

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

VINCENT LEE ROBINSON,)

Petitioner)

v.)

Docket No. 02-46-B

**JEFFREY MERRILL, WARDEN,
MAINE STATE PRISON,**)

Respondent)

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Penobscot County) on charges of gross sexual assault and criminal restraint, in violation of 17-A M.R.S.A. §§ 253 and 302. I recommend that the court deny the petition without a hearing.¹

Background

On September 2, 1997 a grand jury in Penobscot County indicted the defendant on two counts of gross sexual assault, in violation of 17-A M.R.S.A. § 253, and one count of criminal restraint, in violation of 17-A M.R.S.A. § 302. Indictment, *State of Maine v. Vincent Robinson*, Maine Superior Court (Penobscot County), Docket No. CR-97-704. Two attorneys successively appointed by the

¹ The defendant requested court-appointed counsel to assist him with this petition. Motion for Appointment of Counsel (Docket No. 4). The rules governing motions under 28 U.S.C. § 2254 provide that the court shall appoint an attorney if, and when, it determines that an evidentiary hearing is required and that it may do so sooner if the interest of justice so requires. Rule 8, Rules Governing Section 2254 Proceedings. I have determined that, for the purposes of this recommended decision, an evidentiary hearing is not required and that the interest of justice does not otherwise require appointment of counsel. Accordingly, the motion for appointment of counsel is *(continued on next page)*

court to represent the defendant were granted leave to withdraw. Motion to Withdraw [dated October 20, 1997], *State of Maine v. Vincent Robinson*, Maine Superior Court (Penobscot County), Docket No. CR-97-704; Order of Appointment [dated December 19, 1997], *id.* After a trial at which the defendant was represented by his third appointed attorney, he was convicted by a jury and sentenced to concurrent terms of seventeen years, all but twelve suspended, on the two assault counts and 364 days, consecutively, on the restraint count. Judgment and Commitment, *State of Maine v. Vincent Robinson*, Maine Superior Court (Penobscot County), Docket No. CR-97-704.

The defendant's trial attorney filed for leave to appeal from the sentences; leave was denied. Order [dated September 14, 1998], *State of Maine v. Vincent Robinson*, Maine Supreme Judicial Court Sentence Review Panel, Docket No. SRP-98-70. The trial attorney also filed a notice of appeal from the judgment. Notice of Appeal to the Law Court [dated July 10, 1998], *State of Maine v. Vincent Robinson*, Maine Superior Court (Penobscot County), Docket No. CR-97-704. This attorney filed a motion to withdraw with the Law Court dated August 14, 1998, based on the defendant's request that he pursue "issues . . . related to representation" in the appeal. Motion to Withdraw, *State of Maine v. Vincent Robinson*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. PEN-98-385. The motion was denied. Order [dated August 17, 1998], *id.* ("Law Court Order on Motion to Withdraw").

In his direct appeal, the defendant argued

that the Superior Court (1) erred in denying his motion to suppress the complainant's in-court identification; (2) erred in excluding Department of Human Services (DHS) records that were offered to indicate a potential alternative perpetrator; and (3) abused its discretion in not admitting the same DHS records to rebut an inference of the complainant's sexual inexperience.

denied.

State v. Robinson, 730 A.2d 684, 685 (Me. 1999). After consolidating the two assault counts, the Law Court affirmed the judgment. *Id.* at 689.

On August 11, 1999 the defendant filed a *pro se* petition for post-conviction review in state court. Petition for Post Conviction Review, *Vincent Lee Robinson v. State of Maine*, Maine Superior Court (Penobscot County), Docket No. CR-99-561. The petition alleged the following grounds for relief: (i) failure of trial counsel to “properly appeal . . . DHS materials,” including failure to consult with the defendant about this aspect of the appeal; (ii) improper in-court identification by the victim; (iii) failure of counsel to present a physician as a witness to refute medical testimony; (iv) failure of counsel to have a videotape examined by a physician; and (iv) wrongful denial of his motion for a change of venue. *Id.* at 3-4. Counsel appointed for the defendant on October 7, 1999 was allowed to withdraw on October 29, 1999. Docket Record, *Vincent Lee Robinson v. State of Maine*, Maine Superior Court (Penobscot County), Docket No. BANSC-CR-1999-00561 (“Docket”), at 1. Another attorney was appointed to represent the defendant. *Id.* This lawyer was allowed to withdraw on February 16, 2000, and a third attorney was appointed. *Id.* at 2. This attorney filed an amendment to the petition adding two grounds: ineffective assistance of counsel in failing to request sequestration of a police witness as requested by the defendant and ineffective assistance of counsel in failing to object at trial to the admission of a “booking photograph.” Motion for Enlargement of Time to File Amendment Nunc Pro Tunc, etc., *Vincent Lee Robinson v. State of Maine*, Maine Superior Court (Penobscot County), Docket No. CR-99-561 [dated March 30, 2000]. The second ground asserted by the defendant was dismissed by the court on July 3, 2000. Docket at 3. An evidentiary hearing was held on March 8, 2001, and the petition was denied on March 13, 2001. *Id.* at 3-4. The attorney who had represented the defendant through the hearing filed a notice of appeal and was allowed to

withdraw and another attorney appointed. *Id.* at 4. This attorney's request for a certificate of probable cause was denied by the Law Court on June 4, 2001. Docket at 5.

The defendant filed his *pro se* petition in this court on March 12, 2002. Docket No. 1.

II. Analysis

The defendant raises six grounds for relief in his petition:² (i) denial of his right to counsel on the direct appeal when the Law Court refused to allow his trial attorney to withdraw and refused to allow him to raise a claim of ineffectiveness of counsel on direct appeal; (ii) ineffective assistance of counsel in failing to call two witnesses at trial to testify about a telephone call made by the victim; (iii) use at trial of evidence obtained as the result of an illegal search and seizure; (iv) failure of the prosecution to disclose evidence favorable to the defendant; (v) failure of trial counsel to object to the admission at trial of a booking photograph of the defendant; and (vi) failure of trial counsel to obtain a physician to review a videotape and testify for the defendant and to prepare an objection to the expected testimony of a Dr. Riccio. Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 2) at 4-6. The respondent contends that the first ground is not cognizable in this court and that the second, third and fourth grounds have been procedurally defaulted. Response to Petition for Writ of Habeas Corpus, etc. ("Response") (Docket No. 7) at 17-23. He addresses the fifth and sixth grounds on the merits. *Id.* at 24-28.

The defendant's first asserted ground deals with issues of state law. Under Maine law, a defendant is not entitled to court-appointed counsel of his choice on appeal, *State v. Ayers*, 464 A.2d

² The defendant has filed an objection to the respondent's "obtaining and or including [sic] any impounded transcripts." Petitioners [sic] Objection to States [sic] Motion to Obtain a Copy of Impounded Hearing Transcripts and the Use of Transcripts in Its Answer" (Docket No. 6). Two sealed and impounded transcripts have been provided to the court. Counsel for the respondent has represented to the court that he has neither read the transcripts nor based any argument in opposition to the petition on their content. Letter from Charles K. Leadbetter, Assistant Attorney General, to William S. Brownell, clerk of this court, dated May 1, 2002. I find no need to refer to these transcripts in order to reach the conclusions set forth in this recommended decision. The defendant's objection therefore is moot.

963, 966 (Me. 1983), nor may he raise a claim of ineffective assistance of trial counsel on direct appeal, *State v. Nichols*, 628 A.2d 521, 522 (Me. 1997). The defendant's desire to raise this issue on direct appeal was the only reason stated for the request to withdraw filed by his trial attorney, and the Law Court made clear that this claim could not be raised on the defendant's direct appeal, quoting *Nichols*. Law Court Order on Motion to Withdraw. Relief under section 2254 is available only on the ground that a defendant is in state custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In fact, the same result would obtain if the defendant could invoke federal law in support of this claim. A federal prisoner is not entitled to appointed counsel of his choice on appeal, *United States v. Allen*, 789 F.2d 90, 92 (1st Cir. 1986), nor may he raise the issue of ineffectiveness of counsel on direct appeal, unless "the critical facts are not in dispute and the record is sufficiently developed to allow reasoned consideration of the claim," *United States v. Benjamin*, 252 F.3d 1, 13 (1st Cir. 2001) (citation omitted), a situation not presented by the trial record in this case. The defendant is not entitled to relief on this ground.

With respect to the second, third and fourth grounds asserted by the defendant, the statute governing the relief sought by the defendant provides, in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B)(i) there is an absence of available State corrective process; or
- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Here, there is no suggestion in the record that the state has not made corrective process available to this defendant or that the available process is ineffective to protect his rights.

In recognition of the state courts' important role in protecting constitutional rights, the exhaustion principle holds, in general, that a federal court will not entertain an application for habeas relief unless the petitioner first has fully exhausted his state remedies in respect to each and every claim contained within the application.

Adelson v. DiPaola, 131 F.3d 259, 261 (1st Cir. 1997). “[A] habeas petitioner bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim[s].” *Id.* at 262.

In this case, it is clear that the defendant did not present to the Maine courts either on direct appeal or in his petition for post-conviction review the second, third and fourth claims included in his petition to this court. Accordingly, those claims have not been exhausted and may not be addressed by this court. Ordinarily, the presence of both unexhausted and exhausted claims in a petition for relief under section 2254 requires the federal court to dismiss the entire petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, the respondent in this case does not seek dismissal on this basis.³ Instead, he points out that, by operation of 15 M.R.S.A. § 2128(3),⁴ the defendant may not bring these unexhausted claims in state court. Response at 20. This fact leads the respondent to invoke the doctrine of procedural default. *Id.* A procedural default in state court acts as an adequate and independent state ground and immunizes a state court decision based on that default from habeas review in federal court. *Carsetti v. State of Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991). While there is no state court decision on the defaulted claims in this case, the outcome of any attempt by the defendant to raise them at this time is clear; the state courts would hold that those claims are procedurally barred. That is sufficient to allow application of the doctrine. *Id.* at 1010-11. The

³ See *Verner v. Reno*, 166 F.3d 350 (table), 1998 WL 792059 (10th Cir. Nov. 3, 1998), at **2 (government's failure to raise rule requiring dismissal of mixed petitions means that court will address merits of exhausted claims).

⁴ The cited portion of the statute provides: “All grounds for relief from a criminal judgment or from a post-sentencing proceeding shall be raised in a single post-conviction review action and any grounds not so raised are waived unless the State or Federal Constitution otherwise require or unless the court determines that the ground could not reasonably have been raised in an earlier action.”

petitioner has made no attempt to demonstrate both the cause for the procedural fault and the prejudice to his case that is required to avoid application of the procedural-default doctrine, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and accordingly this court will not consider the unexhausted claims for this reason as well. *See generally Burks v. Dubois*, 55 F.3d 712, 716-17 (1st Cir. 1995).

The defendant's two remaining grounds allege constitutionally deficient assistance of counsel. Such claims are evaluated under the standards established by *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his counsel's performance was deficient, *i.e.*, that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must make a showing of prejudice, *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id.*

In his fifth ground, the defendant asserts that his trial attorney's failure to object to the admission of his booking photograph into evidence at trial falls below the *Strickland* standard. The state court reviewing this claim in the post-conviction review proceeding held as follows:

The evidence at the post-conviction hearing and a review of the trial transcript demonstrate that defense counsel ultimately made a tactical decision not to object to a booking photograph offered by the state. *See* Trial Tr. Vol. I (March 6, 1998) at 122-25. [Trial counsel] chose this course because the photograph in question was inconsistent in a material respect with the description offered by the victim. This tactical decision was not manifestly unreasonable. Moreover, counsel raised the issue of the potentially prejudicial effect of booking photographs generally with the court and when he did so, the trial court ordered the photo to be cropped to remove any indication that it was a booking photograph. *See* Trial Tr. Vol. I (March 16, 1998) at 124-25.

On this issue, therefore, [trial counsel's] performance also was not deficient. Even if this were not so, the court finds that any failure to object to the booking photograph did not deprive the defense of a substantial ground of defense or potentially alter the outcome of the trial. It is evident from the record that once the bottom of the photo was cropped, the trial court would

have found that the probative value of the photograph outweighed any danger of unfair prejudice, *see* Trial Tr. Vol. I (March 16, 1998) at 124-25, and this conclusion seems beyond question given that identification of Robinson as the rapist was a crucial issue in the case. Whatever tack defense counsel had taken, it is highly likely that the photo, as cropped, would have been admitted, and this is a second basis upon which [this] ground . . . of the amended petition is rejected.

Decision and Order [dated March 12, 2001], *Vincent Lee Robinson v. State of Maine*, Maine Superior Court (Penobscot County), Docket No. CR-99-561 (“Decision and Order”), at 4-5. The defendant has made no attempt to show that the adjudication of this claim by the Maine post-conviction court resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, the standard applicable to his claim under 28 U.S.C. § 2254(d)(1). Nor has he demonstrated that the state court’s factual determinations were unreasonable, a necessary prerequisite for the only other source of relief, 28 U.S.C. § 2254(d)(2). *See also* 28 U.S.C. § 2254(e)(1) (factual findings of state court presumed to be correct). This is the test that this court must apply. *Phoenix v. Matesanz*, 233 F.3d 77, 82-83 (1st Cir. 2000). *See generally Familia-Consoro v. United States*, 160 F.3d 761, 765 (1st Cir. 1998) (discussing statutory presumption in context of claim of ineffective assistance of counsel).

In addition, defense counsel stated at sidebar that he wanted the photograph to come into evidence, with the booking numbers removed, because the defendant had a mustache in the photograph. Transcript of Proceedings, *State of Maine v. Vincent Robinson*, Maine Superior Court (Penobscot County), Docket No. CR-97-704, Volume I (hereafter “Trial Tr.”) at 122-25. The victim had testified that her attacker had no facial hair. *Id.* at 99. “To avoid the shoals of ineffective assistance, an attorney’s judgment need not necessarily be right, so long as it is reasonable.” *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993). Here, trial counsel made “an unarguably reasonable

choice,” *id.*, as a tactical matter, to allow the photograph to come into evidence. The defendant is not entitled to relief on his fifth ground.

The final ground asserted by the defendant, entitled “Independent Medical Review of a Video Tape,” states as follows, in its entirety:

[Trial counsel] was insistant [sic] that he was unable to locate a doctor who would testify for me and refute Dr. Riccie’s expected testimony at my trial.

The trial eventually concluded without testimony from Dr. Riccie. [Trial counsel] could have prepared an argument on objection well in advance. Dr. Riccie is without the certification to testify on the subject of what he has obsurved [sic] in child abuse evaluation’s [sic]. As Maine has never, and continue’s [sic] not to certify Dr. Riccie as a specilist [sic] in the examination of sexually abused children. [Trial counsel] simply could have prepared to challenge this testimony on objection on the ground’s [sic] that Dr. Riccie was not qualified pursuant to Maine law.

Dr. Rose Choquette testified at my trial that she took a VHS video tape of the alleged victim’s injurie’s [sic]. She testified that the video was reviewed by Dr. Riccie and that he would testify that there was evidence of trauma. The state did not use the tape as evidence nor did they offer it into evidence. Yet I was left without any defense to refute the testimony of the VHS video tape[.] My attorney, as well as the state, knew that the jury would believe that evidence existed [sic], the video tape, that indicated that the injurie’s [sic] occurred withen [sic] the narrow time frame the state alleged.

A doctor for the defendant could have testified and offered, based on laboratory and forensic report’s [sic], that the alleged victime’s [sic] injurie’s [sic] were either old one’s [sic] or self inflicted one’s[sic] [.]

Petition at [6A]-[6B]. A claim that the defendant’s attorney failed to prepare to object to testimony that was never offered at trial from a witness who was never called at trial cannot possibly state a claim of ineffective assistance of counsel. It is simply impossible for the defendant to have been prejudiced within the meaning of *Strickland* by such a failure to act.

With respect to the testimony of Dr. Choquette, the defendant has misrepresented her trial testimony. While she did state that a videotape of her examination of the victim had been made and that Dr. Lawrence Ricci and a Dr. Farquahar reviewed the videotape, Trial Tr. At 55, she never testified that Dr. Ricci would testify, let alone as to the content of such testimony, *id.* at 36-63. It was

Dr. Choquette's direct testimony that gave the jury information about the time the assault was likely to have occurred; nothing was said to suggest that the videotape would confirm Dr. Choquette's testimony on this point in any way and it is difficult if not impossible to imagine how the knowledge of the mere existence of such a videotape could lead to such a conclusion in the minds of jurors. On this claim, the state post-conviction review court made the following findings:

Robinson contends that [trial counsel] failed to follow up on an opportunity to have an independent doctor review the videotape of the victim's injuries. On this issue, the court does not find [trial counsel's] performance to be deficient. As [trial counsel] testified at the hearing, it was the defendant's idea, six days before trial, to have an independent doctor review the tape, and [trial counsel] obtained the court's permission to do that. *See* Tr. of March 10, 1998 at 29-33. [Trial counsel] also testified, however, that he had personally reviewed the tape and did not think that the proposed independent review would yield anything helpful to the defense. [Trial counsel] also convincingly testified that he believed that the theory behind such a review (i.e., that no rape had occurred) would have a counterproductive effect on the jury since Robinson's strongest defense was not that no rape had occurred, but that Robinson had not been the rapist.

In any event, when [trial counsel] tried to find a doctor to perform an independent review, all the doctors he contacted declined to participate once they learned that Dr. Ricci had already reviewed the tape, given their respect for Dr. Ricci and his reputation. Because trial was imminent, [trial counsel] did not pursue the issue further and informed Robinson that he had not been able to get a doctor who was willing to review the tape and that in any event, [trial counsel] thought pursuing this issue was not a good strategy.

Robinson now contends that [trial counsel] should have asked for a continuance to find a doctor willing to review the videotape. At the time, however, he acceded to [trial counsel's] decision not to pursue the issue further. Moreover, it was highly unlikely that any continuance would have been granted since a jury had already been selected and the court had not been sympathetic with what it viewed as Robinson's attempts to delay the proceedings. *See, e.g.*, Tr. of February 23, 1998 at 11-12.

The court finds that at the time of trial, defendant went along with his counsel's tactical decision — one that though ultimately unsuccessful appears to the court to have been well-advised — not to pursue the videotape issue. Tactical decisions by defense counsel can provide a basis for post-conviction relief only when they are manifestly unreasonable. *See State v.*

Brewer, 1997 ME 177 ¶ 24, 699 A.2d at 1145. Counsel's tactics here were in no way unreasonable.

Finally, Robinson has offered absolutely no evidence that having an independent doctor review the videotape would have led to a substantive ground of defense. His current argument that such a review could have led to evidence that the injuries did not result from rape or that the injuries occurred at a different time than alleged by the state is pure speculation.

Decision and Order at 2-4. The state post-conviction review court correctly applied the tenets of *Strickland* to this claim and accordingly the defendant is not entitled to relief under section 2254 on this basis. The defendant does not challenge the state court's factual finding that trial counsel made a tactical decision not to pursue further the possible review of the videotape by an independent physician and, from all that appears in the record, that decision was eminently reasonable.

Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

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 3rd day of June, 2002.

David M. Cohen
United States Magistrate Judge

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plaintiff

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