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

CHARLES HENNINGS,

Petitioner,

v.

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

REPORT AND RECOMMENDATION

05-C-0749-C

REPORT

Charles Hennings, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his March 14, 2000 conviction in the Circuit Court for Milwaukee County for felony murder committed in connection with an armed robbery of Patrick Nash, claiming that:

> 1) Petitioner's lawyer during post-conviction proceedings was ineffective for failing adequately to pursue petitioner's claim of juror misconduct;
>
> 2) Petitioner's trial lawyer was ineffective for failing to present an alibi defense; and
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> 3) Petitioner's trial lawyer was ineffective for failing to present a "someone-else-did-it" defense.[1]

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[1] Petitioner also raised an unexhausted claim that trial counsel was ineffective for "actively assisting" the state in obtaining petitioner's conviction by agreeing to the admission at trial of mug shots of petitioner and by allowing a witness to vouch for the credibility of the state's main witness. Petitioner asserted that he would prefer to withdraw the claim rather than have his entire petition dismissed. *See Rose v. Lundy*, 455 U.S. 509 (1982). On the basis of that representation, this court ordered the claim to be dismissed. Order, January 9, 2006, dkt. # 3, at 2.

The state courts considered all of petitioner's claims and rejected them on the merits. Having carefully reviewed those decisions in light of the record and petitioner's arguments, I conclude that the state courts identified the proper Supreme Court precedent and applied it reasonably in adjudicating petitioner's claims. Accordingly, § 2254(d) precludes this court from granting habeas relief to petitioner.

The following facts are drawn from the opinions issued by the Wisconsin Court of Appeals in this case and from the record:

FACTS

On May 11, 1999, Patrick Nash, a marijuana dealer, asked his friend Douglas Boyd to accompany him on a drug delivery. Boyd agreed and traveled with Nash in Nash's Lincoln Town Car to a street corner in a high crime area of Milwaukee. When they got to the corner, Nash honked the horn several times; eventually, a black man, apparently known to Nash but unknown to Boyd, approached the vehicle. At Nash's instruction, Boyd moved from the front passenger seat to the back right passenger seat; the buyer got into the front passenger seat. Boyd saw Nash hand a ziplock baggie full of marijuana to the buyer. According to Boyd, the buyer pulled out a handgun, told Nash that he was taking the marijuana, then reached over and took some money from Nash. Nash struggled with the would-be buyer and the gun went off. Nash was shot twice in the chest and died at the scene.

Boyd called 911 then ran from the scene and hid from police. The next day, however, he contacted police and provided details about the shooting, including a description of the shooter.

Police investigating the case learned from Nash's cellular phone that just minutes before the shooting, Nash had been on the line with a number registered to a man named Landon Hayes who lived about a block from where Nash was shot. On May 15, 1999, police showed Boyd a photographic array that included Hayes. Boyd pointed out Hayes's picture and remarked that the shooter had similar facial features, but Boyd did not positively identify Hayes as the shooter. Boyd told police that he was sure he would be able to identify the shooter if he saw him in person.

Police arrested Hayes, who admitted to police that he knew Nash and called him daily. Hayes said that he had called Nash on the day of the shooting to make arrangements to purchase marijuana. Hayes claimed that he had been unable to connect with Nash so he ultimately bought his dope from someone else. On May 17, six days after the shooting, Boyd went to the police station to view a lineup that included Hayes. Boyd did not identify Hayes as the shooter.

On at least two more occasions during May, police showed Boyd photo arrays of various individuals matching the description of the shooter, but Boyd did not positively identify anyone. On May 31, Boyd was asked to look through a stack of photos that included Hennings. When Boyd got to Hennings's picture, he unequivocally identified him

as the shooter. About a month later, police arrested Hennings. Boyd subsequently picked Hennings out of a lineup as the person who had robbed and murdered Nash.

Hennings was charged with first-degree intentional homicide and armed robbery with the threat of force. He did not file any pretrial motions challenging the propriety of the photo identification or lineup procedures. The case went to trial in November 1999. Hennings presented an alibi defense. Bruce Powell testified that he worked for a community-service program where he helped people vacate suspensions of their driver's licenses and remediate fines by performing community service. On direct examination, Powell claimed that he had scheduled appointments with Hennings “a couple times” before May 11, 1999, but that Hennings had failed to show up. Powell testified that Hennings did, however, keep his appointment on May 11, 1999, arriving at Powell's office around 11:00 a.m. Powell claimed that he was irritated with Hennings for missing his past appointments, so, to get back at him, he made Hennings sit around at his office until approximately 3:45 to 4:00 p.m. On cross examination, however, Powell testified that Hennings had missed only one appointment before May 11.

Powell further testified that he first learned that Hennings was accused of a crime when he received a letter from Hennings's lawyer. Powell testified that, after he received the letter, he was arrested in an unrelated case and placed in the same jail pod as Hennings. Upon further questioning, Powell recalled he had not received the letter from Hennings's lawyer until after Powell was released from the jail. Powell admitted that he had spoken with

Hennings in the jail, but denied that he had talked to Hennings about his case or why he was in custody.

In rebuttal, the state called Willie Mitchell, Powell's supervisor at work. Mitchell testified that he did not miss one day of work in May of 1999, that he had never seen Hennings before, and that if Hennings had been sitting in Powell's office for hours, he (Mitchell) definitely would have seen him.

The jury was unable to reach a unanimous verdict, so the court declared a mistrial. In February 2000, Hennings went to trial again with a new lawyer and a new trial strategy. Hennings did not present Powell or any other alibi witnesses, but attacked the reliability of Boyd’s identification. At the second trial, Boyd testified on direct examination that he had picked Hennings's picture out of a photographic array and also picked Hennings out of a line-up. During cross examination by Hennings’s lawyer, Boyd admitted that before he had identified Hennings he had picked out a picture of a different individual from a different photo array. However, Boyd testified that he told police that although that person had the same facial and body structure features as the shooter, he was younger than and was not the shooter.

Joevashaun Ward and Charlotte Ward, two witnesses who testified for the state in the first trial, were unable to be located to testify at the second trial. After determining that the witnesses were unavailable, the trial court allowed the state to present their testimony from the first trial.

The jury found Hennings guilty of felony murder. At sentencing, Hennings asked for an adjournment to investigate whether the jury's deliberations had been tainted by introduction of extraneous information. As an offer of proof, Hennings's lawyer told the trial court that an alternate juror, Thomas Buchanan, had had a conversation in the hallway of the courthouse with Hennings's mother after he had been dismissed as an alternate juror. Buchanan allegedly told Hennings's mother that he learned that there had been a mistrial, and that some witnesses who had testified at the first trial did not testify at the second trial. Hennings's lawyer claimed that this information somehow got to the jury before Buchanan was dismissed, and asked for an adjournment to investigate. The trial court denied Hennings's request, determining that Hennings had not presented evidence that supported his claim.

Two days later, the trial court called the parties to court and informed them of the following:

> This morning I received or the Court received a telephone call from one of the jurors because the jurors are always told, if you would like to know what the sentence was, you can call back, and I usually tell them the afternoon or the day after a sentencing, and they can ask one of the staff members, and they'll be told.
>
> One of the jurors called today. I took the call. I advised the juror what the sentence was when the juror asked me. And then because of the issue that we confronted at the sentencing two days ago -- and that is, whether there was any extraneous information that was brought to the attention of the jurors that might have impacted their verdict -- I asked this juror whether or not Mr. Buchanan -- who was the alternate juror who

> supposedly learned over the weekend of our trial that this had been a re-trial -- whether Mr. Buchanan had mentioned to any of the jurors that there had been a previous trial. And this juror told me, no, he did not.
>
> And in fact before he was excused, they were all sitting in the jury room before they were brought into court on that last day, and this juror told me that Mr. Buchanan told them absolutely nothing about learning anything about a prior trial.
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> I then asked the juror whether there was ever any discussion among the jurors that there had been a previous trial, and this juror told me, no, there was not. And I specifically said, during deliberations, did anybody talk about it? Did an issue of a prior trial ever get discussed? And this juror told me, absolutely no.

Tr. of Hearing, March 16, 2000, dkt. 6, vol. VII, exh. RR, at 4-5.

Hennings then filed a motion for postconviction relief under Wis. Stat. § 809.30, re-alleging that the jury had been prejudiced by extraneous information. To support his claim, Hennings submitted an unsworn report from an investigator he had hired named Jim Dunn. Dunn's report stated that he had interviewed Buchanan on November 13, 2000. According to Dunn's report, Buchanan told Dunn during the interview that, after the first day of the trial, a man named Ronnie who worked at the courthouse told Buchanan that the first trial had ended in a mistrial. Buchanan also told Dunn that during the second day of trial,

> [Buchanan] was just listening and listening because he couldn't say anything. He told this black girl, Jackie or Jacqueline, that this one guy told him that he (Hennings) already had a trial. He said that he thinks he told some white girls that were on the jury about it too and added that the guy (Ronnie) told him a lot of details.

When asked by Dunn, Buchanan said the juror named Sabrina might have been the one he thought was Jackie or Jacqueline.

The trial court denied Hennings's motion, determining that there was no evidence that the extraneous information had been brought to the jury's attention or, if it had been, that this information was potentially prejudicial.

On direct appeal Hennings again argued that the jury had been tainted by extraneous prejudicial information. The Wisconsin Court of Appeals agreed with the trial court that Dunn's report was insufficient to impeach the jury's verdict. The court opined:

> [Dunn's] report fails to establish that the extraneous information was improperly brought to the jury's attention. There was no female juror by the name of Jackie or Jacqueline. When Buchanan was later asked by the investigator if there was a juror by the name of Sabrina, Buchanan "said he thinks that she is the one whose name he thought was Jackie or Jacqueline." These vague statements from Buchanan regarding what he thinks he might have told "some white girls" and "this black girl," whose names he cannot remember, do not constitute convincing evidence that extraneous information reached the jury.

State v. Hennings, No. 00-3432-CR (Ct. App. Nov. 13, 2001) (unpublished decision), *attached to* Answer, dkt. #6, vol. I, exh. F, at ¶ 14.

The court of appeals further concluded that even if Hennings had submitted an affidavit from Buchanan confirming the information in Dunn's report, Hennings had failed to establish that the extraneous information was potentially prejudicial:

> Here, the extraneous information that juror Buchanan heard was not potentially prejudicial to Hennings. If anything, this evidence was potentially prejudicial to the State. The information consisted of three facts: (1) Hennings had a

> previous trial; (2) the trial resulted in a mistrial because of a hung jury; and (3) two witnesses . . . who testified in the first trial, could not testify in the second trial. These facts would likely sway an average juror, questioning Hennings's guilt, toward a finding of reasonable doubt and acquittal, rather than a conviction; this information would have suggested to any jurors "on the fence" that other jurors in the previous trial were also not convinced of Hennings's guilt.
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> Additionally, Hennings fails to put forth any arguments regarding the prejudicial nature of this extraneous information. He simply concludes that the "extraneous prejudicial information . . . prejudiced the rights of Hennings and of the State to an impartial jury." In his reply brief, Hennings asserts that "evidence pertaining to a prior trial, which resulted in a hung jury, would have or could have a prejudicial effect upon a new jury," but fails to delineate the prejudicial effect. These conclusory statements are inadequate and fail to establish that the extraneous information is potentially prejudicial.

Id. at ¶¶ 12, 16-17.

On January 29, 2002, the Wisconsin Supreme Court denied Hennings's petition for review.

Hennings then filed a *pro se* motion under Wisconsin's collateral attack statute (Wis. Stat. § 974.06) alleging that his postconviction lawyer had been ineffective. Hennings alleged that counsel did not "adequately litigate" the claim of extraneous prejudicial information. Hennings also filed an affidavit from Buchanan in which Buchanan averred that "he informed some members of the jury" that:

> (1) Hennings had a prior trial;
>
> (2) the prior trial had ended with the jury unable to reach a verdict;
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> (3) during the first trial Hennings had presented an alibi defense;

> (4) Bruce Powell had testified at the first trial that Hennings had been with him on the day of the shooting from 11 a.m. to 4 p.m.;
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> (5) Telly Hennings had testified that he had been with Charles Hennings on the day of the shooting from 5 p.m. until 10 p.m.; and
>
> (6) Saxton Hennings had testified that on May 11, 1999, Charles Hennings did not have brown hair with a reddish tint.

Buchanan also averred that he had told Dunn that Buchanan was willing to come to court to testify concerning "the conversations that [he] had with other jury members" and that he had never been contacted by Hennings's lawyer.

The postconviction court denied this claim in a written order, finding that:

> [The] affidavit from Thomas Buchanan does not alter ... the appellate court's prior decision[ ]. [The] court[ ] determined that the defendant's claim with respect to juror misconduct was not viable <u>even if</u> Hennings had provided the affidavit of Thomas Buchanan himself which would have set forth all of the things he had told Investigator Dunn. Thomas Buchanan's current affidavit does not change the outcome of the prior decisions on this issue. Therefore, the law of the case applies, and Hennings' motion for a new trial is denied on the basis of juror misconduct.

Dec. and Order, Jan. 3, 2003, *attached to* Pet., dkt. #1, exh. G., at 4-5 (underlining in original.)

Hennings further alleged in his postconviction motion that postconviction counsel had been ineffective for failing to raise a claim that Hennings's second trial lawyer, Allen Schatz, was ineffective for 1) failing to present an alibi defense and 2) failing to present evidence indicating that Landon Hayes might have been the shooter. On the alibi issue, Hennings claimed that Schatz did not call Powell to testify because he believed Hennings

was guilty and because he felt responsible for crimes that one of his past clients had committed after Schatz won his case.

The trial court held an evidentiary hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979), at which Hennings was represented by counsel. The three-day hearing included testimony from Hennings, his two trial lawyers and his postconviction/appellate lawyer.

Schatz testified regarding his reasons for not calling Powell at the second trial and for not pursuing a third-party perpetrator defense based on the Hayes evidence. He testified that he never told Hennings that he believed that Hennings was guilty and that he never discussed other clients with Hennings. Rather, Schatz testified that he did not have Powell testify at Hennings's second trial because he did not believe that a jury would credit Powell's testimony: "Mr. Powell's testimony was very, very contradictory. And Mr. Mitchell's testimony, which was a State rebuttal witness--not to want to use the vernacular--but, basically, blew Mr. Powell out of the water." Tr. of Hearing, July 10, 2003, *attached to* Answer, dkt. 6, vol. VII, exh. SS, at 29. According to Schatz, he explained to Hennings his reasons for not using Powell, and told Hennings that, when a defendant calls a witness who is not credible, it hurts the defense as a whole.

Schatz testified that he did not try to portray Hayes as the shooter because he did not think the evidence would be admissible under *State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12, 17 (Ct. App. 1984) (alternate-perpetrator defense admissible if defendant can

show motive, opportunity and direct connection to crime). Schatz testified that he did not believe there was sufficient evidence that Hayes had motive or a direct connection to the crime. He also testified that pursuing the third party defense would have opened the door for Boyd's testimony that he was certain that it was Hennings and not Hayes who had been the shooter. Counsel explained:

> [Presenting the Hayes evidence] certainly would have opened the door . . . for the State to question Mr. Boyd . . . about his identification or -- not identification, but his suspicion that Landon Hayes was the original -- was the actor in his -- in his original choosing of his photographs. And it would just, again, be one more thing that Mr. Boyd could testify to that would be -- that, again, he would be certain of. It's a -- again, it was a tactical, strategical decision at that point, and I don't think we could have gotten it in anyway.

Id., at 23. Schatz further testified that pursuing the Hayes evidence would have allowed the state to present the evidence that Boyd had seen Hayes in person at the lineup and had not identified him as the shooter. According to counsel, this would have bolstered Boyd's credibility because then Boyd "could make two affirmative statements saying I know for a fact it wasn't this man and I also know for a fact it was this man." *Id*., at 66.

In a ruling issued from the bench, the postconviction court found that Hennings had failed to establish the first requirement for a claim of ineffective assistance of counsel, namely defective performance. Implicitly finding Schatz's testimony credible regarding the rationale behind his trial strategy, the court determined that Schatz's decisions not to call Powell or to pursue an alternate perpetrator defense were both reasonable strategic decisions.

With respect to the alibi issue, the court noted that Powell's testimony was not "terribly plausible," and that a jury might consider a bad alibi defense to be a false alibi defense:

> [T]he reality is that when you put on a bad alibi defense, you can shift the issue for the jury from what you might want it to be to the question of: Is this guy putting on a false alibi? And if a jury thinks that a defendant is, that can be a pretty damning thing all by itself.

Dec., Jan. 23, 2004, *attached to* Answer, dkt. 6, vol. II, exh. J, at 18-19. The court concluded that a decision to call Powell would have been "extremely risky," and that Schatz's decision not to call him was "within the realm of reason." *Id*., at 20.

With respect to the Hayes evidence, the court disagreed with Schatz's conclusion that the evidence would have been inadmissible under *Denny*. *Id*. Nonetheless, the court determined that counsel's decision not to present the evidence was reasonable trial strategy:

> So would there have been some advantages to pursuing Landon Hayes and the phone call and the drug dealing and all of that? There might have been. But it would have been at the risk of emphasizing that Mr. Boyd, when given the chance to pick between various people, was sure it was not Hayes and was confident it was Mr. Hennings. So is it better to leave it as kind of a mystery, just a question about Boyd's identification, the fact that he seems to have picked out somebody else and let it go at that, or is it better to focus on Mr. Hayes? There are advantages and disadvantages to both of those approaches. The bottom line is that the choice made by Mr. Schatz . . . is clearly within the realm of reasonable decisions and was clearly not deficient.

Id., at 23. On appeal, the Wisconsin Court of Appeals agreed with the postconviction court that Schatz's failure to call Powell or present evidence suggesting that Hayes was the shooter

were both reasonable strategic decisions under the circumstances; therefore, Hennings's ineffective assistance claim failed on the first prong of the two-part test laid out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court also agreed with the postconviction court that Buchanan's affidavit would not change the court's prior determination with respect to Hennings's claim of juror misconduct. Referring back to its decision on Hennings's direct appeal, the court noted that it had found then that even if Buchanan had submitted an affidavit verifying the information provided by Hennings's investigator, the extraneous information that Buchanan heard was not potentially prejudicial to Hennings. After quoting verbatim from paragraphs 16 and 17 of its prior decision, the court stated: "Hennings's affidavit from Buchanan does not alter this analysis." *State v. Hennings*, 2004 AP 1132 (Ct. App. Sept. 20, 2005) (unpublished opinion), *attached to* Answer, dkt. 6,exh. N. at ¶ 12. Thus, concluded the court, Hennings could not show that he had been prejudiced by his postconviction lawyer's failure to obtain the affidavit. *Id*.

The Wisconsin Supreme Court denied Hennings's subsequent petition for review.

ANALYSIS

In his federal habeas petition, Hennings raises the same claims he raised in his second state court postconviction motion, namely:

> 1) Postconviction counsel was ineffective for failing to support his jury tampering claim with an affidavit from Buchanan; and
>
> 2) Trial counsel was ineffective for failing to present an alibi defense and failing to present evidence suggesting that Hayes was the shooter.

Hennings fairly presented these claims to the state courts and timely filed his petition.

I. Applicable Law

Pursuant to 28 U.S.C. § 2254(d), this court cannot overturn a state court judgment on a claim that has been adjudicated on its merits in the state courts unless that adjudication resulted in a decision based on an unreasonable application of the federal law to the facts or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

Although the term "unreasonable" is difficult to define, the Supreme Court and Seventh Circuit Court of Appeals have offered some guidance on the meaning of that term as used in § 2254(d). To establish that a state court applied federal law or determined the facts "unreasonably," it is not enough for a petitioner to show that the state court applied federal law or determined the facts incorrectly or erroneously. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Rather a petitioner must show that the state court's decision is "at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary" as to be unreasonable. *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003) (quoting *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997)).

An "unreasonable" decision has been defined as "something like lying well outside the boundaries of permissible differences of opinion," *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002), or not "minimally consistent with the facts and circumstances of the case," *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002). Conversely, a state court decision

is *not* unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). In other words, a state court decision cannot be "unreasonable" if fair-minded jurists could disagree over the proper legal conclusion to be drawn from the facts. *Yarborough v. Alvarado*, 541 U.S. 652, 664-65 (2004). Finally, the reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

II. Ineffective Assistance of Trial Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test for determining whether a defendant is entitled to a new trial because of the alleged defective performance of his lawyer. First, the defendant must show that his lawyer's performance was deficient; second, the defendant must show that his defense was prejudiced by the defective performance. *Id*. at 688. To show defective performance, defendant must establish that the lawyer's complained-of acts or omissions were "outside the wide range of professionally competent assistance." *Id*., at 690. The reasonableness of counsel's actions are to be judged in light of all the facts of the case that existed at the time of counsel's conduct, and "counsel is strongly presumed to have rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment." *Id*. To establish prejudice, the defendant must show that there is a reasonable probability that, but for the lawyer's defective performance, the result of the proceeding would have been different. *Id*. A court need not address the prejudice prong if it concludes that counsel's performance was not deficient. *Id*., at 697.

There is no dispute in this case that the state circuit court afforded Hennings a full and fair opportunity to develop the factual record by holding a *Machner* hearing at which Hennings, his postconviction lawyer and two trial lawyers testified. Moreover, there is no dispute that the state court of appeals applied *Strickland* when it analyzed Hennings's claim that his trial lawyer was ineffective. This means that Hennings is entitled to relief on his claim only if the state court's application of *Strickland* was "unreasonable."

Showing that a state court applied *Strickland* unreasonably is extraordinarily difficult: "*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . .". *Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997). Coupling this standard with the deference required by § 2254(d)(1) means that "only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." *Id*.

A. Failure to Present Alibi Defense

In concluding that Schatz had not performed deficiently by choosing not to call Powell at the second trial, the Wisconsin Court of Appeals agreed with the circuit court that

Schatz's decision reflected a reasonable trial strategy. The appellate court agreed that calling Powell would have been "extremely risky," noting that the jury might have considered a bad alibi defense to be a false alibi defense. It agreed implicitly with the trial court that Powell's testimony at the first hearing was not "terribly plausible," pointing out that Powell had contradicted himself regarding when he first got a letter from Hennings's lawyer and that Powell's boss, Willie Mitchell, had offered testimony that clearly refuted Powell's. *Hennings*, 2004 AP 1132, at ¶¶ 17-18, 21.

Hennings asserts that it was unreasonable for the court of appeals to conclude that Powell's testimony was not credible. Focusing solely on Powell's conflicting statements about when he received the letter from Hennings's lawyer, Hennings argues that Powell's testimony showed merely a lack of memory as opposed to fabrication. However, Powell's contradictory testimony about the letter was only one of several reasons to doubt Powell's credibility, which included his inherently incredible testimony that he never talked to Hennings about why Hennings was in jail when he and Hennings were in the same pod at the jail; his reluctance to come forward with the alibi evidence when asked to do so both by Hennings's lawyer and the police; his conflicting statements about how many appointments Hennings had missed before May 11; the dubiousness of his claim that he had made Hennings sit in his office all day to "punish" him, particularly after Powell admitted that Hennings had missed only one appointment; and the fact that Powell's testimony was

impeached by his boss, who testified that if Hennings had been in the office all day on May 11, he would have seen him.

Admittedly, I did not see Powell testify. Perhaps he was more credible on the stand than he appears from the cold transcript. In any event, whether Powell actually was a credible witness was not the question before the state courts and is not the question before this court. The sole question at this juncture is whether it was reasonable for the state courts to conclude that it was reasonable for Schatz to conclude that calling Powell was riskier than not calling him. Having read the transcript, I agree with the state courts that Schatz had good reasons to forgo using Powell at Hennings's second trial. Most lawyers reading the transcript would recognize the weaknesses in Powell's testimony and would doubt the veracity of Hennings's alibi. As the trial court aptly observed, presenting an incredible alibi defense carried substantial risk. In sum, the state court of appeals did not clearly error in applying *Strickland* when it concluded that Schatz's decision to forego using Powell at the second trial was a reasonable strategic decision that did not amount to deficient performance.

B. Failure To Present an Alternate Perpetrator Defense

The state courts also determined that Schatz made a reasonable strategic decision when he decided not to pursue a theory of defense portraying Hayes as the shooter. The court of appeals adopted the trial court's conclusion: Schatz's decision was reasonable

because pursuing the Hayes defense would have opened the door for Boyd to testify that he was certain the shooter was Hennings, not Hayes.

Hennings argues that this analysis is flawed because Schatz opened the door to such testimony anyway: on cross-examination, Schatz asked Boyd to confirm that before picking out the photograph of Hennings, he had picked someone else out of a photo array who looked like the shooter; then on redirect, the prosecutor established that Boyd had not positively identified that person as the shooter, but merely had told police that the shooter had the same facial structure and body build as this other person.

True, Schatz opened the door a crack when he asked Boyd about the first photograph. Schatz, however, did not introduce evidence that this was a photograph of Hayes. As the trial court noted, Schatz merely elicited that Boyd seemed to have picked somebody else "and let it go at that." Although the state then established on redirect that Boyd had not positively identified the man in the photograph (Hayes) as the shooter, Schatz's light-handed approach had precluded the state from asking Boyd specifically whether he thought Hayes was the shooter. If, however, Schatz had presented the *other* evidence connecting Hayes to Nash, then the state would have been allowed to present *its* other evidence that Boyd actually had viewed Hayes in person and was positive that he was not the man who had shot and killed Nash.

This was not happenstance, it was a tactical decision by Schatz. He had decided that it was wiser to employ Boyd's initial selection of Hayes's photograph to create doubt about

the reliability of Boyd's identification of Hennings rather than to overplay the additional Hayes evidence which, in his view, simply would have added weight to Boyd's identification of Hennings as the shooter. Because Hennings was convicted, hindsight allows the accusation that Schatz made the wrong call. But simply because a trial strategy did not result in acquittal does not render counsel's performance deficient. Rather, assessments of counsel's performance must be made on the basis of the circumstances facing counsel at the time, *without* "the distorting effects of hindsight" and *with* the presumption that counsel's action constituted sound trial strategy. 466 U.S. at 689.

Therefore, the state court's determination that Schatz's failure to pursue the Hayes evidence was not deficient reflects a reasonable application of *Strickland*'s guidelines for evaluating counsel's performance. As the Court stated in *Strickland*, "[t]here are countless ways to provide effective assistance in any given case." *Id*. Although Schatz had other strategies available to him, I agree with the state courts that it was not unreasonable for Schatz to conclude that he had a better chance to avoid conviction if he left ambiguous whether Boyd had confused Hennings with Hayes. If he had tried to push the door further open, then the state would have rushed into the opening with its own evidence and probably would have come out way ahead in the exchange.

But even if I disagreed with the state courts' conclusion on this point, Hennings could not obtain federal habeas relief because the state courts' application of *Strickland* to these facts was not unreasonable. Fair-minded jurists could disagree whether Schatz's decision on

the Hayes evidence was a reasonable defense strategy under the circumstances. Given the double dose of deference accorded to state court *Strickland* decisions in a § 2254 case, this is enough to forestall issuance of a writ.

II. Ineffective Assistance of Postconviction Counsel

Finally, Hennings contends that his postconviction lawyer rendered ineffective assistance with respect to his claim that the jury had been exposed to prejudicial extraneous information provided by alternate juror Buchanan. Hennings claims that his lawyer erred by relying on Dunn's report of what Buchanan told him rather than contacting Buchanan himself. Hennings asserts that counsel's reliance on Dunn's report prejudiced him because the report was hearsay and "did not list any extraneous prejudicial information that was allegedly shared with other members of the jury." Mem. in Supp. of Pet., dkt. 2, ¶ 56.

As stated earlier in this report, the state appellate court found that Hennings could not show that he was prejudiced by his lawyer's failure to obtain an affidavit from Buchanan. The court noted that in its decision on Hennings's appeal from the denial of his postconviction motion the court had accepted Dunn's report of Buchanan's statements as if Buchanan had presented them in an affidavit. Citing to its earlier decision in which it had concluded that none of the information Buchanan allegedly conveyed to the jury was potentially prejudicial and that Hennings had made only conclusory statements in support of his claim to the contrary, the court found that "Hennings's affidavit from Buchanan does

not alter this analysis." Therefore, concluded the court, Hennings had not shown that he had been prejudiced by his lawyer's alleged deficient performance.

Hennings now asserts that the state court of appeals' determination that his post-conviction lawyer was not ineffective was an unreasonable application of *Evitts v. Lucey*, 469 U.S. 387 (1985), which provides that a defendant has the right to effective representation on his first appeal of right. However, Hennings fails to support this conclusory assertion with any explanation *why* the state court's application of federal law was incorrect or unreasonable. This court could reject Hennings's claim on this ground alone. *See Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (court cannot develop legal arguments for litigants, even those proceeding without counsel).

Nonetheless, I will give Hennings the benefit of the doubt and assume that he wishes to present to this court the same argument he presented to the Wisconsin Supreme Court in support of his petition for review: Hennings contends that the court of appeals erred when it concluded that its prior decision stood as the law of the case because Buchanan's affidavit contained new information that had not been reported by Dunn, namely, details about testimony that had been introduced at Hennings's first trial. Hennings argues that this additional information constituted "extraneous prejudicial information" that obliged the trial court to hold a hearing. Citing *Remmer v. United States*, 347 U.S. 227 (1954), Hennings posits that if his lawyer had provided this information to the trial court, then the court

would have held a hearing and the burden of persuasion would have shifted to the state to prove that the extraneous information had not affected the verdict.

Buchanan's affidavit contains more detail than Dunn's report regarding what Buchanan alleges he told other jurors about the first trial, and Hennings claims that the state court of appeals ignored these new facts in reaching its conclusion. Actually, the court's opinion suggests that it did consider Buchanan's affidavit. The court summarized the affidavit, noting that Buchanan, in addition to claiming that he had informed some jury members that Hennings's previous trial ended with a hung jury, also averred that he had told other jurors that Hennings had presented an alibi defense at his first trial. *Hennings*, 2004 AP 1132, at ¶ 10. Thus, in spite of other language in the decision suggesting that Buchanan said nothing in his affidavit different from what had been reported by Dunn, the court's summary of the content of the affidavit establishes that the court was aware that the affidavit contained the new "alibi" information.

That said, I agree with Hennings that the court's reliance on the law of the case doctrine gave short shrift to the additional information provided by Buchanan in his affidavit. By characterizing Buchanan's affidavit merely as an attempt by Hennings to relitigate an issue already decided, the court of appeals overlooked both the content of the affidavit and Hennings's claim that his postconviction lawyer was to blame for the absence of the information in the first go-round. Nonetheless, there are several reasons why it was

not unreasonable for the court of appeals to reject Hennings's claim of ineffective assistance of postconviction counsel.

First, Hennings does not claim that his postconviction lawyer failed to investigate the possibility that the jury had been tainted by extraneous information. Rather, he challenges the *manner* in which his lawyer investigated the claim. Hennings appears to contend that it was unreasonable for his lawyer to rely on Dunn's report instead of personally interviewing Buchanan. But Hennings cites no support for his novel premise that employing an investigator to interview a witness amounts to ineffective assistance of counsel, and Hennings has not presented any evidence suggesting that his postconviction lawyer had any reason to suspect that there might be more to Buchanan's story than what Dunn reported. The whole point of hiring a defense investigator is to delegate the fact-ferreting to a trained professional while the attorney focuses on the legal issues. That's what happened here. Absent evidence that it was unreasonable for counsel to rely on Dunn's report, Hennings has not shown that his lawyer's performance was deficient on this point.

Second, nowhere in his submissions–either to this court or the state courts–does Hennings explain *why* the possibility that some jurors learned Hennings had an alibi defense at his first trial would have contaminated the jury's deliberations. (Although this court could brainstorm some conjectural reasons, it cannot develop Hennings's legal arguments for him). In fact, the state court of appeals appears to have rejected Hennings's claim partly for this reason. Notably, the court quoted from its previous decision in which it observed that

Hennings had put forth only conclusory assertions and had "fail[ed] to delineate the prejudicial effect" of the extraneous information allegedly conveyed by Buchanan. The logical inference to draw from the court's citation is that, having considered Hennings's renewed attempt to impeach the verdict with additional information from Buchanan, the court still found that Hennings had failed adequately to articulate prejudice. Perforce, if Hennings had failed to explain adequately why the new information had the potential to contaminate the jury, then it followed that Hennings had failed to establish that his lawyer's failure to present the information affected the outcome of his postconviction motion. In rejecting Hennings's claim on this ground, the state court of appeals reasonably applied *Strickland*. 466 U.S. at 693 (defendant must "affirmatively prove" prejudice).

Finally, even assuming, *arguendo*, that counsel's investigation on this point was deficient and alerting the second jury to the first trial's alibi evidence had the potential to be prejudicial, Hennings cannot prove that the outcome of the proceeding would have been different if the Buchanan affidavit had been submitted in the first instance. Hennings argues that with the new information, the trial court would have been required by *Remmer*, 347 U.S. 227, to hold a hearing at which the state would have borne the burden of establishing that the prejudicial information had been harmless. But Hennings places too much stock in *Remmer*.

Although language in *Remmer* implies that the Court was mandating an evidentiary hearing any time a defendant shows that extraneous information was communicated to the

jury, federal courts after *Remmer* have rejected this notion. The rule that has emerged post-*Remmer* is that further inquiry is required only if the extraneous communication to the juror is "of a character that creates a reasonable suspicion" that the defendant might have been deprived of his right to an impartial jury. *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (citing cases). "How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations." *Id*. (citations omitted). *See also Oswald v. Bertrand*, 374 F.3d 475, 480 (7th Cir. 2004) (the greater the probability of bias, the more searching the inquiry must be).

Presented with Buchanan's affidavit, a cautious trial court certainly could have inquired further. But to prevail on his claim, Hennings must show that it was *reasonably likely* that the trial court in his case would have done so. He cannot make this showing. Notably, Buchanan's affidavit fails to give rise to a reasonable suspicion that information about Hennings's prior trial was communicated to any of the jurors who deliberated on Hennings's trial. As both the state trial and appellate courts noted, Buchanan's claim to have imparted information to other jurors about Hennings's prior trial was vague and it failed to show that any "specific juror" received the information. In his affidavit, Buchanan still does not identify any specific juror, but avers merely that he conveyed the information to "some members of the jury."

Moreover, Buchanan's newfound recall of the detailed information that he allegedly conveyed to other jurors is suspect. Why didn't he provide this information when he was

interviewed by Dunn? Finally, Buchanan's allegations were contradicted by the unidentified juror with whom the trial court spoke two days after sentencing. That juror denied having heard about the prior trial or that the matter was discussed during the jury's deliberations. Although this informal, *ex parte* report was not "evidence," the trial court nonetheless placed it on the record and it is part of the transcripts in this case.

In sum, consideration of the entire record, including Hennings's failure to corroborate Buchanan's affidavit with the affidavit of even one juror who actually deliberated, establishes that it was not unreasonable for the state courts to conclude that the failure by Hennings's postconviction lawyer to make a better record on the tainted jury claim was not reasonably likely to have changed the outcome of the postconviction motion. "[T]he criterion of a reasonable [state court] determination is [not] whether it is well reasoned . . . [i]t is whether the determination is at least minimally consistent with the facts and circumstances of the case." *Hennon*, 109 F.3d at 335. In this case, although I do not agree completely with the state appellate court's approach or reasoning, as just explained, I agree with the court's ultimate conclusion that Hennings failed to establish that his postconviction lawyer provided ineffective assistance of counsel with respect to the tainted jury claim. Accordingly, this court should deny granting habeas relief to Hennings on this claim.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Charles Hennings for a writ of habeas corpus be DENIED.

Entered this 17th day of May, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

May 17, 2006

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Re: Hennings v. Grams
Case No. 05-C-749-C

Dear Mr. Hennings and Ms. 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 June 5, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 5, 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