UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DALE W. MARTIN	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 04-126-B-W
	)	
STATE OF MAINE	)	
	)	
Respondent	)	

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

Dale Martin has filed a petition pursuant to 28 U.S.C. § 2254 seeking federal relief from his state sentence. Martin and his housemate were both charged with numerous counts of possessing and disseminating sexually explicit images of minors stemming from criminal proceedings brought by the State of Maine. Martin entered conditional guilty pleas to twelve counts of dissemination. I now recommend that the Court **DENY** Martin 28 U.S.C. § 2254 relief.

Discussion

A. Section 2254 Review, its Limitations and Prerequisites

Martin's 28 U.S.C. § 2254 petition cannot be granted unless the state court decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the

governing law set forth in[Supreme Court] cases[,]" or (2) "confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision and nevertheless arrives at a [different] result." Williams v. Taylor, 529 U.S. 362, 405-06 (2000). An unreasonable application of clearly established federal law is one in which "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. The import of this distinction is that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; see also Mello v. DiPaulo, 295 F.3d 137, 142 -43 (1st Cir. 2002). The State entitlement to deferential § 2254 review does not turn on citation to a Supreme Court case; "indeed, it does not even require awareness of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002).

With respect to the post-conviction court's factual determinations,

> **(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
> **(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
> **(A)** the claim relies on—
> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e).

Also key to the resolution of Martin's claims is § 2254(b)(1)(A)'s prerequisite to federal habeas review; this court can only grant federal relief on federal constitutional claims that Martin has fully exhausted in the courts of the state. "Accordingly, the decisive pleading is the application for further appellate review, and [I] must determine whether the petitioner fairly presented the federal claim to the [Maine Law Court] within "the four corners" of that application." Adelson v. DiPaola, 131 F.3d 259, 263 (1st Cir. 1997).

Exhaustion "requires that the issue be presented 'in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question.'" Fortini v. Murphy, 257 F.3d 39, 44 (1st Cir. 2001). This requires more than that a similar claim was made but under a non-constitutional or a different constitutional theory, see Harding v. Sternes, 380 F.3d 1034, 1046-48 (7th Cir. 2004), or that a claim could have been identified by the state court if it had latched on to some round-about suggestion of an argument, see Needel v. Scafati, 412 F.2d 761, 765 (1969) ("While with hindsight one can find in the state court record seeds of the argument, so vigorously urged in the federal court, based on alleged lack of knowledge of petitioner's right to a speedy trial and to counsel, the seeds never came to visible fruition.").

Inexplicably the State does not address the exhaustion/procedural default question, advancing straight to the merits of each of Martin's four § 2254 grounds.[1] Although in some circumstances it might be appropriate to consider the matter waived, in Martin's case I believe that concerns about comity override the State's failure to assert the issue. See Perruquet v. Briley, __ F.3d __, 2004 WL 2600589, 9 -11 (7th Cir. Nov. 17, 2004). Martin's four 28 U.S.C. § 2254 grounds are broadly stated and he has not attempted to explicate what precisely in the post-conviction judgment is the target of these obtusely phrased constitutional claims. Given that Martin's theories presented on direct appeal shifted when he commenced the post-conviction proceedings and once again when he filed his petition for review of the denial of post-conviction relief, it is appropriate to limit Martin's § 2254 claims to those that he fully exhausted by presenting the same claim based on the same theoretical and factual predicate to the Maine Supreme Court in his petition for review, the decisive pleading under Adelson. That said, I still give Martin the benefit of the doubt in construing his claims and identifying the factual and record basis for them.

[1] Equally inexplicable based on the record before me is why appellant filed a pro se memorandum of law in support of the request for the certificate of probable cause to appeal the denial of the petition for post-conviction relief. That pleading is the operative pleading upon which I make many of these exhaustion determinations. The Superior Court docket reflects that Martin had court appointed counsel handling his state post-conviction proceeding from January 2001 to July 2003. In July after filing a Notice of Appeal, court appointed counsel was given leave to withdraw. In November 2003 retained counsel entered an appearance on the Superior Court docket. On the Law Court Docket sheet that same counsel appears as court appointed counsel for Martin, pursuant to an order of appointment granted on September 23, 2003. According to the Law Court Docket (and again, inexplicably, the Superior Court docket) court appointed counsel was granted time to file amended petitions in October and December of 2003. No amendment to Martin's August 10, 2003, memorandum is contained within the record provided to this court, although the Law Court docket reflects that such a pleading was filed on January 7, 2004. In February 2004 the Law Court denied a certificate of probable cause. If other issues were raised in an amended pleading, this court has not been given that record.

B. 28 U.S.C. § 2254 Grounds

In his 28 U.S.C. §2254 petition Martin presses the following four grounds: (1) the state court's rejection of his claim that his guilty plea was involuntarily was wrong because it was "clearly based on a violative plain error and reversible error clauses"; (2) Martin was denied effective assistance and the Maine Law Court should have granted him relief on this basis; (3) the Maine courts failed to correctly apply Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) and recognize that the (now-repealed) criminal statue under which he was convicted, 17 M.R.S.A. § 2923(1) "was highly vague and overly broad towards an arbitrary interpretation" ; and (4) the prosecutor failed to disclose favorable evidence concerning Martin's Maine Turnpike Trans-pass records that would have established that he was employed during some of the times that the alleged computer crimes took place. As explained below, not all of these grounds are entitled to § 2254 review because Martin did not fairly present them to the Maine Law Court and they are, therefore, unexhausted.

1. The State Court's Rejection of Martin's Involuntary Guilty Plea Claim and the Constitutionality of Martin's Prosecution under the Maine Statute (Grounds One and Three of this 28 U.S.C. § 2254 Petition)

In his memorandum seeking the Law Court's review of the state post-conviction court's denial of relief, Martin's third ground queried whether the failure of the "lower court" to allow him to withdraw his involuntary plea was unconstitutional. Martin argued that his "eleventh hour" guilty plea was not knowing and intelligent given "the relevant circumstances and disparity of the imposed penalty" in comparison to similar computer crimes convictions. He asserted that a "major concern not emphasized during the review of the Rule 11 proceeding, was petitioner/defendant's understanding of each offense he

was pleading guilty and was he properly informed about the nature of the charges brought against him. As a matter of constitutional due process, his guilty plea should be set aside where the record fails to affirm a showing he entered each plea freely and knowingly" given the State's burden to prove every element of these crimes. The federal law cited by Martin to the Law Court in this ground was Boykin v. Alabama, 395 U.S. 238 (1969).

Based on the parameters of the claim that Martin exhausted in the state courts, I conclude that Martin is entitled to federal review of his claim that his plea was not knowing and intelligent as asserted in his first § 2254 ground.[2] As framed by Martin the factual basis for this claim as developed during the state post-conviction proceeding is, one, the question of Martin's understanding of what the prosecution would have to prove had he gone to trial and, two, his expectations concerning his sentencing exposure.

However, Martin has not exhausted the claim presented in his ground three claim that the Maine statute is unconstitutional in view of Free Speech Coalition (as opposed to the very different constitutional challenge to the statue pursued in Martin's direct appeal).[3]

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[2] Although Martin describes his plea as involuntary, there is no suggestion in this record that Martin has such a claim. See Brady v. United States, 397 U.S. 742, 755 (1970) (rejecting the voluntariness facet of such a claim premised on the looming death penalty, explaining that a "plea of guilty entered by one fully aware of the direct consequences" of the plea is voluntary in a constitutional sense "unless induced by threats ..., misrepresentation ..., or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business").

[3] In his direct appeal Martin argued that the Superior Court erred in failing to dismiss the indictment because the criminal statute was unconstitutional as applied because it was vague as to whether images stored only on a computer -- and not in a more traditional tangible form -- fell under the statutory prohibition. The Maine Law Court rejected the argument that the statute was unconstitutionally vague because it did not specifically refer to images contained on computer files concluding: "An ordinary person reading the statute would understand that the dissemination of computer files depicting child pornography is prohibited because the files contain 'mechanically reproduced visual materials.' Thus, section 2923 does not constitute a denial of due process." State v. Weeks, 2000 ME 171, ¶¶7-10, 761 A.2d 44, 46 -47. If Martin was attempting to resurrect this challenge in this § 2254 setting it would be considered exhausted as Maine's highest court had the opportunity to pass on its merits.

However, at the post-conviction phase Martin's challenge to the constitutionality of the statute morphed into one based on the post-appeal decision Free Speech Coalition which is the same challenge raised in Martin's third § 2254 ground. Martin did not raise this ground in his memorandum seeking review

a. Plea and Martin's awareness vis-à-vis the State's actual children burden of proof

With respect to how knowing and intelligent Martin's plea was vis-à-vis the nature of the images involved, the indicted counts to which Martin pled read that on September 2, 3, and 4, 1998, Martin "did intentionally or knowingly disseminate or possess with intent to disseminate any book, magazine, print, negative, slide, motion picture, video tape or other mechanically reproduced visual material which depicted a minor, who the Defendant knew or had reason to know was a minor, engaging in sexually explicit conduct."

Counsel, in the amended petition for post-conviction review, approached the Free Speech Coalition attack from three different angles. He asserted that the Maine statute was unconstitutional because it prohibited possession and dissemination of images of child pornography even if the children depicted were not real; that, as applied to Martin, the State did not prove beyond a reasonable doubt that the children depicted in the images attributed to Martin were real or actual minors; and that Martin's guilty plea was not voluntary, knowing, and intelligent because at the time of his plea Martin believed he could be convicted under the Maine statute for possessing images of pornography that

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of the denial of his petition for post-conviction review. Probably he did not do so because on the trial court level the issue had dissipated in light of the State's agreement to stipulate that for purposes of this case, the State would have to prove beyond a reasonable doubt that the images were real children. Thus the issue was never raised on direct appeal nor was it fully resuscitated during the post-conviction proceedings, although there is considerable testimony around the issue at the post-conviction hearing. The State court, other than in the Superior Court post-conviction decision, has never addressed the State statute's constitutionality on Free Speech Coalition grounds. This court certainly will not undertake to rule on the constitutionality of the statute when petitioner did not present this issue to the State's highest court in his motion for a certificate of probable cause to appeal from the post-conviction decision. If he did present that issue to the Law Court in a pleading that is not part of this record, then this issue has been fully exhausted. If that were the case, the "unreasonable application" analysis would be applied to the Superior Court decision and I would agree with the Superior Court's conclusion that there is no Free Speech Coalition constitutional challenge to the Maine statute as applied to the facts of this case.

involved only artificially created or computer generated minors engaging in sexually explicit conduct. (Def.'s Am. Pet. Post-Conviction Review at 3-6.)

With respect to the constitutional validity of the tender of Martin's guilty plea, the following testimony relating to Martin's awareness of the charges against him was proffered. Martin testified that he did not believe that the children had to be real or actual children in order for him to be convicted under the statute. (Id. at 20, 34.)[4] According to Martin if he had known that the children depicted had to be real, as opposed to computer generated, virtual or artificial, he would not have pled guilty. (Id. at 20-21, 39.) Martin testified that his attorney never explained to him that the children in the pictures had to be real children in order for him to be convicted of the charges. (Id. at 21.) However, on redirect, Martin was not so sure whether or not he had a conversation with his attorney about this issue. (Id. at 39). Martin claimed that based on Free Speech Coalition he does not think he was guilty of the charges brought against him. (Id.) However, he also testified that he still has no idea whether the kids in the picture were real. (Id. at 34, 35-36.) Martin acknowledged that his attorney had prosecuted a motion to dismiss on the grounds that the statute was unconstitutional. (Id. at 34-35.) When asked if he remembered that prior to his plea the judge indicated that the State would have to prove that the minors were real, Martin replied that he still presumed that it did not matter whether they were real or not. (Id. at 35.)

As to the question of whether the minors depicted were real or not, counsel testified that he considered this as a legal issue and worked with counsel for Martin's co-

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[4] Martin also testified that at the time he plead guilty he did not believe that he could be convicted of dissemination of child pornography if the children depicted in the computer generated images were artificial or virtually generated. (Id. at 19.) This was clearly not the answer Martin's attorney for the post-conviction proceedings was looking for.

defendant in parsing out the grounds for filing the motion to dismiss. (Id. at 55, 65-66.) He never asked Martin whether he thought the children were real or not (id. at 55-56) and Martin never told counsel that he did not think they were real (id. at 89-90). Nor did Martin's co-defendant contest this point. (Id. at 90.) The district attorney conceded that the State would have to prove that the images were real and thus, with this victory for the defendants, this aspect of the motion to dismiss went by the wayside with the resulting order reflected in the State's concession. (Id. at 56, 70-71.) Counsel apprised Martin of this outcome and sent him a copy of the written decision. (Id. at 56, 66.) There was no question in counsel's mind that Martin understood that the State would have to prove that the children depicted were actual children. (Id. at 57.) Getting a plea agreement on only twelve counts became the focus of the defense after that. (Id. at 90.)

Counsel relied on Martin for information regarding the computer technology and did not seek to obtain an expert's opinion in this area to determine if the minors were real. (Id. at 65, 68, 89.) Counsel testified that he never attempted to access the images on the Compact Disks (CDs) containing them and so he never viewed "the actual raw data" underlying the prosecution that was made available to him, instead relying on the still pictures printed from those files. (Id. at 67-68, 88-89.) Counsel gave Martin photo-copies of the images in question (although the CDs themselves had been taken during a Federal proffer) and Martin never disputed the genuineness of the pictures. (Id. at 80-81.) Counsel admitted he was surprised to learn on cross-examination at the post-conviction hearing that the CDs contained ten to twenty second videos. (Id. at 68.)

On rebuttal, Martin testified that he too was surprised to learn at the post-conviction hearing that counsel had never viewed the information that was actually on the

CDs, as he assumed he had, and that he would not have pled guilty if he had known about counsel's failure to do so. (Id. at 91-92.) When asked by the presiding judge why this would have been such an important factor in the decision to plead guilty, Martin suggested that he was relying on counsel to view them and make some sort of judgment as to whether the images were of real children. (Id. at 93-94.) Martin said that he was never given access to the actual CDs himself during his prosecution (id. at 94) although he did see the images while they were on his computer before he decided to shut the file sharing operation down (id. at 95). Martin indicated that he never asked his attorney to see the rest of the CDs. (Id.) Martin allowed that he did not know if he had any reason to believe that had his attorney done so he would have been able to tell whether the images were morphed or not, (id. at 94) and admitted that he could not tell when he saw the images on his computer whether the images had been morphed, telling the court that they appeared to be real children (id. at 95-96).[5]

[5] Although much of this testimony involved counsel's performance vis-à-vis the plea, it also would have informed the post-conviction court's conclusion concerning the intelligent and knowing entry of Martin's plea. I stress, though, that Martin is not entitled to § 2254 review of these ineffective assistance claims because he did not present these claims to the Maine Law Court in his memorandum seeking review of the denial of post-conviction relief. Thus to the extent Martin tries to present this issue via his Ground Two ineffective assistance claim in this court, it is an unexhausted and hence unreviewable claim.

In rejecting Martin's related ineffective assistance claim, the post-conviction court explained:

> Petitioner argues that [his attorney] provided him with ineffective assistance of counsel. Petitioner Martin relies on the above mentioned arguments and also states that his attorney never obtained expert help in examining the computer that transmitted the child pornography over the Internet, nor did his attorney view the pornographic images that the State had transferred to a compact disc format.
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> The first question is whether [Martin's attorney]'s performance fell below that of an ordinary, fallible attorney. Aldus v. State, 2000 ME 47, ¶ 13, 748 A.2d 463, 468. For reasons mentioned above, Petitioner Martin has failed to show that [his attorney] ineffectively counseled him. [Martin's attorney]'s testimony at the Post-Conviction Review hearing satisfied the court that examining the compact discs or hiring a computer expert would not have significantly benefited Petitioner Martin's case. The second question is whether there was a reasonable probability that, but for [his attorney]'s error, Petitioner Martin would not have entered a guilty plea and would have insisted on going to trial. Id. Again, as mentioned above, at the Rule 11 hearing, Justice Cole went to appropriate lengths to determine that Petitioner Martin knowingly and intelligently pleaded guilty, albeit conditionally, to the plea agreement worked out with the

The post-conviction court addressed these related claims in the following manner:

> Petitioner Martin also revisits his assertion that Title 17 M.R.S.A. § 2923 was unconstitutional. While the Law Court held that Title 17 M.R.S.A. § 2923 did "not constitute a denial of due process", Petitioner Marin argues that a recent U.S. Supreme Court case changes this result. State v. Weeks, 2000 ME 171, ¶ 10, 761 A.2d 44, 47. In Ashcroft v. Free Speech Coalition, the U.S. Supreme Court held that two sections of the Child Pornography Prevention Act of 1996 (CPPA), namely Title 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D), were unconstitutional because they abridged the freedom of speech. 535 U.S. 234, 256 (2002). The Court's rationale in Ashcroft was that the CPPA was constitutionally overbroad because it banned speech such as "virtual child pornography" that did not depict real minors. Id. at 254. However, for the Ashcroft case to be of benefit to Petitioner Martin it has to be on point. The question then becomes whether Maine's Title 17 M.R.S.A. § 2923 mirrors the relevant sections of the federal CPPA. ....
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> A reading of the [Maine] statute prohibits the intentional dissemination of sexually explicit material depicting minors. The statutory definition of a minor is "a person under 18 years of age." 17 M.R.S.A. § 2921(3) (1983 & Supp. 2002). To an ordinary reader it would appear obvious that Maine's Legislature deemed a person to be a living human being as opposed to an artificial person such as a corporation. See Black's Law Dictionary 1162 (7th ed. 1999) (defining the term "person"). Title 17 M.R.S.A. § 2923(1) addresses child pornography depicting real children and does not speak to "virtual child pornography" which is, *inter alia*, what certain section in the CPPA unconstitutionally banned. Hence, Petitioner Martin cannot rely upon the Ashcroft case to support the theory that Title 17 M.R.S.A. § 2923(1) was overbroad.
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> Petitioner Martin contends that the State did not prove beyond a reasonable doubt that the pornographic depiction of the minors at issue, in fact, depicted genuine human beings. However, at the Rule 11 hearing the State was only required to establish that it would prove at trial that it had evidence that Petitioner Martin had intentionally disseminated sexually explicit material depicting minors, who by definition were real human beings, which it did. 17 M.R.S.A. § 2923(1)(1983). Furthermore, at the Post-Conviction Review stage the burden is on Petitioner Martin to show that the beings depicted in the material in question were computer-generated and not real minors. Petitioner Martin failed to present any such evidence to this court.
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> Petitioner Martin also contends that he did not voluntarily, knowingly, and intelligently enter into his guilty plea because he

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> Prosecutor. Hence, when considering the answers to both of these questions [his attorney] did not provide Petitioner Martin with ineffective assistance of counsel.

(Order at 3-4.)

> erroneously believed that the Maine Legislature could prohibit the dissemination of computer generated child pornography. Notwithstanding, the Maine Legislature can prohibit the dissemination of pornography involving real children. Osborne v. Ohio, 495 U.S. 103, 109-11 (1990).

(Order, Cr. No. 01-113, at 4-6 (June 12, 2003).)

This final paragraph of the post-conviction court's decision does not identify the constitutional standard[6] for analyzing whether the plea was intelligent and knowing; Osborn is a case that discusses First Amendment issues vis-à-vis child pornography. However, the fact that the Court did not cite Supreme Court precedent vis-à-vis analyzing the constitutional firmness of Martin's guilty plea does not remove the deferential § 2254 prism, Allison v. Ficco, __ F.3d __, 2004 WL 2494972, *2 (1st Cir. Nov. 5, 2004) ("Because the state courts squarely addressed the federal constitutional issue we engage in deferential, and [Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir.2001)] not de novo, review."); the deferential § 2254 review applies even though this aspect of the decision is terse, see Norton v. Spencer, 351 F.3d 1, 5 -6 (1st Cir.2003); see also Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir.2003) ("Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion.").

In Boykin the Supreme Court reflected that what "is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what

[6] Clearly Martin is framing this as a constitutional challenge and not a challenge based on the Maine Rule of Civil Procedure 11. See cf. United States v. Dominguez Benitez, __ U.S. __, __, 124 S.Ct. 2333, 2340 (June 14, 2004) (distinguishing a challenge to the validity of a plea under Federal Rule of Civil Procedure 11 from a constitutional challenge).

the plea connotes and of its consequence." Boykin, 395 U.S. at 243-44 (footnote omitted).

The United States Supreme Court has "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" Bousley v. United States, 523 U.S. 614, 618 (1998) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)). Bousley, like Martin, "contend[ed] that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged" and indicated that if "this contention proved, petitioner's plea would be ... constitutionally invalid." 523 U.S. at 618-19. Bousley was drawing on the Court's Bailey v. United States, 516 U.S. 137 (1995) holding that a conviction for using a firearm under 18 U.S.C. § 924(c)(1) requires the United States to show "active employment of the firearm," not its mere possession. See 516 U.S. at 143.[7] Martin is arguing that Free Speech Coalition similarly redefined the nature of the State's burden vis-à-vis child pornography, requiring that it prove the kids were actual children as opposed to virtual or computer generated.

The problem with Martin's argument, however, is that, at least as applied to him, he was not subject to prosecution for disseminating images that were not of actual children. The portion of the order on the motion to dismiss pertaining to this issue indeed

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[7] In Bousley the Court highlighted the key elements of the Brady v. United States, 397 U.S. 742 (1970) decision, in a challenge based on a post-plea clarification of the law relating to sentencing exposure:

> We further held that Brady's plea was intelligent because, although later judicial decisions indicated that at the time of his plea he "did not correctly assess every relevant factor entering into his decision," id., at 757, he was advised by competent counsel, was in control of his mental faculties, and "was made aware of the nature of the charge against him," id., at 756.

523 U.S. at 618-19.

does reflect the State's concession that the Maine statute in question "prohibits dissemination and possession ... only of visual material depicting real children." (Order, Cr. Nos. 98-1913, 98-1914, at 5 (June 11, 1999).) Thus, his prosecution was in full compliance with the Free Speech Coalition First Amendment principles as, I think, was what the post-conviction court meant in its conclusion. In that sense, even though the motion to dismiss was decided well in advance of Free Speech Coalition, Martin's situation is very different than Bousley's. Bousley's criminal case was resolved prior to the Bailey interpretation of the statute but without the benefit of a stipulation as to what the Government would have to prove. .

The evidence before the post-conviction court was that the issue of the State's burden apropos the images was raised early on in the proceeding, resolved favorable to Martin, and Martin was given a copy of the decision stating as much by counsel. Despite his self-serving protestations at the post-conviction hearing that he would not have pled guilty if he had known that the State had to prove that the images involved actual children, Martin's testimony was that he had no reason to believe that they were not actual children. Martin never asked his attorney to see the CDs, allowed that he did not know if he had any reason to believe that had his attorney done so he would have been able to tell whether the images were morphed or not, and admitted that he could not tell when he saw the images on his computer whether the images had been morphed, telling the court that they appeared to be real children.

The state court having concluded that Martin's plea was intelligent and knowing in this area, its determination that Martin should not be allowed to withdraw his guilty plea survives § 2254(d). See United States v. Alvarez-Del Prado, 222 F.3d 12, 15 (1st

Cir. 2000) (setting forth factors that may be used to determine whether a plea should be withdrawn).

b. Plea and sentencing exposure

With respect to informing Martin of his sentencing exposure, the other facet of Martin's challenge to his plea, Martin testified in front of the post-conviction court that his attorney explained to him that he would get sentenced to five years or less and it was on this basis that he chose to plead (id. at 13); ""[H]e didn't see that I would get any more than, you know, five years for everything, you know." (id. at 14). Martin opined that if he knew that his sentence would be ten-years with another five hanging over his head then he would not have pled guilty. (Id.; see also id. at 39.) He allowed that his attorney told him that there was a possibility for this kind of exposure (id. at 14), but Martin believed that there was a very slim chance that his sentence would be longer than expected (id. at 27, 29). Martin was aware by the time of sentencing that the district attorney was seeking a long sentence through the imposition of consecutive terms. (Id. at 29.) Martin acknowledged that he heard the sentencing judge when he explained that Martin could receive a sixty-year sentence, and testified that he did not say anything to the judge out of fear. (Id. at 27-28.) He relayed that after sentencing his attorney expressed his disbelief at the actual sentence imposed. (Id. at 28.) Despite the differences in their involvement in this project, Martin and his co-defendant received the same sentences. (Id. at 77-78.) Martin did realize that, while Martin pled open, the prosecutor agreed to drop ninety-nine percent of the counts against him as part of the plea agreement. (Id. at 29.)

With respect to his sentencing advocacy counsel testified that when Martin realized that his co-defendant had branched out from using the file-sharing system for adult pornography into child pornography, Martin continued to categorize some of the pictures to allow for exchange. (Id. at 83-86.) However, in arguing for a lower sentence Counsel stated that he tried to make it clear that prior to the police intervention Martin had disabled the file-sharing arrangement because he did not like what was happening with it. (Id. at 44, 61-61.) Counsel also asserted that the computer was not Martin's computer and pointed out that the hard drive was split between the two defendants and that all the images that were still on the hard drive were on the part of the hard drive dedicated to Martin's co-defendant. (Id. at 45, 65.) Counsel presented comparative cases to the court at sentencing that he thought would support the court sentencing Martin to the mid or low range. (Id. at 57-58.)

Vis-à-vis his discussions with his client, Martin's attorney testified that he never promised Martin that his sentence would be no more than five years although he did not believe Martin would get five years. (Id. at 51-52.) In his opinion Martin was going to get less than five-years and he told Martin this. (Id. at 52, 57, 63.) Counsel testified that he actually thought that Martin would get two to three years of confinement with the rest suspended, although he had no opinion about whether the suspended portion would be consecutive (id. at 61, 62). Counsel thought that Martin relied on his impressions of what the sentence would be in deciding to plead guilty. (Id. at 63.)

Counsel said that he did explain to Martin that the district attorney was looking for consecutive sentences before the plea agreement was reached and this he discussed with Martin. (Id. at 51-52.) Counsel also testified that Martin and he discussed how

legally the judge could impose a sentence in excess of five years and that the district attorney was seeking more. (Id. at 52, 58, 62.) He said that as a matter of course in cases of this type he would outline for his client the maximum sentence, indicate that he could not be sure what would happen, and inform him that ultimately the judge would make the determination based on arguments from both sides. (Id. at 62-63.) After the sentence was imposed, counsel testified, Martin was shocked and upset and counsel told Martin that he would file an appeal of sentence. (Id.)[8] At this juncture, Martin did not complain about counsel having promised something different. (Id. at 52-53.)

The post-conviction court reasoned:

> Petitioner Martin argues that his co-defendant was primarily responsible for disseminating child pornography over the Internet and that he was, in effect, an accomplice, playing a role limited to technically facilitating the exchange of the pornographic material. As a result, petitioner Martin claims that he was unaware that he would receive the same sentence as his codefendant. At the Rule 11 hearing, [the judge] explained to Petitioner Martin that he was theoretically facing 60 years in jail time, which Petitioner Martin acknowledged. (Rule 11 Tr. at 10-11.) Moreover, at the Rule 11 hearing, [Martin's attorney] informed [the judge] that Petitioner Martin was acting as an accomplice but was also aware of the result of his action. (Rule 11 Tr. at 24-26.) Finally, at the Rule 11 hearing, while Petitioner Martin was present, the Prosecutor informed [the judge] that she would be seeking consecutive sentences because a single five-year sentence did not reflect upon the serious nature of Petitioner Martin's crimes. (Rule 11 Tr. at 28.) Hence, Petitioner Martin may

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[8] Counsel explained at the hearing that he filed the sentencing appeal which was denied and then got it before the Law Court on the direct appeal on a due process theory. (Id. at 53.) The Law court rejected this argument by Martin and his co-defendant on their direct appeal:

> Defendants also argue, in this direct appeal, that the court abused its discretion in imposing consecutive sentences and that it deviated from the sentencing process set forth in State v. Hewey, 622 A.2d 1151 (Me.1993) and 17-A M.R.S.A. § 1252-C (Supp.1999). Defendants applied for leave to appeal their sentences pursuant to M.R.Crim. P. 40, but their applications were denied. Accordingly, defendants may not now challenge the propriety of their sentences "unless a 'jurisdictional infirmity' appears on the record 'so plainly as to preclude rational disagreement as to its existence.' " State v. Cunningham, 1998 ME 167, ¶ 5, 715 A.2d 156, 157 (quoting State v. Parker, 372 A.2d 570, 572 (Me.1977)). Defendants fail to demonstrate that the court exceeded its statutory powers, and thus there is no jurisdictional infirmity. See State v. Parker, 372 A.2d 570, 572 (Me.1977).

Weeks, 2000 ME 171, ¶11 761 A.2d at 47.

disagree with the length of his sentence on grounds of relative fairness, but his sentence should not have come as a surprise.

(Order at 2-3.)

Once again, the post-conviction court addressed the issue of the constitutionality of Martin's plea and, although it again did not identify the applicable law, this determination still must be reviewed under the deferential standard articulated in 28 U.S.C. § 2254(d). See Allison, 2004 WL 2494972, at *2; Norton, 351 F.3d at 5 -6; Schaetzle, 343 F.3d at 443. Furthermore, the factual determinations related to Martin's awareness are afforded the § 2254(e)(1) presumption of correctness. The cited portions of the Rule 11 hearing are cognizable evidence of what Martin understood at the time of his plea. Also in front of the post-conviction court was the lengthy testimony of Martin and his attorney that amply supports the court's determination. At most the testimony supports the conclusion that both client and attorney were surprised by the sentencing judge's decision to go with a longer sentence; it does not support a determination that Martin was surprised in the sense that he was entirely unaware that he could receive such a sentence. Indeed, Martin admits that he was informed that his exposure was much greater. "A defendant's miscalculation--even a gross miscalculation--anent the likely length of his sentence does not render a guilty plea unknowing, involuntary, or unintelligent in any legally cognizable sense." United States v. Torres-Rosa, 209 F.3d 4, 9 (1st Cir. 2000) (citing United States v. Gonzalez-Vazquez, 34 F.3d 19, 22 (1st Cir. 1994) and United States v. De Alba Pagan, 33 F.3d 125, 127 (1st Cir. 1994)). And once again, the state court having concluded that Martin's plea was intelligent and knowing vis-à-vis his sentencing exposure, its determination that Martin should not be allowed to withdraw his guilty plea survives 28 U.S.C. § 2254(d) review. See Alvarez-Del Prado,

222 F.3d at 15 (setting forth factors that may be used to determine whether a plea should be withdrawn).

2. Denial of Access to Discovery Materials and the Related Ineffective Assistance of Counsel Claim (Ground Four of this 28 U.S.C. § 2254 Petition)

In his initial pro se petition for post-conviction review, Martin complained that he was "meaningfully deprived" access to discovery material when appointed counsel and the prosecutor's office "callously" denied Martin reasonable access to Brady material before his Rule 9 and Rule 11 proceedings commenced. (Pet. Post-Conviction Review at 3.) This claim is resurrected in the federal forum under the catchall ineffective assistance claim in Ground Two and the Ground Four claim that the prosecution breached its constitutionally mandated disclosure duties vis-à-vis Martin's Transpass records. (These records are generated by Transpass holders when they pass through Maine tollbooths using the automated payment system and Martin contends they would have helped exculpate Martin by proving that he was employed during some of the times the alleged computer crimes occurred.) In his memorandum seeking the Maine Law Court's review of the denial of post-conviction relief Martin did raise a claim concerning his Transpass records, limiting it to one arising under the Sixth Amendment right to effective assistance of counsel. Accordingly, this is the only angle from which this court can review the Transpass dispute, as Martin has never exhausted a claim based on prosecutorial misconduct as required by § 2254(b)(1).[9]

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[9] Despite the fact that Martin only mentions the Transpass records in his brevis explanation of Ground Four, and despite the fact that Martin nowhere mentioned other withheld material vis-à-vis his Brady claim in his memorandum seeking Law Court review of the post-conviction determination, the State addresses this fourth ground as if it pertained to three interviews with a man named Tom Jones in which Martin himself participated.

There was a great deal of attention paid to the Jones interviews/prosecutorial disclosure post-conviction claim during the hearing. Post-conviction counsel quizzed Martin on this ground at the very beginning of the evidentiary hearing. Martin indicated that the information in question related to three

During the post-conviction proceedings the Transpass issue was fully explored. Martin's Transpass, which would have recorded the times of Martin's passage on the turnpike, his entrance onto the pike when he went to work and his exit from the pike to the location of his work. (Id. at 5, 7-8.) During the pre-plea proceedings Martin was not told where the records were. (Id. at 5.) His ex-wife eventually got ahold of them, although Martin was told that his lawyer was unable to get them. (Id.) Martin claims he

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interviews pertaining to Tom Jones. (Tr. at 5.) Jones was an associate of Martin's who was interviewed by police and whose computers they confiscated. (Id.) Yet, Martin complained, he never received any information about the Jones interview or computers. (Id. at 5-6.) Martin testified that he was told during one of his interviews that "it would go into his file and could have benefited [his] case" (id.) but he never found out how it could have helped defend the prosecution (id. at 6-7).

On cross-examination Martin indicated that he was told that one of the Jones interviews was a phone conversation between Jones and Martin arranged by the police in which Martin indicated to Jones that Martin had a back-up disk of Jones's computer in the hopes of eliciting information and guilt from Jones. (Id. at 22-23.) Another interview, it seems, was of Martin himself concerning Jones and the computer in an effort to buttress the case against both Martin and Jones. (Id. at 22 -24.) Martin indicated that the law enforcement officers were suggesting that lenience could be bestowed upon him if he was able to assist them apropos Jones (id. at 23, 36), although this cooperation never came up during the sentencing proceedings (id. at 36). Martin admitted that he was a participant in all these Jones interviews and allowed as he didn't know what else in the interviews might have helped his case. (Id. at 23-24.) Martin testified that, in writing, he asked his attorney for the information concerning the interview with Jones but never received any information. (Id. at 5-6, 15.)

As for his part, Martin's attorney testified that he was aware that Martin was helping the police in investigating the distribution of pornography and that both the State and Federal authorities were interested in Martin's and his co-defendant's case. (Id. at 41.) Counsel did not think that this cooperation parlayed into a tangible advantage for Martin vis-à-vis the State disposition (id.), although he did think that the early cooperation would have been important had the federal authorities pursued charges (id. at 49-50). He stated that he told Martin before the plea that the federal authorities had decided not to prosecute him. (Id. at 50-51.) Counsel testified that he never obtained the Jones interviews. (Id. at 59.) He explained that he provided Martin with all the discovery that he received and thinks that Martin may have received additional, non-material discovery on his own motion. (Id.) Counsel knew that the interviews had occurred and considered them important for the fact that they did happen (Martin's cooperation with authorities) but suggested that he did not consider the content relevant to Martin's defense. (Id. at 59-60.)

The post-conviction court addressed this claim:

> Petitioner Martin argues that the Prosecutor meaningfully deprived him of access to discovery material for use in his defense by the Portland Police Department involving another, similar criminal mater. Even though these interviews may have helped the Petitioner there is not enough evidence to show that they would have undermined the state's strong case against the Petitioner. See State v. Brewer, 1997 ME 177, ¶¶ 31-32, 699 A.2d 1139, 1146-47. Moreover, at the Rule 11 hearing, [the judge] asked Petitioner Martin if he had a chance to fully review with his attorney the discovery materials and Petitioner Martin replied in the affirmative. (Rule 11 Tr. at 6.) Hence, the court is satisfied that Petitioner Martin would have pleaded guilty even if he had access to the interviews.

(Order, Cr. No. 01-113, at 2 (June 12, 2003).)

asked his ex-wife and his attorney for them (over the phone or in writing) yet he never saw them. (Id. at 8-9, 15, 26, 38.) Martin was dissatisfied that even though he asked for the records he never got them although he was not sure what he would have done with them had he got them. (Id. at 26.) Admitting that he had knowledge of and helped maintain the file-sharing computer system, Martin indicated that if he could prove that he was not there for two of the three days in question then his co-defendant would be identified as, in essence, the stay-at-home pornographer for the pair. (Id. at 25.) Martin's theory was that if he had his alibi for two days then temporally two-thirds of his culpability would be off the table. (Id. at 37.) Martin testified that his attorney made him believe that even if he was away at work or sleeping while his housemate handled the computer aspects of the file sharing that Martin could be on the hook for accomplice liability. (Id. at 25 - 26.) He also testified that he obtained his time cards from his employer to demonstrate that on two of the three days he was physically at work while his unemployed co-defendant was at home. (Id. at 12, 37.)

Martin's attorney testified that he wrote to the Transpass authority about the records and he believed that, to his surprise, he got the read-outs. (Id. at 42, 60.) He said that he relied on the work time records during the Rule 11 and sentencing (id. at 42-43) and did not think that the Transpass records were critical to any of the issues in the case (id. at 60.) Actually, there was no dispute about the fact that Martin was at work for the portion of the time he claimed. (Id. at 43.) Martin's attorney testified that the theory upon which Martin was charged was that he was an accomplice and that as his advocate he tried to make it clear to the court at sentencing that there was a distinction that should play to Martin's favor between Martin and his co-defendant. (Id. at 44, 46, 83.) He

conceded that the Transpass records would have buttressed the theory that Martin was working two of the three days in question. (Id. at 60-61.)

The post-conviction judge inquired of counsel at the close of cross-examination about whether counsel had sought the employment records to confirm Martin's story that he was at work the particular hours that would have been corroborated by the Transpass records. (Id. at 72.) Counsel responded in the affirmative, indicating that he had included this information in his sentencing memorandum, noting there had been no dispute that Martin had been present at work on two of those three days. (Id. at 73.) Counsel explained that the State's case involved proving what hours the images were received and sent out and as a consequence Martin's location at those particular times was relevant. (Id. at 73-74.) The Court asked counsel if he had come to the conclusion as to whether the time cards were more relevant than the Transpass records and counsel responded that the Transpass records did place Martin out of the house earlier than did the work records, but that the work records were clearer evidence of his prolonged absence. (Id. at 74-75.) Counsel testified that the Transpass records could have demonstrated that Martin left for work twenty minutes before he got to work and that there may have been some pornographic transmissions that occurred in that twenty-minute window, although he did not remember if this was indeed the case. (Id. at 75-76.) Also explored at this juncture were counsel's discussions with Martin concerning the State's theory of accomplice liability which was that Martin was guilty along with his co-defendant as he helped to set-up the computer system that allowed for the exchange of images (originally thinking the system would be used for adult pornography) and the implication that Martin had acknowledged to the police that he had taken some of the images that had been received,

categorized them in subfolders, and participated in the events over the three days even though he was not physically present. (Id. at 76, 83 -84.) It was his co-defendant who defined the rules concerning what types of images would be available, defining the categories; counsel tried to argue that Martin should receive a lesser sentence than did his co-defendant as a consequence. (Id. at 83-84.)

With respect to the Transpass issue and the efforts to minimize Martin's exposure by demonstrating his presence at work, the post-conviction court reflected:

> Petitioner argues that [his attorney] failed to sufficiently investigate whether he was at work when the Police alleged that child pornography was being transmitted from his computer. See Whitmore v. State, 670 A.2d 394, 396 (Me. 1996) (stating "that defense counsel owes a duty to his client to conduct a reasonable investigation"). However, at the Post-Conviction Review hearing, [Martin's attorney] demonstrated that he had reasonably attempted to investigate the Petitioner's potential defenses. As already mentioned, at the Rule 11 hearing Petitioner Martin did not dispute the way his attorney conducted discovery. In addition, Petitioner Martin has failed to demonstrate that if his attorney could have proved that he was not present during the transmission of child pornography then he would not have entered a conditional guilty plea.

(Order at 3.)

In his memorandum in support of his request for a certificate of probable cause to appeal the denial of his post-conviction petition, Martin argued that the superior court wrongfully reviewed Martin's evidence that he was denied the Transpass recorded data which was the most favorable evidence to prove that he was at work during certain computer crimes. (Mem. Certificate Probable Cause at 1-2.) Martin explained that the Transpass data would have corroborated his employment records which proved that Martin was not home during certain logged entries. Martin stated in this memorandum that he was merely an accomplice who knew that sites were being searched but that he had very limited knowledge of the use of the pornographic material retrieved. Apropos

this claim, Martin drew the Law Court's attention to the Strickland standard for ineffective assistance of counsel. Thus, this claim was exhausted for purposes of § 2254 review.

With respect to Martin's claims that counsel was ineffective, the First Circuit addressed the standard for such a claim in the context of § 2254 review in Mello:

> To demonstrate ineffective assistance of counsel in violation of the Sixth Amendment, Mello must establish (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); see also Scarpa v. DuBois, 38 F.3d 1, 8 (1st Cir.1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

295 F.3d at 142.

It is evident to me that Martin's fixation with the Transpass records stems from an honest conviction that they would have measurably strengthened his case. However, it is also evident to me based on the testimony before the post-conviction court that the court's Strickland determination is not reproachable under the review standards of § 2254(d). There is no dispute that Martin was at work for two of the three days in play and there is no dispute that all the records would show was the length of Martin's commute. However, as there also seems to have been no dispute that Martin did indeed commute to work the probative value of having those records would be minimal. It was never Martin's contention that concern about his ability to prove the commuting time was a deciding factor in his decision to plead guilty and counsel would have been remiss in planting such a notion in his client's head. Martin testified that he did not actually know to what use he would have put the records had he obtained them and there was no factual basis presented to the post-conviction court, see § 2254(e)(2), supporting a conclusion

that they would have materially strengthened Martin's position in disproving his role as a tech-savvy accomplice.

3. Martin's Claim that he was Denied Effective Assistance of Counsel and its Relationship to Martin's Third Ground Raised in his Memorandum Seeking Review of the Denial of his Petition for Post-conviction Review (Ground Two of this 28 U.S.C. § 2254 Petition) [10]

[10] During the state post-conviction proceeding, there was also quite a bit of testimony concerning Martin's ineffective assistance claims concerning counsel's advice to Martin regarding the decision to plea and on whether the State had to prove that the images were of actual children. I have addressed those claims as straight-up constitutional challenges brought under Grounds One and Three in this petition.

Vis-à-vis the decision to plead guilty, it was Martin's belief that he never had enough time with his attorney and never had time to really understand what was going on. (Id. at 15, 30.) Martin was held pre-trial for sixteen months. (Id. at 30.) Vis-à-vis the decision to plead, Martin elaborated that the night before his plea his attorney spoke with him for a half hour at the most and he explained that the district attorney had a plea arrangement for the twelve counts and indicated that Martin had to make up his mind by the next morning. (Id. at 15.) According to Martin this plea hearing came right out of the blue; up until this conversation with his attorney Martin thought he was going to trial. (Id. at 30-31.) He said in that short discussion he was "not able to really grasp the whole understanding of it all." (Id.) Martin elaborated that part of the equation was that federal authorities were also considering charges but agreed to forgo a federal prosecution in view of the plea, which is a factor that Martin did discuss with his attorney. (Id. at 16-17, 31-32.) Martin was scared of a harsher federal sentence. (Id. at 18.) Martin also testified that since he has been in custody he has realized that others charged with similar crimes got much better deals than he. (Id. at 18.) Martin did not recall if there was discussion on the day of the change of plea hearing regarding the plea. (Id. at 16.) Generally he complained that he was unable to reach his attorney by phone most of the time and that half of his letters went unanswered. (Id. at 16, 30,33.) Martin did not view his attorney's advice as bad but he just did not have sufficient time to understand what was going on overall. (Id. at 33.) He acknowledged telling the Rule 11 judge that he had had adequate time to talk with defense counsel and explained that he did not speak up because it was the first time he had ever been in trouble with the law, was unaware of what was actually going on, and things were moving too quick. (Id. at 32-33.) Martin allowed as how this Rule 11 proceeding was his first, he felt scared, felt as though he could not stop the proceedings to talk with his attorney, and relayed that prior to entering court his attorney did not counsel him on how he should answer questions or handle the proceeding. (Id. at 38.)

Martin's attorney testified that it was not true that he only talked with Martin about the plea for a short period the night before the change of plea proceeding. (Id. at 46.) He explained:

> This case went on for quite a long time and my recollection is that the plea was not as sudden as Mr. Martin talked about. There was lots of things going on. One of which was were the Federal authorities continuing to prosecute Martin and [his co-defendant] or not and then there was a motion to dismiss which had to be resolved first and there was – after that there were discussions about pleading guilty and the terms of the conditional guilty plea that ultimately was entered.

(Id. at 46-47.) He felt it was key to keep Martin informed about what was going on and getting input from Martin about the plea negotiations, and he conscientiously did this. (Id. at 47.) He testified that Martin never indicated that he did not understand what was going on, although he was frustrated by counsel's office policy of not accepting collect calls from the jail in counsel's absence. (Id. at 47.) He funneled some information to Martin through Martin's ex-wife, who would visit Martin, although her good relation with Martin was on-again, off-again. (Id.) In counsel's opinion the case was not a good candidate for a jury trial and he told Martin as much and also discussed the benefits and risks of going to trial. (Id. at 48.) The conversation focused on the questions of whether a fact finder could objectively view the pictures, which were sure to be admitted, and, whether Martin would have a reasonable shot of not being convicted given the prejudicial impact the images would have. (Id. at 48-49.) On cross examination regarding the "zero jury appeal" of the case, counsel agreed that he did not want to stick the images in front of the jury and flip

Finally, one of three grounds raised in Martin's memorandum seeking the Law Court's review of his state post-conviction disposition was that the post-conviction court incorrectly determined that the computer evidence was not improperly preserved or altered. Martin claimed that he "adamantly challenged" the methods that the investigators used to preserve and/or alter the computer evidence seized from the hard drive by converting them into twenty-second bleeps. He stated that this limited him in his ability to demonstrate that the images were computer generated. Martin framed this as a challenge under Free Speech Coalition and Brady v. Maryland, 373 U.S. 83 (1963). Martin did not frame this as an ineffective assistance of counsel claim which was the milieu out of which this essentially new claim arose during the post-conviction process. In his 28 U.S.C. § 2254 petition Martin has not articulated a similar Free Speech Coalition/ Brady claim challenging prosecutorial misconduct and the only § 2254 ground that such a claim could come under would be his catch-all ground which argues that the Law Court should have granted Martin relief on his ineffective assistance of counsel claims. (Sec. 2254 Pet. at 5.) Accordingly, I conclude that any claim based on ineffective assistance vis-à-vis challenging the nature of the images in question is unexhausted under § 2254(b)(1) and any claim challenging prosecutorial misconduct on this score is exhausted but not presented to this court.

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through them to determine guilt. (Id. at 63.) Counsel stated that his defense tactics were limited by the fact that Martin had made a full confession to the police prior to his entry into the case detailing Martin's efforts to set-up the file sharing system and that a motion to suppress that confession was not tenable. (Id. at 45, 63-64.) Apropos the possibility of having a jury-waived trial, counsel indicated that he was not a fan of jury-waved trials in child pornography or sexual assault cases as the jury is more likely to acquit in instances where you are challenging guilt. (Id. at 64.) The post-conviction court's conclusions vis-à-vis effective assistance of counsel are unassailable and there is no indication that counsel's performance fell below the Strickland standard in any respect.

Conclusion

Because I conclude that Martin's claims are either unexhausted or without merit, I recommend that the Court **DENY** Martin 28 U.S.C. § 2254 relief.

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.

November 24, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

MARTIN v. WARDEN, MAINE STATE PRISON
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 08/02/2004
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

DALE W MARTIN represented by **DALE W MARTIN**
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V.

Respondent

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