

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

JOHN FEOLE )  
Plaintiff, )  
 )  
v. ) C.A. No. 02-518S  
 )  
A.T. WALL, Director of the )  
Department of Corrections )  
Defendant. )

**DECISION AND ORDER**

William E. Smith, United States District Judge.

Petitioner John Feole ("Petitioner" or "Feole") has filed a petition pursuant to 28 U.S.C. § 2254 to vacate and set aside his state court conviction for solicitation of murder. The case is presently before the Court on an objection to a Report and Recommendation ("R&R") issued by Magistrate Judge Jacob Hagopian, which recommends that the petition be denied.

For the reasons that follow, this Court adopts and incorporates the findings and recommendations of the Magistrate Judge and holds that there was no infringement of either the Petitioner's right to testify and/or his Sixth Amendment right to counsel in the state court proceedings below. The Petition is therefore dismissed. This Court writes separately in order to expand upon several issues in the Petition and R&R, and to discuss other points not addressed in the R&R.

Feole has also filed (1) a Motion for Clarification seeking information as to the docket number and judge assigned to his case;

and (2) a Motion for Reconsideration of the previous denial of a motion to appoint counsel, both of which are denied for the reasons discussed herein.

I. Background and Travel

The facts, as set forth in the R&R, are as follows:

In 1995, the Petitioner was convicted in Rhode Island Superior Court of extortion and usury. See State v. Feole, 748 A.2d 239 (R.I. 2000). During trial proceedings in that case, Feole contacted an acquaintance, telling the acquaintance that "he had a problem" and wanted some people "blown away." Feole explained that he wanted the complaining witnesses in his usury and extortion trial "taken care of." In a series of meetings with the acquaintance, Feole described his desire to have the acquaintance carry out the "shootings" and offered to pay the acquaintance \$10,000 for these misdeeds. He also supplied the acquaintance with bullets and a gun and identified where the potential victims resided. Unbeknownst to Feole, the acquaintance contacted the authorities, who listened to, or recorded, some of the conversations and collected evidence concerning the unlawful scheme.

In due course, Feole was charged with solicitation to commit murder. A trial commenced before a Superior Court jury. After both parties had rested, and immediately prior to closing arguments, defense counsel informed the trial judge that Feole was

insisting that he be permitted to testify. Counsel explained to the court that he had previously discussed with Feole the pros and cons of testifying and that he had advised Feole against testifying. See State v. Feole, Cr. No. P2/95-2174, Transcript of Trial Proceedings conducted on August 1, 1997 (hereinafter "Tr.") at 351-52. Counsel indicated that Feole initially acquiesced in his lawyer's advice and that the defense had rested on the previous day with Feole's concurrence. Id. at 351.

The trial judge thereafter entertained a motion to reopen the defense's case in chief. In the course of presenting the motion, defense counsel again indicated that any testimony Feole would offer would be against his advice and that he was unprepared to conduct a direct examination of Feole, since he had been preparing for final arguments. Id. at 356.

The trial judge then discussed the proposed testimony with Feole and his attorney. Feole indicated that he wished to testify concerning events leading up to his prior conviction for usury and extortion and that he wished his attorney to cross-examine further a prior witness concerning facts relating to the earlier conviction. Id. at 355-357. The trial judge explained to Feole that this testimony was irrelevant to the solicitation of murder charges. Id. at 356-357. The trial judge thereafter granted the motion to reopen with certain conditions, including that Petitioner testify in narrative form without the assistance of his attorney

and that his testimony be restricted to the events concerning the solicitation of murder charges only. Id. The defendant requested a new lawyer, which the trial judge denied. Id. at 357-59.

After the jury returned to the courtroom, the trial judge asked Feole if he wished to testify. Feole responded that he did not have a lawyer. Id. at 360. The trial judge construed this response as a declination, and the case proceeded to final arguments. Id. That same day the jury convicted Feole of solicitation to commit murder.

Feole appealed to the Rhode Island Supreme Court, contending that his right to testify was infringed upon, and that, by forcing him to forego a direct examination through counsel and to testify in the narrative form, the trial judge interfered with his Sixth Amendment right to counsel. In a 4-1 decision the Rhode Island Supreme Court affirmed the conviction. State v. Feole, 797 A.2d 1059 (R.I. 2002). The majority held that the trial judge's conditional decision to reopen the trial to permit Feole to give narrative testimony did not violate Feole's right to testify. Id. at 1065-66. The majority also held that Feole's right to counsel was not infringed upon, in view of his initial decision not to testify, his last-minute decision to testify against the advice of counsel, and his insistence on giving testimony irrelevant to the charges against him. Id. at 1066-67. The court noted that a defendant's right to counsel "is not unfettered or unlimited but

must be balanced with the public's right to the efficient administration of justice." Id. at 1067. The majority found that the trial judge's questions to Feole in front of the jury about whether he wanted to testify and conclusion that his nonresponsive answer was a declination was erroneous, but because these issues had not been properly preserved for review, the court did not address them. Id. at 1068.

The dissenting justice concluded that Feole's right to counsel was violated "(1) when [the trial judge] prevented the defendant's counsel from conducting a direct examination of the defendant after granting the defendant's request to allow him to reopen his case so that he could testify; and (2) when he asked the defendant whether he wanted to testify in front of the jury, and then refused to allow him to do so when the defendant responded that he did not have a lawyer" and that "these violations of the defendant's constitutional right to counsel at trial constituted reversible errors . . . ." Feole, 797 A.2d at 1068.

Feole thereafter filed the instant application for federal habeas relief.<sup>1</sup> Feole asserts that he is "appealing [his] case from the R.I. Supreme Court." The Petition does not specify which

---

<sup>1</sup> Feole also filed a second application for relief under 28 U.S.C. § 2254, Feole v. R.I. Attorney General, C.A. No. 03-007T, which purports to seek relief from his conviction of usury and extortion. That petition was assigned to Chief Judge Ernest C. Torres and has been dismissed. See id., Order Denying Petition for Writ of Habeas Corpus dated August 21, 2003.

particular issues it asks this Court to review. The Rhode Island Attorney General filed a memorandum opposing the petition, and Feole filed a response to the opposition.

The Court referred the Petition to Magistrate Judge Jacob Hagopian for a Report and Recommendation. The Magistrate Judge addressed those issues addressed by the Rhode Island Supreme Court, noting that any other issue would be unexhausted under 28 U.S.C. § 2254(B)(1)(A). R&R at 3.

In his R&R the Magistrate Judge reviewed the pertinent events at the state court trial and addressed claims involving both Petitioner's right to testify and his right to counsel. Concerning the defendant's right to testify, the Magistrate Judge noted that the state Supreme Court determined that Petitioner had waived his right to testify twice, the second time because he was prevented from introducing irrelevant and inadmissible evidence. R&R at 5. The Magistrate Judge discussed the sources of a criminal defendant's right to testify and noted that this right may be limited, citing Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Id. at 5-6. After noting that the state court afforded Petitioner an opportunity to testify, the Magistrate Judge concluded that the state Supreme Court's holding that Petitioner's right to testify was not infringed upon was not an "unreasonable application" of clearly established United States

Supreme Court precedent and therefore the alleged infringement was not a ground for relief. Id. at 6.

As to Petitioner's right to counsel claim, the Magistrate Judge noted that the state Supreme Court had correctly identified existing U.S. Supreme Court precedent on this issue, which holds that the Sixth Amendment right to counsel is a basic right, the deprivation of which during a critical stage of the proceedings results in automatic reversal. Id. at 7-8. The Magistrate Judge found, contrary to the state Supreme Court majority, that the trial judge's decision to restrict the participation of defense counsel during Petitioners's direct examination was erroneous. Id. at 8; cf. Feole, 797 A.2d at 1066-67. However, the Magistrate Judge further concluded that this ruling, although erroneous, was not an "unreasonable application" of existing U.S. Supreme Court precedent concerning the right to counsel. Id. at 8-9.<sup>2</sup>

Consequently, the Magistrate Judge recommended that Petitioner's application for relief be denied. Id. at 9. The R&R did not refer in any respect to the dissenting opinion in the Rhode Island Supreme Court's decision.

---

<sup>2</sup> This portion of the R&R focused on the trial judge's actions, rather than on the state Supreme Court's decision affirming those actions. However, because the R&R reached the same conclusion as the state Supreme Court majority, the Court will construe the R&R as finding that the state Supreme Court decision itself was not an unreasonable application of U.S. Supreme Court precedent on this issue.

Both parties filed objections to the R&R. The Attorney General objected to that portion of the R&R which found the state court to be in error in requiring Petitioner to give his testimony without the assistance of counsel but concurred with the Magistrate Judge's recommendation that the petition be denied. Petitioner's objections are less clear, but the Court construes his submission as objecting to the Magistrate Judge's finding that the state Supreme Court's decision on both issues was not an unreasonable application of U.S. Supreme Court precedent, as well as to the recommendation that the Petition be dismissed.<sup>3</sup>

Petitioner's response also includes (1) a Motion for Clarification of information regarding the docket number and district judge assigned to each of his respective petitions and (2) a Motion for Reconsideration of the denial of Petitioner's motion to appoint counsel in the instant proceeding. Because all relevant information has been provided to Petitioner, and his other petition, C.A. No. 03-007T, has been dismissed, the Motion for

---

<sup>3</sup> In his *pro se* response Petitioner states without elaboration that he "does not object to the states [sic] motion to dismiss at this time as long as it is without prejudice." See Plaintiff's Response to R&R at 6. However, in view of Petitioner's overall response to the R&R, which totals more than 30 pages, including exhibits, this Court cannot conclude from that single sentence that Petitioner desires to waive all objections to the R&R. Moreover, to dismiss "without prejudice" would make little sense and would effectively invite the Petitioner to file a successive petition. Thus, the Court will treat his filing as an objection.

Clarification is moot. The Motion for Reconsideration is discussed infra.

## II. Analysis

### A. Standard of Review

A motion for habeas relief may be referred to a magistrate judge for initial findings and recommendations. 28 U.S.C. § 636(b)(1)(B); D.R.I. Local Rule 32. Determinations made by magistrate judges on dispositive pretrial motions and prisoner petitions are reviewed *de novo* by the district judge. See Fed. R. Civ. P. 72(b). In making a *de novo* determination, the district judge “may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.” Id. In reviewing a magistrate judge’s findings and recommendations, the district court must actually review and weigh the evidence presented to the magistrate judge, and not merely rely on the magistrate judge’s report and recommendation. See United States v. Raddatz, 447 U.S. 667, 675-676, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980).

B. Petitioner's Substantive Objections<sup>4</sup>

1. AEDPA and Habeas Corpus Review

The Anti-terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, ("AEDPA") significantly limits the scope of federal habeas review. The AEDPA establishes a two-prong test that federal courts must apply in reviewing a habeas petition filed under 28 U.S.C. § 2254. The pertinent provisions state:

(d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that 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 statute also provides that in federal habeas proceedings, a federal court shall assume that the state court's determination of factual issues is correct, subject to

---

<sup>4</sup> Although it does not appear that Feole pursued any of the state law post-conviction remedies available to him under R.I. Gen Laws § 10-9.1-1, et seq., the Attorney General has not raised any issue as to exhaustion of state court remedies, nor does the R&R discuss the issue. Section 2254(b)(1)(A) provides that an application for writ of habeas corpus shall not be granted unless "the applicant has exhausted the remedies available in the courts of the State"; or state post-conviction remedies are either unavailable or ineffective. The Court need not, however, address the exhaustion issue, since Feole's substantive claims here were presented on his direct appeal to the state Supreme Court, and this Court, in any event, is free to deny all claims, even if unexhausted, on the merits. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

rebuttal only by clear and convincing evidence. See 28 U.S.C. § 2254(e) (1).

The “contrary to” and “unreasonable application” clauses of § 2254(d) (1) have independent meanings. See Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (citing Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). A decision is “contrary to” federal law if the state court applies a legal principle different from the governing principle set forth in Supreme Court cases, or if the state court decides the case differently from a Supreme Court case on materially indistinguishable facts. Bell, 535 U.S. at 694; Williams, 529 U.S. at 407-08. A state decision is deemed an “unreasonable application” of Supreme Court law if the state court correctly identifies the governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of the particular case. Bell, 535 U.S. at 694; Williams, 529 U.S. at 404-05. In describing the “unreasonable application” standard, the Supreme Court has repeatedly noted that “an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.” Williams, 529 U.S. at 412.

The First Circuit has recently elaborated on the unreasonable application standard. For a state decision to be deemed unreasonable

‘some increment of incorrectness beyond error is required.’ [Citation omitted.] The increment need not

necessarily be great, but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court.

McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002) (en banc) (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000)). The McCambridge court further noted that "if it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." Id.<sup>5</sup>

## 2. The Right to Testify

Petitioner objects to that portion of the Magistrate Judge's R&R finding that there was no deprivation of his constitutional right to testify at his trial so as to require habeas relief. The Magistrate Judge found that the state Supreme Court, in analyzing this claim, correctly identified the controlling U.S. Supreme Court precedent, namely, Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987), and therefore the appropriate analysis was whether that court's decision was an "unreasonable application" of this precedent. See R&R at 4-5. After discussing the pertinent principles regarding the right to testify, the Magistrate Judge concluded that the state Supreme Court's decision on this issue could not be deemed an "unreasonable application" of clearly established U.S. Supreme Court precedent. Id. at 6.

---

<sup>5</sup> In McCambridge, the First Circuit held that a state appellate court's finding that there was no Brady violation in the course of defendant's trial (resulting in his eventual conviction for manslaughter) did not constitute an "unreasonable application" of U.S. Supreme Court precedent. 303 F.3d at 37-43.

A defendant's right to testify at his own criminal trial, although not expressly set forth in the text of the U.S. Constitution, "has [its] sources in several provisions of the Constitution." Rock, 483 U.S. at 51. These sources include the Fifth, Sixth and Fourteenth Amendments. Id. at 51-53. A defendant may, however, waive his right to testify. See Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) ("it is . . . recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal").

The right to testify may also be limited. A defendant who testifies must comply with restrictions which are not arbitrary or disproportionate to the purposes they are designed to serve. See Rock, 483 U.S. at 55-56. For example, the right to testify does not extend to testifying falsely. See Nix v. Whiteside, 475 U.S. 157, 173, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986).

This Court agrees with the Magistrate Judge that the state Supreme Court's conclusion that the Petitioner's right to testify was not unconstitutionally infringed upon and therefore did not constitute an "unreasonable application" of clearly established U.S. Supreme Court precedent. As the Supreme Court has noted, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.'" Rock, 483 U.S. at 53 (quoting

Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971)). At trial, Petitioner voluntarily relinquished his right to testify during his case-in-chief. Feole, 797 A.2d at 1065. As noted by the state Supreme Court, his change of heart and last-minute request to testify, against his counsel's advice, presented the trial judge with a dilemma. While the trial judge could well have denied this request given that the Defendant had rested his case, the decision to reopen the evidence with the restrictions imposed by the trial judge -- namely, that his testimony relate to the solicitation of murder charge, rather than Petitioner's earlier trial, and be given in narrative form -- while perhaps not ideal, was not a wholly unreasonable response to this dilemma.

The question here is not whether this Court agrees with the state Supreme Court that these limits on Petitioner's trial testimony were proper or reflected the best choice of alternatives available, but rather only whether the state Supreme Court's conclusion was an unreasonable application of U.S. Supreme Court precedents. See Bell, 535 U.S. at 694. Upon review of both the state Supreme Court's opinion and the trial transcript excerpt, this Court cannot say that the majority opinion was unreasonable. The U.S. Supreme Court has noted that the right to testify is not absolute and that it must sometimes "bow to accommodate other

legitimate interests in the criminal trial process." Rock, 483 U.S. at 55 (internal quotation marks and citation omitted).

The First Circuit's decision in United States v. Peterson, 233 F.3d 101 (1st Cir. 2000), although involving a trial in federal court rather than state court, is instructive. There, the defendant was tried on narcotics and firearms charges. The defense rested without the defendant testifying. Thereafter, before the jury charge, the defendant had a change of heart and sought to testify. Senior Judge Lagueux of this Court refused to reopen the trial to permit defendant to testify. Defendant was convicted and appealed. The First Circuit affirmed, holding, *inter alia*, that the trial judge's refusal to reopen the trial was not an abuse of discretion and not an infringement upon defendant's constitutional right to testify. 233 F.3d at 105-07. The Court of Appeals stated that in deciding whether to reopen a trial to permit testimony, "the court must consider whether the likely value of the defendant's testimony outweighs the potential for disruption or prejudice in the proceedings, and if so whether the defendant has a reasonable excuse for failing to present the testimony during his case-in-chief." Id. at 106. The court found significant the fact that, as here, defense counsel indicated he could not participate in the direct examination of the defendant. Id. at 107. Moreover, the defendant could not state the precise nature of his testimony

and offered no excuse for not testifying during his case-in-chief.  
Id.

Here, as in Peterson, Petitioner changed his mind after the defense had rested, and his counsel refused to assist him in testifying. Similarly, there was no value to Petitioner's testimony, given his insistence on testifying about events in his other trial. Moreover, Petitioner has offered no excuse for not testifying prior to resting. Finally, the state trial court's action here (reopening the trial with conditions) was in theory more favorable to the defendant than the trial judge's action in Peterson. While the resulting colloquy between the judge and the Defendant, which took place in front of the jury, was unfortunate (this is discussed in more detail below) it did not materially change the fairness of the proceeding. In any event, all of this was a situation of the Defendant's own making, and the trial judge was merely attempting to mitigate the problem created by him while bending over backwards to be fair.

This Court adopts the Magistrate Judge's finding that the state Supreme Court decision upholding the conditions imposed by the state trial judge incident to the reopening of Feole's case did not constitute an unreasonable application of existing U.S. Supreme Court precedent so as to qualify for habeas relief.

3. Right to Counsel

Petitioner's alternative ground for federal habeas relief is that his Sixth Amendment right to counsel was infringed upon when the state trial judge, *sua sponte*, required him to forego a direct examination and present his testimony in narrative form.

In his R&R, the Magistrate Judge found that the state Supreme Court correctly identified the controlling Supreme Court precedent on this issue, and he therefore reviewed whether the state court decision constituted an "unreasonable application" of that precedent. R&R at 7. The Magistrate Judge found that although the state trial judge's decision to require Petitioner to testify without the assistance of his counsel at a critical stage in the proceedings was erroneous, that decision was not "unreasonable" so as to entitle Petitioner to habeas relief. Id. at 7-9. This conclusion was based on the fact that the Petitioner had initially waived his right to testify upon advice of counsel; that he changed his mind at the eleventh hour; that this change of heart came as a surprise to his attorney, who was unprepared to conduct a direct examination; and that the trial judge's decision to reopen Petitioner's case-in-chief to permit him to testify was discretionary. Id. at 9.

The right of a criminal defendant to be represented by counsel is firmly rooted in our system of justice. It is a right guaranteed by the Sixth Amendment to the Constitution, which

provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI; see Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S. Ct 792, 9 L. Ed. 2d 799 (1963) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”) (internal citations omitted). That right is fully applicable to state court proceedings. Gideon, 372 U.S. at 345.

The participation of counsel at critical stages in the proceedings, such as the direct testimony of the accused, operates to assure that the accused’s interest will be protected. United States v. Wade, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). The Supreme Court has concluded that the assistance of counsel is among those “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” Chapman v. California, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). “When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage . . . reversal is automatic.” Holloway v. Arkansas, 435 U.S. 475, 489, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) (citing Gideon, 372 U.S. at 335).

The record indicates that after both parties had rested, and immediately prior to closing arguments, defense counsel informed the trial judge that Feole was insisting that he be permitted to

testify. Counsel explained to the court that he had previously discussed with Feole the pros and cons of testifying and that he had advised Feole against testifying. Counsel further indicated that Feole initially acquiesced in his lawyer's advice and that the defense had rested on the previous day with Feole's consent.

The dilemma created by Feole's last-minute request, which this Court noted in discussing the right to testify claim, is more problematic in the context of the right to counsel issue. As observed by the state Supreme Court, the trial judge was faced with an attorney who was not only unprepared and unwilling to examine his client, but who nonetheless requested the court to reopen the case to allow his client to testify. See Feole, 797 A.2d at 1064-65. The trial transcript shows that during the discussion with the trial judge concerning his proposed testimony, Feole indicated that he wished to testify concerning events leading up to his *prior* conviction for usury and extortion, and to have his counsel further cross-examine a prior witness as to those events. Tr. at 355. The trial judge explained to Feole that this testimony was irrelevant to the solicitation of murder charges. Clearly, the refusal to allow irrelevant testimony was an appropriate limitation.

The trial judge thereafter, however, granted the motion to reopen with certain conditions, including that Petitioner testify in narrative form, without the assistance of his attorney, concerning the solicitation of murder charges only. Id. at 356-57.

The defendant then requested a new lawyer (i.e., one who would willingly assist him in testifying), which request was denied. Id. at 357-58. The state Supreme Court upheld the denial, stating that “[t]he right to counsel of one’s choice is not unfettered or unlimited but must be balanced with the public’s right to the efficient administration of justice.” Feole, 797 A.2d at 1067.

There is little question that the decision to limit the scope of the Defendant’s questioning to relevant areas and the denial of the request for a new attorney were appropriate. More problematic, however, was the decision to reopen the testimony without allowing defense counsel a brief continuance to prepare, and to require the Defendant to testify in narrative fashion. As an initial matter, all of this was avoidable. Once the judge agreed to reopen the record, limited the scope of testimony and denied the request for new counsel, the judge could have provided the Defendant with several options: 1) a brief continuance and opportunity to testify through counsel; 2) if counsel refused to participate, the Defendant could either dismiss his attorney and proceed pro se; or 3) forego the additional testimony and withdraw the motion to reopen. Any of these options would have avoided the bizarre scene of asking the Defendant in front of the jury if he wished to

testify and having him reply (not through counsel) that he did not have an attorney.<sup>6</sup>

Given the procedural waiver regarding the brief colloquy between the trial judge and the Defendant in the presence of the jury, the Court is left only with the question of whether the Rhode Island Supreme Court acted inconsistently with clearly established

---

<sup>6</sup> Although not expressly discussed in the Magistrate Judge's R&R, the question posed by the trial judge in the presence of the jury further complicates the question. After the jury returned to the courtroom, the following exchange took place:

THE COURT:                   Your (sic) resting. Mr. Feole, do you wish to take the stand?

THE DEFENDANT:            I don't have a lawyer.

THE COURT:                   The answer is no. All right the case is rested, both sides. Ladies and gentlemen, we will now hear final arguments. . . .

Tr. at 360.

The state Supreme Court majority noted that the trial judge committed an error in asking Feole in the jury's presence whether he wished to testify, but the court declined to address the constitutional issue, as it was not raised, briefed or argued on appeal. Feole, 797 A.2d at 1068 (citing R.I. Sup. Ct. R. 16(a)). The violation of a state procedural rule may constitute an "independent and adequate state grounds" so as to bar federal habeas corpus relief. See Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (adequate and independent state grounds doctrine applies to bar federal habeas relief when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement). Thus, the state Supreme Court committed no constitutional error on this issue, as it never addressed the constitutional question.

federal law in ruling that the Defendant's Sixth Amendment rights were not violated by the trial judge's actions.

Upon review of the Magistrate Judge's R&R, the transcript of the colloquy in question, and the state Supreme Court majority and dissenting opinions, although it is a close call, this Court cannot say that the trial judge's actions and the state Supreme Court's affirmance of those actions was inconsistent with clearly established federal law. While there appears to be no Supreme Court decision directly on point, the First Circuit - like the Rhode Island Supreme Court - has recognized that a defendant's right to counsel is not unlimited, but is subject to the orderly administration of justice. See United States v. Poulack, 556 F.2d 83, 86 (1st Cir. 1977), cert. denied, 434 U.S. 986, 98 S. Ct. 613, 54 L. Ed. 2d 480 (1977) (the right of a criminal defendant to have counsel of his or her choice "must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice") (citing Carey v. Rundle, 409 F.2d 1214 (3d Cir. 1969)); accord Tuitt v. Fair, 822 F.2d 166, 171 (1st Cir. 1987).

The trial judge was not required to continue the case in order to permit Petitioner's counsel to prepare, or for Petitioner to retain other counsel, as the state court dissent suggests. Feole, 797 A.2d at 1071. In Morris v. Slappy, 461 U.S. 1, 11, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) the Supreme Court noted that "[n]ot

every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel . . . . Consequently, broad discretion must be granted trial courts on matters of continuances." Here, Petitioner had been ably represented by counsel throughout the entire trial. Counsel had considered and rejected putting Feole on the stand, and could not endorse his effort to take the stand. Further, counsel was prepared to, and did, continue his representation through final arguments. The state Supreme Court decision upholding the trial judge's denial of counsel struck an appropriate balance between a defendant's right to counsel and the state court's interest in the efficient and orderly administration of justice.

Furthermore, assuming *arguendo* that the brief colloquy between the judge and the Defendant in the presence of the jury could be considered as well, there is still no ground for habeas relief. Although the jury could have inferred from the exchange that Feole had something to hide by not taking the stand, the trial judge gave a curative instruction, cautioning the jurors that they "may not draw any inference of guilt of the defendant" because of his failure to testify.<sup>7</sup> In any event, as noted above in connection

---

<sup>7</sup> The state Supreme Court observed that this error, even if addressed, would be subject to harmless error analysis, as it did not constitute a "structural defect that affects '[t]he entire conduct of the trial from beginning to end.'" Feole, 797 A.2d at 1067 n.7 (quoting Arizona v. Fulminante, 499 U.S. 279, 309, 111

with the right to testify, Petitioner does not clearly set forth the facts about which he would have testified and how his testimony would have helped his case. Thus, there is no showing that the likely value of Petitioner's testimony would outweigh the potential for disruption or prejudice in the proceedings or that Petitioner had a reasonable excuse for failing to present the testimony during his case-in-chief. See Peterson, 233 F.3d at 106.

Undoubtedly, this case presents some close questions. There is record support for the findings and conclusions in both the majority and dissenting state Supreme Court opinions; indeed, the opinions differ only as to the interpretation of the court colloquy set forth in the trial transcript excerpt. Nonetheless, this case does not present a state court action that has "'some increment of incorrectness beyond error' . . . great enough to make the decision unreasonable in the independent and objective judgment of the federal court." McCambridge, 303 F.3d at 36 (citing 221 F.3d 100). As the First Circuit observed in that case, a close question almost always means that the state court decision was not an "unreasonable application." Id.

Finally, the question here is not whether this Court would have decided Feole's appeal differently or in accordance with the dissenting opinion, but rather whether the state Supreme Court's majority opinion constitutes an unreasonable application of

---

S.Ct. 1246, 1265, 113 L. Ed. 2d 302, 331 (1991)).

existing federal law concerning a criminal defendant's right to counsel. See Williams, 529 U.S. at 411 ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."). This Court declines to find that it was.

For the foregoing reasons, the Court concurs with the Magistrate Judge's Report and Recommendation that the state Supreme Court's decision that there was no unconstitutional deprivation of Feole's right to counsel was not an "unreasonable application" of U.S. Supreme Court precedent so as to warrant habeas relief.

C. Motion for Reconsideration

Petitioner has also filed a Motion for Reconsideration of the previous denial of his motion for appointment of counsel to represent him in this habeas proceeding. On June 26, 2003 the Magistrate Judge denied Petitioner's motion for appointment of counsel.<sup>8</sup>

---

<sup>8</sup> If Petitioner's motion for reconsideration is construed as an appeal of the Magistrate Judge's initial ruling, it would be untimely. See Fed. R. Civ. P. 72(a) ("Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made."); D.R.I. Local Rule 32. The Court instead construes the request as a separate motion for reconsideration.

In this motion, Petitioner asserts that due to the complexity of the legal and factual issues and his inability to investigate the facts and present his claims, counsel should be appointed to represent him. He points to his inadequate knowledge of English, and his learning interference, in support of which he submits: (1) a letter from his prison instructor stating that Petitioner "has a severe learning interference" and that his "literacy level is extremely low;" and (2) excerpts from the state court sentencing hearing transcript containing defense counsel's references to Petitioner's lack of education and (without elaboration) past head injuries.

There is no constitutional right to counsel in habeas corpus proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); see Ellis v. United States, 313 F.3d 636, 652-653 (1st Cir. 2002) (same in context of § 2255 proceeding). By statute, a court may in its discretion appoint counsel in a § 2254 proceeding when "the interests of justice so require." Rule 8(c), Rules Governing Sec. 2254 Cases in U.S. District Courts; see 28 U.S.C. § 2254(h) and 18 U.S.C. § 3006A(g). Such an appointment is rare in a federal habeas proceeding, United States v. Mala, 7 F.3d 1058, 1063-64 (1st Cir. 1993), and is generally found to be unnecessary if a hearing is not required, the issues are straightforward, and the petitioner has demonstrated an understanding of the case and an ability to present his claims

coherently. See Blasi v. Attorney General of Pennsylvania, 30 F. Supp. 2d 481, 489 (M.D. Pa. 1998).

Here, an appointment of counsel is not warranted. The Magistrate Judge determined that there was no need for an evidentiary hearing in this case (nor has Petitioner requested one). This Court concurs that the record -- which includes two state Supreme Court opinions and a transcript of the pertinent trial proceedings -- adequately presented the facts pertinent to Petitioner's claims of violation of his right to testify and right to counsel. See Winsett v. Washington, 130 F.3d 269, 281 (7th Cir. 1997) (affirming denial of counsel in § 2254 proceeding where appointed counsel would add little to the analysis, particularly in light of thorough and competing state court opinions in the record).

Moreover, while Petitioner's papers are not a model of conciseness and clarity, construed liberally, they adequately convey the gist of his claims concerning his right to testify and his right to counsel. The exhibits submitted in support of his motion are brief and conclusory and do not persuade the Court of the need for counsel. Furthermore, as noted by the state Supreme Court, the evidence against Petitioner at his solicitation of murder trial was strong, and the testimony which Petitioner sought to give in that trial, with the assistance of counsel, appeared to relate to his earlier conviction for usury and extortion and was

thus irrelevant. See Feole, 797 A.2d at 1066 (noting Feole was not prejudiced by trial judge's restrictions, in view of "the overwhelming evidence presented by the state").

The Motion for Reconsideration is therefore denied.

### III. Conclusion

For the foregoing reasons, the Court hereby adopts the Magistrate Judge's Report and Recommendation and holds that Petitioner's constitutional right to testify and right to counsel were not violated so as to warrant federal habeas relief. Therefore, the Petition is hereby DISMISSED.

Likewise, Petitioner's motion for reconsideration of the Court's previous denial of appointment of counsel is DENIED, and his motion for clarification is DENIED as moot.

IT IS SO ORDERED,

William E. Smith  
United States District Judge

Date: