***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***GERALD GOODALE,*** | ***)*** | |
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| ***Petitioner*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Civil No. 99-158-P-C*** |
| | ***)*** | |
| ***WARDEN, Maine State Prison,*** | ***)*** | |
| | ***)*** | |
| ***Respondent*** | ***)*** | |

***RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS***

Gerald Goodale, confined to the Maine State Prison in Thomaston, Maine, attacks on grounds of ineffective assistance of counsel a seventy-five year sentence imposed upon him by the Maine Superior Court on June 9, 1989 following his conviction for murder. Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 1). Cases in which a petitioner mounts a federal challenge to state criminal proceedings are governed, *inter alia*, by 28 U.S.C. § 2254(d), which provides:

> 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 —
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> **(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
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> **(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.

Construing this section of the statute, the First Circuit held that "the [habeas] writ cannot issue unless the state court decision contravenes, or involves an unreasonable application of, extant Supreme Court jurisprudence." *O'Brien v. DuBois*, 145 F.3d 16, 20 (1st Cir. 1998) (footnote omitted). The Maine Superior Court determined in post-conviction review proceedings that the petitioner's claims of ineffective assistance (including all that are pressed here) did not merit relief. Inasmuch as I find that this decision comported with controlling Supreme Court precedent, I recommend dismissal of the instant petition without an evidentiary hearing.

## I. Background

On September 8, 1988 the petitioner was indicted on charges of having intentionally or knowingly caused the death of Geraldine Finn on or about August 9, 1988, in violation of 17-A M.R.S.A. § 201(1)(A). Indictment, etc., *State v. Goodale*, Criminal No. 88-551 (Me. Super. Ct.), filed with Response to Petition for Writ of Habeas Corpus, etc. ("Response") (Docket No. 4). On May 2, 1989 the trial judge approved the petitioner's request to waive jury trial following a colloquy in which the petitioner was questioned whether his choice was voluntary and consistently answered in the affirmative. Jury-waiver Acknowledgment Before the Honorable Donald G. Alexander, Justice, *State v. Goodale*, Criminal No. 88-551 (Me. Super. Ct.), filed with Response, at 5-8.

In opening arguments in a bench trial held May 8-10, 1989 the State highlighted its evidence against the petitioner, including testimony that: (i) two women had accompanied the 23-year-old Finn to a restaurant in Waterville on August 9, 1988, saw the petitioner driving past and motioning, went outside to talk to him, noticed he was nude and declined his offer to skinny-dip with him; (ii)

the petitioner later returned to the restaurant, chatted with the three women and danced with Finn, who accepted the offer of a ride home from him; (iii) Finn was never seen alive again; (iv) her body was found on August 14, 1988 buried face-down under pine branches and needles in a wooded area near Skowhegan, (v) her bra was partially torn from her body, one arm was pulled out of her shirt and the empty shirtsleeve tied in a knot around it, and her purse found around her neck, (vi) Dr. Roy, the medical examiner, determined that the cause of death was strangulation, (vii) a Good Samaritan accompanied the petitioner to the crime scene in the early morning hours following Finn's disappearance in an unsuccessful attempt to help free the petitioner's vehicle from a stump on which it had become lodged; and (viii) parts consistent with the petitioner's vehicle and cigarette wrappers and butts matching the brand he smoked were found near the scene of the crime. Jury-Waived Trial Before the Honorable Donald G. Alexander, Justice, *State v. Goodale*, Criminal No. 88-551 (Me. Super. Ct.) ("Trial Transcript"), filed with Response, at 6-14.

Defense counsel commenced his opening argument with the acknowledgement: "This is not a who done it. The State has its man." *Id*. at 16. Counsel argued that the evidence would show that the killing had been accidental, conveying the petitioner's offer (to which the State had not agreed) to plead guilty to manslaughter by negligence. *Id*. The court declined to accept the plea. *Id*. at 17. Counsel then contended that the evidence, including the petitioner's testimony, would show that the petitioner invited Finn to go "four-wheeling," that his vehicle got stuck on a stump, that he tried unsuccessfully to free it using a come-along, that he asked Finn to run the motor, that she accelerated so hard that there was smoke and fire, that he angrily approached the driver's side, tripping over the come-along, and screamed at her, that she became panicky, emerged and began beating on him, that he backed away and tripped over the come-along again, that she tripped too and fell on top of him,

and that he put his arm around her neck to calm her, accidentally strangling her. *Id*. at 20-23. Counsel underscored that the evidence would show an absence of sexual overtones or sexual attack, with Finn's clothes having become torn and disarrayed when the petitioner dragged her body some distance over rough terrain to the burial spot.[1] *Id*. at 17-20. He also previewed evidence from a defense pathologist, Dr. Curtis, that would cast doubt on the State's theory that the petitioner strangled Finn with her own purse strap. *Id*. at 26. Dr. Curtis, according to counsel, would testify that the cause of death could not be determined. *Id*.

On direct examination Dr. Roy gave his opinion that the cause of death was asphyxiation due to ligature strangulation. *Id*. at 215. He also testified that the air supply must be blocked for as long as almost ten minutes before death occurs from strangulation. *Id*. at 216. On cross-examination Dr. Roy admitted that "two to five minutes" was an "acceptable estimate" of the time frame within which strangulation would lead to death. *Id*. at 228. He also conceded that Finn could have died by mugging rather than strangulation by purse strap. *Id*. at 238-39.[2]

Also on direct examination Judith Brinkman, a forensic chemist with the Maine State Police crime lab, testified that Finn's bra would have to have been torn by "a substantial amount of force." *Id*. at 164, 171. On cross-examination she admitted that she could not say that tears in Finn's clothing (including her bra) were inconsistent with dragging a body 158 feet through woods over sticks, stumps and stones. *Id*. at 176-77.

Following a recess at the close of the State's evidence the defense rested, choosing to present

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[1]Counsel also argued that the evidence would show that the petitioner was not nude when seen by the women at the Waterville restaurant. *Id*. at 17.

[2]"Mugging," in this context, meant being grabbed from behind with an elbow around the throat. *Id*. at 275.

no witnesses. *Id*. at 242-43. The court questioned the petitioner whether this was his own choice, and the petitioner responded that it was. *Id*. at 244. During closing argument defense counsel adverted to evidence that had not been presented concerning an experiment he had conducted on whether dragging a body would cause pantyhose to roll down. *Id*. at 263-64. The State objected, and the objection was sustained. *Id.* Defense counsel also repeated the petitioner's version of events leading to the death of Finn. *Id*. at 268-69. In its closing argument the State pointed out that this story was not in evidence. *Id*. at 271.

The trial judge found the defendant guilty as charged, commenting that a "sexual assaulted [sic] was perpetrated or attempted, that she was killed resisting or after the sexual assault, and that the killing was intentional or knowing to overcome her resistance to the assault or to prevent her from reporting it afterwards." *Id.* at 274.

On May 17, 1989 defense counsel filed a motion for a new trial or, alternatively, an additional hearing. *See* Docket, *State v. Goodale*, Criminal No. 88-551 (Me. Super. Ct.) ("Trial Docket"), filed with Response, at 6 (entry of 5/17/89). The motion was denied. Transcript of Proceedings at Sentencing, etc., *State v. Goodale*, Criminal No. 88-551 (Me. Super. Ct.) ("Sentencing Transcript"), filed with Response, at 3-13. The trial judge on June 9, 1989 sentenced the petitioner to seventy-five years in prison. *Id*. at 55. On June 23, 1989 defense counsel filed notice of a direct appeal to the Law Court. Trial Docket at 7 (entry of 6/23/89). He contended that the trial court had erred by (i) failing to consider a guilty plea to criminally negligent manslaughter, (ii) finding that the petitioner had intentionally killed Finn, (iii) denying the petitioner's motion for a new trial and (iv) imposing a *de facto* life-imprisonment sentence. *State v. Goodale*, 571 A.2d 228, 228 (Me. 1990). The Law Court on February 26, 1990 rejected each of these contentions, affirming

the judgment. *Id*. at 229.

On March 7, 1990 defense counsel filed an appeal of the appropriateness of the petitioner's sentence; that appeal was dismissed as untimely.[3] Trial Docket at 8-9 (entries of 3/7/90, 4/19/90). Defense counsel followed this on April 26, 1990 with a motion for correction and reduction of sentence pursuant to Me. R. Crim. P. 35. *Id*. at 9 (entry of 4/26/90). On October 2, 1990, following a hearing before the trial judge, this motion was denied. Transcript of Proceedings of October 2, 1990, etc., *State v. Goodale*, Law Docket No. SOM-90-519 (Me. Super. Ct.), filed with Response. On November 1, 1990 defense counsel appealed this denial to the Law Court, which by order dated November 26, 1990 denied the appeal as untimely. Trial Docket at 10-11 (entries of 11/1/90, 11/29/90).

On October 8, 1991 the petitioner initiated a *pro se* state post-conviction review action ("PCR Proceedings"); on January 15, 1992 new counsel entered an appearance in the matter on behalf of the petitioner. Docket, Petition for Post-Conviction Review, *Goodale v. State*, Criminal No. 91-530 (Me. Super. Ct.) ("PCR Docket"), filed with Response, at 1 (entries of 10/8/91, 1/15/92). In March 1992 new counsel filed an amended petition for post-conviction review, asserting ineffective assistance of counsel in the pretrial, trial, sentencing and appeal stages. Amended Petition for Post-Conviction Review, *Goodale v. State*, Criminal No. 91-530 (Me. Super. Ct.), filed with Response, at 3-4. The State conceded that trial counsel had been ineffective in failing to file a timely appeal of the appropriateness of the petitioner's sentence. State's Answer, etc., *Goodale v. State*, Criminal No. 91-530 (Me. Super. Ct.), filed with Response, at 6.

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[3]The Law Court noted the difference between challenging the legality of a sentence, which can be done on direct appeal, and its appropriateness, which must be accomplished through Appellate Division appeal. *Id.* at 229.

On October 6-7, 1993 the Maine Superior Court ("PCR Court") conducted an evidentiary hearing in the matter ("PCR Hearing"). *See* Post-Conviction Review Before: the Honorable Thomas E. Delahanty, II, *Goodale v. State*, Criminal No. 91-510 [sic] (Me. Super. Ct.) ("PCR Transcript"), filed with Response. By decision dated September 10, 1996 and filed the following day, the PCR Court denied all requested relief except for reinstatement of the petitioner's right to appeal the appropriateness of his sentence. Decision and Judgment, *Goodale v. State*, Criminal No. 91-530 (Me. Super. Ct. Sept. 10, 1996) ("Decision"), filed with Response, at 6.

The petitioner on September 30, 1996 filed an appeal of those portions of the Decision adverse to him; he also filed a motion with the PCR Court for findings of fact and conclusions of law. PCR Docket at 4-5 (entries of 10/7/96). The PCR Court directed the parties to file proposed findings and conclusions but to date has made no such findings and conclusions. *Id.* at 5 (entry of 10/24/96); Response at 6 n.10. The Law Court on November 27, 1996 denied a certificate of probable cause to proceed with the appeal. PCR Docket at 5 (entry of 12/18/96).[4]

On September 30, 1996 the petitioner exercised his reinstated right to appeal to the Law Court the appropriateness of his seventy-five year sentence. Trial Docket at 12 (entry of 10/7/96). The Law Court on May 12, 1998 rejected his appeal on the merits, affirming the sentence. *State v. Goodale*, 711 A.2d 848, 849 (Me. 1998). The instant Petition was filed on May 11, 1999. Petition at 1.

[4]The State suggests that inasmuch as the Law Court obtained jurisdiction of the case following the petitioner's appeal, the Superior Court was without jurisdiction to act on the motion for findings of fact and conclusions of law. Response at 6 n.10.

## II. Discussion

### A. Statute of Limitations

The State contends as a threshold matter that the Petition is time-barred pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Response at 8-12. In 1996 Congress, through AEDPA, imposed for the first time a limitations period on the filing of habeas petitions as well as on motions filed pursuant to 28 U.S.C. § 2255. *See Rogers v. United States*, 180 F.3d 349, 353 & n.8, 355 (1st Cir. 1999). AEDPA requires the filing of habeas petitions within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

The State concedes that inasmuch as the petitioner's conviction became final prior to the enactment of AEDPA on April 24, 1996, he was entitled to a one-year grace period from that date within which to file a habeas petition. Response at 9-10; *see also Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999); *Rogers*, 180 F.3d at 355 (grace period ended on April 24, 1997). The State further

acknowledges that the grace period was tolled during the pendency of the petitioner's post-conviction review proceedings. Response at 10; *see also* 28 U.S.C. § 2244(d)(2); *Gaskins*, 183 F.3d at 9. However, the State observes that the post-conviction review proceedings concluded on December 18, 1996, more than one year prior to the filing of the Petition. Response at 11. The State concedes that the Petition would be timely filed if the tolling of the AEDPA clock were extended to the period during which the petitioner pursued his right to appeal the appropriateness of his sentence — a right reinstated as a result of post-conviction review. *Id*. The State nonetheless argues against such an extension inasmuch as the petitioner had fully exhausted his State remedies relative to the issues raised in this Petition as of December 18, 1996. *Id*. at 12 n.13.

Neither party cites, nor can I find, any case considering whether the AEDPA statute of limitations should be tolled during the pendency of a proceeding reinstated upon state post-conviction review. I nonetheless have little difficulty concluding that it should be. A reinstated proceeding logically should be viewed, for purposes of AEDPA, as a continuation of post-conviction review proceedings. Were this not so, a petitioner would be put to a Hobson's choice between pursuing remedies obtained upon state post-conviction review and exercising the federal right to file for a writ of habeas corpus — a right that following enactment of AEDPA can be pursued only once.[5] The Petition therefore was timely filed.

**B. Claims of Ineffective Assistance of Counsel**

Turning to the merits, I follow, as instructed by *O'Brien*, the following analysis:

[5]The State tacitly acknowledges the weakness of its argument, observing: "Given this Court's legal treatment of a collateral state proceeding pending on the effective date of the AEDPA, it appears manifest that this Court will, notwithstanding Respondent's opposition to it, treat this post April 24, 1996 collateral review proceeding — i.e., resuscitated sentence appeal — as preventing (tolling) the running of the 'grace period' as well." Response at 11-12.

> First, the habeas court asks whether the Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is "contrary to" the governing rule. In the absence of a governing rule, the "contrary to" clause drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use of (or failure to use) existing law in deciding the petitioner's claim involved an "unreasonable application" of Supreme Court precedent.

*O'Brien*, 145 F.3d at 24. In assessing whether a "governing rule" exists, "the key inquiry, at bottom, is whether a Supreme Court rule — by virtue of its factual similarity (though not necessarily identicality) or its distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations — can fairly be said to require a particular result in a particular case." *Id*. at 25.

Here, I conclude that there is such a "governing rule" in the form of *Strickland v. Washington*, 466 U.S. 668 (1984), a case that fairly can be characterized as distilling general federal law precepts concerning the Sixth Amendment right to counsel "into a channeled mode of analysis specifically intended for application to variant factual situations." I therefore analyze whether the PCR Court's decision is contrary to this governing rule.

*Strickland* instructs that a defendant seeking to prove ineffective assistance of counsel first demonstrate that counsel's performance was deficient, *i.e.*, that his or her attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must make a showing of prejudice, *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. The court need not consider the two elements in any particular order; failure to establish either precludes judgment in the defendant's favor. *Id*. at 697. The court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional

assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (quoting *Strickland*) (internal quotation marks omitted). The "prejudice" prong of the *Strickland* test entails more than demonstration of a possibility that counsel's errors had some conceivable effect on the outcome of the proceeding. *Id*. A defendant must affirmatively prove a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Id*.

In the habeas context, factual determinations by state courts are presumed correct. 28 U.S.C. § 2254(e)(1). "The [habeas] applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id*.

**1. Waiver of Right to Jury Trial**

The petitioner first claims that counsel rendered ineffective assistance by coercing him to waive his right to a jury trial. Petition at 5. Counsel purportedly did so by informing him that a jury would be aware of other alleged bad acts, omitting to mention that safeguards would have been available to prevent such awareness. *Id*.

Examining the same claim at the State level, the PCR Court determined that:

1. The petitioner's assertion that his counsel urged him to waive a jury because of concern about publicity linking him to another case was "illogical in that counsel was aware of the other case and could have requested the court to exclude or minimize any such evidence to mitigate its effect upon the jury." Decision at 3.

2. It was "more probable and logical that the primary reason for Goodale's waiver was counsel's substantial concern that a jury, with a likelihood that at least several women would be

seated on the panel, would have a strong and adverse reaction to the factual details of the case." *Id*.

3. The petitioner's waiver of a jury trial was knowingly, voluntarily and intelligently made. *Id*. During a thorough examination by the trial court, he exhibited no hesitancy in placing his fate in its hands. *Id*.

4. "The waiver was not the product of any coercion and was done with full disclosure of all issues and consequences by counsel." *Id*. at 3-4.

The petitioner challenges these findings and conclusions on grounds that the PCR Court erred in deeming it illogical that he would have waived his right to a jury trial because of possible adverse publicity. Rebuttal to the Response of Warden, Maine State Prison Filed on June 24, 1999 ("Reply") (Docket No. 7) at 1-2. In the petitioner's view the PCR Court wrongly focused on defense counsel's subjective reasons for preferring a bench trial, ignoring the extent of communications to the petitioner and the reasons for which the petitioner chose to waive this critical right. *Id.* at 2-3. In essence, the petitioner maintains, defense counsel dissuaded him from exercising this right by underscoring the potential impact on a jury of evidence that was in fact highly prejudicial and inadmissible. *Id*. at 3.

Applying *Strickland* in a closely related context in which a defendant alleged that defense counsel had overborne his will to testify at trial, the First Circuit noted that "[u]naccompanied by coercion, legal advice concerning exercise of the right to testify infringes no right." *Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993). Factors relevant to determining whether a defendant's decision was coerced include whether the defendant knew he had such a right, whether counsel presented the defendant with sufficient information to permit a meaningful waiver of the right and whether counsel intimidated or threatened the defendant with retaliation. *Id*. at 52-53. The PCR

Court's finding that the petitioner's waiver of jury trial was voluntary and knowing does not contravene *Strickland* as further refined by the First Circuit in *Lema*.

Defense counsel indeed testified at the PCR Hearing that he recalled informing the petitioner that negative publicity "might" have an effect on a jury and that jurors, particularly women, would be upset by photographs of Finn's body. PCR Transcript at 55-56. He did not recall apprising the petitioner that safeguards were available to screen the jury from adverse publicity. *Id.* at 56; *see also id.* at 200, 220 (testimony of petitioner that he did not recall discussing with defense counsel the possibility of excluding prejudicial photographs or sequestering the jury). However, defense counsel also testified that he recalled informing the petitioner, in the context of the decision whether to waive jury trial, that the expected antipathy of women on the jury to his case was the "primary reason for not going with the jury." *Id*. at 55, 58.

The petitioner's testimony corroborates that counsel expressed three concerns in the context of the jury-waiver decision: (i) the impact of pictures of the decomposed body on women jurors, (ii) the fact that the women in defense counsel's office believed the petitioner was guilty, and (iii) the fact that jurors would be affected by adverse publicity concerning another matter, the so-called "Brochu" case.[6] *Id.* at 188. The petitioner testified that he based his decision to waive a jury trial on "the hypothetical publicity of the Brochu case, and whatnot, and how it would affect a jury." *Id.* at 213. However, the record supports the PCR Court's implicit finding that the petitioner was in fact informed of counsel's primary reason for foregoing a jury trial, from which the court could have determined that counsel presented the petitioner with sufficient information to permit a meaningful

[6]The petitioner was a suspect in the murder of another woman, Janet Brochu, although he was not charged in connection with that crime and denied having committed it. *Id.* at 17-18.

waiver of his jury-trial right.[7]

That the petitioner knew he possessed the right to a jury trial is abundantly clear not only from his contemporaneous colloquy with the trial court on the subject but also from his testimony during the PCR Hearing. PCR Transcript at 235, 237 (testimony by petitioner acknowledging that he had informed trial judge that decision to waive jury trial was his own choice, that no one had pressured him, and that this representation was correct at time "based on what I was told"). There is no evidence that defense counsel intimidated the petitioner or threatened him with retaliation in the context of the exercise of his right to a jury trial. The PCR Court's conclusions thus comport with *Strickland* and *Lema*.

**2. Waiver of Right To Testify at Trial**

The petitioner next contends that counsel coerced him to waive his right to testify at trial by threatening to withdraw as counsel or produce incriminating evidence against him. Petition at 5. With respect to this claim, the PCR Court found that, "although a defendant may always testify on his own behalf, the decision not to exercise that right in this case was a product of [the petitioner's] own free choice based upon the rational evaluation and recommendation of counsel." Decision at 5.

The petitioner initially observes that the PCR Court failed to make specific findings of fact

[7]The PCR Court was presented with other evidence casting doubt on the proposition that the petitioner waived his right to a jury trial primarily because of the possibility of adverse publicity related to the Brochu case. When, during a mid-trial conference, defense counsel remarked to the petitioner that "there is no way on God's earth you could have gotten away with this without a conviction," the petitioner replied: "That's the reason why I waived my rights to a jury trial." *See* transcript of May 9, 1989 conference among Gerald Goodale, defense counsel James E. Mitchell and defense expert Charles H. Robinson, Ph.D. ("Conference Transcript"), Petitioner's Exh. 36 to PCR Proceedings, filed with Response, at 21.

on this issue and has not to date acted on his motion that it do so. Reply at 4 n.4. He argues that his will to testify was overborne when defense counsel threatened in the midst of trial to expose him as a liar (based on information that counsel had withheld from him for as many as eight months) and to place his ex-wife, Stacey Goodale, on the stand to testify against him. *Id.* at 4-7. He also contends that defense counsel swayed him not to testify based on concerns about adverse publicity arising from the Brochu case, failing to advise him that precautions could have been taken to shield the court from such publicity. *Id.* at 7-8; *see also* PCR Transcript at 194-95, 218, 220-21 (testimony of petitioner that decision not to testify was influenced by fears that Brochu matter would emerge and that his own counsel would portray him as liar). The petitioner's loss of his opportunity to testify in his view robbed him of his sole defense: that he did not intend to kill Finn. Reply at 8.

The petitioner's arguments implicate two *Lema* factors: intimidation or threats by counsel and failure to present sufficient information to enable a meaningful waiver. The record supports the PCR Court's implicit finding that neither occurred in this case.

Central to the petitioner's claim is a transcript of a mid-trial strategy conference among the petitioner, defense counsel (referred to as "JEM") and Dr. Charles Robinson, a psychologist and expert hired by the defense. At the May 9, 1989 conference the following exchange occurred:

> JEM: . . . We have come to some conclusions that are really ultimately yours since it's your case. But I have some rather strong recommendations . . . . I would like you to agree or not agree, but if you can't you can make the decision tomorrow. It's still a judgment call. The first thing I've got to tell you is I know you've been lying. You told me that you hadn't told anybody about this incident. You told Donna McEachern about it. She told our investigator. And you told Donna that you pulled Geraldine out of the truck — not that Geraldine jumped out of the truck at you but you pulled her. . . .
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> JERRY: I told her that she came flying at me, then Donna got it screwed up. The only reason why I told her is I didn't want to tell you or anybody else — was to

protect her.

JEM: You also told Stacey. And I have the letters that you wrote to Stacey.

JERRY: The ones I didn't want to tell you about was just because I wanted to protect them.

JEM: But you were lying to me. There's no way around that.

JERRY: No, there's no way to get around it. I did lie to you about it, but I just didn't want to tell you — just to protect them.

JEM: O.K. But I know you told Stacey, and she's in the air coming to Maine right this minute. She lands at 11 o'clock at night. I wasn't going to tell you that. I'll tell you what I planned to do. I planned to put you on the stand and get you to lie on the stand because you've been lying to me. And then walk her into the courtroom and say, "do you see that woman back there? Are you still going to tell me the same thing?" I came to the conclusion that that's a bad idea. I didn't want you to lose trust in me by pulling that trick on you. And I also think we'll have a major problem. O.K.?

JEM: The major problem is that if I put you on the stand and you tell the truth and you're going to tell about this woman in Oakland whom I don't know and you're going to tell about Donna, you're going to tell about Stacey. And the State's going to have a field day. They'll get a police car, pick up Donna, pick up Stephanie. They're going to bring them in, and they're going to say, "Jerry just tells his story to all these girls. And they're going to get each girl to repeat the story and there's going to be something different in the stories. I don't know what it's going to be, I know what Donna said. I don't know what Stephanie's going to say. But they're going to get it screwed up.

JEM: The other thing you can do when I put you on the stand — you can lie. If you lie, I have to tell the judge. That's my responsibility as a lawyer.

JEM: A lot of people know that Stacey knows because in my office everybody knows that. We've got the letter. So if you tell the truth we've got a problem. If you lie, I've got a problem because I cannot continue to represent you. So we have a big problem. Allright? That's what caused me to start rethinking about this whole case. . . .

Conference Transcript at 1-3. Later in the same meeting, defense counsel explained that he intended that Stacey Goodale testify that the petitioner was a non-violent person and that the main reason he

had arranged for her to travel to Maine was to corroborate that the petitioner had told a consistent story of events on the night of Finn's death. *Id*. at 5, 24-25. He recommended that the petitioner not take the stand, not only because of potential problems with perjury or discovery of inconsistent past statements, but also because of his fear that the petitioner's testimony would generate publicity about the Brochu case, causing the judge to "feel a little pressured." *Id.* at 14.

Defense counsel outlined three choices: (i) to put on the whole defense case, (ii) to put on no case at all and rely on the weakness of the State's case, or (iii) to put on professional witnesses only. *Id.* at 6. He urged that the petitioner consider resting after presentation of the State's case if the defense were able to get Dr. Roy to admit that Finn could have been strangled by means other than a purse strap, rather than take the risks of putting on the petitioner's or professional witnesses' testimony. *Id.* at 6-15. The petitioner concurred with defense counsel's recommendation, noting: "I don't have to sleep on it. Just from listening to what you were saying and what Chuck [Robinson] was saying, I strongly agree with you about stopping after Roy or after Curtis. . . . I've agreed with everything you've had to do so far and you haven't let me down yet." *Id*. at 23. The petitioner also noted that the prosecutor was "a damn smart man," commenting "[i]t's scary to be up against him." *Id.* at 24. The following day the petitioner sent defense counsel a handwritten note stating: "If we end the trial today, and give closeing [sic] statements, like we talked about, witch [sic] I fully agree with what you said last night. It all makes seense [sic] to me." Undated letter from Gerald Goodale to Jim Mitchell, attached as Petitioner's Exh. 37 to PCR Proceedings, filed with Response.

Turning first to the question whether defense counsel threatened or intimidated the petitioner, a fair reading of the transcript of the mid-trial conference makes clear that, although defense counsel threatened to use Stacey Goodale's testimony to expose the petitioner as a liar, he quickly clarified

that he would not resort to such a "trick." He further explained to the petitioner that his ex-wife had been brought in not to impeach him but rather to corroborate his version of events and to aver that he was a non-violent person. Defense counsel did caution the petitioner that, were he to catch him in a lie, he would be forced to inform the judge or to resign as the petitioner's counsel. Conference Transcript at 3, 14. This did not amount to undue coercion. Rather, it was an appropriate recitation of one of the risks entailed in putting the petitioner on the stand.

Turning to the question whether counsel provided sufficient information to enable the petitioner to make a meaningful waiver, the record indicates that defense counsel omitted to apprise the petitioner that certain precautions could have been taken to minimize the risks of placing him on the stand, *e.g.*, that defense counsel could have (i) simply refrained from asking the petitioner questions about his prior statements to others, PCR Transcript at 79-80, 96, 194, 197; (ii) filed a motion *in limine* to exclude references to the Brochu case, *id*. at 217; or (iii) cautioned the petitioner to avoid any reference to the Brochu case, *id*. at 230.

Nonetheless, counsel harbored legitimate concerns that despite such protections the petitioner's testimony remained risky. The petitioner himself might have inadvertently referred to Brochu. *Id*. at 98. And although defense counsel could have refrained from querying the petitioner about prior versions of the Finn story, he could not have prevented the prosecution from doing so. *Id*. at 225-26. Thus, counsel's admonitions that the petitioner's testimony entailed risks were not on the whole misleading.

Most significantly, defense counsel underscored during his mid-trial conference with the petitioner that, despite counsel's "strong" recommendations, the choice of whether to testify was the petitioner's to make. The petitioner clearly understood this, informing counsel both during the mid-

trial conference and in a handwritten note the following morning that he fully agreed with the recommendation not to testify.

The petitioner accordingly fails to demonstrate that the PCR Court reached a result "contrary to" *Strickland*, as refined by *Lema*.

**3. Waiver of State-of-Mind Defense**

The petitioner next contends that defense counsel waived state-of-mind defenses without his knowledge or permission. Petition at 5. The PCR Court implicitly addressed this contention in its overall conclusion that "trial counsel examined all conceivable avenues of defense and investigation and systematically eliminated each one as without a factual or legal basis or as defense strategy and tactics to present petitioner's case in the best possible light." Decision at 3.

The petitioner clarifies that he raises this issue here "not to allege that Counsel was ineffective for not presenting these issues, but to highlight that counsel was making decisions without consulting the petitioner and was only providing the petitioner with limited information." Reply at 8. For example, during the PCR Hearing counsel testified that he could not recall informing his client that he had not provided the prosecution with Dr. Robinson's expert opinion or discussing with his client prior to trial potential problems associated with presenting state-of-mind testimony. *Id.* at 8-9 (citing PCR Transcript at 89-90, 93).

The petitioner alleges that when counsel and he finally discussed — at mid-trial — the possibility of presenting a state-of-mind defense, counsel had already (unbenownst to his client) risked waiving that right by failing to have supplied Dr. Robinson's expert opinion to the prosecution. *Id*. at 8-9. It is arguable, however, whether that defense clearly had been waived. The State by letter dated April 20, 1989 expressed surprise that Dr. Robinson might be called as a state-

of-mind witness, requesting copies of his psychological testing and interviewing. Letter from Michael N. Westcott to Michael Popkin dated April 20, 1989, attached as Petitioner's Exh. 24 to PCR Proceedings, filed with Response. Defense counsel responded that "it is apparent to me that I cannot release them [two written Robinson reports] to you without revealing my theory of the case in substantial part." Letter from James E. Mitchell to Michael Westcott dated April 26, 1989, attached as Petitioner's Exh. 29 to PCR Proceedings, filed with Response. Defense counsel took "refuge" in the trial court's controlling discovery order, which exempted from disclosure "the mental impressions, conclusions, opinions, legal theories or legal strategies of the Defendant's attorney." *Id*. Inasmuch as appears, there was no further response from the State.

Thus, when defense counsel represented to the petitioner during their mid-trial strategy conference that he "probably" could present the Robinson state-of-mind testimony, this was not a clearly erroneous or misleading characterization. *See* Conference Transcript at 8. Defense counsel and Dr. Robinson engaged in a thorough and thoughtful discussion with the petitioner of the pros and cons of putting on the state-of-mind testimony. *Id.* at 7-13. This discussion came late in the game (during mid-trial), but not too late for the petitioner to have been fairly apprised of his options and given the chance to participate in making an informed decision whether to risk the Robinson testimony. In affording the petitioner such an opportunity, counsel exceeded the degree of communication expected in the process of strategizing whether to call certain witnesses — an area in which the tactical decisions of defense counsel are afforded wide latitude. *See, e.g., Lema*, 987 F.2d at 54-55.

**4. Failure To Produce Exculpatory Evidence**

As his final grounds for his ineffective-assistance claim, the petitioner argues that defense

counsel failed to produce exculpatory evidence at trial, unsuccessfully attempting to introduce it in closing arguments and through a motion to reopen trial. Petition at 5. This foregone evidence included testimony of Dr. Robinson and another witness, Karl Buchanan, that the petitioner had injuries on his legs consistent with those one would sustain from tripping over a come-along cable and the testimony of Maureen Luberg-Harris, a staff person who worked for defense counsel, that when dragged wearing clothing comparable to that worn by Finn, her skirt remained in place while her pantyhose rolled down (thus negating the inference of a sexual assault). Reply at 5 n.6, 9 n.9. The petitioner alleges that these omissions were sufficiently serious to deprive him of the opportunity to generate a manslaughter defense. *Id.* at 9.[8]

The PCR Court found that:

> The petitioner also claims he was prejudiced because counsel did not call certain witnesses which would assist the defense with little risk that evidence offered through them would impeach any defense theories. On review, the court finds that the testimony of Drs. Curtis and Robinson as well as Maureen Harris-Lewburg would not establish any new or additional facts, or undermine the State's evidence so that a different result would be likely.
>
> Much of the evidence which might be offered by Dr. Curtis was brought out on cross-examination of the State's chief forensic expert, Dr. Roy.
>
> It is unlikely that the potential testimony of Dr. Robinson, a clinical psychologist, would persuade the court to a different result. Although he observed scars and bruises on defendant's legs during an in-jail interview, he has no basis upon which to testify regarding the manner in which petitioner received them.
>
> Counsel's decision not to call Maureen Harris-Lewburg was a tactical one based upon the uncertainty of potential in-court demonstrations and the uncertainty of their admissibility.

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[8]The petitioner concedes that, in the absence of his foundational testimony concerning events on the evening Finn was killed, evidence concerning bruises observed on his legs and the results of dragging tests would have been irrelevant. *Id*. at 9 n.9.

> Petitioner's counsel made several points in undermining the testimony of Dr. Roy. At that point he had his strongest case.

Decision at 4-5.

The record supports the conclusion of the PCR Court, reached pursuant to the "prejudice" prong of the *Strickland* framework, that the introduction of the omitted evidence likely would have had no effect on the outcome at trial. In adjudging the petitioner guilty as charged, the trial court itself observed:

> In terms of the alternative explanation offered by the defense in argument, I would emphasize there are some points that don't make much sense. First of all, the way the victim's clothes were found is not in my view consistent with the type of dragging that was asserted over a lengthy 158 feet. It was not the request tearing of the skirt if the brush had been as indicated to render the bra into three pieces. [Sic]. Beyond that we are not talking about a scene in terms of the scary reaction of the victim. We are not talking about a scene ten miles west of Jackman. We are talking about a scene that is approximately a quarter of a mile off the busiest road in Somerset County and within not too difficult walking distance of downtown Skowhegan. It appears unlikely that somebody is going to get as rabidly afraid so you would have to be restrained as has been suggested in art [sic]. I find that alternative explanation not credible.

Trial Transcript at 275-76.[9]

The petitioner again falls short of demonstrating that the PCR Court reached a result contrary to that required by *Strickland*.

## III. Conclusion

For the foregoing reasons, I recommend that the petitioner's habeas corpus petition be **DENIED**.

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[9]In a similar vein, the trial judge stated in denying the petitioner's motion for a new trial or opportunity to present additional evidence: "It seems to me that the defendant is under no obligation to present evidence. The defendant was not in any way prejudiced, therefore, by his choice not to present evidence." Sentencing Transcript at 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 after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 28th day of December, 1999.***

_____

***David M. Cohen***
***United States Magistrate Judge***