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March 1, 2024

Knox County Superior Court
62 Union St
Rockland, M04841

Re: State of Maine v. Dennis J. Dechaine KNO-CR-89-126

Dear Madam Clerk:

Attached for filing please find Petition for Post Conviction Review/Petition for Writ of Habeas Corpus to be filed on behalf of Mr. Dechaine in the above-captioned matter. Thank you for your prompt attention to this matter.

Sincerely,

John E. Nale

JEN:bc
Enclosure
cc: Dennis J. Dechaine (w/ encl.)
Maine Assistant Attorney General Donald Macomber (w/ encl.)

STATE OF MAINE **KNOX, s.s.**	**UNIFIED CRIMINAL DOCKET** **Docket No. KNO-CR-89-126**
DENNIS J. DECHAINE **Petitioner,** **v.** **MATTHEW A. MAGNUSSON,** **Respondent**	**PETITION FOR POSTCONVICTION REVIEW (15 M.R.S. §2122 et seq)** **PETITION FOR WRIT OF HABEAS CORPUS (14 M.R.S. §5501 et seq)**

INTRODUCTION

1. Mr. Dechaine was raised in Madawaska, Maine. At the time of his conviction and life sentence for murder, he was 31 years old. He and his wife owned a small organic farm in Bowdoinham. Though well-spoken, Dennis Dechaine had no legal training or background. He earned a modest annual income, had no family wealth, and has relied on family/friends to bear the cost of testing and legal defense. He has from 1988 to the present steadfastly maintained his innocence. His post-conviction efforts have occasionally benefitted from state assistance (appointed counsel), but it is fair to say that his relative poverty has contributed to the fact that there were long periods during his thirty-six-year incarceration thus far in which there were no active post-conviction efforts to review his conviction.
2. In 2022, acting through pro bono counsel, Dechaine initiated a post-conviction petition for a new trial based on DNA analysis. Although not the first time he had sought vindication through DNA testing (his prior efforts had fallen short because of

inconclusive results), the new round of testing produced profiles and comparisons that are much more definitive and exculpatory. A testimonial hearing on his motion for a new trial has been scheduled for April 18-19th.

3. This petition asserting violations of constitutional rights is the offspring of that petition for DNA analysis. The claims here evolved from the close study of the trial transcript necessitated by the DNA claims. *See State v. Dechaine, supra*, ¶14 (holding that the standard, "all the other evidence in the case, old and new," found in section 2138(10) of Maine Post-Conviction DNA Statue calls for meticulous reference to the record). Counsels' close reading of the 1,500-page trial transcript brought to light a fundamental constitutional error in the prosecutor's closing argument as to which no objection had ever been made and for which no review had never been sought. Counsel felt obligated and compelled to bring these constitutional violations forward regardless of the passage of time.
4. The prejudicial impact of the constitutional errors is clear.
5. The legal support for asking that these claims be heard now is found in timeless principles of law and justice recognized by the U.S. Supreme Court and the Maine Law Court.

CLAIMS FOR RELIEF

Prosecutorial misconduct, ineffective assistance of defense counsel, judicial error

6. At an early point in the prosecutor's closing argument in the March 1989 trial, in a lengthy paragraph (beginning on page 1411 of the trial transcript) the prosecutor noted

that "there are in this case…[and] in virtually every criminal case, unanswered questions." He went on: "But you must decide this case on what the evidence is and not on what it is not."

7. The prosecutor then pointed out some of the evidentiary holes/gaps in the array of circumstantial evidence, e.g., Mr. Dechaine's fingerprints were not found in or at the Henkel residence (where Sarah Cherry was baby-sitting prior to her abduction and murder). He further noted, "her [Sarah Cherry's] prints were not found in the [Dechaine] truck." The prosecutor concluded this paragraph, this seemingly apologetic justification for the paucity of evidence pointing unequivocally at Mr. Dechaine, as follows: "The point as we tried to make to you with regard to this kind of evidence, whether it be fingerprints or fibers or hairs or what have you, sometimes you have it or sometimes you don't. I can give you no better answer than to say, **that's the way God made it."** (transcript page 1412, emphasis added). Federal case law and the law in most states characterizes prosecutorial language invoking God and/or Biblical references (whether this language occurs at the sentencing phase of a trial or in the prosecutor's closing argument to the jury) as **prosecutorial misconduct** (see *infra* paras. 9-11).
8. The absence of biological trace evidence matching Mr. Dechaine to the crime was a prominent weakness in the State's case.[1] The dearth of biological trace evidence was behind the Law Court's 2015 statement that "the voluminous record in this case raises troubling questions." *State v. Dechaine*, 2015 ME 88, ¶3, 121 A.3d 76.[2]

[1] It had been a sticking point since the night of July 6, 1988, when Detective Hendsby sought Dennis's permission to tow the truck to the Maine Crime Lab for a thorough search for biological trace evidence of the missing girl. Dennis consented to the search because Detective Hendsby assured him that an absence of biological trace evidence of the victim would exonerate him. Dennis knew none would be found because he had nothing to do with the missing girl. The truck was towed to the Maine Crime Lab and thoroughly examined. No biological trace evidence of the victim was found. Nevertheless, as history shows, he was charged.

9. To cover up the gaping hole at the center of the State's case with, "I can give you no better answer than to say, that's the way God made it," was flagrant prosecutorial misconduct.

    a. The prosecutor's misconduct was seemingly intentional, a way to give added weight to the State's weak evidentiary showing. It evinces a desperation, a prosecutorial belief that he (the State) could not win the case without it.

    b. The lengthy paragraph in the prosecutor's closing argument that ended with "that's the way God made it" is a tacit admission that there was no biological trace evidence matching Dechaine to the crime.

    c. The statement invited the jury to decide the case on faith or theological grounds, not reason or hard evidence, which is the bedrock of our judicial system.

    d. The opinion, "that's the way God made it," caused the jury to disregard the defendant's trial testimony that he had nothing to do with the girl's disappearance.

    e. The Maine Law Court and the U.S. District Court confirmed that the lack of evidence raised troubling questions for them.

    f. This unrebutted prosecutorial misconduct (see *infra* para. 9), coming as it did only moments before the jury began its deliberations, was an egregious violation of defendant's constitutional due process right to a fair trial.

10. The potential for prejudicial impact was unmistakable. "That's the way God made it" gutted reasonable doubt. "That's the way God made it" obliterated the wall between Church and State. "That's the way God made it" relieved the jurors of their duty to deliberate conscientiously over the absence of evidence alluded to by the prosecutor. The dearth was God's will and therefore not to be questioned. "That's the way God made it" invited the jury to engage in irrelevant theological rationalization. Invoking God violated widespread judicial precedent striking down references to God, the Bible, etc., to convict criminal defendants. *See Sandoval v. Calderon*, 241 F3d 765 (9th Cir. 2000), where the court noted, "[R]eligious arguments have been condemned by virtually every federal and

[2] "No fingerprints, hairs, or fibers matching those of Dechaine were found on or near the victim or at the Henckel home. Conversely, no fingerprints, hairs, or fibers matching those of Cherry were found on Dechaine or in or on Dechaine's truck." *Id.*

state court to consider their challenge." *Id.* at 777. The *Sandoval* court further noted: "The prosecutor ... clearly intended to appeal to religious authority. . . The prosecutor meant this argument to have an effect on the jury. We think it did. At a minimum, we have grave doubts about the harmlessness of the error and therefore grant relief." *Id.* at 780.

11. The prosecutor in the Dechaine case had a similar intent. He needed to bolster the evidentiary weakness of his case; and, although already clothed in the power and righteousness of the State, he played the "faith card." He brought God into the courtroom and put God on his side. It worked. The jury found Dechaine guilty. But, as in *Sandoval*, a conviction predicated on intentional prosecutorial misconduct, which deprived the defendant of the fundamental right to a fair trial, cannot stand.

12. If intentional misconduct per se is not deemed to be sufficient to warrant post-conviction relief, the question then becomes whether invocation to God can be construed as harmless error. The *Sandoval* court believed it could not. Citing *Jeffries v. Wood*, 114 F.3d 1484, (9th Cir. 1997) (en banc), the *Sandoval* Court held that when "a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted." *Sandoval*, at 780 (citing *Jeffries*, at 1489). If these principles are applied to Dechaine's case, post-conviction relief must be granted.

13. More recently, *Roybal v. Davis*, 148 F. Supp.3d 958 (S. D. Cal. 2015), cited and reaffirmed *Sandoval* as follows: "The California Supreme Court concluded that the prosecutor's biblical references constituted clear misconduct and was to be condemned." *Id.* at 1045 (internal quote omitted). In the Dechaine case, defense counsel did not object to the prosecutor's misconduct and the trial court did not intercede *sua sponte* to correct the error. Whether none, or all of the jurors, or only one juror was moved to vote "guilty"

because they believed "God" wanted it, cannot be determined. Therefore, the misconduct is not harmless.

14. A recent Maine case involving prosecutorial misconduct, *State v. Dolloff*, 2012 ME 130, 58 A3d 1032, though not invoking God or other biblical references, and although not granting the defendant relief, makes clear that prosecutorial misconduct takes many forms. *Id.* ¶43. When the misconduct cannot be dismissed as harmless error, it is "error that affects the criminal defendant's substantial rights … meaning that the error was sufficiently prejudicial to have affected the outcome of the proceeding." *Id.* ¶ 33. Dechaine's constitutional right to a fair trial is a substantial right, and the prosecutor's error asserting that the paucity of hard evidence was "the way God made it," was prejudicial.

15. *Dolloff* held that the totality of the circumstances must be examined to determine whether error justifies fashioning relief. *Id.* ¶33. Viewed in the totality of the evidence, the *Dolloff* Court held that the defendant received a fair trial. *Id.* ¶76. However, none of the factors that led the *Dolloff* court to reach this conclusion existed in the Dechaine case.

16. In *Dolloff* the prosecutorial misconduct was provoked by defense counsel. *Id.* ¶ 48. There was no defense counsel provocation in the Dechaine case. The *Dolloff* court recognized that multiple prosecutorial errors are often met with multiple defense counsel responses, a tit-for-tat standoff that triggers harmless error analysis. *Id.* ¶ 57. In the Dechaine case, however, there was no back and forth error/response standoff.

17. In *Dolloff*, defense counsel immediately objected to each prosecutorial overreach. *Id.* ¶ 22 ("In response to the objections the court gave corrective instructions"). In the Dechaine case, defense counsel failed to object to the prosecutor's introduction of God into the

proceedings. This critical failure to provide effective counsel (without more) may well justify post-conviction relief. *See Aldus v. State of Maine*, 2000 ME 47, 748 A2d 463.

18. Also, in *Dolloff* the court noted that "the trial judge issued curative instructions in response to perceived prosecutorial misconduct [during the trial and] during closing argument ... **and took special care to properly instruct the jury before deliberations began.**" *Id.* ¶ 22. In the Dechaine case (faced with defense counsel's failure to object), the trial judge never interceded *sua sponte* to, first, note the prosecutorial misconduct and, second, to mitigate the conduct by issuing curative instructions to the jury. The *Dolloff* Court stated that the prosecutor's testimonial statement "should have drawn a corrective instruction from the court." *Id.* ¶53. In short, *Dolloff* holds that it is the trial court's duty to speak up when a prosecutor engages in misconduct. In the Dechaine case, the trial court did not discharge its duty. The prosecutorial misconduct was not identified and mitigated by the trial court. This error completed a sequence of errors, i.e., the prosecutor's reference to God, defense counsel's failure to object, and the trial court's failure to discharge its duty. These errors sealed Mr. Dechaine's fate.

19. In *Dolloff* the evidence of guilt fully supported a guilty verdict. *Id.* ¶76. In the Dechaine case, however, all of the evidence was circumstantial; it was not overwhelming; the prosecutor admitted there were "unanswered questions" (para. 5 *supra*); and the U.S. Magistrate concluded that the record "raises troubling questions," which the Law Court echoed. *State v. Dechaine*, 2015 ME 88 ¶3, 121 A.3d 76.

20. In summary, though there was prosecutorial misconduct in *Dolloff*, when one examines the totality of the circumstances, relief was properly denied. In the Dechaine case, however, all of the factors examined by the *Dolloff* court cut the other way. Collectively,

i.e., examining the totality of the circumstances, applying the factors identified in *Dolloff* as material to the question, this Court must conclude that Dechaine is entitled to post-conviction relief.

21. At this point it is moot whether the prosecutor, defense counsel, or the trial judge, erred more egregiously because they all erred and their combined errors prejudiced the defendant. The prosecutorial misconduct began a rapidly cascading sequence of error. Defense counsel compounded the effect by not promptly objecting to the injection of God into the proceedings. The trial judge concluded this sequence by not immediately interceding *sua sponte* to correct the lawyers' errors and by failing to recognize and correct the prosecutorial misconduct in his closing instructions to the jury (see trial transcript, Closing Instructions, pgs. 1492-1536). Consequently, the jury began its deliberations and rendered its verdict with "that's the way God made it" ringing in its ears. Jurors had no knowledge that the invocation of God was impermissible prosecutorial misconduct.

22. Failures of this magnitude, occurring when they did, are clear evidence that Mr. Dechaine was deprived of his constitutional (due process) right to a fair trial. Our whole criminal justice system (prosecutor, defense counsel, trial court) failed Mr. Dechaine. These facts are borne out by the trial record. They fully justify relief, which is long overdue.

23. The fact that this sequence of errors sat openly on the pages of the trial transcript for thirty-five years without anyone recognizing their significance may be hard to understand, but that is the fact. Now, however, these errors are clearly seen. At this point, it is hard to understand why a legal system that cares about justice and fairness would insist that nothing can be done, that it's too late, and that Mr. Dechaine must continue to

bear the consequences of the above-noted derelictions of duty by all arms (prosecutor, defense counsel, trial court) of the criminal justice system. Fortunately, Maine law is better than that. The Law Court wrote, when approving a *coram nobis* petition brought 18 years after the fact, that "Maine takes pride in attempting to carry out the old maxim that 'for every wrong there is a remedy.'" *Dwyer v. State*, 120 A.2d 276, 283 (Me. 1956).

MAINE'S POST-CONVICTION REVIEW STATUTE 15 MRS § 2121 et seq

1. The procedural requirements for hearing the two post-conviction claims of (a) a due process violation based on impermissible prosecutorial argument and (b) ineffective assistance of counsel in failing to object to the improper argument are either met or are excused. The "present impediment" requirement of the post-conviction review statute, 15 MRS §2124(1)(A), is met because Dechaine is serving a life sentence imposed by the challenged criminal judgment in Knox County.

2. The anti-waiver requirement of 15 MRS §2128(1) is met with regard to the claim of improper prosecutorial argument because the issue was not *claimable* on direct appeal. There was no objection at the trial, so the issue was not preserved for appellate review. Ineffective assistance of trial counsel was also not *claimable* on direct appeal. *Salley v. State*, 2017 ME 176, ¶14, 169 A.3d 392.

3. The anti-waiver requirement of 15 M.R.S. §2128(3) is met because both challenges would be permitted in a federal habeas petition under 28 U.S.C. §2254. The front-line waiver rule is that "[a]ll grounds for relief from a criminal judgment . . . must be raised in a single post-conviction review action and any grounds not so raised are waived." 15

M.R.S. §2128(3). Neither the improper prosecutorial argument nor defense counsel's failure to object were raised in Dechaine's post-conviction review petition filed in 1995. However, section 2128(3) goes on to say that such claims are waived "unless the Constitution of Maine or the Constitution of the United States otherwise requires [that they be heard]."

4. The holding of *Schlup v. Delo*, 5123 U.S. 298 (1995), requires that Dechaine's claims of fundamental constitutional rights violations be heard because they are side-by-side with his claims of innocence as proved by DNA analysis. Because of this pairing, the case is one of the "narrow class of cases . . . implicating a fundamental miscarriage of justice" addressed in *Schlup v. Delo*, 513 U.S. 298, 314 (1995). As in *Schlup*, the evidence of innocence contained in Dechaine's new DNA evidence creates the gateway for the Court to examine the constitutional errors. *See Schlup v. Delo*, 513 U.S. 298, 314 (1995).

5. The Constitution of Maine requires that claims be allowed under Article I, §6 (no loss of liberty except by law of the land); §10 (habeas not to be suspended); §15 (right to petition government for redress of wrongs); and §16 (every wrong shall have a remedy).
6. The Constitution of the United States requires that the claim not be considered waived because the Fourteenth Amendment accords all persons "due process of law," which includes the right to a fair trial. The *Dolloff* holding acknowledges this fact. *See Dolloff*, ¶74.
7. Finally, 15 M.R.S. §2128(3) also allows an exception if "the grounds could not reasonably have been raised in an earlier action." The claim could not reasonably have been raised because Mr. Dechaine is not a lawyer and has lived the past thirty-six years behind the walls of the Maine State Prison. He would have no way of knowing the

prosecutor's argument was improper unless his lawyers told him, and they did not. Prior counsel missed that unconstitutional prosecutorial misconduct had occurred by injecting God into the trial.

8. Maine's post-Conviction statute (enacted in 1979) was meant to provide "a comprehensive and, except for direct appeals from a criminal judgment, exclusive method of review of . . . criminal judgments. . . It replaces the remedies available pursuant to post-conviction habeas corpus . . . common law habeas corpus, including habeas corpus as recognized in 14 MRS §§ 5501- 5546, coram nobis . . . and any other common law or previous common law or statutory method of review." 15 M.R.S. §2122. The use of "exclusive," in particular, might be thought to support a conclusion that unless the narrow one-year window of §2128-B(1) is complied with, the Petitioner has no relief. However, constitutional considerations come into play to keep his claim alive.
9. 15 M.R.S. § 2122 ends with an important qualifier. "The substantive extent of the remedy of post-conviction review is defined in this chapter and not defined in the remedies that it replaces; provided that this chapter allows and is construed to permit relief for those persons required to use this chapter as required by the Constitution of Maine, Article 1, §10." In short, the one-year limitation of §2128-B(1) cannot be interpreted as overriding the Maine Constitution.
10. Maine's Constitution, Article I, §10 states: "And the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The key language here is "shall not be suspended [except in] cases of rebellion or invasion." The Dechaine case involves neither.

11. Historically, Maine common law habeas and Maine statutory habeas had *no* limitations period. See M.R.S. 1954, ch. 126 (habeas statute); M.R.S. 1944, ch. 113 (habeas statute); M.R.S. 1930, ch. 113 (habeas statute); M.R.S. 1916, ch. 104 (habeas statute); MRS 1903, ch. 101 (habeas statute); M.R.S. 1883, ch. 99 (habeas statute); M.R.S 1871, ch. 99 (habeas statute); M.R.S. 1857, ch. 99 (habeas statute); M.R.S. 1840, ch. 140 (habeas statute); Public Law1821, ch. 64 (habeas statute). In sum, the legality of imprisonment was always subject to challenge. There was never a time in Maine when a prisoner was expected to bear his incarceration because the calendar won out over justice.

12. Against this backdrop, the meager, one-year limitation period of §2128-B is so short and so grudging, when measured against the history and the purposes of habeas corpus, that it can only be seen as a major suspension of the writ. Whatever benefits the Legislature hoped to realize by consolidating the traditional writs for obtaining post-conviction relief into a modern post-conviction statute, cutting off claims protecting fundamental rights was not one of them. The statute is inconsistent with Article 1, §10 of the Maine Constitution and as such cannot bar Mr. Dechaine's petition for relief.

13. In *Rivas v. Fischer*, 687 F.3d 514 (2d Cir. 2012), the Second Circuit held: "[A]bsent a clear congressional command to the contrary, we conclude that the preexisting equitable authority of federal courts to hear barred claims if they are accompanied by a [*Schlup v. Delo*] showing of actual innocence survives the enactment of AEDPA and applies to claims otherwise barred by its [one-year] statute of limitations." *Id.* at 551. Like habeas petitions under Maine law, federal habeas petitions historically had no statute of limitations until recent statutory enactments. On a similar line of reasoning, Maine's one-

year statute of limitations is also subject to equitable tolling to permit Dechaine's claims of fundamental constitutional rights violations to be heard.

14. In *Petgrave v. State*, 2019 ME 72, 208 A.3d 371, which concerned ineffective assistance of defense counsel in a probation revocation hearing, the Law Court recognized that "where the writ of habeas corpus was available pursuant to Article 1, §10 to protect fundamental rights, including the right to effective assistance of counsel, legislative enactments (here 15 M.R.S. §2122) limiting or effectively barring habeas relief could not stand. Justice Alexander's concurring opinion in *Petgrave* made clear that in his view, given Article 1, § 10, "a habeas corpus fact-finding proceeding is available, even if the Legislature should legislate to the contrary." *Id.* ¶19 (citing a 1961 *Opinion of the Justices*, 157 Me 187, 170 A2d 660). In short, *Petgrave* supports that Dechaine is not a person bound by 15 M.R.S. §2122. Justice Alexander's concurrence further notes that: "No specific rule need be referenced to provide the petitioner such an evidentiary hearing, nor any new process need be announced; the process is available as a matter of constitutional right and has been for 200 years." *Id.* ¶26.

OTHER GROUNDS: CONSTITUTIONAL AND/OR SUPERVISORY

15. In *State v. White*, 2022 ME 54, 285 A.3d 262, the Law Court wrote: "We agree completely with the Supreme Judicial Court of Massachusetts that 'as the highest constitutional court,' it is our duty under our state's constitution and the common law to 'protect and preserve the integrity of the judicial system and to supervise the administration of justice,' which includes 'maintain[ing] and impos[ing] discipline with

respect to the conduct of all members of the bar.'" *Id.* ¶34 (citing *In re Benoit*, 487 A.2d 1158, 1171 (Me. 1985)).

16. The specific issue in *White* was whether a Maine court had authority to order a new trial based on improper prosecutorial argument even if the evidence against the defendant was substantial. The Court held that it had authority to override the harmless error rule of evidence. The *White* court noted: "Hence, when a trial has been infected by prosecutorial error, we are free to require a new trial based on our *supervisory power* regardless of the strength of the evidence against the defendant when necessary to preserve the integrity of the judicial system and to send a message that such conduct will not be tolerated." *Id.* ¶35.

17. The "supervisory power" is therefore a source of legal authority for Maine courts to address Dechaine's claim of the denial of fundamental rights by improper prosecutorial argument notwithstanding the passage of time.

18. The *White* Court in granting a new trial also cited Article VI of the Maine Constitution, see *id.* ¶34, which states: "The judicial power of this State shall be vested in a Supreme Judicial Court." The implication of the Court's citation to the judiciary's founding grant of authority is that Maine courts retain residual power under Article VI to see that justice is done.

19. In *Dwyer v. State*, 120 A.2d 276 (Me. 1956), the Law Court (quoting Maine's Constitution, Article 1, §19) noted that: "... every person for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." *Id.* at 283. The court further noted that "Maine and

its people always endeavor to do exact justice under and according to the Constitution and the common and statutory law." *Id.*

20. In sum, whether in the Constitution, in the interplay between modern statutory law and traditional statutory/common law, the court's supervisory powers, or the court's residual power under Article VI of the Maine Constitution (to ensure that justice is done) there is authority for this Court to protect Dennis Dechaine's fundamental right to a fair trial, i.e., not to be convicted by the sequence of errors commencing with "... that's the way God made it."

MAINE POST-CONVICTION *HABEAS CORPUS* 14 MRS §5501 et seq

21. The Legislature did not repeal the habeas corpus statute when it enacted the post-conviction statute in 1979, nor did the Legislature amend it to water down its traditional purpose of protecting fundamental rights. The historic purpose of habeas corpus is clear from the earliest versions of the statute. *See, e.g.*, Maine's 1821 Habeas Statute, Public Law 1821, ch. 64, https://lldc.mainelegislature.org/Open/Laws/1821/1821_PL_c064.pdf. stating, "That any person imprisoned in any common gaol, or otherwise restrained of his personal liberty by any officer or officers . . . may complain in writing to the Supreme Judicial Court of this State . . ." See *Stewart v. Smith*, 64 A. 663 (Me. 1906) wherein the court notes: "The purpose of this celebrated writ of *habeas corpus*, which has been denominated 'the great writ of liberty,' is not only to secure the right of personal liberty to one who has been illegally deprived thereof, but also to insure a speedy hearing and determination of the questions involved ...." *Id.* at 664. This passage was

referred to by Justice Alexander in his concurring opinion in *Petgrave v. State*, 2019 ME 72, 208 A.3d 371 wherein he stated: "The 'great writ of liberty' must not be destroyed or weakened..." *Id.* ¶19. See also ¶¶ 31, 32 *supra.*

22. 14 M.R.S. §5501, as it has for over two hundred years, notes that: "Every person unlawfully deprived of his personal liberty by the act of another, except in the cases mentioned, **shall of right have a writ of habeas corpus** . . ." The words "of right" in the statute obviously mean the granting of the **opportunity** to be heard, to state the errors of omission or commission that have led to the applicant's assertion that he/she is wrongfully incarcerated and that the granting of habeas relief is justified, see 14 MRS §5513, the Application for a writ of habeas corpus.

23. 14 M.R.S. §5501 acknowledges that there are exceptions to the "shall of right" provision just noted. These exceptions are limited and spelled out in Maine's Constitution, Article 1, §10 which states: "And the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of **rebellion or invasion** the public safety may require it." Any broader statutory assertion of limitations to the right to be heard must fail—statutes cannot limit constitutionally predicated rights. Petgrave (*supra* para. 33) and the cases cited therein confirm this view. Given the fact that Dechaine's incarceration does not involve a "rebellion or invasion," it follows that there is no bar to his filing an application for *habeas* relief pursuant to 14 MRS §5513.

24. The formal requirements for such a filing have been met in that (1) this application is in writing, (2) it is signed and sworn to by Dennis Dechaine, (3) it states the place where and the person by whom the petitioner is restrained, and (4) it contains "a copy of the

precept," i.e., in this case, the Judgment and Commitment Order, by which Mr. Dechaine is restrained. See 14 MRS §5515.

25. 14 M.R.S. §5515 clearly authorizes this Court to look beyond the face of the Judgment and Commitment Order and upon "examination of the whole case and determine whether habeas relief "ought to issue" or should "not be granted."

JURISDICTION

26. This Court has original jurisdiction in this proceeding pursuant to 4 MRS §105 Superior Court jurisdiction), 14 MRS §5301 (Superior Court and Supreme Judicial Court concurrent jurisdiction over habeas corpus), 14 MRS §5501 (every person unlawfully deprived of liberty), and 14 MRS §5513 (application for such writ (*habeas corpus)* by any person). Further, the Superior Court has jurisdiction over a petition for post-conviction review, 15 MRS §2123(1).

PARTIES

27. Dennis Dechaine is a "person unlawfully deprived of his personal liberty by the act of another." 14 MRS §5501. He is serving a life sentence having been convicted of the murder of Sarah Cherry in State v. Dechaine, KNOCD-CR-89-126. Matthew A. Magnuson is the Warden of the Maine State Prison in Warren, Maine where Mr. Dechaine is incarcerated having received a life sentence.

CONCLUSION

28. As noted earlier, the Law Court's *Dolloff* holding (see *supra* paras. 12-18) provides a useful template for dealing with the prosecutorial misconduct in the Dechaine case—a template that strongly suggests Mr. Dechaine is entitled to post-conviction review, and *habeas* relief. Perhaps the strongest reason for according Mr. Dechaine post-conviction relief is found in the *Dolloff* court's anticipation of the very circumstances of the Dechaine case: "If the defendant, having failed to preserve the objection at trial, demonstrates on appeal that there was prosecutorial misconduct that went unaddressed by the court, the defendant has met the burden of demonstrating error." 2012 ME 130 ¶ 36. The trial record speaks for itself; the prosecutor, in an effort to explain the paucity of evidence supporting conviction said "...that's the way God made it." Defense counsel did not object; the court (failing its duty) did not address the misconduct, *sua sponte*. *Dolloff* reasoning would hold--the error, the misconduct is proved.

29. The *Dolloff* court went on: "The next question is whether the error was 'plain'. An error is plain if the error is [so] clear under current law that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." Id. The *Sandoval* and *Roybal* cases (see *supra* paras. 9 and 11) make clear that religious arguments, references to God, have been condemned by virtually all state and federal courts. See *Sandoval* 241 241 F3d at 777 and *Roybal* 148 F. Supp. 3d at 1044, "It is well settled that biblical law has no proper role in the sentencing process."

30. The *Dolloff* court in ¶ 36 cited two U.S. Supreme Court cases, *U.S. v. Olano*, 507 U.S. 725, 734 (1992) and *U.S. v. Frady*, 456 U.S. 152, 163 (1982). Both of these cases added

to the concept of "plain" error the requirement that the error must be "clear" "obvious" and that it must affect a substantial right of the defendant. Neither *Olano* nor *Frady* met this latter requirement, but the Dechaine case surely does. The prosecutorial misconduct coming when it did, i.e., minutes before the jury retired to determine its verdict, with no defense counsel objection, and no *sua sponte* trial court intercession, deprived Mr. Dechaine of a "substantial right," his due process right to a fair trial. The jury began its deliberations with no knowledge that the invocation of God was/is impermissible prosecutorial misconduct; they weighed the evidence with "...that's the way God made it," foremost in their minds, erasing any "troubling questions" they may have had. Again, *Dolloff* reasoning would hold that this verdict cannot stand—the sequence of errors (by the prosecutor, defense counsel, and the trial court) requires post-conviction review and *habeas* relief. See *supra* paras. 19 and 20.

31. Arguments and case law laid out in paragraphs 22 through 44 are not further summarized here. They individually and collectively demonstrate that post-conviction review and *habeas* relief, even at this late date, are not foreclosed. Finally, several provisions of Maine's Constitution do not permit foreclosing these constitutionally protected rights.

WHEREFORE, present counsel for petitioner Dennis Dechaine respectfully asks this court to find that this sequence of errors in the 1989 trial of Mr. Dechaine were not harmless; that they deprive Mr. Dechaine of a fair trial, and therefore *habeas* relief is warranted. Given Mr. Dechaine's long incarceration, Petitioner requests that he be freed.

Dated at Warren, Maine this 1st of March 2024

I declare under penalty of perjury the foregoing is true and correct. Executed on March 1, 2024, in Warren, Maine.

Dennis J. Dechaine, Petitioner
Maine State Prison
Warren, Maine

State of Maine
Knox, ss.

March 1, 2024

Personally appeared the above named and made oath to the truth of the above statements by him subscribed.

Before me,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of this petition to be mailed to AAG Donald Macomber, c/o the Maine Attorney General's Office at

Dated

John Nale, Esq.