UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

STEPHEN MICHAEL WEST, *Petitioner*, v. RICKY BELL, WARDEN, Riverbend Maximum Security Institution, *Respondent.*	)	No. 3:01-cv-91 (VARLAN/SHIRLEY)

ORDER

This capital habeas corpus action filed pursuant to 28 U.S.C. § 2254 is before the Court on an application for a certificate of appealability ("COA") filed by Petitioner Stephen Michael West ("Petitioner") [Doc. 218]. The request for a COA is made in connection with the Court's denial of Petitioner's Rule 60(b) motion requesting relief from judgment [Doc. 217].

A COA will issue only when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a claim has been dismissed on the merits, a substantial showing is made if jurists of reason would find the district court's assessment of the constitutional claims debatable or wrong, or if jurists could conclude the issues raised are adequate to deserve further review. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When a claim has been dismissed on procedural grounds, a substantial showing is demonstrated when it is shown reasonable jurists would debate whether a valid claim has

been stated and whether the court's procedural ruling is correct. Although each prong of the test is part of the threshold inquiry, a court may dispose of the application by resolving the issue whose answer is more apparent from the record and arguments. *See Slack*, 529 U.S. at 475.

Petitioner first requests a COA on the determination that his Rule 60(b) motion was a second or successive habeas petition. Petitioner contends the Court refused to review certain ineffective assistance of counsel claims, deeming them unexhausted. Under Petitioner's argument, a review of those claims would not inextricably lead to a re-examination of the merits of petitioner's prior claim in his habeas petition because the Court deemed those claims unexhausted.

The premise of Petitioner's argument (*i.e.*, the purported "unexhausted" ruling) is flawed and based on a misreading of the Court's opinion.[1] In the original opinion denying habeas relief, the Court conducted a merits review of Petitioner's claim that counsel was ineffective for failing to investigate mitigating evidence. The Court, however, did not review the evidence not presented in state court because Petitioner failed to meet his burden to allow this Court to consider the new evidence. Consequently, as no such procedural ruling was made, Petitioner's argument that this Court's ruling that failure to exhaust precluded a merits determination is incorrect and does not support issuance of a COA.

[1] Petitioner cited to footnote 23 of the Court's Memorandum Opinion to support his claim that the Court found several of his ineffective assistance of counsel claims unexhausted. This footnote, however, makes no exhaustion finding. Rather, it lists the affidavits, reports, and records that Petitioner submitted to this Court to support his ineffective assistance of counsel claim, none of which were presented to the state court.

Petitioner's next argument for a COA targets the Court's alternative finding that, even if Petitioner's filing were a true Rule 60(b) motion, it not only was untimely, but also lacked merit. These particular rulings necessarily will be addressed on appeal by the Sixth Circuit when it considers whether Petitioner's submission constitutes a successor petition, or as Petitioner styled it, a Rule 60(b) motion. Thus, it is unnecessary to issue a COA on this issue because it is already in the line-up for appellate review. Even it were not on the path for appellate review, no COA is warranted because reasonable jurists would not disagree with the Court's determinations regarding timeliness and lack of extraordinary circumstance.

The Court has carefully reviewed the record in this matter and finds Petitioner has failed to make a substantial showing of the denial of a constitutional right: reasonable jurists would not find this Court's resolution of Petitioner's Rule 60(b) motion debatable. Consequently, the Court **DECLINES** to issue a COA, *see* 28 U.S.C. § 2253(c)(2), and **DENIES** Petitioner's application [Doc. 218].

IT IS SO ORDERED.

ENTER:

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE