

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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CHARLES HENNINGS,

Petitioner,

ORDER

v.

05-C-0749-C

GREG GRAMS, Warden,  
Columbia Correctional Institution,

Respondent.

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Petitioner Charles Hennings requests a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22 from this court's June 6, 2006 order and judgment denying his application for a writ of habeas corpus. He seeks leave to proceed in forma pauperis on appeal. He supports his request for leave to proceed in forma pauperis with an affidavit of indigency and a copy of his trust fund account statement for the six-month period immediately preceding the filing of his appeal.

A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Id.; see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must "sho[w] 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 v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)).

Petitioner seeks a certificate of appealability with respect to all of the claims of ineffective assistance of counsel that he raised in his habeas petition: that his trial lawyer was ineffective for failing to call Bruce Powell as an alibi witness at petitioner's second trial and for failing to present evidence tending to show that Landon Hayes and not petitioner had murdered Patrick Nash, and that his appellate lawyer was ineffective for failing to pursue a claim of juror misconduct. With respect to each of these claims, this court determined that petitioner had not shown that the state courts applied Strickland v. Washington, 466 U.S. 668 (1984), unreasonably when they adjudicated the merits of petitioner's claims. As the magistrate judge explained in his report and recommendation, the state court of appeals fairly considered petitioner's claims, recognized Strickland as the controlling rule and produced an answer within the range of defensible positions. Even if reasonable jurists might disagree with the conclusion reached by the state court, I am convinced, for the reasons set forth in the report and recommendation, that reasonable jurists would not debate that the state court's decision was not "unreasonable" under § 2254(d). Accordingly, petitioner should not be encouraged to proceed further on his claims.

That said, I am not convinced that petitioner is not taking his appeal in good faith for the purposes of deciding whether to grant his request for leave to proceed in forma pauperis on appeal. 28 U.S.C. § 1915(a)(3). To find that an appeal is in good faith, a court

need find only that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). Given the debatability of the wisdom of counsel's trial tactics, reasonable persons could suppose the appeal has some merit.

The last question is whether petitioner is indigent for the purpose of appealing from the denial of his § 2254 petition. In making that determination, this court calculates the average monthly deposits and the average monthly balances in the petitioner's prison account for the six-month period mentioned above. If 20% of the greater of these two figures is \$455 or more, then the petitioner is not eligible for indigent status and must prepay all of the \$455 filing fee. If 20% of the greater of these two figures is less than \$455, the petitioner must prepay whatever portion of \$455 the 20% calculation works out to be.

Petitioner's trust fund account statement reveals that he has an average monthly balance of \$290. (Petitioner's monthly deposits over this time period were lower.) Twenty percent of \$290 is \$58. Petitioner will have to pay this amount toward his \$455 filing fee.

## ORDER

IT IS ORDERED that:

1. Petitioner's request for a certificate of appealability is DENIED.
2. Petitioner's request for leave to proceed in forma pauperis on appeal is GRANTED on the condition that no later than August 1, 2006, petitioner is to submit a check

or money order made payable to the clerk of court in the amount of \$58 to cover a portion of the fee for filing his appeal.

Entered this 17<sup>th</sup> day of July, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge