

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

EDWARD MICHAUD,)	
)	
Petitioner)	
)	
v.)	Civil No. 96-270-B
)	
COMMISSIONER,)	
DEPT. OF CORRECTIONS)	
)	
Respondent)	

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

The petitioner, Edward Michaud, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1994) following his conviction on March 26, 1985, in the Maine Superior Court (Kennebec County) on one count of murder in violation of 17-A M.R.S.A. § 201(1)(B) (1983 & Supp. 1984). Michaud was unsuccessful on the direct appeal of his conviction, as well as on subsequent post-conviction reviews. He now challenges the conviction on two separate grounds: (1) that his conviction was obtained in violation of the Fifth Amendment to the United States Constitution prohibition against double jeopardy; and (2) that he was denied effective assistance of counsel during his criminal trial in violation of the Sixth Amendment to the United States Constitution. Having carefully reviewed the record, the Court concludes that the petitioner is not entitled to relief.

I. Procedural Issues

A. Statute of Limitations

The respondent initially contends that the petition is barred by the statute of limitations set forth in the recent amendments to habeas corpus law.

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 August 11, 1986, the date on which the Law Court rejected the petitioner's direct appeal 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 December 9, 1996, almost seven months and two weeks subsequent 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 proceedings, the petition is approximately seven years and one month 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). Thus, 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, filed on December 9, 1996, is not barred by the recent amendment to section 2254.

B. Procedural default

The respondent contends that the petitioner's claim in ground one concerning double jeopardy has been procedurally defaulted due to his failure to raise it on direct appeal to the Law Court. Moreover, the respondent points out that such a default served as the basis for the dismissal by the court of Michaud's petition during his first post-conviction review proceeding. Finally, the respondent maintains that the petitioner has failed to demonstrate cause for the default and prejudice to his case as required by *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992), in order to survive a default.

The Court agrees with the respondent's contentions on this issue, and concludes that the double jeopardy claim may not properly be asserted by Michaud in this petition. The claim was not raised by him on direct appeal. *See State v. Michaud*, 513 A.2d 842 (Me. 1986). Also, the petitioner did not appeal to the Law Court the dismissal of his first petition for post-conviction review after the court concluded that he had procedurally defaulted the claim. Absent the requisite showing of cause or prejudice, a procedural default in a state court serves as an adequate and independent state ground for the state court decision and immunizes that decision from habeas review in federal court. *Carsetti v. Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977)). Accordingly, the Court concludes that the double jeopardy claim is not available for review.

II. The Merits

The sole claim remaining for the Court's consideration is the petitioner's contention that he received ineffective assistance of counsel at all relevant stages of the criminal proceeding due to his lawyers' failure to raise the issue of double jeopardy concerning his "depraved indifference" murder conviction. Michaud first raised this claim in his second petition for post-conviction review. A hearing on the matter was held at which the petitioner was accorded a full and fair opportunity to argue the issue. After the court denied the petition, Michaud unsuccessfully sought a certificate of probable cause from the Law Court to proceed with a direct appeal on this ground.

Essentially, the petitioner contends that he was placed in double jeopardy when jury verdicts were returned both on Count I of the indictment (charging Michaud with "knowing" murder but convicting him with the lesser crime of manslaughter) and on Count II (charging and convicting Michaud of "depraved indifference" murder), thus convicting him on two separate counts that charged him with the same offense. The respondent contends that the matter was properly decided by the state court.

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 applied this standard in denying the petitioner's claim. The court made the following relevant findings with respect to the petitioner's counsel's performance:

Counts I and II of the indictment merely charged the petitioner with alternative means by which the crime of murder could be committed.

The elements of the offenses charged are not the same. Double jeopardy does not attach merely because the same conduct supports the separately charged criminal offenses. *United States v. Dixon*, 113 S.Ct. 2849 (1993).

The case . . . cited by petitioner in support of his position is clearly distinguishable and this court is not persuaded by his argument that double jeopardy attaches under the circumstances of this case. *As a matter of law, no double jeopardy violation occurred. For that reason, trial counsel could not be deemed ineffective for his failure to raise the issue at trial or on appeal.* (Emphasis added.)

Absent an indication that the factual findings of a state court were not based on a full and fair hearing, such findings are presumed to be correct. 28 U.S.C. § 2254(d). Pursuant to *Strickland*, a counsel's strategic decisions at the trial are clothed with a presumption of reasonableness. *Strickland*, 466 U.S. at 689; *see also Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993). The petitioner has failed to demonstrate that his trial counsel's performance was deficient. The petitioner raised the above claim at his post-conviction hearing, at which time he was represented by counsel and was afforded a full and fair opportunity for litigation of the claim. The court made specific findings with respect to the claim, and those findings now are presumed correct. The Court thus concludes that, in light of the above findings made by the state court, no unconstitutional incarceration of the petitioner may be found on the above claim.

III. Conclusion

For the foregoing reasons, I hereby recommend that the Court **DENY** 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.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine, on March 20, 1997.