

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

<b>ANTHONY J. CASELLA,</b>	)	
	)	
<i>Petitioner</i>	)	
	)	
<b>v.</b>	)	<b><i>Docket No. 99-24-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 conviction in the Maine Superior Court (Androscoggin County) on two counts of theft. The petition alleges as grounds for relief a violation of the Fourteenth Amendment to the United States Constitution with respect to a certain instruction given by the trial court to the jury and a violation of the Sixth Amendment to the United States Constitution consisting of the alleged reporting to the prosecution of defense strategy by a government informant. The respondent contends that the petitioner has failed to exhaust his remedies in state court as required by 28 U.S.C. § 2254(b) as to the first claim and denies that the alleged constitutional violations occurred. I recommend that the court dismiss the petition as to the first claim and deny it as to the second claim.

**I. Background**

On December 7, 1995 the petitioner was indicted on two counts of theft by unauthorized

taking, a violation of 17-A M.R.S.A. § 353. Docket Sheet (Attachment 1 to Response to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (“State’s Response”) (Docket No. 3)) at 1; Indictment Docket No. CR-95-644 (“First Indictment”) (Attachment 2 to State’s Response). Count I of this indictment charges that the petitioner committed theft “pursuant to one scheme or course of conduct” with respect to property of Kari Parker with an aggregate value in excess of \$5,000, in violation of 17-A M.R.S.A. §§ 352(5)(E), 353 and 362(1) & (2)(A). First Indictment at 1. Count II of this indictment charges that the petitioner committed theft “pursuant to one scheme or course of conduct” with respect to property of nineteen named individuals with an aggregate value in excess of \$5,000, in violation of the same statutes. *Id.* at 1-2 & Appendix A. A second indictment, charging the petitioner with issuing and negotiating two worthless instruments in violation of 17-A M.R.S.A. § 708(1), (2)(B), (3-A) & (4)(B)(1), was issued on February 27, 1996, Indictment Docket No. CR-96-135 (included in Attachment 2 to State’s Response), and joined with the first indictment for trial, Docket Sheet at 2.

A jury trial was held from August 5, 1996 through August 16, 1996. Docket Sheet at 6-8. Prior to the commencement of trial, the first indictment was amended by striking the names of nine of the nineteen individuals originally named as victims in Count II. Brief of Appellee, *State v. Casella*, Law Docket No. AND-97-194, Maine Supreme Judicial Court sitting as the Law Court (Attachment 16 to State’s Response) at 2. The jury returned a verdict of guilty on all counts. Verdict Form (Attachment 4 to State’s Response).

The petitioner, represented by new counsel, filed a motion for a new trial dated August 22, 1996 alleging suppression of evidence by the state in violation of his right to due process and unspecified violations of Amendments 5, 6 and 14 to the United States Constitution and Article I of

the Maine Constitution. Attachments 5 & 6 to State's Response. A memorandum of law filed in support of the motion on January 23, 1997, Docket Sheet at 9, specified the Sixth Amendment violations as trial counsel's alleged conflict of interest and the failure to give a jury instruction requested by the petitioner requiring all jurors to agree on each victim alleged in Count II of the indictment in order to reach the \$5,000 threshold; and the withholding of exculpatory evidence as, *inter alia*, the failure to divulge that one Tim Stevens "was employed as an agent of the State . . . for the purpose of informing on the activities of" the petitioner and was in fact "privy to the inner workings of defense strategy." Memorandum in Support of Defendant's Motion for a New Trial ("Post Trial Memorandum I") (Attachment 6 to State's Response) at 1-5; Memorandum in Support of Motion for New Trial Based on Errors in Jury Instructions (Attachment 7 to State's Response) at 6-10. The only reference in the memoranda to a violation of federal constitutional due process requirements, and the only citation to federal case law in this regard, occurs in the discussion relating to Mr. Stevens. Post Trial Memorandum I at 4-5.

A testimonial hearing was held on the motion for new trial on February 28, 1997 following which the motion was denied. Docket Sheet at 10. On March 14, 1997 the petitioner was sentenced to two consecutive seven-year terms on Counts I and II, with two years suspended and four years of probation as to Count II, Judgment and Commitment, Docket No. CR-95-644 (Attachment 12 to State's Response), and to a consecutive term of two years, also with four years of probation, on Count III, Judgment and Commitment, Docket No. CR-96-135 (Attachment 3 to State's Response). The petitioner took a direct appeal to the Law Court, which was denied by a memorandum of decision dated February 24, 1998. *State v. Casella*, Dec. No. Mem 98-39 (Me. Feb. 24, 1998), copy attached as Exhibit 2 to Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in

State Custody (“Petition”) (Docket No. 1). The petitioner also sought leave to appeal the sentence imposed.<sup>1</sup> Attachment 14 to State’s Response. As he was on his direct appeal to the Law Court, the petitioner is represented here by his original trial counsel.

## **II. Discussion**

### **A. Exhaustion**

The state asserts that the petitioner has failed to exhaust the remedies available to him in state court as to Ground One of his petition, as required by 28 U.S.C. § 2254, and that Ground One, which deals with the instructions given to the state-court jury, 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.” 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 disputation 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).

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<sup>1</sup> The docket sheet reports that this request was granted. Docket Sheet (Docket No. CR-96-135) at 10. The state’s brief maintains that it was denied. State’s Response at 3. In any event, nothing further concerning this appeal appears in the materials submitted to this court, and neither of the substantive issues presented to this court by the petitioner would be affected by an appeal of the sentence. Accordingly, there is no need to resolve this discrepancy.

Ground One of the petition states, in its entirety:

Violation of Fourteenth Amendment Due Process right not to be convicted of a crime except on agreement of the jury. Supporting FACTS . . .[:] The court failed to instruct the jury that they had to agree that the defendant was guilty of the same alleged theft(s) or they could not find him guilty of theft under counts that listed, or incorporated, more than one alleged theft.

Petition at 5. In his appeal to the Law Court, the only issue raised by the petitioner that relates to this ground is listed as follows:

III. WHETHER THE TRIAL COURT ERRED BY REFUSING THE DEFENSE REQUEST FOR A SPECIFIC UNANIMITY INSTRUCTION THAT THE JURORS HAD TO BE UNANIMOUS AS TO WHICH, IF ANY, TRANSACTIONS UNDER COUNT II OF CR-95-644 WERE TO BE AGGREGATED.

Brief for Appellant, *State v. Casella*, Law Docket No. AND-97-194 (“Petitioner’s Law Court Brief”), at [ii]. The argument in the petitioner’s brief in support of this issue begins: “A criminal defendant has a Maine constitutional right not to be convicted of a crime except on the unanimous agreement of twelve jurors that the prosecution has proved each element of the offense beyond a reasonable doubt.” *Id.* at 26. The state now contends that the federal constitutional nature of the petitioner’s claim concerning the jury instruction was not fairly presented to the state courts and that he is therefore barred from bringing such a claim in this proceeding. State’s Response at 7. In addition, the state points out that the claim presented to the state courts involved only Count II of the indictment, while the petitioner in the present proceeding attacks both Count I and Count II on this basis. *Id.* at 8.

The petitioner argues that the legal and factual underpinnings of the state and federal constitutional claims are the same, making the claims “functionally identical,” so that the federal claim may be said to have been fairly presented to the Law Court, citing *Nadworny*, 872 F.2d at

1099-100. [Memorandum of Law in Support of Petition] (“Petitioner’s Memorandum”), attached to Petition, at 18-19. He also contends that it would have been futile to present an argument based on the federal constitution to the Law Court on this issue because Maine law requires unanimity of all twelve jurors for criminal conviction, while federal law does not require unanimity in state-court criminal jury convictions. *Id.* at 20-21; Petitioner’s Reply (Docket No. 5) at 1-3. The Law Court’s memorandum of decision, denying the petitioner’s appeal without any analysis, provides no indication of the nature of the claims considered by that court.

The petitioner’s Law Court brief cannot be read, however favorably construed, explicitly to place before that court a claim that the trial court’s failure to charge the jury as requested resulted in a violation of the federal constitution. The brief cites several opinions of federal courts, but always as “persuasive” authority on the “analogous” state-law issue that is presented by the petitioner, not as authority directly supporting his position. *E.g.*, Petitioner’s Law Court brief at 26 n.10, 29-31. While there is little doubt that the factual basis of both a state constitutional claim and a federal constitutional claim arising out of the failure to give a single jury instruction sought by the petitioner is the same, the petitioner’s assertion that the legal underpinnings of the two claims are identical requires further examination.

The Supreme Court’s most recent statement on the exhaustion requirement under section 2254 is *Duncan v. Henry*, 513 U.S. 364 (1995), in which the petitioner asserted before the state appellate court that admission of the testimony to which he objected by the trial court was a “miscarriage of justice” under the state constitution. *Id.* at 364. The state court applied this position in determining whether the trial court’s error was harmless. *Id.* at 365. The petitioner then filed a petition for a writ of habeas corpus in the federal court, alleging that the error amounted to a denial

of due process under the federal constitution. *Id.* Quoting *Picard*, the Supreme Court held that

exhaustion of state remedies requires that petitioners “fairly present” federal claims to the state courts in order to give the State the “opportunity to pass upon and correct” alleged violations of its prisoners’ federal rights” . . . . If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

. . . . [Here,] [r]espondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.

*Id.* at 365-66 (citation omitted). *See also Anderson v. Harless*, 459 U.S. 4, 6 (1982) (not enough that a somewhat similar state-law claim was made before the state court).

Here, the petitioner’s Law Court brief cited only Article 1, § 7 of the Maine Constitution. The Maine Constitution’s guarantee of due process of law is found in Article 1, § 6-A. The brief uses the term “due process” only in connection with an argument that 17-A M.R.S.A. § 352(5)(E)<sup>2</sup> “would violate due process” if it were interpreted to define a new substantive offense, rather than merely allowing the aggregation of the values of a number of thefts in order to allow sentencing at

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<sup>2</sup> This subsection of section 352, which provides definitions for terms used in chapter 15 of Title 17-A, states:

Amounts of value involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated to charge a single theft of appropriate class or grade. Subject to the requirement that the conduct of the defense shall not be prejudiced by lack of fair notice or by surprise, the court may at any time order that a single aggregated count be considered as separate thefts. No aggregated count of theft shall be deemed duplicitous because of such an order and no election shall be required. Prosecution may be brought in any venue in which one of the thefts which have been aggregated was committed.

17-A M.R.S.A. § 352(5)(E).

the level of a more serious crime. Petitioner's Law Court Brief at 30. The brief argues that "such a construction would violate due process for the same reasons that not requiring jury unanimity for the predicate offenses under the [federal] CCE statute violates due process," and cites a decision of the Third Circuit construing a federal statute. *Id.* This is the only possible reference to a claim under the federal constitutional guarantee of due process present in the petitioner's brief, and to describe it as an indirect reference is to be charitable. The reference does not transform the petitioner's argument based on Article 1, § 7 of the Maine Constitution into a due process argument, and it cannot bear the weight of the petitioner's conclusion that his argument to the Law Court and his federal constitutional argument here are "functionally identical." *See generally Scarpa v Dubois*, 38 F.3d 1, 7 (1st Cir. 1994).

The legal underpinnings of the two claims are simply not the same. When the legal theories of the state and federal claims differ, "[i]t is for the petitioner to prove that . . . the state courts reached out for, or otherwise became alerted to, the federal issue." *Nadworny*, 872 F.2d at 1101. The Law Court's memorandum decision on the petitioner's appeal certainly does not provide any evidence that it was alerted to a claim under the federal constitution. Even though it is possible to say that the due process argument made here by the petitioner is not "completely alien to the state court record," that is not enough. *Adelson*, 131 F.3d at 262.

The citation of federal case law that discusses the federal due process guarantee, as the petitioner did in his Law Court brief, may have been sufficient under *Nadworny*, 872 F.2d at 1097, if there had been a closer connection between the provision of the state constitution invoked before the Law Court and the federal due process guarantee, *id.* at 1101. Even if that had been the case, however, the Supreme Court's decision in *Duncan* casts doubt on this relatively generous First

Circuit standard.

The petitioner's argument, based on *Allen v. Attorney Gen.*, 80 F.3d 569 (1st Cir. 1996), that his failure to exhaust state-court remedies on this issue may nonetheless be excused because presentation of a due process argument under the federal constitution to the Law Court would have been futile, has a certain appeal at first glance. He contends that it would have been "stupid" to present the Law Court with an argument based on a federal constitutional claim, when the Supreme Court has said that such guarantees do not require unanimous verdicts in state criminal proceedings, as an alternative to an argument based on the state constitution, which does require unanimity. Petitioner's Reply at 2. The petitioner argued to the Law Court that he was entitled to a unanimous jury vote on enough of the individual acts of theft that made up Count II of the indictment to meet the then-existing \$5,000 threshold for punishment as a Class B crime, 17-A M.R.S.A. § 362(2)(A),<sup>3</sup> and if the Law Court determined that he was not entitled to unanimity in this sense under the Maine constitution, it is perhaps unlikely that it would have found that he was entitled to something less than unanimity, but still a majority vote, on each such act under the federal constitution. However, such a result is neither theoretically impossible nor so unlikely as to absolve the petitioner from making the attempt. After all, the petitioner obviously hopes to succeed with the argument, which was not presented to the Law Court, in this court.

In any event, the futility exception to the exhaustion requirement made available by *Allen* does not extend to federal claims that might appear objectively to have little chance of success in the

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<sup>3</sup> Each of the individual acts of theft as to which evidence was presented at the petitioner's trial met the requirements for sentencing as a Class C crime. *Compare* 17-A M.R.S.A. § 362(3)(A) with Petitioner's Memorandum at 4-5 (listing in bold print the transactions presented to the jury on Count II) and testimony of Kari Ann Parker, Excerpt from Trial Transcript (attached to State's Response at Volume I, Item 4), at 10-12, 14, 22-23 (as to amounts involved in Count I).

state court. The First Circuit carefully circumscribed the scope of the futility exception in *Allen*.

Although the exhaustion rule is important, it is not immutable: exhaustion of remedies is not a jurisdictional prerequisite to a habeas petition, but, rather, a gatekeeping provision rooted in concepts of federalism and comity. Consistent with this rationale, the federal courts have carved a narrow futility exception to the exhaustion principle. If *stare decisis* looms, that is, if a state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field, then the state judicial process becomes ineffective as a means of protecting the petitioner's rights. In such circumstances, the federal courts may choose to relieve the petitioner of the obligation to pursue available state appellate remedies as a condition precedent to seeking a federal anodyne. The law, after all, should not require litigants to engage in empty gestures or to perform obviously futile acts.

80 F.3d at 573 (citations omitted). Here, *stare decisis* did not loom; the petitioner points to no Law Court precedent existing at the time he presented it with his appeal that would have foreclosed a federal due process claim.<sup>4</sup> That lack makes it impossible for the petitioner to claim the benefit of the futility exception here.<sup>5</sup>

Accordingly, the petitioner has failed to exhaust his state-court remedies with respect to his

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<sup>4</sup> The petitioner's attempt to use the Law Court's rejection of his own claim to meet the *stare decisis* element of the First Circuit's definition of the futility exception, Petitioner's Reply at 2-3, would, if countenanced, effectively make the exception available to every state prisoner whose direct appeal was denied by the state's highest court who could plausibly argue that the state constitutional provision which he did invoke entitled him to more protection than the unrelated federal constitutional provision which he did not. In addition to the fact that use of one's own appeal in this fashion cannot possibly fit within the definition of *stare decisis*, see Black's Law Dictionary 1406 (6th ed. 1990), adoption of this approach would transform a narrow exception to the exhaustion rule into a wide loophole clearly not within the spirit of the *Allen* decision and the case law that it cites.

<sup>5</sup> The case law cited by the First Circuit in *Allen* reinforces the fact that the futility exception discussed in that case is limited to situations in which "the question raised by petitioner has recently been decided by the state's highest court." *Robinson v. Berman*, 594 F.2d 1, 3 (1st Cir. 1979); accord *Piercy v. Black*, 801 F.2d 1075, 177-78 (8th Cir. 1986).

Fourteenth Amendment due process claim concerning the state trial court's instructions to the jury. The petition should be dismissed as to that claim.

### **B. The Informant**

The petitioner's second asserted ground for section 2254 relief, which was presented to the Law Court, is based on the post-trial testimony of Timothy Stevens. The petitioner contends that Stevens, whom he describes as "his friend and longtime employee," was "acting as an informant for the State Attorney General's Office before and during the trial," unbeknownst to the petitioner; that Stevens attended meetings between the petitioner and his lawyer during this time; and that Stevens reported on the petitioner's trial strategy to an investigator employed by the prosecution. Petitioner's Memorandum at 24-26. According to the petitioner, this "state intrusion into the attorney/client relationship" violated his Sixth Amendment rights. *Id.* at 27-31.

The trial judge, who conducted a testimonial hearing on this issue after the petitioner was convicted but before he was sentenced, found as follows:

There is no evidence that Tim Stevens was employed by — there is no credible evidence that Time Stevens was employed as an agent for the State in the sense that they were relying upon him for information or induced him to provide information. Any assistance that he might have provided — and that's questionable — was voluntary on his part in the expectation of making a deal that didn't come forth. He might have had a hope of working out something and avoiding jail, but he did not.

As far as the original contact with Mr. Stevens, I cannot find that [the investigator for the Attorney General's Office] cooked up his arrest when an arrest warrant was in fact issued for him many months previous.

I find no violation of the attorney/client privilege. Mr. Stevens was present at any time conversations took place with the full knowledge and consent of the defendant. To the extent that Mr. Stevens did have any communications with [the investigator], there is nothing here that indicates that any of that was of any relevance or played any role in this case.

It's the court's opinion that Mr. Stevens was playing both ends of [sic] the middle. He was attempting to protect his friendship and his meal ticket with Mr. Casella, that he was also attempting to curry favor with the State with hopes that he would avoid a jail sentence that he is now serving.

Transcript of Hearing on Motions, Ruling on Motions, February 28, 1997 (attached to State's Response at Volume VII, Item 17), at 7-8.

Section 2254 provides a standard for a federal court's consideration of a factual issue upon which a determination has been made by a state court.

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). The petitioner contends that this presumption does not apply to the state court's factual findings on this issue in this case because the state court sustained an objection to the following question posed to Stevens by the petitioner's lawyer: "Is there any other information that you gave to the State, Mr. Stevens, other than what you've testified to already?" Testimony of Timothy Stevens, Excerpt from Transcript of Hearing on Motions (February 28, 1997) ("Stevens Test."), Exhibit 16 to Petition, at 19. This ruling, the petitioner contends, "unfairly prevented [him] from developing a full record" and therefore deprives the state court's factual findings of the statutory presumption of correctness because "the exception that [sic] under section 2254(d)(2) applies: 'the fact finding procedure employed by the State was not adequate to afford a full and fair hearing.'" Petitioner's Memorandum at 27.

The statutory exception upon which the petitioner relies was repealed by Congress in 1996. Pub.L. 104-132, Title I, § 104, 110 Stat. 1218. The current version of the statutory presumption,

quoted in full above, provides no exceptions. Even if that were not the case, the petitioner's failure to make an offer of proof at the time of the motion hearing, coupled with his failure in his submissions to this court to specify what information Mr. Stevens would have provided had he been allowed to answer the question, makes it impossible for him to overcome the presumption even if the sustaining of an objection could constitute inadequacy of the state court procedure. In the First Circuit, the proper analysis under former section 2254(d)(2) involved "simply the constitutional adequacy of the procedures utilized." *Neron v. Tierney*, 841 F.2d 1197, 1199 (1st Cir. 1988). The petitioner here has not even begun to suggest what, if anything, was constitutionally inadequate about the sustaining of an objection to the question at issue, or, more accurately, what was constitutionally inadequate about a court procedure that allowed for the cross-examination of witnesses, objections to individual examination questions and court rulings thereon.

In an attempt to overcome the statutory presumption, the petitioner asserts that Stevens attended unspecified meetings between him and his attorney "for the specific purpose of spying for the State. He had no cover to protect and no legitimate excuse for intruding into the attorney-client relationship; and he reported attorney client conversations to the State." Petitioner's Memorandum at 29. If that were the case, the petitioner's argument might have merit. *See, e.g., Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995) (Sixth Amendment violation found where prosecutor initiated contact with sheriff's deputy present during defendant's trial preparation conferences with lawyer and thereby became privy to confidential attorney-client communications). However, the testimony cited by the petitioner does not support his conclusions, let alone provide clear and convincing evidence that the state court's factual conclusions were erroneous.

The petitioner asserts that Marge Berkovich, the investigator for the Attorney General's

Office, “had Stevens[] arrested” for failure to report to his probation officer “so that Stevens could talk to the prosecution away from” the petitioner before trial. Petitioner’s Memorandum at 25. That assertion is essentially supported by Berkovich’s testimony. Testimony of Margie Berkovich, Excerpt from Transcript of Hearing on Motions (February 28, 1997) (“Berkovich Test.”), attached to Petitioner’s Memorandum as Exhibit 17, at 6-7. Berkovich made a five-page memorandum of her subsequent conversation with Stevens at the Androscoggin County Jail, a copy of which was provided to the petitioner’s lawyer before trial. *Id.* at 8-9; Letter from Leanne Robbin to Stuart W. Tisdale, Jr., Esq., dated July 30, 1996, enclosing Summary of Interview (attached to State of Maine’s Memorandum in Opposition to Motion for New Trial on the Grounds of Suppression of Evidence, Attachment 9 to State’s Response).

The petitioner relies on Stevens’s testimony that Berkovich asked him during this interview “basically to keep tabs on [the petitioner]. I guess various strategies as far as where they were coming around to, or wherever, as far as the trial goes.” Stevens Test. at 14. Berkovich specifically denied that she asked Stevens to report on the petitioner’s trial strategy. Berkovich Test. at 8. Given this direct contradiction in the testimony of the only two individuals involved in the meeting, the petitioner cannot possibly carry his burden of producing clear and convincing evidence on this point. Stevens was unclear, upon further questioning by the petitioner’s lawyer, as to whether it was Berkovich or the prosecutor who asked him to report the defense strategy, Stevens Test. at 14, and he also testified that he did not speak with the prosecutor until after the trial was underway, *id.* at 24. Stevens later refined his testimony concerning Berkovich’s supposed request to be “basically if anything changes or any information that would be helpful comes about, then here’s my pager number.” *Id.* at 27.

The petitioner also relies on Stevens’s testimony that on two occasions he relayed information concerning defense strategy, apparently to Berkovich. *Id.* at 15. However, he could not recall what information he relayed in these conversations, other than that “[i]t was a strategy that [the petitioner] and [his attorney] had come up with.” *Id.* After the initial conversation, Stevens’s conversations with Berkovich were all initiated by Stevens. *Id.* at 24-25. Berkovich did not document any of her subsequent conversations with Stevens, because none of them generated any substantive information. Berkovich Test. at 9-10. Stevens testified that he attended “a lot of” the “counseling sessions” between the petitioner and his lawyer. Stevens Test. at 24. The petitioner argues that because Stevens called Berkovich “better than five” times, *id.* at 28, and she testified that “most of the telephone calls were not discussions of anything substantive with regard to” the petitioner, Berkovich Test. at 9, the court may infer that some of the conversations were about the petitioner’s trial strategy. Petitioner’s Memorandum at 26. The evidence on which the petitioner relies, read in conjunction with all of Stevens’s and Berkovich’s testimony, does not provide clear and convincing support for such an inference.

Even without the statutory presumption, the evidence presented to the state court would not support a finding of a Sixth Amendment violation in this case. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the seminal case in this area of the law and one upon which the petitioner relies heavily, the Supreme Court held that the presence of an undercover agent at meetings between a defendant and his trial lawyer could violate the defendant’s Sixth Amendment rights if the agent communicated to the prosecution information about the defendant’s trial plans, if the agent testified at trial as to any attorney-client conversations, if any of the state’s evidence originated in such conversations, or if those conversations had been used in any other way to the detriment of the defendant. *id.* at 554,

556. Here, the only evidence that any of these scenarios occurred, Stevens's testimony, is inconsistent, incomplete and contradicted by the testimony of Berkovich. Under these circumstances, the state court's resolution of the credibility issue in favor of Berkovich is well-supported by the record.

The First Circuit's position on this issue is set forth in *United States v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984), which is also cited by the petitioner. In that case, a co-conspirator who had agreed to cooperate with the government was authorized by federal agents to attend a meeting attended by attorneys for three of the other conspirators and by four of the conspirators who subsequently became defendants. 749 F.2d at 903. The First Circuit held that

in order to make a prima facie showing of prejudice [for purposes of Sixth Amendment analysis of alleged intentional intrusion by the state into the attorney-client relationship] the defendant must prove that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting.

*Id.* at 907-08. Here, the petitioner has made no showing that Berkovich was aware that Stevens would be attending any meetings between the petitioner and his lawyer, let alone that she "authorized" his presence at such meetings or directed him to attend them. Taken together with Berkovich's testimony that she never asked Stevens to report on the petitioner's trial strategy, the state court's conclusion that there was no purposeful intrusion by the state into the petitioner's relationship with his attorney, even given Stevens's testimony that Berkovich did make such a request, is fully supported by the record. Even if that were not the case, the most important factor is Stevens's inability to describe any specific information that he conveyed to Berkovich (or the prosecutor, after the trial was underway). This means that the petitioner has failed to prove that any confidential communications were in fact conveyed. His conclusory statement that he told someone

on two occasions about “strategy” that the petitioner and his lawyer “had come up with” does not and cannot constitute such proof.

Accordingly, the petitioner is not entitled to section 2254 relief on the basis of Stevens’ contact with Berkovich.

### **III. Conclusion**

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

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days 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 20th day of April, 1999.*

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*David M. Cohen  
United States Magistrate Judge*