

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

JAMES MELVILLE ALLEY )  
 )  
 Petitioner )  
 )  
 v. ) Civil No. 01-020-P-C  
 )  
 STATE OF MAINE )  
 )  
 Respondent )

***RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION FOR WRIT OF  
HABEAS CORPUS***

James Alley has filed a petition for writ of habeas corpus challenging his state conviction and the revocation of his probation pursuant to 28 U.S.C. § 2254. (Docket No. 1.) The State of Maine has answered. (Docket No. 4.) After a thorough review of these submissions I recommend that Alley’s petition be **DENIED**.

***Background***

The grounds for relief raised by Alley involve proceedings that span a decade. On December 12, 1990, after a two-day jury trial, Alley was convicted in state court on two counts: burglary of a dwelling place and theft by unauthorized taking or transfer. (Cr. 90-1952 Docket at 3.) On March 1, 1991, the court sentenced Alley to concurrent split terms of eight years on each count, with all but two years suspended, and provided for four years of probation. (Id. at 4-5.) Alley in no way appealed this judgment or sentence. (Id. at 5.) Alley was released on February 11, 1992, commencing his four-year period of probation.

However, Alley continued to run afoul of the law. He was indicted on May 7, 1992, for a home burglary committed on March 28, 1992. (CR 92-794 Docket at 1; Cr. 92-794 Indictment.) A motion to revoke Alley's probation with respect to his earlier convictions was filed on May 7, 1992. (CR 90-1952 Docket at 5.) The matters were joined at a hearing in open court on July 28, 1992, in a proceeding at which Alley changed his plea from not guilty to guilty as to the 1992 burglary charge and admitted the violation of probation as to the 1990 sentence. (Tr. July 28, 1992, at 1, 3-6, 11 -12; CR 92-794 Docket at 1.) As a result, Alley was sentenced at a hearing in open court on November 19, 1992. (Tr. Nov. 19, 1992; CR 92-794 Docket at 1 reverse.) Alley's probation on his 1990 sentence was terminated and the suspension was vacated as to the entire remaining portions of the concurrent underlying sentences. *Vis-à-vis* the 1992 conviction, Alley was sentenced to ten years, with all but two years suspended, followed by four years of probation. These sentences for the probation violation and the new criminal conduct were to be served consecutively. (Tr. Nov. 19, 1992 at 66-67, 69, 71-75; CR 90-1952 Docket at 6; CR 92-794 Docket at 1 reverse.)<sup>1</sup>

Alley did not pursue a direct appeal of his 1992 conviction to the Law Court. In 1992 Alley filed a timely application to allow an appeal of his split sentence on the 1992 conviction. (Cr 92-794 Docket at 1 reverse.) The Law Court denied Alley leave to appeal. (Me. Sup. Jud. Ct. Order Jan. 20, 1993.)

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<sup>1</sup> With respect to the December 12, 1990 conviction, Alley did not appeal the 1992 revocation of his probation. He did make an untimely, and thus unsuccessful, (Me. Sup. Jud. Ct. Order Jan. 20, 1993), appeal of the concurrent sentences. (Cr. 90-1952 Docket at 6.) He was discharged from this sentence on February 21, 1996. The 1990 conviction is not relevant to the current petition aside from the fact that it is the baseline in an intermittent series of charges that triggered a sequence of sentences, of which the 1998 probation revocation is one.

Alley's four-year probationary period began to run upon his release from the pre-release center on December 17, 1996. Two motions to revoke Alley's probation vis-à-vis the 1992 conviction and sentence were launched in the summer of 1997. (Mot. Prob. Revocation July 14, 1997; Mot. Prob. Revocation Aug. 19, 1997; Cr. 92-794 at 3 reverse). These two motions proceeded to hearing in front of the Maine Superior Court on April 15, 1998. (Tr. Apr. 15, 1998; Cr 92-794 Docket at 4 reverse.) The transcript demonstrates that Alley admitted two violations of probation conditions. (Tr. Apr. 15, 1998, at 1-3.)<sup>2</sup> Per the parties' agreement, the court unsuspended fifteen months of Alley's remaining probation on the 1992 conviction. (Tr. Apr. 15, 1998 at 3-4, 7; Rev. Probation Apr. 15, 1998; Cr 92-794 Docket at 3 reverse). Alley began serving his fifteen-month term on April 21, 1998, and he was released from the pre-release center on December 14, 1998.

On November 30, 1998, Alley filed a *pro se* motion seeking to reduce his sentence and to terminate his probation, challenging the April 15, 1998, proceedings. (Def. Mot. Reduction Sentence; Cr 92-794 Docket at 3.) Alley, accompanied by court-appointed counsel, had a hearing on this motion on June 2, 1999. (Tr. June 2, 1999; Cr 92-794 Docket at 3.) The court denied the motion, concluding that, given the current posture of the case, there was no available procedural avenue within its embrace by which Alley could challenge his 1992 sentence or the 1998 revocation of probation. (Tr. June 2, 1999, at 2-8.)

On May 4, 2000, Alley filed a notice of appeal to the Law Court pursuant to Maine Rule of Criminal Procedure 37. (Notice Appeal Adverse Order Me. R. Civ. Proc. 37C; Cr 92-794 Docket at 3.) The Law Court dismissed this proffer as out of time. (Cr

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<sup>2</sup> Alley's contest of one of two of these admissions is addressed later in this recommended decision.

92-794 Docket at 3 reverse.) However, by dint of a case management miscue, the April 1998 revocation of probation was not docketed until May 11, 2000. On May 19, 2000, Alley filed an exact copy of his May 4, 2000, notice of appeal. (Notice Appeal Me. R. Civ. Proc. 37; Cr 92-794 Docket at 3 reverse.) He filed an additional notice of appeal to the Law Court on May 24, 2000. This appeal was premised on Maine Rule of Criminal Procedure 37F, attacking the 1998 probation revocation order.<sup>3</sup> The Law Court apparently treated both appeals as timely by virtue of the rules' respective subsections (c), which affords the appellant twenty days from the docketing of the adverse order to appeal. Me. R. Crim. Proc. 37C(c); Id. 37F(c).<sup>4</sup>

The Law Court responded on August 29, 2000, with an "Order Denying Certificate of Probable Cause" in which it denied Alley a certificate of probable cause to proceed with the consolidated appeals. (Order Den. Certificate Probable Cause; Cr. 92-794 Docket at 4.) Subsequently, the Law Court denied Alley's motion to recall this order, but amended the August 29, 2000, order to "delete any reference to post-conviction review." (Sup. Jud. Ct. Order Sept. 11, 2000). In due course, the Law Court denied

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<sup>3</sup> Alley challenged both the April 1998 probation revocation determination and the superior court's denial of his November 1998 motion for a reduction of the sentence. With respect to the former challenge, he moved pursuant to Maine Rule of Criminal Procedure 37F. This rule establishes the procedure for appealing a probation revocation by the superior court to the Law Court pursuant to 17-A M.R.S.A. § 1207 (West Supp. 2000). See Me. R. Crim. P. 37F. Section 1207 of title 17-A of the Maine Revised Statutes Annotated provides that review of a revocation is by appeal. 17-A M.R.S.A. § 1207. Though the statute has since been amended, see id. (effective January 1, 2001, the only relief from revocation determinations made by the district court is in the superior court, and those challenging revocation decisions made in the superior court can seek relief from the Law Court, but there is no appeal as of right), Alley lodged his appeal of his revocation under a version of the statute that identified a direct appeal to the Law Court.

With respect to his November 1998 challenge to the denial of his motion for a reduction of the sentence imposed at the April 1998 proceeding, Alley moved pursuant to Maine Rule of Criminal Proceeding 37C. This rule governs appeals to the Law Court from adverse orders entered on motions for correction or reduction of sentences. See Me. R. Crim. P. 35.

<sup>4</sup> There is a docket entry that indicates that the Law Court issued an "Order of Consolidation" on May 25, 2000. Though this order is not contained in the record, it appears to have consolidated the notice of appeal originally filed on May 4, 2000, and refilled on May 19, 2000, with the notice of appeal filed on May 24, 2000. (Cr 92-794 Docket at 3 reverse-4.)

Alley's "motion to amend motion to recall order denying certificate of probable cause for obvious error." (Sup. Jud. Ct. Order Nov. 9, 2000.)<sup>5</sup>

### *Grounds Raised*

Alley mounts four challenges to his 1992 sentence and the 1998 revocation of his probation. First, the split sentence imposed in 1992 exceeded a ten-year cap to which the parties had agreed. Second, it was inappropriate for the probation officers, and not the court, to modify upon his release in 1996 the terms specified by the 1992 sentencing court concerning treatment and counseling during probation. Third, the April 15, 1998, revocation of probation was improper because it was premised on a false-positive urinalysis that identified Alley's prescription drug(s) as marijuana. Alley alleges that the probation officer knew this result to be false and purposefully used this result (and an ill-gotten, discredited second false-positive) to revoke Alley's probation. He further alleges that as the result of this false-positive test Alley was arrested and detained until he falsely admitted to drug use and permitted a psychological evaluation. And fourth, Alley alleges that his attorney failed to controvert the false-positive drug test.<sup>6</sup>

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<sup>5</sup> With respect to the 1992 sentence, Alley has faced additional motions to revoke his probation since the summer of 1999. (Mot. Prob. Revocation Sept. 7, 1999; Mot. Prob. Revocation Feb. 3, 2000; Cr 92-794 Docket at 2 reverse – 3; PORSC-CR-1992900794 Docket at 3.) A hearing was held on April 13, 2000, with the matter continued. Though there is no transcript of the proceeding in the record, it appears from the docket that on January 29, 2001, Alley admitted new violations of probation and the court entered a judgment to that effect. (PORSC-CR-19992-00794 Docket at 6.) This § 2254 petition was filed prior to this order and is not challenging that determination.

<sup>6</sup> I treat Alley's fourth ground principally as an ineffective assistance of counsel claim, as that is its strongest characterization for § 2254 purposes. With respect to this ground, Alley also attacks a state attorney's subsequent claim, at the June 2, 1999, hearing on Alley's motion to terminate the April 1998 revocation, that the 1998 revocation was not based on either of two drug test results. Alley seems to argue that the statements are probative of the State's true intent at the 1998 revocation hearing to proceed on the basis of what Alley contends are two flawed test results.

At the June 2, 1999, hearing on Alley's probation revocation the dialogue concerning the 1998 revocation was:

Prosecutor: It appears in the August 15<sup>th</sup> motion from 1997 there were three allegations [sic] that he was alleged to have violated. The notes in my file indicate that the state did not proceed on count – the first violation and the second violation. The first one alleged new criminal conduct, the second one alleged the defendant had used unlawful drugs. My notes indicate the State only

## *Discussion*

Dismissal of Alley's petition is appropriate at any time if it appears that the action fails to state a claim on which relief may be granted. R. Governing Sec. 2254 Cases 8 (vesting court with the discretion to dispose of a petition without an evidentiary hearing); see also *id.* 4 ("If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for summary dismissal.").

### *A. Grounds one and two are time barred*

Alley's challenge to the 1992 sentence is time-barred, as is his challenge to the 1996 "modification" of his sentence. Petitioners moving for habeas relief from their state court convictions and/or sentences must file their motions within a year of the date that the judgment became final. 28 U.S.C. § 2244(d)(1) (one year statute of limitation applicable to judgments that became final after the 1996 effective date of the

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proceeded on the allegation the defendant had failed to report. And it appears from the documentation that I reviewed from Mr. Alley that he's contesting the validity of the drug and alcohol test or the drug test that probation was using at the time. And if the State didn't proceed on that basis for the probation violation, then whatever problem Mr. Alley may have with the tests that were performed by probation, it's really not relevant to the determination that the Court made at the time that the 15 months was an appropriate revocation for his having failed to report. The Court: Well, obviously, as I said, one or more of those allegations set forth in the motion of the probation officer apparently relied upon by the Court in its finding that he had violated the terms and, therefore, revoked his probation partially. And which one or ones, I don't know. Maybe all three, maybe not. But with respect to that the only way to – to have that reviewed and determined as to its appropriateness and lawfulness is by an appeal, which was not done. So you don't really get back to that point, from my perspective at this time, we could get into the argument of whether the Court was right or wrong, but it doesn't do anybody any good from a procedural standpoint in reaching any other conclusion than that that's already there. (Tr. June 2, 1999 at 4-6.)

The interchange suggests that the attorney for the State in the 1999 proceeding was relying on notes in making the representation to the court and that the court determined that whether the 1998 determination was based on only the failure to report or on one or both of the drug tests was a concern that was out of its grasp given the procedural posture of the case. For purposes of this review, I address the merits of Alley's challenge to the 1998 revocation hearing based upon what was before that court, and the challenges Alley made to that determination to the Law Court, and not on the somewhat fuzzy understanding of a previously uninvolved district attorney. These after-the-fact representations (by a district attorney who had not represented the state at the revocation hearings) are no more than make-weights with respect to the process afforded in April of 1998.

Antiterrorism and Effective Death Penalty Act enacting the § 2244(d)(1) limitation period); Gaskins v. Duval, 183 F.3d 8, 9 (1<sup>st</sup> Cir. 1999)(concluding that habeas petitioners whose § 2254 cause of action accrued prior to the effective date of the AEDPA have a one-year grace period for filing their petition running from April 24, 1996). The 1992 judgment became final long before the January 22, 2001, filing of the present petition.<sup>7</sup>

However, with respect to Alley’s challenges to the 1998 revocation proceeding, § 2244(d)(1) is no bar as a result of the State’s two-year delay in docketing the revocation order. With the Law Court rejecting his suspended challenge in September of 2000, his January 22, 2001, § 2254 petition as it relates to the 1998 determination falls well within the one-year statute of limitations imposed by the § 2244(d)(1). Thus, grounds three and four must be addressed.

Regarding his second ground, Alley does tether the probation officers’ “major modifications” in his conditions of probation at the time of his 1996 release, without court process, to the 1998 probation revocation. He asserts that the probation officers merely threw “him out on the street” rather than providing him with counseling programs that would assist him in the transition, assistance anticipated by the 1992 sentencing court. The State argues that this alleged deficiency should have been addressed by Alley at the time of his 1996 release pursuant to 17-A M.R.S.A. § 1202(2). To the extent that Alley challenges the fact of the alleged changes in the condition of his release, this view is correct and those claims are time-barred. However, to the extent that the ground two allegations relate to the determination made at the April 1998 revocation hearing, these

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<sup>7</sup> It also appears that Alley did not exhaust his state remedies with respect to challenging this determination. See discussion of exhaustion requirements infra.

claims are not time-barred and are addressed further on in this discussion. Thus, I recommend that grounds one and two be dismissed as time barred.

***B. Alley's claims relating to the 1998 revocation of probation have been exhausted in state court***

Examining Alley's third and fourth asserted grounds, as well as his supporting materials,<sup>8</sup> and reading them liberally in Alley's favor, see Haines v. Kerner, 404 U.S. 519, 520 (1972)(holding *pro se* pleadings to less stringent standards than lawyer drafted pleadings), it is possible to break-out and reconfigure the allegations into two tenable constitutional challenges. Alley's claims of irregularities, bias, and fraud by his probation officer concerning the probation revocation proceedings are cognizable in a federal court's habeas review of a state judgment because they raise concerns that he was denied the due process protections of the Fourteenth Amendments. Black v. Romano, 471 U.S. 606, 610 (1985)("The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation."). Furthermore, his complaints concerning his attorney's failure to provide adequate representation is a commonplace fixture in federal habeas review. See Strickland v. Washington, 466 U.S. 668 (1984)(formulating standard by which to measure ineffective assistance claims); Knight v. United States, 37 F.3d 769, 774 (1<sup>st</sup> Cir. 1994)("[T]his court has repeatedly held that collateral attack is the preferred forum for [ineffective assistance] claims, since there is often no opportunity to develop the necessary evidence where the claim is first raised on direct appeal.").

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<sup>8</sup> Attached to his petition is a transcript of the April 1998, hearing. On this copy Alley has made many interlineations and margin notes that both challenge the accuracies of statements made and the fact that the statements were made. (Pet'r App.) He also asserts that some statements made at the hearing do not appear on the transcript. (*Id.*) See infra note 15.

Alley can only raise federal claims in front of this court that he raised and fully pursued in the state tribunals: “An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted unless it appears that ...the applicant has exhausted the remedies available in the courts of the [s]tate.” § 2254(b)(1)(A). The First Circuit has made it crystal clear that, in order for Alley’s petition to have any sustainability in this court, he must have “tendered” all his grounds “in an appropriate fashion to the state courts.” Martens v. Shannon, 836 F.2d 715, 717 (1<sup>st</sup> Cir. 1988). Passing reference is not enough; “the exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined.” Id. See also Adelson v. Dipaola, 131 F.3d 259, 261-62 (1<sup>st</sup> Cir. 1997) (observing the need for consistent and rigorous enforcement of the exhaustion requirement by federal courts entertaining a habeas petition challenging a state court judgment).

Thus, it is necessary to scrutinize Alley’s consolidated memorandum to the Maine Supreme Judicial Court by which he challenged the 1998 revocation proceeding.<sup>9</sup> In his sixty-page handwritten brief to the Law Court, Alley lodged multiple attacks against the state court proceedings surrounding the 1998 revocation of his probation.<sup>10</sup> A series of Alley’s contentions related to bias and malicious abuse of the legal process involving

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<sup>9</sup> While this undertaking also assists this court in reviewing the reasonableness and constitutionality of the state court determinations, Alley’s allegations before the Law Court do not become part of his case before this court and the § 2254 review is limited to the facts alleged in his federal habeas petition. See Peterson v. Shanks, 149 F.3d 1140, 1143 (10<sup>th</sup> Cir. 1998)(court should not supply additional facts than those plead by the habeas petitioner nor construct a legal theory that requires facts not pleaded).

<sup>10</sup> Alley commenced his complaints with a challenge to the State’s error that postponed the docketing of the 1998 revocation, asserting prejudice to his rights since he was unable to move ahead with his appeal of this decision and obtain the transcripts. The corrective action taken vis -à-vis the docketing and the subsequent review of the consolidated motions remedied this deficiency. Alley does not challenge this docketing glitch before this court.

the predicates for and the conduct of the revocation proceedings, focusing primarily on probation officer Wright and Alley's insistence that a June 16, 1997, drug test resulted in a false-positive due to his prescription medication. (Def's Mem. Law. Ct. at 4-16.) Notably, intertwined in his complaint about these procedural irregularities is Alley's contention that the lack of procedural due process was compounded by his attorney's grossly ineffective assistance.<sup>11</sup>

Thus Alley sufficiently raised claims in the state forum that support presentation of his procedural due process and ineffective assistance of counsel challenges in this court.<sup>12</sup> He "fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim[s]," Adelson, 131 F.3d at 262, and "a reasonable jurist would have been alerted to the existence of the federal question[s]." Id. (quoting Scarpa v. Dubois, 38 F.3d 1, 6 (1<sup>st</sup> Cir. 1994), internal quotation marks omitted).

With respect to exhaustion of his allegations relating to the probation officer's unilateral modification of the conditions of his probation, Alley did not raise his challenge to the conditions of his 1996 release in his November 1998 motion for a reduction of sentence. Yet, in his consolidated memorandum he revisited this line of complaint in front of the Law Court. (Def's Consolidated Mem. at 40-52.) If it survives, it survives as a ground to challenge the 1998 revocation, and was part of the discretionary factors to be raised and considered at the revocation proceedings.<sup>13</sup>

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<sup>11</sup> I mean to make no comment on whether Alley had a constitutional right to counsel at his probation revocation hearing under state or federal law. This is a proposition that can be argued. See Gagnon v. Scarpelli, 411 U.S. 778, 783-91 (1973); Colson v. State, 498 A.2d 585 (Me. 1985). However, Alley was appointed an attorney by the state court, he did exhaust the claim, and it cannot but favor Alley to have the court address the claim.

<sup>12</sup> There are multiple other assertions in his memorandum to the Law Court that need not be addressed here because they are not relevant to establishing whether Alley exhausted the challenges that he has presented to this court.

<sup>13</sup> And indeed it was offered for consideration. (Tr. Apr. 15, 1998 at 4, 6.)

### ***C. Reviewing the claims exhausted in state court***

With respect to Alley's exhausted claims, § 2254 provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted with respect to any claim that was adjudicated on the merits in [s]tate 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 [f]ederal 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 [s]tate court proceeding.

§ 2254(d). Furthermore, the factual determinations of the courts of Maine are presumed correct. § 2254(e)(1)(petitioner has burden of rebutting presumption by clear and convincing evidence).

#### ***1. Alley's procedural due process rights vis-à-vis the probation revocation***

With respect to the particulars of Alley's charges,<sup>14</sup> the court need not look further than Alley's admission during the course of his April 1998 hearing that he used marijuana and violated the conditions of his probation. The court queried: "The first of the 2 probation motions is one from July 11<sup>th</sup> of 1997. Claims that on June 16, 1997 your probation officer took a urine sample and then it got tested a couple of weeks later and came back positive for Marijuana. That's a claim that you used Marijuana. You admit or deny that[?]" Alley responded: "I admit that one." (Tr. Apr. 15, 1998 at 2.) His counsel confirmed this admission. (Id. at 3.) At that hearing Alley in no way challenged the

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<sup>14</sup> With respect to his generalized right to process prior to the revocation of his probation, Alley received the process due him. Gagnon, 411 U.S. at 782 ("[W]e hold that a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing."). The procedural requirements attendant to a revocation of probation "typically involve[] two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation." Black, 471 U.S. at 611. Clearly, the probationer's due process rights are considerably more circumscribed than the rights of the criminally accused. Gagnon, 411 U.S. at 789.

validity of the result, though he did successfully challenge the propriety of considering the second test result which was taken in too close succession to the first to rule out that the positive result was from the same use of drug. (Id. at 2-3.)<sup>15</sup>

After such an unequivocal admission of this probation violation in the state court, Alley cannot recreate the moment in federal court after waiting-out the storm. It is the rare petitioner who successfully uses habeas collateral review to change his position and deny his culpability, even when the court is addressing the more weighty concern of a plea to a unproven criminal charge (as opposed to a probation violation). See Bemis v. United States, 30 F.3d 220, 222-23 (1<sup>st</sup> Cir.1994)(observing general rule that a defendant pursuing habeas relief is “ordinarily bound by his or her representations in court” vis-à-vis a plea); United States v. Butt, 731 F.2d 75, 80 (1<sup>st</sup> Cir. 1984)(affirming denial of habeas motion without a hearing, concluding that the movant’s allegations that his attorney had mislead him concerning the judge’s acceptance of the plea were “unsupported by specific facts and contradicted by the record,” the habeas motion being bare of “credible, valid reasons why a departure from [his] earlier contradictory statements is ...justified,” citing Crawford v. United States, 519 F.2d 347, 350 (4<sup>th</sup> Cir. 1975)); Crawford v. United States, 519 F.2d 347, 350 (4<sup>th</sup> Cir. 1975) (“[T]he accuracy and truth of an accused’s statements ...are ‘conclusively’ established by that proceeding

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<sup>15</sup> Alley does claim that the transcript of the April 1998 hearing is not accurate. In his mark-ups of the attached transcript, he suggests that things were said that are not recorded and things that were not said are recorded. He even questions the authenticity of the official court reporter’s signature. If this transcription tampering were true it might require close scrutiny. However, Alley is not entitled to discovery based on these far-fetched aspersions and, what is more, he has proffered no factual allegations to support this tampering proposition. See Murphy v. Johnson, 205 F.3d 809, 813-15, 816-17 (5<sup>th</sup> Cir. 2000) (habeas petitioner not entitled to discovery regarding his allegations that the prosecutor induced a jailhouse informant to give false testimony because allegations of impropriety in the petition were “conclusory and speculative” and not framed in “specific terms and ... supported by objective, concrete factual evidence tending to support his theory”); Mayberry v. Petsock, 821 F.2d 179, 185 -86 (3d Cir. 1987) (evidentiary hearing not required when habeas petitioner’s allegation of obstruction of his appeal were “vague and general,” devoid of who, when, what, where, and why). A habeas petition is not a fishing expedition. Aubut v. Me., 431 F.2d 688, 689 (1<sup>st</sup> Cir. 1970)

unless and until he makes some reasonable allegation why this should not be so. Stated otherwise, we hold that a defendant should not be heard to controvert his Rule 11 statements in a subsequent § 2255 motion unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statement[s].”); Larrivee v. Warden, Me. State Prison, 2000 WL 760971, \* 6 (D. Me. 2000) (“A defendant’s representation at the plea hearing are a ‘formidable barrier’ in collateral proceedings in which he attempts to take a different position.”). Alley’s conclusory allegations do not bring him within the narrow exception that would allow a challenge of the plea’s facial validity. See Blackledge v. Allison, 431 U.S. 63, 75 (1997)(explaining that in a very limited number of cases the court will allow a defendant’s challenge to his plea on the bases that the plea was “the product of such factors as misunderstanding, duress, or misrepresentation by others,” though the allegations must be concrete and specific).<sup>16</sup>

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<sup>16</sup> To the extent that Alley might protest that there are facts that support his claim that are not part of the record before this court, § 2254 makes is clear that he is not entitled to an evidentiary hearing in this court to prove his claim:

- If the applicant has failed to develop the factual basis of a claim in [s]tate 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 offence.

§ 2254(e)(2). See also Murphy, 205 F.3d at 815-17 (petitioner who was denied discovery and an evidentiary hearing in the state court’s summary dismissal after a “paper hearing” of his habeas petition was not entitled to an evidentiary hearing with respect to his federal habeas petition on his claim concerning a prosecutor’s secret deal because his allegations were conclusory and speculative and his request for a hearing was “tantamount to an impermissible fishing expedition.”). See also footnote 14.

I conclude that there is no need for an evidentiary hearing. R. Governing Sec. 2254 Proceedings 8 (providing that after a review of the record, including answer, transcripts, and state court record, the federal court determines whether an evidentiary hearing is necessary, and, “[i]f it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require”).

And, even if this court were to conclude that the first of Alley's drug tests was flawed and could not support a revocation of probation, Alley in no way contests his failure to report. At the hearing he admitted his failure to report on August 12, 1997. (Tr. Apr. 15, 1998 at 3.) This would be a sufficient ground, under the constitution and Federal law, for revocation of his probation with the same term. See Egerstaffer v. Israel, 726 F.2d 1231, 1236 (7<sup>th</sup> Cir. 1984)(concluding, in the alternative, that one of the grounds was sufficient basis for revocation even if the petitioner succeeded vis-à-vis two other grounds); see also Black, 471 U.S. at 613 ("The decision to revoke probation is generally predictive and subjective in nature and the fairness guaranteed by due process does not require a reviewing court to second-guess the factfinder's discretionary decision as to the appropriate sanction.")(citation omitted). Indeed, as Alley complains mostly of the wrongdoing of his probation officer, it is worth noting that the Supreme Court has provided "broad discretion" to probation officers in recommending or even single-handedly declaring a revocation. Gagnon, 411 U.S. at 783. See also id. at 788 (observing that due process associated with probation revocation must not be "so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed").

Additionally, with respect to Alley's second ground, his complaint that he was not given adequate counseling services upon his release in 1996 and that this void contributed to his 1997 probation violations, this court sees no abuse of discretion arising to the level required under § 2254(d)(2). Alley stated his complaint on this score to the state court after his admission to two violations of his probationary release. (Tr. Apr. 15, 1998, at 4, 6-7.) The court addressed the matter in open court, albeit within the context of the

more limited role that a court takes in the disposition of probation revocation as opposed to the initial criminal sentence. (Id. at 5-8.) This simply does not amount to the type of “fundamental defect which inherently results in a complete miscarriage of justice” nor is it an “omission inconsistent with rudimentary demands of fair procedure.” Hill v. United States, 368 U.S. 424, 428 (1962)(analyzing challenge to the trial court’s inquiry during sentencing).

## ***2. Ineffective Assistance of Counsel***

Alley states in his petition that “due to the defense provided from July 14, 1997 to Apr. 15, 1998 – (9) nine months by court-appointed counsel Henry Griffin III Esq., petitioner had no evidence or proof to provide a defense against the July 01, 1997 drug test results due to not gaining access to Volunteer’s of America’s records, nor drug testing manual from Abbott Laboratories.”

To succeed on the merits of his ineffective assistance of counsel claim Alley would need to meet the two-pronged Strickland test. 466 U.S. 668. He would have to show that Griffin’s performance was “deficient,” in that he “made errors so serious that [Griffin] was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” Id. at 687. In addition, Alley would have to prove that Griffin’s deficient performance prejudiced him, that is, Griffin’s “errors were so serious as to deprive [Alley] of a fair [proceeding]” with a reliable result. Id.<sup>17</sup> See also Knight, 37 F.3d at 774 -75 (First Circuit applying Strickland).

The First Circuit’s Butt guides the disposition of Alley’s ineffective assistance of counsel claim. In Butt, the court stated: “In order to state a claim of ineffective

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<sup>17</sup> I note that the stakes in Strickland were much higher than the stakes for Alley. The Strickland defendant faced a death penalty and challenged his trial counsel’s conduct. Applying the Strickland standard to Alley cannot but favor him.

representation, the petitioner's allegations must clearly indicate the nature of [the] defense attorney's prejudicial conduct." Butt, 731 F.2d at 78. The court affirmed summary dismissal of the § 2255 motion, concluding that the petitioner's statements in the plea petition and transcript of the change-of-plea proceeding was not adequately controverted in his § 2255 motion. This motion had alleged that his attorney had lead him far astray, by incorrectly representing to Butt that the judge had accepted the terms of a plea agreement and by playing down the importance of the Rule 11 inquiry. Id. at 80 & n.4.

Alley's allegation that Griffin did not do enough pre-hearing groundwork to support a challenge of the first drug test at the April 1998 hearing are specific in that he asserts that Griffin should have obtained the laboratory manual and records from Alley's pre-release center. However, he in no way alleges in his § 2254 petition how the manual and records would support a challenge to the first test result as required under Butt. "Habeas corpus is not a general form of relief for those who seek to explore their case in search of its existence." Aubut v. Me., 431 F.2d 688, 689 (1<sup>st</sup> Cir. 1970). "The petition should set out substantive facts that will enable the court to see a real possibility of constitutional error." Id.

Also like the petitioner in Butt, there is unequivocal record evidence that Alley did not contest the legitimacy of the test result or the failure of his attorney to seek and present evidence to controvert the test. The fact that Alley did speak up and challenge the second test result at the hearing further supports the conclusion that he was satisfied with his attorney's performance and representations to the court as to the first test. There is no "credible, valid reason[]" justifying Alley's about-face. Butt, 731 F.2d at 80. In the

face of Alley's acquiescence to the first test result, it cannot be said that his attorney made any errors, let alone ones that made his representation of Alley "deficient" under Strickland.<sup>18</sup>

### *Conclusion*

For these reasons I conclude that the state court proceedings did not result in a decision that was either "contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceedings.." I recommend that Alley's § 2254 petition be **DENIED**, without discovery, supplementation of the record, or 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 of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

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

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Margaret J. Kravchuk  
U.S. Magistrate Judge

Dated April 25, 2001

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<sup>18</sup> Alley's allegations also do not meet Strickland's requirement that he demonstrate prejudice. As observed above, in all likelihood the failure to report charge that was never contested by Alley would be a constitutionally sound ground, standing alone, for revoking Alley's probation for fifteen months. Again, Alley offers no supporting allegations for his conclusory assumption that if the first test result were excluded, he would have been subjected to a milder consequence.

U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 01-CV-20

ALLEY v. ME, STATE OF, et al Filed: 01/22/01

Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

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)

JAMES MELVILLE ALLEY JAMES MELVILLE ALLEY

plaintiff [COR LD NTC pse] [PRO SE]  
CUMBERLAND COUNTY JAIL  
50 COUNTY WAY  
PORTLAND, ME 04101

v.

ME, STATE OF CHARLES K. LEADBETTER  
defendant 289-3661  
ASSISTANT ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, ME 04333  
626-8800

JAMES FARR, SUPERVISOR, STATE OF MAINE PROBATION AND PAROLE CHARLES K. LEADBETTER  
defendant (See above)  
[COR LD NTC]

ALLEN V WRIGHT, STATE OF MAINE PROBATION AND PAROLE OFFICER CHARLES K. LEADBETTER  
defendant (See above)  
[COR LD NTC]

MAINE SUPREME JUDICIAL COURT CHARLES K. LEADBETTER  
defendant (See above)

DANIEL E WATHEN, CHIEF JUSTICE, STATE OF MAINE SUPREME JUDICIAL LAW COURT CHARLES K. LEADBETTER  
defendant (See above)  
[COR LD NTC]

defendant