

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

MICHAEL CONSTANTOPOULOS, :  
Petitioner, :  
 : PRISONER  
v. : Case No. 3:98CV1166 (SRU)  
 :  
COMMISSIONER OF CORRECTION and :  
WARDEN MARK STRANGE, :  
Respondents. :

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Michael Constantopoulos (“Constantopoulos”), brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction, pursuant to a guilty plea, on charges of murder, manslaughter and carrying a pistol without a permit. For the reasons set forth below, the petition is denied.

I. Procedural Background

In September 1990, Constantopoulos pled guilty to charges of murder in the first degree, manslaughter in the first degree and carrying a pistol without a permit and was sentenced to a total effective term of imprisonment of thirty-five years. He did not file a direct appeal.

In 1992, Constantopoulos filed a petition for writ of habeas corpus in state court on the ground that he had been afforded ineffective assistance of counsel. The state court denied the petition and the denial was affirmed on appeal. See Constantopoulos v. Commissioner of Correction, 47 Conn. App. 828, 708 A.2d 588 (hereinafter “Constantopoulos I”), cert. denied, 244 Conn. 927, 711 A.2d 726

(1998).

Constantopoulos initiated this action by petition for writ of habeas corpus signed June 10, 1998. The original petition included the same grounds raised in the state habeas action. On October 25, 2001, the court stayed this action to enable Constantopoulos to exhaust his state court remedies on a claim that his sentence was illegal. The state court denied relief and the denial was affirmed on appeal. See State v. Constantopoulos, 68 Conn. App. 879, 793 A.2d 278 (hereinafter “Constantopoulos II”), cert. denied, 260 Conn. 927, 798 A.2d 971 (2002).

On July 16, 2002, Constantopoulos filed an amended petition for writ of habeas corpus challenging his conviction on the grounds that he was afforded ineffective assistance of counsel and that his sentence is illegal. On July 17, 2002, the court lifted the stay and ordered the respondents to respond to Constantopoulos’ amended petition for writ of habeas corpus. The response was filed on February 28, 2003.

## II. Factual Background

The Connecticut Appellate Court described the background of this case as follows.

In February, 1989, when the petitioner was sixteen years old, he was involved in an ongoing dispute with some other young men in his Bridgeport neighborhood. The petitioner had been involved in several altercations with Reginald Hillyard and Chantel Gray. On February 2, 1989, Hillyard and Gray were in a car that struck the rear of the petitioner’s car. Hillyard exited his car, threatened the petitioner, and revealed that he was carrying a gun under his shirt. The petitioner drove away to avoid Hillyard, and a high speed car chase ensued on Interstate 95 between Bridgeport and South Norwalk. Upon returning to Bridgeport, the petitioner drove to his residence. As he pulled into the driveway, he noticed that Hillyard and Gray were still in pursuit.

The petitioner and Hillyard got out of their cars and continued their

argument. Hillyard shot at the petitioner, who returned the fire. Gray ran away from the scene after the first shots were fired. The petitioner shot Hillyard five times, causing his death. Gray was later found shot to death approximately one-half mile from the petitioner's residence.

The petitioner was charged in a three count information with two counts of murder in violation of General Statutes § 53a-54a (a) and one count of carrying a pistol without a permit in violation of General Statutes § 29-35. The petitioner entered a plea of not guilty on all counts and the case proceeded to trial. The petitioner was represented at trial by attorney Raymond Ganim of Stratford. After the state presented all of its evidence and rested its case, the state and the petitioner engaged in plea bargaining. According to the agreement originally proposed, the petitioner would plead guilty to a substituted information charging one count of murder for the death of Hillyard, one count of manslaughter in the first degree in violation of General Statutes § 53a-55 (a)(3) for the death of Gray, and one count of carrying a pistol without a permit. In exchange, the state would argue for a capped thirty year sentence of imprisonment. The state did not agree to this arrangement, but did agree to an arrangement whereby the petitioner would plead guilty in exchange for a capped forty year sentence with the right to argue for less. Knowing this, the petitioner pleaded guilty to all counts in the substituted information. On September 21, 1990, the trial court accepted the petitioner's guilty plea after conducting the required canvass pursuant to Practice Book § 711.

The trial court scheduled the sentencing hearing for November 13, 1990. Prior to the sentencing hearing, the petitioner had second thoughts about his guilty plea and attempted to contact his attorney. When these efforts proved unsuccessful, he drafted a handwritten pro se motion to withdraw his guilty plea. When the petitioner presented this motion to Ganim at the sentencing hearing, it was the first time that Ganim was notified of the petitioner's desire to withdraw his guilty plea. Ganim orally presented the petitioner's motion to the trial court at the sentencing hearing. The trial court offered to allow Ganim to formalize the motion in typewritten form and present it to the court the next day. Ganim declined this offer and read the petitioner's pro se motion into the record at the sentencing hearing before the trial court. The trial court requested a playback of the September 21 guilty plea canvass. The trial court then denied the petitioner's motion to withdraw his guilty plea, and sentenced him to thirty-five years on the charge of murder,

twenty years on the charge of manslaughter in the first degree, and five years on the charge of carrying a pistol without a permit, all to run concurrently, for a total effective sentence of thirty-five years. No direct appeal was ever filed in this case.

Constantopoulos I, 47 Conn. App. at 829-32, 708 A.2d at 589-90.

### III. Standard of Review

The federal court “shall entertain an application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A claim that a state conviction was obtained in violation of state law is not cognizable in the federal court. See Estelle v. McGuire, 502 U.S. 62, 68 (1991); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (1996), significantly amended 28 U.S.C. §§ 2244, 2253, 2254, and 2255. The amendments “place[] a new constraint” on the ability of a federal court to grant habeas corpus relief to a state prisoner with respect to claims adjudicated on the merits in state court. Williams v. Taylor, 529 U.S. 362, 412 (2000). The federal court cannot grant a petition for a writ of habeas corpus filed by a person in state custody with regard to any claim that was rejected on the merits by the state court unless the adjudication of the claim in state court either:

(1) resulted in a decision that 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) 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.

28 U.S.C. § 2254(d). The federal law defined by the Supreme Court “may be either a generalized

standard enunciated in the Court’s case law or a bright-line rule designed to effectuate such a standard in a particular context.” Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir. 2002).

A decision is “contrary to” clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” Williams, 529 U.S. at 413. A state court decision is an “unreasonable application” of clearly established federal law “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id. The Second Circuit has instructed the district courts that “[i]n determining whether an application was objectively unreasonable, a habeas court does not require that ‘reasonable jurists would all agree’ that the state court erred; on the other hand, ‘the most important point is that an unreasonable application of federal law is different from an incorrect application.’” Jones v. Stinson, 229 F.3d 112, 119 (2d Cir. 2000) (quoting Williams, 529 U.S. at 411). The Second Circuit went on to note that although “‘some increment of incorrectness beyond error is required...the increment need not be great.’” Id. (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000)). In both scenarios, however, federal law is “clearly established” if it may be found in holdings, not dicta, of the Supreme Court as of the date of the relevant state court decision. Williams, 519 U.S. at 412.

When reviewing a habeas petition, the federal court presumes that the factual determinations of the state court are correct. The petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). See Boyette v. Lefevre, 246 F.3d 76, 88-89 (2d Cir. 2001) (noting that deference or presumption of correctness is afforded state court findings where state

court has adjudicated constitutional claims on the merits).

Collateral review of a conviction is not merely a “rerun of the direct appeal.” Lee v. McCaughtry, 933 F.2d 536, 538 (7<sup>th</sup> Cir.), cert. denied, 502 U.S. 895 (1991). Thus, “an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (citations and internal quotation marks omitted).

#### IV. Discussion

In his amended petition, Constantopoulos states that he seeks review of the two Connecticut Appellate Court decisions. Thus, the court assumes that Constantopoulos raises in this petition, the same grounds for relief he presented to the state courts.

##### A. Ineffective Assistance of Counsel

Before the Connecticut Appellate Court, Constantopoulos argued that trial counsel was ineffective because he failed to ensure that the guilty plea was voluntary. Specifically, he argues that counsel did not object to the trial court’s failure to canvass him completely in accordance with state law, failed to discuss the availability of lesser included offenses and possible defenses to the charges of murder and manslaughter and failed to explain all of the elements of these crimes.<sup>1</sup> In addition, he contends that trial counsel was ineffective because counsel did not review and type his pro se motion to withdraw the guilty plea as counsel was encouraged to do by the trial court. Constantopoulos’ arguments are taken from the briefs filed in state court. Thus, some of the arguments rely on state law.

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<sup>1</sup> In his petition, Constantopoulos lists the grounds raised in his petition for certification to the Connecticut Supreme Court. Because these grounds focus on alleged errors of the Connecticut Appellate Court rather than on the constitutionally protected rights at issue, the court considers the grounds for relief as they were presented to the Connecticut Appellate Court.

A violation of state law is insufficient to warrant federal habeas corpus relief. See Estelle, 502 U.S. at 68; Dunnigan, 137 F.3d at 125. Thus, the court considers these arguments in light of the applicable federal law.

An ineffective assistance of counsel claim is reviewed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). To prevail, Constantopoulos must demonstrate, first, that counsel's conduct "fell below an objective standard of reasonableness" established by prevailing professional norms and, second, that this incompetence caused prejudice to him. Id. at 687-88. Counsel is presumed to be competent. Thus, "the burden rests on the accused to demonstrate a constitutional violation." United States v. Cronin, 466 U.S. 648, 658 (1984). To satisfy the prejudice prong of the Strickland test, Constantopoulos must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome" of a trial. Id. When the ineffective assistance of counsel claim is premised on counsel's strategies or decisions, the petitioner must demonstrate that he was prejudiced by his counsel's conduct. To demonstrate prejudice in the context of a guilty plea, the petitioner must demonstrate that "counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). That is, the petitioner must demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. Where the petitioner claims that counsel failed to advise him of available defenses, the "prejudice" inquiry must address objectively whether the defense likely would be successful at trial. See id. To prevail, Constantopoulos must demonstrate both deficient

performance and sufficient prejudice. See Strickland, 466 U.S. at 700. Thus, if the court finds one prong of the standard lacking, it need not consider the remaining prong.

In its analysis, the Connecticut Appellate Court applied the standard established in Strickland and Hill. Because the state court applied the correct legal standard, Constantopoulos may obtain federal habeas relief only if the state court decision was an unreasonable application of that standard to the facts of this case. The state court decided the ineffective assistance claim by considering the prejudice prong of the Strickland test. Similarly, for purposes of ruling on the amended petition, the court focuses on whether Constantopoulos was prejudiced by the conduct of trial counsel.

The Connecticut Appellate Court first considered Constantopoulos' claim that counsel was ineffective because counsel did not object to the trial court's failure to inform him during the plea canvass of the mandatory minimum sentence and the portion of the sentence that could not be suspended. The Connecticut Appellate Court analyzed this claim as follows:

In this case, the petitioner faced a potential sentence of life imprisonment for two murders. If he had allowed the trial to proceed to completion, he may have been found guilty of the murders of both Hillyard and Gray. Pursuant to General Statutes § 53a-35a, the petitioner, who was seventeen years old at the time of trial, was facing the possibility of twenty-five years to life imprisonment for each count of murder. Therefore, the petitioner faced the potential of lengthy incarceration. The total effective sentence of thirty-five years imprisonment, which the petitioner received, is substantially less than the maximum sentences that he faced on both counts of murder. While it is possible that he may have been acquitted on both charges, he decided to plead guilty on the bases of the advice of counsel and the urging of his mother, who was his court-appointed guardian ad litem. We cannot infer, on this record, that the failure to advise the petitioner of the mandatory minimum sentences and the nonsuspendable portions of those sentences would have modified his desire to minimize his exposure at age seventeen to potential life imprisonment.



More significantly, the petitioner agreed to a term of imprisonment that exceeded any mandatory minimum sentence. During the plea bargaining process, the original proposal called for a capped sentence of thirty years imprisonment in exchange for the petitioner's guilty plea. This offer was rejected by the state in favor of an offer of a capped sentence of forty years imprisonment with the right to argue for less. The petitioner has failed to demonstrate that he was prejudiced because he was not advised of the mandatory minimum sentence on the various charges since he knew that he would be subject to a term of imprisonment far exceeding any mandatory minimum sentence. See State v. Domian, 235 Conn. 679, 688-90, 668 A.2d 1333 (1996) (failure of trial court to advise defendant of mandatory minimum sentence did not constitute reversible error when defendant was aware of actual sentencing possibilities). Therefore, the petitioner knowingly pleaded guilty because his decision was based on his knowledge of the actual prison sentences that he faced as a result of the plea bargaining process. We conclude that the petitioner has failed to establish that he would have changed his plea to not guilty had the trial court complied with the requirements of [Connecticut Practice Book] § 711(2) and (3).

Constantopoulos I, 47 Conn. App. at 834-35, 708 A.2d at 591-92 (footnote omitted).

Constantopoulos argues that he was unaware of the actual sentencing possibilities. He states that the trial court did not inform him that the mandatory minimum sentence was twenty-five years or that the plea agreement included a sentencing cap of forty years. The Connecticut Appellate Court, however, determined that Constantopoulos was aware that the maximum sentence would be forty years and that the court had rejected a previous agreement calling for a cap of thirty years. It emphasized that Constantopoulos was aware, because of the course of plea negotiations, that he would be sentenced to a term of imprisonment in excess of thirty years, which exceeded the mandatory minimum sentence. Further, following the state habeas hearing, the court determined that trial counsel had informed Constantopoulos that the trial court had rejected a sentence of thirty years. (See Resp't's

Mem. App. B at 21.)

The record supports these factual determinations. The transcript of the plea hearing reveals that the trial court informed Constantopoulos that, as a result of the substitute information, the state would argue vigorously for a sentence of forty years for the shooting of Reginald Hillyard and, although trial counsel reserved the right to argue for a lesser sentence, he would be sentenced to a term of imprisonment approaching that time. Constantopoulos indicated that he understood the possible sentence. (See Resp't's Mem. App. M at 7-8, 28.) In addition, the trial court explained, and Constantopoulos indicated that he understood, that the maximum sentence Constantopoulos could receive at trial was sixty years on the charge of murder, twenty years on the charge of manslaughter and five years on the gun possession charge, or a possible total sentence of eighty-five years on the substituted charges and a sentence of life imprisonment without the possibility of parole on the original charges. (See Resp't's Mem. App. M at 24-26, 31.) Constantopoulos indicated that he was concerned about the possible maximum sentence and that this concern motivated him to plead guilty to the charges. (See Resp't's Mem. App. M at 28.)

The factual findings of the state habeas court and the Connecticut Appellate Court that Constantopoulos was aware that he would not be sentenced to less than thirty years have not been rebutted by Constantopoulos and are presumed correct. See 28 U.S.C. § 2254(e)(1). Although trial counsel's representation was not flawless, in light of the record, the court concludes that the determination of the Connecticut Appellate Court that Constantopoulos was not prejudiced by trial counsel's failure to object to the trial court's failure to inform him that the mandatory minimum sentence was twenty-five years and that this portion of the sentence could not be suspended is not an

unreasonable application of the law.<sup>2</sup>

The Connecticut Appellate Court next considered whether Constantopoulos was prejudiced by trial counsel's failure to inform him of possible defenses to the murder charge that could result in his conviction for a lesser included offense. The Appellate Court analyzed this claim as follows:

To evaluate such a claim properly, it is customary for the reviewing court to decide whether the affirmative defense at issue would have succeeded at trial. Hill v. Lockhart, supra, 474 U.S. at 59, 106 S. Ct. at 370; Copas v. Commissioner of Correction, 234 Conn. 139, 162-63, 662 A.2d 718 (1995). If it is likely that the affirmative defenses of self-defense, extreme emotional disturbance or defense of property would have succeeded at trial, then the petitioner has demonstrated the required prejudice to prevail on his ineffective assistance of counsel claim.

When reviewing this claim, we “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under these circumstances, the challenged action might be considered sound trial strategy.” (Internal quotation marks omitted.) Levine v. Manson, 195 Conn. 636, 640, 490 A.2d 82 (1985).

In this case, the petitioner’s trial counsel testified that he was planning to make a self-defense argument to the jury during his closing statement. In addition, he considered the defenses of extreme emotional disturbance and defense of property but decided against

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<sup>2</sup> Constantopoulos includes as a separate issue in his petition for certification to the Connecticut Supreme Court and also in his amended federal habeas petition that the Connecticut Appellate Court erred by failing to distinguish the facts of this case from the facts of State v. Domain, 235 Conn. 679, 668 A.2d 1333 (1996). The only claims cognizable in a federal habeas corpus action are that a state conviction was obtained in violation of some right guaranteed by the United States Constitution or other federal law. See Estelle v. McGuire, 502 U.S. 62, 68 (1991) (holding that a claim that a state conviction was obtained in violation of state law is not cognizable in the federal court); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998) (same). Thus, a claim that the state court misinterpreted state law is not cognizable in this action.

employing them. These decisions could be considered sound trial strategy under the circumstances of this case. At the time of trial, Ganim had been a member of the bar for over forty years and had handled between fifty and 100 murder cases during that time. We cannot conclude that informing the petitioner of these defenses would necessarily have changed his plea. Ganim recommended to the petitioner that he should accept the state's plea offer in an attempt to minimize his exposure to a life sentence. Ganim presumably weighed the likelihood of success on the self-defense claim, and, as did the petitioner's mother, recommended that the petitioner accept the state's plea bargain offer. We conclude that the petitioner has failed to prove that he was prejudiced by his counsel's failure to discuss the potentially relevant defenses and the lesser included offenses to the murder charge.

Constantopoulos I, 47 Conn. App. at 836-37, 708 A.2d at 592-93.

In support of his petition, Constantopoulos argues that the Connecticut Appellate Court applied an incorrect legal standard in evaluating this claim. He contends both that the Connecticut Appellate Court did not comply with the Strickland standard and that the court did not comply with a standard set forth under state law. To the extent that the state law standard differs from the Strickland standard, the claim is not cognizable in a federal habeas petition. See Estelle v. McGuire, 502 U.S. 62, 68 (1991) (holding that a claim that a state conviction was obtained in violation of state law is not cognizable in a federal habeas petition); Dunnigan v. Keane, 137 F.3d 117, 125 (2d Cir. 1998) (same). Thus, the court considers this claim only with regard to the federal standard.

Whether Constantopoulos has made the requisite showing of prejudice depends on the facts of this case. See Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000). As set forth above, the Connecticut Appellate Court determined that the evidence presented at trial demonstrated that this incident occurred following a high speed chase. Hillyard previously had threatened Constantopoulos and shown him a gun. The chase ended when Hillyard drove into Constantopoulos' driveway behind Constantopoulos.

This court cannot discern from the available facts whether Constantopoulos had a gun in his car or retrieved it from his residence or somewhere on the property. The state court determined, however, that the argument continued after Constantopoulos and Hillyard exited their cars, Hillyard may have fired one shot, and Constantopoulos fired eight shots, shooting Hillyard five times. See Constantopoulos I, 47 Conn. App. at 829-30, 708 A.2d at 589. In addition, there are references in the transcript of the sentencing hearing that Constantopoulos later drove Hillyard's car over Hillyard's body when Constantopoulos was attempting to flee. (See Resp't's Mem. App. N at 100, 113-14.)

In considering whether counsel provided effective assistance when he recommended that his client plead guilty without advising him of a potentially valid affirmative defense, the Supreme Court stated that "the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Hill, 474 U.S. at 59. See also Panuccio v. Kelly, 927 F.2d 106, 109 (2d Cir. 1991) ("The likelihood that an affirmative defense will be successful at trial and an assessment of the probable increase or reduction in sentence relative to the plea if the defendant proceeds to trial are clearly relevant to the determination of whether an attorney acted competently in recommending a plea."). Such a prediction "when necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" Hill, 474 U.S. at 60. See also Flores-Ortega, 528 U.S. at 485 (stating that evidence of nonfrivolous grounds for appeal was "highly relevant" in determining whether counsel was ineffective for failing to file notice of appeal). The Second Circuit has held that "this prong of the inquiry is not satisfied merely by [petitioner's] testimony that he would have gone to trial had he known of the defense, ... since a defendant's testimony after the fact suffers from obvious credibility problems." Panuccio, 927 F.2d at 109 (internal citations omitted).

The Connecticut Appellate Court considered Constantopoulos' possible defenses and determined that they likely would not succeed at trial. In his petition for certification to the Connecticut Supreme Court, Constantopoulos argues only that the Connecticut Appellate Court applied an incorrect legal standard in reviewing this claim. Because the state court applied the correct legal standard in reviewing this claim, Constantopoulos' argument is without merit. In addition, Constantopoulos has provided nothing other than his own statement that he would have elected to continue the trial if he had been informed of the possible defenses. This bald assertion is insufficient to demonstrate that he was prejudiced by trial counsel's actions.

Third, the Connecticut Appellate Court considered Constantopoulos' contention that trial counsel failed to discuss with him all of the elements of the crimes with which he had been charged.

The court analyzed this claim as follows:

We previously determined that the petitioner did not prove the required prejudice caused by his counsel's failure to ensure that he be advised of the mandatory minimum sentence, the nonsuspendable portion of his sentence, and the potentially relevant defenses to the charge of murder. Since there was no demonstration of prejudice on those issues, we conclude that the failure to be advised of the specific elements of the crimes with which he was charged would also not cause prejudice. It is not likely that the petitioner would have withdrawn his guilty plea and elected to have the trial proceed to completion because he had been advised of the elements of the crimes with which he was charged.

Constantopoulos I, 47 Conn. App. at 837, 708 A.2d at 593.

A review of the plea hearing reveals that Constantopoulos indicated that trial counsel had discussed with him the elements of the various charges. In addition, the trial court explained the elements of all of the charges at the hearing and questioned Constantopoulos about his actions and

intention. (See Resp't's Mem. App. M at 18-21.) The record supports the Connecticut Appellate Court's determination that Constantopoulos failed to demonstrate that he was prejudiced by the alleged failure of trial counsel to inform him of the elements of the crimes with which he had been charged. Cf. Diaz v. Mantello, 115 F. Supp. 2d 411, 420-21 (S.D.N.Y. 2000) (holding that language in the indictment and petitioner's acknowledgments and admissions during plea hearing demonstrated that petitioner suffered no prejudice from counsel's alleged failure to discuss elements of crime). The Connecticut Appellate Court noted that Constantopoulos had presented at the habeas hearing no credible evidence showing that he would have elected to go to trial and face a sentence of life plus 125 years rather than plead guilty and receive a sentence capped at forty years. The court determined that the decades-long reduction in sentence from the maximum sentence under the substitute information was a substantial benefit to Constantopoulos that supported defense counsel's recommendation and Constantopoulos' decision to plead guilty. This court concludes that the determination of the Connecticut Appellate Court on this issue is not an unreasonable application of the applicable law to the facts of this case.

Finally, the Connecticut Appellate Court considered Constantopoulos' argument that trial counsel's failure to review and type his motion to withdraw the guilty plea constituted ineffective assistance.

The petitioner next claims that he was denied the effective assistance of counsel when his attorney failed to reduce his handwritten pro se motion to withdraw his guilty plea into a formal typewritten motion at the sentencing hearing on November 13, 1990. As part of this claim, the petitioner further alleges that his counsel did not articulate to the trial court the specific legal basis from Practice Book § 721 on which he would rely to have the petitioner's guilty plea withdrawn, and that

counsel should have formally researched and briefed the issue. We are not persuaded.

At the sentencing hearing, the trial court offered Ganim a one day continuance so that the motion could be typewritten to present fully the issue of plea withdrawal. Ganim declined the trial court's offer and read the petitioner's pro se motion into the record. The trial court requested a playback of the guilty plea canvass from September 21, 1990, to determine whether it was legally sufficient. The trial court then denied the petitioner's motion to withdraw his guilty plea.

The petitioner again has failed to demonstrate that any prejudice resulted from Ganim's performance. The petitioner does not point to any additional legal arguments that Ganim could have made to the trial court in support of the motion had he allowed the sentencing hearing to be continued to the next day. We conclude that the motion was properly before the trial court in satisfactory form to enable the court to rule on the motion, and the petitioner was not prejudiced in any way because it was not typewritten. In addition, the petitioner has not demonstrated that the outcome of the proceeding would have been different if Ganim had submitted the motion to withdraw the guilty plea in typewritten form. Accordingly, we conclude that the petitioner was not denied the effective assistance of counsel.

Constantopoulos I, 47 Conn. App. at 837-39, 708 A.2d at 593 (footnote omitted).

Constantopoulos argues that the Connecticut Appellate Court applied an incorrect legal standard in reviewing this claim. He contends that the court improperly focused on the outcome of the trial had he withdrawn the guilty plea rather than on the reliability of his conviction.

At the sentencing hearing, the trial court heard argument from the prosecutor and trial counsel. Each characterized the evidence that had been presented in the case before Constantopoulos entered his plea. Although trial counsel contested the prosecutor's statement that Constantopoulos intentionally drove over Hillyard's body, he did not dispute that Constantopoulos fired five shots into Hillyard, some at close range after Hillyard had been knocked down. Although Constantopoulos moved to withdraw



his plea because he had second thoughts regarding the manslaughter charge, he did not question the evidence presented on the murder charge, and has provided no evidence suggesting that he would have preferred to continue the trial and face the possibility of a sixty-year sentence on the murder charge. Thus, Constantopoulos has not demonstrated that the decision of the Connecticut Appellate Court was an unreasonable application of Supreme Court law.

After careful review, this court concludes that the decision of the Connecticut Appellate Court regarding Constantopoulos' various claims of ineffective assistance of trial counsel was a reasonable application of the law to the facts of this case. Accordingly, the petition for writ of habeas corpus is denied on this ground.

B. Illegal Sentence

In his second ground for relief, Constantopoulos argues that his sentence is illegal because the trial judge incorrectly believed, and led Constantopoulos to believe, that he would be eligible for parole. Constantopoulos bases this argument on the plea colloquy,<sup>3</sup> which included the following exchange:

Q Do you know what the maximum penalty could be for the offense of Manslaughter in the First Degree?

A Yes, sir.

Q Can you tell me what you understand that to be?

A I believe twenty years.

Q Correct. And do you understand what the maximum penalty can

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<sup>3</sup> The entire plea colloquy was read back and placed upon the record in connection with Constantopoulos' motion to withdraw his guilty plea, which the trial court heard immediately prior to sentencing Constantopoulos. (See Resp't's Mem. App. N at 48-86.)

be in respect to the offense of Murder?

A Yes, sir.

Q Can you tell me what you understand that to be?

A I believe life without parole.

Q Not true.

THE COURT: Is that right?

MR. BENEDICT [Prosecutor]: You're right; he's wrong.

THE COURT: The maximum is life?

MR. GANIM: Life imprisonment.

THE COURT: What?

MR. BENEDICT: Sixty years.

MR. GANIM: Yes.

Q Which, in your life, would total seventy-seven years of age; correct?

A Yes, sir.

Q All right. Do you understand that now?

A Yes.

Q As you were charged with capital felony you'd have no benefit of parole; that is not in the cards at this time. Do you understand that?

A Yes.

Q Did you confuse that?

A Yes, sir.

Q You now understand what your maximum sentence is?

A Yes, sir.

Q And the Murder alone is sixty years or life?

A Yes.

(Resp't's Mem. App. M at 24-25.) Constantopoulos inferred from this exchange that he would be eligible for parole on the charges to which he pled guilty.

The Connecticut Appellate Court determined that Constantopoulos' sentence was not illegal under applicable state law.

“An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory.” (Internal quotation marks omitted.) Cobham v. Commissioner of Correction, 258 Conn. 30, 38, 779 A.2d 80 (2001); State v. McNellis, 15 Conn. App. 416, 443-44, 546 A.2d 292, cert. denied, 209 Conn. 809, 548 A.2d 441 (1988), citing 8A J. Moore, Federal Practice, para. 35.03[2], ¶. 35-35 through 35- 36. The remedies available for correcting an illegal sentence include reconstructing the sentence to conform to its original intent or to the plea agreement, eliminating a sentence previously imposed for a vacated conviction or resentencing a defendant if it is determined that the original sentence was illegal. Cobham v. Commissioner of Correction, *supra*, at 39, 779 A.2d 80.

In the present case, the defendant's claim that the court improperly led him to believe that he would be eligible for parole, even if accurate, does not result in an illegal sentence. The sentence did not exceed the relevant statutory maximum limits or violate the defendant's right against double jeopardy, and the defendant does not claim on appeal that the sentence was ambiguous or internally contradictory. Furthermore, the defendant cites no case law, and we are aware of none, supporting the proposition that a defendant's failure, at the time of the plea, to comprehend fully the terms of his sentence renders the sentence illegal. Accordingly, we conclude that the court properly denied the defendant's motion to correct.

Constantopoulos II, 68 Conn. App. at 882-83, 793 A.2d at 280-81.

The Supreme Court has held that the trial court is not required to furnish any information regarding parole eligibility. See Hill, 474 U.S. at 59 (“We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant’s plea of guilty to be voluntary ....”). Accord King v. Dutton, 17 F.3d 151, 154 (6<sup>th</sup> Cir.) (“a defendant need not be informed of the details of his parole eligibility, including the possibility of being ineligible for parole”) (citations omitted), cert. denied, 512 U.S. 1222 (1994). Although the Court has recognized that an attorney’s erroneous advice about parole eligibility may constitute ineffective assistance, see Hill, 474 U.S. at 56-57, Constantopoulos does not allege that trial counsel provided any misinformation.

Prior to the enactment of the AEDPA, several federal appellate courts recognized misinformation regarding parole eligibility that was provided by the state or defense counsel as a possible ground for habeas corpus relief. See Meyers v. Gillis, 93 F.3d 1147 (3d Cir. 1996) (“[W]here parole eligibility information is provided to a defendant by the state or the defendant’s attorney and that information is grossly erroneous, a defendant may be entitled to habeas relief where he can show that he would not have pleaded guilty had accurate information been provided.”) (collecting cases). To date, however, the Supreme Court has not recognized misinformation regarding parole eligibility as a ground for federal habeas corpus relief. Because there is no applicable Supreme Court precedent, the determination of the Connecticut Appellate Court is neither contrary to nor an unreasonable application of Supreme Court law. Thus, federal habeas corpus relief is not available on this ground.

Further, although Constantopoulos argued, in his petition for certification to the Connecticut Supreme Court, that his sentence was illegal because the trial court relied on inaccurate information when it imposed the sentence, the record does not support his claim. Constantopoulos alleges no facts suggesting that the trial court assumed that he would be eligible for parole on the charge of murder. Instead, Constantopoulos identifies his own mistaken inference as the inaccurate information. The transcript of the plea colloquy does not reveal that the trial court advised Constantopoulos one way or the other concerning his parole eligibility. Rather, considering the entire colloquy in context, it is clear to this court that the trial judge was attempting to correct Constantopoulos' impression that the murder charge in the substitute information carried the same sentence, life imprisonment without the possibility of parole, as the original charge of capital felony murder. The trial court emphasized that the substitute murder charge carried a sentence of life, which was defined as sixty years' imprisonment. Thus, Constantopoulos would be eligible for release from prison when he was seventy-seven years old. At the hearing, Constantopoulos asked no questions regarding parole eligibility and indicated that he understood the sentence as explained to him by the court. (See Resp't's Mem. App. M at 24-25.) Thus, the record fails to support Constantopoulos' claim that the trial court relied on or communicated inaccurate information either at the plea proceeding or at sentencing.

Constantopoulos also argued in his appeal of the denial of his motion to correct sentence that his sentence was imposed in an illegal manner. Such a claim challenges a sentence that was imposed within the relevant statutory limits but imposed in a way that violates the defendant's rights, such as the right to be addressed personally at sentencing and to speak in mitigation of punishment, the right to be

sentenced by a judge relying on accurate information or considerations solely in the record, or the right that the government keep its plea agreement promises.

Constantopoulos II, 688 Conn. App. at 883 n.3, 793 A.2d at 281 n.3 (citation omitted). The Connecticut Appellate Court declined to review this claim because the claim was not included in the motion to correct sentence that Constantopoulos filed in the trial court. The court stated that review was available under the plain error doctrine or pursuant to State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), but noted that Constantopoulos did not invoke either doctrine. Thus, Constantopoulos was procedurally barred from raising this claim on appeal. See Constantopoulos II, 688 Conn. App. at 883, 793 A.2d at 281.

The availability of review on the merits of a constitutional claim is limited by various procedural barriers, such as statutes of limitation and rules governing procedural default and exhaustion of state court remedies. See Daniels v. United States, 525 U.S. 374, 381 (2001). When a habeas petitioner has failed to comply with state procedural requirements, the claims will not be reviewed on a federal petition for writ of habeas corpus unless the petitioner can demonstrate cause for his state-court default and prejudice resulting therefrom. The only exception to this prohibition is where the petitioner can demonstrate that the failure to review the federal claim will result in a fundamental miscarriage of justice. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (citations omitted). The Supreme Court interprets this exception to mean that the constitutional violation “has probably resulted in the conviction of one who is actually innocent.” Murray v. Carrier, 477 U.S. 478, 496 (1986).

Nowhere does Constantopoulos argue that he is innocent of all charges. Thus, the exception does not apply. In addition, Constantopoulos makes no showing of cause for failing to raise this issue properly or prejudice resulting from the state court's failure to consider the issue. Absent such a showing, this court will not address the claim that Constantopoulos' sentence was imposed in an illegal manner.

V. Conclusion

The amended petition for a writ of habeas corpus [doc. #19] is DENIED. A certificate of appealability will not issue. The Clerk is directed to enter judgment and close this case.

SO ORDERED this \_\_\_\_ day of April 2003, at Bridgeport, Connecticut.

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Stefan R. Underhill  
United States District Judge