

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

**Kent C. Foster,**

**Petitioner,**

**v.**

**Case No. 2:11-cv-133**

**Warden, Chillicothe  
Correctional Institution,**

**Judge Michael H. Watson  
Magistrate Judge Kemp**

**Respondent.**

**OPINION AND ORDER**

On April 8, 2011, the Court dismissed this action, finding that it was a habeas corpus petition filed pursuant to 28 U.S.C. § 2254 and that it was not filed within the applicable one-year limitations period. Petitioner's subsequent motion for reconsideration was denied. Petitioner has now appealed and has asked for leave to proceed in appeal *in forma pauperis*.

Because the Court (against petitioner's wishes) construed the petition he filed as seeking habeas corpus relief under 28 U.S.C. § 2254, it will construe his notice of appeal as a request for a certificate of appealability.

Where the Court dismisses a claim 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). *Slack v. McDaniel*, 529 U.S. 473, 483-44, (2000). To make a substantial

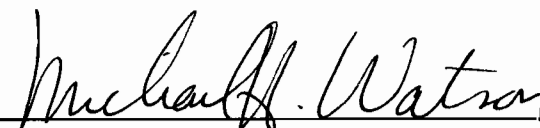
showing of the denial of a constitutional right, a petitioner must show:

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 . . . .

*Id.*

For the reasons set forth in the Court's Opinion and Order adopting the Magistrate Judge's Report and Recommendation, and for the reasons set forth in that Report and Recommendation, the Court finds that reasonable jurists would not debate either that this case is, in fact, an action seeking habeas corpus relief, or that it is barred by the statute of limitations. The Court therefore **DECLINES** to issue a certificate of appealability. For similar reasons, **CERTIFIES** that the appeal is not taken in good faith, and therefore **DENIES** the motion for leave to appeal *in forma pauperis* (ECF No. 10).

**IT IS SO ORDERED.**

  
**MICHAEL H. WATSON, JUDGE**  
**UNITED STATES DISTRICT COURT**