

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GEORGE R. JORDAN, JR.,)	
)	
<i>Petitioner</i>)	
)	
v.)	Civil Docket No. 96-23-P-H
)	
CUMBERLAND COUNTY JAIL¹)	
)	
<i>Respondent</i>)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Appearing *pro se*, petitioner George R. Jordan, Jr. seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction in the Maine Superior Court (Cumberland County) (Criminal Docket Nos. CR-93-1559, CR-93-1858, CR-93-2362, CR-94-486, CR-94-895, CR-94-920, CR-94-487 and CR-94-490) on six counts of violating a permanent order for protection from abuse, 19 M.R.S.A. § 769, one count of filing a false public report, 17-A M.R.S.A. § 509, and one count of violating a condition of release, 15 M.R.S.A. § 1092. I recommend that the court deny the petition unless the petitioner amends it to delete claims for which he has not exhausted state-court remedies.

¹ At the time he filed his petition, the petitioner was incarcerated at the Cumberland County Jail and therefore named that institution as the respondent. Subsequently, he was transferred to the Maine Correctional Center in the custody of the Maine Department of Corrections. Notwithstanding the captioning of the petition, the state of Maine is the real party in interest and is therefore treated as such. *See, e.g., Scarpa v. Dubois*, 38 F.3d 1, 6 (1st Cir. 1994), *cert. denied*, 130 L. Ed. 2d 885 (1995).

I. Background

The petitioner contends that he was denied his right to assistance of counsel during the appeal of his convictions, that he suffered the ineffective assistance of counsel at trial, that the prosecutor made improper pretrial statements, that the prosecutor knowingly permitted a witness for the state to commit perjury at trial and that the trial court improperly increased his sentence because of his exercise of certain First Amendment liberties. The petition also refers the court to the issues raised in the petitioner's brief submitted on direct appeal of his convictions. The additional issues therein raised are an allegation that the prosecutor improperly referred to "stalking" in his opening statement and closing argument, a contention that adverse pretrial publicity deprived the petitioner of a fair trial, the contention that the sentence imposed by the court is in violation of the Eighth Amendment's prohibition of cruel and unusual punishment, an allegation that the trial process was tainted when the jury foreperson observed the petitioner being led into the courthouse while manacled, and the contention that newly discovered evidence requires vacation of the criminal convictions.

The record reflects that the petitioner was adjudged guilty of the eight above-referenced offenses on September 21, 1994, following a jury trial at which he was represented by court-appointed counsel.² On September 28, 1994 the petitioner filed a *pro se* "Motion of Expedited Appeal for Overturn of Conviction, New Trial, or Reduction of Sentence." Superior Court Docket Record, CR-93-1559 (Attachment 1) at 3, 11. The Superior Court treated this submission as a notice of appeal to the Law Court, where the matter was docketed on October 6, 1994. *Id.* at 3; Law Court

² The docket records of the Superior Court proceedings, which were consolidated for trial, appear as Attachments 1 through 8 to the state's response ("Response") (Docket No. 5). Counsel was first appointed for the petitioner on February 22, 1994. Docket CR-93-486 (Attachment 4) at 25, 28.

Docket Record, CUM-94-773.³ The Law Court denied the petitioner's motion for an expedited appeal and determined that the matter should “proceed in the usual course.” *Id.*, Order of October 17, 1994. Appearing *pro se*, the petitioner filed his Law Court brief on November 29, 1994.⁴ *Id.*, Docket Record. Thereafter, the Law Court denied the petitioner's motion for appointment of counsel to represent him at oral argument and for reimbursement of certain expenses associated with briefing the case. *Id.*, Order of Feb. 21, 1995. The petitioner then moved to “bar” oral argument of the case, *id.*, Motions to Bar Oral Arguments of March 1, 1995, and the matter was submitted on briefs without any oral presentation to the court.

The Law Court affirmed the convictions.⁵ *State v. Jordan*, 659 A.2d 849 (Me. 1995). The matters discussed in the Law Court's opinion bear significantly on the petition now pending before this court. The Law Court found meritless the petitioner's contention that adverse pretrial publicity

³ Part of the Law Court docket record, with the parties' briefs and certain other papers submitted to that court in connection with the appeal, appears as Attachment 10 to the state's Response.

⁴ Upon receipt of the brief, the clerk of the Law Court notified the petitioner that he had failed to file the requisite number of copies, failed to bind the brief with a blue cover, failed to submit an appendix containing certain Superior Court records and failed to serve the brief on the state. Law Court Record, Docket Sheet; letter of James C. Chute to petitioner dated November 29, 1994, appended to Petition (Docket No. 1). *See* M.R. Crim. P. 39B (discussing requirements for appellant's brief in criminal matters).

⁵ The Law Court did, however, modify the sentence imposed by the Superior Court as to the conviction for violating a condition of release. The trial court had imposed a sentence of 364 days' incarceration on this count, which was facially improper because the offense is a Class E crime for which a court may not impose a sentence in excess of six months. *State v. Jordan*, 659 A.2d 849, 852 (Me. 1995). The Law Court therefore modified the sentence on this count to six months' incarceration. *Id.* The modification was of little practical consequence because the trial court had both suspended all incarceration on this count and made it concurrent with the 364 days of incarceration imposed in connection with the charge of filing a false public report. Docket Record, CR-94-490, Attachment 8 to Response. That period of incarceration was also suspended, subject to a one-year period of probation. Docket Record, CR-94-487, Attachment 7 to Response.

deprived him of a fair trial, noting that the issue had not been presented in the Superior Court and that the petitioner's failure to provide a record of the publicity in question made it "impossible [for the court] to review this claim or to gauge the impact, if any, on the jury." *Id.* at 851. Likewise, noting that it reviews only for "obvious error" matters raised for the first time on appeal, the court found "no error, much less obvious error," in the prosecutor's references in opening statement and closing argument to the petitioner's alleged "stalking" of his ex-wife. *Id.* The court also rejected the petitioner's contentions regarding newly discovered evidence on the ground that he had failed to bring that claim before the Superior Court by a motion for a new trial pursuant to M.R. Crim. P. 33 and the court was therefore without an adequate record to review it. *Id.* And the court declined to address the petitioner's claim of ineffective assistance of counsel, noting that Maine law precludes consideration of such an issue on direct appeal "unless the record reveals, beyond the possibility for rational disagreement, that the defendant received inadequate representation" that was outcome-determinative. *Id.* at 851-52 (citations omitted). "We have repeatedly stated that such claims are better suited for post-conviction review," the Law Court stressed. *Id.* at 851 (citations omitted). Finally, the Law Court summarily disposed of the petitioner's other contentions by simply stating that, after review, they "need not be addressed." *Id.* at 851 n.1.

The state avers that on February 10, 1996 the petitioner completed serving the 364 days of incarceration imposed in connection with the six counts of violating an order for protection from abuse. Response at 4. Sentences on the remaining counts were imposed concurrent with the period of incarceration that ended in February, but suspended subject to a one-year period of probation. *See supra* at 4 n. 5. However, the petitioner remains incarcerated in connection with other state and federal criminal proceedings that are not the subject of the instant petition. Response at 4.

II. Exhaustion of State Court Remedies

The statute governing federal 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 should 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.A. § 2254(b) and (c) (1994).⁶ The exhaustion rule set forth in section 2254 requires a federal district court to dismiss a petition for a writ of habeas corpus that contains any claims that have not been exhausted in state court. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). This “assures that state courts have the chance to pass on federal constitutional issues before federal courts intrude on the state criminal process.” *Beauchamp v. Murphy*, 37 F.3d 700, 704 (1st Cir. 1994).

Although the petitioner contends that he has exhausted all available state remedies because there is “no higher court available,” he concedes in his petition that he has filed no other petitions, applications or motions in state court other than his direct appeal. Petition at 3 (actual 2). In particular, the petitioner has not availed himself of the post-conviction-review process set forth at 15 M.R.S.A. § 2121 *et seq.*, which permits a person under criminal restraint to challenge the

⁶ Title I of the Antiterrorism and Effective Death Penalty Act (“Antiterrorism Act”), P.L. 104-132, enacted on April 24, 1996, has altered the standards for the granting of habeas corpus relief, and in particular has significantly changed the law governing the requirement that a petitioner exhaust state-law remedies. The state does not invoke the Antiterrorism Act in support of its position that the petition should be dismissed. In any event, because the instant petition antedates the Antiterrorism Act, it is inapplicable here. *See Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996) (noting non-retroactivity of provisions revising habeas corpus statute); *Williams v. Calderon*, 83 F.3d 281, 285 (9th Cir. 1996) (same); *but see Leavitt v. Arave*, 927 F. Supp. 394 (D. Idaho 1996) (to opposite effect).

underlying criminal judgment or sentence as unlawful or unlawfully imposed by filing a petition in the Superior Court.

It is clear that the petitioner meets the jurisdictional requirement of “present restraint by criminal judgment” set forth at section 2124 of the post-conviction statute even though it appears the petitioner's present incarceration is unrelated to the matters raised in his petition. Restraint by criminal judgment within the meaning of the statute includes probation “imposed as a result of the sentence for the criminal judgment which is challenged,” even if such probation is to be served in the future because another sentence must be served first. *Id.* at § 2124(1)(B) and (D). The probation (and the suspended jail sentence the petitioner could serve in the event he violates his probation) that remains unexecuted relates solely to the convictions for filing a false report and violating a condition of release. The state, relying on *Boutot v. State*, 380 A.2d 195 (Me. 1977), contends that post-conviction review is still available to the petitioner even on the six counts of violating an order for protection from abuse, although the sentence on those counts has been fully served. *Boutot* was decided under a predecessor to the current post-conviction-review statute, and involved a petitioner who was entitled to credit on an ongoing sentence as the result of his post-conviction challenge to a prior criminal judgment. *Id.* at 197. It is not necessary to decide whether the rationale of *Boutot* would be applicable to this case if presented to a state tribunal. Nor is it necessary to address the state's contention that the petitioner's delay would operate as a procedural default barring relief here as to the protection-from-abuse charges even if the petitioner has exhausted available state remedies as to these convictions. The rule of *Rose v. Lundy* operates inexorably; the Supreme Court has repeatedly stressed that if *any* of the claims presented by the

petitioner remains cognizable in state court then a federal tribunal must dismiss the petition. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989).

Plainly, the petitioner's contention that he suffered the ineffective assistance of counsel, at the trial leading to the conviction on all eight counts, is a claim that remains ripe for review by a state tribunal. The Law Court made that point abundantly clear in its opinion rejecting the petitioner's direct appeal of the criminal judgments themselves. Circumstances arising after the entry of the underlying judgments -- i.e., the non-appearance of the petitioner's court-appointed counsel beyond that point -- might also be relevant to the petitioner's contentions relative to his Sixth Amendment right to effective counsel. But the state court must be given an opportunity to consider the subject before it is properly reviewable as part of a federal habeas corpus proceeding. The same is true of every matter raised by the petitioner here but not adjudicated finally by the Law Court on direct appeal.

The *Lundy* rule requires the court not simply to dismiss the petition, but to give the petitioner “the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.” *Lundy*, 455 U.S. at 510; *Tart v. Commonwealth of Mass.*, 949 F.2d 490, 494 (1st Cir. 1991). To make that choice a meaningful one, it is necessary to articulate precisely which of the petitioner’s claims he must delete in the event he elects to proceed with his federal petition.

In its opinion, the Law Court addresses and unmistakably disposes, on the merits, of the petitioner’s fair-trial claim based on the prosecutor’s use of the word “stalking” during opening statement and closing argument, and of all of the unspecified claims summarily dealt with in a

footnote.⁷ Less clear is the nature of the court's disposition of the petitioner's contentions that he was deprived of a fair trial by adverse pretrial publicity and that there is new evidence warranting a new trial. In each case the court cites an inability to review the claims because of the petitioner's failure to present an adequate record.

When the question is whether a procedural default provides an adequate and independent ground for the state court's determination, thus barring federal habeas corpus review altogether in most circumstances, no such bar is imposed "unless the last state court rendering a judgment in the case *clearly* and *expressly* states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (citations and internal quotation marks omitted) (emphasis added). However, a somewhat more flexible inquiry is appropriate when the issue before the court is simply whether there is a possibility that the petitioner might still obtain relief in state court on a claim presented in a habeas petition. *See Castille*, 489 U.S. at 350 ("principles of comity" underlying exhaustion requirement do not "mandate recourse to state collateral review whose results have effectively been predetermined"). The appropriate focus is whether the claim has been "fairly presented" to the state courts. *Id.* at 351 (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

Here, the Law Court does not clearly and expressly state that the petitioner is now procedurally barred from raising these issues again in a state-court post-conviction proceeding because of his failure to have perfected his direct appeal of them by providing an adequate record. As to the adverse-pretrial-publicity issue, however, the Law Court requires that such a record be

⁷ In this latter connection, a comparison of the petitioner's Law Court brief and the court's opinion reveals that the court was thereby referring to the petitioner's contentions regarding the Eighth Amendment, the alleged observation by the jury foreperson of the petitioner in manacles, and the alleged enhancement of the petitioner's sentence as a means of punishing him for exercising First Amendment liberties.

made in the Superior Court in the first instance. *State v. Addington*, 518 A.2d 449, 451 (Me. 1986). Thus, the Law Court's ruling on this issue is tantamount to a disposition on the merits and the contention can be said to have been fairly presented to that tribunal. As to the newly-discovered-evidence claim, the court cites the petitioner's failure to have brought that claim before the Superior Court by a motion for a new trial pursuant to M. R. Crim. P. 33. At the time of the Law Court's decision, the petitioner still had time within which to bring such a motion.⁸ But by the time this recommended decision is acted upon, he will have lost that right unless he files such a motion by September 23, 1996.⁹ Thus, whatever the Law Court might be saying about the petitioner's ability to pursue this claim further in state court, he will no longer have such a right if by September 23, 1996 he does not file a motion for new trial in Superior Court pursuant to M. R. Crim. P. 33. In that instance, "there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Coleman v. Thompson*, 501 U.S. 722, 735 n.* (1991). All of the claims raised in the instant petition, then, are exhausted except for the petitioner's ineffective-assistance-of-counsel claim, provided that by September 23, 1996 the petitioner has not filed a motion for new trial in state court in behalf of his newly-discovered-evidence claim.

⁸ Rule 33 reads in relevant part:

Any motion for a new trial based on the ground of newly discovered evidence may be made only before, or within two years after, entry of the judgment in the criminal docket.

The judgments as to all eight offenses were entered on the criminal dockets on September 22, 1994.

⁹ Because September 21, 1996, the last day of the two-year period, falls on a Saturday, pursuant to M.R. Crim. P. 45(a) the petitioner has until the following Monday, September 23, 1996, within which to file the motion.

Finally, although the state invokes the *Lundy* rule in its Response, it also invites the court to adjudicate certain of the petitioner's claims based on the “adequate and independent ground” principle discussed in *Harris v. Reed* and first set forth in *Wainwright v. Sykes*, 433 U.S. 72 (1977). However, a full discussion of that issue and of the question of whether any procedural defaults should be excused upon a showing of both cause for the default and actual prejudice, *see id.* at 87, would be inappropriate prior to the filing of a petition that the court is not required to dismiss pursuant to *Lundy*. *Levine v. Commissioner of Correctional Servs.*, 44 F.3d 121, 125 (2d Cir. 1995). And, in any event, the First Circuit has recently reemphasized that the “cause” and “actual prejudice” tests do not apply when the underlying claim alleges ineffective assistance of counsel. *Smullen v. United States*, No. 95-2315, 1996 WL 482712, at *2 (1st Cir. Aug. 30, 1996) (citation omitted). It would also be premature to address the state’s position that the court should deny the instant petition because the petitioner's contentions lack merit and fail to raise federal issues. *See, e.g., Martens v. Shannon*, 836 F.2d 715, 718 n.4 (1st Cir. 1988) (“supererogatory” to declare exhausted portion of mixed petition “not of constitutional stature”).¹⁰

¹⁰ As noted, *supra*, the significant changes to the law of habeas corpus wrought by Title I of the Antiterrorism Act are not applicable to the instant petition because the state does not invoke the Act and the filing of the petition antedates the effective date of the new statute. The same circumstances may not apply to any subsequent petitions filed by this petitioner. I express no view as to how the Antiterrorism Act would affect any such petitions arising out of the underlying criminal conviction here, but it seems only fair to alert the *pro se* petitioner that the Antiterrorism Act may be an issue in any subsequent federal proceedings.

III. Conclusion

For the foregoing reasons, I recommend that the court grant the petitioner leave to file an amended petition, without the claims for which he has not exhausted state remedies as described in the opinion herein, within 30 days and, in the event no such petition is by then filed, I recommend that the pending petition for a writ of habeas corpus be **DENIED** without a hearing.

NOTICE

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

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

Dated this 18th day of September, 1996.

*David M. Cohen
United States Magistrate Judge*