

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>GREGORY POULOS,</b>	)	
	)	
<i>Petitioner</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 98-155-P-C</i></b>
	)	
<b>SUPERINTENDENT, MAINE</b>	)	
<b>CORRECTIONAL CENTER,</b>	)	
	)	
<i>Respondent</i>	)	

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

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his sentencing in the Maine Superior Court (Cumberland County) after his conviction on four counts of unlawful sexual contact. The petition alleges as grounds for relief that his sentence was enhanced in violation of the United States Constitution due to his exercise of his rights to remain silent, to a trial by jury and to confront the witnesses against him. The respondent contends that the petitioner has failed to exhaust his post-conviction review remedies in state court, as required by 28 U.S.C. § 2254(b). I recommend that the petition be dismissed.<sup>1</sup>

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<sup>1</sup> Poulos has also requested leave to file a motion for summary judgment, contending that the form provided to initiate a proceeding under 28 U.S.C. § 2254 prevents him from including argument and citations to authority, thus unlawfully depriving him of an opportunity to present authority in support of his position to the court. To the contrary, the form prohibits citation “to cases or law” only in the spaces provided for a statement of facts supporting each asserted ground for relief. Indeed, a petition should include a listing of the legal principles on which the petitioner relies to support each claim. J. Liebman & R. Hertz, *Federal Habeas Corpus Practice & Procedure* § 11.6 (continued...)

## I. Background

After a jury trial, the petitioner was convicted of four counts of unlawful sexual contact, in violation of 17-A M.R.S.A. § 255 in March 1997. Judgment and Commitment, *State v. Poulos*, Docket No. CR 96-1484, Maine Superior Court (Cumberland County). On April 11, 1997 he was sentenced to concurrent terms of imprisonment of two and one-half years with all but eighteen months suspended, followed by a four-year period of probation with certain special conditions. *Id.* The petitioner filed an appeal of the sentence pursuant to 15 M.R.S.A. § 2151 on the same date. Application to the Law Court to Allow an Appeal of Sentence (“Application”), *State v. Poulos*, Docket No. CR-96-1484, Maine Superior Court (Cumberland County). The sentence review panel of the Maine Supreme Judicial Court denied leave to appeal. *State v. Poulos*, Supreme Judicial Court Sentence Review Panel, Docket No. SRP-97-42, Order dated April 29, 1997 (“Order”). The petitioner also filed on April 11, 1997 an appeal on the merits of his conviction, which was denied without oral argument. *State v. Poulos*, 1998 ME 43, 707 A.2d 1307 (Me. 1998). The petitioner has not filed a petition for post-conviction review under 15 M.R.S.A. § 2121 *et seq.* in the Maine courts.

## II. Analysis

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<sup>1</sup>(...continued)  
(2d ed. 1994) at 349. Nothing in the form prevents a petitioner from attaching to it a legal memorandum, although that “technique” should be used “sparingly and only when necessary to keep the length of the petition within reasonable bounds.” *Id.* and § 29.1 at 949. A federal habeas corpus petition need not plead the law at all. *Bounds v. Smith*, 430 U.S. 817, 825 (1977). Poulos is represented by counsel and has presented the court with citations to authority in support of his position in a reply brief. Petitioner’s Reply and Motion (“Reply”) (Docket No. 4). No further briefing is necessary. *See generally* Liebman & Hertz §§ 29.1 - 29.3. The motion is denied.

The respondent asserts that the petitioner has failed to exhaust the remedies available to him in state court, as required by 28 U.S.C. § 2254, and that this petition must therefore be dismissed. Section 2254(b)(1)(A) provides that an application for a writ of habeas corpus shall not be granted unless it appears that “the applicant has exhausted the remedies available in the courts of the State.” An applicant shall not be deemed to have exhausted the remedies available to him in state court if he has the right under state law to raise, “by any available procedure,” the question presented in the petition. 28 U.S.C. § 2254(c). “[A] federal court will ordinarily defer action on a cause properly within its jurisdiction until the courts of another sovereign with concurrent powers . . . have had an opportunity to pass upon the matter.” *Scarpa v. Dubois*, 38 F.3d 1, 6 (1st Cir. 1994) (finding this practice codified in section 2254).

To exhaust a federal constitutional claim, a prisoner must present its “substance” in state court before seeking a second opinion through habeas corpus in federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). “In this area of federal-state relations, the exhaustion principle is the disputatious sentry which patrols the pathways of comity. A habeas petitioner must have presented both the factual and legal underpinnings of his claim to the state courts in order for us to find it exhausted.” *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citations omitted). The habeas petitioner “bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim.” *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997). The first two issues presented in his petition, which are essentially the same, concern his decision not to speak at his sentencing and the court’s finding that he had expressed no remorse and accepted no responsibility for the crimes of which he had been convicted. This issue was presented to the Maine Law Court in Poulos’s application to allow appeal of his sentence, Application, which

was denied, Order. There is no indication in the record that the petitioner has presented the state courts with any request for review of his sentence raising the third issue presented in his petition here — i.e., that the trial court violated the Constitution by imposing further incarceration due to his exercise of his rights to jury trial and to confront the witnesses against him.<sup>2</sup> Indeed, the defendant has not filed any petition for post-conviction review in state court pursuant to 15 M.R.S.A. § 2121 *et seq.*<sup>3</sup>

Failure to exhaust is excusable under section 2254(b) if there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. To be “ineffective” within the meaning of section 2254(b), the state corrective process must be “so clearly deficient as to render futile any effort to obtain relief.” *Gagne v. Fair*, 835 F.2d 6, 9 (1st Cir. 1987) (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)). Failure to exhaust is also excusable if a petitioner demonstrates both cause and resulting prejudice. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Whitten v. Allen*, 727 F. Supp. 28, 30 (D. Me. 1989). Poulos does not contend that the state post-conviction relief process is ineffective.<sup>4</sup> Because the state

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<sup>2</sup> The defendant’s assertion to the contrary — “Poulos gave the Maine Law Court an opportunity to take the issues raised in his petition, and the Law Court, acting through the sentencing review panel, rejected that opportunity,” Petitioner’s Reply and Motion (Docket No. 4) at [2] — is not supported by the record.

<sup>3</sup>Poulos contends that he is not subject to the waiver provisions of 15 M.R.S.A. § 2128(1), Reply at [1], but that statute affects only the state post-conviction review process and cannot control the application of exhaustion requirements under federal law.

<sup>4</sup> One statement in Poulos’s Reply might be construed to assert that the state process is so deficient as to render futile any effort to utilize it. Noting that he will serve approximately twelve months on his sentence, Poulos argues that “[h]e is not required, as a function of federal exhaustion, to waste his time forcing the state of Maine to clarify its postconviction procedures.” *Id.* at [2]. First, Maine’s postconviction procedures are not in need of clarification. Second, the fact that the  
(continued...)

corrective process of post-conviction review pursuant to 15 M.R.S.A. § 2121 *et seq.* is still available to Poulos, he cannot show prejudice at this time. Nor can he show the miscarriage of justice that is the only other excuse for failure to exhaust state remedies. *Sawyer*, 505 U.S. at 339. Therefore, his third claim is subject to dismissal because state procedures available for its review have not been exhausted. *See Mele v. Fitchburg Dist. Court*, 850 F.2d 817, 823 (1st Cir. 1988) (no exhaustion where issue not squarely raised in application for appellate review).

Under *Rose v. Lundy*, 455 U.S. 509 (1982), a petition for habeas corpus relief that raises both claims that have been exhausted under state law and those that have not been exhausted must be dismissed. *Id.* at 522. Even if Poulos's first two claims have been exhausted by presentation in his application for leave to appeal his sentence, therefore, this petition is at best a "mixed petition," which must be dismissed. *Martens v. Shannon*, 836 F.2d 715, 717-18 (1st Cir. 1988).

### **III. Conclusion**

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a 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,***

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<sup>4</sup>(...continued)

short length of Poulos's incarceration might make federal habeas corpus relief unavailable as a practical matter if he is first required to pursue state habeas corpus relief does not make the state process ineffective within the meaning of *Duckworth*. *E.g., United States v. Cahn*, 282 F. Supp. 275, 279 (E.D.N.Y. 1968).

*within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

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

*Dated this 30th day of June, 1998.*

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*David M. Cohen  
United States Magistrate Judge*