IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TENG VANG,

Petitioner,

v.

WILLIAM POLLARD, Warden,
Green Bay Correctional Institution,

Respondent.

OPINION AND ORDER

10-cv-306-bbc

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Petitioner Teng Vang has moved for reconsideration of the July 28, 2010 order denying his motion for a stay of his habeas corpus petition under 28 U.S.C. § 2254 and dismissing his petition. His motion will be denied. Nothing in the motion shows that it was error to dismiss his petition or deny his motion for a stay.

In his original petition, petitioner argued, among other things, that it was error to deny him a continuance to allow his lawyer to obtain laboratory testing of gun powder residue, for the lead investigator to lie on the stand about the availability and cost of such tests and for his trial counsel not to impeach the investigator's testimony on this point. In his motion, he raises the same issues but argues that these errors amounted to a violation of

due process. Neither this characterization nor his re-argument require reconsideration.

As I explained in the July 28 order, the state court of appeals held that the failure to grant the continuance was of no consequence because the testing that petitioner wanted was not material. It would not have necessarily determined whether he was the shooter. In addition, because he was charged with being a party to the crimes, it was not necessary for the state to prove that he did the actual shooting.

The state appellate court's disposition of the claim is binding on this court unless it is clear that the state court decision "was contrary to, or involved an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d). Petitioner has suggested no reason for finding the decision contrary to clearly established federal law. Federal law would not require giving a criminal defendant a continuance to pursue an issue such as the one petitioner raises that has minimal if any bearing on the outcome of a case.

The alleged false testimony of the investigator about laboratory testing facilities is equally immaterial. Petitioner has not shown how such testimony could have affected the trial's outcome. Without such a showing, it would be pointless to allow him a continuance to investigate this point further. Furthermore, because the alleged false testimony was immaterial, the failure of petitioner's counsel to impeach the witness was not prejudicial to petitioner and could not have violated petitioner's right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

Petitioner raises one additional point. In his original petition, he alleged that the prosecutor acted vindictively in charging him with additional crimes after petitioner succeeded in withdrawing his guilty plea. As I explained in the July 28 order, what seemed to be the product of vindictiveness was merely the reinstatement of all of the original charges after petitioner was allowed to withdraw his guilty plea to less than all of them. Now, petitioner argues that the trial court acted vindictively in imposing a greater sentence after petitioner went to trial on more serious charges than those to which he was exposed in his plea agreement. This is a new issue but it is not one that supports a reversal of his conviction. It is true that the state court gave petitioner a longer sentence at his sentencing after his jury trial, but when petitioner raised this issue on direct appeal, the state court of appeals rejected it. The court of appeals found that the sentencing court had given an adequate explanation for its harsher sentence: petitioner had been found guilty of more serious charges than those to which he had pleaded guilty. This is a reasonable conclusion, supported by the record and in no conflict with federal law.

ORDER

IT IS ORDERED that

1. Petitioner Teng Vang's motion for a reconsideration of the denial of his motion for stay of his petition for federal habeas relief under 28 U.S.C. § 2254 and the dismissal of

his motion is DENIED.

2. I maintain my decision to decline to issue a certificate of appealability because reasonable jurists would not debate the correctness of the rulings in this case. Slack v. McDaniel, 529 U.S. 473, 484 (2000). If petitioner wishes, he may ask a circuit judge to issue the certificate under Fed. R. App. P. 22(b).

Entered this 1st day of September, 2010.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge