

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ALBERT P. COCHRAN	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 01-86-B-S
	)	
JEFFREY MERRILL, WARDEN	)	
MAINE STATE PRISON	)	
	)	
Respondent	)	

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

Petitioner, Albert Cochran, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 2, 2001. (Docket No. 1) Respondent, Jeffrey Merrill, Warden of the Maine State Prison, was ordered to answer (Docket No. 4) and has so done (Docket No. 5). After review of all these submissions, and after consideration of a brand new First Circuit decision directly on point, I recommend that the petition be **DENIED**.

***Overview***

In November of 1976 Janet Baxter was murdered in Norridgewock, Maine. In May of 1999, over twenty-two years later, Cochran was tried before a jury for the Baxter murder. During the trial Cochran attempted to introduce the testimony of a witness, Mary Gidney, who in late 1976 had overheard a longtime acquaintance of hers, Perley Doyon, make a telephone call at a restaurant bar that Gidney was tending in Waterville, Maine. Statements that Gidney allegedly overheard supported Cochran's theory that a group of men unknown to Cochran was responsible for the murder. The prosecution objected to the admission of the evidence. The trial judge ruled that the testimony was

inadmissible hearsay evidence. Cochran was convicted. He was sentenced to a mandatory life prison term pursuant to the statutory provision effective in 1976 on June 11, 1999.

On June 21, 1999, Cochran filed a notice of appeal to the Maine Supreme Judicial Court sitting as the Law Court asserting three challenges to his conviction, one of which attacked the exclusion of the Gidney testimony. The Law Court denied this direct appeal identifying no reversible error in the exclusion of this evidence. Cochran filed a petition for certiorari with the United States Supreme Court on August 2, 2000, his sole challenge being to the constitutionality of the exclusion of this evidence. The Supreme Court denied this petition, Cochran v. Maine, 121 S. Ct. 252 (2000), and Cochran's conviction became final on October 2, 2000.<sup>1</sup> Cochran has not, as of yet, filed a motion for post-conviction review in the state courts pursuant to Maine Rule of Criminal Procedure 66 and 15 M.R.S.A. § 2121 et seq.

### ***State Court Proceedings***

#### ***A. Cochran's Defense and the Proffered Statements***

As did Cochran in his statement of the case to this court, I draw on the Law Court's summary of the admitted evidence supporting Cochran's "shadow defendants" theory:

Cochran's defense was that someone else murdered Baxter. He presented a number of witnesses to support this defense. Skip Kelley testified that he was an eye witness to the murder of Baxter. Kelley was acquainted with Perley Doyon, Armand Boudreau, Galen Lessard, and Alan Pelletier in the mid-1970s. He delivered drugs and other items for Doyon. According to Kelley, Doyon ran an illegal garage where he altered vehicle identification numbers on cars. Kelley testified that on the night of Baxter's murder he was with Doyon in the office of the garage. Doyon told Boudreau and Lessard "to go do what they had to do." Pelletier arrived with a satchel containing money for drugs, and Doyon counted

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<sup>1</sup> In its answer, the State concedes that Cochran's petition is timely. See § 28 U.S.C. § 2244(d).

the money. At that time a blue car drove into the garage. Boudreau was the driver, and Baxter was in the passenger seat. Another car followed, driven by Lessard. Kelley testified that he heard talking and laughing, and he saw Boudreau, Lessard, and Pelletier, one after the other, have sex with Baxter in the back seat of the first car. Kelley testified that he saw Doyon pull a gun from under his shirt, exit the office, and order Boudreau, Lessard, and Pelletier to stand against the wall. Doyon then dragged Baxter out of the car and shot her twice. Kelley, who said he saw this from the window in the office overlooking the garage, exited the office and walked over to the car where he saw Baxter with blood coming from her nose, mouth, and chest. Kelley went back to the office partition, took money that he was owed and left. Kelley testified that he did not know Cochran and that Cochran was not at the garage that night. He also testified that a few weeks earlier Baxter had asked Kelley if she could borrow money from him because she owed a drug debt to Doyon.

Two State Police detectives and a Waterville police officer, who had investigated the Baxter murder at different times during the period from 1977 to 1998, testified that they had considered Doyon, Boudreau, Lessard, and Pelletier as suspects. Two of the officers said that Boudreau resembled a composite sketch that was based upon the description of a witness, Clarice Merrill, of a man she had seen in a Ford LTD with a woman. Merrill had seen the man and woman on the night that Baxter's body was discovered and on the River Road, near the location where the body was found. Merrill, who testified at trial, also saw a yellow Volkswagen, with the word "Bug" written on it, stop on the River Road near the Ford LTD, and she saw two men exit the Volkswagen. Witnesses testified that Doyon, Boudreau, Lessard, and Pelletier were friends, and Doyon was the leader of the group. Lessard's ex-wife testified that she and Lessard owned a yellow Volkswagen with the word "Bug" written on it.

Dawnann Roberts testified that she was at a garage in 1979 with Doyon, Boudreau, and others. According to Roberts, Boudreau bragged about killing two women, and he said that one had been "fucked to death" and put in the trunk of a car. Roberts testified that Boudreau said that Doyon paid Pelletier to do the killings because the women owed him drug money.

State v. Cochran, 2000 ME 78, ¶¶ 6-8, 749 A.2d 1274, 1277 (footnote omitted).

Cochran offered the videotaped testimony of Mary Gidney as a proffer. The Law Court described the testimony thus:

Gidney testified that in late 1976 when she was the bartender at a Waterville restaurant, Doyon and Lessard came into the restaurant. Gidney knew both of them and had gone to school with Doyon. Gidney said Doyon had been drinking and walked "kind of macho" up to the bar where he used the telephone located on the bar. There was no one else at the bar. Gidney overheard Doyon say into the telephone that they had taken care of the Volkswagen and the woman

they killed was in the trunk of a car. Gidney did not know to whom Doyon was talking. She also heard him say something about the location of a gun, but she could not remember what that was. She also testified that more than once Doyon said they got away with murder, and she acknowledged that the reason she remembered that statement was because "they would gather in the corner and say well, they got away with murder." Doyon's telephone conversation upset Gidney, and she asked him to leave. She first told the police about this conversation in 1987.

Id. at ¶ 9, 749 A.2d at 1278.<sup>2</sup>

### ***B. Trial Court's Evidentiary Ruling***

#### **1. The Rule**

The state trial court excluded Gidney's testimony respecting what Doyon said on his end of the bar-side telephone conversation on the grounds that it was inadmissible hearsay evidence. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Me. R. Evid. 801(c).<sup>3</sup> Rule 804(b)(3) excepts from the general hearsay prohibition certain statements made against interest:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

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<sup>2</sup> In his petition to this court Cochran notes that Gidney told the Maine State Police in 1987 that she heard Doyon state that the gun was in the garage. Subsequently, in the months preceding trial Gidney told a different detective that the gun was in the Volkswagen's glove compartment. At the time of trial Gidney could not remember which of the two locations Doyon identified. (Sec. 2254 Pet. at 10 n.2.) Cochran contends that either location meshes with other evidence in the case. Id.

<sup>3</sup> Maine Rule of Evidence 802 provides: "Hearsay is not admissible except as provided by law or by these rules." Rule 802 explains further: "The words 'as provided by law' include applicable state and federal statutes, the Maine Rules of Civil Procedure and the Maine Rules of Criminal Procedure." Me. R. Evid. 802.

Me. R. Evid. 804(b)(3) (emphasis added).<sup>4</sup>

2. Defense Proffer, State Rebuttal, and Trial Court Reasoning
  - a. Defense Proffer

Near the conclusion of the trial, during a session out of the hearing of the jury, the trial judge ruled on the admissibility of two hearsay statements.<sup>5</sup> With respect to the Gidney/Doyon proffer, defense counsel argued that other evidence in the case corroborated with the statements made by Doyon at the restaurant bar. (Tr. Vol. VII at 233-235.) He stated that there was evidence in the case that Doyon shot Baxter with a firearm with others present; that the body was found in the trunk of her car; that Baxter was driven to the garage in a blue car, which car was followed by a two-tone Ford LTD; that one witness drove by the Ford LTD and the Volkswagen the night of the murder on the road where the body was discovered and later observed an older blue or black car drive into her yard from which two people got out and inspected the witness's car; and that Doyon had a garage that altered vehicle identification numbers. (Id. at 233-35, 249.) The defense argued that this corroboration of the proffered Doyon statements as heard by Gidney -- that he shot a woman whose body was in the trunk of a car, that he had got rid of the handgun, that he altered VIN numbers, and that he "got away with murder" -- supported a determination that the statements were trustworthy and, thus, admissible hearsay. (Id. at 235, 248-49.)<sup>6</sup> With respect to the context in which the statements were made and the audience for the Doyon remarks, defense counsel pointed out that, though

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<sup>4</sup> Federal Rule of Evidence 804(b)(3) is identical to the Maine Rule except it does not except statements that tend "to make the declarant an object of hatred, ridicule, or disgrace." See Fed. R. Evid. 804(b)(3).

<sup>5</sup> The testimony of the two defense witnesses who heard the statements was recorded on video because of the witnesses' need to return to their home states prior to a weekend recess of the Cochran trial.

<sup>6</sup> At the same time the parties and the court discussed the admissibility of testimony of Dawann Brennan concerning statements that she allegedly heard made by Armand Boudreau, an individual allegedly involved in the Doyon murder cohort. (Id. at 235 – 39, 241-48.)

they were made in “not the most confidential setting,” it was “a setting where the person behind the bar was someone he’d known all his life.” (Id. at 250.) He observed that the statements were made in temporal proximity to the Baxter murder. (Id.) Counsel also argued that Gidney had no motive to falsify her testimony: Mr. Cochran was unknown to Gidney and she did not have any reason to think that her evidence vis-à-vis Doyon would be used to exculpate Cochran twenty-two years after the murder. (Id.)

b. State Rebuttal

The State opposed admitting the Gidney statements, identifying several frailties. The prosecutor complained that ten and one-half years had elapsed between the time of the Doyon phone call and the first time Gidney “came forward” with her description of the conversation. (Id. at 239.) This delay, he argued, made it questionable whether Doyon uttered the statements at all or throws into doubt the exact content of the statements. (Id.) He complained of inconsistencies in Gidney’s description of what Doyon said. (Id.) The prosecutor also identified a weakness in Gidney’s inability to identify with whom Doyon was speaking on the phone and the fact that she did not fully comprehend the meaning of the conversation. (Id.) Addressing the need for “corroborating circumstance” that indicate the trustworthiness of the hearsay statement, the prosecutor urged that it was not clear how close to the time of the murder Doyon allegedly made the phone call. (Id. at 239-40.) The prosecutor suggested that the inability to gauge the “remoteness” of the Doyon statement was in some way exacerbated by the years that elapsed between the statements and the time Gidney came forth with them to the authorities. (Id. at 240.) The prosecutor then argued that the Doyon statements were not sufficiently against penal interest because it was not clear “what it is

he's talking about," and the context of the telephone conversation was undetermined. (Id.) Though he spoke of "a reasonable person standard," the prosecutor argued that Doyon, subjectively, could not have known that what he said on the telephone exposed him to criminal or penal liability. (Id.) He argued that Doyon had no idea that Gidney could overhear him. (Id.)

c. Trial Court Reasoning

After ruling that the other offered hearsay statement was admissible as a statement against interest (Id. at 251-54.), the trial judge addressed the Gidney/Doyon proffer:

The Doyon statement is another matter altogether, separate and apart from the fact as to exactly what he's talking about, who he was talking to, and the fact that it could be rather equivocal, is subject to many interpretations. It really was more of an overhearing situation, it wasn't that he was saying this in the presence of the witness for the purpose of saying it to her. And of course, the whole purpose of this rule is if you say something to someone with the intention of them knowing that you're exposing yourself to criminal liability, that that statement ordinarily has some degree of trustworthiness.

None of the hearsay exceptions refer to the overhearing situation, unless the Court is prepared to forge some new territory in that department. I don't believe that's what was anticipated in Rule 804(b)(3). I will stand by my earlier ruling excluding the Doyon statement against interest.

(Id. at 254-55.)<sup>7</sup>

**C. *The Law Court's Reasoning***

Because hard to summarize, the Law Court's reasoning is best excerpted:

Rule 804(b)(3) sets forth a three-prong test for the admissibility of an out-of-court statement against interest:

- (1) the declarant must be unavailable as a witness;
- (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in [his] position would not have made the statement unless [he] believed it to be

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<sup>7</sup> With respect to the trial court's preceding reasoning concerning the hearsay statement it held admissible, the court phrased the inquiry as "whether the content of [the hearsay proponent/witness's] testimony strongly indicate the – clearly indicate the trustworthiness of the [declarant's] statement." (Id. at 153.) Because there was corroborative testimony by a third witness who was an eyewitness that would put the declarant at the crime scene, the court allowed this statement in as meeting the Rule 804(b)(3) exception to exclusion. (Id. at 253-54.)

true; and (3) the statement must be corroborated by circumstances that "clearly" indicate its trustworthiness.

State v. Long, 646 A.2d 1228, 1230 (Me. 1995) (quoting State v. Smith, 415 A.2d 553, 559-61 (Me. 1980)).

The first prong is satisfied because the State concedes that Doyon is dead. The second prong means that Doyon's statement must have exposed him "in a real and tangible way" to criminal liability. Boucher v. State, 652 A.2d 76, 78 (Me. 1994) (quoting United States v. Hoyos, 573 F.2d 1111, 1115 (9<sup>th</sup> Cir. 1978)). Furthermore, a reasonable person in Doyon's position would not have made the statement unless he believed it to be true. See Smith, 415 A.2d 1t 560. With regard to the third prong, the trustworthiness prong, there are four factors we consider:

- (1) the time of the declaration and the party to whom it was made;
- (2) the existence of corroborating evidence in the case;
- (3) whether the declaration is inherently inconsistent with the accused's guilt; and
- (4) whether at the time of the incriminating statement the declarant had any probable motive to falsify.

Boucher, 652 A.2d at 79.

The trial court relied on the second prong in excluding the evidence. It found that Doyon's statement did not meet the rule because, as an overheard statement and one not made directly to Gidney, it did not have the same trustworthiness as a direct statement. The court reasoned that an overheard statement could not be as trustworthy as one made when the intended listener recognized that the speaker exposed himself to criminal liability.

In determining whether the second prong has been met, the circumstances surrounding the statement are essential. Indeed, the context in which a statement is made can reveal as much about it as the words used. An important contextual fact is missing for Doyon's statement in that it is not known to whom Doyon was speaking on the telephone. Therefore, we do not know whether the statement to the unknown person was exposing Doyon to criminal liability in a "real and tangible way." Because the recipient of the statement is unknown it is difficult to even speculate as to whether Doyon believed the statement to be true. Even assuming that Doyon knew that Gidney could overhear his conversation, it is not possible to infer that he made the statements knowing they were true. The facts surrounding Doyon's telephone conversation do not support a finding that Doyon was exposing himself to criminal liability.

Concerning the truthfulness prong and the first of the four factors considered for that prong, Gidney testified that the conversation took place sometime in late 1976, and we have already noted that the person on the receiving end of the conversation is not known. For the second factor, there is corroborating evidence in the form of Kelley's testimony about seeing Doyon shoot Baxter; the testimony of the police officers who found Baxter's body in the trunk of a car; and the testimony of Merrill about a Volkswagen that stopped near a Ford LTD on the night Baxter's body was found. The State argues that Kelley's testimony was incredible, but whether Kelley was truthful was for the jury to

determine. For this evidentiary issue it is sufficient that the corroborating evidence is presented. See People v. Swaggirt, 282 Ill. App. 3d 692, 218 Ill. Dec. 150, 668 N.E. 2d 634, 641(1996).

Considering the third factor, Doyon's statement is inherently inconsistent with Cochran's guilt. Although it could be inferred from Doyon's statement that he and one or more people killed a woman, there was no suggestion during the trial that Doyon and Cochran acted together or that Cochran acted with anyone in murdering Baxter. With regard to the final factor to be considered in determining the trustworthiness of the statement, there is no information as to whether Doyon had any probable motive to lie about killing the woman or stating that her body was in a car trunk. It is possible that Doyon was talking to a criminal cohort and indulging in braggadocio. See United States v. Seabolt, 958 F.2d 231, 233 (8<sup>th</sup> Cir. 1992). Conversely, Doyon could have been speaking with a friend, in which case the statement is more likely to be true. See Swaggirt, 218 Ill. Dec. 150, 668 N.E. 2d at 640. Ultimately we cannot say that these circumstances show whether Doyon had any motive to lie when making the challenged statement.

Considering the four trustworthiness factors, the trustworthiness of Doyon's statement is not apparent. While two of the factors indicate trustworthiness, two of the factors do not support a finding of trustworthiness because we have no information on them. Thus, we cannot say that the surrounding circumstances of the statement "clearly" indicate its trustworthiness. See Me. R. Evid. 804(b)(3). In light of the fact that neither the second nor the third prong of the rule are met, the court did not err in excluding Gidney's testimony.

Cochran, 2000 ME 78, ¶¶ 11-17, 749 A.2d at 1278-80.

### *Discussion*

#### ***A. Exhaustion and Standard for Reviewing the State Court Decision***

As a rule, to succeed with this federal habeas challenge to a state court conviction a § 2254 petitioner must demonstrate that the state's adjudication:

(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.

28 U.S.C. § 2254(d). A § 2254 petitioner must also meet the exhaustion requirements of 28 U.S.C. § 2254(b)(1).

The State concedes, and the trial transcripts and brief on appeal confirm (Tr. Vol. VII at 249; Appellant Br. at 20-25), that Cochran alerted the Maine courts to the federal

nature of his claim. See Fortini v. Murphy, \_\_\_ F.3d \_\_\_, 2001 WL 831244, \*3 – 5 (1<sup>st</sup> Cir. July 27, 2001) (thorough discussion of § 2254(b)(1) exhaustion concerns vis-à-vis the presentation of a similar challenge to the constitutionality of a state trial court’s exclusion of evidence); Martens v. Shannon, 836 F.2d 715, 717 (1<sup>st</sup> Cir. 1988) (“The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined.”). The fact that neither the trial court nor the Law Court measured in Constitutional dimensions the exclusion of Gidney’s testimony/Doyon’s out-of-court statement does not alter the conclusion that Cochran has exhausted his Constitutional claim. Fortini, 2001 WL 831244, at \* 4 – 5.

However, the First Circuit has now made it clear that the fact that the state courts failed to address Cochran’s constitutional challenge does mean that the § 2254(d)’s “strict standard of review” does not apply to claims that the state tribunals have not addressed because unaddressed constitutional claims have not been “adjudicated on the merits” within the meaning of § 2254(d). Fortini, 2001 WL 831244, at \* 7 (reasoning that § 2254(d)’s “requirement of deference to state court decisions” is inapplicable with respect to unaddressed claims because federal courts “can hardly defer to the state court on an issue that the state court did not address”). See also Pettijohn v. Hall, 599 F.2d 476, 480 n.2 (1<sup>st</sup> Cir. 1979) (reviewing a habeas challenge claiming infringement of the defendant’s Sixth Amendment right to present witnesses in his own defense, observing that the trial and state appellate court “overlooked” the constitutional concern, reflecting that the federal court was, thus, not “treading on a state trial judge’s discretion; rather, [the First Circuit] was reaching an issue clearly preserved on the record, yet bypassed by the trial and appellate courts”). Thus, this court must review the exclusion of the

Gidney/Doyon evidence de novo. Fortini, 2001 WL 831244, at \* 7.<sup>8</sup>

### ***B. The Constitutional Inquiry***

The Sixth and Fourteenth Amendments to the United States Constitution promise Cochran the right to present witnesses in his defense. Rock v. Arkansas, 483 U.S. 44, 52 (1987). The compulsory process clause of the Sixth Amendment<sup>9</sup> is the source of Cochran's right to present witnesses in his own defense. See Rock, 483 U.S. at 52; Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973); Pettijohn, 599 F.2d at 480. The Fourteenth Amendment<sup>10</sup> requires that the State of Maine observe Cochran's Sixth Amendment Rights. Washington v. Texas, 388 U.S. 14, 17-19 & n.6, 23 (1967) (recognizing that the Sixth Amendment right to present witnesses in ones own defense "is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment"). If the state courts deprived Cochran of his right to present witnesses in his defense, then that error would "undermine confidence in the

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<sup>8</sup> In Lilly v. Virginia, 527 U.S. 116 (1999) a plurality stated:

Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that "independent review is ... necessary ... to maintain control of, and to clarify, the legal principles" governing the factual circumstances necessary to satisfy the protections of the Bill of Rights. Ornelas v. United States, 517 U.S. 690, 697 (1996) (holding that appellate courts should review reasonable suspicion and probable cause determinations de novo ).  
Lilly, 527 U.S. at 136.

<sup>9</sup> As relevant, it reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed by the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

<sup>10</sup> As relevant, it reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1.

fundamental fairness of the state adjudication [and would] certainly justify the issuance of the federal writ.” Williams v. Taylor, 529 U.S. 362, 375 (2000).

On numerous occasions federal courts have had to reconcile a state’s rule or ruling that was designed or applied to assure that the evidence is trustworthy and trial worthy with this constitutional right of the criminal defendant. See, e.g., Rock, 483 U.S. 44; Chambers, 410 U.S. 284; Washington, 388 U.S. 14; Pettijohn, 599 F.2d 476. Many courts, including the First Circuit Court of Appeals early on in United States v. Barrett, have acknowledged that the trustworthiness inquiry under Rule 804(b)(3) may need to be further scrutinized when constitutional concerns are raised. 539 F.2d 224, 253 (1<sup>st</sup> Cir. 1976).<sup>11</sup>

The Supreme Court, addressing the declaration against interest hearsay exception, has made it clear that the evidentiary analysis properly undertaken in the state courts does not do service for the Constitutional analysis. Lilly, 527 U.S. at 136. <sup>12</sup> Accord United States v. Westmoreland, 240 F3d 618, 626 (7<sup>th</sup> Cir. 2001). Which is not to say that the evidentiary analysis is a mere sideshow. As the Ninth Circuit aptly put it: “Due process draws a boundary beyond which state rules cannot stray; it does not displace the law of

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<sup>11</sup> In Barrett the Court, concluding that there was no issue of a constitutional dimension in the case before it, stated: “Clearly the federal rule is no more restrictive than the Constitution permits, and may in some situations be more inclusive.” 539 F.2d at 253.

<sup>12</sup> Lilly was a Confrontation Clause case, addressing a defendant’s challenge to the admission of a declaration against interest hearsay statement by an accomplice implicating the defendant. Here, at stake is Cochran’s Sixth Amendment right to present witnesses in his own defense. Though the right to confront witnesses against you and the right to present witnesses on your behalf have equal constitutional stature, see Washington, 388 U.S. at 19 (affirming “the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies,” concluding: “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.”), the analysis is different, if not inverted. Thus this court need not undertake the Lilly inquiry into whether the hearsay statement “is so inherently dependable that [it] would constitute a firmly rooted hearsay exception.” 529 U.S. at 131.

evidence with a constitutional balancing test.” Perry v. Rushen, 713 F.2d 1447, 1453 (9<sup>th</sup> Cir. 1983).<sup>13</sup>

The Chambers decision read as a whole demonstrates that this constitutional analysis is nuanced, and seems to, at least, overlap with the evidentiary rule analysis. See 410 U.S. at 302 –03.<sup>14</sup> The Court stressed: “Few rights are more fundamental than that of

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<sup>13</sup> The State suggests that the Maine Court undertook the constitutional analysis even though it framed its reasoning solely as a Rule 804(b)(3) inquiry because it cited its own precedent, State v. Smith, 415 A.2d 553 (Me. 1980) that relied on the Supreme Court’s Chambers. It is true that Smith cites the four trustworthiness “factors” so often culled from Chambers. Smith, 415 A.2d at 560. However, both Smith and Chambers do treat the constitutional challenge as an additional, if not wholly distinct, concern. See Chambers, 410 U.S. at 302 (discussing the constitutional right of the accused to present witnesses in his own defense after describing the elements of the against penal interest hearsay exception, stating that “the hearsay rule may not be applied mechanistically to defeat the ends of justice”); Smith, 415 A.2d at 561 (after conducting a Chambers trustworthiness analysis addressing the defendant’s constitutional right to present witnesses in his own behalf, simply concluding that “[t]he right of an accused to present witnesses in his own behalf, even though ‘[f]ew rights are more fundamental,’ does not grant him complete freedom to introduce evidence that fails to ‘comply with established rules of ... evidence designed to assure fairness and reliability in the ascertainment of guilt and innocence’”) (second alteration original)(citation omitted).

The Law Court’s evidentiary-based decision identifies a three prong test under Maine law for determining admissibility under Rule 804(b)(3), citing State v. Long, 656 A.2d 1228, 1230 (Me. 1995) and Smith, 415 A.2d at 559-61, and then invests the third prong, it dubs the “trustworthiness” and “truthfulness” prong, with four sub-prongs, citing State v. Boucher, 656 A.2d 76, 79 (Me. 1994). Tracing the four-prong test’s lineage in Law Court opinions, they seem to have been plucked from Chambers. However, Chambers made no attempt to set forth a test or standard for making this trustworthiness determination. It merely referenced the facts of the case before it that demonstrated to it that the excluded hearsay was trustworthy. There is no indication that the Supreme Court saw the facts it highlighted as the exclusive criterion for judging trustworthiness. From Chambers’s rather gestaltian analysis some courts, including the Maine Law Court, have erected a rather rigid four-pronged test, as if no other factual circumstances could be relevant. See e.g., State v. Anglin, \_\_ S.W.3d \_\_, 2001 WL 265143, \*1-3 (Mo. App. W.D. June 26, 2001) (describing the Chambers’s observation that the declarant made statements to close friends as a “close acquaintance” prong that is required for the admission of hearsay statements against interest). For the Maine Courts this practice seems to have commenced with Smith, 415 A.2d at 560. However Smith identifies these factors merely as *relevant* to gauging trustworthiness. Smith cites to Chambers, United States v. Hoyos, 573 F.2d 1111, 1115 (9<sup>th</sup> Cir. 1978), and a couple of cases from far flung states. Chambers made observations about the declarant and the circumstances of the declaration in the case before it that it found probative that match up with these prongs, 410 U.S. at 300-01, but there is no suggestion in Chambers or other decisions of the Court that these are the definitive and exclusive gauges of trustworthiness.

The recent Fortini decision indicates that the First Circuit does not read Chambers as developing such rigid standards. Fortini reflected: “It is very difficult to predict the evolution of Chambers because in over [sic] 30 years it has been used by the Supreme Court only a handful of times to overturn convictions; and the Supreme Court’s standards are quite vague, although understandably so in a due process matter.” 2001 WL 831244, at \*7. See also discussion section B, subsection 1, *infra*.

<sup>14</sup> Chambers differs from this case in a crucial manner. Chambers dealt with the application of state evidentiary rules that simply did not have the exception for declarations made against penal interests. Thus the “mechanistic application” was not of the Rule 804(b)(3)-style exception but of the state’s rules of evidence as a whole that systematically refused to allow hearsay statement of the Rule 804(b)(3) ilk into evidence. See also Green v. Georgia, 442 U.S. 95, 96-97 & n.1 (1979) (post-Chambers case reviewing and

an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” Id. at 302 (internal citations omitted).

***1. The First Circuit’s Fortini Controls Disposition of Cochran’s Petition***

In a case that was issued after the parties had briefed this matter, the First Circuit has issued a decision analyzing Chambers that, while not involving the exclusion of a hearsay statement against penal interest, persuasively guides the disposition of Cochran’s petition.

In Fortini, cited above for its conclusion involving exhaustion, the First Circuit analyzed a Massachusetts trial court’s pre-trial exclusion of evidence proffered by the murder defendant that related to his victim’s conduct and statements made minutes prior to a lethal altercation. 2001 WL 831244, \*1- 2. Fortini was claiming that he shot his victim in self-defense. Id. at \*2.

Fortini, who is white, introduced evidence that someone had driven by his house about an hour and one half before the shooting incident, honking a horn and hurling curses and racial epithets towards the house. Id. at \*1. This barrage put Fortini on the defensive, resulting eventually in his taking up position on his porch with a shotgun. Id. The evidence that Fortini unsuccessfully sought to introduce was that his black victim was witnessed shortly before his confrontation with Fortini running onto a basketball

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reversing a Georgia state capital sentence, the defendant having been denied the right to introduce at the punishment phase a hearsay statement/confession of a third party because Georgia did not recognize the against penal interest exception). In contrast, Maine has a now well-tested hearsay exception of which Cochran attempted to avail himself. And while the Mississippi and Georgia courts forbade the introduction both the trial court and the Law Court undertook an analysis to determine if the Gidney/Doyon statements fell within the exception.

court and striking or attempting to strike four white men. Id. at \*2. While being pulled away from this run-in by a friend the victim yelled, “I’ll kill them all. Remember my face, I’m Ceasar Monterio. I’m the baddest motherfucker in town.” Id. The victim and his friend then walked immediately toward Fortini’s house, and just a few minutes from this destination a police officer heard the victim yell, “I’m bad. I’m the baddest motherfucker in the world.” Id.

The trial court rejected the defense’s various grounds for why this evidence should be admitted. Id. at \*2 & n.3. It found that Fortini was not aware of his victim’s action on the basketball court and that Fortini was not the target of the victim’s threats. Id. at \*2.<sup>15</sup> On appeal to the Massachusetts Appeals Court Fortini for the first time presented his constitutional argument, asserting that his right to due process of the law was violated in that this evidence was pivotal, trustworthy, and relevant to his defense, and that its exclusion was “inconsistent” with Chambers. Id. The Appeals Court affirmed, reasoning that the exclusion may have been an error but that the error was harmless. It noted that Fortini was able to get in some evidence of the victim’s state of mind and so the excluded testimony was cumulative. Id. It also concluded that there was no prejudice in the exclusion because Fortini was lying in wait on his porch armed with a shotgun and did not retreat when his victim approached. Id. at 3. Since in the court’s view Fortini could not as “a matter of law” prove that he acted in self-defense, the exclusion did not prejudice Fortini. Id.

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<sup>15</sup> The Maine Law Court has applied a very similar analysis to its sister state with respect to a very similar evidentiary dispute. See State v. Leone, 581 A.2d 394 (Me. 1990). However, Justice Glassman wrote in dissent in Leone, underscoring the need for a fact-specific inquiry by the trial judge into how the proffered evidence related to the defendant’s argument that he acted in self-defense. See 581 A.2d at 400-01. The dissent reflected: “It was for the jury to determine the credibility of and the weight to be given this evidence in deciding whether Leone was guilty of murder or manslaughter or not guilty because he acted in self-defense.” Id. at 402.

The First Circuit picked up the reins after Fortini appealed the United States District Court’s dismissal of his § 2254 petition for failure to exhaust his constitutional claims as required by 28 U.S.C. § 2254(b)(1). After concluding that there was sufficient presentation to the state tribunals of the constitutional claim to satisfy § 2254(b)(1), see exhaustion analysis in Discussion section A supra, the Court confronted the Constitutional issue on its merits.

The First Circuit addressed Chambers, in light of the recent Supreme Court split decisions drawing on it, and concluded that the Supreme Court “has made clear that it can be invoked only in extreme cases.” Fortini, 2001 WL 831244, \* 5. Citing its own Pettijohn, Fortini seems to accept a balancing test for making the Chambers constitutional determination. Id.<sup>16</sup> The task necessitates the weighing of the “incommensurate competing interests”: in one scale “taking account of the importance of the testimony to the defense, its inherent strength and reliability,” and placing in the other scale the “various kinds of countervailing reasons” the State tenders for its exclusion. Id. The Court observed that despite the attempts of lower federal courts to fairly operate the

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<sup>16</sup> Prior to the appearance of Fortini, I was inclined to follow the approach of the Ninth Circuit in Perry to weigh this dispute. Perry noted that the Supreme Court has not formulated “any flat test to determine when state rules of procedure or evidence trespass upon constitutionally protected ground.” 713 F.2d at 1450. Perry reads Chambers as anticipating a “balancing test.” Perry 713 F.2d at 1450. This appears to be the approach taken by the First Circuit in Pettijohn. See 599 F.2d at 480-82; see also Perry, 713 F.2d at 1450 (describing the Pettijohn approach as a balancing test in line with Chambers and other Supreme Court precedent).

On the one hand is “the defendant’s general right to present evidence,” and on the other is “the state’s legitimate interest in reliable and efficient trials.” Perry, 713 F.2d at 1451. “Where the state interest is strong, only the exclusion of critical, reliable and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected.” Id. at 1452. Perry explained:

In evaluating the significance of the evidence, the court should consider all the circumstances: its probative value on the central issue, its reliability, whether it is capable of evaluation by the finder of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. The weight of the state’s interest likewise depends on many factors. The Court must determine the purpose of the rule, its importance, how well the rule implements this purpose, and how well the purpose applies in the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, in excluding unreliable or prejudicial evidence. Id. at 1452-53. Perry seems to anticipate a more point-by-point analysis than Fortini can be read to require.

scales of justice, “in cases less powerful than Chambers, a defendant whose proffer of evidence was rejected for any conventionally plausible reason or rule usually has an uphill struggle.” Id.

Stating that the trial court was “misled” as to the real relevance of Fortini’s evidence -- in that it was relevant to the victim’s rather than to Fortini’s state of mind -- the First Circuit identified a “strong argument” for admission of the evidence under “conventional evidence rules.” Id. \*5-6 (suggesting that the basketball court confrontation was so close in time to the shooting that it could be properly admissible). “It might,” the Court suggested, “be argued that there was no valid justification invoked for excluding the evidence.” Id. at \*6. See also id. at \*7 (“[M]any courts would not have chosen to exclude the evidence on [the cited] grounds.”).

However, the Court reflected:

Yet not every ad hoc mistake in applying state evidence rules, even in a murder case, should be called a violation of due process; otherwise every significant state court error in excluding evidence offered by the defendant would be a basis for undoing the conviction. The few Supreme Court cases that actually undid convictions based on a Chambers analysis involved far more egregious situations; and the more recent decisions of the Court we have cited create serious doubts that the Court is interested in carrying the doctrine beyond egregious cases.

Id. at \*6.

When faced with these state evidentiary rulings cum Constitutional claims, Fortini seems to anticipate that courts must identify where the case at hand falls on a spectrum, with weak cases on the low end and “powerful” cases like Chambers on the high end. Only the high-end cases parlay into federal habeas relief, such as cases that involve “highly probative evidence absolutely critical to the defense,” or “a defendant’s own right to testify.” Id. at \*6. The Court concluded that Fortini’s claim with respect to the

excluded evidence was “sufficiently weaker” than high-end, “egregious” cases because Fortini had offered direct evidence on the victim’s lunge at him and, thus, the basketball court confrontation was “at best indirect evidence which does no more than add to existing proof that [the victim] was in a mood to lunge.” Id. at \*6 -7.

In conclusion the First Circuit reflected:

It is very difficult to predict the evolution of Chambers because in over [sic] 30 years it has been used by the Supreme Court only a handful of times to overturn convictions; and the Supreme Court's standards are quite vague, although understandably so in a due process matter. Although this is a close case, exclusion of the evidence does not in our view add up to the kind of fundamental unfairness that warrants a federal court in finding a violation of due process. The exclusion in our view was error but it was not constitutional error.

Id. at \*7.

## 2. *Cochran’s Claim in View of Fortini*

In light of Fortini I conclude that there was no cognizable infringement of Cochran’s Sixth Amendment right as a result of the Gidney/Doyon exclusion. Like Fortini, Cochran was able to introduce substantial evidence to support his theory that third-parties, entirely unknown to him, were responsible for the Baxter murder. The Gidney/Doyon proffer would have done “no more than add to existing proof” that Doyon was involved in the crime. It is not the kind of make-or-break evidence like the series of exclusion addressed in Chambers or the suppressed identification in Pettijohn. See also Morales v. Portuondo, 2001 WL 826879 (S.D.N.Y. July 24, 2001) (recent case of high national notoriety in which the District Court found Chambers level constitutional error in the state court’s refusal to set aside the verdict and grant a new trial, ruling that the declarations made to several witnesses that the deceased declarant and two others had

committed the murder and that the two men convicted were not involved in the attack were inadmissible hearsay).<sup>17</sup>

As for the other side of the scales, the hearsay exception for statements against penal interest is but a limited exception to a well-weathered rule of inadmissibility. Prior to articulating the need for the against penal interest exception, Chambers recognized the state's interest in abiding by the general hearsay rule:

The hearsay rule, which has long been recognized and respected by virtually every [s]tate, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Chambers, 410 U.S. at 298. State courts have a real interest in assuring that the exception does not swallow the rule. Thus, it cannot be said that this exclusion by the Maine courts rose to the level of "egregious," a level at which the First Circuit has set the mark, and thus Cochran fails in his admittedly "uphill struggle" to get relief under Chambers.

However, there are two concerns which I do believe I am compelled to discuss. First, I echo the concerns expressed by the First Circuit with respect to the Fortini evidentiary exclusion: as an evidentiary ruling, the trial court's exclusion may have been

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<sup>17</sup> Unlike the facts of Chambers, the courts of the State of Maine did not apply the hearsay rule "mechanistically." 410 U.S. at 302. The trial court concluded that there were insufficient indications of trustworthiness to allow the Gidney testimony as to the Doyon statements to go before the jury. It is not possible to say that the Gidney testimony was "likely to be trustworthy"; that is "bore persuasive assurances of trustworthiness." Id. As far as out-of-court statements against penal interest go, Doyon's remarks on the telephone and to his compatriots are fragments that may or may not fit into the large puzzle that Cochran was attempting to piece for the jury. Furthermore, given the other, more concrete testimony and evidence that came before the jury in support of Cochran's shadow defendant theory, it would be a stretch to declare that the Gidney testimony would have turned the corner for Cochran and was "critical" to his defense in the same way that a full-fledged one-on-one confession by a third party would be. Id. Compare Pettijohn, 599 F.2d at 482-83 (excluded eye-witness identification of a third-party as the armed robber was "vital," and its exclusion was "necessarily harmful error," as it was the only support for the defendant's theory that another man perpetrated the crime).

an “ad hoc” mistake. But that view simply highlights the point made in Fortini that evidentiary rulings may vary among trial judges. In ruling against Cochran the trial court put great emphasis on the fact that Gidney merely overheard the statements by Doyon and that they were not made to her. This, it concluded, was determinative of the second prong, the “against penal interest” prong, according to the Law Court. The Law Court also focused on the fact that the identity of the other party to the call was not known so that the court could not determine whether Doyon knew that he was exposing himself to criminal liability vis-à-vis the listener.

Both courts overlooked the very real consideration that Doyon made these statements in front of Gidney, a long-time acquaintance, and it was with respect to Gidney that he was exposing himself to criminal liability (as well as maybe to the person on the other end of the phone). The trial court reasoned that the “overhearing situation” rendered the statement inadmissible. The Law Court stated categorically that because the “intended” listener was unknown it was not possible to infer that Doyon made the statements knowing they were true, even “assuming that Doyon knew that Gidney could overhear his conversation.” If one assumes that Doyon knew that Gidney could overhear this conversation does not she become an intended listener within the context of the fact specific inquiry urged by the Law Court as essential to the determination made under that second prong? <sup>18</sup>

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<sup>18</sup> It is clear that the Rule 804(b)(3) exception is not limited to direct confessions. Barrett, 539 F.2d at 251. As Barrett made explicit, the context in which the statements are made are not part of the analysis of whether the remarks are “against penal interest” but, rather, should be evaluated in analyzing whether there are clear indications of trustworthiness to warrant the hearsay statement’s admission. Id. at 251-52. Indeed, the context of the utterance of the Barrett statements is not dissimilar to those of the Gidney/Doyon remarks. In Barrett the remarks were made during a card game with a group of acquaintances. The remarks were not direct confessions but “strengthened the impression that [the declarant] had an insider’s knowledge of the crimes.” Id. at 252. This was sufficient in the First Circuit’s view to meet the “against penal interest” part of the inquiry. The Court remanded to allow the district court to inquire into whether

The evidentiary standard is clearly an objective standard; would a reasonable person in Doyon’s position have made the statements unless he believed them to be true? See Me. R. Evid. 804(b)(3); Smith, 415 A.2d at 560; see also Barrett, 539 F.2d at 251 (applying Federal Rule of Evidence § 804(b)(3), asking whether a “ reasonable person would have realized that the remarks of the sort attributed to [the declarant] strongly implied his personal participation in the [crime] and hence would tend to subject him to criminal liability.”). A reasonable person would most likely have realized that speaking in earshot of another person about disposing of a body and a gun would implicate them in a crime in that person’s mind. Of course, there are many situations where declarations are made to people familiar to the declarant because the declarant is convinced that the person would not betray the declarant. Such statements often fall within the exception. See, e.g., Chambers, 410 U.S. at 289, 300 (identifying as unconstitutional the exclusion of hearsay statements against penal interests made in private conversations with friends, and remarking that the declarant had warned one of his friends “not to ‘mess him up’”). As the Law Court stated, there was no indication that Doyon had any motive to lie when making these statements to the unidentified party and certainly the fact that he made them in front of Gidney suggests that if he had such a motive he might have done so in a more private setting. In my view there is no question that the second prong under the evidentiary rule was satisfied. The final prong under the rule, the “trustworthiness” prong (dubbed “truthfulness” in the Law Court opinion) is much more discretionary and the weight given to the “intended” listener’s lack of identity was properly for the trial court’s consideration in the first instance under the Barrett analysis. Reasonable minds

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there were sufficient indicia of trustworthiness to warrant admission. Id. at 253.

may differ as to the evidentiary analysis undertaken but that does not amount to constitutional violation.

Finally, the twenty-two years between the crime and the prosecution ought to have been a concern for the court and, perhaps, taken into consideration when ruling on the exclusion of the Doyon declarations, not in terms of the evidentiary ruling, but in terms of the constitutional considerations. The prosecutor argued that the statements were suspect because of the stretch of years between the Baxter murder and the time that Gidney first came forward with them to authorities. However, every indication was that Gidney did not want to tangle with Doyon or the authorities and so only came forth when approached. It was the State that took over two decades to bring this case to trial, and brought it to trial on the basis of the newly available DNA analysis. These tests can be highly persuasive to a jury and the results are not subject to fading memory or poor recollection. Cochran's only hope was to garner witnesses on his behalf who were still alive and able to recall these now distant events. If anything, the evidentiary rulings ought to have taken into account the detriment to Cochran in mounting his defense in the face of the state's delay in bringing him to trial. Surely this is part of the analysis when determining whether he had a fundamentally fair trial. In this sense, the Gidney/Doyon evidence may have been more "critical" to the defense within the meaning of Chambers and Fortini. However, though it gives me pause, I do not believe that this time-factor twist sufficiently distinguishes it from Fortini so as to raise Cochran's case sufficiently on the spectrum to permit the "undoing" of his state conviction.

Finally, I conclude, in the alternative, that Cochran's case falls within the alternative holding of Fortini. Even if the exclusion were constitutional error, it is

harmless error. Fortini, 2001 WL 831244, at \* 7- 10 (applying the Bretch v. Abrahamson, 507 U.S. 619 (1993) prosecution friendly harmless error standard to habeas motion in a case in which the state court did not undertake a harmless error standard in line with Chapman v. California, 386 U.S. 18 (1967)). However, I am satisfied that the First Circuit's recent interpretation of Chambers dictates my conclusion that there are no constitutional grounds for granting Cochran's petition. There is no need to engage more fully in the harmless error analysis.

### *Conclusion*

For the forgoing reasons I recommend the Cochran's petition for habeas relief be **DENIED.**

### 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) (1988) 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  
United States Magistrate Judge

August 3, 2001

ADMIN

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-86

COCHRAN v. CORRECTIONS, ME WARD

Filed: 05/02/01

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Demand: \$0,000

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Jurisdiction: Federal Question

Dkt# in other court: None

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

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