

UNITED STATES DISTRICT COURT  
 DISTRICT OF SOUTH DAKOTA  
 NORTHERN DIVISION

**FILED**  
 MAR 09  


FRANKLIN SANDOVAL NELSON,

Plaintiff,

vs.

JUDGE JON S. FLEMMER, STATE'S  
 ATTORNEY KERRY F. CAMERON,  
 WARDEN ROBERT DOOLEY, and  
 OFFICER OF THE COURT TIMOTHY J.  
 CUMMINGS, IN THEIR OFFICIAL AND  
 INDIVIDUAL CAPACITIES;

Defendants.

1:15-CV-01001-CBK

OPINION AND ORDER DENYING  
 CERTIFICATE OF APPEALABILITY

TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

This Court dismissed petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the basis that he had failed to exhaust his state court direct appeal and habeas remedies. Petitioner filed a notice of appeal and a request for a certificate of appealability.

Pursuant to 28 U.S.C. § 2253, a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, 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 that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard . . . 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.

Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000) (emphasis supplied). Petitioner did not and has not made a substantial showing that jurists of reason would find it debatable whether this matter was correctly dismissed for failure to exhaust state court remedies.

IT IS HEREBY CERTIFIED that there does not exist probable cause of an appealable issue with respect to the Court's order denying petitioner's petition for a writ of habeas corpus. Petitioner's application for a certificate of appealability, Doc. 13, is denied. This in no way hampers the petitioner's ability to request issuance of the certificate by a circuit judge pursuant to Fed. R. App. P. 22.

DATED this 5<sup>th</sup> day of March, 2015.

BY THE COURT:

  
CHARLES B. KORNMANN  
United States District Judge