

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

WESLEY THOMPSON,

Petitioner,

v.

WARDEN, Ohio State Penitentiary,

Respondent.

CASE NO. 2:09-CV-739

JUDGE GRAHAM

MAGISTRATE JUDGE KING

OPINION AND ORDER

On November 3, 2010, the Court entered final judgment dismissing the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter now is before the Court on Petitioner's request for a certificate of appealability. (Doc. 18.) For the reasons that follow, Petitioner's request for a certificate of appealability is **GRANTED** in part and **DENIED** in part.

In this habeas corpus petition, Petitioner asserts that he was denied a fair trial because he was not permitted to call certain defense witnesses to impeach the testimony of a prosecution witness (claim one); that he was denied the effective assistance of counsel because his attorney failed to request a jury instruction on voluntary manslaughter (claim two); that his convictions on aggravated robbery, robbery and murder were against the manifest weight of the evidence (claim three); and that the evidence was constitutionally insufficient to sustain his convictions (claim four). On November 3, 2010, the Court dismissed claims one and four on the merits and claims two and three as procedurally defaulted. When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "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 (1983). See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (recognizing codification of *Barefoot* in 28 U.S.C. § 2253(c)(2)). 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.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S., at 893, & n.4).

Where 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." *Id.* at 485. The court may first "resolve the issue whose answer is more apparent from the record and arguments." *Id.*

Upon review of the record, the Court concludes that Petitioner has failed to establish that reasonable jurists would debate whether the Court properly dismissed claims two and three as procedurally defaulted or whether these claims state a valid claim of the denial of a constitutional right. Petitioner's request for a certificate of

appealability on claims two and three, therefore, is **DENIED**.

However, the Court concludes that reasonable jurists could debate whether claims one and four should have been resolved differently. Therefore, the Court **GRANTS** Petitioner's request for a certificate of appealability on claims one and four. The Court certifies the following issues for appeal:

1. Was Petitioner denied a fair trial and the right to present a defense when the trial court refused to permit admission of testimony from three proposed defense witnesses intended to impeach the testimony of prosecution witness Isaac Jackson?
2. Was the evidence constitutionally sufficient to sustain petitioner's convictions on aggravated robbery, robbery, and murder?

IT IS SO ORDERED.

Date: November 18, 2010

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