UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RICHARD A. SARGENT,	)	
	)	
Petitioner	)	
	)	
v.	)	***Civil No. 90-0285 B***
	)	
MARTIN A. MAGNUSSON,	)	
	)	
Respondent	)	

PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION ON MOTION TO VACATE PETITIONER'S SENTENCE AND CONVICTION

Richard A. Sargent, a state prisoner serving a 14-year sentence for armed robbery, filed with this court on November 14, 1990 his second petition for a writ of habeas corpus pursuant to 28 U.S.C. ' 2254. His previous petition, filed on April 30, 1990, was denied as a mixed petition. In his present petition Sargent asserts the following three grounds for issuance of the writ, each of which has been exhausted in state court: (1) trial court error in denying the petitioner's motion for new trial upon discovery of new evidence of perjured testimony; (2) trial court error in limiting his cross-examination of a state witness as to bias; and (3) ineffective assistance of counsel.

Following the trial, Sargent filed a motion for a new trial or, alternatively, for a judgment of acquittal based upon the discovery of new evidence. The Superior Court denied his motion, as did the Maine Supreme Judicial Court (``Law Court") on appeal.

Subsequently, Sargent raised the claim of ineffective assistance of trial counsel in a state post-conviction proceeding. On November 8 and 30, 1989 the Superior Court held hearings and, finding counsel's performance adequate, denied the petitioner's claim. *Sargent v. State*, No. CR-88-701 (Me. Super. Ct.,

Penob. Cty., Jan. 8, 1990). On April 23, 1990 the Law Court denied Sargent's request for a certificate of probable cause to pursue his claim.

For the reasons articulated below, I recommend that Sargent's petition be denied.

I. PROPOSED FINDINGS OF FACT

Sargent was tried on an indictment for armed robbery before a Maine Superior Court (Penobscot County) jury on July 10 and 11, 1986. The prosecution put on three witnesses: Charles Dolan, the armed robbery victim; Maine State Police Detective Barry Shuman, an officer who investigated the armed robbery; and Paul Pollard, the state's eyewitness who testified that Sargent participated in one of two armed robberies that Pollard committed against Dolan. The defense presented no witnesses. Sargent was represented by J. Hilary Billings, Esq.

Prior to trial the defense attorney engaged in discovery which included a review of the district attorney's file, Pollard's criminal record and other relevant files. Transcript of Partial Postconviction Review Hearing (Nov. 8, 1989) (``Review I'') at 21; Transcript of Post-Conviction Review Hearing (Nov. 30, 1989) (``Review II'') at 79, 108, 111, 113-16. These efforts failed to uncover certain relevant information. Review I at 21, 26-27; Review II at 49-50, 55-56, 109, 133-34. Specifically, Billings did not find the impeaching evidence that Pollard was convicted of forgery and that Detective Shuman had played a role in the state's dismissal of an unrelated reckless conduct indictment against Pollard. *Id.* The record does not indicate whether Billings uncovered evidence of burglaries that Pollard had committed. Review II at 141. Although Billings had once been an assistant district attorney and during that time had obtained this particular indictment against Pollard, he did not know the circumstances of the reckless conduct dismissal because he handled the case only to the point of indictment. Review I at 20. He did, however, discuss the matter with Pollard's defense attorney but

failed to learn of Shuman's role. *Id.* at 21, 26-27. Unaware of the forgery and Shuman's role in the dismissal, defense counsel did not cross-examine Pollard with this information at trial; nor did he attempt to impeach Pollard with evidence of the burglaries. Trial Transcript Vol. I (``T. I") at 114-31; Trial Transcript Vol. II (``T. II") at 28-41; Review II at 108. Prior to the armed robbery Billings had defended Sargent on a murder indictment and at that time informed him that he was a former assistant district attorney. Review II at 78-79, 100. There is no record of Sargent acting on any conflict-of-interest concern that he may have had prior to his post-conviction claims.

The unsolved but alleged murder of one Michael Cochran in 1981 figured prominently in Sargent's theory of defense at his armed robbery trial. T. II at 2-9. Shuman was an investigating officer on both the Cochran murder case, in which Sargent was initially indicted, and the two Dolan armed robberies.[1] T. I at 62-65. In the course of investigating the murder Shuman questioned Pollard in February 1985 at which time Pollard confessed to twice robbing Dolan and stated that Sargent had participated in one of the armed robberies. *Id.* at 62-65, 80, 111-12. At the time of Pollard's confession the murder case against Sargent was weak and was subsequently dismissed. *Id.* at 78-80. At the armed robbery trial the defense sought to establish that Pollard colluded with Shuman against Sargent on the armed robbery charge because Pollard was a murder suspect and wanted to divert attention away from himself. T. II. at 7-8.

After describing the armed robberies at trial, Dolan disclosed on cross-examination that he first spoke of the armed robberies when he was arrested by Drug Enforcement Administration (``DEA") agents in 1984 for drug trafficking. T. I at 41-42, 58-59. Stating that he did not give the names of any armed robbery suspects to the agents, Dolan also explained that he was unable to identify his

[1] I refer to Michael Cochran's death as a ``murder" simply to be consistent with the context and terminology of the investigation into his death upon which testimony and argument were based at

assailants, who wrapped his eyes in tape and disguised themselves in ski masks. *Id.* at 32, 59. The defense, surprised by the revelation of his conversation with the DEA, chose for tactical reasons not to question Dolan in detail about it. Review II at 111-12. Billings made no effort during the trial to learn of or obtain a report of the conversation, known as the ``Dolan Debriefing Report."[2] T. I and II; Review II at 85-86. Three months after trial, however, counsel learned that such a report existed and that in it Dolan named two men whom he suspected of committing the armed robberies.[3] Review II at 82-83. Neither of the men described was Sargent. *Id.*

Upon taking the stand at trial, Detective Shuman stated that in February 1985 he questioned Pollard about the Cochran murder. T. I at 62-63, 75. Shuman testified that during the interview in an effort to clear his conscience Pollard made an unsolicited confession that he committed two armed robberies against Dolan. *Id.* at 62-63. Shuman further testified that prior to this disclosure the police knew nothing of the armed robberies, although they were aware that Dolan had been assaulted on the date of the second armed robbery. *Id.* at 63-64. In the state's closing argument much was made of

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Sargent's trial.

[2] Nothing in the record suggests that the state of Maine relied upon this report in prosecuting Sargent. Review II at 26-27.

[3] Counsel then filed a motion for sanctions and appropriate relief for the prosecution's failure to provide this report in response to his pretrial request for discovery. Motion for Discovery Sanctions (Nov. 18, 1986). There is no record of any court action on the motion.

Pollard's coming clean on his own and informing the police of the armed robberies, of which they had been previously unaware. T. II at 69-73.

In the course of the Cochran murder investigation Shuman had conducted interviews of three witnesses, including Sargent, prior to Pollard's divulgement. Review II at 97-98. In each of the interviews the detective made reference to what could be perceived as the Dolan armed robberies in seeming contradiction to his trial testimony that he first learned of the armed robberies at a later date from Pollard. *Id.* at 87-88, 92, 99. Defense counsel did not predict that the timing of Shuman's knowledge of the armed robberies would become an issue at trial. *Id.* at 114-15. While counsel did know of these interviews from representing Sargent on the murder indictment, he did not remember Shuman's reference to the armed robberies and therefore did not ascertain their relevance to the detective's credibility before or even during Sargent's armed robbery trial. *Id.* at 91, 93, 98-99, 120. Having failed to notice the alleged inconsistency between Shuman's testimony and his prior statements, Billings did not question Shuman about it. T. I at 64-68, 87-91; T. II at 49-54; Review II at 93, 96, 120.

On cross-examination Billings did question Shuman about other facets of the investigation of the unsolved Cochran murder. T. I at 64-65. In response to a relevance objection Billings stated in an offer of proof that he was challenging Pollard's credibility by eliciting testimony that Pollard cooperated with Shuman to avoid being indicted for the murder. *Id.* at 65-66, 76-85. The judge ruled that the Cochran murder was irrelevant at that juncture because Pollard had not yet testified. *Id.* at 66-68. However, he stated that Billings could recall Detective Shuman after Pollard testified, during the state's case-in-chief. *Id.* at 67.

Defense counsel then questioned Shuman about statements that Sargent made in the course a December 1984 interview in connection with the Cochran investigation. *Id.* at 87. In response to a

hearsay objection counsel alleged that during the interview Sargent denied any involvement in the Dolan armed robberies. *Id.* at 87, 90. Although defense counsel knew of this interview from defending Sargent on the murder indictment, Billings explained that Shuman failed to disclose this exculpatory statement to the prosecution and the defense in the armed robbery case. *Id.* at 88-90. Counsel argued that this line of questioning was designed to attack Shuman as a biased witness, not to prove the truth of Sargent's assertion of innocence. *Id.* The trial judge was unpersuaded. *Id.* at 89-90. Upon sustaining the hearsay objection the court noted that Sargent could take the stand if he wanted the jury to hear his statement (i.e., that he denied committing armed robbery). *Id.* at 87-88.

When Pollard took the stand he detailed what he knew of Sargent's participation in the armed robbery along with that of other individuals, and he stated that he confessed his involvement to Shuman in February 1985 in order to clear his conscience. *Id.* at 93-98, 109-13, 117. On cross-examination defense counsel questioned Pollard as to his general propensity for truthfulness and bias and, more specifically, as to the integrity of his statements about the armed robbery. *Id.* at 118-19; T. II at 28-30. Pollard admitted that he had been a person who would rob, steal and lie and that he had lied to Detective Shuman regarding this and other investigations. T. II at 28-30. In particular, Billings cross-examined Pollard at length about various inconsistencies between statements he made to Shuman in March 1981 and others he made to Shuman in the February 1985 interview. *Id.* at 35-38. Counsel also elicited from Pollard that in exchange for his testimony at trial he was receiving full immunity from prosecution for both armed robberies, one of which involved acts of violence.[4] *Id.* at 38-39, 41; T. I at 116-17. Furthermore, Pollard admitted that the state was permitting him to keep the fruits of these armed robberies, which amounted to several thousand dollars. T. I at 117-18.

[4] During the second robbery one of the robbers cut off Dolan's left ear with a kitchen knife. T. I at 43, 56.

On recall, defense counsel questioned Detective Shuman about Pollard's credibility. T. II at 49-54. Shuman responded by corroborating that Pollard had lied to him on a number of occasions in connection with this and other investigations. *Id.* at 51-53.

Upon conclusion of the state's case the defense sought to introduce the testimony of a series of witnesses to flesh-out what was known about the Cochran murder. *Id.* at 2-8. The judge denied this request on relevancy grounds. *Id.* at 25-26. Billings did not place Sargent on the stand for the reason that Sargent had confessed to him that he had committed the armed robbery and Billings wanted to avoid the scenario where Sargent either admitted his guilt or perjured himself. Review I at 31. The result was that the defense put on no witnesses. T. II at 55-58. After the two-day jury trial Sargent was convicted of armed robbery. *Id.* at 108.

II. NEW TRIAL

Sargent asserts that the trial court erred in not granting his motion for new trial or, alternatively, judgment of acquittal, on the basis of newly-discovered evidence. Petitioner's Memorandum of Law in Support of Petitioner's Writ of Habeas Corpus (Jan. 7, 1991) (``Petitioner's Memorandum") at 1-5. Specifically, the petitioner's new-trial claim is bottomed on his contention that state's witness Detective Shuman enhanced his own and Pollard's credibility through perjured testimony at trial that Shuman was unaware of the armed robbery until informed about it by Pollard during an interview that took place in February 1985. *Id.* Sargent claims that Detective Shuman knew of the Dolan armed robberies months earlier as illustrated by his questioning of Sargent and two other witnesses about them during separate interviews conducted in connection with the Cochran murder investigation in 1984. *Id.* at 2-3, 6-8. Furthermore, Sargent argues that the DEA's disclosure to the state police of their

conversation with Dolan also makes it likely that the police knew of the armed robbery prior to Pollard's confession. *Id.* at 6-7.

The standard governing a new-trial motion of the kind at issue here is well settled:

> A motion for new trial on the basis of newly discovered evidence will ordinarily not be granted unless the moving party can demonstrate that: (1) the evidence was unknown or unavailable to the defendant at the time of trial; (2) failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial of the defendant. . . . In considering such a motion, the court has broad power to weigh the evidence and assess the credibility of both the witnesses who testified at trial and those whose testimony constitutes ``new'' evidence. . . . Ordinarily . . . the trial court's denial of a new trial [will be affirmed] unless the court has manifestly abused its discretion; the court's findings of fact will not be overturned unless they are without any support in the record.

United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980) (citations omitted); *see also Subilosky v. Callahan*, 689 F.2d 7, 9-10 (1st Cir. 1982).

The trial court based its denial of the motion on its conclusion that it was not clear that the ``new'' evidence established that Shuman had committed perjury, *see State v. Perry*, 253 A.2d 705, 707-08 (Me. 1969), or that the assertedly fresh evidence was newly-discovered. That court had the

distinct advantage of judging Shuman's demeanor in determining whether he perjured himself at trial. This court is in no position to second-guess that determination. *See Wright*, 625 F.2d at 1020-21.[5]

[5] Even if Shuman's testimony could be characterized as perjurious, his knowledge of the robbery prior to his interview of Pollard could not by itself have had a direct bearing on Sargent's guilt or innocence. Rather, such knowledge related only to the defense's theory that Shuman colluded with Pollard to frame Sargent.

The court went on to refute the petitioner's claim that the interviews which allegedly prove that Shuman committed perjury constituted new evidence. The trial judge ruled that ``[t]he Defendant's failure to understand the significance of facts known to him at trial does not generate newly discovered evidence when the Defendant sees these facts in a new light." *State v. Sargent*, No. CR-85-681, at 7 (Me. Super. Ct., Penob. Cty., Apr. 15, 1987).[6] My own review of the record confirms that the evidence proffered by the petitioner was not newly-discovered after the trial. It is undisputed that Sargent knew of these interviews prior to trial. His failure during trial to focus on and exploit inconsistencies between Shuman's testimony and the interviews of which he was aware does not mean that once he noticed these inconsistencies the underlying facts assumed the status of new evidence.[7]

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[6] On appeal, the Law Court affirmed concluding that ``the record discloses that the trial court did not abuse its discretion . . . in denying the motion for new trial or acquittal . . . ." *State v. Sargent*, 536 A.2d 1133, 1134 (Me. 1988) (citations omitted).

[7] Even if the evidence of Detective Shuman's alleged perjury could be characterized as ``new," the petitioner would be entitled to a new trial only if he could show that ``the evidence is material, and not merely cumulative or impeaching; and . . . will probably result in an acquittal upon retrial of the defendant." *United States v. Vazquez*, 857 F.2d 857, 865 (1st Cir. 1988) (*quoting Wright*, 625 F.2d at

III. RIGHT TO CROSS-EXAMINATION

Sargent also claims that the trial court erred in limiting the scope of his cross-examination of Shuman. Petitioner's Memorandum at 12-13. In particular, he asserts that when the judge prohibited his counsel from questioning Shuman as to Shuman's failure to disclose to the prosecution and defense exculpatory statements that Sargent made in a 1984 interview, the judge violated his Sixth Amendment right of confrontation. *Id.*

A defendant exercises his Sixth Amendment right of confrontation primarily through cross-examination and impeachment of adverse witnesses at trial. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). The exercise of this right is, of course, not absolute. It is subject to the limitations of the rules of evidence as properly applied by the trial judge.

1019). During the petitioner's armed robbery trial defense counsel cross-examined state's witnesses Pollard and Shuman about an alleged collusive effort to convict Sargent. The ``remembered'' evidence of Shuman's interviews with Sargent and two other witnesses suggesting he knew of the Dolan armed robberies at an earlier point in time would have served at most only to further impeach the state's witnesses, not to establish his innocence. Even to this end its value would have been limited. Shuman's knowledge of the armed robberies had no obvious bearing on Pollard's testimony. Pollard merely stated that he had volunteered to Shuman the fact that he had participated in the Dolan armed robberies. This information is not so significant that had the jury been aware of it it would have acquitted Sargent. At trial the jury had ample evidence that the state had made a deal with Pollard, namely, granting him immunity for his testimony. Although further evidence of collusion may have been useful to the defense, it would have been cumulative nevertheless.

A trial court's decision to exclude evidence as hearsay is reviewable only for abuse of discretion. *United States v. Zannino*, 895 F.2d 1, 7 (1st Cir.), *cert. denied*, 110 S. Ct. 1814 (1990). However, even though

> the trial judge retains the traditional discretion to limit the scope of cross-examination, discretion in the area of bias evidence becomes operative only after the constitutionally required threshold level of inquiry has been afforded the defendant. . . . The test for abuse of discretion . . . where the trial judge limited cross-examination on bias is whether the jury had sufficient other information before it, without the excluded evidence, to make a discriminating appraisal of the possible biases and motivations of the witness.

United States v. Tracey, 675 F.2d 433, 437 (1st Cir. 1982) (citations omitted).

The jury had before it evidence of the possible motivations and biases of both Shuman and Pollard and thus the excluded questions would merely have been reinforcing. It was evident that Pollard was testifying for the prosecution against Sargent and the jury heard through testimony that the state granted Pollard immunity from prosecution for his crimes and further permitted him to keep the money that he had stolen. Such evidence and defense counsel's allowed cross-examination concerning it squarely presented to the jury the issue of Shuman's and Pollard's biases and motivations. I conclude that the constitutionally required threshold level of inquiry was therefore reached by Billings on cross-examination.

Having come this far, I must now review the trial court's ruling for abuse of discretion in limiting cross-examination.

> Once the constitutional threshold is satisfied, a trial court may exclude certain of the defendant's questions on cross-examination so as to restrict repetitive cross-examination and conjectural testimony. Such a limitation on cross-examination is not a denial of the constitutionally protected right of confrontation; rather it is a legitimate evidentiary ruling entrusted to the discretion of the trial judge.

Niziolek v. Ashe, 694 F.2d 282, 289 (1st Cir. 1982) (citation omitted). Although Billings was not permitted to probe as deeply as he wished, ```the question is not whether some other judge might have been more flexible than the judge who handled the case but rather whether his ruling was so arbitrary as to violate the fundamental protections contained in the sixth amendment to the federal Constitution.'" *Id.* at 290 (*quoting Blaikie v. Callahan*, 691 F.2d 64, 69 (1st Cir. 1982)).

Only when substantial limitations are placed on a defendant's right of cross-examination will reviewing courts find an abuse of discretion. In *Davis v. Alaska* the Court found such an abuse because the trial court altogether prohibited cross-examination of a key prosecution witness as to his probation status. First Circuit cases finding an abuse of the trial court's discretion involve similarly substantial limitations on cross-examination. In *United States v. Lynn*, 856 F.2d 430 (1st Cir. 1988), for example, the defense was denied an opportunity to elicit facts surrounding the terms of a plea agreement between a state's witness and the prosecution. Nothing so prejudicial occurred at the petitioner's trial.

Conversely, courts have consistently found no abuse of discretion when reviewing cases more factually akin to this one. *See, e.g., United States v. Twomey*, 806 F.2d 1136 (1st Cir. 1986); *United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980); and *Stack v. Vestal*, 540 F. Supp. 775 (D. Me. 1982). Here, because the judge permitted counsel to examine the detective in other areas and to recall him for further cross-examination later in the trial, the jury had before it other evidence that Shuman colluded with Pollard. The additional piece of excluded information about which the defense complains would have been cumulative. Its exclusion on hearsay grounds was a reasonable evidentiary ruling and not an abuse of discretion. I therefore conclude that Sargent's Sixth Amendment right of confrontation was not violated.[8]

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[8] In any event, a finding of abuse of discretion alone does not *a fortiori* mandate reversal. The reviewing court must determine whether the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). This process involves an assessment of the record as a whole to determine the probable impact of the error on the jury. *Morgan v. Hall*, 569 F.2d 1161, 1166 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978). Shuman's testimony served primarily a credibility-enhancing function in the prosecution's case. Neither Dolan nor Shuman testified to having any direct knowledge of Sargent's guilt. Pollard gave the only testimony relating personal experience about Sargent's involvement with the robbery. Shuman testified on direct-examination how the robbery came to his attention, namely that Pollard volunteered the information to clear his conscience.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Sargent's final argument is that his attorney's advocacy both prior to and during trial was ineffective in violation of his Sixth Amendment right to counsel. Petitioner's Memorandum at 17-27. He asserts the following specific grievances: (1) Billings did not adequately prepare for trial in that he did not discover impeachment evidence that Pollard had been convicted of forgery and had participated in burglaries, and that Detective Shuman was instrumental in the state's dismissal of Pollard's indictment for reckless conduct with a firearm; (2) Billings failed to impeach Pollard with inconsistent statements that he made to Shuman in March 1981 and February 1985; (3) despite the fact that Billings knew of three relevant interviews conducted in the Cochran murder investigation, he did not use them to impeach Detective Shuman's testimony that he was unaware of the Dolan armed robberies until Pollard disclosed them; (4) although Dolan's conversation with the DEA about the armed robberies was brought to his attention at trial, Billings did not make efforts during trial to obtain further relevant information, including the so-called ``Dolan Debriefing Report''; and (5) Billings'

Shuman also testified that the state had not promised Pollard immunity at the time Pollard disclosed the robberies to Shuman. The rest of his testimony revolved around these facts.

Defense counsel did not succeed in impeaching Shuman on the basis of bias or motive. However, the fact that Shuman interviewed Sargent in connection with the unrelated Cochran murder investigation, somewhat remote in time, and failed to disclose certain relevant evidence from that interview does not compel the conclusion that he was not credible. Although it is not known how Shuman would have testified if cross-examined as to this issue, the court's decision not to allow this line of questioning is harmless when considered in light of the whole record.

representation of Sargent presented an actual conflict of interest because six years before the armed robbery trial Billings had prosecuted Pollard while serving as an assistant district attorney. *Id.*

A criminal defendant's Sixth Amendment ```right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). To be constitutionally ineffective, a defense attorney's performance must not only be deficient but also so prejudicial as to undermine confidence in the justness of the trial's result. *Id.* at 687, 694. A criminal-defense attorney's trial representation is to be judged deferentially and with ``every effort . . . 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." *Id.* at 689.

A court reviewing criminal-defense counsel's performance ``must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" *Id.* (citation omitted). ``The Constitution does not guarantee a defendant a letter-perfect defense or a successful defense; rather, the performance standard is that of reasonably effective assistance under the circumstances then obtaining." *United States v. Natanel*, 938 F.2d 302, 309-10 (1st Cir. 1991) (citation omitted).

A criminal defendant who proves that counsel's performance was deficient next must demonstrate that his lawyer's flaws likely prejudiced his defense. ``It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, ``[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. ``A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Defense counsel's performance was, on the whole, quite competent. His efforts to execute the defense's trial strategy, while not flawless, were certainly well considered, diligent and vigorous. Furthermore, the deficiencies that Sargent alleges do not amount to prejudice.

First, Billings diligently searched for discovery in a reasonable fashion. He filed a motion for discovery and personally searched the prosecution's file on Sargent. He consulted files on Pollard's criminal record and discussed the dismissal of Pollard's reckless conduct indictment with Pollard's attorney. By itself, his failure through these efforts to uncover evidence that Pollard committed a forgery or participated in burglaries, or that Shuman played a role in the dismissal of the reckless conduct charge against Pollard, does not constitute ineffectiveness. Billings cannot be held to account for failing to find information just because it may in fact have existed somewhere. To constitute ineffectiveness his search must fall short of the reasonable diligence expected of a criminal-defense attorney. Nothing in the record supports such a conclusion.

In any case, Billings' failure to discover and use such information at trial was not prejudicial. He soundly challenged the credibility of Pollard, whose testimony formed the crux of the state's case against Sargent. Prompted by Billings' cross-examination, Pollard admitted, among other things, to lying to the police on more than one occasion in this and other investigations, receiving immunity from prosecution for his testimony, participating in two armed robberies and being allowed to keep the fruits of those crimes. Furthermore, Sargent's allegation to the contrary notwithstanding, the record is clear that not only did defense counsel question Pollard about inconsistencies between his statements to Shuman in March 1981 and February 1985 but Pollard admitted that some inconsistencies were deliberate on his part. Evidence that Pollard was convicted of forgery or that he had committed burglary would have been cumulative, merely reinforcing the evidence already before the jury. Therefore, counsel's failure to elicit these bad acts of Pollard did not have a bearing on the outcome of

the petitioner's trial.[9] Similarly, because Pollard's testimony concerning his immunity provided evidence of collusion between him and the state Shuman's role in the state's dismissal of Pollard's indictment would have been merely cumulative. Thus, there was no prejudice.

Nor was it lack of reasonable diligence in preparing for trial for defense counsel to fail to consult three relevant interviews kept in his closed files on Sargent's prior murder indictment. These interviews, in which Shuman allegedly spoke of the Dolan armed robberies prior to learning of them from Pollard, were conducted over one year before the armed robbery trial as part of an entirely unrelated investigation. While Sargent himself appears to have been actively involved in his own defense, even he failed to recall these interviews at trial, despite the fact that he participated in one of them in 1984. Defense counsel simply did not remember them at trial and had no reason to predict the relevance of these interviews while preparing for trial. It was only at trial that he learned that the prosecution was packaging Pollard's confession, in part, as a service to the police because he reported an unknown crime. While these interviews may have proved useful in impeaching Shuman, counsel's failure to remember those relevant aspects of the unrelated and sizeable closed murder file in which they were located hardly constitutes a deficient performance on his part. Nor would such impeachment likely have resulted in Sargent's acquittal. Pollard's and Shuman's motives were before the jury independent of these interviews and, therefore, this information would simply have served a cumulative effect.

Billings' handling of Dolan's disclosure of his conversation with the DEA was neither deficient nor prejudicial to the petitioner. For tactical reasons, at trial defense counsel asked only perfunctory

[9] For the trial court's decision on Sargent's ineffective-assistance-of-counsel claim, see *Sargent*, No. CR-88-701, at 2-3 (Jan. 8, 1990).

questions about Dolan's conversation with the DEA. Dolan had testified that he did not give the DEA any names in relation to the armed robbery and there was no evidence that Dolan had either identified or implicated anyone in the crime. Absent any information that the prosecution had relied on the report, it was reasonable for Billings to refrain from embarking on a discovery mission that could just as easily have impaired his defense of Sargent as enhanced it. Such a decision does not amount to ineffectiveness even though, following the trial, Billings learned that Dolan indeed had named suspects, not including Sargent.

For the same reasons, counsel's failure to attempt to recess the trial in an effort to learn of and acquire the DEA report of Dolan's conversation did not constitute lack of due diligence or prejudice the petitioner. There is nothing in the record to suggest that the prosecutor in Sargent's case had a copy of the report. If the report was maintained by the state of Maine with regard to other investigations, it would have been confidential. *See* 5 M.R.S.A. ' 200-D. Thus, it would have been unavailable to the defense had Billings requested it.

Finally, Sargent's claim that Billings had a conflict of interest is specious. There are no facts in the record to support the charge that Billings' activities as an assistant district attorney impaired his representation of Sargent. Nor is the suggestion that Billings was loyal to the district attorney's office anything but mere conjecture. In particular, the record does not suggest that through his former position Billings had any knowledge of Shuman's role in the dismissal of a reckless conduct charge against Pollard or any other exculpatory information that would have benefited Sargent. I find no actual or implied conflict of interest on defense counsel Billings' part.

The totality of the record reveals that Billings zealously represented Sargent at the armed robbery trial. He conducted vigorous cross-examination and performed well under difficult circumstances. The petitioner is entitled to a fair trial, not a perfect one. I conclude that Billings provided reasonably effective assistance of counsel and that Sargent received, on the whole, a fair trial.

V. CONCLUSION

For the foregoing reasons, I recommend that the court ***DENY*** Sargent's petition for writ of habeas corpus.[10]

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 at Portland, Maine this 11th day of December, 1991.

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David M. Cohen
United States Magistrate Judge

[10] If my recommended disposition is accepted, Sargent's pending motions for appointment of counsel and discovery will be moot.