

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

GORDON MACRAE,

PETITIONER

AGAINST –

RICHARD M. GERRY, WARDEN,
NEW HAMPSHIRE STATE PRISON

RESPONDENT

PETITION UNDER 28 U.S.C. § 2254 FOR
WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

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ATTORNEYS FOR PETITIONER GORDON MACRAE

Dated: January 23, 2014

PETITION

1. The name and location of the court that entered the judgment of conviction challenged is:

State of New Hampshire Superior Court: Cheshire County
Cheshire County Superior Court
Box 444
Keene, New Hampshire 03431

The docket or case number is: 93-S-0218

2. The date of the judgment of conviction is September 24, 1994.
The date of sentencing is November 14, 1994.
3. The length of sentence is 33 ½ years to 67 years.
4. MacRae was convicted of more than one count and more than one crime.
5. MacRae was convicted and sentenced for Felonious Sexual Assault (1 count) and Aggravated Felonious Sexual Assault (4 counts).
6. MacRae pled not guilty. He was tried by a jury. He maintains his innocence.
7. MacRae testified at a pretrial hearing.

8. MacRae appealed his judgment of conviction.

9. MacRae's direct appeal was filed in the New Hampshire Supreme Court. The docket number is 94-841.

The appeal was denied on June 6, 1996. *State v. MacRae*, 141 N.H. 106 (1996).

The grounds raised were:

Whether the state impermissibly used expert testimony to prove that accusations were true;

Whether the trial court erred in precluding the defense from cross-examining complainant with juvenile convictions;

Whether the trial court erred in instructing the jury to disregard certain of the complainant's answers to defense questions.

There is no opportunity to seek further direct review in the New Hampshire courts.

MacRae did not file a petition for certiorari in the United States Supreme Court.

10. In addition to the direct appeal listed above, On April 24, 2012, MacRae filed a petition for post conviction relief in the Merrimack County Superior Court. The docket number of that action is 12-CV-279.

The grounds raised in that action were:

Defense counsel introduced powerful, otherwise suppressed, "uncharged acts" evidence, literally provided the state with the defense case, failed to object to powerful "expert" testimony, and refused to conduct critical discovery.

Newly discovered evidence reveals that complainant's stories were lies.

The state court did not hold a hearing on any of the issues presented.

The petition was denied on July 9, 2013.

A notice of Discretionary Appeal seeking review was filed in the State Supreme Court on August 12, 2013. Review was denied on September 26, 2013.

12. The grounds raised in this petition are:

I. MacRAE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL: A) OPENED THE DOOR TO POWERFUL, OTHERWISE SUPPRESSED, “UNCHARGED ACTS” EVIDENCE, B) FAILED TO INVESTIGATE AND OBTAIN AVAILABLE EVIDENCE OF GROVER’S ADMISSIONS THAT MacRAE IS INNOCENT, C) PROVIDED THE STATE WITH THE DEFENSE CASE BEFORE TRIAL, D) FAILED TO OBJECT TO “EXPERT” TESTIMONY, AND E) FAILED TO CONDUCT CRITICAL DISCOVERY

Supporting facts for that evidence are set out in MacRae’s combined petition and memorandum of law, submitted herewith.

II. MACRAE IS ENTITLED TO RELIEF BECAUSE HE IS ACTUALLY INNOCENT

Supporting facts for that evidence are set out in MacRae’s combined petition and memorandum of law, submitted herewith.

13. All of the grounds for relief that are raised in this petition have been presented to the highest state court having jurisdiction, the New Hampshire Supreme Court. That court denied review on the merits. Thus all issues presented to this court have been exhausted in state court.

14. MacRae has not filed any type of petition, application or motion in a federal court regarding the challenged petition.
15. There are no petitions or appeals pending in any court.
16. MacRae's attorney throughout the trial was Ron Koch, a New Mexico attorney, who appeared *pro hac vice*. Mr. Koch is deceased. Local counsel was J.R. Davis, 28 Middle Street, Keene, New Hampshire 03431.
MacRae's attorney on appeal was David M. Rothstein, Assistant Appellate Defender, 2 White Street, Concord, New Hampshire 03301.
MacRae's post conviction counsel in state and federal court is Robert Rosenthal (*pro hac vice*), 523 East 14th Street, New York, New York 10009, and Cathy Green (#995), Green & Utter, 764 Chestnut Street, Manchester, New Hampshire 03104.
17. MacRae has no future sentence to serve after completing the sentence for the conviction challenged.
18. The petition is timely. This petition is filed within one year of the collection of sufficient newly discovered evidence to support MacRae's petition – less the time period that his state court post-conviction petition, which was properly filed, was pending in court. Thus it is filed within the time limits of 28 U.S.C. § 2254 motions. Further, the newly discovered evidence claim establishes actual innocence, which overcomes any time or

procedural bars that might be alleged. *McQuiggen v. Perkins*, 133 S.Ct. 1924 (2013), *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995). A discussion of timeliness appears in MacRae's combined petition and memorandum of law.

19. For all of these reasons, and those stated in MacRae's combined petition and memorandum of law, and all of those stated during his state court litigation, MacRae respectfully asks that this Court grant his Petition for Habeas Corpus, and that an evidentiary hearing be conducted to resolve any pertinent facts that may be disputed.

Respectfully submitted by his attorneys,

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Dated: January 23, 2014