

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LISA M. DAVIS,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	NO. 99-2717
	:	
DONALD L. KELACHNER, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this day of February, 2003, upon consideration of the Order of the Third Circuit Court of Appeals remanding this matter to this Court, it is hereby ORDERED that a Certificate of Appealability should not issue in this matter for the reasons stated herein.

In an Order dated January 16, 2003 and entered January 17, 2003, this Court denied the Amended Petition for Writ of Habeas Corpus filed by Petitioner Lisa M. Davis pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). The habeas petition was denied on procedural grounds. The Court found that Petitioner had twice failed to present to the appellate courts of the Commonwealth of Pennsylvania the claims she asserted in her federal habeas proceeding, and that by failing to appeal these claims in state court the claims, Petitioner had procedurally defaulted on these claims. Cristin v. Brennan, 281 F.3d 404, 409-10 (3d Cir. 2002). The Court further found that Petitioner was unable to demonstrate either cause for the default combined with actual prejudice, or that failure to consider her claims would result in a

fundamental miscarriage of justice, and that the procedural default was therefore not excused. Id. at 412.

Petitioner filed a Notice of Appeal on February 11, 2003, appealing this Court's Order to the United States Court of Appeals for the Third Circuit. The ruling of a District Court on a habeas corpus proceeding, or a proceeding under § 2255 of the AEDPA, is subject to review on appeal by the court of appeals for the circuit in which the proceeding is held. 28 U.S.C. § 2253(a). However, 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, or (B) the final order in a proceeding under § 2255 of the AEDPA, unless a certificate of appealability ("COA") is issued. See 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b). Furthermore, a COA may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).¹ On February 25, 2003, the Court of Appeals for the Third Circuit entered an Order remanding the matter to this Court "for the sole purpose of either issuing a certificate of appealability or stating reasons why a certificate of appealability should not issue." We therefore undertake the required examination to determine whether a COA should issue.

As noted, the Court denied the habeas petition on procedural grounds.

¹ Although 28 U.S.C. § 2253(c)(1) states that only a "circuit justice or judge" may issue a COA, the Court of Appeals for the Third Circuit has held that § 2253(c)(1) authorizes a district judge to issue a certificate of appealability. U.S. v. Eyer, 113 F.3d 470, 473 (3d Cir. 1997); see also Fed. R. App. P. Rule 22(b)(1) ("If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.").

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. . . . 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.

Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments. The recognition that the "Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of," allows and encourages the court to first resolve procedural issues.

Slack v. McDaniel, 529 U.S. 473, 484-85 (2000) (citation omitted).

The Court has carefully reviewed the procedural grounds upon which the habeas petition was denied. A plain procedural bar was present based upon the fact that, as previously stated, Petitioner twice failed to present to the appellate courts of the Commonwealth of Pennsylvania the claims she asserted in her federal habeas proceeding. See Cristin, 281 F.3d at 409-10. Petitioner first failed to file a direct appeal of her conviction to the Superior Court, and Petitioner also failed to file with the Superior Court an appeal of the denial of her petition pursuant to the Post-Conviction Collateral Relief Act, 42 Pa. Cons. Stat. Ann. § 9541 *et seq.* This Court

believes that it was correct to invoke this procedural basis to dispose of the case, and therefore determines that 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. For these reasons, the Court determines that a COA should not issue in this matter.

BY THE COURT:

Legrome D. Davis