

STATE OF MAINE  
CUMBERLAND, ss.

UNIFIED CRIMINAL DOCKET  
No. CR-15-5036

TIMOTHY WILCOX,

Petitioner,

v.

STATE OF MAINE  
Cumberland, ss. Clerk's Office

ORDER

STATE OF MAINE,

AUG 24 2016

Respondent

RECEIVED

Before the court is the State's motion to dismiss Grounds Two and Three of the Amended Petition filed by Timothy Wilcox in the above-captioned post-conviction case.

This case is unique because the pending petition was filed 19 years after Wilcox was convicted.

On March 27, 1996 a jury found Wilcox guilty of two counts of kidnapping, eight counts of gross sexual assault, two counts of robbery, and one count of unlawful sexual contact. *State v. Wilcox*, CR-95-818. Wilcox was sentenced in October 1996 to consecutive sentences totaling 49 years (Calkins, J.). Thereafter Wilcox filed a petition for post conviction review alleging ineffectiveness of counsel, which was denied after a hearing on June 30, 2004. *Wilcox v. State*, CR-97-590 (Crowley, J.).

This second petition was filed in August 2015, triggered by a May 2015 letter from the Department of Justice stating that a witness from the FBI Laboratory had presented what the letter described as hair comparison testimony "containing erroneous statements."

Wilcox thereafter filed the post-conviction petition that is now before the court. Counsel was appointed, and after several extensions, an amended petition was filed on May 2, 2016.

Ground One of the amended petition is based on the now-questioned hair comparison testimony. The amended petition also asserts two additional grounds. Ground Two of the amended petition alleges that Wilcox's original trial counsel was ineffective in not seeking a severance of the charges, which involved three different victims. Ground Three of the amended petition alleges that Wilcox's counsel in his first post-conviction proceeding was ineffective in not asserting a claim based on trial counsel's failure to seek a severance.

In its response to the petition, the State has outlined its defense to Ground One and has moved to dismiss Grounds Two and Three. Specifically, as to Ground Two, the State argues that the failure to seek a severance was an issue that could have been raised in the first post-conviction petition and that petitioner's claim as to the failure to seek a severance is untimely. As to Ground Three, the State argues that post-conviction review is not available to challenge the effectiveness of counsel in a prior post-conviction review proceeding.

In response, counsel for petitioner addressed the State's arguments on Ground One but did not address the State's arguments with respect to Grounds Two and Three.<sup>1</sup> *See* Petitioner's Reply to State's Answer to Amended Petition dated July 20, 2016.

The court agrees that Grounds Two and Three are subject to dismissal. First, as to Ground Two, any argument that trial counsel was ineffective in not seeking severance should have been filed within one year. 15 M.R.S. § 2128-B(1)(A). The State is not challenging the timeliness of petitioner's claim with respect to the hair comparison testimony (Ground One), presumably because it acknowledges that the factual predicate of that claim could not have been discovered through due diligence prior to the Department of Justice letter. 15 M.R.S. § 2128-B(1)(C). In contrast, the factual predicate for any claim of alleged ineffectiveness with respect to

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<sup>1</sup> Counsel for petitioner asked for time to address the State's response and was granted an extension to address the motion to dismiss Grounds Two and Three. See handwritten endorsement dated June 20, 2016.


severance (Ground Two) would have been immediately apparent. The court cannot see any reason why such a claim could not have been asserted in a timely fashion. Specifically, that claim could have been asserted in Wilcox's first post-conviction petition. It was not, and in any event it cannot be raised 19 years later.

As to Ground Three, under longstanding Law Court precedent, Maine's post conviction review statute does not authorize a second post-conviction petition seeking to challenge the effectiveness of counsel who represented the defendant on a prior petition for post-conviction review. *McEachern v. State*, 456 A.2d 886, 889-90 (Me. 1983).

Accordingly, Grounds Two and Three of the amended petition are dismissed.

In the petition, the State's response, and petitioner's reply to the State's response, petitioner and the State have both presented arguments with respect to the merits of Ground One. However, the court is uncertain whether there is agreement that Ground One can be decided on the basis of the existing record and the trial transcript or whether further proceedings are necessary. The Clerk's office shall schedule a conference to address what further proceedings counsel believes are necessary to resolve Ground One.

Dated: August 24, 2016

  
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Thomas D. Warren  
Justice, Superior Court