in forma pauperis* is GRANTED, in that the Court

determines petitioner is financially indigent, but DENIED, in that it has denied his request for a certificate of appealability.

Date: August 11, 2011

s/James L. Graham
James L. Graham
United States District Judge