

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERVIN PORTER JOHNSON,

Petitioner,

v.

Case No. 07-12783
Honorable Patrick J. Duggan

ERIC BALCARCEL,

Respondent.

_____ /

**OPINION AND ORDER DENYING PETITIONER'S MOTION FOR
CERTIFICATE OF APPEALABILITY**

At a session of said Court, held in the U.S.
District Courthouse, Eastern District
of Michigan, on January 27, 2010.

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

Petitioner, a Michigan prisoner, previously filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 2004 conviction in the Circuit Court for Wayne County, Michigan. In an opinion and order entered on December 22, 2009, this Court denied Petitioner's request for habeas relief. On January 26, 2010, Petitioner filed a notice of appeal and a motion for certificate of appealability.

In his habeas petition, Petitioner asserted three grounds in support of his request for relief, which he summarized as follows:

- I. Defendant is entitled to a new trial where the trial court erred by refusing to let his trial counsel withdraw before trial, given the breakdown in communication between them.

- II. Trial counsel's failure to investigate and other errors constituted ineffective assistance of counsel under the Sixth Amendment requiring a new trial.
- III. Defendant is entitled to a new trial where the trial court refused to allow a brief adjournment of the trial to allow Defendant's alibi witness to appear and testify.

With respect to Petitioner's first ground for relief, the Court concluded that Petitioner failed to establish good cause for allowing his trial counsel to withdraw on the eve of trial. As to Petitioner's second and third grounds for relief, the Court found that Petitioner failed to offer proof as to the substance of the proposed witness' testimony to demonstrate that he was prejudiced by his trial counsel's alleged errors with regard to that witness and the trial court's failure to adjourn the trial to provide Petitioner the opportunity to secure the witness' testimony at trial.

28 U.S.C. § 2253 provides that a certificate of appealability may issue only if a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). As the Supreme Court has stated, when a district court denies a habeas petition on the merits of the claims presented, a certificate may issue if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). Petitioner fails to establish that reasonable jurists would find the Court's assessment of his claims debatable or wrong. Therefore, the Court holds that Petitioner is not entitled to a certificate of appealability.

Accordingly,

IT IS ORDERED, that Petitioner's motion for certificate of appealability is
DENIED.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

Ervin Porter Johnson, #336432
Pine River Correctional Facility
320 N. Hubbard
St. Louis, MI 48880

Laura A. Cook, Esq.
Magistrate Judge Paul Komives