

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

DAVID LEE AUSTIN,

Petitioner,

vs.

JOHN AULT,

Respondent.

No. C02-0064-MWB

**REPORT AND
RECOMMENDATION**

I. INTRODUCTION

On May 6, 2002, the petitioner David Lee Austin (“Austin”) filed a petition for writ of *habeas corpus* in this court pursuant to 28 U.S.C. § 2254. In the petition, Austin challenged his conviction on a charge of second-degree sexual abuse in Black Hawk County, Iowa, District Court. (Doc. No. 5) Austin filed an amended petition on May 16, 2002 (Doc. No. 6), and a second amended petition on July 8, 2002 (Doc. No. 15).¹ The respondent John Ault (“Ault”) answered the second amended petition on July 24, 2002. (Doc. No. 17) The merits of Austin’s second amended petition are presented to this court in a brief filed by Austin on October 28, 2002 (Doc. No. 19); a brief filed by Ault on December 23, 2002 (Doc. No. 21); and a reply brief filed by Austin on February 10, 2003 (Doc. No. 24).

On November 22, 2002, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) for the

¹In his second amended petition, Austin incorporated the claims made in his first amended petition, and added two additional claims.

filing of a report and recommended disposition. (Doc. No. 20) The court finds the matter has been fully submitted, and turns to a consideration of the merits of the claims asserted by Austin in his action.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY IN STATE COURTS OF IOWA

On May 8, 1997, a jury in the Black Hawk County, Iowa, District Court found Austin guilty of second-degree sexual abuse. Austin filed a motion for new trial on May 19, 1997, and a second motion for new trial on June 10, 1997. Both motions were denied on July 10, 1997, and Austin was sentenced to twenty years in prison. His conviction was affirmed on direct appeal, but the case was remanded to the district court for re-sentencing. *State v. Austin*, 585 N.W.2d 241 (Iowa 1998). After the case was remanded, Austin filed a third motion for new trial. Austin was re-sentenced on November 2, 1998. His third motion for new trial was denied on June 11, 1999. He did not appeal.

On July 19, 1999, Austin filed an application for state post-conviction relief. The application was denied on May 25, 2001. He appealed from this ruling, but on April 2, 2002, his appeal was dismissed by the Iowa Supreme Court as frivolous, and *Procedendo* issued on April 9, 2002.

In ruling on Austin's direct appeal, the Iowa Supreme Court described the background facts of this case as follows:

This case involves an eight-year-old female victim, A.H. Austin had lived with the girl's mother and her three children since December 24, 1995. On May 7, 1996, the victim's mother left the family home to take one of her children to the doctor. She made arrangements for A.H. to go to a friend's

apartment after school. However, A.H. did not go directly to the friend's apartment but stopped by her own apartment.

A.H. testified that when she got home Austin was there. She told him that she was supposed to go to her friend's house. Austin accused her of lying. He told her to go to her room and remove her clothes, and she complied. Austin came into the room and told her to turn away from him. A.H. provided slightly divergent testimony about whether she was standing up or leaning over the bed when the defendant touched her from behind. She then described the alleged assault.

A.H. told her cousin about the incident, and the report found its way to the victim's mother, who immediately took her to a doctor. This doctor referred A.H. to Dr. Opdebeek, a specialist who concluded that A.H. probably suffered vaginal penetration consistent with the abuse allegation.

Shannon Cooper, a social worker at St. Luke's Child Protection Center, videotaped an interview with A.H. prior to Dr. Opdebeek's examination. An officer of the Waterloo Police Department, a police investigator, and a member of the child abuse unit of the department of human services, observed Cooper's interview through a two-way mirror.

Austin, 585 N.W.2d at 242-42.

In his first and second amended petitions, Austin raises the following six issues:

- (1) his conviction was obtained by an unconstitutional failure of the prosecution to disclose favorable evidence;
- (2) he was denied effective assistance of trial counsel due to lack of preparation;
- (3) he was denied due process because the prosecution reneged on an agreement to continue the trial;
- (4) the prosecution violated its ethical duties by withholding discovery;

- (5) he was denied effective assistance of counsel in his post-conviction relief action because his attorney failed to preserve issues for appeal; and
- (6) he was denied effective assistance of appellate counsel because his attorney failed to preserve issues for appeal.

(Doc. No. 19, pp. 1-2) Ault argues all of these claims have been procedurally defaulted, and otherwise are meritless.

In Austin's first motion for new trial, Austin's attorney argued he was not provided with discovery in a timely fashion, and he was denied a continuance which would have allowed him time to investigate the case, and thereby defend his client. In his second motion for new trial, Austin argued he had located several alibi witnesses, and this constituted newly discovered evidence. The district court denied both motions.

On direct appeal, Austin argued two issues: (1) "The district court erred in admitting the videotape interview of A.H. based on Iowa RS. EVID. 106(a) and 801(d0(1))"; and (2) "Trial counsel failed to provide effective assistance of counsel by failing to object to the imposition of the mandatory minimum sentence pursuant to Iowa Code Section 902.11." (Appellant's Brief and Argument, filed June 5, 1998, Iowa Sup. Ct. No. 97-1284) The Iowa Supreme Court ruled the district court had not erred in admitting the videotaped interview of A.H., but the court agreed the mandatory minimum sentence had been imposed improperly and remanded the case for re-sentencing.

In Austin's third motion for new trial, filed after the remand, he argued (1) there was additional newly discovered evidence, and (2) his trial counsel was ineffective because he failed to investigate his case thoroughly or prepare the case adequately for trial. The district court denied the motion. The court noted the "newly discovered evidence" was a report from a witness, Dr. Barbara Oolman, that was known to Austin's attorney before the trial. Dr. Oolman was deposed and then testified for the defense at trial. The court

further held trial counsel was not ineffective. Finally, the court noted neither of these issues was raised on direct appeal, and therefore both issues were procedurally defaulted. Austin did not appeal from this ruling.

In Austin's post-conviction relief action, he argued his trial counsel was ineffective in not preparing adequately for trial. The PCR court held that because Austin had not raised ineffective assistance of trial counsel in his direct appeal, the issue was procedurally defaulted. The PCR court nevertheless addressed the issue on its merits, and found Austin's trial counsel was not ineffective. The PCR court further held Austin's appellate counsel was not ineffective in failing to raise the issue on appeal, given that trial counsel was not ineffective. Austin appealed the ruling on appellate counsel's ineffectiveness to the Iowa Supreme Court, and the appeal was dismissed as frivolous.

The court turns now to consideration of these issues.

III. PROCEDURAL DEFAULT

Ault argues all of Austin's claims in this action are procedurally defaulted. The Eighth Circuit Court of Appeals has explained repeatedly:

Before a federal court may reach the merits of a claim in a *habeas* petition by a state prisoner, it "must first determine whether the petitioner has fairly presented his federal constitutional claims to the state court." *See Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (*per curiam*); *McCall v. Benson*, 114 F.3d 754, 757 (9th Cir. 1997). "In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts." *McCall*, 114 F.3d at 757 (internal quotations omitted).

Frey v. Schuetzle, 151 F.3d 893, 897 (8th Cir. 1998).

Of Austin's six issues in the present action, noted above, Austin failed to raise claims (1), (3), (4), and (5) as constitutional arguments in the state courts. The Iowa courts therefore did not have the full opportunity to pass upon, and potentially correct, these alleged violations of federal constitutional rights in connection with Austin's conviction. Providing the State with such an opportunity is a necessary precursor to federal review. *See id.*; *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) (prisoner must give state courts an opportunity to rule on his claims before presenting them to federal court in *habeas* petition); *Hood v. Helling*, 141 F.3d 892, 896 (8th Cir. 1998) (citing *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 888, 130 L. Ed. 2d 865 (1995)); 28 U.S.C. § 2254(b)(1)(a), (c).

Austin's first claim is that the prosecution failed to disclose favorable evidence. Although Austin argued in both his first and third motions for new trial that the prosecution failed to provide timely discovery, he never asserted the claim on constitutional grounds. Even if the claim had been asserted on constitutional grounds, it was not preserved for this court's review because Austin did not raise the issue on appeal.² *Id.* Therefore, the claim is unexhausted, procedurally defaulted, and should be denied.

Austin's third claim, that he was denied due process because the prosecution reneged on an agreement to continue the trial, was not raised in the Iowa state courts, and is therefore unexhausted, procedurally defaulted, and should be denied. *Id.*

²In Austin's direct appeal, which was prosecuted after the trial court denied his first and second motions for new trial, he did not pursue this issue. Austin filed no appeal from the denial of his third motion for new trial, even though it was an appealable final judgment. *See* Iowa R. App. P. 6.1(1) ("any order denying a new trial shall be deemed a final decision.")

His fourth claim, that the prosecution violated its ethical duties by withholding discovery, appears to be identical to the first issue, and likewise is exhausted, procedurally defaulted, and should be denied. *Id.*

The fifth claim, that Austin was denied effective assistance of counsel in his post-conviction relief action because of the attorney's failure to preserve issues for appeal, was never raised in the Iowa state courts, and is therefore unexhausted and procedurally defaulted. Furthermore, Austin has no constitutional right to counsel in a state post-conviction action, and therefore, PCR counsel's ineffectiveness is not a cognizable claim, either independently or as "cause" for procedural default. *See Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999), *and Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (both citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991)). This claim also should be denied.

Austin's second claim, that he was denied effective assistance of trial counsel because his trial counsel was unprepared for trial, and his sixth claim, that his appellate counsel was ineffective in failing to preserve the issue for appeal, will be addressed below.

IV. LEGAL ANALYSIS

A. General Standard of Review

The standard of review to be utilized by this court in considering Austin's non-procedurally defaulted claims is governed by the recent United States Supreme Court decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The *Williams* analysis focuses on the requirements of the federal *habeas* statute, 28 U.S.C. § 2254, in light of amendments enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The amendment "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." 529 U.S. at 399, 120

S. Ct. at 1516. For a state prisoner “to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1) . . . [which] modifies the role of federal habeas courts in reviewing petitions filed by state prisoners.” 529 U.S. at 403, 120 S. Ct. at 1518. Specifically, the AEDPA limited the source of legal doctrine upon which federal courts may rely in considering a state prisoner’s *habeas* petition to “clearly established law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 381, 399, 120 S. Ct. at 1506-07, 1516.

Prior to the AEDPA’s enactment, federal courts could “rely on their own jurisprudence in addition to that of the Supreme Court.” *Williams*, 529 U.S. at 381, 120 S. Ct. at 1507. The Court explained that subsequent to the AEDPA:

Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.”

Williams, 529 U.S. at 404-05, 120 S. Ct. at 1519 (quoting 28 U.S.C. § 2254(d)(1)).

Under the first category, a state-court decision is “contrary to” Supreme Court precedent “if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” *Id.*, 529 U.S. at 405, 120 S. Ct. at 1519. The Court explained:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Id., 529 U.S. at 412-13, 120 S. Ct. at 1523. Further, “the phrase ‘clearly established Federal law, as determined by the Supreme Court of the United States’ . . . refers to the holdings, as opposed to the dicta, of [the Court’s] decisions as of the time of the relevant state-court decision.” *Id.*, 529 U.S. at 412, 120 S. Ct. at 1523.

The second category, involving an “unreasonable application” of Supreme Court clearly-established precedent, can arise in one of two ways. As the Court explained:

First, a state-court decision involves an unreasonable application of this Court’s precedent if the state court identifies the correct governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case. Second, a state-court decision also involves an unreasonable application of this Court’s precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id., 529 U.S. at 407, 120 S. Ct. at 1520 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case,” that decision “certainly would qualify as a decision ‘involv[ing] an unreasonable application of . . . clearly established federal law.’” *Id.*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Notably,

Under § 2254(d)(1)’s “unreasonable application” clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id., 529 U.S. at 411, 1250 S. Ct. at 1522.

If the state court decision was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and if it did not involve an

unreasonable application of that law, then the federal court must determine whether the state court decision “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).

B. Law Applicable to Ineffective Assistance of Counsel Claims

The standard for proving ineffective assistance of counsel was established by the Supreme Court in *Strickland v. Washington*:

First, the defendant must show that counsel’s performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added).

The reviewing court must determine “whether counsel’s assistance was reasonable considering all the circumstances.” *Id.*, 466 U.S. at 688, 104 S. Ct. at 2065.

The defendant’s burden is considerable, because “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). “Reasonable trial strategy does not constitute ineffective

assistance of counsel simply because it is not successful.” *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996).

Furthermore, even if the defendant shows counsel’s performance was deficient, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067.

Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel’s errors were unreasonable, to go further and show the errors “actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test.” *Id.* See *Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). Rather, a petitioner must demonstrate “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A petitioner must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. See *id.*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that “if it is easier to dispose of an ineffectiveness claim on the ground of lack of

sufficient prejudice, that course should be followed.” *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

In short, a conviction or sentence will not be set aside “solely because the outcome would have been different but for counsel’s error, rather, the focus is on whether ‘counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.’” *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

C. Ineffective Assistance of Trial Counsel

Except with respect to a sentencing error missed by both trial counsel and the trial court and remedied by the Iowa Supreme Court, Austin did not assert ineffective assistance of trial counsel in his direct appeal. The PCR court therefore found the claim had been procedurally defaulted. “Ineffective assistance of trial counsel must be raised in Iowa on direct appeal before postconviction relief is available, unless the defendant can show sufficient reason for the default.” *Knox v. Iowa*, 131 F.3d 1278, 1281 n.2 (8th Cir. 1997) (citing *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981)).

However, the Iowa Supreme Court has explained:

[A] claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence “sufficient reason” for not having raised the issue at trial and on direct appeal, and also establishes actual prejudice resulting from the alleged errors. *Polly v. State*, 355 N.W.2d 849, 855-56 (Iowa 1984). Ineffective assistance of appellate counsel may provide “sufficient reason” to permit the issue of ineffective assistance of trial counsel to be raised for

the first time in a proceeding for postconviction relief.
Washington [v. Scurr], 304 N.W.2d at 235.

Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991). Consistent with *Jones*, Austin asserts the ineffectiveness of his appellate counsel was “cause” for his failure to raise the issue of his trial counsel’s ineffectiveness on direct appeal. He argues his appellate counsel was ineffective in failing to preserve the issue of his trial counsel’s effectiveness for review.

The PCR court found Austin had failed to “establish sufficient reason for not raising the alleged ineffectiveness [of trial counsel] in prior proceedings.” (Doc. No. 22, tab D, p. 2) The PCR court noted appellate counsel was aware of the issues relating to trial counsel’s preparedness, and those issues “were specifically litigated in [Austin’s] renewed motion for new trial.” (*Id.*)

Furthermore, Austin’s trial counsel testified at the PCR trial, and despite finding the issue to be procedurally defaulted, the PCR court addressed Austin’s ineffective assistance of counsel claim on the merits. The PCR court noted the following:

Based upon the entire records in this case, including [trial counsel’s] testimony, the court cannot conclude that [trial counsel] was ineffective or that [Austin’s] appellate counsel was ineffective for failing to raise trial counsel’s ineffectiveness on appeal. Specifically, [trial counsel] does not agree that he was “unprepared” for trial. The most favorable position [trial counsel] can assert for [Austin] is that he was not as prepared as he would have been had he been given more time. [Trial counsel] could not say that [Austin] was denied a fair trial, just that he could have done a better job if he would have had more time. The court also notes that [Austin] was very involved in his case. He submitted many filings on his own, and took control of his case in regards to continuances. He filed a document refusing to allow a continuance in his case. [Austin] had demanded a speedy trial. No waiver of speedy trial is reflected in the court file or the record. The 90-day speedy trial deadline was about to arrive. [Austin] was

insistent that his case be tried quickly. Even if any late delays were chargeable to [Austin] for speedy trial purposes, speedy trial issues could have later arisen if the trial had been continued with time taxed to [Austin] and then for some reason the trial could not go forward at the continued date as anticipated.

Although there was a substantial amount of activity and trial preparation conducted in the eight days before trial, the court is aware that that is usually the case. It is typical for a substantial amount of trial preparation to occur in the days immediately preceding trial.

Thus, even if [Austin] had raised ineffectiveness of trial counsel on appeal and preserved that issue for post-conviction relief, the court would conclude, based upon the record presented, that [Austin] was not denied effective assistance of trial counsel. Because [Austin's] ineffective assistance of trial counsel claim must fail, so must his claim for ineffective assistance of appellate counsel.

(*Id.*, pp. 2-3)

The PCR's court's ruling that Austin had not shown sufficient cause for failing to raise ineffective assistance of trial counsel as an issue on appeal is consistent with *Strickland*, and does not represent an unreasonable application of applicable law, nor was the PCR court's determination of the facts unreasonable in light of the evidence. "[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572, 71 L. Ed. 2d 783 (1982). The court finds Austin has failed to satisfy the "cause" prong of the *Strickland* analysis, and this claim should be denied.

D. Ineffective Assistance of Appellate Counsel

Austin's sixth claim, ineffectiveness of appellate counsel, was presented to the PCR court, and then was appealed unsuccessfully to the Iowa Supreme Court. Therefore, Austin has exhausted his State court remedies on this issue, and the issue is properly before this court.³

As noted above, the PCR court found that because Austin had failed to prove his trial counsel was ineffective, he therefore could not prevail on a claim that his appellate counsel was ineffective in failing to preserve the issue of trial counsel's ineffectiveness. The court finds that in ruling on this issue, the PCR court reached legal conclusions that were consistent with, and not contrary to, Supreme Court precedent. The PCR court made a reasonable determination of the facts in light of the evidence, and reasonably applied the law to the facts in the case.

Because the court has found Austin cannot prevail on his claim for ineffective assistance of trial counsel, his appellate counsel's failure to preserve the issue cannot have been ineffective. This claim should be denied.

IV. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Austin has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be issued.

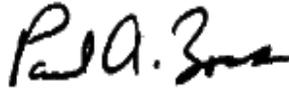
³ Ault's discussion of Austin's claim that his appellate counsel was ineffective was limited to the observation that because the Iowa court "reasonably rejected" the claim that Austin's trial counsel was ineffective, "[i]t follows that the court also exonerated [Austin's] direct appeal counsel's decision not to preserve this issue for PCR proceedings." (Doc. No. 21, pp. 26-27)

V. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections⁴ to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), within ten days of the service of a copy of this Report and Recommendation, that Austin's petition be denied, and judgment be entered in favor of Ault and against Austin.

IT IS SO ORDERED.

DATED this 11th day of February, 2004.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

⁴Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).