UNITED STATES OF AMERICA
DISTRICT OF MAINE

ROBERT S. HUTCHINSON,	)	
	)	
Petitioner	)	
v.	)	Civil No. 03-11-B-S
	)	
CORRECTIONS COMMISSIONER,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Robin S. Hutchinson was convicted by a Maine jury of gross sexual assault on May 9, 2000. He was subsequently sentenced to a seven-year term of incarceration, two years suspended, and four years of probation. He now seeks federal relief from his conviction in this 28 U.S.C. § 2254 petition. (Docket No. 1.) I recommend that the Court **DENY** Hutchinson relief.

Discussion

Federal relief from final state court convictions is available only in the most limited circumstances. Section 2254 of title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted with respect to any claim that was adjudicated on the merits in [s]tate court proceedings unless the adjudication of the claim –
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal 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 [s]tate court proceeding.

§ 2254(d).

Section 2254 has strict inbuilt exhaustion requirements. It provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted unless it appears that --
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> (A) the applicant has exhausted the remedies available in the courts of the [s]tate; or
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> (B) (i) there is an absence of available [s]tate corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

§ 2254(b)(1). Subsection (c) requires a thoroughgoing presentation of each claim to the state's tribunals:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the [s]tate, within the meaning of this section, if he has the right under the law of the [s]tate to raise, by any available procedure, the question presented.

Id. at § 2254(c).

With respect to the exhaustion of his remedies, Hutchinson previously filed a § 2254 petition prior to the resolution of his state post-conviction. I dismissed that petition without prejudice on April 24, 2001, to allow Hutchinson to exhaust his remedies in advance of presenting his § 2254 claims. On April 4, 2002, Hutchinson's state post-conviction conviction was denied after an evidentiary hearing. Hutchinson requested a certificate of probable cause seeking review by the Maine Supreme Court sitting as the Law Court. This request was denied in early September 2002. The present petition was filed on January 14, 2003, and the State concedes that it is timely. See 28 U.S.C. § 2244(d)(1).

As ciphered from Hutchinson's petition, the characterization of the claims by the State, and Hutchinson's reply to the State's answer, Hutchinson has two main § 2254

claims. First, his trial counsel was ineffective in not objecting to the composition of the jury or the propriety of the alleged victim's testimony. The second ground relates to Hutchinson's belief that his constitutional right to confront witnesses against him was infringed because he was not allowed to cross-examine the complaining witness on her prior incidents of untruthfulness in dealings with her ex-husband and his relatives. Hutchinson complains that his motion for a new trial should have been granted for this reason.[1]

Ineffective Assistance of Counsel Claim with Respect to the Composition of the Jury and Propriety of Victim's Testimony

In Hutchinson's pro se petition for post-conviction review in state court he alleged the following ineffective assistance of counsel ground against trial counsel:

> I have reason to believe that th[ere] is possible ... ineffective assistance of counsel[] as far as producing evidence on claimant and not going in to the right avenue[]s that [were not] pursued, no objection was made by my attorney to the composition of the jury or to the victim's testimony, the[re is] a lot wrong here all around.

(Pet. Post-Conviction Review ¶ 27(D).) This plaint, absent the final catch-all gripe, tracks his § 2254 claim. However, at the state's pre-hearing conference, Hutchinson,

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[1] Hutchinson also argues that his sentence was improper because the trial court's order denying the new trial contained a misrepresentation that Hutchinson testified at trial when in fact he did not. It appears that this was a mistake of recollection on the part of the trial judge. The information referred to in the order on the motion for a new trial appears to have come into evidence by a different avenue, i.e., as a result of a statement Hutchinson allegedly made to law enforcement officers.

On this note, in his reply Hutchinson also represents that there was a pre-trial suppression order vis-à-vis statements he made to an investigator that was disregarded at trial. He contends that his attorney should have made a motion for a mistrial on this ground and, in the absence of this advocacy, the court should have sua sponte granted a mistrial. From what I can garner from the record, Hutchinson made two statements to the police, one prior to his arrest and one at the point of his arrest. The statements made at the second occasion were suppressed. Hutchinson contends that when the officer testified at his trial he introduced many of the details obtained in the second interview and that if Hutchinson's attorney had not given him faulty advice about not testifying he would have been able to clarify what turned out to be damaging phrasing by him during these interviews. (See Post-Conviction Tr. at 12-17.) This matter came up during the post-conviction hearing. (Post-conviction Tr. at 119-21.) However, raising claims like this in such fragmented, on again, off again manner, is not an adequate presentation of the claim in the state court and thus does not preserve the claim for federal review.

now represented by counsel, agreed that there were three issues remaining: two entirely different ineffective assistance claims – failure to give accurate advice concerning the implications of testifying and failure to object to unsubstantiated information in the Presentence Investigation Report - and a (apparently stand alone) claim that he was denied his right to testify.[2] (Pre-hr'g Conference Order ¶ 3.) When asked during the post-conviction hearing what he viewed to be the main issues with trial counsel's performance Hutchinson stated that he thought his attorney should have objected to certain testimony in which witnesses were contradicting each other (Post-conviction Tr. at 17,47-49); that his attorney should have moved to have the trial in a different county because of plea publicity (id. at 18, 51-52); that there was evidence that the victim had previously falsely accused another of forcible sex and had lied to her husband to provoke jealousy and/or reconciliation (id. at 12, 50-51, 101-02); and that his "biggest issue" (already addressed on direct appeal) was that his attorney did not present defense witnesses (id. at 17-18). During the course of the hearing there was quite a bit of discussion of his attorney's advice concerning the pros and cons of Hutchinson taking the stand at trial. (Id. at 12-14, 32-50, 63-68, 70, 74-77, 95-101, 10-06, 108-18.)

In his post-hearing memorandum Hutchinson focused on the argument that Hutchinson was denied his right to testify at trial because of the ill-considered advice of his attorney. (Pet.'s Post-Conviction Mem. at 1-3.) He also contended that trial counsel was ineffective with respect to preparation for sentencing, in particular with respect to presenting information relating to Hutchinson's psychological and educational profile.

[2] The post-conviction court in its decision on the petition characterized all three claims as ineffective assistance of counsel. (Post-conviction Review Order at 3.) The concern is of little moment because to the extent that the denial of the right to testify claim is an ineffective assistance claim it essentially merges with Hutchinson's claim that his attorney gave him bad advice vis-à-vis the consequence of him taking the stand.

(Id. at 3-4.) The post-conviction court denied Hutchinson relief on all the grounds asserted. (Post-conviction Review Order at 3, 8.)

In the entire state post-conviction record I can find no mention by Hutchinson, his attorney, the state's attorney, or the court of the composition of the jury or impropriety in the testimony of the victim. This claim has clearly not been presented to the state courts as required by § 2254(b)(A) and (c)[3] and therefore will not be considered by this court.

Constitutional Right to Confront Adverse Witnesses

As indicated above, Hutchison filed a motion for a new trial based on his claim that he ought to have been allowed to cross-examine the complaining witness "regarding a number of instances whereby the witness repeatedly attempted to contact her estranged husband and, when he would not respond to her, she made up stories or false emergencies which were then used to get her husband to return to her." (Mot. New Trial ¶ 5.) He unsuccessfully appealed the denial of that motion to the Law Court. It is clear to this court, as is demonstrated below, that this claim has been fully exhausted within the meaning § 2254(b)(A) and (c) for purposes of obtaining federal review.

The State's adjudication of the claim

In his motion for a new trial Hutchinson relied on Maine Rule of Evidence 608(b)[4] and Olden v. Kentucky, 488 U.S. 227 (1988), a sexual assault case in which the

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[3] Furthermore, Hutchinson has utterly failed to adequately plead the who, what, when, and why of these claims and I have no clue what is the substance of his claim vis-à-vis the jury or the victim's testimony. Such conclusory claims are insufficient for that reason alone. See United States v. McGill, 11 F.3d 223, 225 (1st Cir.1993).

[4] This rule provides:

> **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross- examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or

defendant argued that the victim had consented and wanted to cross-examine her to suggest that she was alleging rape to protect her relationship with her boyfriend. Hutchinson argued that because his trial "was largely, if not almost completely, about whom to believe" the complaining witness's credibility was the crux of the trial. (Id. ¶ 11.)

A hearing on this motion was held. Hutchinson's attorney explained that during a sidebar at trial he made an offer of proof that he was going to question the complaining witness about falsities told to her in-laws "that she was either hurt or in an accident or she needed her husband for various reasons." (Hr'g Mot. New Trial Tr. at 2.) "Those reasons," counsel argued, "turned out not to be true, and this was – this allegation of essentially rape was another one of those instance of telling untruths." (Id. at 2-3.) He complained that the court, while allowing him to go forward on a limited basis, would not let him go beyond asking the witness about her relationship with her husband and whether or not such an allegation of rape might perhaps protect the relationship. (Id. at 4.) He explained that he had a witness available to testify for impeachment purposes. (Id. at 6.)

In its order denying its motion for a new trial, the trial judge discussed Olden, Maine Rule of Evidence § 608(b), and a decision by the Maine Law Court, State v. Almurshidy, 1999 ME 97, 732 A.2d 280, that analyzes, among other things, the admissibility of prior accusations of rape to impeach a sexual offense victim under Rule 608(b).

> untruthfulness of another witness as to which character the witness being cross-examined has testified.

Me. R. Evid. 608.

The court viewed Hutchinson as arguing, "in essence," that the evidence concerning the complaining witnesses untruthful communications vis-à-vis her ex-husband "would show bias on the part of the witness and the character of the witness in the matter of truth and veracity." (New Trial Order at 2.) The court noted that, both at trial and at argument, Hutchinson argued that the evidence was to establish that the complaining witness had "a motivation to explain the sexual act so that it would not become a factor in further straining the relationship with her husband." (Id.) The court went on:

> The Court's recollection of the sequence of events is that the Defendant's counsel asked for sidebar conference during the course of his cross-examination of the prosecuting witness. At the sidebar conference, counsel explained that he had available as witnesses, relatives of the prosecuting witness's estranged husband who would testify that the evidence would show a desire on the part of the witness to reconcile with her husband and that she had specific lying conduct in her history. The Court allowed counsel to inquire of the witness whether she was seeking to reconcile with her husband or, otherwise, what that relationship was, but would not allow inquiry as to other instances of lying because it would create a trial within a trial, that is whether the stories were the truth or not, and would otherwise put the immediate relatives of the Defendant against the victim in a truth/lie contest. The Court is aware of [Maine Rule of Evidence] 608(b), that it may allow inquiry of the prosecuting witness by cross-examination concerning character for truthfulness or untruthfulness if the Court is satisfied that it is probative of such a character trait. The Court is also aware of the broad authority in [Maine Rule of Evidence] 611(b) that a defendant should be given wide latitude in cross-examination of a witness on any matter, including credibility and that such questions going to motivation, bias or prejudice of a witness ... are [quite] relevant.
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> The interpretation of [Maine Rule of Evidence] 608(b)(1) argued by the State is found in State v. Al[]murshidy, 7[3]2 A.2d 280 (Me. 1999) in determining whether specific instances of conduct of a witness may be introduced. After discussing the wide discretion of the trial court, the Law Court says that the appropriate exercise of that discretion requires and examination of several factors in order to determine how probative the evidence of the witness's character for truthfulness or untruthfulness may be. One of the factors to be considered is the importance of the witness to the case.

Two women testified to incident. The prosecuting witness and her female friend spent a period of time with the Defendant drinking alcoholic beverages. It was undisputed that the victim drank less than the other party participants, but that upon going to bed she took a Valium pill which had been prescribed to her to assist her in sleeping. At some point while she was sleeping she became aware that the Defendant was in the bed with her engaging in a sexual act. Because of the alcohol and medication, it took a few moments to realize her circumstances at which time she resisted and succeeded in removing the Defendant from her bed. The second woman who was a participant in the party, confirms the prosecuting witness's testimony as to the events leading up to the witness's retiring to her bed and observations made immediately after she removed the Defendant from her bed.

At this stage in the proceedings, the jury had been advised that the Defendant was claiming consensual sexual activity. Photographs were presented of a bruise on the prosecuting witness which she attributed to the process of removing the Defendant from the position of the sexual act. The female witness presented no evidence of any intimate overtures between the prosecuting witness and the Defendant prior to the witness retiring to her bed. In sum, the sexual act itself was witnessed only by the prosecuting witness, but there was substantial corroboration of all other circumstances by her friend. Therefore, the testimony of the witness in question was very important and essential to this case, but not without circumstantial corroboration.

The Al[]murshidy Court further states that another factor is how probative of truthfulness or untruthfulness the bad acts are. While making statements to the relatives may have provided some evidence of instances of untruthfulness, the jury would have been required to determine whether or not such statements were true or not as a preexisting precedent to determining whether or not the statements were an indication of a propensity to lie. Further, the Al[]murshidy Court says that the reliability of the information that the bad acts in fact occurred is another factor. This would have put into the case the credibility of the relatives of the [complaining witness's ex-husband]. Al[]murshidy goes on to prohibit fishing expeditions requiring good faith belief on the part of the Defendant's counsel that the conduct occurred. This Court does not question in any respect that Defendant's counsel had a good faith belief based upon what he had been told by these relatives.

It should be noted that the Defendant was allowed to inquire of the prosecuting witness as to her relationship with [her ex-husband]. To the extent that she was attempting reconciliation or, for that matter, had any other attitude toward her estranged husband, the Defendant had no limitations as to cross-examination on that question. Therefore, it is the Court's belief that the Defendant was not prohibited from presenting issues of motivation, bias or prejudice on the part of the prosecuting

witness, nor that the Defendant was denied his right of confrontation in the sense argued by the Defendant.

(New Trial Order at 2-5.) The court then went on to explain its reason for its conclusion that even if its ruling was error, the error was harmless. (Id. 5-7.)

Hutchinson appealed this determination to the Law Court. In a memorandum of decision the Court ruled:

> Hutchinson contends that the court erred by refusing to allow him to cross-examine the victim regarding allegedly false statements the victim had made to her estranged husband and her in-laws prior to the alleged assault. The statements at issue were unrelated to this case. Considering the broad range of questioning of the victim and the opportunity to present adverse character evidence that was allowed, the court committed no error or abuse of discretion under M. R. Evid. 608(b) in excluding the cross-examination sought by the defense. See State v. Walker, 506 A.2d 1143, 1148 (Me. 1986).[5]

(Mem. Decision at 1-2.)

Tenability of this claim as grounds for federal habeas relief

This case poses some concern with respect to the level of deference to be afforded the state courts' adjudication of this claim. While the trial court in ruling on the motion for a new trial fully addressed the claim and recognized both its evidentiary and constitutional facets, the Law Court was terse and does not expressly discuss the claim as

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[5] In the referenced section of Walker the Law Court stated:

> On cross-examination, the Defendant sought to elicit from the victim evidence that her mother had collected certain money from members of a bowling league of which the mother was secretary and that the victim had taken this money. The presiding justice ruled this testimony inadmissible, and the Defendant challenges the ruling on the ground that the testimony is probative of truthfulness or untruthfulness under M. R. Evid 608(b). It is true that, under the rule, specific instances of a witness's conduct must be probative of truthfulness or untruthfulness to be admissible on cross- examination. The evidence may still be excluded, however, in the court's discretion. See Field & Murray, Maine Evidence § 608.2 at 143 (1976). That discretion was not abused here because there was a risk that this evidence, if admitted, would have injected a collateral issue into the trial and thereby confused the jury.

State v. Walker, 506 A.2d 1143, 1148 (Me.1986) (footnote omitted).

one implicating constitutional concerns. If I had before me only its decision it would be hard to confer § 2254 deference vis-à-vis the constitutional claim. See Fortini, 257 F.3d at 47 (observing that a federal court can hardly impart § 2254(d) deference "to the state court on an issue that the state court did not address"). However, the United States Supreme Court has recently clarified that § 2254 deference is triggered even without citation to its cases, and that there need not even be a demonstration of an "awareness of [its] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer. 537 U.S. 3, __,123 S. Ct. 362, 365 (2002). Early may narrow the field of state court decisions subject to de novo federal review; although quite recently the First Circuit, in Ellsworth v. Warden, __ F.3d __, 2003 WL 21374024 (1st Cir. 2003), suggested that its conclusion in Fortini concerning the standard of review for unaddressed claims is not necessarily undermined by the Early statement. Id. at *2, *11 n.1.

I think in this case I need not wrestle with this issue because I think it is fair to read the order on the motion for a new trial and the Law Court's memorandum in tandem, as the Law Court gave no indication of disproving of the trial court's reasoning and clearly the Law Court was aware that the constitutional claims were pressed in view of this record. Accordingly, I look at the State courts' treatment of this claim to determine whether it resulted in a decision that either was "contrary to, or involved an unreasonable application of, clearly established [f]ederal law." § 2254(d)(1).[6]

I conclude that under § 2254(d)(1) I am bound to uphold the State's court's determination in light of the First Circuit's recent en banc Ellsworth decision, reversing

[6] This case does not generate a question of whether the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." § 2254(d)(2).

and remanding the Panel's decision granting § 2254 relief on confrontation clause grounds. 2003 WL 21374024, rev'g 318 F.3d 285.[7]

I will explain the reason I find Ellsworth to be binding. The District Court and the First Circuit in Ellsworth addressed two confrontation clause claims: one that had been presented to the state courts and one that had not. The exhausted confrontation clause claim concerned the defendant's efforts to introduce evidence that the eleven-year-old victim of the defendant's sexual assault had made false allegations of sexual voyeurism and theft against his classmates at a residential school to which he went after the incidents of alleged assault by the defendant. State v. Ellsworth, 709 A.2d 768, 772 (N.H. 1998). In addition to arguing to the New Hampshire Supreme Court that the evidence should have been admitted as proof of knowledge, plan, and motive, id. at 772-73, the defendant argued that the trial court's refusal to allow the evidence under Rule 608(b) violated his due process and confrontation clause rights, id. at 773. Like Hutchinson, the defendant was allowed to question the victim about the allegations but was not allowed to admit extrinsic evidence to counter the victim's denial on cross-examination. Id.

Recognizing that evidentiary rules cannot be applied in a manner that infringes constitutional rights, id. (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973), and that due process rights guaranteed by State and Federal Constitutions may trump established evidentiary rules, the New Hampshire Supreme Court held that the defendant had failed to make a threshold showing of probity and similarity to justify admission of the testimony under New Hampshire law. Ellsworth, 709 A.2d at 773 -74. With respect to the federal analysis, the court concluded: "Because we conclude that federal law

[7] The Court of Appeals sua sponte called for en banc review of the Panel's decision.

provides no additional protection in this area, we will not undertake a separate federal analysis." Id. at 774.

This was the § 2254(d)(1) decision that the federal court was asked by Ellsworth to review. The First Circuit en banc Panel lead-up to its discussion of the exhausted confrontation clause claim by first rejecting, de novo, the unexhausted confrontation claim concerning Ellsworth's inability to introduce evidence that the victim was sexually abused when he was three-years-old. Ellsworth, 2003 WL 21374024, at *5. In so doing, the en banc Court declared:

> "The Confrontation Clause lies obscurely behind ... claims of evidentiary error because, in a few extreme cases, the Supreme Court has invoked it to overturn state court restrictions on cross- examination or impeachment. However, such a challenge is tenable only where the restriction is manifestly unreasonable or overbroad." United States v. Gomes, 177 F.3d 76, 81-82 (1st Cir.), cert. denied, 528 U.S. 911, 941, 120 (1999). Cf. Chambers v. Mississippi, 410 U.S. 284(1973) (overturning the defendant's murder conviction where the court excluded evidence that another person had repeatedly confessed to the murder).

Ellsworth, 2003 WL 21374024, *6. Suggesting that "perhaps" under state law the evidence of prior childhood sexual abuse ought to have been admitted, the First Circuit emphasized that "trial judges are constantly making on-the-spot judgments as to whether evidence, although formally relevant, is too remote, likely to lead to unnecessary excursions, or partly or wholly duplicative--the range of considerations embraced in the federal courts by Rule 403's balancing test." Id. at *6 (citing Fed. R. Evid. 403.) "Close calls are common and, right or wrong, do not thereby become constitutional violations." Id. (citing Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986)); see also Fortini, 257 F.3d at 46 ("[I]n cases less powerful than Chambers, a defendant whose proffer of

evidence was rejected for any conventionally plausible reason or rule usually has an uphill struggle.").

With respect to the exhausted confrontation claim, so relevant to my § 2254(d) analysis in this case, the en banc Ellsworth Panel stated:

> Quite apart from the higher standard [of § 2254(d)(1) review], there is nothing unusual about limiting extrinsic evidence of lies told by a witness on other occasions; under the Federal Rules of Evidence, exclusion of such evidence is the usual rule and even cross-examination as to such lies is limited. The theory, simple enough, is that evidence about lies not directly relevant to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries. In this instance, a lie about toy stealing or peeping at a different time and location from the alleged sexual abuse by Ellsworth is classic "collateral" evidence regularly excluded in federal criminal trials. See Fed. R. Evid. 608(b).

Ellsworth, 2003 WL 21374024, at *7. It also must be noted that in framing its discussion of the exhausted claim, the en banc Court was rejecting the first Panel's thorough discussion of this claim under Chambers v. Mississippi, 410 U.S. 284 (1973), Crane v. Kentucky, 476 U.S. 683 (1986), United States v. Scheffer, 523 U.S. 303 (1998), and Montana v. Egelhoff, 518 U.S. 37 (1996), in which the Panel reversed the District Court's determination that there was no § 2254 merit, see 2003 WL 203467, 12 -14.[8]

I turn now to Hutchinson's claim. Although the Maine Law Court was terse in discussing this claim, the trial court's discussion of Hutchinson's confrontation clause claim, that the Law Court seemed to be in full agreement with, is certainly no less reasoned and no less tethered to principles of federal law than was the New Hampshire Supreme Court's discussion of Ellsworth's constitutional claim. Both state courts focused on the lack of a similarity between the alleged assault and the incidents of

[8] The District Court apparently disposed of this claim by Ellsworth in an earlier summary judgment order. See 242 F. Supp. 2d 95, 101 (D.N.H. 2002).

untruthfulness sought to be admitted. Both saw a lack of an evidentiary nexus. If anything, the evidence Hutchinson sought to introduce is more "attenuated" -- relative to his efforts to impeach the complaining witness as to her lack of consent – than was Ellsworth's relative to the eleven-year-old's propensity for using false accusation to get attention. Ellsworth, 2003 WL 21374024, at *6 (quoting United States v. Powell, 226 F.3d 1181, 1199 (10th Cir. 2000) for its conclusion that the confrontation clause was not trespassed when evidence of a sexual assault victim's allegedly flirtatious past behavior was not admitted to rebut an inference of sexual naiveté).

In this case, the complaining witness's untruthful mechanizations as to her ex-husband if used to impeach her credibility are, in fact, more like a "random unrelated episode of untruthfulness," that the Ellsworth Court suggested would not implicate the Brady v. Maryland, 373 U.S. 83 (1963)/failure to turn over exculpatory evidence requirement, Id. at *4. For similar reason, it was not unreasonable for the state court to conclude that they do not form a sufficient basis for a confrontation clause claim. With respect to Hutchinson's argument that the complaining witness's untruthfulness about consenting to his sexual contact was one more example of her efforts to manipulate her ex-husband toward reunification, it was not § 2254(d)(1) unreasonable for the trial court to conclude that the extent to which it allowed cross-examination in this area vis-à-vis motivation, bias, or prejudice on the part of the prosecuting witness meant that the limitation imposed did not run afoul of the confrontation clause. In the First Circuit's view, "exclusion of such evidence is the usual rule and even cross-examination as to such lies is limited. The theory, simple enough, is that evidence about lies not directly relevant

to the episode at hand could carry courts into an endless parade of distracting, time-consuming inquiries." Ellsworth, 2003 WL 21374024, at *7.

For purposes of § 2254(d) review it does not matter whether another court might come to a different conclusion concerning whether there was a confrontation clause concern had it been presiding over trial, ruling on the motion for a new trial, or deciding the appeal. It was "at least reasonable to conclude that there was not, which means that the state court's determination to that effect must stand." Early, 123 S.Ct. at 366. If this was a reasonable application of clearly established federal law then the decision clearly was not contrary to clearly established federal law.[9]

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 of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated June 27, 2003

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

[9] If there is no federally reversible confrontation clause frailty in the exclusion of evidence, there is no need to analyze the trial court's harmless error analysis.

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00011-JAW
Internal Use Only

HUTCHINSON v. CORRECTIONS, ME COMM
Assigned to: JOHN A. WOODCOCK
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/16/03
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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