

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>STEVEN H. OKEN,</i>)	
)	
<i>Petitioner</i>)	
)	
<i>v.</i>)	<i>Docket No. 98-336-P-C</i>
)	
<i>ANDREW KETTERER, et al.,</i>)	
)	
<i>Respondents</i>)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his sentencing in the Maine Superior Court (York County) after his pleas of guilty to charges of murder, robbery and theft. The petition asserts thirteen grounds for relief, nine of which are based on alleged ineffective assistance of counsel, and four of which raise claims of error by the state court. I recommend that the petition be dismissed.

I. Background

The petitioner was charged with the murder, on November 16, 1987, of Lori Ward, a motel desk clerk, in Kittery, Maine. Indictment, *State v. Oken*, Docket No. CR-87-1433; *State v. Oken*, 569 A.2d 1218, 1218 (Me. 1990) (“Oken Me. I”). On April 21, 1989 he entered a conditional plea of

guilty, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970),¹ to this charge and related charges of robbery and theft. Transcript of Proceedings, Plea, *State v. Oken*, Docket No. CR-87-1433, Maine Superior Court (York County) (“Plea Tr.”), at 14-17; Defendants [sic] Conditional Guilty Plea, *State v. Oken*, Docket No. CR-87-1433, Maine Superior Court (York County). At that time, two charges of murder were pending against the petitioner in Maryland. Transcript of Proceedings, Sentencing Hearing, *State v. Oken*, Docket No. CR-87-1433, Maine Superior Court (York County) (“Sentencing Tr.”), at 3-4. After his conditional plea on the Maine charges was accepted, the petitioner was sentenced to concurrent terms of imprisonment for life on the murder charge, twenty years on the robbery charge, and five years on the theft charge. *Id.* at 79-80; Judgment and Commitment, *State v. Oken*, Docket No. CR-87-1433, Maine Superior Court (York County), at 1. An appeal challenging the denial of a motion to suppress evidence obtained during a warrantless search of the petitioner’s Kittery motel room was denied, *Oken Me. I*, 569 A.2d at 1221, and the life sentence imposed was affirmed by the appellate division of the Maine Law Court, Order (dated July 15, 1991), *State v. Oken*, Docket No. AD-89-49, Maine Supreme Judicial Court, Appellate Division. The petitioner was represented through all of these proceedings by a Maine lawyer and a lawyer from Maryland. Petition for Writ of Habeas Corpus (“Petition”) (Docket No. 2) at 3.

After the sentence was imposed in Maine, the petitioner was tried on the first Maryland murder charge and found guilty. *Oken v. State*, 612 A.2d 258, 260-61 (Md. 1992) (“*Oken Md. I*”). During the penalty phase of this proceeding the jury was informed of the Maine sentence and subsequently sentenced the petitioner to death. *Id.* at 261; *Oken v. State*, 681 A.2d 30, 42 (Md. 1996)

¹ Under *Alford*, a court may accept a guilty plea from a defendant who continues to assert his innocence, if there are grounds to conclude that a defense at trial would most likely be unsuccessful. *Allard v. Helgemoe*, 572 F.2d 1, 2-3 (1st Cir. 1978).

(“*Oken Md. I*”). The petitioner later pleaded guilty to the second Maryland murder charge. *Oken Md. I*, 612 A.2d at 266 n.4. The petitioner was represented throughout these Maryland proceedings by the same Maryland lawyer who had represented him in Maine. *Oken Md. II*, 681 A.2d at 35.

In 1991 the petitioner filed a petition for post-conviction relief in the Maine Superior Court, York County. Docket Sheet, *Oken v. State*, Docket No. CR-91-1132, Maine Superior Court (York County), at 1. In this proceeding he was represented by court-appointed counsel different from the Maine lawyer who had represented him previously. *Id.* Evidentiary hearings were held on June 7, 1995 and April 2, 1996, in the absence, and over the objection, of the petitioner, who was then imprisoned in Maryland. *Id.* at [4] & [6]; Deposition of Steven Howard Oken (June 23, 1993), Postconviction Proceeding, *Oken v. State*, Docket No. CR-91-1132, Maine Superior Court (York County), at 3-4. The Superior Court denied the petition on July 15, 1997. Decision and Judgment, *State v. Oken*, Docket No. CR-91-1132, Maine Superior Court (York County) (dated July 15, 1997) (“Maine Post-Conviction Judgment”), at 14. The petitioner’s appeal from this judgment, concerning which he was represented by yet another court-appointed Maine attorney, was denied by the Law Court. *Oken v. State*, 716 A.2d 1007 (Me. 1998) (“*Oken Me. II*”). A petition for writ of certiorari was denied by the United States Supreme Court. *Oken v. State*, 119 S.Ct. 517 (1998).

The petitioner, appearing *pro se*, filed the petition at issue here on September 24, 1998.

II. Discussion

The statute that provides the terms under which federal habeas corpus relief is available to defendants convicted in state court provides, in relevant part:

- (a) The Supreme Court, a Justice thereof, a circuit judge, or a district

court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State;

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(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.

* * *

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S. § 2254.

A. Ineffective Assistance of Counsel

Claims of constitutionally deficient performance by counsel are reviewed under the test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner must demonstrate both that his attorney's performance was unreasonably deficient and that he was prejudiced as a result of it. *See Scarpa v. Dubois*, 38 F.3d 1, 8 (1st Cir. 1994). The first element "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The second element "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The *Strickland* standard applies to claims of ineffective assistance of counsel raised in connection with a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985). The petitioner's claims concerning his attorneys arise out of the *Alford* plea, advice allegedly given to him about the operation of the Interstate Compact Agreement on Detainers, the attorneys' treatment of the pre-sentence investigation report, their alleged failure to obtain certain evidence of the petitioner's drug use, their alleged failure to present evidence in mitigation of sentence, their failure to argue the

disproportionality of the sentence on appeal,² and their failure to argue on appeal that victim impact statements should not have been considered in connection with sentencing.

1. The Alford plea. The petitioner contends that his trial counsel provided constitutionally deficient assistance when they advised him that his *Alford* plea “could not be introduced as evidence against [him] during any proceeding in the pending Maryland death penalty case.” Petition at 5. He asserts that the Maine conviction was subsequently introduced as evidence in “the Maryland death penalty case” and prejudiced him there because it deprived him of a statutory mitigating factor to be considered by a jury deciding whether to impose the death penalty, Md. Ann. Code art. 27, § 413(g)(1) (1957). *Id.* The petitioner asserts that, but for this allegedly erroneous advice, he would not have pleaded guilty and would have proceeded to trial. Petition at 6.

The defendants respond that the advice allegedly provided by the petitioner’s trial counsel is not inaccurate, because the alleged promise was only that the plea would not be introduced as evidence, and the conviction, not the plea, was what was introduced in the Maryland proceeding; that state post-conviction courts in both Maine and Maryland found as a fact that trial counsel did not promise the petitioner that his Maine conviction could not be used in Maryland; and that the petitioner has not shown that he would have insisted on a trial but for this advice. State’s Answer to Petitioner’s Writ of Habeas Corpus (“Defendants’ Mem.”) (Docket No. 5) at 7-8.

Both the Maine and the Maryland post-conviction review courts found that the advice given

² The petitioner states in his reply memorandum that he “conditionally withdraws this claim, pending the appointment of counsel. Petitioner reserves the right to re-assert this claim after counsel is appointed and Petitioner has had time to consult with such counsel.” Petitioner’s Traverse to State’s Answer (“Reply Mem.”) (Docket No. 9) at 10. No counsel has been appointed to represent the petitioner in this proceeding. I will address the merits of this and other claims raised in the initial petition and “conditionally” withdrawn by the petitioner in his reply memorandum.

to the petitioner by his counsel in the Maine proceeding concerning his *Alford* plea was not constitutionally deficient. *Oken Me. II*, 716 A.2d at 1010; *Oken Md. II*, 681 A.2d at 49-51. Specifically, the Maine Superior Court, following hearings on the petitioner's request for post-conviction relief, found that

[the petitioner's Maine attorney] testified at the post-conviction hearing that he did not advise Oken that the Maine conviction itself would be inadmissible in Maryland. He recommended the *Alford* plea because "you may pick up a little strength in that it's not an admission as opposed to — it's a conviction, there is a conviction, but it's not an admission on its face that can be used against you." [The attorney] also stated that the entry of an *Alford* plea was considered because of "how this was going to be used in Maryland." Counsel advised Oken to enter the *Alford* plea rather than a guilty plea since the latter may be used as an admission of guilt and with the hope that they may have been able to exclude the Maine conviction from the Maryland proceedings completely. As it turned out, Oken's conviction was admitted in proceedings in Maryland. The court finds that this fact does not make his counsel's advice deficient; advising Oken to enter an *Alford* plea was a legitimate attempt to minimize the impact of a Maine conviction on subsequent proceedings in Maryland.

Maine Post-Conviction Judgment at 7-8 (citations omitted). The court also found this attorney "to be a credible, competent, and compelling witness to events surrounding Oken's plea," *id.* at 5, and that, because the state had a strong case against Oken and because his attorney testified that Oken did not want to go to trial on the Maine charges, the petitioner had failed to establish that, but for the advice at issue, he would have insisted on going to trial, *id.* at 11-12.

After holding a hearing at which the petitioner was present, the Maryland post-conviction court made the following findings:

Petitioner's own expert admitted the case against Petitioner in Maine was overwhelming. Based on this fact, counsel advised Petitioner to enter the *Alford* plea with the hope that an argument could be made during the [first Maryland] proceedings that this plea was inadmissible. Despite these efforts, the plea was found to be admissible and was entered into evidence

during the [first Maryland] proceedings. The fact that the plea was admitted, however, does not make counsel's advice deficient. Faced with an overwhelming case in Maine, the advice to enter an Alford plea was reasonable despite its ultimate admission in the [first Maryland] proceedings. While it is true that an Alford plea is the functional equivalent of a guilty plea, it was not certain that this plea would be admissible in the [first Maryland] proceeding. Furthermore, counsel testified that he never promised Petitioner the plea would be inadmissible; he was only trying to manufacture as many arguments as possible. This particular argument failed, but it is the finding of this Court that the advice was not deficient.

Oken Md. II, 681 A.2d at 50. The Maryland Court of Appeals also found that the petitioner's statement when he entered the *Alford* plea that his decision to enter the plea was unrelated to any other prosecutions against him in other states, Plea Tr. at 27, was "strong evidence that his plea was unrelated to the Maryland proceedings," *Oken Md. II*, 681 A.2d at 51, and that the post-conviction court's finding that the Maryland lawyer who represented the petitioner in Maine made no promises to the petitioner concerning the Maryland proceedings was not clearly erroneous, *id.* The Maryland Court of Appeals also found it significant that the petitioner made no assertion that he was not guilty of the Maine charges. *Id.* n.23.

The petitioner has made no attempt to show that the adjudication of this claim by the Maine courts resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law. The factual findings of those courts are presumed to be correct, 28 U.S.C. § 2254(e)(1), and the petitioner has failed to demonstrate that the state courts' factual determinations were unreasonable, *id.* § 2254(d)(2).³ See generally *Familia-Consoro v. United States*, 160 F.3d

³The petitioner argues in his Traverse to "State's Response to Steven Oken's 'Motion to Stay Proceedings'" ("Traverse") (Docket No. 8), which he incorporates by reference into his reply memorandum, Reply Mem. at 9, that this court may not presume the findings of the state post-conviction court to be correct pursuant to 28 U.S.C. § 2254(e)(1) because he was not allowed to be present at the evidentiary hearings held by that court, thereby depriving him of a full, fair and (continued...)

761, 765 (1st Cir. 1998) (discussing statutory presumption in context of claim of ineffective assistance of counsel). In addition, there is no prejudice under *Strickland* and *Hill* absent a claim of innocence or the articulation of a plausible defense which could have been raised at trial. *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd in part on other grounds*, 117 L.Ed.2d 1673 (1997). Here, the petitioner makes no such claim and articulates not such defense. Further, he offers nothing to overcome the presumption of truthfulness that attaches to his statements at the plea hearing and sentencing. *United States v. Mateo*, 950 F.2d 44, 46-47 (1st Cir. 1991); *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984).

For all of these reasons, the petitioner is not entitled to relief on this ground.

2. *The Interstate Compact on Detainers* (“IAD”).⁴ The petitioner contends that his attorneys in the Maine proceeding provided constitutionally deficient assistance when they allegedly advised him that “based on the IAD, Petitioner could not be transferred to Maryland after a Maine trial and sentence without Petitioner being returned to Maine to serve any Maine sentence in existence before Petitioner would be returned a second time to the State of Maryland to serve any Maryland sentence, even a sentence of death.” Petition at 6. The petitioner alleges that his attorneys advised him that a long sentence on the Maine charges would “insulate” him from execution if the death sentence

³(...continued)
adequate hearing and denying him due process of law, invoking three “exceptions” to the statutory presumption, which he identifies as 28 U.S.C. § 2254(e)(2), (6) and (7). Traverse at 3. There are no subsections 6 and 7 to subsection (e) of section 2254, and subsection (e)(2) is quite different from the language which the petitioner purports to quote from it. He apparently means to invoke the former subsections (d)(2), (6) and (7) of section 2254, which were repealed in 1996. The previous version of the statute does not apply to claims filed after the effective date of the amendments. *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997).

⁴ I use the abbreviation used by the parties, which is based on the former title of the statute at issue, the Interstate Agreement on Detainers.

were imposed upon his conviction of the pending Maryland charges. *Id.* Again, he asserts that he would not have pleaded guilty and would have insisted upon trial but for this “erroneous” advice. Specifically, he alleges that his attorneys failed to research the applicable Maine and Maryland statutes, both of which establish that application of the IAD on this point may be avoided by the execution of an executive agreement by the governors of the two states involved, 15 M.R.S.A. § 205; Md. Ann. Code art. 41, § 2-205, and that they failed to contact the office of the Maryland public defender, whereupon they would have been advised that such an agreement had been used in a previous capital case. Petition at 7. The governors of Maine and Maryland did execute such an agreement with respect to the petitioner. Executive Agreement [between Governor John R. McKernan, Jr. of Maine and Governor William Donald Schaefer of Maryland, regarding Steven Howard Oken (Date of Birth: January 29, 1962)], dated August 25, 1989 and October 12, 1989.

The relevant portions of the IAD provide that the appropriate officer of a jurisdiction in which untried charges are pending against a person who has entered upon a term of imprisonment in another jurisdiction may obtain temporary custody of that person for purposes of trial, 34-A M.R.S.A. § 9604(1), and that the prisoner shall be returned to the sending state thereafter “[a]t the earliest practicable time,” 34-A M.R.S.A. § 9605(4) & (5). The language of 15 M.R.S.A. § 205 and Md. Code Ann. art. 41, § 2-205 is identical with the exception of the material in brackets, which in the first paragraph does not appear in the Maryland statute and in the second paragraph does not appear in the Maine statute:

When it is desired to have returned to this State a person charged in this State with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this State may agree with the executive authority of such other state for the extradition of such person before the conclusion of such

proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this State as soon as the prosecution [or imprisonment following conviction] in this State is terminated.

The Governor [of this State] may [also] surrender on demand of the executive authority of any other state any person in this State who is charged in the manner provided in § [2-]223 [of this subtitle] with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

The post-conviction state courts made factual findings concerning this issue as well.

According to the Maine court,

Oken contends that he pleaded guilty to the charges against him because his attorneys represented to him that a conviction in Maine that predated a conviction in Maryland would “insulate” him from execution if he received a death sentence in Maryland. Oken claims he was advised that, pursuant to the Interstate Compact Agreement on Detainers (IAD) 34-A M.R.S.A. § § 9601-9636 (1988), any sentence imposed by Maine must be served before execution of a Maryland sentence. The IAD may, however, be circumvented by executive agreement pursuant to 15 M.R.S.A. § 205 (1980). As it turned out, the governors of Maine and Maryland agreed to allow Maryland to execute its sentence against Oken first.

The court is unpersuaded by Oken’s claim and finds that Oken’s attorneys . . . never advised him that a Maine sentence would “insulate” him from execution in Maryland. . . . [Oken’s Maine attorney] testified at the post-conviction hearing that he believed that the IAD was the best means available for Oken to avoid the death penalty. Oken’s attorneys made no guarantees that Oken would serve his Maine sentence before his Maryland sentence; he was informed that there was a risk that the governors of Maine and Maryland could, by agreement, avoid the IAD’s requirement that Oken be returned to Maine to serve his sentence.

Oken’s attorneys took steps to secure any protection afforded under the IAD. Through negotiations [the assistant attorney general] agreed that the Attorney General’s Office would “take no affirmative steps through clemency or executive action to circumvent [the IAD].” [Oken’s Maine attorney] testified that [the assistant attorney general’s] agreement was the best that could be done to secure Oken’s return to Maine to serve his sentence and that there was no guarantee against an agreement between the governors.

Maine Post-Conviction Judgment at 4-6 (citations and footnotes omitted). As was the case with the

claim based on the petitioner's *Alford* plea, the Maine court found that his attorneys did not perform unreasonably and that the petitioner failed to establish that he would have insisted on going to trial absent the advice concerning the IAD. *Id.* at 10-12.

The Maryland court that also addressed this issue found as follows:

Petitioner's second argument regarding the Maine case is that counsel erroneously advised him that, under the Interstate Agreement on Detainers (IAD), the Maine sentence would have to be served before any Maryland sentence. Since Maine had no death penalty statute, counsel believed this would insulate petitioner from a death sentence. As it turned out, however, the Governors of Maryland and Maine entered into an Executive Agreement which "trumped" the IAD by allowing Maryland to execute its sentence first. Counsel testified at the post conviction hearing that he believed this was a good argument to help Petitioner escape the death penalty but he never guaranteed this argument would be successful. Although allowed by law, there was no way of knowing the Governors of the two states would enter into the agreement and counsel was simply trying every possibility to save his client from a death sentence. The fact of the matter is, counsel's advice . . . developed two arguments which could have saved Petitioner's life. This Court finds that not only was this advice in no way deficient, it was a good way to try to develop sound arguments in a very weak case.

Oken Md. II, 681 A.2d 50. The petitioner's Maryland counsel testified that he "advised Oken that under the Interstate Agreement on Detainers, it was possible that Oken would have to be returned to Maine to serve his sentence before any Maryland sentence could be satisfied; although he was aware that the Governors could agree otherwise, he did not expect that they would do so in this case." *Id.* at 51. The Maryland Court of Appeals found that "[i]t is clear that [the petitioner's Maryland attorney's] strategy was to given Oken the benefit of every possible defense that he could create." *Id.* It found that the representation was not deficient. *Id.*

As was the case with the petitioner's first claim, he has made no attempt to show that the adjudication of this claim by the Maine courts resulted in a decision that was contrary to clearly

established federal law, nor has he demonstrated that the state courts' factual determinations were unreasonable. The petitioner has not made a claim of innocence nor has he articulated a plausible defense. He offers nothing to overcome the presumption of truthfulness that attaches to his statements at the plea and sentencing hearings, such as his agreement that the state's evidence would be sufficient to satisfy a factfinder beyond a reasonable doubt that he was guilty of all three charges. Plea Tr. at 97. He is not entitled to relief on this claim.

3. *The Presentence Investigation Report.* The petitioner argues that his attorneys provided constitutionally defective assistance when they failed to object to a statement in the presentence investigation report ("PSI"), prepared after he entered his plea and before he was sentenced, to the effect that the victim was sexually assaulted. He asserts that this information was "materially false," "wholly unsupported by the evidence," and relied upon by the sentencing court, "form[ing] the basis of the court's imposition of a life sentence." Petition at 8. He states in conclusory fashion that "[b]ut for counsel's unprofessional error" in failing to have this information redacted, "the result of the proceeding would have been different." *Id.* The respondent contends that the petitioner has not presented any evidence that the information in the PSI was in fact false and that he has not demonstrated any prejudice from the presence of this information in the PSI. Defendants' Mem. at 10-11.

The Maine post-conviction court found that "counsel's decision not to object to evidence of sexual abuse was a reasonable tactical choice, as they feared that if they challenged the offer of proof the State could substantiate the allegation." Maine Post-Conviction Judgment at 13. Here, the petitioner's claim is limited only to the PSI and does not include other possible evidence of sexual abuse that was presented by the state. A copy of the PSI, with a cover sheet signed by the presiding

justice and bearing the heading “State of Maine Department of Corrections Probation and Parole Request for Presentence Investigation,” is attached to Defendant’s Sentence Appeal Memorandum, *State v. Oken*, Docket No. AD-89-49, with a cover letter dated May 17, 1991. The document is 15 pages in length and contains no statement that the victim was subjected to sexual abuse. The only statement that could possibly be construed to refer to sexual activity in any way is the following sentence: “[The victim’s] underwear, pantyhose and shoes had been removed and were discovered in close proximity to the body.” PSI at 9. The petitioner apparently means to refer to an undated police report that was attached to the PSI, entitled “Follow up Investigation of the Homicide Involving Lori E. Ward,” signed by Edward F. Strong, Chief of Police. *See* Reply Mem. at 5. That document includes the following statement: “At around 8:30 PM I was again informed by Lt. White of the State Police that Oken had been arrested without incident and that the autopsy report on Lori Ward had confirmed that there had been a rape.” *Id.* at [4]. The written autopsy report, a copy of which was also attached to the PSI, does not mention rape or sexual assault. Office of Chief Medical Examiner, Document #ML 87-970, dated November 30, 1987, Name of Deceased: Laurie [sic] Ward, signed by Ronald P. Roy, MD, Deputy Chief Medical Examiner.

At the sentencing hearing, the prosecutor included the following statement in his argument:

Robbery, however, was not his sole motive. The evidence fairly suggests that after the robbery, he then took Lori Ward to the storage room where her body was later found. The evidence certainly suggests as the presentence report in part says, that she fought for her life. There was, the Court will recall, a broken lightbulb by the door to the storage room. The Defendant had a cut on the back of his neck

The Court will recall that she suffered among other things an intestinal bruise, that as I recall an earring had been torn from her, found lying near her body. Her shoes were off. One shoe was wedged under a portable bed some feet away from where her body lay. There were bruises on her arms, showing that she had fought defensively. And there were fibers

in her hand from the Defendant's clothing.

The Court will recall as well that when she was found, she was found with her skirt up over her buttocks, and her underwear removed. I trust the Court will be satisfied that this case has obvious sexual overtones, although the Indictment did not include any sexual crime because we could not prove before a jury beyond a reasonable doubt precisely what occurred. Proof to that level, however, is certainly not required for the Court to rely on the underlying facts as reliable for sentencing purposes.

* * *

We do not ask lightly for a life sentence, we never do, but we do so only when we feel compelled to do so because of the seriousness of the case and because we believe the facts of the case fit the criteria for a life sentence, primarily in this case, premeditation in fact, and it may well be sexual abuse of the victim.

Sentencing Tr. at 6-7, 10.

The sentencing court discussed sexual abuse in setting forth the reasoning supporting its sentence as follows:

In this case here, I feel there is ample evidence, I don't intend to rehash all of the evidence, to indicate that the actions of Mr. Oken were deliberate and planned in taking a gun, going down to the desk area in the motel. It's clear that he intended to take the money, and to make sure that there was [sic] no witnesses left behind.

Another aggravating factor that I find is the fact of sexual abuse that . . . obviously accompanied his actions and was perpetrated on the victim, Lori, or Miss Ward. Those are two aggravating factors which are set forth by the Appellate Court in considering whether or not to impose a life sentence.

I'm further very much concerned here with Mr. Oken's actions, and I would say — indicate another factor indicating the premeditation was when he checked into the motel in Freeport, he did not use a credit card at that point in time, he paid in cash, indicating at that point in time that he was very much intent upon covering his tracks and attempting to evade responsibility for his criminal actions.

I feel, Mr. Oken, you're a substantial risk to the public if you are not placed in a secured setting, and I think you're going to be a substantial risk for the rest of your life. Taking into account both the deliberate planning and premeditation and the sexual abuse of the victim, I feel I have no choice but to order you incarcerated for the rest of your natural life on Count One, the

charge of murder.

* * *

I recognize that some reasonable people may disagree with my determination that there is premeditation here, and perhaps even that there was evidence of a sexual abuse of the victim.

You have an appellate right of review of this sentence. . . . And you may challenge also my determinations of premeditation and sexual abuse .

. . .

Id. at 78-80.

It is very clear from this record that the sentencing court did not rely on the police chief's statement that a state police officer had told him that the autopsy report confirmed that the victim in this case had been raped in reaching his decision to impose a life sentence. The court refers only to "sexual abuse," and the prosecutor had acknowledged that no sexual crime had been charged or could be proved. *See State v. Rosa*, 575 A.2d 727, 731 (Me. 1990) (failure of court to state on record that it would not consider contested allegation included in PSI does not deny defendant due process where the court does not refer to assault allegation in describing basis for sentence imposed). The court relied on facts that are neither "materially false" nor "wholly unsupported by the record" but rather undisputed: the condition of the body of the victim and her clothing when the body was found. The court drew an inference of sexual abuse from these facts, and used that inference as one factor supporting imposition of a life sentence. Contrary to the petitioner's argument, the life sentence was not based solely on the finding of sexual abuse, but rather primarily upon the finding of premeditation.

Under Maine law, the sentencing court could rely on evidence of uncharged criminal activity by the defendant in determining the appropriate sentence. *Rosa*, 575 A.2d at 730 (sentencing justice has wide discretion when determining what sources and types of information to consider; only

restriction is that information be factually reliable); *State v. O'Donnell*, 495 A.2d 798, 803 (Me. 1985) (sentencing justice may consider evidence of defendant's uncharged conduct). This procedure is fully in accordance with federal law. *United States v. Watts*, 117 S.Ct. 633, 635 (1997). Therefore, the petitioner cannot show that the his sentence would have been reduced or the outcome otherwise changed if his attorneys had challenged the statement in the police chief's report that was attached to the PSI, and as a result he cannot establish that the assistance provided by his attorneys was constitutionally deficient in this regard. *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996).

4. *Evidence of drug abuse.* The petitioner presents two attacks on the effectiveness of his attorneys based on his alleged drug use. First, he contends that his attorneys should have obtained documentary evidence from the pharmacy where he was employed that he asserts would have corroborated "other evidence that [he] was using massive amounts of drugs (Xanax, Halcion, and Ativan) prior to and at the time of the alleged offenses" to aid the petitioner "at the competency hearing,"⁵ and as mitigating evidence at sentencing. Petition at 9. The second claim is that the attorneys failed to "present any evidence or witnesses at the competency hearing to substantiate Petitioner's claim of drug abuse and amnesia," and that they "failed to corroborate . . . with scientific testing" the testimony of Dr. Henry Payson at the sentencing hearing that the petitioner had abused several drugs. *Id.* at 10. Specifically, the petitioner contends that his counsel should have had his hair chemically analyzed. *Id.*

The state responds that these claims were not raised in the post-conviction proceeding in the Maine state courts and have accordingly been waived. It further contends that, since the petitioner

⁵ Because the petitioner pleaded guilty, no competency hearing was held. The petitioner's submissions suggest that he uses this term to refer to the hearing at which he entered his plea, at which the state offered the testimony of a forensic psychologist as to the petitioner's competence to enter the plea. Testimony of Neil MacLean, Plea Tr. at 29-74.

did not raise a claim of incompetence to enter a plea in the post-conviction proceeding, any contention that his attorneys did not present evidence to support such a claim has been waived. Finally, the state argues that the petitioner has failed to show any prejudice resulting from either claim. Defendant's Mem. at 12-13.

The petitioner's amended petition for state post-conviction relief does not specifically mention either of these claims, but does allege that "[t]he PSI lacked readily available evidence that tended to mitigate the circumstances of the offense. Such evidence includes contacts with petitioner's relatives and treating physicians." Amended Petition, *Oken v. State*, Docket No. CR-91-1132, Maine Superior Court (York County) ("Amended State Pet."), at [2]. The petitioner's claims as recited in the Superior Court's decision and judgment include "[t]hat counsel were unprepared for and deficient in their representation of petitioner at sentencing." Maine Post-Conviction Judgment at 2. The judgment also notes that "Oken argues that counsel were deficient in failing to present mitigating evidence at the sentencing of his drug and alcohol abuse." *Id.* at 12. The court found that "Dr. Henry Payson testified extensively at the sentencing about Oken's abuse of drugs and alcohol as mitigating factors," and that "counsel's representation of Oken at sentencing did not fall below an objective standard of reasonableness." *Id.* at 13.

Based on this record, I can only conclude that to the extent either of the claims concerning the petitioner's abuse of drugs is based on the plea hearing (referred to by the petitioner as "the competency hearing"), those claims were not raised in the state post-conviction proceeding and accordingly may not be pursued here. 28 U.S.C. § 2254(b)(1)(A) (requiring that state remedies for a federal constitutional claim be "exhausted" before the claim may be raised in a section 2254 proceeding). To exhaust a federal constitutional claim, a prisoner must present its "substance" in state

court before seeking a second opinion through habeas corpus in federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). “In this area of federal-state relations, the exhaustion principle is the disputatious sentry which patrols the pathways of comity. A habeas petitioner must have presented both the factual and legal underpinnings of his claim to the state courts in order for us to find it exhausted.” *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citations omitted). The habeas petitioner “bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim.” *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997). A claim of ineffective assistance of counsel must be addressed in a state post-conviction review proceeding. *State v. Nichols*, 698 A.2d 521, 522 (Me. 1997). Here, the petitioner’s failure to challenge in state court his attorneys’ efforts with respect to the plea hearing means that this court may not consider the effectiveness of those efforts on a petition for a writ of habeas corpus.

With respect to the claims addressed to the sentencing hearing, the petitioner assails his attorneys’ alleged failure to produce corroboration for the testimony of the expert witness they did present. The state-court judge did not mention the petitioner’s claimed drug abuse while imposing sentence. Sentencing Tr. at 76-80. Under Maine law, the purposes of criminal sentencing are the following:

1. To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;
2. To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served.
3. To minimize correctional experiences which serve to promote further criminality;
4. To give fair warning of the nature of the sentences that may be

imposed on the conviction of a crime;

5. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;

6. To encourage differentiation among offenders with a view to a just individualization of sentences;

7. To promote the development of correctional programs which elicit the cooperation of convicted persons; and

8. To permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:

A. The age of the victim; and

B. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation of that person or of the owner or occupant of that property.

17-A M.R.S.A. § 1151. When the petitioner was sentenced, there were no statutory requirements concerning aggravating or mitigating circumstances to be considered by a court in imposing a sentence upon conviction of murder.⁶ While the sentencing court noted that unreported decisions of the Appellate Division of the Law Court discussed criteria for sentencing, Sentencing Tr. at 77, there was no requirement in reported case law that sentencing courts in Maine consider any mitigating factors. Sentencing at that time, under reported case law, was within the discretion of the court. *State v. Mudie*, 508 A.2d 119, 121 (Me. 1986) (selection for appropriate emphasis among § 1151 purposes rests in discretion of sentencing court, which has “broad discretion” in sources and types of information to be relied upon in sentencing). *See also State v. Samson*, 388 A.2d 60, 67-68 (Me. 1978) (listing factors a trial court should take into consideration in imposing sentence, including “the

⁶ The Maine legislature created such requirements in 1995. 17-A M.R.S.A. § 1252-C.

defendant's degree of culpability").

There was no requirement at the time the petitioner was sentenced that the sentencing court consider any mitigating factors. The evidence which the petitioner suggests his attorneys should have pursued would have been cumulative at best to the testimony of Dr. Payson. There are so many other possible alternative explanations for any "missing" drugs that might be revealed by the pharmacy's records that it cannot be said that there is a reasonable probability that the result of the sentencing proceeding would have been different if this information had been provided. *Argencourt*, 78 F.3d at 16. Assuming *arguendo* that the petitioner's hair could have been analyzed as he contends and that such analysis would have provided evidence that he had used certain drugs — points that would require proof by the petitioner at any hearing on this petition — the outcome is nonetheless the same. Nothing in the record indicates that the court did not credit Dr. Payson's testimony even without this supposedly confirming evidence. The petitioner has made and can make no showing that his sentence would have been different if this "corroborating" information had been available. Accordingly, the petitioner has not established any prejudice from the failure of his attorneys to provide evidence either from the pharmacy records or from chemical analysis of the defendant's hair during the sentencing hearing. *See also United States v. Jackson*, 935 F.2d 832, 846 (7th Cir. 1991) (not ineffective assistance for defense counsel not to pursue course of investigation that would yield only cumulative evidence). The petitioner is not entitled to relief under section 2254 on these claims.

5. *Other mitigating evidence.* The petitioner contends that his attorneys provided constitutionally ineffective assistance by failing to present testimony in mitigation of sentence from eight individuals "who submitted affidavits to the post-conviction court." Reply Mem. at 7. Bearing in mind that Maine law at the time sentence was imposed did not require the sentencing court to consider

mitigating factors, the decision whether to present the testimony of potential witnesses must be evaluated in the light of the strategy reasonably competent counsel might have devised in the particular case. *Lema v. United States*, 987 F.2d 48, 55 (1st Cir. 1993). The records of the post-conviction court show only six affidavits, those of Thomas Saunders and Dr. Payson, Maine Post-Conviction Judgment at 2, and the petitioner, Davida Oken, David Oken, and Robin Ruben, Docket Sheet at [2]. Dr. Payson did testify at the sentencing hearing and the petitioner, who was present, does not contend that he wished to testify and was prevented from doing so.

In any event, I see no evidence in the state post-conviction record that this issue was raised. Maine Post-Conviction Judgment at 1-14; Amended State Pet. at [1]-[3]. For the reasons discussed above, this court may not consider a federal constitutional claim not presented to the state court. 28 U.S.C § 2254(b)(1)(A).

6. *Cumulative effect of trial counsel errors.* The petitioner contends that the alleged errors of his trial attorneys, discussed above, taken in the aggregate constitute constitutionally deficient assistance of counsel. I have concluded that none of these alleged errors, standing alone, constituted ineffective assistance of counsel. To the extent that any of the claims properly before this court might be construed nonetheless to set forth an error on the part of trial counsel, I conclude that no possible aggregation of such errors could rise to the level of a violation of the petitioner's constitutional rights. *See United States v. DeWolf*, 696 F.2d 1, 4 (1st Cir. 1982).

7. *Disproportionality of sentences.* The petitioner argues that his counsel on direct appeal of the sentences imposed by the Maine Superior Court provided constitutionally deficient assistance by failing to argue that the sentences imposed upon him were not proportional to those imposed upon others convicted of similar crimes in Maine. Petition at 16. The state responds that disproportionality

of sentencing is an issue of state law, which is not cognizable in federal habeas corpus proceedings. “A federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law.” *Pulley v. Harris*, 465 U.S. 37, 41 (1984). The question of the disproportionality of the sentence itself may not be cognizable under section 2254, e.g., *Bloyer v. Peters*, 5 F.3d 1093, 1098-99 (7th Cir. 1993), but that is not the issue raised here by the petitioner. The petitioner has raised a Sixth Amendment issue concerning the effectiveness of his appellate counsel. Such an issue is properly addressed under section 2254.

The petitioner contends that his appellate counsel “refused” to present this issue on appeal. Petition at 16. Defense counsel has no duty to raise on appeal every nonfrivolous issue requested by the defendant. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). The petitioner does not suggest that presentation of this issue on appeal from his sentence would have resulted in a reduced sentence. That fact alone requires denial of relief on this ground. *Argencourt*, 78 F.3d at 16. In addition, the facts known to the sentencing court fully support the imposition of a life sentence on the murder charge, and any change in the sentences on the robbery and theft charges, which ran concurrently, would have no practical effect. Therefore, it is not reasonably probable that an effective change in the petitioner’s sentence would have occurred if his appellate counsel had raised this argument, and he is not entitled to section 2254 relief based on ineffective assistance of counsel in this regard.

8. *Victim impact statements*. The petitioner argues that, at the time the appeal from his sentence was taken, *Booth v. Maryland*, 482 U.S. 496 (1987), made inclusion of victim impact statements in the presentence investigation report unconstitutional, and that the failure of his appellate counsel to include the issue of such statements in the appeal from his sentence constitutes constitutionally defective assistance. Petition at 17. The state responds that the petitioner has waived this claim by

failing to include it in his state post-conviction proceeding and that the subsequent Supreme Court decision in *Payne v. Tennessee*, 501 U.S. 808 (1991), overruled *Booth* on this issue.

To the extent that the petitioner bases this claim on an assertion that he asked his appellate counsel to raise this issue, there is some evidence that the claim was raised before the state post-conviction court. Maine Post-Conviction Judgment at 2 (“Counsel on appeal did not assert grounds consistent with petitioner’s wishes.”) However, as noted above, counsel has no duty to do so. The state court found that any such refusal did not amount to ineffective assistance. *Id.* at 13.

It is not possible to discern from the record whether the substance of this issue was brought to the attention of the state post-conviction court. I will assume for purposes of this proceeding that it was. The petitioner’s trial counsel effectively invoked the holding in *Booth* at the time of sentencing and objected to the presence of victim impact statements in the record, Sentencing Tr. at 59-60, and the sentencing court indicated that the sentencing process at issue in *Booth* was “entirely different” from that used in Maine, *id.* at 60. Other than the facts that the statements in *Booth* were presented to the jury rather than to the court, 482 U.S. at 503, and that the death penalty was sought in *Booth*, *id.* at 509, whereas it is not available in Maine, there is little difference between the petitioner’s sentencing and that provided to the Maryland defendant in *Booth*. However, the Supreme Court in *Payne* characterized the *Booth* holding as making victim’s statements “*per se* inadmissible in the sentencing phase of a *capital* case.” 501 U.S. at 818 (emphasis added). *Payne* was decided before the appeal from the petitioner’s sentence was decided.⁷ See *United States v. Anderson*, 923 F.2d 450, 454 (6th Cir. 1991) (Supreme Court decision issued while section 2254 proceeding pending

⁷ *Payne* was decided on June 27, 1991. 501 U.S. at 808. The petitioner’s direct appeal from his sentence was denied on July 15, 1991. Order, *State v. Oken*, Docket No. Ad-89-49, Maine Supreme Judicial Court, Appellate Division.

applied to that proceeding). Accordingly, it may be assumed that the Law Court would have applied the *Payne* holding to the petitioner's claim, and the outcome would not have been different.

In addition, the Supreme Court has held directly that the "failure to make an objection in a state criminal sentencing proceeding — an objection that would have been supported by a decision which subsequently was overruled — [does not] constitute[] 'prejudice' within the meaning of" *Strickland. Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993). There is no reason to conclude that this holding is not equally applicable to appellate counsel. It is dispositive of the petitioner's claim. Even if that were not the case, the evidence independent of the victim statements is easily sufficient to justify the imposition of a life sentence on the murder charge, as discussed above. Accordingly, it is not reasonably probable that raising this issue on appeal would have resulted in a reduced sentence. *Argencourt*, 78 F.3d at 16. For all of these reasons, the petitioner is not entitled to section 2254 relief on this ground.

B. Alleged Errors of the Trial Court

The petitioner argues that he is entitled to relief under section 2254 due to two errors⁸ by the trial court: that it erred at sentencing in considering the claim, "wholly unsupported by the evidence," that the victim was sexually abused, in violation of his right to due process, and that it erred in determining that the petitioner had voluntarily waived his *Miranda* rights. Petition at 12-13. The state responds that the petitioner has waived both issues, the first because it was not raised in the direct appeal from his sentence and the second because he pleaded guilty and did not preserve this claim for appeal at the time. The state is wrong on both points, but the petitioner is not entitled to

⁸ The petitioner states in his reply that he "conditionally withdraws" both of these claims, "pending the appointment of counsel." Reply Mem. at 8. For the reasons previously stated, I will nonetheless address the merits of both claims.

relief on these claims.

The petitioner's appeal from his sentence was based primarily on the sentencing court's allegedly improper reliance on a finding that the murder victim had been sexually abused. Defendant's Sentence Appeal Memorandum, *State v. Oken*, Docket No. AD-89-49, Maine Supreme Judicial Court [Appellate Division], at 1-5. The Supreme Judicial Court rejected this claim. Order [denying appeal], *State v. Oken*, Docket No. AD-89-49, Maine Supreme Judicial Court, Appellate Division. While the petitioner's claim in this proceeding may be read to assert only that the trial court should have excluded any reference to sexual assault on the victim from the PSI, rather than that the court should not have relied on any such information, the practical effect is the same. The only reason for exclusion of the information from the PSI would be to ensure that the court did not rely upon it in reaching its sentencing decision.

The sexual assault information relates only to the sentence on the murder charge. As I have already discussed, there is sufficient evidence in the record independent of the possible sexual assault to justify the imposition of a life sentence on the murder charge. Since the petitioner has not shown that there is a reasonable probability that a reduced sentence would have been imposed in the absence of the challenged information, he cannot recover under section 2254 on this ground. *Preston v. Delo*, 100 F.3d 596, 602 (8th Cir. 1996) (unnecessary to determine whether prosecutor's closing remarks rose to level of due process violation where no reasonable probability that statement more than minimally affected outcome of sentencing phase); *Muwwakkil v. Hoke*, 968 F.2d 284, 285-86 (2d Cir. 1992) (13-year delay in disposition of state court appeal constituted due process violation but did not entitle defendant to section 2254 relief where defendant produced no evidence that prompt disposition would have yielded different outcome).

With respect to the petitioner's challenge to the trial court's *Miranda* ruling, it is clear that he did preserve this issue when he entered his conditional guilty plea.

By Motion dated May 5, 1988 the Defendant sought to suppress the following evidence:

* * *

B) All statements of the Defendant, or observations by police officers, made in connection with his arrest, and subsequent to his arrest, in the above captioned matter.

* * *

It is this Motion and subsequent ruling thereon which the Defendant wishes to preserve for appellate review.

Defendants [sic] Conditional Guilty Plea at 1-2. However, when he pursued this appeal, the petitioner abandoned the *Miranda* claim. *Oken Me. I*, 569 A.2d at 1218. Having chosen not to pursue this claim in the state court, the petitioner may not now press it as a basis for section 2254 relief. *Harper v. Mazuriewicz*, 849 F. Supp. 377, 379 (E.D.Pa. 1994) (failure to pursue claims raised on appeal in state court means that those claims are not exhausted for purposes of section 2254).

The petitioner is not entitled to relief on either of his claims based on the actions of the trial court.

C. Alleged Errors of the Post-Conviction Court

1. Hearing held in absence of defendant. Two evidentiary hearings were held in the state court on the petitioner's petition for state post-conviction relief. The petitioner was incarcerated in Maryland when these hearings were held and the state court "refused to compel Petitioner's presence." Petition at 14. The petitioner contends, as he did in the state courts, that he was thereby deprived of his constitutional rights to confront witnesses and to consult with and assist his attorney. He also contends that it was an error of constitutional magnitude for the state court to make a credibility determination by comparing his deposition testimony with the in-person testimony before the court

of one of the petitioner’s trial attorneys. Both the petitioner and the state invite this court to revisit the arguments that they made on this issue to the Law Court. Reply Mem. at 8-9; Defendants’ Mem. at 16-17.

The Law Court, after noting that the question whether the confrontation clause of the Sixth Amendment applies in a post-conviction review proceeding has not been resolved,⁹ held that there was no violation of the clause in the petitioner’s case in any event because he had an opportunity for full and fair cross-examination of the witnesses who testified at the hearings, despite his physical absence. *Oken Me. II*, 716 A.2d at 1010. This was due to the fact that he was represented by counsel during the testimony of these witnesses, was permitted to consult with his attorney and review transcripts of that testimony, and then was permitted to recall and further cross-examine those witnesses. *Id.* at 1010-11. The Law Court noted that the ability to recall and further cross-examine witnesses under these circumstances “is more than Oken would have been entitled to if he had been present at the evidentiary hearing.” *Id.* at 1011. I agree. This decision is neither contrary to clearly established federal law nor does it involve an unreasonable application of any such law.¹⁰ 28 U.S.C.

⁹ The Sixth Amendment, by its own terms, applies only to “criminal prosecutions.” U. S. Const. amend. VI.

¹⁰ The petitioner relies heavily on *United States v. Hayman*, 342 U.S. 205 (1952), in which the Supreme Court held that a court should require the presence of a defendant seeking relief under section 2255, which provides a post-conviction relief process for those convicted of federal crimes, when “there are substantial issues of fact as to events in which the prisoner participated.” *Id.* at 223. This holding does not automatically apply to state prisoners seeking relief under section 2254, it is not based on constitutional grounds, and it is to be applied, by its own terms, on a case-by-case basis. *Id.* Federal courts since 1952, some of which are cited in the text of this opinion *infra*, have held that defendants need not be present at section 2255 hearings. In any event, as discussed hereafter in the text of this opinion, any “substantial issues of fact,” to the extent that they are identified by the petitioner, do not form the basis for the post-conviction court’s conclusions in this case and the presence of the petitioner at the evidentiary hearing therefore cannot be said to be required by (continued...)

§ 2254(d)(1). The petitioner does not dispute the facts set forth by the Law Court. *Id.* § 2254(d)(2). Accordingly, the petitioner has not established a basis for section 2254 relief on the Sixth Amendment aspect of this claim. *See Machibroda v. United States*, 368 U.S. 487, 495 (1962) (section 2255 movant need not always be allowed to appear for full hearing; facts may at times be fully investigated without requiring personal presence of prisoner). *See also Villarreal v. United States*, 508 F.2d 1132, 1133-34 (9th Cir. 1974) (no requirement that defendant be present at section 2255 hearing; affidavits sufficient); *Deaton v. United States*, 422 F.2d 345, 346 (6th Cir. 1970) (no error in not having defendant present at section 2255 hearing).

The petitioner offers no constitutional source for his asserted right to consult with and assist his attorney other than the Sixth Amendment. For the reasons discussed above, he is not entitled to relief under section 2254 on this ground. The Law Court also rejected the petitioner’s claim that the post-conviction court could not properly assess his credibility without seeing him and hearing his testimony in person. *Oken Me. II*, 716 A.2d at 1011. The petitioner offers no clearly established federal law that is contrary to the Law Court’s resolution of this claim. 28 U.S.C. § 2254(d)(1). He does point to *Loinaz v. EG&G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990), in which the First Circuit stated, with respect to a trial, that “[w]hen a witness’ credibility is a central issue, a deposition is an inadequate substitute for the presence of that witness.”¹¹ That holding is not directly applicable to this

¹⁰(...continued)

Hayman, to the extent that its holding may be applicable to section 2254 proceedings.

¹¹ The petitioner’s submissions do not specify the factual issue or issues as to which he contends his credibility was a central issue, beyond a general reference to “the events surrounding the plea.” Reply Mem. at 9. The petitioner’s Law Court brief also fails to specify these factual issues. Brief of Petitioner, *Oken v. State*, Docket No. CUM-97-444. The petitioner’s mother, Davida Oken, testified in person at the post-conviction hearings. Maine Post-Conviction Judgment (continued...)

case, however. Here, the state post-conviction court did find the petitioner’s trial attorney who testified in person “to be a credible, competent, and compelling witness,” Maine Post-Conviction Judgment at 5, but it drew that conclusion only after seeing that attorney testify twice, the second time after the petitioner had had an opportunity to review the transcript of the first testimony and advise his counsel with respect to a second cross-examination. Under the circumstances, where the petitioner’s right to confront and cross-examine the witness was protected by the interim consultation with counsel and where the petitioner has failed to identify any specific factual issue as to which the post-conviction court made a choice between his testimony and that of his trial attorney that formed the basis of its judgment, the post-conviction court’s finding that the trial attorney’s testimony was credible does not provide the petitioner with cause for legal complaint. The petitioner has made no showing that his credibility was a central issue before the post-conviction court.

The petitioner is not entitled to section 2254 relief on this claim.

2. *Voluntariness of guilty plea.* The petitioner contends that the post-conviction court erred in finding that his *Alford* plea was voluntary and knowing. Petition at 15-16. His argument on this point essentially repeats the argument he made concerning the alleged ineffective assistance of counsel in

¹¹(...continued)

at 2. She was present during the petitioner’s discussions with his attorneys of the *Alford* plea and the potential effect of the IAD. Sworn Statement of Davida Oken dated August 2, 1992, included in court file, *Oken v. State*, Docket No. CR-91-1132, Maine Superior Court (York County), at [1]. Assuming (in the petitioner’s favor) that her testimony at the post-conviction hearing, a transcript of which has not been provided to this court, was consistent with her sworn statement, she presented the same information to that court that the petitioner would have presented in person. Deposition of Steven H. Oken (June 17, 1996), *Oken v. State*, Docket No. CR-91-1131[sic], Maine Superior Court (York County), at 23-33,47-54, 64-68 (testifying that the attorneys “didn’t use the word guarantee, they didn’t use the word promise”), 77-78; Deposition of Steven Howard Oken (June 23, 1993), *Oken v. State*, Docket No. CR-91-1132, Maine Superior Court (York County), at 19-29.

advising him to enter this plea. The state argues that this court should defer to the factual findings of the state court on this issue and that, “[a]bsent findings of ineffective assistance of trial counsel, the decision of a represented defendant to waive trial and plead guilty is constitutionally sufficient (i.e., knowing and voluntary) and final.” Defendants’ Mem. at 17.

This claim appears to be foreclosed by *Tollett v. Henderson*, 411 U.S. 258 (1973), in which the Supreme Court held that a defendant seeking relief under section 2254 who has pleaded guilty “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann [v. Richardson]*, 397 U.S. 759 (1970).” *Id.* at 267. Here, the petitioner has already made such an attack. Under *Tollett*, he is not entitled to a second try by characterizing the constitutional error as one of the court rather than as one of counsel. Even if he could do so, the argument made here by the petitioner is the same as the argument he made earlier concerning his attorneys’ advice with respect to the likely consequences of an *Alford* plea, and my analysis of that claim on the merits would be no different merely because the petitioner has given it a different title. The petitioner is not entitled to relief under section 2254 on this claim.

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DENIED** without an evidentiary 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 17th day of March, 1999.

*David M. Cohen
United States Magistrate Judge*