

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. 89-71

STATE OF MAINE

v

DENNIS DECHAINED

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DEFENDANT'S OBJECTION TO THE
STATE'S MOTION TO DISMISS THE
DEFENDANT'S MOTION FOR NEW TRIAL

NOW COMES the defendant, Dennis Dechaine, by and through his attorney, Thomas J. Connolly, and respectfully requests this Honorable Court to dismiss the State's Motion to Dismiss which was filed in response to Defendant's Motion for New Trial. For good cause the defendant states as follows:

1. The defendant, Dennis Dechaine, filed a Motion for New Trial with this Court on May 5, 1992. Following that filing, on May 21, 1992 the State filed a Motion to Dismiss. Neither affidavits, nor certified copies of records were provided with the State's motion. In addition, no averment of any kind as it relates to dates or Court action was provided with the State's motion;

2. A certified copy of the clerk's record in this case is attached to this motion and incorporated by reference herein. The clerk's record in docket CR-89-71 establishes an entry date of final judgment of 5/9/90. This is the date upon which counsel computed the two year limitation for the motion

Thomas J. Connolly
Attorney at Law
Fore Street
Box 7503 D.T.S.
Portland, Maine 04112
(207) 773-6460

for new trial. The entry of the clerk's judgment occurred on 5/9/90 and that date is not mentioned anywhere in the State's Motion to Dismiss;

3. The State's motion also fails to take into consideration that during the time in which it maintains the Rule 33 time expired a petition was filed by the defendant to the United States Supreme Court requesting a Writ of Certiorari. Based upon the affidavit provided this motion as well as the accompanying documents from the Supreme Court of the United States, the docketing of the Writ of Certiorari **was** entered the by U.S. Supreme Court on June 13, 1990 and the disposition of the case took place on October 1, 1990. Copies of the Supreme Court notices documents are attached and incorporated by reference herein;

4. At all times material herein the U.S. Supreme Court had jurisdiction over the case and authority to hear the merits;

5. The entry of a final judgment can not and could not take place until the conclusion of the United States Supreme Court's review of Dennis John Dechaine's case. Therefore, the date upon which a motion for new trial could be filed extends all the way to October 1, 1992;

6. The Memorandum of Law and the attached documents which accompany this motion in opposition to the State's Motion to Dismiss are incorporated by reference herein and

provides a further legal and factual basis in which to deny the State's Motion to Dismiss.

WHEREFORE the defendant respectfully requests that the State's Motion to Dismiss the Motion for New Trial be denied and that the Motion for New Trial be granted.

DATED: June 17, 1992

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Thomas J. Connolly
Attorney for Defendant

STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
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v

MEMORANDUM OF LAW AND STATEMENT
OF FACT IN OPPOSITION TO STATE'S
MOTION TO DISMISS

DENNIS DECHAINED

The State has moved to dismiss Defendant's Motion for New Trial based upon a timeliness objection. For the articulated reasons below the Motion for New Trial was indeed filed on time.

T. THE MOTION TO DISMISS MUST BE DENIED AS IT FAILS TO
CREATE A BASIS FOR DISMISSAL AS A MATTER OF LAW.

The attorney for the State has filed a request to this Court to dismiss the Motion for New Trial which was filed on May 5, 1992. The filing by the defendant included affidavits as well as a memorandum of law. The motion for the State includes neither affidavits nor certified copies of docket entries.

Although the filing of an affidavit is not a requirement for a motion for new trial nor for a motion to dismiss, the hearing justice must have all the tool necessary in order to make an adequate decision. See State v Spear, 467 A.2d 173, 175 (Me. 1983). This is because of the requirement of the court to act upon a motion based upon the evidence presented

in the motion. There is a presumption that a hearing will be had and affidavits are useful in order to fully inform the Court as to the status of the case. State v. 413 A.2d 161 (Me. 1990). See also Glassman Oaine Criminal Procedure, Section 47.2.

In the instant case, the State has not provided sufficient information for the Court to rule upon. The affidavits which are attached and incorporated by reference herein establish that during the time in which the State alleges certain dates to have taken place expired, the defendant had filed a Petition for Writ of Certiorari with the United States Supreme Court. The importance of this is to show by way of verified evidence that the dates used to argue the State's motion are not reliable. Insofar as the burden is upon the moving party to dismiss, the burden has not been met. Because of the conflict of dates, verification should be required in order to pass upon the motion to dismiss. It is the State's burden of proof to establish the dates and their failure to have done so via certification or averment should be fatal.

II. THE MOTION FOR NEW TRIAL WAS FILED TIMELY UNDER MAINE LAW.

Defendant filed his Motion for a New Trial May **5v 1992**. The defendant maintains that the proper date for calculation of the period in which to determine the timeliness of the motion for new trial is the clerk's entry of the judgment and

order of May 9, 1990. See the certified copy of the clerk's record which is attached and incorporated by reference herein. The defendant was within the two year proscribed period.

In fashioning their pedantic argument the State would require the Court to stand on one foot, look around a corner in order to see its argument. Merely analyzing the argument that the State offers should put to rest any issue of timeliness.

On page 2 of its brief the State argues quite clearly that the time frame in which to calculate the "final judgment" for purpose of new trial is the entry of judgment of the conviction. State's brief at page 2. By quoting Berman v United States, 302 U.S. 211, 212 (1937) and the other cases the State establishes that "final judgment in a criminal case means the sentence. The sentence is the judgment." State's Brief at 2. Therefore, the gravamen of the analysis, by the State's own argument, is when the sentence was finally entered in this docket by this Court.

The operative date for the entry of the final judgment, as the certified copy of the clerk's record establishes, is May 9, 1990. This is the date in which all state appeals were exhausted and the judgment recorded by the clerk. Further authority for this computation principle may be seen in Maine Rule of Criminal Procedure 37 (c) which states "a judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket..." (emphasis supplied)

Furthermore, Cluchey ~ Seitzinger in Maine Criminal Practice §37-31 state the period begins with proper entry of the judgment or order on the clerk's docket sheet..." Similarly, Glassman in his work on Maine Criminal Procedure states "within two years after final judgment means two years after the conviction ceases to be subject to direct attack. Thus the date of final judgment is the last date for taking an appeal if no appeal is taken, or if an appeal is taken, the date when the appellate process is terminated." (citations omitted) Glassman §33.2 page 371.

The two affidavits which are attached and incorporated by reference herein also establish the appropriateness of the May 9, 1990 date as the entry of final judgment. Although the representation by the Knox County clerk's to defendant's counsel and his secretary is not binding, it does show importantly that the common parlance of the Court is that the final judgment is not entered until the clerk in the Superior Court enters the denial of the appeal of sentence. Insofar as the sentence is the judgment, as the State maintains, the final judgment did not come into effect until the clerk entered to mandate from the Law Court. This is consistent with previous Maine law. See Glassman id.

III. THE FINAL JUDGMENT DATE EXTENDS FROM THE TIME THAT THE UNITED STATES SUPREME COURT TOOK ACTION ON THIS CASE WHICH WAS OCTOBER OF 1990.

The attorney for the State entirely neglects to mention

to the Court or take into account that the defendant had filed a Request for Petition of Certiorari to the United States Supreme Court directly following the Law Court's action in the case. The failure to examine the interrelationship between the Petition for Certiorari and the action taken by the United States Supreme renders the State's Motion to Dismiss void.

Examining the affidavit attached as well as the documentation provided by the United States Supreme Court it is clear that on June 13, 1990 the Petition for Writ of Certiorari filed by Dennis Dechaine was docketed as Supreme Court Docket No. 90-5006. The action of the Supreme Court in docketing the entry indicates the Supreme Court's jurisdiction in the matter. Further documentation as to Supreme Court jurisdiction can be found in the United States Supreme Court Rules 10.1 (c). This provision allows for the Petition of Certiorari for an alleged constitutional deprivation by a defendant through the state court process and then to the United States Supreme.

The Supreme Court ultimately refused to hear the case and denied the Petition for Writ of Certiorari but that action did not take place until October 1, 1990. See attached affidavit and documents provided in the appendix from the Supreme Court of the United States docket number 90-5006.

It is the defendant's position that the State's motion is inappropriate in arguing that the final judgment was entered at any other time then following when the U.S. Supreme

Court acted. To accept the State's argument is to deny the supremacy of the United States Constitution and the Supreme Court's authority to review the case. Simply put, the authority of the Supreme Court to review and the request for the case to be reviewed, meant that a final judgment by definition could not be entered. The pendency of a Petition for Writ of Certiorari acts as a prevention for the entry of a final judgment. To allow the phrase final judgment to be used in this context would be to deny the ability of the Court to have accepted the Petition for Writ of Certiorari and to have acted upon the same. Gomez v Perez, 409 U.S. 535, fn 2 (1972); Mishkin v New York, 383 U.S. 502 (1966).

It is elemental that the supremacy clause of the United States Constitution, Article 6 § 2, as well as the establishment of the Supreme Court in Article 3 § 1 and 2, provides that the Constitution is the supreme law of the land and the Supreme Court is the ultimate determinator of the law. As Chief Justice John Marshall wrote in _____ 5 U.S. (1 CRANCH) 137, 177, (1803) "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each...if then the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution and not such ordinary

act, must govern the case to which they both apply." See also the Judiciary Act of 1789, § 25, 1 Stat. 73, 85; Martin v Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). See also Cooper v Aaron, 358 U.S. 1, 18 (1959).

As was documented above the finality of a judgment can not take place until the expiration of all appellate process. See Cluchey and Seitzinger Maine Criminal Procedure § 33-12.1 citing Glassman Maine Criminal Practice § 33.2 at 271. The two years from the final judgment is October of 1992. Thus, by this analysis, the Motion for New Trial is still within the statutory period by some five months.

Maine has long recognized that the application for a Writ of Certiorari acts a limitation upon the trial court's ability to act and to enter final judgment. A Writ of Certiorari takes the case out of the custody of the lower court, leaving nothing there which can be acted on and hence prevents the entry of a final judgment. See for example Brooks v Clifford, 69 A.2d 825, 144 Me. 370 (Me. 1950), Toulouse v Board of Zoning, 87 A.2d 670, 147 Me. 387 (Me. 1952). In Donnell v Board of Registration of Medicine, 128 Me. 523, 149 A. 153 (1930) the Maine Supreme Court ruled that a petition for Certiorari: filed under state procedures then existent, operated as a bar to use of a manslaughter conviction because it was not a final judgment. The Court stated "The end of a criminal case is not reached when an appeal follows verdict, presenting a question of law. The case is pending

notwithstanding verdict and sentence." at 528. The Court went on to state "It goes without saying that the 'determinator' of the Law Court may not end the case." Id at 528.

Similarly, in State v. [redacted], 150 Me. 28, 103 A.2d 523 (1954) Chief Justice Merrill determined that a criminal conviction is not final until avenues of redress are completed." . . . the defendant is not deemed to have been convicted. . . until the case has reached such a stage that no issue of law or fact determinative of his guilt remains to be decided. The end of a criminal case has not been reach if exceptions to the refusal to direct a verdict for the defendant are still pending in the Law Court such case is pending notwithstanding verdict and sentence. . . In fine, there is no conviction in the sense we are now using the term until the guilt of the defendant has been legally and finally determined and adjudicated." Id at 31 (elipse supplied)

Thus, given the jurisdiction of the U.S. Supreme Court and its supremacy over State Court proceedings, the final judgment could not have constitutionally been entered until October 1, 1990. The two year limit runs from that date and the defendant's Motion for New Trial is jurisdictionally properly before this Court.

IV. THE STATE'S ARGUMENT AS TO THE RULE CHANGE OF MAINE RULE OF CRIMINAL PROCEDURE 33 OF FEBRUARY 1, 1992 IS NOT APPLICABLE TO THE FACTS OF THE CASE.

The State has argued that the Maine Rule of Criminal

Procedure change effective February 1, 1992 is dispiesitive of the case. That rule change as is argued by the State would have retroactively eliminated Dennis Dechaine's ability to seek a new trial upon its implementation on February 1, 1992. If the State argument is correct that the rule changed Maine Law to compute the date of the two year filing limitation for the entry of judgment as the initial underlying entry of the judgment, by its terms the February 1, 1992 Amendment would have eliminated a vested right that Dechaine had prior to the adoption of the rule. This is in contradistinction to the constitutional requirement of post facto law and due process.

"[O]ur Federal Constitution neither prohibits nor requires that retrospective effect be given to new legal concepts in the field of criminal juris prudence made by court decisions changing the rules and law in existence at the time of trials. Even in cases involving issues of constitutional dimension, provided that the reliability of the quill t determining process is not seriously."

State, 322 A.2d 594, 597 (Me. 1974) (emphasis supplied by the Law Court) (quoting State v Wheeler, 252 A.2d 455 (Me. 1969)). Criteria for determining retroactive applicability of a new rule reversing prior doctrines in the area of criminal law in Maine are "(a) the purpose to be served by the new standard; (b) the extent of reliance by law enforcement authorities on the old standard and; (c) the effect on the administration of justice of a retroactive application of the new standard."

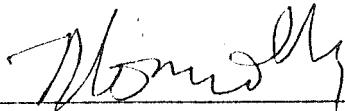
_____ State, 322 A.2d at 597-98 (quoting Stovall v _____
388 U.S. 293, 87 S.Ct. 1967). See also Teague v _____ 486
U.S. -, 109 S.Ct. 1060, 1075-75 (1989). Mackey v United
States, 401 U.S. at 693-694.

The Law Court has also been concerned with the standard for retroactive application of law which primarily effect the accuracy of the truth determining process in the judicial system. The primary factor in determining if a new law should be applied retroactively under the Poitraw standard is whether the "integrity of the truth determining process" is involved. 322 A.2d at 598. Thus, "the effect of any new rule, under Maine's Poitraw standard or the Supreme Court's Teague standard, on the truth determining process is paramount to determining whether it shall be applied retroactively." The issue here in Dechaine goes to the heart of the truth determining process. The allegations made by the defendant and supported by affidavits should show that the State was in possession of evidence that would have directly led to the defendant's acquittal. The failure to turn over that evidence, despite their knowledge of it goes to the heart of the truth determining process. The Motion for New Trial is largely based upon evidence which was not turned over to the defendant and which could not have been obtained by due diligence. It should be underscored that the State had in its possession the information which was never provided to the defendant. The mechanism for the Motion for New Trial is to

verify and validate the truth seeking function of a trial. Insofar as hypersensitive and retroactive determination of timeliness prevents the exploration of the critical truth determining function renders the entire process suspect. It is in exactly these kinds of instances that the application retroactively should not be allowed.

Similarly, if the Court does apply the February rule the Court by necessity will have determined that right to file the Motion for New Trial was extinguished upon the adoption of the February 1992; rather that the May 9, 1992 date to file the argument would conclude the two years expired April 4, 1991, eliminating by more than one year the time in which to file. The application of the rule in this context would have retroactively extinguished the defendant's right to file a Motion for New Trial within the time frame. This is constitutionally impermissible.

DATED: June 17, 1992



Thomas J. Connolly
Attorney for Defendant