

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>RICHARD POTTIOS,</b>	)	
	)	
<b>Petitioner</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 98-188-B</b>
	)	
<b>JEFFREY D. MERRILL, WARDEN</b>	)	
	)	
<b>Respondent</b>	)	

**RECOMMENDED DECISION TO DENY  
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, Richard Pottios, seeks a writ of habeas corpus pursuant to 28 U.S.C. section 2254. On October 20, 1988, a jury convicted Petitioner of aggravated assault and criminal mischief in violation of 17-A M.R.S.A. sections 208(1)(A) & 806(1)(A) (1983). Petitioner's conviction has been upheld on both his direct appeal and his state post-conviction challenge. Petitioner comes now before the Court and claims that he was denied effective assistance of counsel at various stages during his trial and that the trial judge abused his discretion by permitting the state to admit evidence of Petitioner's past rape conviction to impeach Petitioner if Petitioner chose to testify. For the reasons stated below, the Court recommends that the petition be DENIED.

**I. Background**

This case arises out of Petitioner's conviction of aggravated assault and criminal mischief. Petitioner was found guilty of smashing a car window and beating Donald Clark with a tire iron or lead pipe. Petitioner appealed his conviction on the grounds that: (a) the trial judge

committed error by permitting the state to use Petitioner's prior rape conviction to impeach Petitioner if Petitioner chose to testify; (b) that insufficient evidence existed to support his aggravated assault conviction. The Law Court affirmed Petitioner's conviction in a judgment dated September 26, 1989.

On September 8, 1995, Petitioner filed his state post-conviction challenge in Maine Superior Court (York County). In the challenge, Petitioner argued that trial counsel committed several errors that deprived him of his Sixth amendment protection against ineffective assistance of counsel. The Superior Court conducted an evidentiary hearing in which the trial judge and Petitioner's trial attorney testified. The Court later issued an order that denied Petitioner's request for post-conviction relief. On December 31, 1997, the Law Court affirmed the Superior Court's order.

## **II. Analysis**

Petitioner lists three grounds in his application for the writ. Petitioner contends that: 1) trial counsel provided him ineffective assistance of counsel because he denied Petitioner's right to take the stand on his own behalf; 2) trial counsel provided ineffective assistance of counsel by failing to make an offer of proof as to Petitioner's testimony so that the trial judge could properly determine whether evidence of Petitioner's past rape conviction should be allowed into evidence pursuant to Rule 609 of the Me. R. Evid.; 3) the trial judge committed error by deciding to admit Petitioner's past rape conviction for the sole purpose of impeaching Petitioner if Petitioner chose to testify. Before addressing each of the grounds raised by Petitioner the Court will first address two issues raised by Respondent, namely, whether Petitioner is statutorily

barred from filing his petition and whether the Court can consider factual allegations made by Petitioner in what appears to be a memorandum in support of his petition.

*A. Statute of limitations*

Respondent argues that under the Antiterrorism and Effective Death Penalty Act (AEDPA) Petitioner is statutorily barred from filing his petition pursuant to section 2254. For our purposes, the relevant portions of section 2244 of the AEDPA reads:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

...

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. section 2244(d)(1) & (2).

In the case at bar, the relevant starting date for calculating the statute of limitations period is December 26, 1989, the final day on which Petitioner could file his writ of certiorari appealing the Law Court order denying his direct appeal. The AEDPA was signed on April 24, 1996, therefore, even excluding the period when Petitioner's state post-conviction appeal was pending from September 8, 1995 to December 31, 1997, Petitioner's application for the writ is over six years late.

The Constitution, however, requires that a reasonable time period be permitted for existing causes of action to be filed before imposing the limitation period. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *see also Black v. North Dakota*, 461 U.S. 273, 286 n.23 (1983) (applying the same requirement to state statutes). Accordingly, many federal circuits have, in the interests of equity, applied a one year grace period allowing those persons whose habeas petitions would have been time barred under the AEDPA until April 23, 1997 to file their petitions. *United States v. Flores*, 135 F.3d 1000, 1004-05 (5th Cir.1998). *See also United States v. Simmonds*, 111 F.3d 737, 745-46 (10th Cir.1997); *Burns v. Morton*, 134 F.3d 109,111-12 (3d Cir. 1998); *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir.1997) (reasonable time allowed); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir.1996), *rev'd on other grounds*, 521 U.S. 320 (1997).

At issue in this case is whether the one year grace period is tolled when a state post-conviction appeal is pending during the one year grace period, i.e. from April 24, 1996 - April 23, 1997. Addressing this issue, this Court previously wrote that:

Ordinarily, then, Petitioner would have been required to file this Petition no later than April 23, 1997 to be timely under the amendment. In this case, however, Petitioner had a state post-conviction review petition pending on April 24, 1996, and it remained so until the Law Court denied him leave to appeal the result on February 12, 1997. This period is not counted toward the one-year limit, 28 U.S.C. § 2244(d)(2), so the deadline actually expired on February 11, 1998.

*Leone v. Merrill*, Civ. No. 98-0038-B (Recommended Decision, May 21, 1998). Respondent argues that this Court's reasoning in *Leone* was flawed, and instead urges the Court to apply April 23, 1997 as the latest date Petitioner could file his petition even though an outstanding state post-conviction appeal was pending. Other courts that have confronted an outstanding state post-conviction appeal during the one year grace period have, as this Court did in *Leone*, tolled the

grace period pending resolution of the state post-conviction appeal. *Ellis v. Johnson*, 11 F.Supp. 2d 695, 697 (N.D. Texas 1998) (“Petitioner’s state habeas corpus proceeding tolled the limitation period pursuant to 28 U.S.C. section 2244(d)(2) from July 10, 1996, when he filed his [state post-conviction] application, until April 9, 1997, when the Texas Court of Criminal Appeals dismissed his state habeas application for abuse of the writ.”); *Amar v. Cain*, 1998 WL 378143, \*3 (E.D. La. July 2, 1998) (“[S]ince petitioner had a properly filed post-conviction application pending in the state courts during the one year grace period (April 24, 1996 through April 23, 1997), this Court finds that the one year [grace] period for filing was tolled until January 10, 1997 when the Louisiana Supreme Court acted on petitioner’s application for post-conviction relief.”)

In the case at bar, Petitioner state post-conviction was pending on April 24, 1996, and it remained so until the Law Court’s December 31, 1997 order refusing to grant Petitioner post-conviction relief. Accordingly, the one year grace period was tolled until December 31, 1997, thereby giving Petitioner until December 31, 1998 to file his federal habeas petition. Petitioner filed his petition on September 11, 1998, well within the time period permitted. As a result, Respondent’s request to dismiss this petition as time barred is DENIED.

***B. Petitioner’s attached document entitled “Petition for Habeas Corpus”***

In addition to filing a printed form petition that was sworn to under penalty of perjury, Petitioner filed with the Court a lengthy document he entitled “Petition for Habeas Corpus.” This document contains a twenty-six page memorandum of law with supporting materials attached. Petitioner did not sign the memorandum under oath or have a notary sign the memorandum. It is clear that in this Circuit, “A habeas application must rest on a foundation of

factual allegations presented under oath, either in a verified petition or supporting affidavits. . . . Facts alluded in an unsworn memorandum will not suffice.” *United States v. LeBonte*, 70 F.3d 196, 1413 (1<sup>st</sup> Cir. 1995), *rev’d on other grounds*, 117 S.Ct. 1673 (1997). Accordingly, the Court recommends that Petitioner’s unsworn submission entitled “Petition for Habeas Corpus” be stricken from the record.<sup>1</sup>

### **C. Grounds Raised by Petitioner**

#### ***a. Ineffective assistance of counsel - Grounds I and II***

Petitioner claims that trial counsel rendered him ineffective assistance of counsel. Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Petitioner must demonstrate to the Court that counsel’s performance was deficient. *Id.* at 687. Second, Petitioner must also show that, but for counsel’s deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel’s performance. *Id.* “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.*

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<sup>1</sup> The Court notes that it has reviewed the substance of Petitioner’s unsworn submission, and is satisfied that had the Court permitted the submission to stay on record the recommendation in this matter would have been unchanged.

Petitioner first argues that Petitioner denied him ineffective assistance of counsel by refusing to allow Petitioner to testify at his trial. The law is clear that defense counsel has an affirmative duty to advise a defendant of his right to testify and must accede to a defendant's choice, even if defense counsel strongly disagrees with that choice. *Lema v. United States* 987 F.2d 48, 52 n.3 (1<sup>st</sup> Cir. 1993); *United States v. Camacho*, 40 F.3d 349 (11<sup>th</sup> Cir. 1994), *cert denied*, 514 U.S. 1090 (1995). In fact, under the Fifth Amendment, a defendant has a right to testify even if defense counsel objects to his client's choice to testify.<sup>2</sup> *Lema*, 987 F.2d at 52-53, (citing *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir.), *cert. denied*, 121 L.Ed.2d 82 (1992); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987)) Although couched in Petitioner's ineffective assistance of counsel claim, the state post-conviction hearing examined whether Petitioner's counsel prevented Petitioner from testifying. Based on trial counsel's and Pottios's testimony at the hearing the state post-conviction judge wrote:

The testimony presented at the post conviction hearing leads the court to conclude that [trial counsel] discussed with [Petitioner] whether he should take the stand, knowing that the rape conviction would be used by the state for purposes of impeachment. *[Trial counsel's] advice was for [Petitioner] not to take the stand and [Petitioner] agreed to follow that advice.*

*Pottios v. State*, CR-95-712 (Super. Ct., York Cty. 1996) (italics added). Based on its finding above, the Court determined that Petitioner received effective counsel at the trial. Further, it is clear from the excerpted portion of the judge's opinion above, that the state post-conviction court was satisfied that defense counsel did not prevent Petitioner from testifying.

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<sup>2</sup> None of the parties addressed the Fifth Amendment implications of Petitioner's claim that trial counsel prevented him from testifying.

A habeas petition can attack two aspects of a state post-conviction decision. The petitioner can attack the factual findings or the petitioner can attack the state court's application of the law. To find differently from the factual findings stated in the state post-conviction decision this Court must find that Petitioner presented clear and convincing evidence to this Court that rebutted the state post-conviction factual findings. 28 U.S.C. § 2254(e)(1). If the post-conviction court's application of the law is attacked, the Petitioner must demonstrate that the state court's application was "contrary to", or involved an unreasonable application of, clearly established federal law. 28 U.S.C. §2254(d)(1).

After reviewing the record, the Court is satisfied that Petitioner has not presented clear and convincing evidence to rebut the presumed correctness of the state post-conviction factual findings as required under the AEDPA. 28 U.S.C. § 2254(e)(1). Petitioner presents no new evidence to this Court. Instead, Petitioner merely asks this Court to make different findings than the state post-conviction court. This the Court refuses to do. Having found that the state post-conviction court's findings are correct, the Court is satisfied that the post-conviction court's application of the *Strickland* standard was not "contrary to" or involved an unreasonable application of, clearly established federal law. 28 U.S.C. §2254(d)(1). Further, the Court is satisfied based on the factual findings of the state post-conviction court Petitioner's Fifth Amendment right to testify was not violated.

Petitioner next contends that trial counsel rendered him ineffective assistance of counsel when he failed to make an offer of proof in response to the State's motion in limine to allow Petitioner's previous rape conviction to impeach Petitioner if Petitioner chose to testify. No dispute exists that the trial judge granted the State's motion and that trial counsel failed to make

an offer of proof. In Petitioner's post-conviction evidentiary hearing the trial judge was asked whether Petitioner's offer of proof, namely an offer describing the substance of Pottios's testimony should Pottios chose to testify, would have influenced his decision to grant the state's motion. The judge stated:

I don't see how the offer of proof relating to evidence that the defendant might present relates in anyway to the issue that I have to decide [Rule 609] . . . It seems to me implicit in any defense concern about evidence of prior convictions that it might affect the defendant's decision as to whether or not to testify. I think that that issue is always there and it seems to me that the possible substance of the defendant's testimony, should he decide to testify is irrelevant to the decision that I have to make as to whether or not the prior conviction can be used for purposes of impeachment.

(P-C Hrg. Tr. 7/19/96 at 8-9). With the trial judge's testimony in hand, the post-conviction judge determined that the trial judge's decision was unaffected by trial counsel's failure to make an offer of proof. Finding that the offer of proof would not have altered the outcome of the trial, the court found that Petitioner failed to demonstrate that he suffered prejudice as required under the second prong of *Strickland*.

As stated earlier, this Court cannot find differently from the factual finding stated in the state post-conviction decision unless it determines that Petitioner presented clear and convincing evidence to this Court that rebutted the state post-conviction factual findings. 28 U.S.C. § 2254(e)(1). After reviewing the record the Court is satisfied that Petitioner failed to meet this burden. Further, the state post-conviction court's application of the *Strickland* standard was not "contrary to" nor did it involve an unreasonable application of, clearly established federal law. 28 U.S.C. §2254(d)(1). Accordingly, Petitioner's ineffective assistance of counsel claim does not warrant granting the writ.

***b. Ground III - Abuse of discretion by trial judge***

Petitioner alleges that the trial judge failed to properly weigh the probative value of Petitioner's past rape conviction to the prejudicial effect it would have on the jury when the trial judge decided to allow the state to admit Petitioner's rape conviction for the sole purpose of impeaching Petitioner if Petitioner chose to testify. Me. R. Civ. P. 609. Whether a trial judge committed error by admitting evidence is not reviewable on federal habeas review. 28 U.S.C. §2254(a). Federal habeas review is limited to those errors that constitute federal constitutional violations. *Burks v. DuBois*, 55 F.3d 712, 715 (1<sup>st</sup> Cir. 1995). Accordingly, this ground is not sufficient to grant Petitioner's application for the writ.

**III. Conclusion**

For the reasons, above, this Court recommends that the petition be DENIED.

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.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on November 25, 1998.