

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANA GOODINE,)
)
 Petitioner)
)
 v.) Civil No. 95-0246-B
)
 JEFFREY MERRILL,)
)
 Respondent)

RECOMMENDED DECISION

Petitioner raised several claims of ineffective assistance of counsel in this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On December 12, 1995, the Court issued an Order in which it indicated that one of Petitioner's claims had been raised and decided on Petitioner's first Petition for Writ of Habeas Corpus. Accordingly, this claim, that Petitioner was denied the effective assistance of counsel for counsel's failure to permit him to testify at trial, is barred. Rule 9, Rules Governing Habeas Petitions, foll. 28 U.S.C. § 2254. The Court appointed counsel to assist Petitioner, and directed a hearing be held on the question whether the remaining grounds constituted an abuse of the writ for purposes of Rule 9. The Court further directed that the parties address the merits of these claims, which are:

1. Whether Petitioner was denied the effective assistance of trial counsel for counsel's failure to present certain testimony which allegedly would have provided Petitioner with an alibi; and
2. Whether Petitioner was denied the effective assistance of trial counsel on the basis of an alleged conflict of interest in counsel's representation of an individual charged with raping one of Petitioner's alibi witnesses; and

3. Whether Petitioner was denied the effective assistance of counsel by the State Court's denial of counsel's motion to withdraw.¹

Hearing on the Petition began on March 1, 1996, with Petitioner's testimony. Following that portion of the hearing, the Court issued an Order, dated March 20, 1996, in which it concluded that the issue regarding the alibi witnesses was also barred by the Court's decision on the earlier Petition. The Court limited the remainder of the hearing to the question regarding counsel's motion to withdraw, and failure to move for a directed verdict. We further concluded as to the former that it did not constitute an abuse of the writ. The Court indicated it would address the attorney withdrawal claim on the merits. The hearing was continued to April 10, 1996.

In light of these limitations, the only testimony presented at the April 10 hearing was that of Richard Romanow, Esq., Petitioner's trial counsel. In his closing argument, Petitioner conceded that his claim regarding counsel's failure to move for a directed verdict on one of the three counts of his conviction was barred by Rule 9 for its having been decided on the merits in the earlier petition. Accordingly, the sole issue remaining for resolution is whether Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when the State court denied counsel's motion to withdraw without a hearing. The Court concludes that he was not.

Petitioner argues that his constitutional right to counsel of his choice was violated by the trial court's refusal to grant a hearing on counsel's motion to withdraw. The Court acknowledges that "[t]he sixth amendment right to effective assistance of counsel encompasses the corollary that defendants have a right to choose their counsel." *United States v. Richardson*, 894 F.2d 492, 495-96

¹ This claim was also raised in the first petition, but was not decided on the merits for the reason that the Court viewed it as further explanation of other of Petitioner's stated grounds, rather than as a separate ground for relief.

(1st Cir. 1990) (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("it is hardly necessary to say, that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.")). This rule has not been extended, however, to a choice of *court-appointed* counsel. Cf., *Richardson*, 894 F.2d at 494 (defendant hired new attorney week before trial); *United States v. Panzardi-Alvarez*, 816 F.2d 813 (1st Cir. 1987) (defendant retained out-of-state counsel); see also, *Morris v. Slappy*, 461 U.S. 1, 23 n.5 (1983) (Brennan, J., concurring) ("it is clear that when an accused is financially able to retain an attorney, the choice of counsel to assist him rests ultimately in his hands and not in the hands of the State").

In this case, Petitioner sought the withdrawal of his court-appointed counsel, without naming the attorney he preferred. Petitioner testified before this Court that he did not want a particular attorney, just a different one. So while counsel explained to Petitioner that his wish to have counsel removed from the case would be enhanced if Petitioner would find substitute counsel who was ready and willing to appear in his stead, Petitioner took no steps to secure substitute counsel.

The record further reflects that Petitioner and his attorney were able to work together, and although Petitioner was not pleased with counsel's advice, he acted accordingly. So for example, while Petitioner may still wish counsel had agreed that Petitioner's 'alibi witnesses' were credible, it is nevertheless true that at the time of trial, Petitioner accepted counsel's advice against calling them to testify.

Petitioner's request for substitute counsel under these circumstances was nothing more than a request that the trial court continue "shopping" on his behalf for an attorney who would be more inclined to agree with Petitioner. Accordingly, even were the Court to impose the standards articulated in *Richards* and *Panzardi-Alvarez* in a case involving court-appointed counsel, this is

simply not a case where the trial court gave inappropriate "deference to a criminal defendant's actual choice of counsel." *Panzardi-Alvarez*, 816 F.2d at 816.

Conclusion

For the foregoing reasons, I hereby recommend the Petition for Writ of Habeas Corpus be DENIED in its entirety.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on December 6, 1996.