

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

<b>DE DE CHIEM,</b>	)	
	)	
<b>Petitioner</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 00-394-P-C</b>
	)	
<b>RAYMOND WELLS, Administrator,</b>	)	
<b>Kennebec County Jail, et al.,</b>	)	
	)	
<b>Respondents</b>	)	

**RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS**

De De Chiem, who faces deportation by the Immigration and Naturalization Service (“INS”) as the result of a judgment entered against him by the Maine Superior Court (Cumberland County) on August 14, 1997, challenges that judgment on two grounds and, in addition, contests the constitutionality of his current indefinite confinement without opportunity for bail pursuant to two federal immigration statutes, 8 U.S.C. §§ 1226 and 1252(a)(2). Amended Memorandum of Law in Support of Petition for Habeas Corpus Relief Pursuant to Title 28 U.S.C. Sections 2254 and 2241 (“Memorandum”) (Docket No. 3) at 6-36; Judgment and Commitment, *State v. Chiem*, Criminal No. 96-1865 (Me. Super. Ct. Aug. 14, 1997) (“*State v. Chiem*”), filed with State’s Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (“Response”) (Docket No. 8).<sup>1</sup> For the

---

<sup>1</sup> Chiem’s characterization of his grounds for relief in his memorandum does not square with that in his petition, which omits mention of the final ground (involving his confinement) and divides the subject matter of the remaining two grounds into three. *Compare* Amended Petition for Habeas Corpus Relief (“Petition”) (Docket No. 3) at 4 *with* Memorandum at 8-36. Inasmuch as the Memorandum contains the more thorough and complete exposition of Chiem’s grounds for relief, I adopt its characterization.

reasons that follow, I recommend that the first two grounds of Chiem's petition be denied without a hearing and that the third ground be dismissed without prejudice.

### **I. Background**

De De Chiem immigrated with his mother, a sister and a brother from Vietnam to Portland, Maine on July 13, 1993, joining relatives who already were living in Portland. Transcript of Post-Conviction Review Hearing dated June 1, 1999 ("June PCR Transcript"), *Chiem v. State*, Criminal No. 99-544 (Me. Super. Ct.) ("*Chiem v. State*"), filed with Response, at 94-97. Chiem, who was then twenty years old and a person of limited education (having attended school in Vietnam for a total of one and a half years), *id.* at 117, 119, was admitted to the United States as a "public interest parolee" based on paperwork filed on his behalf by a brother, *id.* at 119; Transcript of Post-Conviction Review Hearing dated May 10-12, 1999 ("May PCR Transcript"), *Chiem v. State*, filed with Response, Vol. I at 26.

Public-interest parolees are permitted to enter the United States for humanitarian or public-interest purposes (in Chiem's case, that he and his family were refugees). May PCR Transcript, Vol. I at 26. INS district directors may in their discretion revoke public-interest parolee status subject only to review for abuse of discretion; upon revocation of this particular status, the immigrant is detained without possibility of release on bail. *Id.* at 29-30.

On October 10, 1996 Chiem was indicted on three criminal charges stemming from an August 1996 incident in which, according to the prosecution's version of events, Chiem and another Asian male approached a parked car occupied by four men, Chiem pulled a handgun from his waistband, the occupants fled the vehicle, Chiem gave chase, repeatedly firing the gun, and a bystander was injured by a ricocheting bullet. Transcript of Rule 11 Plea and Sentencing ("Rule 11 Transcript"), *State v.*

*Chiem*, filed with Response, Aug. 12 section at 7-8;<sup>2</sup> Indictment, etc. (“Indictment”), *State v. Chiem*, filed with Response. Chiem was indicted on charges of aggravated assault in violation of 17-A M.R.S.A. § 208, a Class B crime (Count I), criminal threatening with a firearm in violation of 17-A M.R.S.A. §§ 209 and 1252(4), a Class C crime (Count II), and violation of a condition of release in contravention of 15 M.R.S.A. § 1092, a Class C crime (Count III). Indictment.<sup>3</sup>

Attorney Joel Vincent was appointed to represent Chiem. June PCR Transcript at 6-7. Chiem initially pleaded not guilty; however, on August 12, 1997, he changed his plea. *Id.* at 8-9; Rule 11 Transcript, Aug. 12 section at 3. Vincent negotiated a plea agreement with the prosecution pursuant to which, if Chiem pleaded guilty to Count II (criminal threatening), Counts I and III would be dropped. June PCR Transcript at 12. Each side was free to argue an appropriate sentence, the maximum for Count II being five years’ imprisonment. *Id.* at 12-13. Chiem pleaded guilty to Count II and was sentenced two days later on that count to a term of three years’ imprisonment with all but eighteen months suspended, followed by four years’ probation. Rule 11 Transcript, Aug. 12 section at 11 & Aug. 14 section at 21-22.<sup>4</sup>

Han Trieu served as interpreter at Chiem’s Rule 11 hearing. *Id.*, Aug. 12 section at 1. After describing the elements of the crime in issue, the court explained that by pleading guilty Chiem was giving up his rights to be presumed innocent, to have a speedy and public trial before a judge or jury of twelve people, to confront and cross-examine his accusers, and to call witnesses in his behalf, file

---

<sup>2</sup> For ease of reference I describe the separately numbered Rule 11 and sentencing sections of the combined transcript as the “Aug. 12 section” and the “Aug. 14 section,” respectively.

<sup>3</sup> The third in this trio of charges stemmed from an alleged contact between Chiem and Michael Jensen, the injured bystander, following Chiem’s release on bail on condition *inter alia* that he have no contact with Jensen. Indictment; Rule 11 Transcript, Aug. 12 section at 8.

<sup>4</sup> Chiem also pleaded guilty to a separate misdemeanor offense charged at the request of defense counsel as part of a sentencing strategy. Rule 11 Transcript, Aug. 12 section at 2; Aug. 14 section at 24-26.

motions and produce evidence and take, or choose not to take, the witness stand in his own behalf. *Id.* at 2-7. The court periodically paused to query whether Chiem understood the rights he was waiving; he responded that he did. *Id.* The court found that Chiem had understood the constitutional rights outlined and had knowingly and willingly relinquished them. *Id.* at 11. No issue was raised during the proceeding concerning the adequacy of Trieu's interpretation services or Chiem's ability to comprehend the proceeding. *Id.* at 1-12. No recording or other transcription was made of the Vietnamese-language portion of the proceeding. May PCR Transcript, Vol. III at 337-38 (representation of petitioner's counsel).

Chiem did not directly appeal the judgment or apply to the Law Court for permission to appeal the sentence entered against him. *See* Docket, *State v. Chiem*, filed with Response. In February 1999, after Chiem had served his jail time and been released on probation, the INS revoked his public-interest parole status. May PCR Transcript, Vol. I at 72-73. Pending deportation proceedings, Chiem was detained without possibility of bond. *Id.* at 30-31.

On March 26, 1999 Chiem filed a state petition for post-conviction review, collaterally attacking the judgment against him on grounds of (i) ineffective assistance of counsel/unknowing plea/involuntary waiver, based on Vincent's asserted failure to inform him of the deportation consequences of his plea; (ii) ineffective assistance of counsel/interpreter – unknowing plea/involuntary waiver, based on the alleged inadequacy of Trieu's interpretation; and (iii) unknowing plea/involuntary waiver, based on the court's failure at the Rule 11 proceeding to advise Chiem that he had a right to choose not to testify at trial and a right to trial by jury. Docket, *Chiem v.*

*State* (“State PCR Docket”), filed with Response, at 1 (entry of Mar. 26, 1999); Petition for Post-Conviction Review, *Chiem v. State*, filed with Response, at 3-4.<sup>5</sup>

The Superior Court (Cumberland County) (“State PCR Court”) held an evidentiary hearing during which Chiem testified (through an interpreter) that Vincent never informed him of, nor did he ever ask Vincent about, the deportation consequences of his plea. June PCR Transcript at 98-99. Vincent testified that although he had no “formal” discussion with Chiem concerning the subject, “I told him at least once or twice that he had to hope that INS expressed no interest in him or that he came to their attention.” *Id.* at 32-34. He elaborated:

Well, again, I don’t think we had a discussion about INS consequences. I didn’t say INS will come in April if you plead guilty, or if you are convicted. It was basically a general understanding. And perhaps it was only a one-sided understanding, I don’t know, but there was a general understanding that he was only in the country a very short period of time, INS had not expressed an interest in him but, if they did, it would be a problem and that he had to do everything he could do to stay out of trouble and not have them express an interest in him.

*Id.* at 65-66.

Chiem testified that he remembered nothing that the court had told him at the Rule 11 hearing, apart from how much time he would spend in jail. *Id.* at 116-17. Trieu testified that he did not recall exactly how he translated the Rule 11 hearing. May PCR Transcript, Vol. II at 154. As a general matter, he recalled that “[a]t the time [he] would summarize when everyone speaking at one [sic] all [he] could do is just summarize what’s being said the best [he] could.” *Id.* at 158-59. He stated that several key words or phrases are not readily susceptible to translation into Vietnamese, including “reasonable doubt,” “conscious object” and “presumption of innocence.” *Id.* at 184, 187-88, 198-99. Trieu’s training as a translator did not include instruction on the translation of legal phrases. *Id.* at

---

<sup>5</sup> Because the Superior Court, in ruling on the merits of Chiem’s petition, melded his third and fourth grounds for review into one, I have done the same here. See Order on Petition for Post-Conviction Review (“State PCR Order”), *Chiem v. State*, filed with (continued on next page)

225-26. The Chiem case was the most serious criminal matter for which Trieu served as an interpreter, the previous criminal cases on which he had worked having been minor traffic violation matters. *Id.* at 172.<sup>6</sup>

Prior to the Rule 11 hearing Vincent had advised Chiem at least twice of the constitutional rights that Chiem would be waiving if he were to plead guilty. June PCR Transcript at 68 & Plaintiff's Exh. 6 thereto. Although Vincent met frequently with Chiem without an interpreter, he made sure that in the context of describing important legal principles (such as Chiem's Rule 11 rights) an interpreter was present. *Id.* at 66-67. Two Portland police officers who interviewed Chiem following his arrest testified that they communicated with him in English. *See, e.g., id.* at 161-63 (testimony of Stephen D. Taylor that he read Chiem his *Miranda* rights and Chiem waived them), 166 (testimony of Gary L. Hutcheson that Chiem seemed to understand English and Hutcheson had no trouble communicating with him).

By decision dated November 8, 1999 the Superior Court denied Chiem's post-conviction review petition. *See generally* State PCR Order. The court held two of the three grounds of the petition (all but that alleging ineffective assistance of counsel) time-barred. *Id.* at 3-4. However, it ruled that even had these grounds not been time-barred, Chiem still would have lost on the merits, explaining:

A review of the record and the evidence of the Rule 11 proceeding reflects that the petitioner was adequately informed of his constitutional rights, including his rights to a jury trial and against self-incrimination, and that the presiding justice's Rule 11 inquiries were constitutionally adequate. Based upon this determination, the petitioner

---

Response, at 2, 6-7.

<sup>6</sup> To a limited extent the State PCR Court permitted Trieu to translate certain phrases into Vietnamese; for example, "intentionally, knowingly and recklessly" and "plea of guilty." May PCR Transcript, Vol. II at 166-68. The State objected to Chiem's counsel's repeated attempts to elicit such testimony on relevance grounds given that Trieu testified he did not recall how he translated the Rule 11 hearing. *See, e.g., id.* at 157, 173. Thai Ngoc Nguyen, an attorney and native of Vietnam who testified on behalf of Chiem, disputed the accuracy of most of the handful of Vietnamese translations Trieu had given. *See id.*, Vol. III at 286-97. Thai testified that, in his opinion, a person could not accurately perform a simultaneous translation of what the court said to Chiem at the Rule 11 hearing without special legal training. *Id.* at 299.

bears the ultimate burden of proving that his guilty plea was in fact not voluntary and knowing.

To this end, the petitioner is left with the argument that his guilty plea was not constitutionally valid because his court-appointed interpreter at the Rule 11 proceeding was not sufficiently fluent in his native language – Vietnamese. However, the petitioner has not presented sufficient credible evidence in support of this proposition and has failed to meet his burden of proof on this issue. Accordingly, the court cannot conclude that the petitioner did not understand and did not knowingly and voluntarily waive his constitutional rights as explained to him by the court at the Rule 11 proceeding.

*Id.* at 6-7 (citation omitted).

With respect to Chiem’s ineffective-assistance ground, the court ruled in relevant part that even if Chiem were not actually aware of the risk of deportation and even if his attorney did not inform him of it either adequately or at all, the claim still would fail in part because “the risk of deportation is a collateral consequence and cannot support a claim of ineffective assistance of counsel.” *Id.* at 5 (citing *Nunez Cordero v. United States*, 533 F.2d 723, 726 (1st Cir. 1976), and *United States v. Quin*, 836 F.2d 654 (1st Cir. 1988)).

On November 29, 1999 Chiem filed a notice of appeal of the Superior Court’s decision. State PCR Docket at 4 (entry of Nov. 29, 1999). The Law Court on April 4, 2000 denied a certificate of probable cause, ruling that “upon consideration of the complete record of the proceedings in the Superior Court and any memorandum filed by the petitioner in support of his request for a certificate of probable cause, it is apparent that the appeal does not raise any issue worthy of being fully heard[.]” Order Denying Certificate of Probable Cause, *Chiem v. Maine*, Docket No. Cum-99-706 (Me. April 4, 2000), filed with Response.

Chiem filed an initial petition and memorandum in the instant action on December 20, 2000. Petition for Habeas Corpus Relief (“Original Petition”) (Docket No. 1) at 1; Memorandum of Law in Support of Petition for Habeas Corpus Relief Pursuant to Title 28 U.S.C. Section 2254 (Docket No. 1)

at 1. On February 2, 2001 he filed his amended petition and memorandum. Petition at 1; Memorandum at 1.

## II. Discussion

Chiem seeks relief pursuant to 28 U.S.C. §§ 2254 and 2241 on three grounds: (i) ineffective assistance of counsel, based on Vincent's failure to advise him of (or, alternatively, misrepresentation of) the INS consequences of his plea, Memorandum at 8-25,<sup>7</sup> (ii) denial of his Fifth and Sixth Amendment rights to a fair trial and due process of law, based on the asserted inadequacy of Trieu's translation of the Rule 11 proceeding and the trial court's failure to ensure that Chiem (through Trieu) knowingly, voluntarily and intelligently waived his rights, *id.* at 26-34, and (iii) the asserted unconstitutionality of Chiem's confinement without possibility of release as a result of the revocation of his public-interest parolee status, *id.* at 35-36.<sup>8</sup>

As a threshold matter, the State acknowledges that because the Law Court did not expressly rest denial of a certificate of probable cause on Chiem's procedural default, this court is not barred from reaching the merits of the defaulted claims. Response at 10 (citing *Carsetti v. Maine*, 932 F.2d 1007, 1010 (1st Cir. 1991)). The State also concedes the timeliness of the instant petition in view of Chiem's inability to have discovered the factual predicate for his ineffective-assistance claim until

---

<sup>7</sup> Chiem describes his ineffective-assistance claim as having two components: "counsel's failure to advise him of the fact that his plea would result in his deportation, and . . . counsel's failure to provide him with information sufficient for Petitioner to make a meaningful waiver of his constitutional rights at the time of his plea." Memorandum at 12. However, Chiem never identifies an omission by counsel apart from his alleged failure to explain the immigration consequences of the guilty plea. *See id.* at 8-25. The State understandably considered the second component to be a restatement of the first, and did not address it separately. Response at 5 n.5.

<sup>8</sup> Inasmuch as, at the time of filing of the instant petition, Chiem continued to serve his four-year sentence of probation on the underlying state charge here challenged, this court has jurisdiction to adjudicate his habeas petition. *See, e.g., Tinder v. Paula*, 725 F.2d 801, 803 (1st Cir. 1984) (continuation of parole or probation status at time of filing of habeas petition tantamount to "custody" for jurisdictional purposes).

February 1999. *Id.* at 7-8.<sup>9</sup> The State nonetheless argues that (i) as to Chiem’s first two grounds for relief, the State PCR Court’s findings on the merits are unassailable under the applicable standard of review, *id.* at 8-17, and (ii) as to the third ground, no proper party defendant is joined against whom the relief sought can be granted, *id.* at 6. I agree.

Chiem’s first two grounds for relief implicate 28 U.S.C. § 2254, which provides in relevant part:

(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.

As the First Circuit has observed, this language “exalt[s] the role that a state court’s decision plays in a habeas proceeding by specifically directing the habeas court to make the state court decision

---

<sup>9</sup> I question the correctness of the State’s apparent assumption that late discovery of the factual predicate for one claim excuses the late filing of all claims set forth in a section 2254 petition, regardless when the factual predicates for those other claims were or should have been discovered. I find no caselaw precisely on point; however, the language of the controlling statute of limitations indicates that the late-discovery exception is claim-specific. *See* 28 U.S.C. § 2244(d)(1)(D) (habeas petition must be brought within one year of “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”). Nonetheless, habeas statute-of-limitations defenses are waivable, *see, e.g., Fadayiro v. United States*, 30 F. Supp.2d 772, 779 (D.N.J. 1998) (“Because the limitations period in the AEDPA [Antiterrorism and Effective Death Penalty Act of 1996] is not considered a limit on the subject matter jurisdiction of the district courts, it is subject to tolling and waiver.”), and the State interposes no such defense in this case.

the cynosure of federal review.” *O’Brien v. DuBois*, 145 F.3d 16, 20 (1st Cir. 1998). “Only if that decision deviates from the paradigm described in section 2254(d) can a habeas court grant relief.” *Id.*

### **A. Ground One: Ineffective Assistance of Counsel**

In the context of assertions of ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), provides the Supreme Court’s guidepost for analysis. A habeas petitioner first must demonstrate that counsel’s performance was deficient, *i.e.*, that his or her attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Second, the petitioner must show prejudice, *id.*, which in the context of a challenge to a guilty plea entails proof that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial,” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A court need not consider the two elements in any particular order; failure to establish either precludes judgment in the petitioner’s favor. *Strickland*, 466 U.S. at 697. The court “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (quoting *Strickland*) (internal quotation marks omitted).

Chiem assails the State PCR Court’s conclusions on both prongs of the *Strickland* analysis: (i) its legal conclusion that failure to advise a defendant adequately (or at all) of the deportation consequences of a guilty plea cannot constitute ineffective assistance of counsel, and (ii) its factual conclusion that, in any event, Chiem fell short of demonstrating that had he known of those deportation consequences, he would not have pleaded guilty. Memorandum at 12-25. Consideration of the first of these challenges is dispositive of Chiem’s claim.

As Chiem recognizes, the State PCR Court simply straightforwardly applied First Circuit precedent in ruling that failure to advise a defendant (at all) of the deportation consequences of a guilty plea cannot constitute ineffective assistance of counsel. *See* Memorandum at 12, 19; *see also* State PCR Order at 5; *Quin*, 836 F.2d at 655 (noting that deportation “is generally regarded as a collateral consequence, only, viz., legally irrelevant, even as to an outright guilty plea”).<sup>10</sup> Nonetheless, Chiem struggles to assail this portion of the State PCR Court’s ruling on grounds that (i) the Law Court had not yet addressed the issue and (ii) other state courts had taken “a more enlightened approach” than the First Circuit. Memorandum at 13-14, 19-20. Those facts are irrelevant. This portion of the State PCR Order was neither “contrary to” Supreme Court precedent, inasmuch as no controlling precedent existed, nor an “unreasonable application” of such precedent inasmuch as the State PCR Court faithfully followed controlling lower federal court caselaw on point. *See O’Brien*, 145 F.3d at 25 (“To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court’s treatment of the contested issue.”).

Chiem in addition challenges that portion of the State PCR Order holding that inadequate advice concerning deportation cannot constitute ineffective assistance of counsel. Memorandum at 22-24. Chiem relies on *Wogan v. United States*, 846 F. Supp. 135 (D. Me. 1994), for the proposition that an attorney’s “misrepresent[ation of] the realities of [a defendant’s] case” constitutes ineffective assistance. Memorandum at 23-24. In Chiem’s view, Vincent’s advice to “stay out of trouble” and hope that the INS did not “express an interest in [Chiem]” greatly misrepresented the realities of

---

<sup>10</sup> Since the State PCR Order, the First Circuit has reaffirmed that deportation is a “collateral consequence” and that failure to advise of that consequence does not constitute ineffective assistance of counsel. *See United States v. Gonzalez*, 202 F.3d 20, 27-28 (1st Cir. (continued on next page))

Chiem's alien status in the calculus of the decision whether to enter a guilty plea. *Id.* at 24. *Wogan*, which turns on radically different facts, is inapposite. *Wogan*, 846 F. Supp. at 142 (counsel failed to advise defendant that, in electing not to testify, he risked being found responsible for larger drug quantity if government successfully appealed downward departure). However, my research reveals that there is caselaw standing for the proposition that an affirmative misrepresentation to a defendant of the deportation consequences of a conviction/guilty plea can constitute ineffective assistance of counsel. *See, e.g., Downs-Morgan v. United States*, 765 F.2d 1534, 1538-41 (11th Cir. 1985) (remanding case for evidentiary hearing whether misrepresentation that petitioner would not be deported constituted ineffective assistance under circumstances); *United States v. Khalaf*, 116 F. Supp.2d 210, 214-15 (D. Mass. 1999) (counsel's erroneous advice that Judicial Recommendation Against Deportation would protect petitioner from deportation, upon which petitioner substantially relied in deciding to plead guilty, constituted ineffective assistance).

This line of caselaw nonetheless does not aid Chiem. The State PCR Court found that Vincent's statements constituted at most an inadequate explanation (as opposed to an "affirmative misrepresentation"). *See* State PCR Order at 5. Indeed, unlike in *Downs-Morgan* or *Khalaf*, there is no evidence that Vincent ever reassured Chiem that he was not at risk of being deported. Vincent's statements instead were in the nature of warnings, albeit vague and inadequate ones. In any event, even assuming *arguendo* that Vincent's statements could be said to have constituted a "misrepresentation," Chiem testified unequivocally that Vincent told him nothing about deportation consequences. Hence, Chiem plainly could not show that the asserted misrepresentation "prejudiced"

---

2000) (affirming prior holdings that application of the collateral-consequences doctrine "bar[s] any ineffective assistance claims based on an attorney's failure to advise a client of his plea's immigration consequences.").

his case in the sense that, but for his reliance upon it, he would have taken his chances at trial. *Compare, e.g., Khalaf*, 116 F. Supp.2d at 215 (petitioner had relied on misrepresentation in deciding to plead guilty). The State PCR Order accordingly constituted an objectively reasonable application of controlling precedent to the facts of Chiem's case. *See Phoenix v. Matesanz*, 233 F.3d 77, 81 (1st Cir. 2000) (“[U]nder § 2254(d)(1)'s ‘unreasonable application’ clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”) (citation and internal quotation marks omitted).

### **B. Ground Two: Denial of Rights to Due Process and Fair Trial**

In his second ground for relief, Chiem challenges the State PCR Court's finding that he failed to present sufficient credible evidence to meet his burden of proving that Trieu's translation of his Rule 11 hearing was so inadequate as to be constitutionally deficient. Memorandum at 31. Chiem asserts that (i) he established that it was doubtful, at best, that there was a complete and meaningful translation, (ii) Trieu, who was not a certified court interpreter, could not remember how he translated the hearing, (iii) Trieu acknowledged that he merely “summarized” the court's statements, and (iv) Trieu testified that several key words are not readily susceptible to translation into Vietnamese. *Id.* at 31-32. As a result, Chiem argues, one cannot possibly conclude that he made a knowing and intelligent waiver of his rights. *Id.* at 32. He further complains that despite these circumstances the trial court merely recited the Rule 11 verbiage, making no special effort to ensure that his waiver of rights was knowing and intelligent. *Id.* at 32-33.

The State characterizes this second ground for relief as a challenge to the State PCR Court's “factual” findings. *See* Response at 10-11. I view it instead as a challenge to the State PCR Court's

finding, as a matter of law, that Chiem failed to adduce sufficient evidence to prove that Trieu's interpretation of the Rule 11 hearing was constitutionally deficient (*i.e.*, "fundamentally unfair"). *See, e.g., United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990) ("The basic constitutional inquiry remains unchanged [in the wake of enactment of the Court Interpreters Act, 28 U.S.C. § 1827]: whether any inadequacy in the interpretation 'made the trial fundamentally unfair.'"); *see also United States v. Arthurs*, 73 F.3d 444, 447 (1st Cir. 1996) ("From what we can ascertain, we cannot say that [the defendant's] language problems were of such a magnitude as to have deprived him of a fair trial.").

Chiem's task, even as correctly characterized, remains daunting: to show that the State PCR Court not only erroneously but also objectively unreasonably applied controlling precedent in determining that he fell short of meeting his burden of proof. As an initial matter, it is clear that the State PCR Court properly cast the burden of proof on Chiem despite the hardship of the absence of any recording or other transcription of the Vietnamese-language portion of his Rule 11 hearing. *See, e.g., Parke v. Raley*, 506 U.S. 20, 30 (1992) ("On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights.").<sup>11</sup>

At bottom, Chiem simply was unable to adduce much evidence that as he stood before the court on the day of his Rule 11 hearing he did not understand his rights. Neither Chiem nor Trieu could

---

<sup>11</sup> Chiem relies heavily on *Boykin v. Alabama*, 395 U.S. 238 (1969), and *McCarthy v. United States*, 394 U.S. 459 (1969), in arguing that his Rule 11 waiver of constitutional rights was not knowing, intelligent or voluntary. Memorandum at 32-34. In *Boykin*, a state trial judge accepted the petitioner's guilty plea to an offense punishable by death without, insofar as the record showed, asking any questions of the petitioner. *Boykin*, 395 U.S. at 239. On direct appeal, the Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242; *accord McCarthy*, 394 U.S. at 466 (noting, in context of challenge to federal Rule 11 proceeding, "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."). *Parke*, in which the petitioner collaterally attacked his state conviction, distinguished *Boykin* on that ground, noting: "Our precedents make clear . . . that even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant." *Parke*, 506 U.S. at 31. The State PCR Court therefore (*continued on next page*)

remember what Trieu said in Vietnamese to Chiem on that day. Vincent testified that, with the aid of an interpreter, he had gone over Chiem's rights with him twice prior to the Rule 11 hearing. The testimony of Vincent and of two police officers indicated that, to a certain extent, Chiem could communicate in English. Finally, the English transcript of the Rule 11 proceeding reflected that no contemporaneous question or objection was raised about the quality of Trieu's interpretation or Chiem's understanding of the proceedings – thus failing to put the trial court on notice of a need to take any unusual measures to press whether Chiem truly comprehended the waiver of his rights. *See Joshi*, 896 F.2d at 1310 (“A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objection to the quality of the interpretation.”); *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (“Only if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.”).

Under these circumstances, the State PCR Court reasonably could have determined that Chiem failed to adduce sufficient evidence to demonstrate, either by virtue of the trial court's or the interpreter's asserted shortcomings, that the Rule 11 proceeding was fundamentally unfair or that his waiver of rights was unknowing or unintelligent.

### **C. Ground Three: Unconstitutionality of Detention Without Bond**

In his third ground for relief, Chiem asserts that he is entitled to be released on bail based on the unconstitutionality of federal immigration statutes that require his indefinite detention without possibility of bond. Memorandum at 35-36.

---

correctly assigned the burden to Chiem to overcome the presumption of the regularity of his Rule 11 proceeding.

In his initial petition, Chiem named United States Attorney General Janet Reno and Kennebec County Jail Administrator Raymond Wells among the respondents in this case. Original Petition at 1. In ordering the State of Maine to file a responsive pleading, this court observed: “Under the roof of his § 2254 petition Chiem houses an additional ground for relief [Ground Three]; this ground seems to be the impetus for Chiem’s naming of Wells and Reno as respondents.” Order To Answer (Docket No. 2). Noting that this request for relief appeared potentially to fall under the rubric of 28 U.S.C. § 2241 rather than section 2254 and that “the petition in its current form is not clear in this regard,” the court ordered Chiem to file an amendment to his petition clarifying this ambiguity. *Id.*

Chiem amended his petition to delete Reno and add Jeffrey Newton, administrator of the Cumberland County Jail, as a respondent, Petition at 1, and clarified that he based his claims on section 2241 as well as on section 2254, Memorandum at 2. The court ordered the United States of America (in addition to the State of Maine) to respond. Order To Answer (Docket No. 5). The United States of America noted *inter alia* that it was not a party to the proceeding and that Reno would not in any event have been the appropriate respondent in the context of a claim challenging Chiem’s arrest by the INS. Response by the United States of America to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, etc. (Docket No. 6) at [2]-3. For its part, the State noted that it was not a party to the INS action and could therefore offer no further response to Ground Three. Response at 6. Chiem never sought to amend his petition to add a proper party defendant. Inasmuch as the relief sought cannot be granted, Ground Three should be dismissed without prejudice. *See, e.g., Fellows v. Raymond*, 842 F. Supp. 1470, 1471 (D. Me. 1994) (“[I]n the typical prospective assault on the constitutionality of a state statute, the state judge is not a proper party defendant under § 1983 because he has no stake in upholding the statute: he is not the plaintiff’s adversary, and the complaint should be

dismissed for failure to state a claim upon which relief can be granted.”) (citation and internal quotation marks omitted).

### III. Conclusion

For the foregoing reasons, I recommend that Grounds One and Two of the petitioner’s habeas corpus petition be **DENIED** with prejudice without an evidentiary hearing, and that Ground Three be **DISMISSED** without prejudice.

### 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 21st day of June, 2001.*

---

*David M. Cohen  
United States Magistrate Judge*

MAG ADMIN

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-394

CHIEM v. KENNEBEC COUNTY JAIL, et al

Filed: 12/22/00

Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

DE DE CHIEM                      RICHARD S. BERNE, ESQ.  
    plaintiff                      [COR LD NTC]  
   BERNE & LAFOND  
   22 FREE ST.  
   SUITE 801  
   PORTLAND, ME 04101  
   871-7770

   BRUCE M. MERRILL, ESQ.  
   [COR LD NTC]  
   225 COMMERCIAL STREET  
   SUITE 401  
   PORTLAND, ME 04101  
   775-3333

v.

ATTORNEY GENERAL, US  
    defendant  
[term 02/02/01]

MAINE, STATE OF                      LAURA YUSTAK SMITH, ESQ.  
    defendant                      [COR LD NTC]  
   ASSISTANT ATTORNEY GENERAL  
   STATE HOUSE STATION 6  
   AUGUSTA, ME 04333  
   626-8800

ADMINISTRATOR, KENNEBEC COUNTY  
JAIL  
    defendant

ADMINISTRATOR, CUMBERLAND  
COUNTY JAIL  
defendant

USA  
defendant

MARGARET D. MCGAUGHEY, ESQ.  
[COR LD NTC]  
OFFICE OF THE U.S. ATTORNEY  
P.O. BOX 9718  
PORTLAND, ME 04104-5018  
(207) 780-3257