IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TONY B. OLIVER,

Petitioner,

v.

DAN BENIK, Warden, Stanley Correctional Institution,

Respondent.

REPORT AND RECOMMENDATION

03-C-433-C

REPORT

Before the court for report and recommendation is petitioner Tony B. Oliver's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Oliver, who is presently incarcerated at the Stanley Correctional Institution, challenges a judgment of conviction and sentence entered on December 5, 2001 in the Circuit Court for Eau Claire County.[1] Oliver was convicted by a jury of one count of delivery of cocaine, with an enhancer for habitual criminality. The court sentenced him to seven years and two months

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[1] When Oliver filed his petition, he was incarcerated at the Kettle Moraine Correctional Institution, where Jane Gamble is the warden. Because Oliver is now in custody at the Stanley Correctional Institution, I have amended the caption to reflect that the proper respondent in this action is that institution's warden, Dan Benik. The parties and the clerk's office should do the same.

of imprisonment, consisting of an initial term of confinement in prison of three years and two months followed by four years of extended supervision.

Oliver contends that he is in custody in violation of his rights under the Sixth Amendment. More specifically, he raises the following claims: 1) the trial court denied him his Sixth Amendment right to the counsel of his choice when it denied his request for a continuance 11 days before trial for the purpose of retaining private counsel; 2) his trial attorney was ineffective for failing to challenge the state's evidence indicating that money found in Oliver's home was buy money used in a prior drug transaction; and 3) his trial attorney was ineffective for failing to object to certain hearsay evidence introduced by the state against petitioner at trial. The state concedes that Oliver exhausted his state court remedies and filed his federal petition within the one-year time period prescribed by 28 U.S.C. § 2244(d). It contends that Oliver is not entitled to habeas relief because the state courts properly applied governing Supreme Court precedent and reasonably applied it in adjudicating Oliver's claims. Because I agree that the state courts analyzed Oliver's claims under the proper legal standard and reasonably applied the law to the facts, I am recommending that this court deny petitioner's application for a writ of habeas corpus.

FACTS

In a decision issued November 26, 2002, the Wisconsin Court of Appeals set out many of the pertinent facts. Because Oliver has not propounded any clear and convincing

evidence that demonstrates that the court's findings of fact are unreasonable, *see* 28U.S.C. § 2254(e)(1), I adopt verbatim the facts found by the court of appeals. Those facts are as follow:

> On March 5, 2001, the State charged Oliver with two counts of delivering cocaine, five grams or less, with repeater enhancers. In the same complaint, the State charged Derick Stewart with intent to deliver. At trial, the court granted Oliver's motion for a directed verdict on one of the charges. Consequently, this appeal only addresses the other charge.
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> The charge arose out of a controlled crack cocaine purchase by agent Bobbi Jo Becker of the Department of Justice's Division of Narcotics Enforcement on March 2, 2001. Becker, acting undercover, attempted to purchase crack cocaine from Stewart. Stewart agreed to sell her the cocaine. He told Becker his source was coming over and said he would call the source and increase the order. After the telephone call, Stewart told Becker the source would be over in ten minutes and the two went to Becker's automobile to wait. Becker gave Stewart two marked $100 bills to purchase the cocaine.
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> Oliver arrived in his car and parked in front of Becker. Stewart got into Oliver's car and after a short time, returned to Becker and gave her the cocaine. Oliver was arrested later that night after a second controlled buy that served as the basis for the dismissed charge. After the arrest, the police executed a search warrant at Oliver's home and found the marked bills.
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> At his preliminary hearing in April, Oliver was represented by attorney John Bachman. At a July status conference, public defender Carl Bahnson

represented Oliver. Oliver said he fired Bahnson because he had recommended a guilty plea. In addition, Oliver requested a continuance from the planned August trial date so that Bahnson could familiarize himself with the case. The court granted the continuance and rescheduled the trial for September.

> Eleven days before trial, Oliver requested another continuance because he wanted to obtain private counsel. Oliver said he wished to have an attorney with more drug defense experience and said Bahnson also recommended a guilty plea. In addition, Oliver said his family arranged to retain Michael Stanley, an attorney from Milwaukee. Bahnson said Stanley agreed to take the case provided it could be rescheduled. The court denied Oliver's request, noting the case was not complex, Oliver was represented by competent counsel, Bahnson had not sought to withdraw, Stanley had not appeared or otherwise notified the court of his intentions, and other rescheduling complications.

At trial, Oliver renewed his motion to substitute counsel, which the court again denied. The court granted Oliver's motion for a directed verdict on one of the charges and the jury convicted Oliver on the other. Oliver filed a motion for postconviction relief, arguing the trial court denied his right to counsel when it denied his substitution motion. In addition, Oliver claimed Bahnson was ineffective at trial because he did not cross-examine one of the State's witnesses regarding the serial numbers of the buy money and failed to object to numerous hearsay statements. After a *Machner* hearing, the trial court denied Oliver's motions. *State v. Machner*, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979).

State v. Oliver, 2002 WL 31661014, *1-*2, 2003 WI App. 1, 655 N.W. 2d 547 (Table) (Ct. App. Nov. 26, 2002) (unpublished opinion).

On appeal, Oliver raised the same claims. Addressing Oliver's first claim, the court of appeals observed that the Sixth Amendment right to counsel includes a right to representation by counsel of the accused's choice. *Id*. at *2. The court noted that this right is qualified: when asserted with an associated request for a continuance, the court must balance the right to counsel of one's choice against the societal interest in the prompt and efficient administration of justice. *Id*. The court noted several factors relevant to this balancing of interests: the length of the delay requested; whether there is competent counsel presently available to try the case; whether other continuances have been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory. *Id*., citing *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W. 2d 89 (1988).

The court of appeals concluded that the trial court properly exercised its discretion when it denied Oliver's request for a continuance so he could retain new counsel. The court of appeals noted that the trial court considered "many of the appropriate factors" in its decision. The court of appeals observed that:

> Oliver did not request a specific length for the continuance, but the court noted that any delay would be substantial because of its full trial calendar. The court also said the case was fairly straightforward and there was no suggestion Bahnson was not competent to try the case. In addition, the court noted Oliver's previous substitution of counsel and continuance, the inconvenience to one of the State's witnesses and the court. Finally, the

> court's consideration of Stanley's failure to appear was also appropriate given the nature of Oliver's request.

Id.

The court rejected Oliver's contention that the court had abused its discretion by failing to determine the extent to which Oliver and Bahnson's attorney/client relationship had disintegrated. The court of appeals found no evidence that the alleged conflict between Bahnson and Oliver was "so irreconcilable that it led to an unjust verdict," noting that Bahnson did not seek to withdraw his representation or otherwise inform the court that a conflict had developed. Also, the court found no evidence that Bahnson's guilty plea recommendation had negatively affected his representation of Oliver at trial. *Id*. at *3.

Turning to Oliver's ineffective assistance of counsel claim, the court began by citing the familiar performance-prejudice test of *Strickland v. Washington*, 466 U.S. 668 (1984). It then addressed Oliver's claim that counsel was ineffective for failing to cross-examine a state's witness, investigator Jeffery Wilson, regarding his testimony that the $100 bills he found in Oliver's apartment were the same ones used in the controlled buy. Oliver argued that after the prosecutor failed to adduce anything beyond Wilson's assertion that the bills were the same, Bahnson should have challenged Wilson's testimony, perhaps by asking him to offer proof of the bills' serial numbers. The court of appeals rejected Oliver's claim, reasoning as follows:

> At the *Machner* hearing, Bahnson testified he did not pursue this claim because he thought by forcing Wilson and the district attorney to produce the proof, it would remove all doubt about Oliver's innocence. Instead, Bahnson

> said he waited until closing arguments to note that the State had failed to actually introduce the buy money. Oliver argues this amounts to deficient performance. We disagree.
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> The trial court accepted Bahnson's explanation of his strategy and noted the State would likely have been able to prove the bills found in Oliver's apartment were the same ones used in the buy. This finding is not clearly erroneous. Further, we determine Oliver has not proved Bahnson's choice of strategy was in any way deficient or prejudicial. On the contrary, as the trial court noted, Oliver would have been in "worse shape" had Bahnson proceeded in the way Oliver now suggests.

Id. at *4.

Turning to Oliver's claim that Bahnson should have objected to various hearsay statements, the court noted initially that two of the four statements did not prejudice Oliver because they were related to the charge on which the court directed a verdict. As for the remaining two statements, the court found that no prejudice had inured to Oliver from counsel's failure to object. The court wrote:

> The third statement concerns Becker's conversation with Stewart arranging the crack purchase. Specifically, Oliver objects to Becker's testimony that Stewart said "his crack source was already on the way to our location to bring Derick Stewart some crack cocaine and that, if we wanted to call his crack source, he would call his crack source and order up the two rocks of cocaine that I wanted." Again, assuming without deciding this statement constituted hearsay, we cannot say Bahnson's failure to object to it constituted prejudice to Oliver.
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> Stewart testified that he did not receive any crack from Oliver and instead said he had the crack he sold to Becker the whole time. Nonetheless, Stewart testified he made it appear he was obtaining it from someone else by telling Becker his source was on his way and making the telephone call. Stewart's testimony supports Oliver's claim of innocence and the hearsay at issue is consistent with Stewart's version of the events. We conclude Bahnson's failure to object to it did not prejudice Oliver.

> The final statement Oliver claims Bahnson should have objected to was Wilson's testimony that after Stewart was arrested, Stewart said he was not going to talk about anybody else and that Wilson "seemed to have the facts from explaining them involving Mr. Oliver pretty well figured out." During his testimony, however, Stewart denied making this statement. Wilson's testimony was not hearsay because it revealed a prior inconsistent statement by Stewart. A hearsay objection to this statement would likely have been unsuccessful under Wis. Stat. § 908.01(4)(a)1, and we cannot say Bahnson's failure to object constitutes deficient performance.

Id. at *4-5.

Oliver filed a petition for review with the Wisconsin Supreme Court, raising the same issues he had raised in the court of appeals. The supreme court denied Oliver's petition for review on February 19, 2003. On August 11, 2003, Oliver filed the instant habeas petition in which he reasserts the claims he raised in the state courts.

ANALYSIS

I. Standard of Review

Because the state courts adjudicated Oliver's claims on their merits, this court must evaluate the claims under 28 U.S.C. § 2254(d). Specifically, this court may not grant Oliver's application for a writ of habeas corpus unless the state court's adjudication of his 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; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The "contrary to" clause of § 2254(d)(1) pertains to pure questions of law. *Lindh v. Murphy*, 96 F.3d 856, 868-69 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The "unreasonable application" clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh*, 96 F.3d at 870. A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[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." *Id*. at 411. In a case involving a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the

range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored.").

Finally, as for § 2254(d)(2), a federal court's disagreement with a state court's determination of the facts is not grounds for relief. Pursuant to § 2254(e)(1), the state court's findings of fact are presumed correct, and it is the petitioner's burden to show by clear and convincing evidence that the state court's factual determinations were incorrect *and* unreasonable. *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002).

II. Trial Court's Denial of Motion for Substitution of Counsel

As the Wisconsin Court of Appeals recognized, the Sixth Amendment right to be represented by counsel of one's choice is not absolute. "[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The Sixth Amendment right to counsel of choice "does not give an accused the power to manipulate his choice of counsel to delay the orderly progress of his case." *United States v. McGinnis*, 796 F.2d 947, 951-52 (7th Cir. 1986), quoting *Spurlark v. Wolff*, 683 F.2d 216, 220 (7th Cir. 1982). Thus, when a request for substitution of counsel includes a request for a

continuance, it need not be granted if it will interfere with the "fair and efficient administration of justice." *Id*., at 952. As the Supreme Court explained in *Morris v. Slappy*, 461 U.S. 1 (1983),

> [t]rial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.

461 U.S. at 11-12 (citation omitted).

The state court of appeals recognized this as the governing standard and applied it to Oliver's Sixth Amendment claim. The court of appeals properly noted that to balance a defendant's right to counsel against the societal interest in the prompt and efficient administration of justice, the court must consider various factors, including the length of delay requested; whether competent counsel is presently available to try the case; the convenience or inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory. *Accord United States v. Burton*, 584 F.2d 485, 491(D.C. Cir. 1978) (setting out factors). *See also United States v. Bjorkman*, 270 F.3d 482, 500 (7th Cir. 2001) (to determine whether district court abused discretion in denying motion for substitute counsel, court of appeals considers following nonexhaustive factors: (1) timeliness of motion; (2) adequacy of court's inquiry into defendant's motion; and (3) whether conflict was so great that it resulted in total lack of

communication preventing an adequate defense). Because the factors considered by the court of appeals were not contrary to federal law, the question for this court merely is whether the court unreasonably applied the law to the facts when it found that the trial court had not violated Oliver's qualified right to counsel of his choosing.

As the foregoing discussion of § 2254(d)(1) should make clear, the answer to this question is no. As the court of appeals correctly observed, the trial court considered many of these factors in denying Oliver's substitution request and explained the reasons for its decision. As noted by the court of appeals, the trial court found that a continuance would burden the court's full trial calendar, there was no suggestion that Bahnson was not competent to try the case, Oliver had already changed lawyers once and had been granted a continuance earlier in the case, a continuance would inconvenience one of the state's witnesses and the court and Stanley had not appeared or communicated directly with the court. By considering the various relevant factors and explaining how it weighed them, the court demonstrated that its decision to deny Oliver's motion was neither unreasonable nor arbitrary. Although a different court might have decided Oliver's motion differently, the trial court's determination that various factors weighed against granting a continuance was "within the range of defensible positions." Given the broad deference owed to trial court's on matters involving continuances, it follows that the state's court of appeals did not act unreasonably when it found that no Sixth Amendment violation had occurred.

Oliver does not contest the accuracy of any of the underlying findings made by the trial court regarding its decision to deny his substitution motion. Rather, he contends that the trial court failed to inquire adequately about the extent to which his relationship with his appointed counsel, Bahnson, had deteriorated. *See Bjorkman*, 270 F.3d at 500. The court of appeals addressed this argument in its decision. Apparently conceding that the trial court did not conduct an extensive inquiry on this subject, the court nonetheless found that reversal was not required because Oliver had failed to show that the alleged breakdown was "so irreconcilable that it led to an unjust verdict." The court noted that Bahnson had not sought to withdraw or otherwise informed the court that a conflict had developed, and that Oliver had stated only that he did not think Bahnson could properly represent his interests at trial because he had urged him to enter a plea of guilty. The court of appeals found that the mere fact that Bahnson had recommended a guilty plea was insufficient to show that Bahnson did not perform adequately at trial. Oliver has not pointed to any evidence that might cast doubt on the court of appeals' conclusion that there was no evidence of an irreconcilable conflict, much less one that had any effect on the verdict. Absent such evidence, Oliver cannot show that the court of appeals' determination of the facts or its conclusion that the trial court did not violate Oliver's right to counsel of his choosing was unreasonable. *See United States v. Taylor*, 128 F.3d 1105, 1108 (7th Cir. 1997) ("there is no constitutional right to be represented by an attorney who shares the defendant's belief as to the best trial strategy").

In sum, it was not unreasonable for the Wisconsin Court of Appeals to find that the trial court did not act unreasonably or arbitrarily when it denied Oliver's request for substitution of counsel, and that therefore Oliver had not been deprived of his qualified Sixth Amendment right to counsel of his own choice. Accordingly, § 2254(d) precludes this court from granting relief to Oliver on this claim.

III. Ineffective Assistance of Counsel

I now turn to Oliver's claims of ineffective assistance of counsel. To establish ineffective assistance of trial counsel, petitioner has the burden of showing both that counsel's performance was deficient and that petitioner was prejudiced as a result. *See Strickland*, 466 U.S. at 687. To prove that counsel's performance was deficient, petitioner must show that counsel acted "outside the wide range of professionally competent assistance." *Id*. at 690. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. To prove prejudice, petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "[B]ecause counsel is presumed effective, a party bears a heavy burden in making out a winning claim based on ineffective assistance of counsel." *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995).

A federal habeas petitioner claiming that the state courts applied *Strickland* unreasonably bears an even heavier burden: "*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . . This means that only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." *Holman v. Gilmore*, 126 F.3d 876, 881 (7th Cir. 1997). This is because "*Strickland* builds in an element of deference to counsel's choices in conducting the litigation [and] § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard." *Id*.

Oliver cannot surmount this incredibly steep barrier. The state court of appeals identified the governing legal standard and evaluated Oliver's claim under the two-part test of *Strickland*. Starting with Oliver's claim that his lawyer should have challenged the state investigator's testimony that bills found in Oliver's apartment matched the buy money that agent Becker had turned over to co-defendant Stewart, the court upheld the trial court's finding that counsel had offered a strategic reason for his decision and that the state would likely have been able to prove up Wilson's testimony about the buy money. Therefore, the court of appeals agreed with the trial court that Oliver had failed to establish deficient performance. Furthermore, the court found that Oliver had not been prejudiced because he would have been worse off if Bahnson had proceeded in the way suggested by Oliver.

Oliver appears to be challenging the state courts' finding that the state would likely have been able to prove that the bills found in his apartment matched the buy money. Oliver argues that there were no serial numbers to match because there "was never any buy

money to begin with." However, Oliver has adduced no credible evidence to support his assertion. Although Oliver has submitted several documents, none of them supports his claim that no buy money existed. Absent evidence that is "clear and convincing," this court must presume that the facts found by the state courts are correct. 28 U.S.C. § 2254(e)(1). Applying this presumption to the state courts' finding with respect to the state's ability to prove up the buy money leads to the conclusion that the court of appeals' did not act unreasonably when it found that counsel's strategic decision was reasonable and did not prejudice Oliver.

The court of appeals also reasonably concluded that counsel was not deficient for failing to object to the two statements that Oliver contends were inadmissable hearsay. As to Stewart's statement to agent Becker, the court found that its admission did not prejudice Oliver because it was consistent with Stewart's testimony that he only pretended to have a crack source and that the drugs he delivered to Becker were actually his. As for Stewart's statement to Becker, the court noted that it was a prior inconsistent statement that was not subject to exclusion under the hearsay rule; therefore, Bahnson was not deficient in failing to object to the statement's admission. Oliver has not adduced any clear and convincing evidence to undermine the court's findings regarding the content of the challenged testimony or its relationship to other testimony at trial. On these facts, Oliver cannot show that the court of appeals committed clear error when it found that his lawyer's failure to object to the challenged statements did not constitute ineffective assistance of counsel.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Tony Oliver for a writ of habeas corpus be DENIED.

Dated this 3rd day of December, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge