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

DAVID HUUSKO,

Petitioner,

v.

JEFFREY ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

07-C-59-C

REPORT

Before the court for report and recommendation is the petition of David Huusko for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, an inmate at the Redgranite Correctional Institution, challenges his January 24, 2001 conviction in the Circuit Court for Eau Claire County for armed robbery as party to the crime in violation of Wis. Stat. § 943.32(2). Petitioner asserts that he is in custody in violation of the Constitution of the United States because of errors made by the lawyer who represented him at the postconviction and appellate proceedings. For the reasons stated below, I am recommending that this court deny the petition.

Petitioner contends that his postconviction/appellate lawyer was ineffective for failing to pursue on appeal various claims of ineffective assistance by his trial attorney, William Schembera: 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. Petitioner further contends that his postconviction/appellate lawyer had a conflict of interest that prevented him from calling a witness at the initial postconviction hearing. Petitioner argues that the cumulative effect of the above errors denied him a fair trial.

Respondent acknowledges that this petition is timely filed and that petitioner exhausted his state court remedies as to the claims in his petition. Respondent contends that this court must deny the petition because the state court of appeals adjudicated the claims in a manner that was neither contrary to nor reflected an unreasonable application of clearly established federal law and that was based on a reasonable determination of the facts in light of the evidence presented. Respondent is correct.

From the state appellate court decisions and the record of the trial and appellate court proceedings submitted by the parties, I find the following facts:

FACTS

On May 16, 2000, in Eau Claire, Wisconsin, petitioner and his buddy Shea Mattice, drove to the Twin Cities, bought some crack, returned to Eau Claire and smoked it all. They wanted more crack but were out of money. They decided to rob a convenience store. Mattice, wearing a poncho and armed with a knife, entered and held up a Golden Express store while petitioner drove the getaway car. They returned to Minnesota, bought and smoked more crack, then returned to Eau Claire.

Just after midnight, (that is, early in the morning on May 17), Mattice and petitioner agreed that another robbery was necessary to generate more crack funds. They drove about Eau Claire until they found a SuperAmerica convenience store open at about 1:00 a.m.. Being fair-minded, petitioner volunteered to enter the store to rob it, since Mattice had performed the previous hold-up. Petitioner, armed with a knife, put a $5 bill on the counter and asked the clerk, Kathleen Field, for a pack of Marlboro cigarettes. While the cash register was open for Field to make change, petitioner grabbed her wrist and asked for the rest of the money. Field gave the cash box to petitioner who left the store with $266.69. A surveillance video at the SuperAmerica store showed a male with a white baseball cap and an inside-out sweatshirt committing the armed robbery.

Mattice was arrested for both armed robberies on May 17, 2000 and promptly inculpated both himself and petitioner. Officers executed a search warrant for petitioner's apartment and recovered a knife in the kitchen sink matching the victim's description, a poncho, a crack pipe from petitioner's bedroom, and a pack of Marlboro cigarettes in petitioner's car. Petitioner was charged with two counts of armed robbery/party to a crime.

At his preliminary hearing in the Eau Claire County Circuit Court on June 27, 2000, petitioner requested a speedy trial, which the court noted had to be scheduled within 90 days. Subsequently, trial was set for September 15, 2000.

At a motion hearing on September 5, 2000, the court granted the state's motion to do further testing on petitioner's fingerprints and noted that if the results were exculpatory, petitioner would be given an opportunity to obtain testimony regarding that evidence. The state

questioned whether petitioner would object to a new trial date given it would be outside the speedy trial deadline of September 27th. Petitioner then personally agreed to waive his right to a speedy trial:

THE COURT: Okay. So if you have made a demand for a speedy trial, that's waived.

MR. SCHEMBERA: Well, he's willing to waive it, but would like it as soon as possible, Your Honor.

THE COURT: Sure. Is that accurate, Mr. Huusko.

HUUSKO: Yes, that is.

Dkt. 9, Exh. V at 4-5.

The state also noted that petitioner had a "potential prison revocation sentencing hanging over him, as well, so he's likely to be going back to federal prison for a violation of his federal parole." *Id.* at 6. The court revoked petitioner's cash bond as a result of his federal status and scheduled the trial for October 9 and 10, 2000.

At an October 4, 2000 status conference, Mattice's newly appointed lawyer requested additional time to familiarize himself with the case, which was set for a joint trial with petitioner the following Monday. The public defender's office had not told the attorney anything about the status of the case or that it was set for trial in a little over a week. Dkt. 10, Exh. BB at 2-4. The court recognized that petitioner would want his trial as soon as possible but noted, and the parties agreed, that petitioner was "not doing any dead time with this county" because he was on a federal detainer. *Id.* at 5. Petitioner's lawyer, Schembera, stated that petitioner was in federal custody "[s]o there's no speedy trial problem in that regard" and also noted that he was

still waiting on the state crime laboratory to process fingerprint evidence, which he expected to be favorable to the defense. *Id.* at 4-5. The court set a trial date of December 13 and 14, 2000 but later continued it to January 23, 2001. The record does not reflect the reason for the latter continuance. Because Mattice pled guilty the day before petitioner's trial began in January 2001, he was no longer a joint defendant. Dkt. 9, Exh. Y at 71.

At trial, the state's witnesses included petitioner's accomplice, Shea Mattice; Mattice's roommate, Jacob Sieg; petitioner's roommate, John Switzenberg; Marshall King, an inmate incarcerated with Mattice and later with petitioner; and Detective Travis Quella.

Mattice told the jury about how he and petitioner had performed both robberies. He also reported that he and petitioner had consumed crack cocaine together between 12 and 15 times during the first part of May 2000, including on May 16 and 17. Dkt. 9, Exh. Y at 119-129.

Sieg testified that when he saw the surveillance video of the SuperAmerica robbery, the robber's sweatshirt and blond hair sticking out of his baseball cap looked like petitioner. Sieg also testified that he saw or heard petitioner and Mattice talk about consuming crack cocaine more than once in early to mid-May 2000. *Id.* at 154.

Switzenberg testified that in early to mid-May 2000, he saw drug paraphernalia, noticed an odor of crack cocaine and heard petitioner talk about consuming crack cocaine. *Id.* at 147-48.

At trial, inmate King acknowledged that he had signed an affidavit on September 7, 2000 in which he claimed that Mattice had confided in him that petitioner had not participated in the robberies. King also acknowledged that in December 2000, when skeptical police challenged this

report, he falsely maintained that his affidavit was true and falsely denied that someone had paid him $20 to swear to this version of events. King later recanted and implicated petitioner. According to King, after his attorney told him in January 2001 that he could be charged with perjury, he disavowed his affidavit and told Detective Quella that petitioner asked him to complete the false affidavit. *Id.* at 168-72. To corroborate King's disavowal, Detective Quella testified at petitioner's trial that King had not been incarcerated with Mattice at the time when one of his conversations with Mattice allegedly had occurred. *Id.* at 192-93.

Lisa Sieg, Jacob Sieg's wife, testified for the defense that she had told police that the individual in the surveillance video was wearing a hat and shirt like Mattice's. But on cross examination, she admitted that, after looking at the video again, the individual could not be Mattice because "the hair in the back looks like Dave Huusko's and he was wearing an inside out sweatshirt which Dave always wore." Dkt. 9, Exh. Y at 176-78.

Timothy Easker, petitioner's federal probation agent, testified that in order to detect the presence of cocaine, a urine sample should be tested within 72 hours of ingesting the drug but preferably within 48 hours. *Id*. at 214-15.

The jury acquitted petitioner of the Golden Express robbery but found him guilty of the SuperAmerica robbery. The court sentenced petitioner to 15 years' incarceration followed by 10 years' supervised release.

Petitioner filed a motion for postconviction relief in the trial court. Represented by a new lawyer (Jay Heit) petitioner alleged that his trial lawyer had been ineffective for failing to move to suppress the store clerk's in-court identification of him. The trial court denied the motion

following a hearing on October 22, 2001. Petitioner appealed, and the Wisconsin Court of Appeals affirmed the judgment and the trial court's order on the postconviction motion. The Wisconsin Supreme Court denied petitioner's subsequent petition for review.

On August 25, 2003, petitioner filed a pro se motion for postconviction relief under Wis. Stat. § 974.06, alleging the following:

1) Attorney Heit was ineffective for failing to raise the following issues on appeal:

> a) Schembera was ineffective for failing to object to numerous continuances, which in turn, led to a violation of petitioner's right to a speedy trial;
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> b) Schembera was ineffective for failing to obtain drug test results that would have countered the state's theory that petitioner committed the robbery to enable him to purchase cocaine;
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> c) Schembera was ineffective for failing to adequately cross-examine witness Ann Gardner;
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> d) Schembera was ineffective for introducing damaging hearsay testimony; and
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> e) Schembera was ineffective for failing to investigate information about the probation status of witness Jacob Sieg that would have impeached the testimony of Sieg and his wife;

2) Heit had a conflict of interest that prevented him from calling Sieg as a witness at the initial postconviction hearing; and

3) these, errors, taken together, required a new trial in the interest of justice.

The trial court denied this motion without a hearing. Petitioner appealed. On February 23, 2005, the court of appeals summarily reversed and remanded the case for a postconviction hearing, concluding that with the exception of petitioner's speedy trial argument, petitioner's detailed allegations were adequate to compel a hearing.

The trial court held an evidentiary hearing on June 28, 2005. Petitioner was represented by new counsel who questioned Schembera about his failure to introduce the negative drug test results obtained by petitioner's federal probation officer on May 8, 2000, roughly a week before the robberies. Schembera responded that the probation agent was very cooperative and provided him with all federal information about petitioner's various drug tests, but that somehow the May 8 test was not in the packet. Schembera testified that he shared this packet with petitioner but petitioner never alerted him that the May 8 test was missing. Schembera testified that he had not been aware of a May 8, 2000 drug test before that day. Schembera testified that he had no reason to believe that the probation agent withheld any information; he speculated that the agent accidently omitted the May 8 test.

Petitioner contradicted Schembera's account, claiming that he had told Schembera a couple of times about the missing May drug test result.

When asked whether petitioner asked him to pursue the issue of ineffective assistance of counsel for failure to present or uncover the negative May 8th test, petitioner's appellate attorney, Heit, testified:

HEIT: I remember discussions on that and I discussed those with Mr. Schembera and I remember the substance of the discussions being that there was nothing there, that the blood tests had been taken too far away from the robbery or before the robbery to be of any relevance or use at trial. That's what I remember about that.

PETITIONER'S ATTORNEY: But if there was a missing blood test, particularly the one on May 8th, 2000, at that point you didn't know when that test was offered, correct?

HEIT: Correct. And the one thing is I do remember discussions about a test being ordered but it not showing up on the – on the record, as well, and nothing came of that, either.

Dkt. 9, Exh. N at 39.

Petitioner testified that just before his initial appearance on May 19, 2000, he had asked Schembera to have blood drawn for drug testing. A police report introduced into evidence at the hearing showed that a blood sample was taken on May 22, 2000. Schembera testified that he requested petitioner's blood be drawn around this time but he never submitted the sample for testing because he agreed with the state that a negative result would have been of minimal value given cocaine would already have left petitioner's system by the time the blood was drawn. Schembera testified that at the time the blood was drawn, he did not know how long drugs stayed in the system, but he wanted to preserve the evidence. Schembera also testified that he was not aware how long cocaine residue would remain in a hair follicle. *Id.* at 28-30.

Petitioner testified that he did not know when he became aware that Jacob Sieg was on probation or whether he ever discussed this with Schembera. Schembera testified that he had no recollection of discussing Sieg's probation status or violations with petitioner. Petitioner further testified that he asked Heit to investigate if Sieg was on probation and to look into why Sieg would have testified at trial to something different than what was in his police report.

Heit testified that he had represented Jacob Sieg on a 1999 burglary charge and conviction that had led to Sieg being placed on probation. Heit testified that under the terms of the state public defender assignment, his representation of Sieg ended when Sieg was sentenced, but he still was bound by attorney-client privilege. Heit testified that he did not

know whether Sieg had committed any probation violations or was in danger of being revoked. Heit further testified that it would not have been a conflict for him to question Sieg adversely about Sieg's motives for changing his testimony or to ask Sieg questions regarding his conduct on probation. Heit testified that he believed that although he had previously represented Sieg, he would have been unfettered in his ability to investigate and impeach Sieg.

A probation supervisor testified at the postconviction hearing that she had reviewed Sieg's probation record and concluded that his probation had not been in danger during the time leading up to petitioner's trial because no violations were noted in his file.

The trial court again denied petitioner's claims of ineffective assistance of counsel, finding that Schembera, Heit and the probation supervisor were more credible than petitioner. The trial court found that Schembera's performance was not deficient with respect to the missing May 8 negative drug test result because he only could have known that the report was missing if petitioner had told him. The trial court determined that no prejudice resulted because neither the May 8 test result nor a test of the May 22nd blood draw could have shown petitioner was not using drugs at the time of the robbery. The trial court found that even if petitioner had asked for the blood draw earlier than May 22, law enforcement would not have performed it immediately. The trial court also found that Heit did not have a conflict of interest or exhibit deficient performance in failing to question Sieg at the initial postconviction hearing.

Petitioner appealed this ruling , reasserting the claims raised in his postconviction motion.

On September 12, 2006, the court of appeals rejected petitioner's claims and affirmed his conviction. *State of Wisconsin v. Huusko*, dkt. 9, Exh. R. As a procedural matter, the appellate

court found that although petitioner asserted in his postconviction motion that Schembera had been ineffective for failing to raise seven issues, petitioner did not make an offer of proof on three of the issues under Wis. Stat. § 901.03(1)(b).[1] Relying on *State v. Machner*, 92 Wis.2d 797, 804 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."), the court found that petitioner had failed properly to preserve these three issues for appeal because he did not ask his attorneys any questions regarding these issues at the hearing on remand. *Id.* at 2-3. The appellate court rejected petitioner's assertion that the trial court had limited the issues he could raise at the hearing, finding it unsupported by the record. The appellate court acknowledged that because it had characterized petitioner's speedy trial claim as non-meritorious in its February 2005 order, the trial court did not take testimony on this claim at the hearing on remand. However, the appellate court noted that the state did not object to and the trial court did not prohibit inquiry into any other matters. *Id.* at 3.

More substantively, the court rejected petitioner's claim that his right to a speedy trial had been violated. As an initial matter, the court noted that petitioner had confused his constitutional speedy trial right with the more restrictive rights set forth in Wis. Stat. § 971.10(4), which provides that a felon not brought to trial within 90 days of a written demand for a speedy trial is a release on bond pending trial. The court noted that after petitioner's trial had taken place, the statutory remedy was no longer available and any violation of § 971.10 was

[1] Although the court did not identify the three issues, petitioner's appellate briefs show that his claims related to the cross examination of Gardner, the admission of hearsay evidence and the request for a new trial were not addressed by the court. *See* Dkt. 9, Exhs. O and Q.

moot. *Id.* The court also found no violation of petitioner's *constitutional* speedy trial right because petitioner personally waived this right and had not shown inordinate delay, an unacceptable reason for the delay, a re-assertion of his speedy trial right that was not withdrawn, or any actual prejudice to his defense. *Id.* at 3-4 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Although the court recognized that the trial testimony of several witnesses differed from their statements to police or the preliminary hearing, the court noted that a change in witness testimony is not necessarily due to the passage of time and does not by itself constitute proof of prejudice. *Id.* at 4.

With regard to petitioner's claim that his trial lawyer failed to present evidence of the May 8, 2000 drug test, the court found that the lawyer could not be faulted for failing to present evidence about which petitioner knew but did not divulge. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (reasonableness of counsel's actions may be determined by defendant's own statements or actions.)). The court noted that petitioner's testimony on this issue at the motion hearing on remand contradicted that of his trial lawyer. Citing *Chapman v. State*, 69 Wis. 2d 581, 583 (1975), the court stated that it had no authority to overturn the trial court's credibility determination on this dispute unless the finding was contrary to conceded facts or the laws of nature. *Id.* The court also found that because cocaine in the bloodstream dissipates after 48 hours, a negative test result would not have contradicted the state's theory as to motive, or Mattice's testimony that he and petitioner consumed cocaine in early and mid-May. *Id.* at 5.

Similarly, the court rejected petitioner's allegation that his lawyer had acted unreasonably by not ordering a drug test on petitioner's May 22, 2000 blood sample. The court explained

that because the blood sample was taken more than 48 hours after petitioner's arrest, negative results would not have been exculpatory and positive results would have been inculpatory. The court also found that petitioner had not established that reliable hair testing was available in May 2000, or that reasonably effective counsel would have been aware of this possibility and would have preserved a hair sample. *Id.*

The court rejected petitioner's argument that his trial lawyer had been ineffective for failing to present evidence that Jacob Sieg violated his probation. The court noted that petitioner's argument that Jacob Sieg and his wife had motive to curry favor with the prosecutor because of Sieg's probation violations depended on Sieg believing that his probation was in jeopardy. The court determined that Sieg's probation was not in jeopardy because his probation officer did not know of any violations. *Id.* at 5-6.

Finally, the court rejected petitioner's allegation that Heit had a conflict of interest preventing him from calling Sieg as a witness in the first postconviction hearing. The court stated that while Heit had a continuing obligation to maintain confidentiality, he had no privileged or confidential information that might have affected petitioner's case. The court held that Heit's failure to inquire about Sieg's alleged probation violations was based on his judgment that the violations were not relevant to petitioner's case rather than out of any continuing duty to protect Sieg. *Id.* at 6.

Petitioner filed a petition for review with the Wisconsin Supreme Court in which he reasserted his claims of ineffective assistance of postconviction counsel. The state supreme court denied the petition for review on January 9, 2007. Petitioner's federal petition followed.

ANALYSIS

I. Legal Framework

This court's ability to grant habeas relief is limited by 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (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.
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> 28 U.S.C. § 2254(d).

When applying this statute, a federal court reviews the decision of the last state court that ruled on the merits of petitioner's claims, *Simelton v. Frank*, 446 F.3d 666, 669 (7th Cir. 2006), which in this case is the Wisconsin Court of Appeals. A decision is "contrary to" federal law when the state court applies a rule that "contradicts the governing law set forth by the Supreme Court," or when an issue before the state court "involves a set of facts materially indistinguishable from a Supreme Court case," but the state court rules in a different way. *Boss v. Pierce*, 263 F.3d 734, 739 (7th Cir. 2001) (*citing Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). "'A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular petitioner's case' qualifies as a decision involving an unreasonable application of clearly established federal law." *Id.* (quoting *Williams*, 529 U.S. at

407-08). An "unreasonable" state court decision is one that is "well outside the boundaries of permissible differences of opinion." *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002).

In a case involving a flexible constitutional standard, a state court determination 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 v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) ("[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."), *reversed on other grounds*, 521 U.S. 320 (1997). 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). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

Under § 2254(e)(1), the state court's findings of fact are presumed correct, and it is the petitioner's burden to show by clear and convincing evidence that the state court's factual determinations were incorrect. *See Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002).

Section 2254(d)'s standard of review applies only to claims actually "adjudicated on the merits" in state court. When a state court is silent with respect to a habeas petitioner's *federal* claim, then the federal court must apply the more lenient standard of 28 U.S.C. § 2243 and "dispose of the matter as law and justice require." *Canaan v. McBride*, 395 F.3d 376, 382-83 (7th Cir. 2005).

In this case, all of petitioner's claims relate to the ineffectiveness of his postconviction lawyer. To establish a claim for ineffective assistance of counsel, a defendant must prove that: (1) his attorney's performance fell below an objective standard of reasonableness; and (2) the attorney's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant "bears a heavy burden when seeking to establish an ineffective assistance of counsel claim." *Jones v. Page*, 76 F.3d 831, 840 (7th Cir. 1996) (quoting *Drake v. Clark*, 14 F.3d 351, 355 (7th Cir. 1994)). To satisfy the first prong of the *Strickland* test, the performance element, a defendant must identify the acts or omissions of counsel that form the basis of his claim of ineffective assistance. *Strickland*, 466 U.S. at 690; *United States v. Moya-Gomez*, 860 F.2d 706, 763-64 (7th Cir. 1988). A court's review of counsel's performance is highly deferential, presuming reasonable judgment and declining to second-guess strategic choices. *Strickland*, 466 U.S. at 689; *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *United States v. Williams*, 106 F.3d 1362, 1367 (7th Cir. 1997). With regard to the second prong, the prejudice element, "the defendant must show that there is a probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Moya-Gomez*, 860 F.2d at 764.

II. Speedy Trial

Petitioner contends that his postconviction counsel was ineffective for not raising on appeal a claim that petitioner was denied his right to a speedy trial as a result of his trial lawyer's failure to object to the trial court granting numerous continuances. As an initial matter, the

appellate court noted in its decision that petitioner appears to confuse his constitutional speedy trial right with the more restrictive state statutory rights. Under Wis. Stat. § 971.10, "[t]he trial of a defendant charged with a felony shall commence within 90 days from the date trial is demanded by any party in writing or on the record," and the statutory remedy for a violation of this right is release on bond pending trial. Petitioner argues that the trial court continued the trial beyond the 90 days allowed by § 971.10 and improperly relied on the fact that he would be on federal detainer for a federal probation violation in revoking his cash bond. However, as the appellate court noted, these arguments relate to his now-moot statutory rights and are not relevant to a constitutional speedy trial claim. *Hogan v. McBride*, 74 F.3d 144, 145 (7th Cir. 1996) (statutory speedy trial rules not enforceable under § 2254) (citing *Pulley v. Harris*, 465 U.S. 37, 41 (1984)).

Under the Sixth Amendment to the United States Constitution, "[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: a) length of delay; b)

reasons for the delay; c) the defendant's assertion of his right; and d) 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).

In this case, a little more than eight months elapsed between petitioner's arrest and trial. Petitioner argues that this length of time is prejudicial for a simple street crime in which proof is dependent on eyewitness testimony. Generally, courts find delays approaching one year to be presumptively prejudicial. *Id*. at 651 n.1 (citation omitted)*; United States v. White*, 443 F.3d 582, 589-90 (7th Cir. 2006). In the Seventh Circuit, delays of eight or nine months have been found long enough to warrant a more searching analysis. *See White*, 443 F.3d at 590 (nine month delay presumptively prejudicial); *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1127 (7th Cir. 1984) (eight month delay presumptively prejudicial); *cf. Hogan*, 74 F.3d at 145 (eight month delay not presumptively prejudicial).

The appellate court did not discuss whether the delay was presumptively prejudicial in this case, opting instead to take the further step and analyze petitioner's claim under *Barker*. The court of appeals' decision shows that it adjudicated petitioner's claim in a manner that was not unreasonable or contrary to the approach required by *Barker*. The outer limit of "reasonable" is broad with respect to a speedy trial claim because the rule governing its adjudication involves a "difficult and sensitive balancing process," *Barker*, 407 U.S. at 533, as opposed to a bright line rule. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("The more

general the rule, the more leeway courts have in reaching outcomes in case by case determinations."); *Lindh*, 96 F.3d at 871 (citing speedy trial claim as example of "question of degree," for which "a responsible, thoughtful answer reached afer a full opportunity to litigate is adequate to support the judgment").

In *Doggett*, 505 U.S. at 652, the Supreme Court held that after deciding that a delay is presumptively prejudicial, the next step is considering "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination." *White*, 443 F.3d at 590. In *White*, the court explained that because an eight to nine month delay is barely long enough to constitute presumptive prejudice, it is not excessive. *Id.* It follows that the state appellate court was reasonable in finding that the delay was not inordinate in petitioner's case.

In *Barker*, 407 U.S. at 531, the Court explained how to analyze the second factor–the reason for the delay:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Petitioner argues that this factor should weigh in his favor because he did not cause the delay resulting in any of the continuances of his trial.

The record shows that although the state requested the first continuance in order to further process fingerprint evidence, there was a chance that the test results would have been

exculpatory. Petitioner readily agreed to that continuance in order to see the results of the evidence. Dkt. 9, Exh. V at 3-5. The appellate court determined that the primary reason for the subsequent delay was that Mattice obtained new counsel, who needed more time to familiarize himself with the case. Petitioner contends that this is an invalid reason because he was not tried jointly with Mattice and Mattice was a key witness against him for the state. However, the record shows that at the time of the October continuance, Mattice was being tried jointly with petitioner; Mattice did not plead guilty until the day before petitioner's trial in January 2001. Further, the delay was not caused by the state in an effort to hamper petitioner's defense. The record shows that the public defender's office had not informed the attorney appointed for Mattice of the scheduled trial date. In addition, the fact that Mattice was a key witness against petitioner does not weigh in favor of petitioner. The Court in *Barker*, 407 U.S. at 531, specifically noted that a missing witness should serve to justify appropriate delay.

There is no record of why the trial court continued the December trial date. However, petitioner has not alleged and a review of the record does not show that the state acted deliberately or with negligence with respect to this last continuance. Because the continuances were, at worst, for neutral reasons and were not attributable to any deliberate attempt to hamper the defense, the appellate court did not contravene *Barker* by finding that petitioner had not shown an unacceptable reason for the eight and a half month delay.

With regard to the third factor, the court found that petitioner waived his right to a speedy trial at the September 5, 2000 hearing. Petitioner asserts that he thought he was merely agreeing to postpone his trial until fingerprint evidence could be completed. However, a review

of the hearing transcript shows that petitioner's speedy trial rights were discussed at length before petitioner personally waived his right to a speedy trial. Petitioner argues that even if he waived his speedy trial right, his attorney should have reasserted it before the court granted two additional continuances. However, Schembera stated at the October 4, 2000 status conference that a continuance would benefit petitioner because potentially favorable fingerprint evidence had not yet been processed by the state crime lab. The record is silent as to whether Schembera objected to the December continuance. Accordingly, the appellate court's finding that petitioner waived and did not reassert his right to a speedy trial was not unreasonable.

Finally, there are three types of prejudice that can result from unreasonable delay between accusation and trial: 1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence. *Barker*, 407 U.S. at 532. Of these, the most serious is the last. *Id.* Petitioner argues that he suffered this last form of prejudice because several witnesses at trial were unable to accurately recall the events of the robbery and changed their earlier accounts made in police statements. According to petitioner, between the time of the robbery and trial, Jacob and Lisa Sieg became more convinced that the individual on the surveillance tape was him and not Mattice; Kathleen Field's and Anna Gardner's eye-witness descriptions of the robber became more inculpatory; and Marshall King and Shea Mattice became witnesses for the prosecution.

It was not unreasonable for the appellate court to conclude that these changes in witness testimony were not necessarily due to passage of time and did not by themselves constitute proof

of prejudice. Apart from noting that each witness testified at trial that their recollection would have been sharper at the time of the robbery, petitioner has not adduced any evidence specifically linking the delay to the changes in the witnesses' accounts. The differences in the descriptions and identifications made by the Siegs, Field, and Gardner might have occurred shortly following their police statements and were not necessarily due to the 8½ month delay. Although it is unclear when Mattice cut his final deal with the prosecution, he always had been a key witness against petitioner, implicating petitioner at the time of his arrest on May 17, 2000. The record also shows that Marshall King changed his story from that contained in his affidavit, not because of the delay in trial, but because his own attorney had warned to avoid perjury. Petitioner cannot show that the outcome of the trial would have been different based on King's affidavit because King admitted–and the trial court found–that the affidavit was untrue.

Further, even if the trial delay resulted in unintentional benefits for the prosecution, it was not unreasonable for the appellate court to conclude that petitioner had not shown enough prejudice to outweigh the other factors showing no speedy trial violation. As stated above, only 8½ months passed between arrest and trial, and there is no evidence that the government purposefully caused the delay in trial in order to have time to sway witness testimony. Accordingly, the appellate court's finding that petitioner did not show any actual prejudice to his defense as a result of the delay is not contrary to *Barker*.

In conclusion, it was reasonable for the appellate court to weigh the four *Barker* factors together and to conclude that petitioner's constitutional right to a speedy trial was not violated. Given there was no violation of petitioner's right to a speedy trial and that the delay of the

September and October trial dates actually benefitted petitioner, it follows that it could not have been unreasonable for petitioner's trial counsel not to objecting to the continuances. To the same effect, because petitioner could not have prevailed on his speedy trial claim, his postconviction counsel's failure to raise the issue on appeal was not deficient or prejudicial.

III. Exculpatory Evidence

Petitioner argues that if his trial attorney had introduced evidence of negative drug tests from early May, 2000, counsel could have countered both the state's contention that petitioner committed the robberies in a drug frenzy and Mattice's testimony that petitioner consumed cocaine in early and mid-May 2000. Petitioner contends that his trial lawyer was ineffective because he did not obtain a report of the negative May 8, 2000 drug test taken by petitioner's federal probation officer, he did not test petitioner's May 22, 2000 blood sample, and he did not request a hair sample for testing. The court of appeals determined that counsel's alleged inaction did not violate an objective standard of reasonableness, and that any arguable deficiency did not prejudice the defense under *Strickland*. In his federal petition, petitioner has failed to establish that these unfavorable conclusions unreasonably applied *Strickland* or involved an unreasonable factual determination.

The appellate court found that because Attorney Schembera did not know about the May 8, 2000 negative drug test, he could not be faulted for failing to present it as evidence at trial. Although petitioner testified at the hearing that he had told Schembera about the test before trial, the trial court rejected this testimony and accepted Schembera's testimony that he had not

learned about the test until the June 2005 hearing. The appellate court accepted and adopted this credibility finding.

Undaunted, petitioner argues that because he signed a release form allowing Schembera to review his federal probation file (*see* dkt. 10, Attachment p. 5) Schembera would have found the May 8 drug test result if he actually had reviewed this file.[2] However, Schembera testified that he spoke with petitioner's federal probation officer, who was forthcoming, and Schembera had no reason to believe that any test result was missing. It was reasonable for Schembera to rely on the probation officer's review of petitioner's file and to assume he was getting complete information. Further, there is no evidence indicating that if Schembera had physically reviewed petitioner's probation file, he would have found the May 8 drug test result.

Petitioner also argues Schembera's testimony was not credible because Heit testified at the hearing that he had spoken with Schembera about the May 8 test when preparing petitioner's appeal. The appellate court did not address this argument. However, a review of Heit's hearing testimony does *not* establish that Heit and Schembera specifically spoke about the May 8 drug test: Heit testified that he remembered discussions with Schembera that "blood *tests* had been taken too far away from the robbery or before the robbery to be of any relevance." Dkt. 9, Exh. N at 39 (emphasis added). However, Heit then testified that at that point, he did not know when the missing test was offered and stated that "the one thing is I do remember discussions about a test being ordered but it not showing up." *Id.* It is not at all clear from this

[2] On June 18, 2006, petitioner asked the court of appeals to supplement the record with the release form. The record does not reflect whether the court of appeals considered it in reaching its decision on September 12, 2006.

testimony that Heit even knew about a missing drug test when he spoke with Schembera, but it is clear that he did not know the date of the test. Accordingly, petitioner has not provided clear and convincing evidence that the appellate court's credibility finding with respect to Schembera was incorrect. *See* 28 U.S.C. 2254(e)(1). Therefore, this finding stands.

But even if Schembera knew about the May 8 test and this rendered his performance on this point deficient, the appellate court reasonably concluded that petitioner had suffered no prejudice. Unrebutted trial testimony established that cocaine in the bloodstream dissipates after 48 hours. A negative May 8, test result would have shown only that petitioner did not consume cocaine between May 6 and May 8. Given that Probation Officer Easker testified that in order to detect the presence of cocaine, a urine sample should be tested within 72 hours of ingesting the drug but preferably within 48 hours, the court's finding is not unreasonable.

Additionally, both Schembera and Heit testified that this was Schembera's understanding at the time of trial. The appellate court reasonably concluded that this evidence would not have contradicted the prosecutor's theory as to motive and would not have impeached Mattice's testimony that petitioner consumed cocaine in early and mid-May. Mattice, Jason Sieg, and Jason Switzenberg all testified about petitioner's consumption of crack cocaine on more than one occasion during early to mid-May 2000. Because none of the witnesses were specific as to which days petitioner used cocaine, a negative May 8 drug test is consistent with petitioner consuming cocaine during other times in early to mid-May.

Similarly, the appellate court concluded that because petitioner's May 22, 2000 blood sample was taken more than 48 hours after petitioner's arrest, a negative result would not have

been exculpatory, while a positive result would have been inculpatory. Petitioner correctly points out that Easker's testimony concerning the 48-hour testing window related to urine and not blood samples. The record does not indicate how long cocaine is detectable in the blood. However, the appellate court's conclusion is not unreasonable. Schembera testified that he did not submit petitioner's blood sample for testing because he agreed with the state that a negative result would have been of minimal value because any cocaine already would have left petitioner's system by the time of the blood draw. Petitioner asserts that he asked that a blood sample be taken on May 19, 2000 and faults counsel for not arguing that if the state had drawn his blood that day, it may have resulted in exculpatory evidence. However, there is no evidence as to when petitioner asked for the test or that it would have been possible for law enforcement to draw petitioner's blood on the same day that of a request. In fact, the trial court found that even if petitioner had asked for the blood draw earlier than May 22, law enforcement would not have performed it immediately.

Petitioner also faults his trial attorney for failing to look into other options for drug testing, specifically hair sample testing. However, the court reasonably concluded that petitioner had not established that reliable hair testing was available in May 2000, or that reasonably effective counsel would have been aware of that possibility and would have preserved a hair sample. To the contrary, Schembera testified that he was not aware in May 2000 of how long cocaine residue would remain in a hair follicle. Although petitioner contends that information on drug testing hair follicles was readily available on the Internet, he did not establish that this type of testing would have been known to reasonably effective counsel or even available and reliable in his case in Eau Claire, Wisconsin at the time of trial.

Because petitioner has not established that the court applied *Strickland* unreasonably or made unreasonable determinations of fact, this court should deny habeas relief to petitioner on this claim.

IV. Failure to Investigate The Siegs

Petitioner contends that Schembera was ineffective for not attempting to impeach Jacob and Lisa Sieg by investigating Jacob Sieg's alleged probation violations. Petitioner argues that the Siegs changed their identification of the robber seen in the video in order to curry favor with the prosecution, which knew Jacob Sieg had committed potential probation violations. The state responds that it was not unreasonable for the appellate court to conclude that because Sieg's probation officer did not know of any probation violations, neither Sieg nor his wife had any incentive to curry favor with the prosecution.

The court's conclusion is not unreasonable and is not contrary to the standard set out in *Strickland*. There is no evidence that Schembera's performance fell below an objective standard of reasonableness or prejudiced the defense. Petitioner cites trial testimony that Jacob Sieg had consumed alcohol, had lived with Mattice (who had two active arrest warrants), and had associated with other convicted felons; he posits that Sieg changed his testimony so that the prosecution would not tattle to his probation agent. But the record establishes that Sieg's probation officer *did* know about Sieg's involvement in petitioner's case and had not noted any potential probation violations in his file. Further, at the June 2005 postconviction motion hearing, petitioner testified that he did not know when he became aware that Jacob Sieg was on

probation or whether he ever discussed this with Schembera. Schembera confirmed this, testifying that he had no recollection of discussing Sieg's probation status or violations with petitioner. Similarly, a review of the record does not reveal that the prosecution or police knew of any potential probation violations committed by Sieg. So how could Schembera have impeached either of the Siegs?

Petitioner also argues that Sieg was worried about his probation being in danger because Detective Quella had threatened the status of his probation. *See* dkt. 10 at 9 (citing dkt. 9, Exh. J, Attachment 147-48). However, the threat petitioner cites involved Detective Quella telling Sieg that his probation status could be affected if he did not answer questions about Mattice's involvement in the robberies. Sieg answered Detective Quella's questions, eliminating this concern. *Id.*

Accordingly, there is no evidence that Schembera's performance was deficient for failing to explore Sieg's probation status. Even if Schembera could have called Jason and Lisa Sieg's credibility into question, it would have been the equivalent of re-arranging deck chairs on the Titanic. Other witnesses had identified petitioner at the scene of the crime and had testified about his involvement in the robbery.

V. Conflict of Interest

Petitioner argues that he was deprived of his constitutional right to conflict-free counsel at his initial postconviction hearing because Heit's previous representation of Jacob Sieg prevented him from calling Sieg as a witness at the initial postconviction hearing on October 22,

2001. Petitioner asserts that Heit had a continuing duty to protect Sieg from potential probation violations and argues that if Heit had questioned Sieg on alleged discrepancies between his police statement and trial testimony, Sieg might have to admit lying under oath–a potential probation violation. Although the state did not respond to this claim in its answer, the appellate court addressed this issue in ruling on petitioner's postconviction motion, finding that petitioner did not establish that Heit had an actual conflict of interest.

A criminal defendant's right to effective assistance of counsel under the Sixth Amendment includes representation that is free from conflict of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Hall v. U.S.*, 371 F.3d 969, 973 (7th Cir. 2004). There are two ways to assert a claim based on counsel's conflict of interest: 1) under *Strickland*, the attorney had a potential conflict of interest that prejudiced the defense, or 2) an actual conflict of interest adversely affected the lawyer's performance, *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *Hall*, 371 F.3d at 973; *Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir. 1995). By referencing an "actual conflict of interest" in his petition, petitioner appears to be invoking the more lenient standard of *Cuyler*. *Hall*, 371 F.3d at 973 ("Proceeding under *Sullivan* places a 'lighter burden' on the defendant than *Strickland* because demonstrating an 'adverse effect' is significantly easier than showing 'prejudice'."); *Enoch*, 70 F.3d at 1496 ("Most defendants seek relief under *Cuyler* because it is easier to demonstrate.").

Under *Cuyler*, "[a]n actual conflict of interest results if 'the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests,'" and "[a]n adverse effect occurs, if, but for the attorney's actual conflict of interest, there is 'a

[reasonable] likelihood that counsel's performance somehow would have been different.'" *Stoia v. U.S.*, 22 F.3d 766, 771 (7th Cir. 1994) (citations omitted). In habeas cases like this one, where there is successive representation, the Seventh Circuit has held that the petitioner "must show either: 1) the attorney's representation of the first client was 'substantially and particularly related to his later representation of defendant,' or 2) that the attorney actually 'learned particular confidential information during the prior representation of the witness that was relevant to defendant's later case.'" *Hall*, 371 F.3d at 973 (quoting *Enoch*, 70 F.3d at 1496-97).

Initially, I note that the appellate court did not cite federal case law in its decision, but it did not have to. "[A] state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite [the Supreme Court's] opinions." *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (*per curiam*). Indeed, a state court need not even be aware of Supreme Court precedent "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id*. (*quoting Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*)). The appellate court's reasoning demonstrates it's a correct understanding that petitioner had to show an actual conflict of interest that adversely affected Heit's performance.

Sieg's case with Heit was a 1999 burglary. Petitioner does not allege that his case is substantially similar to Sieg's or that Heit learned any actual confidences during his representation of Sieg that were relevant to his case. In fact, petitioner states in his reply brief that "postconviction/appellate counsel . . . had previously represented Sieg in an *unrelated* criminal matter." Dkt. 10 at 14 (emphasis added). Although the court did not specifically address whether Sieg's case was "substantially and particularly related" to petitioner's, nothing

in the record suggests that the two crimes were factually related, shared actors, or were motivated by each other. *See Enoch*, 70 F.3d at 1497. The court of appeals found that Heit did not possess any privileged or confidential information that might have affected petitioner's case. This determination was reasonable given Heit's testimony that he did not know whether Sieg had committed any probation violations or whether his probation was in danger of being revoked.

In its decision, the court cited Heit's testimony that while he had a continuing obligation to maintain confidentiality, he did not believe it would have been a conflict for him to question Sieg about his motives for changing testimony or about his conduct on probation. As a result, the court reasonably determined that Heit's failure to inquire about Sieg's alleged probation violations was based on his judgment that the violations were not relevant to petitioner's case rather than out of any attempt to protect Sieg. *See Enoch*, 70 F.3d at 1498 (Reasonable for court to rely on defense counsel's assessment because attorney is in best position to determine whether conflict exists) (citing *United States v. Fish*, 34 F.3d 488, 493 (7th Cir. 1994)). Accordingly, the court did not act unreasonably in concluding that there was no actual conflict of interest that adversely affected petitioner.

VI. Inadequate Cross Examination and Hearsay Evidence

Petitioner contends that his trial lawyer introduced hearsay evidence from Detective Quella that Sieg identified petitioner's watch, and that counsel failed adequately to cross-examine Ann Gardner's identification of the SuperAmerica robber. The state responds that petitioner procedurally defaulted these claims by failing fairly to present them to the state court in the postconviction hearing on remand.

Under the procedural default doctrine, a federal court cannot review a question of federal law decided by a state court if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004); *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir. 2002). A state ground is "independent" of the federal claim if the state court "actually relied on a state rule sufficient to justify its decision." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1382 (7th Cir. 1990). It is plain from the court of appeals' decision in this case that it did not adjudicate the federal claim but relied on an independent state procedural rule to deny petitioner's undeveloped claims of ineffective assistance of counsel. The court of appeals refused to consider petitioner's claims on the ground that he did not ask his attorneys any questions about Schembera's cross examination of Gardner or solicitation of Quella's hearsay testimony in the evidentiary hearing on remand. The appellate court noted that although petitioner raised these issues in his first § 974.06 motion, he did not raise them in his hearing before the trial court on remand as required under *State v. Machner*, 92 Wis. 2d 797, 804 (Ct. App. 1979).

"A state ground is 'adequate' only if the state court acts in a consistent or principled way." *Prihoda*, 910 F.2d at 1383. In *Machner*, 92 Wis. 2d at 804, the Wisconsin Court of Appeals held:

> [I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.

The court's application of the *Machner* rule was both independent and adequate to support the state court's judgment. Wisconsin courts have been applying *Machner* consistently since 1979 by refusing to consider ineffective assistance of trial counsel claims in the absence of testimony from the trial lawyer.

Where, as here, a petitioner commits state court procedural default, the federal court must deny the defaulted claim with prejudice, thereby foreclosing petitioner's opportunity for federal review of the claims, unless the petitioner can show (1) cause for the default and prejudice resulting therefrom, or (2) a miscarriage of justice would result if the claim were not entertained on the merits. *Perruquet*, 390 F.3d at 514 (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)). To establish cause, "a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court;" to establish prejudice, he must show that the errors "worked to his actual and substantial disadvantage, infecting his entire trial." *Id.* at 514-15. Alternatively, to show a miscarriage of justice, a petitioner "must convince the court that no reasonable juror would have found him guilty but for the error committed by the state court." *Id.* at 515.

Petitioner essentially argues that he had cause for procedurally defaulting his claims because the trial court on remand did not allow him to take testimony about the cross-examination or hearsay evidence issues even though his attorney explained that the court of appeals had remanded the case for a hearing on all of the postconviction claims. The appellate rejected this excuse as unsupport by the record. Having reviewed the June 2005 hearing transcript, I agree that the trial court cannot be blamed for petitioner's failure to adduce

evidence on his defaulted claims. Because petitioner has not offered any other reason for his default, he has failed to establish cause.

For the sake of completeness, I note that even if petitioner's lawyer on remand may have botched the job at the hearing, any errors by that lawyer cannot establish cause. Attorney error will constitute cause "only if it is an independent constitutional violation." *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). Petitioner had no constitutional right to have a lawyer represent him in his collateral attack brought under Wis. Stat. § 974.06. *Id.* at 756; *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (no right to counsel in state collateral proceedings after exhaustion of direct appellate review). It follows that any attorney error that might have led to default cannot constitute cause to excuse the default on federal habeas review. *Coleman*, 501 U.S. at 757.

Finally, petitioner has not attempted to show that he meets the miscarriage of justice exception. Accordingly, this court is precluded from reviewing petitioner's defaulted claims.

VII. Fair trial

Petitioner's final habeas claim is that the cumulative effect of his attorneys' alleged errors denied him a fair trial. The state responds that because petitioner's claims of error are independently insubstantial, their cumulative effect cannot require habeas relief. The appellate court did not adjudicate this claim, apparently denying it on the ground of procedural default because petitioner had not fairly presented it to the trial court in the postconviction hearing on remand. *See* dkt. 9, Exh. R at 1. However, because it seems odd to require petitioner specifically to adduce testimony regarding such a claim at a *Machner* hearing, I will consider

petitioner's claim to be properly presented to the state court and will review it under 28 U.S.C. § 2243. *See Canaan*, 395 F.3d at 382-83.

Cumulative errors, even if harmless individually, conceivably could prejudice a defendant as much as a single reversible error and therefore could violate the defendant's right to due process of law. *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) (citing *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *United States v. Haddon*, 927 F.2d 942, 949-50 (7th Cir.1991)). To demonstrate cumulative error, petitioner must establish that at least two errors were committed in the course of the trial and when considered together along with the entire record, these errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial. *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) (citations ommitted). Courts will consider only plain errors or errors which were preserved for appellate review. *Id.* at 825.

Petitioner cannot prevail on his cumulative effect claim. As the state correctly observes, petitioner either has not shown any error by his counsel at trial or has not preserved claims of such errors for appellate review. Further, even assuming *arguendo* that petitioner has established two trial errors, it is clear from the lengthy discussion above that he suffered no prejudice. Accordingly, the appellate court's failure to grant petitioner a new trial was not unreasonable or contrary to federal law.

The bottom line is that petitioner got a fair trial. His complaints against his attorneys amount to quibbling and unpersuasive second-guessing. Petitioner is not entitled to habeas relief from this court.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny the petition of David Huusko for a writ of habeas corpus and dismiss this case.

Entered this 21st day of May, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
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May 21, 2007

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Re: Huusko v. Endicott
Case No. 07-C- 0059-C

Dear Mr. Huusko and Ms. 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 newly-updated 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 11, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 11, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, Chief Judge