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

MIQUEL BROWN,

Petitioner,

v.

CATHERINE FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-624-C

REPORT

Miquel Brown,[1] a Wisconsin inmate incarcerated at the New Lisbon Correctional Institution, has petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Brown has exhausted his state court remedies and his petition is timely. For the reasons stated below, I am recommending that the petition be denied.

Brown's incarceration results from his October 25, 2002 conviction on drug charges in the Circuit Court for Eau Claire County. Brown contends that his conviction is invalid because: 1) the evidence adduced at trial was insufficient to support a guilty verdict; 2) he was denied his right to a speedy trial; and 3) his trial was unfair because the court refused to sever a possession with intent to deliver charge from two delivery charges.

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[1] Brown's first name is actually "Miquel," not "Miguel" as stated originally in the court caption. I have changed the caption, and I direct the clerk's office and the parties to do the same.

The Wisconsin Court of Appeals rejected Brown's speedy trial claim and his insufficient evidence claim on their merits. I have reviewed the record, the parties' briefs, and the court of appeals' opinion, and I conclude that the court of appeals's decision is based on a proper application of Supreme Court precedent and a reasonable determination of the facts. Therefore, pursuant to 28 U.S.C. § 2254(d), Brown cannot obtain a writ on these claims. Finally, Brown failed properly to present his claim of prejudicial to the state courts. This default bars federal habeas relief on this claim.

FACTS

On January 30, 2002, the state of Wisconsin filed a criminal complaint charging Miquel Brown with two counts of delivering cocaine in violation of Wis. Stat. § 961.41(1)(cm)1.[2] Brown was bound over for trial after a preliminary hearing. At his February 25, 2002 arraignment, Brown demanded a speedy trial. Trial was scheduled for May 1, 2002. The state requested and received a continuance because one of its witnesses was not available. Trial was rescheduled for August 13 and 14, 2002.

In April 2002, the state filed a motion to amend the information to add one count of possessing with intent to deliver more than 100 grams of cocaine. The state averred that during witnesses interviews about the delivery charges it had uncovered new evidence inculpating Brown in cocaine trafficking activities during the spring and summer of 2001.

[2] The state had filed a complaint alleging the same delivery counts on December 18, 2001, but its witnesses failed to appear at the preliminary hearing. So, the state dismissed that complaint on January 29, 2002, then filed a new complaint charging the same offenses the next day.

The court granted the motion, finding that the possession with intent to deliver charge was transactionally related to the delivery charges because all of the charges involved the same drug in the same geographic area during roughly the same time period.

Brown was tried to a jury on August 13 and 14, 2002. State witness Pamela Boerger Boerger testified that on June 8, 2001 and July 12, 2001, while working as a police informant, she purchased crack cocaine from a woman named Therese LaRock at a house located at 1427½ Madison Street in Eau Claire. Boerger wore a body wire during the buys. During the July 12 transaction, while in Boerger's presence, LaRock used a telephone to call someone she referred to as "Red," and asked him if he could provide LaRock with two eightballs.[3] After she got off the phone, LaRock told Boerger that Red would be there in 10 to 15 minutes with the drugs. About 20 minutes later, surveillance agents saw a man drive up in a black Bonneville and enter the Madison Street residence. (At trial, surveillance officer Timothy Hoyt testified that he recognized this man as someone known on the street as "Red," who later was determined to be Miquel Brown).

Boerger testified that 20 to 25 minutes after LaRock called Red, someone showed up at the apartment. (Boerger, who was in the living room or kitchen area, heard the person enter the apartment but did not see his or her face.) LaRock then came into the room where Boerger was and offered her two eightballs of cocaine. Boerger purchased only one because she did not have enough money for the second. Later she called LaRock to work out a "deal"

[3] "Eightball" is a common term for one eighth an ounce of cocaine or crack.

to buy the second. LaRock told her to telephone "Red" and provided the phone number. Boerger called this number and spoke to Red. They discussed the quantity of crack cocaine Boerger had received in the first buy of June 8. (At trial, an agent monitoring the phone calls testified that she recognized the voice of Red to be that of Miquel Brown).

After both of Boerger's purchases agents took custody of the drugs and sent them to the state crime lab for testing. An analyst from the state crime lab testified that the substances were crack cocaine. The state did not introduce the actual drugs at trial.

LaRock also testified for the state, confirming that she had sold crack cocaine to Boerger on June 8, 2001 and July 12, 2001 and that both times Brown was her source. LaRock testified that she passed Boerger's money to Brown and Brown paid her $20 per transaction. LaRock further testified that another occasion she had seen Brown at the Madison Street apartment chopping up a chunk of cocaine the size of a two-liter bottlecap.

Crystal Severson testified that she lived with LaRock at Madison Street from March until summer 2001. Severson reported that on one occasion in April or early May she saw Brown in the apartment chipping a rubber-ball sized rock of cocaine into pieces the size of pencil erasers and then bagging them. She testified that Brown had asked her to deliver cocaine for him on two occasions and she had completed one of those deliveries. From approximately March to May 2001, Severson said, she and Brown drove to Minneapolis two to five times a week. On a couple occasions, Brown told Severson that he was going to Minneapolis to "get $300 or $200 worth" of cocaine. The trips followed a pattern: upon

arriving in the Twin Cities, Brown and Severson would drive to a hotel, which Brown would enter alone while Severson waited in the car. Brown would emerge a few minutes later and they immediately would drive back to Eau Claire. Severson testified that during three return legs of such trips between March and May 2001 she saw what she believed to be crack cocaine in plastic bags in Brown's possession.

DNE special agent Bobbi Jo Becker testified that crack cocaine the size of a soda bottle cap would weigh approximately 7 grams and that $300 to $400 would buy approximately 7 grams of crack in Minneapolis.

At the close of the evidence, the court instructed the jury that it was to consider each count separately and that its "verdict for the crime charged in one count must not affect your verdict on any other count."

During its deliberations, the jury sent out a note asking: "Do the amounts in Counts One and Two [count] in calculating the amounts in Count Three?" The prosecutor had "no problem with [the court] telling them no." Tr. of Jury Trial, Aug. 14, 2002, attached to Answer, dkt. 6, exh. U at 73. The court answered the question "No."

The jury found petitioner guilty of all three counts. On the special verdict for the possession with intent to deliver count, the jury found petitioner not guilty of possessing more than 100 grams, but guilty of possessing more than 15 grams.

Brown appealed his conviction, raising three claims:

> 1) The evidence was insufficient to support the convictions on all three counts because: the state did not place the cocaine into evidence; witnesses who saw the crack cocaine that he possessed

> with intent to deliver were not qualified to establish it was cocaine; and the state failed adequately to prove the total weight of this cocaine.
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> 2) He was denied his constitutional right to a speedy trial.
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> 3) The trial court violated his due process right by permitting the state to add the possession charge and then try it jointly with the delivery counts.

The court of appeals rejected all of Brown's claims and affirmed the conviction. *State v. Brown*, 03-3257-CR (Ct. App. Feb. 8, 2005) (per curiam) (unpublished opinion), attached to Answer, dkt. 6, Exh. E.

Responding to Brown's attacks on the sufficiency of the evidence, the court reasoned:

> The jury could reasonably infer from the testimony that the substances identified by the crime lab as cocaine and the larger pieces observed by LaRock and Severson were cocaine even though the items were not placed in evidence. A narcotics violation need not be proved by direct evidence, and there is no need for a sample of the narcotic seized to be placed before the jury. *See United States v. Kelley*, 14 F.3d 1169, 1175 (7th Cir.1994). The jury could reasonably find that LaRock and Severson, who sold crack cocaine for Brown, and witnessed him acquiring and packaging cocaine, were qualified to identify crack cocaine. Their testimony was supported by laboratory analysis of smaller amounts that LaRock sold to Boerger. From the size of the pieces LaRock and Severson observed, the amount Brown spent on the crack and the special agent's testimony on the price of cocaine, the jury could reasonably find that Brown possessed with intent to deliver more than fifteen grams of cocaine, excluding the amounts sold to Boerger.

Id. at ¶ 6.

The court dispensed quickly with Brown's speedy trial claim, finding that the claim failed at the outset because the 8½ month delay between Brown's arrest and trial was not

"presumptively prejudicial." *Id*. at ¶ 7. Although the court did not specify at what point a speedy trial inquiry would be required, it stated: "The constitutional speedy trial right is not implicated until a substantially longer delay occurs." *Id*. (citing *Doggett v. United States*, 505 U.S. 647, 651 (1992)).

Finally, the court rejected Brown's improper joinder claim, finding that the amendment and subsequent joint trial were proper because the deliveries occurred during the same time frame covered by the possession with intent charge (March - July 2001); all of the charges involved crack cocaine; all of the charges involved the same witnesses; and all of the charges involved a common scheme or plan. *Id*. at ¶ 8.

The Wisconsin Supreme Court denied Brown's petition for review on June 30, 2005.

Brown then filed a writ of habeas corpus in the Wisconsin Court of Appeals pursuant to *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W. 2d 540 (1992), alleging that his appellate lawyer had been ineffective for failing to raise a claim that the evidence was insufficient to convict Brown as a direct actor in the deliveries and insufficient to show that Brown possessed cocaine with the intent to deliver. In a one-paragraph order issued July 11, 2005, the court of appeals rejected Brown's claim, stating:

> We deny the petition *ex parte* because the jury could reasonably infer from the evidence that Brown delivered the cocaine even though the recipient had her back to him at the time of the delivery. Regarding the possession with intent to deliver charge, it was not necessary for the police to seize the drugs to prove that Brown possessed them.

State ex rel. Brown v. Farrey, 2005 AP 1676-W (Ct. App. July 11, 2005), attached to Answer, dkt. 6, Exh. I.

On October 14, 2005, the Wisconsin Supreme Court denied Brown's petition for review.

ANALYSIS

I. Speedy Trial

As he did in the state courts, Brown contends that the 8½-month delay from the time he was arrested until he was tried violated his Sixth Amendment right to a speedy trial. Because the state court of appeals adjudicated this claim on the merits, this court's review is governed by 28 U.S.C. § 2254(d), which provides that a state prisoner cannot obtain federal habeas relief on any claim that was adjudicated on the merits in state court unless that adjudication:

> 1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Brown does not contest any of the state court determinations of fact, focusing instead on the appellate court's legal conclusions. Under subsection (d)(2), a state court decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court decision is an "unreasonable application" of Supreme Court precedent if the state

court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .". Examining the contours of that right in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the United States Supreme Court stated:

> [T]he right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.

Id. at 521 (footnote omitted.) Thus, courts must perform a functional analysis of the right in the particular context of the case. *Id*. at 522. The Court in *Barker* adopted a four-part balancing test that weighed the conduct of both the prosecution and the defendant: 1) the length of the delay; 2) the reasons for the delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. *Id.* None of the factors is dispositive. *Id*. at 533. Moreover, the analysis is not required unless the defendant first shows that the delay was "presumptively prejudicial," in other words, that the delay was longer than typical for cases of similar nature. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992) (citing *Barker*, 407

U.S. at 530-31). The Court noted in *Doggett* that "[d]epending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Id*. at 651 n.1 (citation omitted).

Brown argues that by citing to *Doggett*, the state appellate court implicitly found that a speedy trial claim would not lie until there was a delay of at least one year. He argues that by drawing this line the state court of appeals adjudicated his claim in a manner contrary to *Barker*, in which the Supreme Court rejected a bright line approach in favor of a balancing test that considered case-by-case whether a given delay crossed the "presumptively prejudicial" threshold. *See Barker*, 407 U.S. at 530.

True, the Supreme Court has eschewed a bright-line test, but the state appellate court's conclusion that the delay here was not presumptively prejudicial is a reasonable application of *Barker* and *Doggett* (or at least not unreasonable, to employ the statutory litotes). The Supreme Court's footnote in *Doggett* strongly supports the state court's suggestion that delays shorter than one year are not long enough. Although strict adherence to a one-year cutoff might violate *Barker* in a case on the bubble, this is not that case. As the appellate court pointed out, the delay in Brown's case was far less than one year. He presented no evidence to suggest that a delay of 8½ months for a drug case like his was out of the ordinary. Accordingly, the state court of appeals reasonably concluded that the delay was not presumptively prejudicial. *Accord Hogan v. McBride*, 74 F.3d 144, 145 (7th Cir. 1996) (eight month delay between charge and trial not presumptively prejudicial).

II. Sufficiency of the Evidence

Brown reasserts his claim that the evidence was insufficient to support his convictions. When reviewing a challenge to the sufficiency of the evidence, courts look to see whether the evidence, viewed in the light most favorable to the prosecution, permits any reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Although the state court did not identify *Jackson* as governing Brown's claim, it cited *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W. 2d 752 (1990), which adopts the same standard as *Jackson*. *Poellinger*, 153 Wis. 2d at 501 (appellate court may not reverse conviction unless evidence, viewed most favorably to state, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt").

It was a reasonable application of *Jackson* for the court of appeals to conclude that the evidence was sufficient to support the jury's verdicts on all three charges. As for the possession with intent count, the court properly concluded that LaRock and Severson, who sold crack cocaine for Brown and had seen him acquiring and packaging it, were qualified to identify crack cocaine. It found that the jury reasonably could infer from LaRock and Severson's testimony and the testing of the smaller amounts of cocaine that LaRock sold to Boerger that the substances LaRock and Severson had observed in Brown's possession was crack cocaine. Brown is incorrect when he suggests that the actual drugs be recovered by the state in order for him to be found guilty of possessing them. *See United States v. Kelly*, 14

F.3d 1169, 1174 (7th Cir. 1994) (narcotics violation need not be proved by direct evidence). Finally, it was up to the jury to determine how much weight to afford Severson's and LaRock's testimony in light of the deals they had made with the state.

As for the delivery counts, Brown argues that the evidence showed only that LaRock delivered cocaine to Boerger, not that he was a participant. Brown is incorrect. LaRock testified that Brown provided the drugs that she passed to Boerger. LaRock's testimony that Brown was her source was not "unsubstantiated," as Brown contends: it was corroborated by the recording of LaRock's phone call to "Red"; by Brown's arrival at the Madison Street residence moments after LaRock's phone call; and by the phone call placed directly from Boerger to Brown after LaRock had identified him to Boerger as her source. The state court's determination that the evidence was sufficient to support the convictions on all three counts fits well within the parameters of *Jackson*.

III. Improper Joinder

Finally, Brown contends that the trial court deprived him of due process by allowing the state to amend the criminal information to add the charge of possession with intent to deliver. Brown argues that the joinder was improper because the new count was "wholly unrelated" to the delivery counts that were the subject of the preliminary examination. *See State v. Williams*, 198 Wis. 2d 516, 528-29, 544 N.W. 2d 406 (1996) (prosecutor may include additional charges in information so long as charges are not "wholly unrelated" to

transactions or facts considered or testified to at preliminary hearing). However, preliminary examination is a statutory creation, not a constitutional requirement. *Williams*, 198 Wis. 2d at 525. Thus, the state's prosecution of charges that allegedly exceeded the scope of the preliminary examination at most would establish an error of state law for which habeas relief is not available. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). To obtain federal habeas relief on a misjoinder claim, Brown would have to establish first that he suffered misjoinder, and second that this resulted in prejudice so great as to deny him his right to a fair trial. *Leach v. Kolb*, 911 F.2d 1249, 1258 (7th Cir. 1990) (quoting *United States v. Lane*, 474 U.S. 438, 446 n. 8 (1986)).

But before we get to the substantive question, we must answer a procedural question: has Brown defaulted this claim? Prior to raising a due process claim in federal court, Brown was obliged to provide the state courts a meaningful opportunity to address and correct this alleged constitutional deprivation. *Picard v. Connor*, 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b)(1)(A). This means that Brown must have fairly presented the same claim to each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). "Presenting the 'same claim' in state court that he later seeks to make in federal court means that the petitioner must alert the state courts that he is relying on a provision of the federal constitution for relief." *Perruquet v. Briley*, 390 F.3d 505, 513-514 (7th Cir. 2004) (citations omitted). Mere similarity of state and federal claims is insufficient to satisfy the fair presentment requirement. *Duncan v. Henry*, 513 U.S. 364, 66 (1995) (per curiam) (citations omitted).

This is particularly true with respect to procedural due process claims. *See Wilson v. Briley*, 243 F.3d 325, 328 (7th Cir. 2001) ("[A]buse-of-discretion arguments are ubiquitous, and most often they have little or nothing to do with constitutional safeguards."); *Verdin v. O'Leary*, 972 F.2d 1467, 1475 (7th Cir. 1992) (because due process claims are "particularly indistinct" and overlap with state claims, defendant must do more than refer vaguely to "due process" or "denial of fair trial" fairly to present constitutional due process claim to state court). In deciding whether the state courts were alerted to the federal underpinnings of a claim, federal courts look to a number of factors, including:

> 1) whether the petitioner relied on federal cases that engage in constitutional analysis;
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> 2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts;
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> 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and
>
> 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.

Wilson, 243 F.3d at 327.

Applying these standards, I find that Brown did not fairly present his due process claim to the state court of appeals.[4] Although Brown used the phrase "due process" in his

[4] The state failed to raise a fair presentment defense to this claim. Nonetheless, it is an appropriate exercise of discretion for this court to consider the issue *sua sponte* in light of Brown's clear default, the interests of comity and the absence of any state court determination of the merits of this constitutional claim. *See Perruquet*, 390 F.3d at 518-19.

point heading and tiptoed close to a due process argument when he contended that the joinder of the possession with intent count with the delivery counts was prejudicial, he did not cite in his appellate briefs to any federal cases, to the Fourteenth Amendment or to the United States Constitution generally. Brown only cited state statutes and cases, none of which employed any constitutional analysis.

The Wisconsin Court of Appeals, when presented with Brown's claim of improper joinder, understandably analyzed that claim solely under state law without undertaking any constitutional analysis. Although Brown's federal due process claim arises out of the same circumstances as his state court claim, his failure to alert the state court to the constitutional ramifications of his improper joinder claim means that he did not fairly present that claim to the state court. *Perruquet*, 390 F.3d at 520; *Sullivan v. Fairman*, 731 F.2d 450, 453-55 (7th Cir. 1984).

Brown no longer has state court remedies available to him (having already pursued a direct appeal and a collateral claim of ineffective assistance of appellate counsel). Therefore, his failure to present his due process claim in state court amounts to a procedural default. *Perruquet*, 390 F.3d at 514. A procedural default precludes this court from reaching the merits of the due process claim unless Brown can demonstrate cause for the default and prejudice resulting therefrom, or alternatively, that a miscarriage of justice would result if he claim were not entertained on the merits. *Id*.

To establish cause for default, a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986). To establish prejudice, he "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Perruquet*, 390 F.3d at 516 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)).

The only discernible "cause" for Brown's procedural default might be the performance of his appellate lawyer, who failed to state the claim in constitutional terms. However, "ineffective assistance adequate to establish cause for the procedural default of some *other* constitution claim is *itself* an independent constitutional claim" that must be exhausted in state court before it may be used in federal court to establish cause for a procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Brown has not exhausted this claim of ineffective assistance of appellate counsel. Nor can he, having already presented an ineffective assistance of appellate counsel claim to the state appellate court based on other alleged errors that did not include counsel's failure to argue the misjoinder claim in constitutional terms. Accordingly, such a claim, were Brown now to raise it in state court, is itself procedurally defaulted. And, Brown cannot establish cause for *that* default because he pursued his state court habeas petition *pro se*. *Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir. 2003) (petitioner's *pro se* status does not constitute adequate grounds for cause). *See also*

Dellinger v. Bowen, 301 F.3d 758, 763 (7th Cir. 2002) (petitioner's youth and lack of education did not constitute cause); *Henderson v. Cohn*, 919 F.2d 1270, 1272-73 (7th Cir. 1990) (petitioner's illiteracy and limited education insufficient to establish cause).

This means that Brown's last chance to overcome his procedural default is to establish a miscarriage of justice, namely that he is actually innocent of the crime of which he stands convicted. Brown must convince this court that no reasonable juror would have found him guilty but for the trial court's allegedly erroneous joinder of charges. *Schlup v. Delo*, 513 U.S. 298, 327-29 (1995). This is a higher showing than that needed to establish prejudice. *Id*.

Brown cannot meet this extraordinary burden. The evidence against Brown on the delivery counts was persuasive even without the additional evidence pertaining to the trips to Minneapolis. Although the government's case on the possession with intent charge was weaker, it too was sufficient to support the conviction, even without the evidence of the deliveries. Moreover, evidence of the two *actual* cocaine deliveries likely would have been admitted at any separate trial on the charge of possessing cocaine with *intent* to deliver it as "other acts" under Wis. Stat. § 904.04(2), the state equivalent of F.R.Ev. 404(b). Conversely, although it would be a closer call, at a severed trial on Brown's distribution charges § 904.04(2) would have permitted introduction of evidence that Brown regularly visited Minneapolis to replenish his supply. Thus, joinder of the possession and distribution counts could not have prejudiced Brown. *See United States v. Quilling*, 261 F.3d 707, 715 (7th Cir. 2001)("prejudice requiring severance is not shown if evidence on the severed counts

would be admissible in the trial of the remaining counts"). Additionally, at the actual trial, the court instructed the jury that it must consider each count separately and not allow its verdict on one count to affects its verdict on any other count. Instructions of this sort are "an adequate safeguard against the risk of prejudice in the form of jury confusion, evidentiary spillover and cumulation of evidence." *Id.*

All of these factors lead to the conclusion that no miscarriage of justice occurred in this case. Accordingly, the doctrine of procedural default bars this court from reaching the merits of Brown's improper joinder claim. In any event, the preceding paragraph establishes that Brown would lose this claim on the merits if this court were to reach them. The bottom line is that Brown is not entitled to federal habeas relief from his conviction.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that Miquel Brown's petition for the issuance of a writ of habeas corpus be DENIED.

Entered this 21st day of February, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

February 21, 2006

Miquel Brown
Reg. No. 319816
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New Lisbon, WI 53950

Katherine Lloyd Tripp
Assistant Attorney General
P.O. Box 7857
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Re: Brown v. Farrey
Case No. 05-C-624-C

Dear Mr. Brown and Attorney Lloyd Tripp:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before March 14, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by March 14, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge