

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

TOD A. PABST,

Petitioner,

v.

CASE NO. 08-3258-SAC

DAVID A. McKUNE and  
STEPHEN SIX,

Respondents.

O R D E R

This matter comes before the court on petitioner's Notice of Appeal (Doc. 25), motion for a Certificate of Appealability (Doc. 26), and motion for leave to proceed on appeal in forma pauperis (Doc. 27).

By a memorandum and order issued on September 9, 2010, the court denied habeas corpus relief. Pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, Title 28, U.S.C., §§ 102 and 103 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, this appeal may not proceed unless a district judge or circuit judge issues a certificate of appealability.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court clarified the standard to be applied by federal courts under 28 U.S.C. § 2253, as revised by the AEDPA. See *id.* at 483-84. "Under AEDPA, a COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Id.*

at 483 (quoting § 2253(c)).

To satisfy this requirement for claims determined on their merits, a petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. For claims denied on procedural grounds, a petitioner must establish "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and ... whether the district court was correct in its procedural ruling." *Id.*

Having considered petitioner's motion, the court finds petitioner has made a sufficient showing to support the issuance of a certificate of appealability. The issues which merit additional review are whether prosecutorial conflict deprived petitioner of a fair trial and whether petitioner's trial and appellate counsel provided ineffective assistance by failing, respectively, to request removal of the prosecutor and to pursue the alleged conflict of interest on appeal.

The court defers ruling on petitioner's application for leave to proceed in forma pauperis pending receipt of a current financial statement.

IT IS, THEREFORE, BY THE COURT ORDERED petitioner's motion for a certificate of appealability (Doc. 26) is granted.

Copies of this order shall be transmitted to the parties and to the Clerk of the United States Court of Appeals for the Tenth Circuit.

**IT IS SO ORDERED.**

DATED: This 20<sup>th</sup> day of October, 2010, at Topeka, Kansas.

S/ Sam A. Crow  
SAM A. CROW  
U.S. Senior District Judge