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STATE OF MAINE
KNOX, ss

Superior Court
Criminal Action
Docket No. CR-95-380

DENNIS J. DECHAINE,

Petitioner

v.

ORDER DISMISSING
POST-CONVICTION PETITION

STATE OF MAINE,
Respondent

This matter is before the court upon the Respondent's Motion to Dismiss DeChaine's petition for post-conviction review (PCR).

FACTS AND PROCEDURAL SUMMARY

Petitioner was convicted of murder, kidnapping, and gross sexual assault and sentenced to life in prison in CR-89-126. The Law Court's affirmation of petitioner's judgment and sentence modification was recorded in the docket on March 16, 1990. Leave to appeal his sentence further was denied and that order was docketed on May 4, 1990. Petititioner in this case has not filed a federal habeas petition. He filed this PCR petition pursuant to 15 M.R.S.A. 2121-2132 on September 29, 1995. A more extensive timeline of the relevant events in this case is set forth below.

TIMELINE

-Convicted by jury trial on March 18, 1989 (CR-89-126) Sentenced on April 4, 1989
-Judg. Affirmed *State v. Dechaine*, 572 A.2d 130 (Me.) cert. denied 498 U.S. 57(1990)
-Appeal of sentence denied *State v. Dechaine*, AD-89-27 (Me. App. Civ. May 4, 1990)
-May 5, 1992 Connolly obtained victim's nail clippings
-May 5, 1992 Dechaine filed a Motion for New Trial based on new evidence.

-Denial of New Trial Motion Affirmed in *State v. Dechaine*, 630 A.2d 234 (Me. 1993)
-June 10, 1993 Connolly sent victim's nail clippings to Lab for modern DNA test
-April 22, 1994 Dechaine's blood sample was forwarded to Lab for comparison
-May 4, 1994 Dechaine informed his DNA was not on the nail clippings
-December 20, 1993 Mandate on Court Order to return clippings Affirmed *State v. Dechaine*, 644 A.2d 458 (Me. 1994)
-September 15, 1995 Co-counsel George Carlton Jr. suffers a debilitating stroke
-September 29, 1995 *Pro se* PCR petition filed
-September 29, 1995 effective date of 15 M.R.S.A. s 2128(5)
-April 16, 1996 Dechaine's PCR counsel enters appearance
-April 22, 1996 Court Grants State's Motion to Depose George Carlton
-June 17, 1996 State files Motion to Dismiss PCR petition (memoranda on this motion were exchanged through December of 1997 due to various continuances)
-December 29, 1997 Dechaine files a Motion to Test Third Party's Saliva
-January 16, 1998 Hearing held on Pending Motions
-June 21, 1998 George Carlton died without ever being deposed.

DISCUSSION

The State's motion asserts that the Petitioner's 5 year delay in bringing his PCR petition has resulted in a presumption of prejudice pursuant to 15 M.R.S.A. s 2128(5) [1] which the Petitioner has failed to rebut. This statutory provision at issue has no language of retroactive effect so it can not operate retroactively.[2]

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1. This provision states:

> A petition may be dismissed if it appears that by delay in its filing the State has been prejudiced in its ability to respond to the petition or to retry the petitioner, unless the petitioner shows that it is based on grounds of which the petitioner could not have had knowledge of by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred. If the delay is more than 5 years following the final disposition [date when the Law Court mandate is entered in the docket of the trial court] of any direct appeal to the Maine Law Court ... prejudice is presumed, although this presumption is rebuttable by the petitioner.

15 M.R.S.A. s. 2128(5) (eff. September 29, 1995).

2. Technically a statute can really only have a prospective effect because it prescribes legal consequences after its enactment but new laws also operate to some extent on affairs formed to some

> extent by past events. The variety and sequence of those relevant events will be different depending upon the area of law and the policy choices as to the changing or preserving of the pre-enactment effects on those past events. *Adams v. Buffalo Forge Co*., 443 A.2d 932, 942 (1982).

Nevertheless, the Law Court has found that "the application of a statute remains prospective if it governs operative events that occurred after its effective date, even though the entire state of affairs includes events predating the statute's enactment." *Liberty Mutual Ins. Co., v. Superintendent of Ins*., 689 A.2d 600, 602 (Me. 1997)(citations omitted). The "operative event" for the application of the 1995 amendment was the filing of the petition, which occurred in this case on September 29, 1995.[3] Thus, applying the amended statute to Petitioner's case does not give the statute unconstitutional retroactive effect, because the operative event being affected by the statute occurred when the statute was in effect.

The effect of this presumption of prejudice imposes upon the Petitioner the burden of proving that the nonexistence of prejudice is more probable than its existence. 15 M.R.S.A. s 2128(5)(1995); M.R.Ed. 301(a). The Petitioner has failed to meet his burden. Petitioner claims only one of his attorneys was ineffective. He asserts that trial counsel, Connolly's now deceased, co-counsel George Carlton[4] would not have had any relevant or admissible testimony to offer on the issue of the quality of legal assistance the Petitioner received, since only Connolly is accused of being ineffective. This argument is without merit.

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3. Most of the PCR statutory framework revolves around the petition itself, making other prior events relevant, but not operative. *See Liberty Mutual Ins. Co., v. Superintendent of Ins*., 689 A.2d 600, 602 (Me. 1997)("In determining the legal consequences of new legislation, [a Court] must look to the events the legislature intended to be significant").

4. George Carlton suffered a debilitating stroke on September 15, 1995. The State made extensive but ultimately unsuccessful efforts to depose Carlton, which were continually opposed by the Petitioner. On June 21, 1998 George Carlton died.

The Petitioner's failure to file his petition in a more timely fashion has resulted in the State being precluded from calling George Carlton as a witness, which it clearly would have had to do if Carlton were available. If the state were required to respond to Petitioner's claims now, one-half of Dechaine's defense team would be unavailable to provide insight on whether the overall defense fell below the standard expected of an ordinary fallible attorney and caused the defendant prejudice thereby. See *State v Brewer,* 699 A.2d 1139 (Me. 1997)(explaining the proper standard for determining whether counsel's performance was ineffective). The Petitioner has not shown that the circumstances both now and on the date the PCR petition was filed are not materially prejudicial to the State both in its ability to reply to the petition and its ability to retry Dechaine.

Even if this Court did not apply the presumption of prejudice set forth in 15 M.R.S.A. s 2125(5)(1995) and the burden of rebuttal was not upon the Petitioner, the State has shown that the delay of the petition has resulted in actual prejudice to the State's ability to counter the Petitioner's assertion that Connolly was ineffective. Before the 1995 amendment, 15 M.R.S.A. s 2128(5)(1994) permitted a court to deny relief when "delay in the bringing of an action for post conviction review . . . has caused [the Court] to be seriously hindered in its ability to determine necessary facts . . . unless it finds the delay caused by the person seeking relief is excusable." Dechaine's assertion at the Janaury 16, 1998 hearing that he postponed his PCR petition due to his difficulty retaining counsel cannot provide an excuse for his delay since he ultimately filed his petition *pro se*, just as most PCR petitioners do.

Petitioner's inexcusable delay has hindered the Court's ability to determine necessary facts such that dismissal of the petition is proper regardless of which statutory provision is applied.

The United States Supreme Court has spoken on the issue of prejudice multiple times. It has noted that one of the law's very objects is the finality of its judgments and that neither innocence nor just punishment can be vindicated until the final judgment is known. *Teague v. Lane*, 489 U.S. 288, 309 (1989)("Without finality, the criminal law is deprived of much of its deterrent effect."). It also stated in *Kuhlmann v. Wlson*, 477 U.S. 436 (1986) that when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," prejudice the government and diminish the chances of a reliable criminal adjudication. *Id*. at 453. The Law Court has held that "[i]n the interests of fostering an end to litigation and preserving the integrity of criminal judgments, motions for a new trial on the ground of newly discovered evidence are regarded with disfavor." *State v. Preston*, 521 A. 2d 305, 308 (Me. 1987). Accordingly, under state law and federal jurisprudence, dismissal of Dechaine's petition and denial of a new trial on the basis of prejudice to the State is proper.

This Court finds that dismissal of Dechaine's petition is required as a matter of law. However, it notes that a review of the extensive record reveals that the Petitioner's procedural default of filing late has not resulted in a manifest unfairness or a wrongful conviction. 15 M.R.S.A. s 2122 (1995) states the purpose of the PCR statute in Maine is to provide comprehensive, and except for direct appeals from a

criminal judgment, the exclusive method of review of those criminal judgments. It replaces the remedies available pursuant to common law post-conviction habeas corpus. *Id* at s 2122. However, the privileges available under common law habeas corpus remain, as is required by the Constitution of Maine, Article I s 10. See also *Kimball v. State*, 490 A. 2d 653 (Me. 1985). The most important principles of habeas corpus are articulated by United States Supreme Court decisions reviewing federal habeas corpus decisions.

Where a defendant has procedurally defaulted on a claim, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent. *McCleskey v. Zant*, 499 U.S. 467, 494, (1991)(citations omitted). It suffices if the petitioner can show a probability that a reasonable jury would not have convicted but for the constitutional violation. *Id*. In the case at bar, Petitioner claims he has newly discovered evidence that he is actually innocent and that this evidence was not brought forth earlier due to the ineffectiveness of his counsel.[5] It is important to note here that evidence which was known to the defendant at an earlier time, but whose legal significance was not fully appreciated until later, is not "newly discovered" evidence in the legal sense unless its significance could not have been discovered earlier. See *State v. Ardolino*, 1998 ME 14 (January 21, 1999).

Attorney error short of ineffective assistance of counsel, however, does not

5. The sole claim of ineffective assistance of counsel at trial cannot qualify as "newly discovered evidence," because it could not be presented to a jury as having relevance to the innocence or guilt of defendant. *State v. Clements*, 431 A.2d 67, 69 (Me. 1981)

constitute cause and will not excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 486-488 (1986). This rule is grounded in the principle that federal habeas corpus courts sit to ensure that individuals are not imprisoned in violation of the Constitution - - not to correct errors of fact. *Herrera v. Collins* 506 U.S. 390, 399 (1993) (citations omitted). The standard in Maine for judging whether counsel was constitutionally defective is whether the relevant conduct fell below that of an ordinary fallible attorney. *State v. Brewer*, 699 A.2d 1139, 1144 (Me. 1997).

Here Connolly made multiple attempts to have the victim's nail clippings tested and to have the results admitted in a new trial.[6] In the appeal of the Superior Court's denial of a motion for new trial based upon new evidence, the Law Court concluded that other proffered new evidence was not credible and that testing the nail clippings would not be useful due to the clear sufficiency of the trial evidence supporting Petitioner's conviction. *See Dechaine v. State*, 630 A.2d 234 (Me. 1993); *Dechaine v. State*, 572 A.2d 130, 132 n. 3 (Me. 1989) *cert. denied* 498 U.S. 857 (1990). Connolly's lack of success cannot be blamed on his defective performance, but rather upon the volume of incriminating evidence against his client.

Assuming that the Petitioner could convince the Court that Connolly did provide constitutionally defective counsel, he must also demonstrate that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," *Schlup v. Delo*, 513 U.S. 298, 327-328, (1995)(setting forth the

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6. The extensive record in this case establishes that the Petitioner knew of the significance of a DNA test of the victim's nail clippings for years before his PCR petition was filed and that great efforts were made to obtain a DNA test and a new trial. *See State v. Dechaine*, 630 A.2d 234 (Me. 1993).

standard for showing actual innocence) or that substandard counsel deprived him of an otherwise available substantial ground of defense, *Levesque v. State*, 664 A.2d 849 (Me. 1995).[7]

The threshold burden for showing actual innocence is necessarily extraordinarily high because of the disruptive effect that entertaining such claims has on the need for finality in serious cases, and the enormous burden that retrying cases on often stale evidence places on the States. *Herrera v. Collins*, 506 U.S. 390, 392 (1993). Once a defendant has been afforded a fair trial and convicted of he offense for which he was charged, the presumption of innocence disappears. *Id*. at 399. The dismissal of the Dechaine PCR petition on procedural grounds will not result in a manifest injustice because the Petitioner cannot show that no reasonable juror would convict him even if he could get DNA test results of the victim's fingernail clippings into evidence.

Therefore the entry will be:

Respondent's Motion to Dismiss PCR petition is GRANTED,

DATED: January 9, 1999

Donald H. Marden /s/
Donald H. Marden
Justice, Superior Court

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7. There have not been any Maine cases which provide that "actual innocence," as defined in federal habeas corpus cases, qualifies as a substantial ground of defense but since this term was asserted by the Petitioner as a ground for PCR review, this Court will assume that it does.