UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FRANK P. GIFFORD,	)	
	)	
Petitioner	)	
	)	
v.	)	***Civil No. 95-70-B-C***
	)	
MAINE DEPARTMENT	)	
OF CORRECTIONS,[1]	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Appearing pro se, the petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction following a jury trial in the Maine Superior Court (Somerset County) (Criminal Docket No. CR-89-612) on two counts of rape and one count of gross sexual misconduct. He asserts a denial of effective assistance of counsel because his trial attorney did not pursue a defense based on the petitioner's impotence, did not seek a transcript of a related child protective proceeding and then use the transcript to impeach certain witnesses at trial, and did not move to suppress statements made by the petitioner immediately after his arrest. Additionally, the petitioner alleges the deprivation of rights secured by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution because the jury heard evidence at trial of sexual acts between the petitioner

[1] The petitioner originally named as respondent Martin Magnusson, the warden of the Maine State Prison. The matter has subsequently been styled as noted in the caption above. The state of Maine is the real party in interest, and it is therefore appropriate to treat the state as such. *See Scarpa v. Dubois,* 38 F.3d 1, 6 (1st Cir. 1994), *cert. denied,* 130 L. Ed. 2d 885 (1995).

and the accusing witness that exceeded the temporal and geographic scope of the indictment. I recommend that the court deny the petition.

I. Background

On July 18, 1989 a grand jury sitting in Somerset County returned an indictment charging the petitioner with two counts of rape, in violation of 17-A M.R.S.A. § 252, and one count of gross sexual misconduct, in violation of 17-A M.R.S.A. § 253. *See* Indictment (CR-89-612) (Exh. 1(b) to Response).[2] The petitioner was accused of committing these acts against his stepdaughter, with whom he lived during the times relevant to this proceeding and who had not attained her fourteenth birthday. Specifically, Count I alleged that the petitioner engaged in sexual intercourse with his step-daughter "between September 1, 1983 and September 1, 1984, in the Town of Fairfield." *Id*. Count II alleged that the petitioner engaged in a sexual act with his step-daughter, "between September 1, 1983 and September 1, 1984, in the Town of Fairfield." *Id*. Count III charged the petitioner with having engaged in sexual intercourse with the victim "between September 1, 1984 and September 1, 1985, in the Town of Fairfield." *Id*.

Attorney Charles Veilleux represented the petitioner during the trial phase of the criminal proceedings. *See* Trial Docket Record (CR-89-612).[3] He was also counsel to the petitioner in connection with a child protective proceeding involving the petitioner's step-daughter that was heard

[2] The key documents from both the initial criminal proceeding and the subsequent state court post-conviction proceeding appear in the record as an appendix to the state's response to the petition.

[3] The trial docket is marked as Defendant's Exhibit 4 and attached to a letter received by the court on May 3, 1995 from Assistant Attorney General Charles Leadbetter.

in the Maine District Court between September 1989 and January 1990.[4] The child protective hearing concluded on January 4, 1990. Four days later, on January 8, the Superior Court heard but denied Veilleux's request to continue the impending criminal trial. *See* Partial Transcript of Proceedings, January 8, 1990, CR-89-612 (Exh. N to Petition). According to the transcript of the January 8 hearing, Veilleux sought the continuance because he believed the grand jury was about to return a second indictment of the petitioner, based on allegations involving a different step-daughter, that he wanted to consolidate with proceedings on the initial indictment. *Id.* at 1-2. The prosecutor characterized this request as a delaying tactic, and the court denied the motion. *Id*. at 2-3.

Trial of the criminal matter commenced on January 29, 1990 and concluded four days later when the jury returned a verdict of guilty on all three counts. See Trial Docket Record (CR-89-612) at 2. The court sentenced the petitioner to a 20-year prison term. *Id*. Thereafter, Veilleux withdrew as petitioner's attorney in favor of Burton Shiro, Esq., who filed timely notices of appeal both as to the merits and as to the sentence. *Id*. at 3. The Sentence Review Panel of the Supreme Judicial Court denied the petitioner leave to appeal his sentence on December 20, 1990, *see* Exh. 3 to Response, and the Law Court affirmed the criminal judgment on August 12, 1991, *see State v. Gifford*, 595 A.2d 1049 (Me. 1991). The U.S. Supreme Court denied a petition for certiorari. *Gifford v. Maine*, 502 U.S. 1040 (1992).

Appearing pro se, the petitioner initiated post-conviction review proceedings in the Superior Court on February 12, 1992. *See* Post-Conviction Docket Record (CR-94-663) (Exh. 5 to Response) at 1. Attorney Peter Rodway entered an appearance on behalf of the petitioner on July 31, 1992. *See id*. at 2. The Superior Court conducted an evidentiary hearing on November 9, 1993 and denied

[4] Excerpts from the transcript of the child protective proceeding appear in the record as Exhibit M to the Petition and as attachments to the Leadbetter letter.

post-conviction relief in an order filed on July 25, 1994. *See id*. at 3-5. Thereafter, attorney Rodway filed a notice of appeal and was then replaced by attorney Anthony Shusta, who filed an amended notice of appeal. *See id*. at 5. The Law Court denied a certificate of probable cause on November 10, 1994, thus rendering the Superior Court's determination final. *See id*. at 6; *see also* 15 M.R.S.A § 2131.

Thereafter, the petitioner instituted these proceedings. He has not requested a hearing.

III. The Double Jeopardy/Due Process Claim

The statute governing habeas corpus proceedings precludes a federal court from granting relief to a petitioner

> unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. . . . An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b) and (c). "This means that the habeas corpus petitioner must have presented the substance of his federal constitutional claim to the state appellate courts so that the state had the first chance to correct the claimed constitutional error." *Hall v. DiPaolo*, 986 F.2d 7, 10 (1st Cir. 1993).

The petitioner's second ground for relief concerns the admission of evidence at trial of sexual acts between the petitioner and the victim that took place during times and in places other than those specified in the indictment. He states his claim as follows:

> First, petitioner submits that the Trial Judge committed error when he allowed the prosecutor to broaden the scope of the indictment through the introduction of evidence of sexual acts allegedly committed outside the time frame set forth by the grand jury. Second, petitioner submits that the Trial Judge committed error when he

> failed to give a limited use instruction to the evidence that was introduced outside the time frame of the indictment and when he instructed the jury that they could consider those acts and acts allegedly committed outside the Town of Fairfield, County of Somerset and the State of Maine. Third, that this impermissible evidence and unlawful instructions allowed for the possibility that petitioner would not be protected from Double Jeopardy.

Petitioner's Memorandum of Law in Support of Petition for Writ of Habeas Corpus ("Petitioner's Memorandum"), appended to petition, at 34-35. The petitioner contends that through admission of this evidence, and through certain references to the indictment made at trial by the prosecutor and by the court in its jury instructions, a constructive amendment of the indictment took place in violation of his right to due process and his right to be protected from double jeopardy.

The petitioner did not present this claim in his state post-conviction proceeding, which focussed entirely on his claim of ineffective assistance of counsel. And a careful examination of the Law Court's opinion and the briefs submitted by the petitioner to the Law Court leads to the conclusion that the petitioner did not make this claim on direct appeal either, although he certainly raised related contentions. Specifically, the Law Court held that the trial court gave an erroneous instruction on the applicable limitation period, but that the error had not been preserved at trial and thus reversal was not justified. *See Gifford*, 595 A.2d at 1051. The Law Court further rejected the petitioner's claim that the indictment as written was not sufficient to protect him from possible double jeopardy. *See id*. at 1051-52. And, finally, the Law Court found no obvious error in the trial court's having failed to give, sua sponte, a limiting instruction on the purpose for which the court had admitted evidence of sexual acts between the petitioner and the victim outside the scope of the offenses charged in the indictment. *Id*. at 1052. The Law Court dismissed this claim as simply not rising to the level of "obvious error," *id*.; a review of the brief submitted to the Law Court by the petitioner makes clear that he based his argument to the contrary on the notion of unfair prejudice

as enshrined in the Maine Rules of Evidence. *See* Exh. 2 to Response. The petitioner did not argue on direct appeal, as he does here, that admission of this evidence was of constitutional significance.

The petitioner has defaulted on this claim so as to preclude consideration of it here. The Maine statute governing state court post-conviction proceedings contains the following provision:

> All grounds for relief from a criminal judgment or from a post-sentencing proceeding shall be raised in a single post-conviction review action and any grounds not so raised are waived unless the State or Federal Constitution otherwise require or unless the court determines that the ground could not reasonably have been raised in an earlier action.

15 M.R.S.A. § 2128(3). In *Carsetti v. State of Maine*, 932 F.2d 1007 (1st Cir. 1991), the First Circuit applied this provision to conclude that Maine's state courts would hold a claim procedurally barred because the petitioner did not show in his federal petition that he had been unable to raise the claim in the previous state court proceeding, which asserted other grounds for relief.[5] *Id*. at 1011. In such circumstances, the petitioner must "show cause for his default and prejudice arising therefrom" before this court may reach the merits of his new claim. *Hall*, 986 F. 2d at 11. "Alternatively, he must show that a constitutional violation has resulted in his conviction despite his innocence." *Id*. There is no such showing here, nor does the petitioner even attempt to explain why he has never made this argument before. Dismissal of this claim is therefore appropriate.

IV. The Ineffective Assistance of Counsel Claim

[5] *Carsetti* presented the court with an added wrinkle not present here: The petitioner in *Carsetti* was unsuccessful in arguing ineffective assistance of counsel in his initial post-conviction petition presented to the Superior Court, and then sought to add a due process claim when appealing the adverse determination to the Law Court. *Id*. at 1009. In denying a certificate of probable cause, the Law Court did not "clearly and expressly" default the petitioner as to his due process claim on procedural grounds. *Id*. at 1010. Thus, the First Circuit was unable to conclude that the Law Court's determination rested on an adequate and independent state law ground sufficient to preclude habeas corpus review. *Id*. This allowed the First Circuit to reach the merits of the due process claim. *Id*.

The petitioner's ineffective assistance of counsel claim, fully presented in the state post-conviction proceeding, fails on its merits. He has refined his contentions to three, all rejected by the state court: that trial counsel should have pursued a defense strategy based on the petitioner's alleged impotence at the time the charged offenses took place, that trial counsel should have sought a continuance in order to obtain a transcript of a related child protective proceeding and use that transcript to impeach certain witnesses at trial, and that trial counsel should have moved to suppress certain statements made by the petitioner after police allegedly arrested him without a warrant.

The familiar test for determining when there has been ineffective assistance of counsel so as to require habeas corpus relief was first articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In determining whether the *Strickland* test has been met, a federal court does not write on a blank slate. This is because the statute governing habeas corpus proceedings specifies that findings of fact made by a state court enjoy the presumption of correctness in the absence of certain enumerated circumstances. *See* 28 U.S.C. § 2254(d).

These principles require the court to reject the petitioner's contention that he suffered ineffective assistance of counsel by virtue of his trial counsel's determination not to present evidence to the jury designed to suggest that the petitioner was impotent at the time of the crimes charged in the indictment. At the post-conviction hearing in state court, the petitioner presented the testimony

of Dr. Edward Salmon, a urologist who examined the petitioner in 1988. Salmon testified that the petitioner suffered from impotence that was "psychogenic" in nature, i.e., that "there is no obvious organic or physical reason for the . . . impotency, and [it] is most probably related to some emotional, behavioral, or psychological reason." Transcript of Post-Conviction Proceedings (hereinafter "transcript" or "tr.") (Exh. R to Petition) at 5-6. Both the petitioner and his wife testified that he suffered from impotence beginning in 1982 as a result of a back injury, tr. 17-20; 46-48, testimony the post-conviction court rejected as "less than credible." *Gifford v. State*, CR-92-68 (Me. Super. Ct., Somerset Cty., July 22, 1994) (Marsano, J.) (hereinafter "post-conviction order") (Exh. H to Response) at 5. Accordingly, the court concluded that pursuit of an impotence defense at trial would have actually been detrimental to the petitioner's case because it would have focused the jury's attention on his sexual activities. *Id*. In other words, the impotence defense would have backfired because the prosection would have argued that any psychogenic inability on the part of the petitioner to have sexual relations with his wife actually made it *more* likely the petitioner decided to gratify his sexual desires in the criminal manner specified in the indictment.

The petitioner presents no reason here why this court should not defer to the post-conviction court's explicit rejection of the testimony of him and his wife that he suffered from impotence beginning in 1982. Salmon's testimony does not contradict this finding, which is fairly supported by the record. So, too, with the post-conviction court's finding that the petitioner had explicitly agreed with his attorney during trial that the defense would make the tactical choice not to present evidence about impotence. *See id.* at 6. The attorney testified that he had such a discussion with his client on the eve of the defendant's trial testimony.[6] Tr. 123.

[6] Attorney Veilleux also testified at the post-conviction hearing that he thought he had asked (continued...)

In his memorandum of law, the petitioner contends that "in order for any defense attorney to present a proper adversarial test of the State's case, that attorney must present any and all evidence of any inference which tends to negate the guilt of the defendant." Petitioner's Memorandum at 15. This is incorrect. The First Circuit has recently reemphasized that a "strong presumption" exists that an attorney's conduct in conducting a criminal defense "falls within the wide range of reasonable professional assistance" and that a petitioner alleging ineffective assistance of counsel must overcome the presumption that the attorney's actions amount to "sound trial strategy." *Matthews v. Rakiey*, 1995 U.S. App. LEXIS 10289 (1st Cir. 1995) at *22 (quoting *Strickland*, 466 U.S. at 689). The record supports the post-conviction review court's finding that the jury heard no evidence on impotence because the petitioner and his counsel made an explicit strategic choice to withhold such evidence. And I agree with the state court's conclusion that the decision was a professionally reasonable one. "That it was not ultimately a winning strategy is of no moment in assessing its reasonableness at the time." *Id*. at *26.

As he did in state court, the petitioner relies on *Foster v. Lockhart*, 811 F. Supp. 1363 (E.D. Ark. 1992), *aff'd*, 9 F.3d 722 (8th Cir. 1993). The petitioner in that case stood convicted of rape, although he suffered at the time of the crime from a spinal injury that rendered him "organically" impotent. *Foster*, 811 F. Supp. at 1369. The impotence did not render the petitioner in *Foster* completely incapable of having an erection, but there was expert testimony at the habeas hearing that it was "difficult to believe" the petitioner could have penetrated the victim and ejaculated within a

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[6](...continued)
the petitioner's wife about the impotence issue during her trial testimony. *See* tr. 115. He conceded, however, that the trial transcript makes clear that she raised the subject while on the stand, and he "cut her off" from further discussion of it. *Id*. at 114-15. This is consistent with the post-conviction court's finding that the petitioner and his counsel had not yet decided whether to pursue the impotence defense, and subsequently decided not to present such evidence.

few minutes, as had been alleged by the prosecution, *id*. at 1368, 1369, and that "it would have been discomforting for petitioner to have sex in the position in which the victim testified that she was raped," *id*. at 1368. As the Eighth Circuit observed in affirming the district court's determination that habeas corpus relief was appropriate, the trial counsel's investigation of the impotence defense was objectively unreasonable because it consisted of only one phone call to an unidentified urologist, "who merely told the attorney an impotent person can produce and emit sperm." *Foster*, 9 F.3d at 726. "If the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the victim's story." *Id*.

Those facts are easily distinguishable from those presented by the instant case. Even assuming that the investigation performed by the petitioner's trial counsel was as cursory as that in *Foster* -- and there was record evidence to the contrary before the post-conviction court, *see* tr. 112 (trial counsel sought without success to track down a physician in Texas who had treated petitioner for impotence) -- the most any investigation would have uncovered was that the petitioner suffered not from a physical condition but only a psychological one. This would not have cast significant doubt on the prosecution's theory of the case; indeed, as noted by the post-conviction court, it might have even had the opposite effect.

Next, the petitioner contends he is entitled to relief because his trial counsel failed to seek a continuance to allow for the acquisition of the transcript of a related child protective hearing. Many of the witnesses who testified in the child protective proceeding, including the victim, also testified at the petitioner's trial, which took place less than a month after the child protective hearing concluded. The petitioner contends his trial counsel could have and should have used the transcript

to impeach witnesses by pointing out inconsistencies between their trial testimony and their testimony at the previous hearing.

The post-conviction court wrestled with this issue, in light of attorney Veilleux's testimony that the trial court rejected his request for a continuance to obtain the transcript. The record of the trial court reflects that Veilleux sought a continuance, but for a different reason. There is no reason to disturb the post-conviction court's determination not to credit Veilleux's testimony on this point, or the court's finding that Veilleux failed to take steps to make the transcript available at trial.

I further agree with the post-conviction court that any impeachment that would have been generated through the use of the child protective hearing transcript would have gone only to minor or tangential issues, and therefore that any error of omission committed by trial counsel in this regard was not so serious as to deprive the defendant of a fair trial. As cited by the petitioner, these impeachment issues relate to whether any sexual contact between the petitioner and the victim occurred at the first of several homes at which they both lived; the petitioner's previous testimony that much of the sexual contact took place in the early morning, contrasted with her previous testimony that the petitioner was drunk every time he abused her; the victim's previous testimony that no abuse took place when she shared an upstairs bedroom with her sisters, contrasted with the previous testimony of another witness who stated that the petitioner left an upstairs bedroom to be with the victim in an adjacent room; the victim's trial testimony that a third person was present on the night of the last incident, contrasted with her previous testimony that no one else was present; her trial testimony that an incident took place during an overnight ferry trip, contrasted with the absence of any testimony about this incident in the child protective hearing; the victim's previous testimony of a fight among her, her mother and the petitioner over use of drugs and alcohol by the

victim and her boyfriend, which the petitioner contends would have rebutted his theory that the victim's accusations were a form of revenge for his effort to keep the victim away from her boyfriend; and certain statements made at the child protective hearing by a key witness in both proceedings, relative to his intoxication on the night that was the focus of his testimony. Had the defense made all of these points at the petitioner's trial they would have struck only glancing blows at the prosecution's case, the heart of which was the victim's testimony that the petitioner embarked upon a course of repeated sexual abuse of her that began in 1979, when she was six years old, and ended in 1988. *See Gifford*, 595 A.2d at 1051. Assuming that counsel's failure to obtain the transcript amounted to deficient performance in the sense contemplated by *Strickland*, the petitioner has not met the other prong of the *Strickland* test, which requires not merely a showing that the errors of counsel were outcome-determinative, but that "the result of the proceeding was fundamentally unfair or unreliable." *See Carey v. United States*, 50 F.3d 1097, 1101 (1st Cir. 1995) (quoting *Lockhart v. Fretwell*, 113 S. Ct. 838, 842 (1993)).

Finally, the petitioner contends he was deprived of the effective assistance of counsel because his trial attorney failed to move to suppress certain statements made by him subsequent to his arrest. According to the petitioner, the police obtained these statements illegally because he was arrested without a warrant.

The post-conviction court found that the petitioner had been arrested pursuant to a duly executed warrant, and that any statements made by the petitioner thereafter were given subsequent to the administration of *Miranda* warnings. In so finding, the court relied on the testimony of the arresting officer given at the petitioner's trial. The officer testified unequivocally that he obtained a warrant prior to conducting the arrest. *See* trial tr. (Exh. A to Response) at 54. The post-conviction

court made its finding notwithstanding that the record of the criminal proceeding is itself devoid of any record that such a warrant was ever issued or returned.

I find no reason to disturb the post-conviction court's presumptively correct factual finding. The arresting officer did not testify at the post-conviction hearing, but there is no indication that the petitioner was unable to call him, or that the petitioner was otherwise prevented from fully and fairly presenting his case to the post-conviction court. Nor is there any reason to suppose that the officer's testimony would have differed from that which he had given at trial.

The petitioner invites this court to ignore the post-conviction court's finding because "[i]f such a warrant had been issued and served there would be a return in the Court file as required by the Maine Rules of Criminal Procedure." Petitioner's Memorandum at 27. The criminal proceeding against the petitioner began in the Maine District Court. *See Gifford*, 595 A.2d at 1050. In March 1989, the since-abrogated Maine District Court Criminal Rules, rather than the Maine Rules of Criminal Procedure, applied to proceedings in that court. District Court Criminal Rule 4(c)(4) provided that "[t]he officer executing a[n arrest] warrant shall make return thereof to the magistrate before whom the defendant is brought." Nothing in the rule permits this court to infer, from the absence of references to an arrest warrant in the docket record of the Maine District Court, that the evidence does not support the post-conviction court's finding that the petitioner was arrested pursuant to a valid warrant. Accordingly, it was not ineffective assistance of counsel for Veilleux to have failed to file a suppression motion based on an allegation of improper warrantless arrest.

IV. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

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

Dated at Portland, Maine this 7th day of July, 1995.

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David M. Cohen
United States Magistrate Judge