

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>NORMAN G. KEHLING,</b>	)	
	)	
<b>Petitioner</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 96-0108-B</b>
	)	
<b>JEFFREY D. MERRILL, WARDEN,</b>	)	
	)	
<b>Respondent</b>	)	

**RECOMMENDED DECISION TO DENY  
PETITION FOR WRIT OF HABEAS CORPUS**

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994) following a judgment entered in the Maine Superior Court (York County) convicting him of one count of arson in violation of 17-A M.R.S.A. § 802(1)(B)(2) (Supp. 1989). He was unsuccessful on the direct appeal of his conviction, as well as on a subsequent post-conviction review. The petitioner challenges the conviction based on a claim of ineffective assistance of counsel. The respondent has filed an answer to the petition, and the petitioner has replied. The Court has carefully reviewed the record and concludes that the petitioner is not entitled to relief.

**I. Background**

Following a jury trial in the Superior Court, the petitioner was found guilty on June 1, 1990, of Class A arson. He subsequently was sentenced by the court to a forty-year term of imprisonment to be served consecutively to a prior sentence already imposed. The petitioner ultimately began execution of the sentence on July 8, 1992. On June 13, 1990, the petitioner filed a notice of appeal to the Law Court pursuant to M.R. Crim. P. 37 and 15 M.R.S.A. § 2115 (Supp. 1990). He also filed

at that time an application for leave to appeal his sentence, which subsequently was granted by the Law Court's sentencing review panel.

Through his attorney, the petitioner raised four issues on appeal, namely: (1) whether the trial court erred by admitting in evidence in violation of the constitutional privilege against self-incrimination a statement made by the petitioner to his probation officer; (2) whether the court erred by admitting in evidence the contents of a telephone conversation between the petitioner and his wife that had been recorded by the petitioner's mother-in-law; (3) whether the court erred in sentencing the petitioner to the enhanced sentencing range of twenty to forty years due to the crime's heinous and violent nature; and (4) whether the court erred by failing to give proper weight at sentencing to the goal of rehabilitation. The Court rejected both appeals and, in a published opinion addressing each of the above issues, found no reversible error on the part of the trial court and affirmed the judgment. *State v. Kehling*, 601 A.2d 620 (Me. 1991).

The petitioner subsequently sought through new counsel a post-conviction review proceeding pursuant to M.R. Crim. P. 67 and 15 M.R.S.A. §§ 2121-2132 (Supp. 1996). The sole issue advanced by the petitioner at the proceeding was ineffective assistance of counsel at the pre-trial and trial stages of the case. The petitioner raised issues related to his trial counsel's failure to properly advise him of the risk of a greater sentence following a trial as opposed to a guilty plea; his counsel's failure to make a claim through a motion *in limine* of inadequate evidence of *corpus delicti* at the pre-trial phase of the case and to prepare adequately for the expected cross-examination of witnesses by the State on this issue at the trial; his attorney's presentation of two inconsistent theories of defense in his opening and closing statements to the jury, and his comments regarding the circumstances wherein the petitioner might testify in his own defense. The court subsequently granted the

petitioner's request to add an additional basis to his claim of ineffective assistance of counsel, namely, the failure by his attorney to object to the State's cross-examination of the petitioner at the trial. The court denied, however, the petitioner's motion to add a claim based on the asserted incompetency of his trial counsel at the sentencing stage.

An evidentiary hearing featuring witnesses and exhibits was conducted by the court on February 7, 1994, and on February 10, 1994, pursuant to M.R. Crim. P. 73. Following the hearing, the court granted the State's motion for a judgment in its favor pursuant to M.R. Crim. P. 73A and denied the petitioner's claim to relief. The Law Court subsequently denied the petitioner's application for a certificate of probable cause on September 13, 1994. A second post-conviction review proceeding based on the calculation of the petitioner's "good time" in prison is pending at this time in the Superior Court. The current habeas petition was filed in this Court on April 15, 1996 pursuant to 42 U.S.C. § 2254.

## **II. Procedural Issues**

The respondent contends that the petition is barred by the recent one-year statute of limitations amendment to habeas corpus law and, in the alternative, that two of the petitioner's asserted bases for his claim of ineffective assistance of counsel have been procedurally defaulted. The Court disagrees with the respondent's first contention but agrees with the latter one.

### ***A. Statute of limitations***

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 101 of the Act amended 28 U.S.C. § 2244 (1994 & Supp. 1996) to provide a one-year period of limitation for the filing of an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state

court. 28 U.S.C. § 2244(d)(1). In the case at bar, the relevant starting date for purposes of calculating the statute of limitations is January 2, 1992, the date on which the actual mandate was entered on the criminal docket of the trial court and the date on which the underlying criminal judgment "became final by the conclusion of direct review." 28 U.S.C. § 2244(d)(1)(A). The petition in the case at bar was filed on April 15, 1996, nine days prior to the enactment of the new law. Even when the Court deducts the tolled period during which the petitioner pursued his state post-conviction review proceeding, the petition still would be considered late under the new law.

The Constitution requires, however, that statutes of limitation permit a reasonable period of time after they take effect for the commencement of suits on existing causes of action. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21 (1982); *see also Black v. North Dakota*, 461 U.S. 273, 286 n.23 (1983) (applying same requirement to state statutes). Finding that it would be inequitable and prejudicial to apply a new statute of limitations to a habeas claim that accrued prior to the announcement of the new rule without providing a grace period in which to file a petition on such a claim, two federal district courts have concluded that a grace period in the amount of the new one-year limitation period would be reasonable. *Duarte v. Hershberger*, 947 F. Supp. 146, 149 (D. N.J. 1996); *Flowers v. Hanks*, 941 F. Supp. 765, 771 (N. D. Ind. 1996). Under this rationale, claims brought pursuant to section 2254 would not be barred by the new statute of limitations if filed on or before April 23, 1997. Because the Court finds the above reasoning to be persuasive and equitable, it concludes that the petitioner's claim is not barred by the recent amendment to section 2254.

### ***B. Procedural defaults***

The Court agrees, however, with the respondent's contention that two of the petitioner's bases for his claim of ineffective assistance of counsel have been procedurally defaulted. The two bases at issue are the petitioner's counsel's failures to: (1) object at the trial to the State's assertion in its closing argument that the petitioner had been lying, and (2) adequately prepare for and present relevant information at the sentencing hearing to counter a certain witness's report and the accuracy of other information supplied in the pre-sentence investigation report.

A review of the record discloses that the petitioner failed to raise in his first state post-conviction review proceeding the first basis listed above, namely that he received inadequate assistance of counsel when, at the trial, his attorney failed to object to the characterization of him by the State as a liar in its closing argument to the jury. "Where the petitioner--whether a state or federal prisoner--failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'" *Reed v. Farley*, 114 S.Ct. 2291, 2300 (1994) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). A claim of ineffective assistance of counsel as "cause" for failure to raise a claim on state appeal must "be presented to the state courts as an independent claim" before it may be considered by the federal courts on collateral review. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). The petitioner has failed to show any cause or actual prejudice to satisfy the excusable neglect requirement. Thus, the Court concludes that this basis for relief may not now be raised in light of the petitioner's failure to have raised it on direct review. *Wainwright*, 433 U.S. at 84.

The same is true for the petitioner's second basis cited above regarding his counsel's failure to adequately prepare for the sentencing hearing. Although the petitioner did attempt to include this argument in his post-conviction proceeding through a motion to further amend the petition, the court

expressly excluded the claim because the motion did not demonstrate the excusable neglect or good cause required by M.R. Crim. P. 70(c)(3). Again, the petitioner has not satisfied his burden of demonstrating excusable neglect and, hence, the Court suggests that both of these asserted bases are precluded from review in this matter.

### **III. The Merits**

The petitioner contends that he was denied effective assistance of counsel at the trial in light of his counsel's failure to: properly advise him of the risk of a greater sentence following a trial as opposed to a guilty plea; make a claim of inadequate evidence of *corpus delicti* during the pre-trial proceedings and prepare adequately for the expected testimony of witnesses on this issue at the trial; present the defense of voluntariness in his opening and closing statements to the jury; and object at the trial to questioning by the State regarding the petitioner's opinion as to whether other witnesses were lying. The respondent concedes that the remaining bases underlying the petitioner's claim of ineffective assistance of counsel all were raised on direct review and thus satisfy the exhaustion requirement of federal habeas review. The respondent contends that the petitioner had a full and fair opportunity to litigate the claim in the state courts, that he was represented by counsel at all times and was accorded an evidentiary hearing at his post-conviction review proceeding, and that such matters properly were decided by the state courts.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. The petitioner also must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to

show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

The post-conviction court correctly applied this standard in denying the petitioner's claim. The petitioner was accorded a full and fair opportunity to litigate these bases at a two-day evidentiary hearing where, represented by counsel, he presented witnesses and exhibits of his own choosing. At the conclusion of the hearing, the court denied the petitioner's claim that he had been denied the effective assistance of counsel at his trial. The court made the following relevant findings on the record with respect to the petitioner's counsel's performance at the trial:

1. [Risk of greater sentence] "I cannot find, however, that [] [] [the petitioner's trial attorney] had the obligation to essentially force his client into taking a 20 or 25-year plea when the person still was saying I don't remember doing this, I believe it to be an accident. I cannot expect that [] [] [the petitioner's trial attorney] at that time given the new statute, the fact that no one had apparently been sentenced under that would have had to be able to guess what a judge was going to do later. Yes, the advice turned out to be wrong, . . . it was bad advice, but I don't find that it was seriously incompetent, inefficient or inattentive advice, . . . ."
2. [*Corpus delecti*] "I do have to find initially that [] [] [the petitioner's trial attorney] was not familiar with the [*corpus delecti*] rule and had difficulty properly stating it. However, any deficiencies that he may have had are completely harmless and that [] argument could not succeed. There was ample evidence, . . . to conclude that this was arson rather than accident."
3. [Questioning by the State] "At that time that question [whether the petitioner believed other witnesses were lying] was reasonably common, it had not received any attention from the Maine Supreme Court, . . . . That type of comment was relatively frequent. . . . Any error was not sufficiently obvious for the Maine Supreme Court

to raise on its own initiative in [] [] [the petitioner's] appeal. Any error was not sufficiently obvious to be raised in the initial petition for post-conviction review. . . . So I cannot find . . . that there was any serious incompetence, inefficiency or inattention of counsel. At that time [] [] [the petitioner's attorney] was acting just like any other lawyer would have acted."

4. [Conclusion] "I simply cannot find that [] [the petitioner] has demonstrated any basis to obtain any relief on post-conviction review. . . . I am not going to tell [] [] [the petitioner] that [] [] [his trial counsel] did the best job in the world. . . . There may have been some weaknesses . . . but none of those reach the level of serious incompetency, inefficiency or inattention which falls measurably below that which might be expected for an ordinary fallible attorney. So while you did not get perfect service, while you did not get the best possible service, you received effective assistance of counsel. That's what's constitutionally required."

Such findings, arrived at following a full and fair hearing, must be presumed correct for purposes of this review. 28 U.S.C. § 2254(d). On the basis of these findings, the Court concludes that the petitioner is not entitled to relief on any of these bases.

#### **IV. Conclusion**

For the foregoing reasons, the Court hereby recommends that the Court DENY without an evidentiary hearing the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

#### **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) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of 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.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated in Bangor, Maine on February 28, 1997.