UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT PAYZANT,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 94-0234-B
	)	
MARTIN MAGNUSSON,	)	
	)	
Respondent	)	

RECOMMENDED DECISION TO DENY PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Petitioner was convicted in the Maine Superior Court for Cumberland County on eight counts of a criminal indictment on February 28, 1989. He now challenges that conviction on four separate counts. Respondent has filed an Answer to the Petition, and Petitioner has replied. The Court has carefully reviewed the record and determined that Petitioner is not entitled to relief.

As a preliminary matter, certain of Petitioner's claims were raised in a state post-conviction proceeding. Following a hearing, the state court issued an Order which included the following factual findings:[1]

1. "Prior to trial, the District Attorney's office gave defense counsel a document . . . which contained the following language:

> Jerry Larrivee and Danny Butts were both told by the police that their cooperation in the way of truthful statements and testimony would be given consideration by the District Attorney's office in plea negotiations."

[1] Some of these "findings" are described as testimony by particular witnesses. Nevertheless, it is clear by the judge's ultimate legal conclusions that he accepted this testimony as fact. *See, LaVallee v. Delle Rose,* 410 U.S. 690 (1973).

2. "[D]efendant's counsel cross-examined Butts extensively and attempted to impeach him by demonstrating that he had lied on a number of occasions concerning this matter and that he had a lengthy criminal record with a number of prior convictions."

3. "[I]n response to direct questions concerning promises or inducements, Butts denied the same and defendant's counsel did not pursue the matter further."

4. "[D]efense counsel testified that he did not pursue the matter because he considered that Butts had been sufficiently impeached and that any further effort to impeach him would be merely cumulative."

5. "[P]etitioner was advised of his right to appeal, was advised of his counsel's opinion that there were no grounds for such appeal and . . . he accepted his attorney's advice."

6. "[N]o direct appeal to the Law Court was filed because both petitioner and his then attorney considered that such an appeal would be without merit."

Opinion and Order, Docket No. CR-91-2654, January 18, 1994.

These factual findings are presumed to be correct pursuant to 28 U.S.C. § 2254(d) unless the Court determines that the state court proceeding was in some way unfair or did not adequately resolve the merits of Petitioner's claims. 28 U.S.C. § 2254(d)(1)-(8). There is no suggestion that the state court proceeding in this case was anything but full and fair. Accordingly, we afford the court's factual findings the presumption of correctness set forth in subsection (d).

Ground 1 -- Ineffective Assistance of Counsel.

Petitioner alleges his trial counsel was ineffective for three reasons. First, he asserts that counsel his failure to adequately impeach the testimony of Danny Butts on the basis of the promise that his cooperation would be "given consideration" by the District Attorney's office. Second, he

asserts that counsel either failed to perfect an appeal of his conviction, or erroneously told Petitioner there were no grounds to appeal. Third, he alleges that counsel knew of witnesses that would be "highly beneficial to the defense," but counsel failed to call them to testify.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Petitioner must show the Court that counsel's performance was deficient. *Id*. at 687. 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. Failure to impeach Danny Butts.

Petitioner's claim that counsel's performance was deficient when he failed to pursue Danny Butt's denial of special treatment by the District Attorney's in exchange for his cooperation is without merit. The mere fact that counsel did not utilize the document provided by the District Attorney's office is not sufficient to constitute deficient performance. The record reflects that Danny Butts repeatedly contradicted himself throughout his cross-examination, including on the issue of his cooperation in respect to Petitioner's prosecution. Although he denied a promise of "consideration by the District Attorney's office," he did acknowledge that he hoped to 'help himself' with respect to his own pending charges by making statements to the police.

Under *Strickland,* counsel's strategic decisions at trial are clothed with a presumption of reasonableness. *Id*. at 689; *see, also, Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993). Viewed in the light of the overall cross-examination of Danny Butts, the Court does not find

Petitioner has met his "very heavy burden" of overcoming that presumption. *Lema*, 987 F.2d at 51. Even were the Court to conclude that counsel should have used the document he received from the District Attorney's office to impeach Butts, we would be utilizing "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Further, the Court is not satisfied that one more bit of evidence on the issue of Butts's credibility would have tipped the scales measurably. It is certainly not the case that in the absence of this one piece of evidence, the jury was left to conclude that Butts was invariably truthful.

b. Denial of right of appeal.

The Court is unclear about whether Petitioner is claiming that counsel simply failed to file an appeal, or whether he claims counsel gave him inappropriate advice when he said there were no grounds for appeal. Regardless, this claim is without merit.

We presume the state court was correct when it found that counsel told Petitioner there were no grounds upon which to base an appeal, and that Petitioner agreed. We therefore do not accept Petitioner's new assertion that counsel told him the "battle" was not over; there was still an appeal to be taken.

On the issue of whether counsel's advice that there was no available ground for appeal was in error, Petitioner has offered no grounds about which he believes he should have been informed. "Mere assertions of ineffective counsel . . . are not enough. Nor is it sufficient to refer to an act or omission of counsel . . . without indicating why it constituted gross impropriety or prejudicial misconduct." *Bernier v. Moore*, 441 F.2d 395, 396 (1st Cir. 1971); *see, also, Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970) (the petition must "set out substantive facts that will enable the court to see a real possibility of constitutional error"). Despite the liberal reading accorded *pro*

se pleadings, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), we require at a minimum that *pro se* litigants set forth a factual scenario sufficient to permit the Court to assess the merits of Petitioner's claim. Accordingly, Petitioner is not entitled to relief on this ground.

c. Failure to call "beneficial witnesses."

As with Petitioner's assertion that counsel failed to identify a valid ground for appeal, Petitioner's claim that counsel failed to call certain witnesses to testify is presented without a description of who the witnesses were or what they might have said. For the reasons discussed in the previous section, Petitioner is not entitled to relief on this ground.

Ground 2 -- Use of Perjured Testimony.

Petitioner contends that his due process rights were violated by the state's reliance on the testimony of Danny Butts, who is, in Petitioner's view, a "chronic liar." Specifically, Petitioner asserts that Butts lied with respect to whether he was to receive a benefit relative to his own criminal charges in exchange for his testimony against Petitioner. He also asserts Butts lied when he told the jury he was charged with crimes connected to those with which Petitioner was charged.[2]

Except in connection with his ineffective assistance claim, Petitioner did not raise the issue of Danny Butts's alleged perjury before the state postconviction court. He would now be barred from doing so. *McEachern v. State*, 456 A.2d 886, 889 (Me. 1983) (citing 15 M.R.S.A. § 2128(1),(3); *Duguay v. State*, 309 A.2d 234, 236 (Me. 1973)).

Petitioner's failure to pursue this claim before the state court triggers a requirement that he show "cause" for the default, and resulting "prejudice." *Keeney v. Tamayo-Reyes*, 501 U.S. 1, 7 (1992) (citation omitted). Petitioner has made no attempt to show either.

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[2] Interestingly, Petitioner views this lie as an effort to *bolster* Butts's credibility.

Ground 3 -- *Failure to produce exculpatory evidence.*

Petitioner claims that the prosecution failed to provide information to the defense that the victims in his case had initially selected persons other than Petitioner from a photographic line-up. Once again, this issue was not raised in the state proceeding, and Petitioner has made no effort to explain the procedural default.

In any event, the record in this matter reflects that counsel had the information. Counsel's cross-examination of the victims clearly reveals that he knew of the first identifications, and the victims were adequately cross-examined on that subject. Petitioner is not entitled to relief on this ground.

Ground 4 -- Denial of Right of Appeal.

Petitioner's claim in Ground 4 is simply a reformulation of so much of Ground 1 as dealt with Petitioner's appeal. For the reasons stated in connection with Ground 1, the claim has no merit.

Conclusion

For the foregoing reasons, I hereby recommend the Petition for Writ of Habeas be DISMISSED and the Writ 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 in Bangor, Maine on March 4, 1996.