

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

1 FIRST REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 1219

6
7 H.P. 860

House of Representatives, April 4, 1985

8 Referred to the Committee on Judiciary. Sent up for concurrence and
9 ordered printed.

10 EDWIN H. PERT, Clerk

Presented by Representative Paradis of Augusta.

11 Cosponsored by Representative Theriault of Fort Kent and Representative
Boutilier of Lewiston.

12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-FIVE
16

17 AN ACT to Modify Waiver of Grounds for Relief
18 in Post-conviction Review.
19

20 Be it enacted by the People of the State of Maine as
21 follows:

22 Sec. 1. 15 MRSA §2128, sub-§§1 and 2, as enacted
23 by PL 1979, c. 701, §15, are amended to read:

24 1. Errors claimable on direct appeal. Errors at
25 the trial which have been or could have been raised
26 on a direct appeal, whether or not such an appeal was
27 taken, may not be raised in an action for post-
28 conviction review under this chapter, provided that
29 if unless the failure of the convicted or adjudicated
30 person to take an appeal or, to perfect an appeal, to
31 raise certain issues on appeal or to provide an ade-
32 quate record on appeal to resolve certain issues, is
33 excusable and the those trial errors not appealed may
34 result in reversal of the criminal judgment; the
35 court may order that an appeal be taken as provided
36 in section 2130. In the appropriate circumstance the

1 assigned justice may order that a direct appeal be
2 taken as provided in section 2130.

3 2. Errors claimable in federal habeas corpus.
4 The assertion of a right under the Constitution of
5 the United States shall not be held waived by its
6 nonassertion at trial or on, in a direct appeal, in a
7 post-conviction review proceeding or in an appeal
8 from a post-conviction review proceeding if the as-
9 sertion of the right would be held not waived in a
10 federal habeas corpus proceeding brought by the con-
11 victed or adjudicated person, pursuant to the United
12 States Code, Title 28, sections 2241 to 2254.

13 Sec. 2. 15 MRSA §2128, sub-§3, as enacted by PL
14 1979, c. 701, §15, is repealed and the following en-
15 acted in its place:

16 3. Grounds claimable in a prior post-conviction
17 review proceeding. Grounds for relief which have
18 been or could have been raised in a prior action for
19 post-conviction review under this chapter, or in a
20 prior action under Title 14, sections 5502 to 5508,
21 or its predecessors, whether or not an appeal to the
22 Law Court was initiated, are waived unless the fail-
23 ure of the convicted or adjudicated person to raise
24 any ground in the prior collateral proceeding, to
25 take an appeal, to perfect an appeal or to raise cer-
26 tain grounds on appeal, or to provide an adequate
27 record on appeal to resolve certain grounds is excus-
28 able and such grounds for relief may result in rever-
29 sal of the criminal judgment. In the appropriate
30 circumstance the assigned justice may order that a
31 request for a certificate, as authorized under sec-
32 tion 2131, subsection 1, be initiated as provided in
33 section 2130.

34 Sec. 3. 15 MRSA §2128, sub-§4, as enacted by PL
35 1979, c. 701, §15, is repealed.

36 Sec. 4. 15 MRSA §2130, as amended by PL 1981, c.
37 238, §6, is further amended to read:

38 §2130. Relief

39 If the court determines that relief should be
40 granted, it shall order appropriate relief, includ-

1 ing: Release from incarceration or other restraint;
2 reversal of the criminal judgment, including one entered upon a plea of guilty or nolo contendere; entry
3 of judgment for a lesser included offense; reversal
4 of another order or decision, with or without affording
5 the State or other party a new hearing; granting
6 the right to take an appeal from the criminal judgment;
7 granting the right to initiate a request for a
8 certificate of probable cause to the Law Court; correction
9 of errors appearing as a matter of record;
10 resentencing or a new sentence; and entry of an order
11 altering the amount of time that a person incarcerated
12 under a sentence has served or must serve. The
13 judgment making final disposition shall be a final
14 judgment for purposes of review by the Law Court.
15 When relief is granted to the petitioner and release
16 is appropriate, the justice may release a petitioner
17 on bail pending appeal.
18

19

STATEMENT OF FACT

20 The critical modifications made in this bill to
21 the Maine Revised Statutes, Title 15, section 2128,
22 are expressly designed to address how and to what extent
23 alleged incompetency of counsel claims arising
24 out of counsel's performance either on appeal to the
25 Law Court or in a post-conviction review proceeding
26 or its statutory precursor, are to be cognizable in a
27 subsequent post-conviction review proceeding.
28 Impetus for these changes come from both prior post-
29 conviction review actions and from the Law Court case
30 of McEachern v. State, 456 A.2d 886 (Me. 1983). Because
31 of the pending cases before the Law Court of
32 Stack v. State, No. Cum-84-223 (Me. argued Nov. 16,
33 1985) and Kimball v. State, No Oxf-84-193 (Me. argued
34 Jan 15, 1985), a conscious effort has been made to
35 avoid addressing in any way how and to what extent
36 alleged incompetency of counsel claims arising out of
37 counsel's performance relative to either an appellate
38 review of sentence, pursuant to the Maine Revised
39 Statutes, Title 15, sections 2141 to 2144 and M.R.
40 Crim. P. 40, or a motion for new trial, pursuant to
41 M.R. Crim. P. 33, are to be cognizable in a post-
42 conviction review proceeding. Further, it is important
43 to note that the modifications herein made to

1 the Maine Revised Statutes, Title 15, section 2128,
2 do not purport to alter the availability of wholly
3 unrelated exceptions to the issue and
4 ground-reclusion rules presently contemplated by Ti-
5 tle 15, section 2128, subsections 1 and 3, as for ex-
6 ample, an intervening state or federal constitutional
7 mandate. McEachern v. State, 456 A.2d 886, 889 (Me.
8 1983).

9 Section 1 expressly addresses amendments to
10 present the Maine Revised Statutes, Title 15, section
11 2128, subsection 1, a subsection which:

12 1. States an important issue-preclusion rule,
13 namely, "(e)rrors at the trial which have or
14 could have been raised on a direct appeal, wheth-
15 er or not such an appeal was taken, may not be
16 raised in an action for post-conviction review
17 under this chapter" - ;

18 2. Describes the conditions by which a petition-
19 er may prevent that rule from applying to him;
20 and

21 3. Gives to the assigned justice the option of
22 ordering, as the appropriate form of relief for
23 the petitioner, the opportunity to take a direct
24 appeal to the Law Court. Section 1, in addition
25 to making certain nonsubstantive changes in lan-
26 guage designed to enhance clarity, identifies
27 more completely the conditions under which a pe-
28 titioner may prevent the issue preclusion rule
29 from applying to him. Specifically, it adds 2
30 circumstances in which counsel's performance on
31 appeal potentially forecloses resoluion of al-
32 leged trial errors, to wit, causing the Law Court
33 to dismiss the appeal for want of prosecution,
34 see, E.G., M.R. Crim. P. 37(e)(2) and precluding
35 appellate review of an issue raised on appeal be-
36 cause the proper record, although potentially
37 available, has not been provided to the Law Court
38 by the appellate counsel.

39 Section 1 also modifies the Maine Revised Stat-
40 utes, Title 15, section 2128, subsection 2, to ensure
41 that the failure to assert a federal constitutional
42 right will not be held waived, notwithstanding the

1 dictates of the Maine Revised Statutes, Title 15,
2 section 2128, subsections 1 and 3, if the assertion
3 of such right would nonetheless be cognizable in a
4 federal habeas corpus proceeding.

5 Section 2 modifies the Maine Revised Statutes,
6 Title 15, section 2128, subsection 3, in 5 important
7 respects. First, it incorporates within the Maine
8 Revised Statutes, Title 15, section 2128, subsection
9 3, the substance of Title 15, section 2128, subsec-
10 tion 4, thereby allowing for the repeal of the latter
11 as unnecessary. Second, it restates the
12 ground-preclusion rule addressing grounds for relief
13 which have been or could have been raised in a prior
14 collateral proceeding employing the same approach as
15 utilized respecting trial errors in the Revised Stat-
16 utes, Title 15, section 2128, subsection 1. Third,
17 it expressly imposes conditions by which a petitioner
18 may prevent the rule from applying to him. As to
19 these conditions, they parallel those utilized re-
20 specting trial errors in subsection 1. In this re-
21 gard, the language "unless the State or Federal Con-
22 stitution otherwise requires or unless the court de-
23 termines that the ground could not reasonably have
24 been raised in an earlier action" has been removed
25 from the Maine Revised Statutes, Title 15, section
26 2128, subsection 3, since its substance is incorpo-
27 rated within the term "excusable." Fourth, section 2
28 modifies the Maine Revised Statutes, Title 15, sec-
29 tion 2128, subsection 3, by giving to the assigned
30 justice the option of ordering, as the appropriate
31 form of relief for the petitioner, the opportunity to
32 seek approval from the Law Court of a direct appeal.

33 Section 3 repeals the Maine Revised Statutes, Ti-
34 tle 15, section 2128, subsection 4, whose substance
35 is now in Title 15, section 2128, subsection 3.

36 Section 4 amends Title 15, section 2130,
37 substantively to include as a form of appropriate re-
38 lief "granting the right to initiate a request for a
39 certificate of probable cause to the Law Court."
40 This is made necessary by the last sentence of Title
41 15, section 2128, subsection 3.

42

1784031385