

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>GEORGE JORDAN,</b>	)	
	)	
<i>Petitioner</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 99-361-P-H</i></b>
	)	
<b>STATE OF MAINE,<sup>1</sup></b>	)	
	)	
<i>Respondent</i>	)	

**RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS**

The petitioner, currently on bail awaiting retrial on a state charge of reckless conduct with the use of a dangerous weapon, a violation of 17-A M.R.S.A. § 211, Docket, *State of Maine v. George Jordan*, Docket No. CR94-1025, Maine Superior Court (Cumberland County), asks this court to stay the proceedings in the state criminal case and to issue a writ of habeas corpus pursuant to 28 U.S.C. § 2241 preventing his retrial on the ground that it would violate the Double Jeopardy Clause of the United States Constitution, Petition I at 11.<sup>2</sup> I recommend that the court dismiss the

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<sup>1</sup> The petition names the warden of the Federal Correctional Institution at Allenwood, Pennsylvania and the State of Maine as respondents. Petition to Stay State of Maine Proceedings Pursuant to 28 U.S.C. § 2251, etc., dated November 28, 1999 (Docket No. 1). The petitioner is no longer incarcerated and therefore the warden is not an appropriate party to this proceeding. I have removed him from the caption.

<sup>2</sup> The petition also requests a protective order blocking the transfer of the petitioner from the federal penal institution in which he was incarcerated at the time he first filed this petition in November 1998. Petition at 10. The petitioner is now free on bail, Conditions of Release, *State of Maine v. George Jordan*, Docket No. CR94-1025, Maine Superior Court (Cumberland County), (continued...)

petition.

### **I. Background**

The petitioner first filed this petition in the United States District Court for the Middle District of Pennsylvania in 1998. Order dated December 7, 1998, *George Jordan v. Jake Mendez, et al*, Docket No. 3:CV-98-1932 (Middle District of Pennsylvania), at 1-2, included in Docket No. 1, *Jordan v. Warden*, Docket No. 98-442-P-H. The petition was transferred to this court. *Id.* at 3. By the time the petition was ready for consideration by this court, the petitioner had been released from federal prison in Pennsylvania and was residing with his mother in South Portland, Maine. Recommended Decision on Petition for Writ of Habeas Corpus (Docket No. 15 in Docket No. 98-442-P-H) at 4. Finding that the petitioner was no longer in custody as required for purposes of habeas corpus relief under 28 U.S.C. §§ 2241 or 2254, this court dismissed the petition. Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 17 in Docket No. 98-442-P-H). The petitioner took an appeal from the dismissal, Docket No. 19 in Docket No. 98-442-P-H, and that appeal is still pending before the First Circuit Court of Appeals.

On November 30, 1999 the petitioner, after being placed on bail on the state charges, initiated the current action by filing a petition that incorporates by reference his first petition. Petition. The respondent has asked this court to proceed to resolve the current action, despite the pending appeal on the first petition, because the current petition is identical to the first, and, should the petitioner's appeal be successful, this court would be required to determine the same issue presented by the current action. Response to Petition for Writ of Habeas Corpus Pursuant to 28

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<sup>2</sup>(...continued)  
attached to Petition, and accordingly the request concerning a transfer is moot.

U.S.C. § 2254 (“Response”) (Docket No. 4) at 6-7. I see no reason to delay consideration of the issue presented by this petition any further, particularly where it appears that resolution of the appeal is currently being delayed by the petitioner’s failure to comply with the First Circuit’s order that he apply to this court for a certificate of appealability in connection with that case. *Id.* at 6.

The petitioner was convicted in state court of reckless conduct with the use of a dangerous weapon on August 30, 1995. Docket, *State of Maine v. George Jordan*, Docket No. CR94-1025, Maine Superior Court (Cumberland County) (“State Docket”), at 3 (reverse). He was sentenced to a term of three years imprisonment. *Id.* He took an appeal to the Law Court and the conviction was vacated in May 1997. *State v. Jordan*, 694 A.2d 929, 931-32 (Me. 1997). The case was returned to the trial list and the petitioner filed a motion to dismiss the case on double jeopardy grounds. State Docket at 4 (reverse). The motion to dismiss was granted on the ground of mootness on October 21, 1997. Order On Motion to Dismiss, *State of Maine v. George Jordan*, Docket No. CR94-1025, excerpts attached to Petition, at 6-8. The state took an appeal, State Docket at 5, and the Law Court reinstated the indictment, rejecting the petitioner’s argument that retrial would violate his federal constitutional protection against double jeopardy, *State v. Jordan*, 716 A.2d 1004, 1006 (Me. 1998) (“*Jordan II*”).

## **II. Discussion**

### **A. Motion for Stay**

Section 2251 of Title 28 of the United States Code provides:

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

The petitioner asks this court to stay the state criminal proceeding pursuant to this statute.

The respondent states that the state court criminal action has been stayed “pending the outcome of Jordan’s habeas petition,” Response at 3, but the record in that case reveals only that a motion to continue for six months was granted on May 6, 1999, Order, Motion to Stay/Continue Proceedings, etc., *State of Maine v. George Jordan*, Docket No. CR94-1025, Maine Superior Court (Cumberland County), at 3. The copy of the state docket sheet provided to this court on March 1, 2000 (attached to letter from Nancy Torresen, AAG, to Susan Hall) shows no activity in that case since a bail review hearing held on September 1, 1999.

In any event, I conclude that a stay of the state case is not indicated here, where the petitioner is not entitled to federal habeas relief, for the reasons discussed *infra*. See *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987) (court must consider whether petitioner has made showing of likelihood of success on merits of habeas corpus petition and irreparable injury if stay not granted, as well as whether stay would serve public interest). The motion for a stay should be denied.

### **B. Habeas Corpus Relief**

The petitioner contends, as he did before the Maine Law Court, that retrial on the charge of reckless conduct would subject him to double jeopardy in violation of the United States Constitution.<sup>3</sup> The Fifth Amendment to the United States Constitution, applicable to the states

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<sup>3</sup> The petition also contends, in conclusory fashion, that retrial is barred by the Eighth Amendment and the due process clause of the Constitution. Petition at 7. The Law Court’s opinion (continued...)

through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794 (1969), provides in relevant part: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” The petitioner argues that, because a defendant who has served the entire sentence imposed upon initial conviction may not be subjected to a longer sentence upon vacation of that conviction and subsequent conviction on the same charge, retrial on the same charge somehow violates the double jeopardy clause. Petition at 4-6. However, sentencing and the ability to retry a defendant upon vacation of his conviction are two separate issues, even when the defendant has served the entire sentence imposed upon the initial conviction before the retrial begins.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court noted that “at least since 1896, . . . it has been settled that [the constitutional guarantee against double jeopardy] imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside,” *id.* at 719-20. The Court went on to conclude that this provision also imposed no “absolute bar to a more severe sentence upon reconviction.” *Id.* at 723. In *United States v.*

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<sup>3</sup>(...continued)

in the petitioner’s most recent appeal, 716 A.2d at 1005-07, does not suggest that either of these grounds was raised by the petitioner in that proceeding. If the petitioner intends to press claims based on either or both of these constitutional provisions here, the entire petition must be dismissed because he has failed to exhaust those claims in state court as required for habeas corpus relief. *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997). However, I conclude that the single, undeveloped mention of these two constitutional provisions in the petition is insufficient to warrant relief in any event, *David v. United States*, 134 F.3d 470, 478 (1st Cir. 1998) (“a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings”), allowing this matter to go forward on the double jeopardy claim alone. See also Rules Governing Section 2254 Cases in the United States District Court, Rule 2(c); *United States v. Detella*, 2000 WL 149257 (N.D.Ill. Feb. 8, 2000), at \*4 (“While pro se pleadings are construed liberally . . . there are limits. It is not enough for a habeas petitioner to present a litany of undeveloped claims, such as simply listing ‘due process’ or ‘ineffective assistance,’ and expect the court to winnow through the entire record to see if there might be some error that might fall under one of the listed categories.”)

*DiFrancesco*, 449 U.S. 117 (1980), the Court suggested in *dictum* that a defendant who has a legitimate expectation of finality in his sentence may not be subject to an increase in that sentence, *id.* at 139, but that observation pertains only to sentencing and cannot be interpreted to bar retrial merely because a sentence on a conviction subsequently vacated has been fully served. Sentencing will become an issue for the petitioner only after, and if, he is retried and convicted.

Two state courts have addressed the issue raised here by the petitioner and both have decided that retrial is not prohibited by the double jeopardy clause. *State v. Swartz*, 541 N.W.2d 533, 540 (Iowa App. 1995); *State v. Clemons*, 873 S.W.2d 1, 2 (Tenn. Crim. App. 1992). While my research has not located any federal case law directly on point, that is not a relevant consideration here. The petitioner has failed to show that the Law Court's rejection of his double jeopardy claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The petition suggests that it seeks relief only under 28 U.S.C. § 2241 and not under § 2254, but even if that could be the case, the petitioner has failed to demonstrate that retrial would violate the double jeopardy clause. *See generally Wallace v. Reno*, 194 F.3d 279, 284 (1st Cir. 1999) (§ 2241 is general grant of authority to issue habeas writs for persons held in violation of Constitution or laws). Only if *Pearce* and the long-settled proposition upon which it relies had been overruled or limited by the Supreme Court to cases in which the defendant had not fully served his sentence would the petitioner have a claim to habeas relief from any source, and neither of those events has occurred.

### **III. Conclusion**

For the foregoing reasons, I recommend that the petition be **DISMISSED** without an evidentiary hearing and that the motion for stay 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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after 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.*

*Dated this 14th day of March, 2000.*

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*David M. Cohen  
United States Magistrate Judge*