

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MARLON E. CLOUTIER, )  
 )  
 Petitioner )  
 )  
 v. ) Civil No. 01-167-B-S  
 )  
 JEFFREY MERRILL, WARDEN, )  
 )  
 Respondent )

***Recommended Decision on 28 U.S.C. § 2254 Motion***

Petitioner, Marlon Cloutier, pled guilty to one count of theft, one count of burglary, four counts of arson, and no contest to two additional arson counts. Following a direct appeal, a remand for re-sentencing, and series of state post-conviction proceedings, stretching from December 1992 to April 2001, Cloutier filed this petition pursuant to 28 U.S.C. § 2254 on August 16, 2001. I now recommend that the court **DENY** the petition.

***Factual Background***

Cloutier was indicted by the Kennebec County Grand Jury for five counts of arson, a burglary, and a theft on August 6, 1992. (Docket Entries, Kennebec County, CR – 92-491.). On August 28, sixteen days later, he pled guilty to six counts and no contest to one of the arson counts. On that same date the State filed an information charging one count of arson and Cloutier waived indictment and pled no contest to that count as well. (Docket Entries, Kennebec County CR- 536). On November 24, 1992, a sentence was imposed.

On December 3, 1992, Cloutier filed a motion for correction or reduction of sentence and an application to the Maine Supreme Court sitting as the Law Court to allow an appeal of sentence. On December 10, 1992, the sentencing justice denied the motion for correction or reduction of sentence. The next day Cloutier filed an application to allow an appeal of sentence to the Law Court. Ultimately, on August 23, 1994, his appeal was granted and the matter remanded for resentencing. On the basis of the Law Court's decision, on August 31, 1994, Cloutier filed a pro se motion to withdraw his guilty plea. Shortly thereafter his counsel moved to withdraw and new counsel was assigned. On March 2, 1995, the motion to withdraw the guilty plea was denied and resentencing occurred on June 16, 1995. Cloutier's new sentence required him to serve twenty years on the arson counts in 92-491, followed by a five-year suspended sentence on the burglary count and a six-month suspended sentence on the theft count, those sentences with the attendant period of four years probation were to be served concurrently with one another but consecutively to the twenty-year imprisonment on the arson counts. On Docket No. 92-536, the information charging one count of arson, Cloutier received a sentence of ten years suspended with six years of probation to be served consecutively to the completion of the sentence in Docket No. 92-491. Cloutier's re-sentencing did not change the actual length of initial imprisonment, which remained at twenty-years under both sentences, but the new sentence reconfigured the length of the underlying sentences and the concurrent versus consecutive nature of certain of the sentences.

Cloutier took a timely direct appeal and applied to the Law Court to allow an appeal of sentence in each case. Leave to allow appeal of sentence was denied on July 12, 1996, and the underlying judgments were affirmed on April 2, 1997.

Shortly thereafter on May 8, 1997, Cloutier filed a pro se state post-conviction review petition. (Docket No. 97-180.) This petition raised one ground only: ineffective assistance of counsel with respect to his pleas and the Rule 11 proceeding. Court appointed counsel was assigned and eventually, on November 1, 2000, an evidentiary hearing was held on the petition. On January 10, 2001, the superior court denied the petition in a six-page written decision. Cloutier attempted to appeal the adverse decision to the Law Court, but an order denying a certificate of probable cause issued from that court on April 2, 2001.

On April 16, 2001, Cloutier filed his 28 U.S.C. § 2254 petition in this court alleging three grounds: (1) he was impermissibly deprived of his right to withdraw his guilty plea following the remand for resentencing; (2) the trial court's denial of his motion to withdraw his guilty plea was an abuse of discretion; and (3) he received ineffective assistance of counsel as to his pleas.<sup>1</sup> The state concedes that Cloutier's federal petition was timely filed pursuant to the one-year period of limitations found at 28 U.S.C. § 2244 (d)(1) and (2).<sup>2</sup>

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<sup>1</sup> Cloutier inadvertently phrases this ground as "Denial of ineffective assistance of counsel."

<sup>2</sup> For reasons that can only be understood by those familiar with Maine's computerized docketing system, it should be noted that the first docket entry in this post-conviction case is dated May 11, 1998, and that docket entry indicated that the post-conviction petition was filed May 8, 1997. The case itself bears a 1997 docket number and the presiding justice at the evidentiary hearing held November 11, 2000, references the fact that the case was filed in 1997. (Tr. at 2). Based upon these facts I am willing to conclude that the State Solicitor's calculations regarding the one-year statute of limitation found at page 16 of the state's response to the petition were unnecessary and inaccurate. He is correct in his conclusion that the petition is not time-barred, but he did not need to go through such an elaborate counting process because there has been a state action pending for almost the entire period during the last nine years.

## *Discussion*

Two basic tenants of federal habeas review of state court determinations must be noted before I go on to address the merits of Cloutier’s three claims. First, this court can only grant relief if Cloutier is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Challenges that do not argue violations of the United States Constitution or federal law are noncognizable under § 2254. Second, § 2254 requires full exhaustion of these constitutional or federal law claims: “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).<sup>3</sup> See also 28 U.S.C. § 2254(c); Rose v. Lundy, 455 U.S. 509, 520 (1982) (“[O]ur interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.”); Adelson v. DiPaola, 131 F.3d 259 (1<sup>st</sup> Cir. 1997) (discussing § 2254 exhaustion requirement).

### ***A. Grounds One and Two – Denial of Motion to Withdraw Guilty Plea***

Cloutier’s first and second ground both challenge the denial of his motion to withdraw his guilty pleas. The first ground is phrased: “Conviction obtained by an illegal guilty plea.” In his supporting facts section, Cloutier asserts that he should have been allowed to withdraw his guilty plea after the Law Court determined that the original sentencing was not proper. The second ground asserts that the trial court abused its discretion by denying his motion to withdraw. In the supporting facts Cloutier argues

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<sup>3</sup> Cloutier’s petition does not contain facts to generate the subsection (B) exceptions to the exhaustion requirement. §§ 2254(b)(1)(B)(i),(ii).

that he should have been given a “meaningful opportunity” to withdraw his plea and asserts that prosecutors withheld key information about one of the buildings involved in an arson count to which Cloutier pled no contest.

These claims are “exhausted” in that Cloutier has pursued his assertion that he should be allowed to withdraw his plea through (and past) the State courts’ finish line. When Cloutier’s case was remanded by the Law Court for resentencing – but prior to the resentencing -- Cloutier filed a pro se motion to withdraw his guilty plea. A hearing on this motion was held March 2, 1995, and Cloutier was represented by counsel. Cloutier testified. At the close of the testimony the State argued that there was a question as to whether the motion to withdraw the guilty plea was timely under Maine Rule of Criminal Procedure 32 because Cloutier’s sentence had already been imposed more than two-years earlier. (Mar. 25, 1995, Tr. at 25-26.) Cloutier’s attorney argued that judicial economy would be best served if the court addressed Cloutier’s challenge to his plea in the current posture, observing that his claims could be raised in a direct appeal or a post-conviction petition. (Id. at 24.) The court denied Cloutier’s motion, stating that on the “time issue, it seems this motion is filed way late.” (Id. at 29.) It also stated that it thought that the Rule 11 colloquy was sufficient and that the advice Cloutier received from his attorney and the sentencing court as to his maximum sentence exposure was correct, even in light of the subsequent decision by the Law Court. (Id. at 29-30.)

Cloutier appealed this determination and the Law Court affirmed in an unpublished decision. State v. Cloutier, 1997 ME 62, ¶ 1 (unpublished memorandum of decision at [www.cleaves.org](http://www.cleaves.org)). The premise of that decision is straightforward. Pursuant to Maine law a motion to withdraw guilty plea must be made before sentence is

imposed under Rule 32(d) of the Maine Rules of Criminal Procedure. Prior to Cloutier the Law Court has determined that such a motion is untimely if made at a resentencing. See State v. Frechette, 687 A.2d 628, 629 (Me. 1996).

The issue of whether or not a defendant may move to withdraw a guilty plea at the time of resentencing is uniquely a question of Maine state law and is not cognizable in this court as a challenge under the United States Constitution or federal laws. If Cloutier intended to raise constitutional challenges in these first two grounds clearly he has not fairly and fully presented them to the Maine courts. See Adelson, 131 F.3d at 263-64; Martens v. Shannon, 836 F.2d 715, 717 (1<sup>st</sup> Cir. 1998); see also Wilder v. Cockrell, \_\_\_ F.3d \_\_\_, 2001 WL 1504709, \*7 (5<sup>th</sup> Cir. Nov. 26, 2001); King v. Merrill, 2001 WL 1512624, \* 4 & n.3 (D. Me. 2001) (Kravchuk, Magis. J.).

***B. Ground Three – Ineffective Assistance of Counsel***

In ground three of the petition Cloutier alleges that his former counsel provided him with ineffective assistance both at the pre-plea and plea stages of this proceeding. This is a claim of constitutional magnitude and it has been presented to the state court and is fully exhausted within the meaning of 28 U.S.C. §§ 2254(b)(1)(A) and (c). Therefore this court must consider the merits of Cloutier’s claim under the now familiar rubric set forth in § 2254(d).

***1. Habeas Review Standard***

A habeas petition may not be granted unless the state court decision: (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State

court proceeding.” 28 U.S.C. § 2254 (d). See Brown v. Maloney, 267 F.3d 36, 39-40 (1<sup>st</sup> Cir. 2001); see generally Williams v. Taylor, 529 U.S. 362, 375 -90 (2000). I must presume that the state court’s holdings on factual issues are correct and Cloutier bears the burden of disproving these holdings by “clear and convincing evidence.” 28 U.S.C. § 2254 (e)(1); Brown, 267 F.3d at 40.

In Cloutier’s case the immediately relevant state court decision for purposes of my § 2254 review is the April 2, 2001, summary order of the Law Court denying a certificate of probable cause. That order states that the Law Court considered the superior court proceedings and the memorandum in support of Cloutier’s request for a certificate of probable cause to appeal the superior court’s ruling to the Law Court. Cloutier v. State, CR. 97-180, Docket No. Ken-01-65 (April 2, 2001). The Law Court concluded that “it is apparent that the appeal does not raise any issue worthy of being fully heard.” Id.

Though this disposition was brief, it was predicated on the six-page written decision of the trial court. That court conducted a lengthy evidentiary hearing on Cloutier’s post-conviction petition and then took the matter under advisement allowing for a review of the full record and all argument. In its written decision denying Cloutier relief the post-conviction court applied the ineffective assistance of counsel standard articulated in Aldus v. State, 2000 ME 47, 748 A.2d 463. Aldus provides a thoroughgoing ineffective assistance analysis in the context of guilty pleas that is front-to-back premised on the United States Supreme Court’s cases Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985). Thus, for purposes of this federal habeas, Cloutier’s ineffective assistance claim was “adjudicated on the

merits” in the State courts within the meaning of § 2254(d), and, therefore, is reviewed under the deferential standards of §§ 2254(d)(1) and (2). See DiBenedetto v. Hall, \_\_\_ F.3d \_\_\_, 2001 WL 1415416, \* 4 (1<sup>st</sup> Cir. Nov. 16, 2001).

## **2. *Analysis of the State Court Determination***

My review of the State court decision reveals that the State did not apply any rule that contradicted the governing law of Strickland and Hill. The Strickland/Hill standard is now well worn. As the First Circuit articulated in Knight v. United States, 37 F.3d 769, 774 (1<sup>st</sup> Cir. 1994), Strickland requires the complaining defendant to “first demonstrate that counsel's performance fell below an objective standard of reasonableness. This means that the defendant must show that counsel's advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” Knight, 37 F.3d at 774 (quoting Hill, 474 U.S. at 369.) The defendant must also demonstrate “that he or she was prejudiced by the errors.” Id. “That is,” Knight explains, “the defendant must prove that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.” Id. In the context of a guilty plea, Hill provides that this second prong of Strickland requires that the defendant demonstrate that there is a “reasonable probability” that if counsel had not erred the defendant would not have pleaded guilty but would have proceeded to trial. Hill, 474 U.S. at 59; see also Knight, 37 F.3d at 774.

The guilty-plea case relied on by the State court, Adlus, describes defendant’s showing under Strickland/Hill as requiring a demonstration that, “(1) the performance of [the defendant’s attorney] fell below that of an ordinary fallible attorney; and (2) there is a reasonable probability that, but for [the] attorney's error, [the defendant] would not have

entered a guilty plea and would have insisted on going to trial.” 2000 ME 47, ¶ 13, 748 A.2d at 468. The Law Court interprets its first prong as being “virtually identical” to the Strickland first prong. Id. 2001 ME 47, ¶ 12, 748 A.2d at 467. Because the Law Court frames Maine’s ineffective assistance of counsel standard by reference to Strickland I am satisfied that the Maine court in Cloutier’s case identified the correct federal law for purposes of § 2254(d)(1). See Williams, 529 U.S. at 379 –84, 390-91. Consequently it cannot be maintained that the trial justice’s application of Strickland/Hill/Adlus to the facts of Cloutier’s case was “contrary to” this clearly established law. See Kibbe v. Dubois, 269 F.3d 26, 35-36 (1<sup>st</sup> Cir. 2001).

I must also determine how the State’s determination measures with respect to the “unreasonable application” prong of § 2254(d)(1). Under this prong of subsection (d)(1) I must determine whether, the State, having identified the correct legal rule from the Supreme Court cases, unreasonably applied it to the facts of Cloutier’s case. Williams, 529 U.S. at 408; Kibbe, 269 F.3d at 36. This is an objective inquiry. Williams, 529 U.S. at 410; Kibbe, 269 F.3d at 36.

The application of Strickland and Hill is by its nature a fact intensive inquiry and the trial justice’s factual findings are presumed to be correct unless rebutted by clear and convincing evidence. § 2254(e)(1). This inquiry also provides the answer to the question posed by § 2254(d)(2): whether the post-conviction proceedings “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” § 2254(d)(2).

During the post-conviction hearing Cloutier’s attorney commenced by stating the grounds Cloutier wished to press in the post-conviction proceeding. He argued that his

attorney's ineffectiveness vis-à-vis many pre-plea responsibilities in effect made the plea involuntary: "counsel inadequately investigated the charges, spent an inadequate time with him, and because of this, he was pressured to make a snap decision regarding a plea agreement and he did that." (Post-Conviction Tr. at 3.) The court also articulated a concern that Cloutier's representation generated an involuntary plea concern. (Id. at 10.)

In an attempt to prove his case Cloutier presented himself as a relative novice to the criminal system at the time he plead. (See, e.g., id. at 31, 42.) He testified that he only met with his attorney for about ten minutes prior to the day he entered his plea (id. at 5; see also id. at 18); that he arrived for the plea without advance notice and when he met with his attorney his attorney coached him on what to say and that he believed he would be hit with a 245 year sentence if he did not proffer the proper responses (id. at 28, 34 41-42); that his attorney informed him that his "nolo content" to the arson charged in the new information would be "throw[n] in for free" (id. at 7); that he would not have plead guilty if he did not believe that he might be sentenced to 245 years (id. at 13, 30-31); and that if he was facing a possible 120 year exposure (reflecting a twenty-year cap on each arson) and he was offered a cap of forty years by the prosecution he might not have entered a plea and might have held out for a better plea deal (id. at 39-40; see also id. at 34 -35).

Cloutier's testimony at the post-conviction evidentiary hearing did not serve to convince the court of any of the relevant factual issues. The court found the testimony of Cloutier's plea attorney, Ronald Bourget, credible:

Cloutier's original attorney was Ronald Bourget, Esq., an attorney with approximately seven years of criminal law experience at the time of the proceedings. Bourget met with Cloutier twice at the jail and twice at the courthouse before the Rule 11 proceedings on August 28, 1992. Attorney

Bourget reviewed the discovery materials with Cloutier but did not want Cloutier to enter a plea when he did. Counsel wanted to have a psychologist evaluate Cloutier and the circumstances of the arsons to determine whether Cloutier had the necessary specific intent. Counsel also informed Cloutier that with six Class A arson charges, Cloutier had a lot of exposure in terms of potential incarceration, but he did not tell Cloutier that he would receive a sentence of 245 hours if he did not enter a plea. Mr. Bourget was aware of the [current state of Maine decision law on sentencing] and informed Cloutier that although the maximum sentence for a Class A crime is 40 years, he did not feel that the upper level (21 years through 40) would be applicable. Despite attorney Bourget's advice that Cloutier obtain a psychological evaluation before deciding whether to enter a plea, Cloutier himself decided that he wished to proceed at that time.

(Post-Conviction Order at 2-3.) Though some of Cloutier's testimony recited above contradicts this version of events and advice, there is record support for these factual findings. (See Post-Conviction Tr. at 43-77.) The post-conviction justice's rejection of Cloutier's testimony as unreliable was, as the court pointed out, supported by the prior rejection of the same testimony by the trial justice at the hearing on the motion to withdraw guilty plea and by Cloutier's own statements at his Rule 11 proceeding. (*Id.* at 3-5; see also Mar. 25, 1995, Tr. at 29-30; Tr. R. 11 Proceeding at 2-17.)

I also note that the post-conviction court principally rested its determination on the first prong of Strickland and concluded that the information that Cloutier's attorney provided him about his maximum sentence exposure was "technically correct" "given the state of the law at that time," and, thus, satisfied the "ordinary fallible attorney" standard. In light of this determination the court need not have considered the prejudice prong under Strickland/Hill.<sup>4</sup>

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<sup>4</sup> In application for a certificate of probable cause to appeal the adverse post-conviction determination Cloutier asserted that the post-conviction court addressed the concern of the voluntariness of the plea but did not address the lack of time spent by his attorney prior to the plea, as reflected in the ten-hour time voucher. (Req. Certificate Probable Cause at 2.) He argues a "presumption of prejudice should attach." (*Id.* at 2-3.)

The number of hours billed by the attorney was simply one factor that the post-conviction justice considered, along with the attorney's own testimony of the work that he had performed in connection with the plea proceeding and his client's unwillingness to postpone the plea.

After an independent but deferential review of the entire record I conclude that there is nothing in the transcripts or pleadings that would justify habeas relief vis-a-vis the State court's conclusion that the attorney's performance at the plea and pre-plea stage was not deficient within the meaning of Strickland/Hill/Adlus. Its determination certainly is not "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," O'Brien v. Dubois, 145 F.3d 16, 25 (1<sup>st</sup> Cir. 1998); accord Kibbe, 269 F.3d at 36, and, therefore, I conclude Cloutier has not carried his burden of proving that he was subject to an unreasonable application of the legal standard within the meaning of § 2254(d)(1). I also conclude that the state court's determination of the facts in light of the evidence at hand was not unreasonable for purposes of § 2254(d)(2).

### **Conclusion**

Based upon the foregoing, I now recommend that the court **DENY** petitioner's request for relief.

### **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.

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In its discussion of presumptive prejudice with respect to ineffective assistance of counsel the United States Supreme Court has never indicated a willingness to allow low hours billed to trigger a presumption of prejudice. Cf. United States v. Cronic, 466 U.S. 648, 659-60 & n.25 (1984) (acknowledging presumption when the attorney fails to test the prosecution's case or when an attorney is completely absent from trial or absent at a critical stage). However, because the post-conviction court rested its determination on the first prong of the Strickland standard there is no reason for me to consider whether the Law Court's apparent refusal to extend Cronic to these facts is an unreasonable application of that precedent for purposes of § 2254(d)(1).

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

December 5, 2001.

ADMIN

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

CIVIL DOCKET FOR CASE #: 01-CV-167

CLOUTIER v. CORRECTIONS, ME WARD Filed: 08/16/01

Assigned to: Judge GEORGE Z. SINGAL

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)

MARLON E CLOUTIER MARLON E CLOUTIER  
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MAINE STATE PRISON  
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v.

CORRECTIONS, ME WARD CHARLES K. LEADBETTER  
defendant 289-3661

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