

commitment signed by the sentencing judge states, under a handwritten notation “Ct 4:” “It is ordered that all of the foregoing sentence be suspended and the defendant be committed to the custody and control of the Division of Probation and Parole for a term of 2 yrs upon conditions attached hereto and incorporated by reference herein.” Judgment and Commitment, Escape Case, at [1]. A document entitled “Conditions of Probation” signed that day by the sentencing judge states, in part: “You have been convicted of Escape, Theft . . . and the court has placed you on probation.” Conditions of Probation, Escape Case. The docket entry for that date states, in part: “Court orders that all of sentence be suspended and places defendant on probation for 2 years with condition.” Docket, Escape Case, at 2.

The petitioner, represented by counsel, appealed from this conviction on grounds not related to those raised in the current petition, and the appeal was denied. *State v. Larrivee*, Dec. No. 6913, Law Docket No. Cum-93-602 (Me. June 23, 1994) (memorandum of decision).

In 1994, the petitioner, appearing *pro se*, filed in this court a petition for a writ of habeas corpus pursuant to section 2254, alleging that the state had violated his rights to a speedy trial and that a correctional officer rather than the courts had imposed his sentence by requiring him to serve the two-and-one-half year sentence imposed on the escape charge rather than treating it as having been suspended. Petition under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody (Docket No. 1), *Larrivee v. Magnusson*, Docket No. 94-167-B (“First 2254”), at 5. The petition was dismissed for failure to exhaust remedies available in the state courts. Recommended Decision (Docket No. 9), First 2254, at 2; Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 11), First 2254.

In 1996, represented by the same lawyer who had filed his direct appeal, the petitioner filed a petition for post-conviction review in state court, alleging that the state Department of Corrections had

wrongfully altered his sentence by requiring him to serve the two-and-one-half year sentence imposed on the escape charge rather than treating it as having been suspended. Petition for Post-Conviction Review, *Larrivee v. State*, Docket No. CR 96-1546, Maine Superior Court (Cumberland County) (“State Post-Conviction Case”), at 3 & attachment at 1-2. The state responded to the petition with a request that the docket entry in CR 93-59 be amended to reflect the fact that the sentence on the escape conviction was not suspended. Answer to Petition for Post Conviction Review and Motion to Amend Docket Entries, etc., State Post-Conviction Case, at [1]. Although a hearing was apparently scheduled on the petition, and the petitioner was present in the courthouse, the judge who had sentenced the petitioner denied the petition and granted the state’s motion without a hearing, endorsing the state’s answer and motion as follows:

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No hearing is necessary on this motion to amend or on this petition. The original judgment and commitment in CR 93-59 makes it clear that the escape sentence was not suspended but was intended to be consecutive to CR 88-1871, as was required by 17-A M.R.S.A. § 1256(1). The same statute also requires that the escape sentence not be suspended. The motion to amend is granted and the docket entries should be amended to reflect that the escape sentence in CR 93-59 was consecutive to CR 88-1871 and unsuspended. Petitioner’s petition for post conviction review is denied.

Id. at [2]. The petitioner appealed, and the Law Court denied a certificate of probable cause. Docket, State Post-Conviction Case, at 2 [reverse].

While the appeal was pending, the petitioner, acting *pro se*, filed a motion in the underlying case to withdraw his guilty plea, Docket, Escape Case, at 3 [reverse], alleging that the entire sentence on his escape conviction had been suspended and that the court’s amendment of the docket entry to show that the sentence was not suspended did not comply with the terms of the agreement he had made with the state before tendering his plea, Motion to Withdraw Plea, Escape Case, ¶¶ 2-7. After a hearing, a justice of the Superior Court other than the justice who had sentenced the petitioner, that

justice having retired, Order dated May 21, 1999, Escape Case, denied the motion, *id.* (endorsement) and Transcript, Hearing on Motion to Withdraw Plea, Escape Case. The petitioner, represented by counsel, appealed, alleging that the state had violated the plea agreement. Brief of Appellant, *State v. Larrivee*, Docket No. CUM-99-439, Maine Supreme Judicial Court sitting as the Law Court, at i. The Law Court denied the appeal on the ground that a petition for post-conviction review is the only means by which the defendant may seek relief after sentence has been imposed. *State v. Larrivee*, Dec. No. Mem 00-29, Maine Supreme Judicial Court (Feb. 29, 2000).

While the Law Court appeal was pending, the petitioner filed a second section 2254 petition in this court, alleging the same grounds for relief as those presented in his appeal to the Law Court. Memorandum Decision on Motion for Stay and Recommended Decision on Petition for Writ of Habeas Corpus (Docket No. 8), *Larrivee v. Warden*, Docket No.99-333-P-C (“Second 2254”), at 3. That petition was dismissed for failure to exhaust state remedies because the claims were then pending in the Law Court. Order Affirming Recommended Decision (Docket No. 10), Second 2254. The petitioner filed a notice of appeal from the dismissal and requested a certificate of appealability, which was denied. Letter to petitioner from Susan L. Hall, dated March 9, 2000, in Second 2254 file. The office of the clerk of the First Circuit Court of Appeals has informed the clerk of this court that the matter remains pending in that court.

The current petition was filed on April 17, 2000.

II. Discussion

The petition seeks relief on two grounds: (i) the amendment of the docket entries to show that the escape sentence was not suspended was not consistent with Me. R. Crim. P. 35 and violated his federal constitutional rights to due process and equal protection of the law, and (ii) the sentence as

currently imposed breaches his plea agreement. Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody (Docket No. 2) at 5 & Attachment at 1.

A. Procedural Issues

The respondent contends that “it is not open to this Court to stay this case to await final disposition on Petitioner’s appeal” in the Second 2254 and that, because the petitioner only raised the second ground asserted here before the state courts in his attempt to withdraw his plea, an avenue procedurally unavailable for that purpose, he has failed to exhaust state remedies as to that claim, which must be brought by way of a state post-conviction review proceeding before it may be considered by this court. Response to Petition for writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, etc. (“Response”) (Docket No. 4) at 16-19.

No party has asked for a stay of this proceeding, and I see no reason to consider one. The petitioner contends that he has filed a “dismissal of Certificate of Probable Cause,” referring to his letter dated March 31, 2000 to the clerk of the First Circuit. Petitioner’s Response to Respondent’s Answer, etc. (Docket No. 5) at [1] & Exh. A. The letter is equivocal and cannot be reasonably interpreted as an unconditional withdrawal of the petitioner’s request for a certificate of appealability. However, it makes no sense to dismiss the current action due to the pendency of the appeal, if that is indeed what the respondent seeks. In the unlikely event that the First Circuit considers the merits of the petitioner’s appeal and overturns the dismissal of the second 2254 petition, this court would merely have to address the issues presented by the current petition. It is a better use of the court’s time and resources to resolve those issues now.

It may well be that the petitioner’s second ground remains technically unexhausted, but the court does not need to reach that issue under the circumstances. Section 2254(b)(2) provides that “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure

of the applicant to exhaust the remedies available in the courts of the State.” That provision is applicable here. As will become apparent, the petitioner’s claims are without merit, and a dismissal of this action requiring the petitioner to initiate yet another state post-conviction proceeding¹ raising the plea-bargain issue would inevitably result in a denial of relief in the state courts, wasting considerable time and resources of both the state and the federal courts. Under these circumstances, consideration of the merits of both claims, whether they have been exhausted in state court or not, is appropriate. *See, e.g., Jones v. Jones*, 163 F.3d 285, 299 (5th Cir. 1998).

B. The Merits

First Ground

The petitioner contends that he has been denied due process and equal protection of the law because the state amended the sentence imposed on him for the escape conviction “5 years after imposition in Direct Violation of Maine Rules of Criminal Procedure 35(a), and 11(a), (b), (c).” Petition, Attachment at 1. The respondent does not address this claim.

It is not necessary to consider the questions whether failure to comply with a state procedural rule can constitute violation of a defendant’s federal constitutional rights and whether the petitioner has alleged that he is a member of any protected class for purposes of equal protection analysis, because there was no violation of the state procedural rule in this case. The state’s motion to amend that was granted by the sentencing judge, resulting in amendment of the docket entries concerning the petitioner’s sentence on the escape charge, does not invoke Rule 35, Petition Exh. 10, nor does

¹ I note that Maine law appears to prohibit successive petitions for post-conviction review arising out of a criminal judgment. 15 M.R.S.A. § 2128(3). The respondent suggests that a petition for post-conviction review claiming that the petitioner did not receive the benefit of his plea bargain would not, in his view, be subject to dismissal under this statute. The text of the statute does not appear to support the respondent’s position, but it is not necessary under the circumstances to reach that question.

the endorsement granting the motion, *id.* at [2]. The petitioner apparently relies on a handwritten note on the Notice of Setting for the motion which reads as follows: “Motion on Rule 35 must go to Sentencing Justice” Petition Exh. 11. This note does not and cannot mean that the motion was brought pursuant to that rule or could only be decided under that rule.

M.R.Crim. P. 35 provides, in relevant part:

- (a) **Correction of Sentence.** On motion of the defendant or the attorney for the state, or on the court’s own motion, made within one year after a sentence is imposed, the justice or judge who imposed sentence may correct an illegal sentence or a sentence imposed in an illegal manner.

Here, the sentence imposed was not illegal nor was it imposed in an illegal manner. In Maine, “[w]here a discrepancy exists between the oral pronouncement of sentence and the written judgment and commitment, it has long been the law that the oral pronouncement of sentence controls.” *State v. Hutchinson*, 593 A.2d 666, 667 (Me. 1991). The same rule must obviously apply when the discrepancy is between the oral pronouncement and the written notation of sentence on the docket.

The oral pronouncement of sentence in this case was as follows:

The sentence on the motion to revoke is a full revocation and of course probation will terminate on that particular charge; on Count I, two-and-a-half years consecutive to the sentence that he will be serving on the motion to revoke; and then on Count IV, three years, all suspended, two years probation consecutive to Count I.

Transcript, Escape Case, at 13. The sentencing judge clearly suspended only the three-year sentence on Count IV, not the sentence on Count I, the escape charge.² Accordingly, all that was amended five years later was the erroneous notation on the docket, a procedure authorized by M.R.Crim.P. 50:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the

² A suspended sentence on the escape charge could well have been illegal. The relevant statute, 17-A M.R.S.A. § 1256(1), provides, in relevant part: “[W]hen a person subject to an undischarged term of imprisonment is convicted of a violation of section . . . 755 . . . , the sentence is not concurrent with the undischarged terms of imprisonment. . . . No portion of the nonconcurrent sentence may be suspended.”

court at any time of its own initiative or on the motion of any party and after such notice as the court orders.

The action of the sentencing judge in this case was fully in accordance with this rule, *see State v. Brydon*, 454 A.2d 1385, 1388 (Me. 1983), and did not deprive the petitioner of any constitutional right.

The petitioner is not entitled to relief on this ground.

Second Ground

The petitioner next contends that the sentence on the escape charge, if it was not suspended, breached his plea agreement. Petition at 5 & attachment at 5. He states that “[c]ounsel,” apparently his own lawyer, “conveyed a totally suspended sentence to Client.” In order to obtain relief on this basis, the petitioner must assert under oath that he would not have pleaded guilty if he had been told that the sentence on the escape charge would not be, and indeed could not have been, suspended. *See generally Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). The petition does not include such an assertion, and this claim is accordingly subject to dismissal for that reason alone. Even if that were not the case, however, the only evidence of the terms of the plea bargain in the record makes clear that the petitioner agreed to an unsuspended sentence on the escape charge.

There is no written plea agreement in the record and the docket of the escape case does not reflect that any written plea agreement was filed. The only evidence concerning the substance of the agreement therefore is found in the transcript of the hearing at which the petitioner tendered his guilty plea.

THE COURT: . . . What’s the plea bargain?

[THE PROSECUTOR]: With regard to the probation revocation, your Honor, my understanding is there is to be a full revocation of the probation and Mr. Larrivee is to serve the three years that are remaining on that sentence; consecutive to that sentence would be a two-and-one-half-year sentence on the escape, Class C; and consecutive to that two-and-a-half years

would be three years, all suspended, and two years probationary period on the sentence of the theft, two priors.

THE COURT: Mr. [defense attorney], is that your understanding?

[DEFENSE ATTORNEY]: That is my understanding, your Honor.

THE COURT: Mr. Larrivee, is that your understanding?

MR. LARRIVEE: Yes, sir.

Transcript, Escape Case, at 12. The only evidence concerning the substance of the plea bargain, other than the petition's assertion that the petitioner's lawyer told him that his sentence on both charges would be "totally suspended," is that only the sentence on the theft charge was to be suspended. The evidence is also that the petitioner explicitly agreed to that sentence, on the record.

A defendant's representations at the plea hearing are a "formidable barrier" in collateral proceedings in which he attempts to take a different position. *Roderick v. Trickey*, 902 F.2d 9, 10 (8th Cir. 1990). In almost every instance, the defendant is bound by his answers at the plea hearing. *Id.*; see *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998) (defendant may seek relief on basis of alleged promise, although inconsistent with representations she made in open court, only by proving "(1) the exact terms of the alleged promise, (2) exactly when, where, and by whom the promise was made, and (3) the precise identity of an eyewitness to the promise"). In the First Circuit, a defendant's responses to the court's inquiries at a plea hearing are presumed to be truthful. *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984). The petitioner has presented no credible reasons for disbelieving the response he made at the time; indeed, he ignores the fact that he made that response. See also *United States v. Martinez-Molina*, 64 F.3d 719, 733 (1st Cir. 1995). The petitioner agreed at his plea hearing that the plea bargain included a suspended sentence only on the theft count; he offers no reason why this court should conclude that he was being less than truthful at the time. Accordingly,

the statement may be credited by this court. *United States v. Marerro-Rivera*, 124 F.3d 342, 349 (1st Cir. 1997).

The petitioner is not entitled to relief on this ground.

III. Conclusion

For the foregoing reasons, I recommend that the petition be **DISMISSED** 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.

Date this 9th day of June, 2000.

David M. Cohen
United States Magistrate Judge