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

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DAVID G. HUUSKO,

Petitioner, ORDER

v. 07-C-0059-C

JEFFREY P. ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent.

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Before the court is petitioner David G. Huusko's request for a certificate of appealability from this court's judgment entered on June 19, 2007, denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner has not paid the $500 filing fee but has an affidavit of indigency on file. Although petitioner did not specifically seek leave to proceed *in forma pauperis* on appeal, I will assume he intended to do so in filing his notice of appeal.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In order to make this showing, a petitioner must establish 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 raised in his habeas petition. The magistrate judge reviewed all of petitioner's claims, and I adopted his report and recommendation.

Petitioner claimed that his postconviction/appellate lawyer was ineffective for failing to pursue on appeal various claims of ineffective assistance by his trial attorney: 1) failing to object to numerous continuances, which in turn, led to a violation of petitioner's right to a speedy trial; 2) not obtaining exculpatory evidence; 3) failing to investigate a witness in order to impeach the testimony of that witness; 4) inadequately cross-examining a witness; and 5) introducing damaging hearsay testimony. With respect to the first three 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 these claims.

This court did not reach the merits of petitioner's ineffective assistance claims related to Gardner's cross examination or the hearsay evidence, finding that he had procedurally defaulted these claims by failing fairly to present them to the state court and not showing cause for the default. Petitioner failed to question either his trial or postconviction lawyer about these claims in the postconviction hearing on remand. Because these claims were dismissed on procedural grounds, petitioner must make the additional showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484. Thus, "[d]etermining 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." Id. at 484-85 (emphasis added).

It is not necessary to consider whether petitioner has made a substantial showing of the denial of a constitutional right because petitioner cannot show that jurists of reason would debate the correctness of this court's determination that he did not fairly present these claims to the state court. In my order adopting the report and recommendation, I determined that Wisconsin courts have been applying State v. Machner, 92 Wis. 2d 797, 804 (Ct. App. 1979) consistently since 1979 by refusing to consider ineffective assistance of trial counsel claims in the absence of testimony from the trial lawyer. I found that the

appellate court's application of the Machner rule was both independent and adequate to support its judgment. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004); Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002). I also found that the hearing transcript does not support petitioner's claim that the trial court prevented him from taking testimony on these claims. Therefore, petitioner's request for a certificate of appealability on these claims is denied.

In his habeas petition, petitioner also claimed that his postconviction lawyer had a conflict of interest that prevented him from calling a witness at the initial postconviction hearing. Petitioner argued that it would have been a conflict for the lawyer to question his former client about conduct that may result in probation violations. Pursuant to Cuyler v. Sullivan, 446 U.S. 335 (1980), this court concluded that there was no actual conflict of interest that adversely affected petitioner. Although petitioner's lawyer had represented the witness in a 1999 burglary case, the court found that the burglary case was not substantially similar to petitioner's and that the lawyer did not learn any confidences during the 1999 case that were relevant to the case at hand. See Hall v. U.S., 371 F.3d 969, 973 (7th Cir. 2004). Further, the court concluded that the lawyer did not have a continuing duty to protect his former client from potential probation violations. Reasonable jurists would not debate whether petitioner has made a substantial showing of a denial of his constitutional right to conflict-free counsel.

Finally, petitioner raised the claim in his petition that the cumulative effect of his attorneys' errors denied him a fair trial. The court found that petitioner either did not establish that his attorneys committed any errors or did not preserve claims of such errors for appellate review. See Alvarez v. Boyd, 225 F.3d 820, 824 (7th Cir. 2000). Further, as explained above, the court determined that petitioner did establish did not suffer prejudice as a result of any of the alleged errors. Id. Having reviewed the report and recommendation and my order adopting it, I am convinced that reasonable jurists would not debate whether petitioner got a fair trial. Accordingly, petitioner's request for a certificate of appealability will be denied.

With respect to petitioner proceeding *in forma pauperis* on appeal, I cannot certify that his appeal is not taken in good faith. A reasonable person could suppose the appeal has some merit. However, I cannot decide whether to grant his petition until petitioner submits an affidavit of indigency accompanied by the required six-month trust account statement. (Petitioner did submit an affidavit of indigency with his petition for a writ of habeas corpus in February 2007, but updated financial information is needed). Accordingly, the court will take no action on petitioner's request to proceed *in forma pauperis* on appeal until he submits an updated affidavit of indigency, a blank copy of which is enclosed with this order.

ORDER

IT IS ORDERED that:

1. Petitioner's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

2. Petitioner's request for leave to proceed *in forma pauperis* on appeal is STAYED until petitioner submits an affidavit of indigency.

Entered this 16th day of July, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge