

Docket No.

26-5017

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED
STATES OF AMERICA

Nicholas Sexton
Petitioner,

v.

Maine
Respondent,

ON PETITION FOR A WRIT OF CERTIOARI
TO THE
SUPREME JUDICIAL COURT OF MAINE

Nicholas Sexton, pro se, 111838
281 N. State St./P.O. Box 14
Concord, New Hampshire, 03302

I. Question(s) Presented

The Petitioner filed a Pro se Second Petition for Post-Conviction Review ("2nd Pro se Petition") in May 2022 (See 2nd Pro Se Petition of May 2022, Appdx. P.6) in the Penobscot County Superior Court (PCSC), Penobscot County, within the city of Bangor, Maine. This 'Petition' raised a single issue of ineffective assistance of counsel ("I.A.C."), in violation of United States Constitution, Amendment V, VI, and XIV, as well as Maine State Constitution, Article 1 § 6, in that the Petitioner's trial-counsel represented the Petitioner while operating under a non-waivable conflict-of-interest, as defined by Maine Rules of Professional Conduct (MRPC), Rule 1.7 (Concurrent Conflict of Interest/Current Client)("Rule 1.7"), for having had formerly represented one of three victims of homicide to which the Petitioner had been charged with the death of in his criminal case.

The PCSC Post-Conviction Review ("PCR") Judge initially accepted the 2nd pro se Petition base on the pre-requisite that the Petitioner make a showing that exceptions existed related to; a). time-statute of limitations (which the State abandoned at the January 24, 2025 'Hearing on PCR Petition', see Appdx. P.92 L#19-21), and; b). procedural waiver, and; c). the merits of the ground raised (see PCSC Order Assigning Post-ConvictionReview, Appdx. P. 42)

The Petitioner obtained counsel and filed additional pleadings (See 'Brief Of Petitioner Showing Cause As To Why The Procedural Bars On His PCR Claim Should Be Inapplicable In This Case', Appdx. 48) A hearing was held on January 24, 2025, where the PCSC PCR Judge ruled on the State's Motion to Dismiss ("MTD")(See State's MTD at Appdx. P. 78), finding only that the Petitioner had 'waived' the PCR ground raised because the Petitioner had not complied with Maine Revised Statutes Annotated (MRS) 15 MRS § 2128 (3), requiring that all PCR grounds be

raised in a single PCR action, and any grounds not so raised are deemed waived unless the Constitution of Maine, or the Constitution of the United States otherwise requires, or unless the court determines that the ground could not reasonably have been raised in the earlier action. (15 MRS § 2128 (3))

The Petitioner's 2nd Pro se PCR Petition also presented several Federal and State exceptions to waiver, which Maine State law recognizes in 15 MRS § 2128-A (Exceptions to waiver.), such as defenses to [procedural] defenses promulgated by decision of this Court, i.e. cause and prejudice [doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977)], the voluntary, knowing & intelligent waiver of substantial Constitutional Rights, and plain error, none of which were considered by the State courts in their rulings.

Question 1

Did the PCR Judge speculate to facts critical to the fair resolution of the issue of 'waiver', specifically that defense counsel provided notice of his former representation of the victim, via letter, which the PCR Judge speculated was transferred to 1st PCR counsel, and that because trial counsel must have forwarded the file with the letter, that the issue/ground could have been, but was not raised in the 1st PCR action, (See 'Hearing' of 1/24/2025, P.21, L#1-6, Appdx. P.106), and therefore the ground was deemed 'waived'?

Question 2

Did the PCSC PCR Judge fail to consider State & Federal arguments, which presented exceptions to procedural waiver, cognizable on Federal Habeas Corpus, pursuant to 28 U.S.C. §§ 2241-2254, specifically: a). "cause" and "prejudice" of Wainwright v. Sykes, 433 U.S. 72 [1977], b). voluntary, knowing & intelligent waiver, and; c). plain error?

Question 3

Did the Maine Supreme Judicial Court, or Law Court, err as a matter of law and fact, when refusing to grant the Petitioner's request for a 'Certificate of Probable Cause', ruling that; "The Court has reviewed the judgment entered in the trial court and fully considered the [Petitioner's] request for [a] certificate of probable cause.", and further adding that; "The Court has determined that no further hearing or action is necessary to a fair disposition of the matter." (See MSJC 'Order', denying certificate of probable cause, dated October 9, 2025, Appdx. P. 128)(Reconsideration denied also at Appdx. P. 151)

The Petitioner takes issue with the MSJC's acquiescence in the previous Questions 1 & 2, and incorporates all points of fact and law which militate in favor of this Court-of-last-resort, to GRANT this Petition for Writ of Certiorari to the Maine Supreme Judicial Court.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is provided below. If a party is a corporation with a stock ticker symbol, that symbol is also included.

Petitioner- Nicholas Sexton 111838
281 N. State St./P.O. Box 14
Concord, N.H., 03302

Respondent- State of Maine

RELATED CASES

- 1). Nicholas J. Sexton v. State of Maine,
Date of Judgment: (denied) 1/24/2025

Penobscot County Superior Ct.
Docket# PEN-CD-CR-2022-1928
Title: Second Post-Conviction
Review proceeding.

- 2). Nicholas J. Sexton v. State of Maine,
Date of Judgment: (denied) 10/9/2025

Maine Supreme Judicial Court/
Law Court [MSJC]
Docket# PEN-25-107
Title: Petition for Certificate
of Probable Cause

- 3). Nicholas J. Sexton v. State of Maine,
Date of Judgment: (denied) 11/7/2025

MSJC/Law Court
Docket# PEN-25-107
Title: Motion to Reconsider

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- 1). APPENDIX A Penobscot County Superior Court 'ORDER' (Ruling Contained in the Hearing Transcript of January 24, 2025, T/P. 20, L# 16)(Appdx. P105)
- 2). APPENDIX B 'ORDER' denying Certificate of Probable Cause of the Maine Supreme Judicial Court/Law Court on October 9, 2025
- 3). APPENDIX B "ORDER" denying MOTION TO RECONSIDER, on November 7, 2025.

V. Table of Authorities

United States Supreme Court

- 1) Powell v. Alabama, 287 U.S. 45 (1932).....P.24
- 2) Gideon v. Wainwright, 372 U.S. 335 (1932).....P.24
- 3) Mcmann v. Richardson, 397 U.S. 759 (1970).....P.24
- 4) Argersinger v. Hamlin, 407 U.S. 25 (1972).....P.24
- 5) Wainwright v. Sykes, 433 U.S. 72 (1977).....P.3, 10, 36
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- 7) Cyler v. Sullivan, 466 U.S. 335 (1980).....P.24, 26, 34
- 8) Wood v. Georgia, 450 U.S. 261 (1981).....P.25, 34
- 9) Strickland v. Washington, 466 U.S. 668 (1984).....P.3, 10, 24, 36
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- 10) Wheat v. United States, 486 U.S. 153 (1988).....P.34, 37
- 11) Coleman v. Thompson, 501 U.S. 722 (1991).....P.20
- 12) United States v. Wells, 519 U.S. 482 (1997).....P.24
- 13) Swidler & Berlin v. United States, 524 U.S. 399 (1998).....P.1 fn1
- 14) Richardson v. United States, 526 U.S. 813 (1999).....P.24
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- 1) Mountjoy v. N.H. State Prison, Warden, 245 F. 3d. 31,(36 (1st Cir 2001)...P.37
- 2) United States v. Brown, 500 F. 3d. 48, 59 (1st Cir 2007).....P.24

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- 1) Newell v. State of Maine, 277 A. 2d. 731, 737 (1971)
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- 6) State v. Cyran, 586 A. 2d. 1238, 1240 (1991).....P.16
- 7) State v. Laferrier, 1997 ME. 169,(1997).....P.29
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- 8) Haraden v. States, 2011 ME. 113 *, 9 *, 32 A.3d, 448 **, 452 ** (2011).....P.20, 29
- 9) State v. Sexton, 2017 ME. 65, 159 A. 3d. 335 (2017).....P.17

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix P.128 to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Penobscot County Superior Court, Maine court appears at Appendix P.105* to the petition and is [* contained in body of Hearing Transcript]

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

VII. Jurisdiction

The Maine Supreme Judicial Court/Law Court, having denied a Certificate of Probable Cause on November 7, 2025, would have made this Court's filing deadline for Petition for Writ of Certioari, on February 5, 2026, however, on January 21, 2026, the Petitioner filed a pro se Motion to Extend Time to file the Writ, which was GRANTED by Justice Jackson on February 6, 2026, thereby rendering the new filing deadline on or by April 6, 2026. (See ORDER of Justice Jackson, of 2/6/2026) (§ee 'ORDER' of Justice Jackson, P. 10-A infra.)

Jurisdiction is provided by United States Supreme Court Rules (U.S. S. Ct.) Rule 10, (c). The Penobscot County Superior Court (PCSC), Post-Conviction Review [PCR] Judge, mad clearly erronious decisions based on important Federal Question, i.e. U.S. Const. Amend. V, VI., and XIV., and Strickland v. Washington, 466 U.S. 668, (1984) (Ineffective Assitance of Counsel), as well as Wainwright v. Sykes, 433 U.S. 72, 73 (1977) (where a state prisoner has defaulted on an adequate and independent state procedurall rule, the prisoner must show both 'cause and prejudice' from the default, to obtain relief.)

VIII. Constitutional and Statutory Provisions

Federal

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without Due Process of law..." See, U.S. Const. Amend., V.

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense." See, U.S. Const. Amend., VI.

Fourteenth Amendment

"All persons born or naturalized in the United States...are citizens of the U.S. and of the State wherein they reside. No State shall...deprive any person of life, liberty, or property, without Due Process of law." See, U.S. Const., Amend. XIV.

State

Maine Revised Statutes Annotated (MRS) > Title 15. Court-Procedure-Criminal (Pts 1-8) > Part 4. Judgment and Proceedings §Ch 301-311 > Chapter 305-A Post §§ 2121-2132 > § 2128(3), "Waiver of grounds not so raised in prior post-conviction review action. All 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 unless the Constitution of Maine, or the Constitution of the United States otherwise requires, or unless that the court determines that the ground could not reasonably have been raised in an earlier action."

§ 2128-A "Exception to waiver. The assertion of a right under the Constitution of the United States may not be held waived by its non-assertion at trial or on appeal

if the assertion of the right would be held not waived in a federal habeas corpus proceeding brought...pursuant to 28 United States Code, Sections 2241 to 2254."

Maine State Constitution

Article 1 §6 Rights of persons accused

"In all criminal prosecutions...the accused shall have the right to effective representation of counsel."

IX. Statement of the Case

On August 13, 2012, Maine News Media had reported that several victims had been discovered in a burning automobile in the Bangor, Maine area. Due to the fact that the automobile was rented in the Petitioner's name, the Petitioner decided to consult with an attorney, as the interaction with law enforcement was inevitable. The Petitioner sought the name of an attorney from the Yellow-Pages in the Bangor area, where the name Attorney David Bate, Esq. ("Attorney Bate") was chosen for two reasons, first, because he advertised as a criminal lawyer, second, because he was in the Bangor area. The Petitioner traveled to Bate's office where he tendered the sum of \$800.00 for a consultation. Attorney Bate had advised that once the Maine State and/or local police contacted him, that he should remain silent, as well as inform them that he had retained Bate as his counsel. This consultation occurred on August 13, 2012, the day of the news reports.

On August 14, 2012, the police contacted the Petitioner after locating him via phone-tracking at a Waterpark in Danvers, Massachusetts. There, the Petitioner exercised his right to remain silent and notified the police of his attorney representation. The police had no arrest warrant at that juncture.

Approximately a month and a half went by without an arrest warrant, however, sometime in the middle of this timespan, the Petitioner had terminated his and Bate's representation advising Bate that he no longer needed his services, then, on or around September 26-27, 2012, the Brockton, Massachusetts Police Department, along with the Plymouth County Massachusetts Swat Team & United States Marshall's Service, Fugitive Apprehension Unit, executed an arrest warrant for the Petitioner in Brockton, Massachusetts, where the Petitioner was taken to

the Plymouth County Correctional Facility ("PCCF"), Plymouth, Massachusetts, to await extradition to the Penobscot County Jail ("PCJ"), Penobscot, Maine.

This extradition occurred approximately one month later, and the Petitioner was booked into the PCJ. Within a day or two, Attorney Bate came to the Jail to see the Petitioner, telling him that the PCSC had appointed Bate to represent him in this case, which the Petitioner found odd, seeing as he had terminated his representation in large part because of Attorney Bate's exuberant request for retainer of fees and the Petitioner's absolute adamancy that there would be an inability to reach that request.

Within a day or two of this meeting between Bate and the Petitioner, Bate sent a letter to the Petitioner, which informed the Petitioner that;

"...[W]hen you and I first met on August 13, 2012, I did not realize that one of the deceased victims in this matter was Nichole Lugdon. As we discussed, she is a former client from about seven years ago. I have not had any contact with her but once since that time, and that contact was just in passing and not related to any representation." (See Letter from Attorney Bate to the Petitioner, dated; November 2, 2012, "Letter, 11/2/2012" Appendix P.34)

The 'conflict of interest' doctrine, being far outside the ken of the Petitioner, made it incumbent on Attorney Bate to assuage the Petitioner, because Bate's statement that; "I do not believe I have a conflict of interest." id. meant that, in plain english, that he was not sure that he 'did not' have a conflict of interest, per se, actual, or whatever.

The Petitioner had no reason to second-guess Bate's legal advice, and therefore proceeded to trial with Bate's representation, where several aspects of Bate's defense more than likely were triggered by the mainsprings of human emotion from having to examine, consider, and argue a reason for the absolutely

unreasonable, for instance, the circumstances surrounding the death of the victim(s), autopsy photographs, victim impact statements, one-third of which belonged to Bate's former client, who he had known both personally and professionally as a young female client, Nichole Lugdon, whose attorney-client privilege survived her death and was well protected by this Court's Jurisprudence, unable to help the Petitioner, or hurt him. Nevertheless, Bate had an obligation to notify more than just the Petitioner of this 'former representation', for instance, the trial court, who ordered that counsel be appointed, the Maine Commission on Indigent Legal Services ("MCILS"), which has an 'Application Process' requiring any attorney with any conflict, potential conflict or otherwise to notify their Agency of such, and lastly the Maine State Attorneys, whose conviction could be placed in jeopardy by a violation of ethical rules.

Prior to trial, Bate had advised the Petitioner, via letter dated November 10, 2013 (approximately 6-months prior to commencement of trial), that; "As your lawyer, I need you to know that a life sentence is not the worst possible outcome and that, following a State acquittal you could be held on federal charges and face a death sentence if convicted there." (See 'Letter from Bate to Petitioner' of November 10, 2013' "Letter of 11/10/2013"; Appendix 9.40), this advice Bate tendered, despite the Petitioner adamantly maintaining his innocence. It should be noted, that the State of Maine does not have a statutory provision for the death penalty.

Interestingly, during jury deliberations, the jury requested clarification three times about using duress for murder, as opposed to arson, which they were told by the trial court that they could do. Bate told the Petitioner that he 'could not' use that duress instruction for murder. The jury three times sought

to resolve the verdict at the direction of the trial court, and, at the end of deliberations, could not reach a unanimous verdict against the Petitioner, except one count of homicide for the death of Nichole Lugdon, and one count of arson, involving the automobile.

Having been convicted of one count of Murder (17-A.M.R.S. § 201, (1), (A), Intentionally or knowingly causing the death of another.), namely Nicolle Lugdon, and one count of Arson (17-A M.R.S. § 802 (1), (A), Arson and other property destruction.), for the automobile, Attorney Bate and/or lead counsel Attorney Jefferey Toothaker, at the conclusion of the July 28, 2015 Sentencing Hearing, would have been required to file a Maine Supreme Judicial Court ("MSJC"), Notice of Appeal (NOA), subject to ME. Rules of Appellate Procedure ("Me. Rs. of App. Prcdr."), Section I. General Appeal Proceedings, Rule 2A Notice and Filing of Appeal ("Rule 2A"). However, the issues presented in this NOA would not have included challenges to the effectiveness of trial counsel for two reasons.

First, Ineffective Assistance of Counsel ("I.A.C.") claims, in the State of Maine, are not reviewable on Direct Appeal, in the MSJC, unless; a). there is no need for development of a record and the claims can be decided from the transcript alone, or; b). unless the Direct Appeal is stayed while a properly filed post-conviction motion is filed to decide factual questions. (See, State v. Gilcott, ME. 420 A 2d. 1238 (1980); see also, State v. Cyran, 586 A 2d 12 38, 1240 (1991)).

Second, neither Attorney Bate, nor Attorney Toothaker would have been compelled to file an NOA issue based on their own ineffectiveness, and it is still uncertain whether Bate even notified Toothaker of the former representation of Nicolle Lugdon.

Upon relinquishment of the Attorney 'Work-Product File', or 'Client File', from Attorney Bate to Attorney Jeremy Pratt (Attorney for Direct Appeal) ("Appellate Attorney"), Pratt would have had no knowledge of any potential conflict, which would

have arisen out of Bate's former representation of a victim in the Petitioner's homicide trial, unless Bate had produced that November 2, 2012 'Letter' in the forwarded file.

Whatever Questions of Law were presented in the NOA on the Petitioner's Direct Appeal are of no consequence to the deciding factors in this Petition, and hence will be left out. To Note, however, the MSJC decided the Direct Appeal on April 6, 2017; See, State v. Sexton, 2017 ME. 65, 159 A 3d. 335 (2017); MSJC Docket No. PEN-15-389.

The Petitioner was then appointed counsel, Attorney J. Andrus ("Atty. Andrus"), who then filed the Petitioner's first Petition pursuant to the Me. Rs. of Unified Crim. Procedure, Section X, Proceeding for Post-Conviction Review ("PCR"), Docket No. PENCD-CR-2017-01530, which raised several claims of ineffective assistance of counsel. The PCSC denied that Petition for PCR, and, subsequently, the MSJC/Law Court, denied a Certificate of Probable Cause on February 20, 2020. Andrus' filing did not contain the issue related to Bate representing the victim in this case.

The Petitioner then sought hiring an attorney to pursue filing a Federal habeas-corpus pursuant to 28 U.S.C.S. § 2254. Unfortunately, the Coronavirus had made reaching attorneys extremely difficult. Upon finally speaking with an attorney, via telephone, and furnishing that attorney with the Petitioner's name and case, the attorney stopped the call and informed the Petitioner that he could not represent him, as he had represented his co-defendant in the past, and that circumstance would present a conflict of interest.

The Petitioner used his resources at the NH State Prison Law Library in order to research the rules of professional conduct, as it did not seem logical to him that an attorney who had formerly represented a co-defendant would cause a 'conflict of interest', but Attorney Bate representing a current victim would not.

After some research, the Petitioner filed his 2nd Pro se PCR Petition to the PCSC on May 9, 2022. (See 2nd PCR Petition "Pro Se PCR Petition", filed 5/9/2022) (Appdx. P. 6-34).

PCSC Judge Anderson issued an 'Order' (See PCSC 'Order' of August 1, 2022, Appdx. P105), finding that the Petitioner had met the Court's "preliminary screening" process and that his pro se petition "meets the threshold requirements to proceed.")id. The Petitioner was appointed counsel, however, after speaking with family, he was gifted the funds to obtain counsel.

The Petitioner contacted the Cumberland County [MAINE] Legal Aid Clinic, who recommended several attorneys, and out of that list, the Petitioner hired Attorney Mehron Bueger, Esq., who filed the document titled; BRIEF OF PETITIONER SHOWING CAUSE AS TO WHY THE PROCEDURAL BARS ON HIS PCR [Post Conviction Review] CLAIM SHOULD BE INAPPLICABLE IN THIS CASE. "2nd Attorney-filed PCR Petition". (Appdx. P48) Attorney Bueger's PCR Petition reiterated the basis for the Ineffective Assistance of Counsel claim, incorporated by reference all of the arguments of the Petitioner's pro se Petition, and presented arguments for equitable tolling toward the State's 'Statute of Limitations', which the State declined to take issue with at the hearing held on January 24, 2025. (T/P. 7, L#18-21)(Appdx. P.48)

After consulting with Attorney Bueger, it was determined that out of the issues presented in the Petitioner's 2nd Pro Se PCR Petition, that Bueger was going to focus on several issues; 1). that the United States Constitution Amendment, V, Vi, and XIV., and Maine State Constitution Art. 1 §6, both require that the Petitioner be represented by a 'conflict free' attorney, and the waiver of any potential conflict, must be a 'voluntary, knowing and intelligent' waiver,

and, Attorney Bate, "...needed to obtain the Petitioner's informed consent in writing as to waiver of any potential conflict of interest." (2nd attorney-filed PCR Petition, P.9)(Appdx. P.6), and; 2). that the claim of ineffective assistance of counsel, related to the potential conflict of interest was considered both untimely and procedurally waived, pursuant to 15 M.R.S. § 2128 (3), and Buerger needed to overcome both as articulated by PCSC Judge Anderson (See 'Order' of PCSC, dated 8/1/2022)(Appdx. P.42). As noted previously, the State abandoned the timeliness argument, at the hearing and on the record, (T/P. 7, L# 18-21)(Appdx. P.92), in response to the Petitioner presenting facts militating in favor of equitable tolling.

After the 2nd attorney-filed PCR Petition was filed, the PCR Judge scheduled a hearing on the State's Motion to Dismiss ("MTD")(See MTD, Appdx. P.78). There, the PCR Judge heard arguments on both sides, from the Petitioner's Attorney Mehron Buerger, that he; "...discussed with Nick [Petitioner] extensively that we're kind of trying to see if we can get over some initial procedural bars, so we're not getting into the meat and potatoes of the actual discovery today." (T/P. 7 L#9-13)(Appdx. P.92)

The State, adamantly maintaining that; " The real issue I think, here, is why it [the conflict] was never raised in the first Petition for Post-Conviction Review." (T/P. 7-8 L#22-23)(Appdx. P.92)

The PCR Judge made his ruling on the Petitioner's arguments, which provided exceptions to the waiver, which exceptions were based on both state and federal law, i.e. the 'cause and prejudice' doctrine, plain error, and the 'voluntary, knowing and intelligent' waiver of Constitutional Rights, and, whether Maine statutes, invoking both waiver and exceptions to waiver, more specifically, whether any

of these exceptions would be applicable here, such as;

"15 M.R.S. § 2128 (3) Waiver of grounds for relief...3. Waiver of grounds not raised in prior post-conviction review action. All grounds for relief from a criminal judgment or from a post-sentencing proceeding must be raised in a single post-conviction review action and any grounds not so raised are waived unless the Constitution of Maine or the Constitution of the United States otherwise requires or unless the court determines that the ground could not reasonably have been raised in the earlier action."

See, Maine Revised Statutes Annotated> TITLE 15. Court Procedure-Criminal (Pts 1-8)> PART 4 Judgment and proceedings (Chs. 301-311)> CHAPTER 305-A Post (§§2121-2132)("M.R.S. or M.R.S.A.")

and;

"15 M.R.S. § 2128-A Exceptions to waiver; The assertion of a right under the Constitution of the United States may not be held waived by its non-assertion at trial or on appeal, if the assertion of the right would be held not waived in a federal habeas corpus proceeding brought...pursuant to 28 United States Code Sections 2241 to 2254."

Id.

NOTE: Both of the above mentioned State Statutes, "are so interwoven with Federal law that it cannot be said to be an independent state ground." (quoting Coleman v. Thompson, 501 U.S. 722, 725 [1991]): (Syllabus Section (c)-Interwoven)

The PCR Judge ruled that; "The State's Motion to Dismiss is legally sound. I don't think I have any basis on which I could not grant it. And therefore, I am going to do so." (T/P. 20 L#17-19)(Appdx. P.) The Petitioner through pro se pleadings, as well as attorney-filed pleadings established exceptions to waiver which are mentioned supra, as well as that the ground "...could not reasonably have been raised in the earlier post-conviction review action." (See 15 M.R.S. § 2128 (3) supra)

Attorney Mehron Buerger presented a Petition for Certificate of Probable Cause ("Petition for CPC")(MSJC Docket No. PEN-25-107)(Appdx. P/28) to the

MSJC, pursuant to ME. Rs of Appellate Procedure> II. Special Appeal Proceedings> (19) Discretionary Criminal Appeals, (2), (f), (on May 14, 2025. This Petition presented the PCSC's Transcript of Hearing, all pro se and attorney-filed pleadings, State's filings, etc.... Then, on October 9, 2025, the MSJC denied the Petitioner a Certificate of Probable Cause to proceed, stating; "The Court has reviewed the judgment entered in the trial court, and has fully considered the request for a Certificate of Probable Cause." also stating that, "The Court has determined that no further hearing or other action is necessary to a fair disposition of the matter." (See 'Order' of MSJC denying Petition C/PC)(*SEE, APPOX B, P. 128*)

The Petitioner, through counsel, filed a Motion to Reconsider, which pointed out facts and law which the MSJC overlooked or mis-apprehended, however, that Motion was denied on November 7, 2025. This Petition for a Writ of Certiorari proceeded.

X. Reason(s) for Granting this Petition for Writ of Certioari.

NOTE: THE ARGUMENTS PRESENTED IN THIS SECTION CORRESPOND DIRECTLY TO THE QUESTIONS PRESENTED IN SECTION I. SUPRA OF THIS PETITION.

Argument 1

The right to post-conviction review in this case, is established by Maine Revised Statutes Annotated ("M.R.S.")>Title 15 Court Procedure-Criminal (Pts 1-8)>Part 4 Judgment and Proceedings (Chs. 301-311)>>Chapter 305-A POST (§§ 2121-2132) (2010). In affording a procedure for post-conviction review ("PCR"), the Maine State Legislature has imposed significant limitations restricting the contents and setting up procedural hurdles for a PCR Petitioner, i.e. the timeframe within which such relief may be sought (15 M.R.S. § 2128 [5], [6]), the number of petitions that may be filed (15 M.R.S. § 2128 [3]), the type of restraint or impediment from which a petitioner must suffer (15 M.R.S. § 2124), the nature and scope of the claims that may be pursued (15 M.R.S. §§ 2125, 2126, & 2128), and the type of relief that may be afforded (15 M.R.S. § 2130)(See Haraden v. State, 2011 ME. 113*, [9*], 32 A. 3d. 448**, 452** (2011).

"Factors in determining whether a defendant [petitioner] is able to assist counsel;include; the ability of a defendant to communicate and co-operate with counsel, his ability to maintain a collaborative relationship with his attorney and assist in planning legal strtegy, whether he maintains a consistent defense, his ability to recall and relate facts concerning his actions and whereabouts at certain times; his ability to identify witnesses and help counsel locate and examine them (cross-examine) [;] his ability to comprehend instructions and advice, and make decisions based on well-EXPLAINED alternatives, including the entering of pleas and waiving of rights..." id, @ 452 fn 3.

Lastly, the Haraden Court notes that; "If the Court determines that the petitioner is competent, [or, has been properly advised of the law surrounding waiver of significant Constitutional State and Federal Rights], the Court must then review the petition to determine (1) whether, if the newly asserted evidence or grounds were true, [that] the outcome of the post-conviction judgment would be different, and (2) in the Court's discretion and according to equitable principals, which, if any, of the claims may be pursued despite the intervening delay." Id.

If the Court determines that the outcome of the defendant's prior post-conviction petition would be different given the competence [or legal advice] to the defendant; and the renewing petition is equitable, " the Court SHALL CONSIDER" the eligible claims according to 15 M.R.S. §§ 2121-2132.", finally concluding that; "This process affords a previously incompetent defendant [who has been sorely misadvised of the law] a final opportunity to obtain a post-conviction remedy." Id.

15 M.R.S. § 2128 (3), gives the pre-requisite for consideration of a ground raised in a 2nd PCR Petition, which had not been raised in the earlier PCR action, it also provides, however, three exceptions to the procedural default which occurs from failing to raise the claim either from a failure to object at trial, on direct appeal, or in post-conviction collateral proceedings. '2128 (3)' contains these exceptions in its natural language, for instance; "ALL grounds...MUST be raised in a SINGLE post conviction review action...and ANY grounds NOT SO RAISED... ARE WAIVED..." (15 M.R.S. § 2128 (3)) ("2128 [3]"), the statute then shifts language to state exceptions as such, "UNLESS the Constitution of Maine, the Constitution of the United States OTHERWISE requires...OR UNLESS the court determines that the ground COULD NOT REASONABLY HAVE BEEN RAISED IN the earlier action." (Emphasis-added)

Addressing the 'excetion(s)' in order; Lang v. Murch, 438 A. 2d. 914*, 916*, ✓
(1981) articulated that; "Article 1, § 6 of the Maine State Constitution, and the Sixth Amendment to the United States Constitution, both guarantee to a defendant in a criminal prosecution the right to representation by counsel. See Newell v. Maine, 277 A. 2d. 731, 737 (1971)", then stating that; Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S. Ct. 55 (1932), is the starting point in a line of decisions defining under the United States Constitution the right of indigent defendant's in a criminal prosecution to appointed counsel. See Gideon v. Wainwright, 372 U.S. 335, 9 L Ed. 799, 83 S. Ct. 792 (1932); Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed. 530, 92 S. Ct. 2006 (1972) In Gideon, the Court made the Sixth Amendment Right to counsel applicable to the states by the incorporation into the Fourteenth Amendment." Id.

In Strickland v. Washington, 466 U.S. 668, 686 (1984), "For that reason, the Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" (quoting Mcmann v. Richardson, 397 U.S. 759, 77. n14 (1970)) "id.

"Counsel however, can deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'" Cuyler v. Sullivan, 466 U.S. 335, 345-50 (1984) (Actual conflict of interest 'adversely affecting lawyer's performance' renders assistance ineffective.)

This Court has stated that; "When interpreting a statute, we look first to the language." (quoting Richardson v. United States, 526 U.S. 813, 818 (1999); see also, United States v. Wells, 519 U.S. 482, 490 (1997); United States v. Brown, 500 F.3d 48, 59 (1st Cir 2007).

The language in 15 M.R.S § 2128 (3) states specifically that a petitioner is required ALL his PCR grounds in his first PCR action, then waiver applies to all claims "not so raised", unless the State Constitution and the United States Constitution "otherwise requires". Using this 'plain meaning' it is reasonable to say

that the Petitioner's attorney, David Bate, Esq., by mis-advising the Petitioner, concerning the 'duties to former clients' (ME. Rs. of Prof. Condt., Rule 1.9), persuading the Petitioner, via Letter (See 'Letter' of Nov. 2, 2012 Appdx. P.34) that, the representation of one of three victims, to which the Petitioner had been charged with the death of, that Bate's legal conclusion to the Petitioner was; "I do not believe I have a conflict" id., as well as other manipulating comments before and after that conclusion, i.e. mention of ethical rules surrounding conflicts, hearsay alleged to have come from 'several other attorneys' id., and lastly that Bate's knowledge and memory of the former representation would have "no impact" whatsoever in the Petitioner's case. id. ✓

It was this 'Letter' which mis-advised the Petitioner and would have rendered this ground unable to have been raised in the earlier PCR action.

Moreover, Bate also informed the Petitioner that he had been appointed to represent him, though just how he was appointed remains a mystery, seeing as the Maine Commission for Indigent Legal Services ("MCILS") has the task of filtering attorneys at the request of the Maine Superior Courts, and also, as evidenced from the fact that both the Penobscot County Superior Court (P.C.S.C.), and the Maine State's Attorney had no knowledge of the 'Letter', or the former representation of Nicolle Lugdon, as indicated from their statements at the January 24, 2025 PCR Hearing, where the State declared that; "I do not recall if Justice Anderson, Mr. Bate and I ever had a conversation about this in open court." (T/P. 8, L#3-4)(Appdx. P.93), then it is reasonable to say that Bate knew he could not mention the former representation and still remain on the Petitioner's case, because the U.S. Constitution does "otherwise" require that the Petitioner receive counsel, that the counsel be effective, and to be effective, counsel must be 'conflict free'. Wood v. Ga., 450 U.S. 261 (1981)(Where a constitutional right to counsel exists, our SIXTH

Amendment cases hold that there is a correlative right to representation that is 'free from conflicts of interest')

It is of no consequence here, that in Mickens v. Taylor, 535 U.S. 162 (2002), this Court declined to; "...extend Holloway's [Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)] automatic reversal rule to this situation and held that absent objection, a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation.'" id. @ 168-69 (quoting Cuyler v. Sullivan, 466 U.S. id. @ 348-49.

Though Sullivan addressed separately, "...a trial court's duty to inquire into the propriety a [conflict of interest]...only when the trial court knows or reasonably should know that a particular conflict exists.' 466 U.S. at 347. which is not to be confused with when the trial court is aware of a vague, unspecified possibility of a conflict. id. @ 348. " Mickens 535 U.S. @ 168-69. ✓

Without the PCSC PCR Court granting an inquiry into the depths of Attorney Bate's representation, granting post-conviction discovery requests, depositions, funds for private investigators, Bate would have been bound by the attorney-client privilege Rules of Professional Conduct, Rule 1.9 (duties to former clients), which would have prohibited Bate from answering ANY questions concerning his representation of one of the victims in this case, which the Petitioner was charged with her death & arson of. ✓

The November 2, 2012 from Bate to the Petitioner may have mildly informed the Petitioner of the Rules of Professional Conduct [which the Petitioner was not responsible for digesting and interpreting], and then spent considerable effort to convince him that Attorney Bate's loyalty was not divided, such as; a). "I have reviewed the rules of professional conduct, governing duties to former clients, specifically Rule 1.9."; b). "I have also consulted with several attorneys." ✓

c). "I do not beleive I have a conflict of interest."; d). "I do not remember anything about my prior representation that is material to your case."; e). "Moreover, almost all that I learned from that prior representation has become generally known through local media coverage."; f). "I suppose it could undermine confidence in my willingness to zealously advocate on your behalf, despite Mr. Toothaker being at the defense table as well." (See 'Letter' of November 2, 2012)(Appdx. P. 34) ~

It is also worthy of noting, that Bate 'CC'd' (carbon copy) ALL of the correspondence which he provided to other partys involved, including Attorney Jeffery Toothaker, Esq., save the November 2nd 'Letter', which as noted previously, the trial court and state's attorneys had not recieved.

The PCSC PCR Judge, in refusing to use the exceptions to waiver in 15 M.R.S. § 2128 (3)/ § 2128-A to allow the Petitioner to bring this claim forward, did not rely on a determination of whether the Petitioner had been able to make a 'voluntary, knowing & intelligent' waiver of a significant constitutinal right, because a real, competent advisory letter, demonstrating the risks of such a conflict, as occurred here, should have resembled the advisory factors contained in the Honorable Justice Breyer's Dissent in Mickens [535 U.S. 162, 210 (2002)], where he eloquently stated;

"...the evidence submitted by both sides regarding the victim's character may easily tip the scale of the jury's choice between life and death. Yet even with extensive investigation in post-trial proceedings, it will often prove difficult, if not impossible, to determine whether the prior representation affected defense counsel's decisions regarding, for example; which avenues to take when investigating the victim's background; which witnesses to call; what type of impeachment to take; which arguments to make to the jury; what language to characterize the victim; and as a general matter, what basic strategy to adopt at the sentencing stage. Given the subtle forms that prejudice might take, the consequent difficulty of providing actual prejudice, and the significant likelihood that it will nonetheless occur when the same lawyer represents both accused killer and victim..."

At the January 24, 2025, Post-Conviction Review ("PCR") Hearing (PCR Hearing), held at the Penobscot County Superior Court (PCSC), Petitioner's retained counsel Attorney Mehron Buerger, Esq ("Attorney Buerger") focused on presenting evidence that the complexity of the ethical Maine Rules of Professional Conduct (Me. Rs. of Prof. Cdt.) vs. the fact that as a 'lay person', these rules are outside the ken of the average Petitioner. (See Transcript of Hearing "T/P" on 1/24/2025 throughout)(Appdx. P. ~~84~~-107)

Attorney Buerger also emphasized the fact that the PCR Court should grant that the 2nd PCR proceeding move forward because it is likely that a 'concurrent' conflict of interest occurred. Me. Rs. of Prof. Cdt., Rule 1.7 covers conflicts-of-interest with current clients, and provides, in relevant part, as follows;

"(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict-of-interest. A concurrent conflict-of-interest exists if; (1) the representation of one client would be directly adverse to another client, even if representation would not occur in the same matter or in substantially related matters; or (2) there is a significant risk that the representation of one or more clients would be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer

Though Rule 1.7, (b) states;

"(b) Notwithstanding the existence of a concurrent conflict-of-interest under paragraph (a)[supra], a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer would be able to provide [*8] competent and dilligent representation to each affected client, and (2) each affected client gives informed consent, confirmed in writing."

Attorney Buerger also focused on the fact that no such 'waiver' was made by the Petitioner let alone a 'voluntary, knowing and intelligent' one. A comparison to the list of the Honorable Justice Breyer's 'risks' that are posed by

a situation when, "...the same lawyer represents both accused killer and victim." versus the 'Letter' from Attorney Bate to the Petitioner is so stark in contrast, that it would be debatable whether assuming *arguendo*, that the Petitioner would have been deemed 'competent' to have made a 'voluntary, knowing and intelligent waiver'. As noted by Maine State law, to be "competent", for the purposes of assisting post-conviction counsel, as set forth in Haraden v. State, 2011 ME. 113*, [9*], 32 A.3d. 448**, 452** (2011), "Factors in determining whether a defendant is able to assist counsel include; ...his ability to comprehend instructions and advice, and make decisions based on well-explained alternatives, including entering of pleas and waiving of rights)." id. @ 452 fn3

This mis-advisement of the law rendered ineffective representation at trial and on the first PCR as of right, as guaranteed by ME. Constitution, Art.1 § 6, because "Post-conviction petitioner's in Maine are expressly afforded a statutory right to counsel." Haraden, id. @ [P11*], 32 A.3d @ 448**, and also holding that; "Whether of Constitutional or statutory dimension, 'the right to counsel is the right to the effective assistance of counsel.'" id. (quoting Laferriere v State, 1997 ME. 169 ¶15, 697 A.2d. 1301)

Understanding that the 'waiver' doctrines have their grounds in being an 'adequate and independent state procedural rule, here the PCR Judge showed a complete disregard for the exceptions or defenses to waiver which were presented in both the Petitioner's pro se filings, as well as attorney-represented filings. Having shown this 'disregard' for the exception 'clause' of 15 M.R.S. § 2128 (3), which the Maine Legislature incorporated into § 2128 (3), for situations where the unthinkable might occur, where in a case sufficiently analogous, such as Mickens v. Taylor, 535 U.S. 162 (2002), where an attorney represents both an accused

murderer and victim in such a close proximity that it drew a sharp retort from the Honorable Justice Souter, where in his dissent in *Mickens* he stated; "... (1) the District Court, in reviewing the Habeas Corpus Petition [of *Mickens*] in the case at hand, found that the state court judge, who had appointed the attorney in question to represent the accused...knew or should have known that obligations stemming from the attorney's prior representation of the accused's alleged victim potentially conflicted with the duties entailed by defending the accused; (2) the state judge was therefore obliged to look further into the extent of the risk and, if necessary, either to secure the accused knowing and intelligent assumption of the risk or to appoint a different lawyer; (3) the state judge, however, did nothing to discharge her constitutional duty of care; and (4) the Supreme Court should have held that, as a remedy for such judicial dereliction, the accused's ensuing conviction had to be reversed and the accused had to be afforded a new trial." *Mickens v. Taylor*, 535 id. @ 190-191.

Here, in this Petitioner's case, the PCR Judge shot straight from the hip and stated;

"The State's Motion to Dismiss [MTD] is legally sound. I don't think I have any basis on which I could not grant it. And, therefore, I am going to do so.

(T/P. 20 L#16-19)(Appdx. P105)

The problem with the PCR Judge's ruling, inter alia, is the fact that he relies heavily on an 'Unreasonable determination of fact in light of the evidence presented'; for instance; prior to making his ruling, the PCR Judge states; "I don't want to spend a whole lot of time speculating with you, sir. But I know that Mr. Bate wrote a letter to you. I know that letter was in your file. I know that Mr. Andrus [1st post-conviction counsel] had that file, and that is the point at which

it would have had to be raised, we're it going to be raised." (T/P. 21, L#1-6)

(Appdx. P.106)

*NOTE TO COURT: At the time of preparation of this Petition for Writ of Certiorari, a Grievance/Complaint filed 10/22/2025, against the Petitioner's trial counsel Attorney David Bate, with the Board of Overseers of the Bar of Maine, was responded to by Deputy Bar Counsel Suzanne E. Thompson, Esq., on 3/13/2026, which contained a 'Response to Grievance' from Attorney Bate ("Response")(See, GCF #25-502, Nicholas J. Sexton v. David W. Bate Esq., Appdx. P) This 11-Paragraph Response, contained paragraph titles; a) Fees:, b) Counsel was not terminated by Petitioner:, c) Procedure by which I was appointed:, d) First notice that my former client was avictim:, e) No conflict of interest:, f) Professional relationship with prior client:, g) Advice regarding potential federal death sentence prosecution:, h) Only guilty murder verdict;oncount involving my former client:, i) Notice to the Clerk of prior representation;, j) Attorney-client confidence:, end.

Several of these submissions by Bate unequivocally undermine the PCR Judge's ruling, making his determination of fact, clearly erroneous, for instance; Bate states in paragraph# 10/title i) supra, that; "To the best of my recollection, I did not notify the Clerk or the Judge of my prior representation of Lugdon [victim] because there was no reason to do so. However, I did notify Petitioner of the prior representation after discussing the issue with experienced local defense lawyers. He [Petitioner] did not raise any objection, I believe, until may, 2022. He could have made that argument to me ten years earlier, in 2012, when I informed him of the prior representation, or in his initial petition for post-conviction review, in which case I would have withdrawn from his case. He also could have raised the issue with attorney Toothaker or, when in court, with Justice Anderson, but he did not."

Throughout the post-conviction review proceeding, the Petitioner has asserted that Attorney Bate has violated his United States Constitution, Amendment V., VI., and XIV., right to effective representation, as well as Maine State Constitution, Article 1, § 6 Right, for representing the Petitioner while operating under a concurrent conflict of interest.

The Petitioner at the outset has asserted that though the issue was not in his post-conviction action, that the exception(s) to waiver, provided in 15 M.R.S. § 2128 (3), should provide avenue for the state court to reach the merits of whether the Petitioner had waived a significant constitutional right having given informed consent, ~~confirmed in writing~~. (See MRPC, Rule 1.7 (a),(b)) and

The problem has been the PCSC PCR Judge's and the State's Attorney's unwillingness to develop a record, to inquire of Bate these things which the Petitioner has asserted.

Deputy Bar Counsel, Suzanne E. Thompson, Esq., instructed Attorney Bate to respond to the following MRPC Rule(s), 1.7, and 8.4 (a), (d). which shows an intentional disparity from the advice given to the Petitioner in Bate's 'Letter' dated November 2, 2012, (Appdx. P. ~~34~~) (See Letter from Deputy Bar Counsel to Atty. Bate, of January 15, 2026, Appdx. ~~35~~), where Bate mis-advises the Petitioner that it's his duty under MRCP Rule 1.9 (Duties to former clients), that is the alleged 'non-conflict', versus Rule 1.7 (Concuurent conflict-of-interest/Current client), which is the actual conflict of interest.

This Court should exercise it's jurisdiction to find that; a). the PCSC PCR Judge's ruling, granting the State's Motion to Dismiss ("MTD"), is clearly erroneous as a matter of law. 15 M.R.S. § 2128 (3), requires exception to waiver where either state or federal Constitutions require, since this Court will only grant relief where Federal law is implicated, then the Petitioner's trial-counsel

previously represented the murder victim, Nicolle Lugdon, in this case, and he advised the Petitioner that; "I don't believe I have a conflict of interest." (See Atty. Bate's 'Letter' of November 2, 2012, Appdx. P 34), then mis-guided the Petitioner further by referring him to MRPC, Rule 1.9 (Duties to former clients), without any indication that any other Constitutional law, Rules, or treatise of the United States would prohibit his representation, then spent many words to persuade the Petitioner of other provisions of right, instead of his duty to his current client, by MRPC 1.7 (a), and (b) (Concurrent conflict-of-interest/ Current client), which Rule requires unequivocally that a criminal defendant, to who desires to have a lawyer represent him notwithstanding an actual conflict, to waive an a Constitutional Right of conflict, by obtaining 'informed consent, confirmed in writing.' id.

b). The PCR Judge's ruling was based on an erroneous factual finding; as the Judge ruled that initial post-conviction review counsel Jusin Andrus, Esq., "...I know that Mr. Andrus had that file, and that is the point at which it would have had to be raised, we're it going to be raised." (T/P. 21, L#1-6) (Appdx. P 166) even though, as shown in in Attorney Bate's 'Response' to Deputy Bar Counsel Suzanne E. Thompson, esq., Bate concedes that he didn't let anyone know about the representation where he stated; "I did not notify the Clerk or the Judge of my prior representation of Lugdon [victim] because there was no reason to do so." ('Bate' Response', id at GCF #25-502, para [i], Appdx. P 35)

The Petitioner, having been mis-advised, that MRPC, Rule 1.9 (Duties to former clients), probably didn't have any conflictual implications to the Petitioner is an absurd conclusion. As this Court has routinely dealt with the type of conflict that this Petitioner's Attorney created in cases past, such as;

- 1). Mickens v. Taylor, 535 U.S. 162 (2002).
- 2). Wheat v. United States, 486 U.S. 153 (1988).
- 3). Wood v. Georgia, 450 U.S. 261 (1981).
- 4). Cyler v. Sullivan, 446 U.S. 335 (1980).
- 5). Holloway v. Arkansas, 435 U.S. 475 (1978).

Essentially, the PCR Court used a state provision of 'waiver', to circumvent the ugliness of both a unconstitutional appointment of counsel, and an unconstitutional representation of counsel, amounting to a violation of this Petitioner's United States Constitutional Fifth, Sixth, and Fourteenth Amendment Right to representation that is 'conflict-free'.

In the interest of justice, may this Court reverse and remand this case back to the Maine State Courts for a ruling consistent with law.

Argument 2

As already laid-out in Section X, (Reasons for granting this Petition for Writ of Certioari) Argument 1, supra, the right to post-conviction review is established by, 15 M.R.S. §§ 2121-2132. As stated in Question 1/Argument 1 previously, the state statute both hold within itself the standard that deems a ground properly raised (in the initial post-conviction review action), and the standard which provides a pass on the waiver, for instance; "...unless the Constitution of Maine, or the Constitution of the United States otherwise requires, or unless the court determines that the ground could not reasonably have been raised in an earlier action."

This Argument #2, deals with 15 M.R.S. § 2128-A (Exceptions to Waiver), where Maine Revised Statutes Annotated (MRSA) seemingly invokes all procedural defenses, as well as exceptions which would be cognizable in a federal habeas corpus ("Federal Habe") filed under 28 United States Code 2241-2254 (28 U.S.C. §§ 2241-2254).

The Petitioner filed a second pro se Post-Conviction Petition ("2nd PCR Petition")(See 2nd PCR Petition filed 5/9/2022)(Appdx. P. 6) This 'Petition' asserted several defenses to waiver, based on several decisions of this Court, which the Maine state courts seemingly stone-walled or left unresolved.

After filing his 2nd PCR Petition, the PCR Judge Anderson, in accord with Maine State Judiciary adopting Federal procedures, and, in accord with what appears to be U.S.C.S. Federal Rules Annotated> Rules Governing Section 2254 Cases> Rule 9 (Second or successive petitions), as set forth by 28 U.S.C. § 2244(b), (3-4), permitted the Petitioner to make arguments in favor of allowing the 2nd PCR Petition to move forward, 'if', the Petitioner could make a 'good-faith' showing of issues related to 'timeliness', as the Maine State Legislature had opted-in to AEDPA (1996), as stated above.

At the PCR Hearing held on January 24, 2025, on both the Paetioner's pro se 2nd PCR Petition, and, the State's Motion to Dismiss (MTD), the State, regarding the 1-year Statute of Limitations (15 MRS § 2128 (5)(Repealed), opined that; "I'm not taking issue with the fact that during covid Mr. Sexton and his team didn't have the oppotunity to file. The real issue, I think here, is why it was never raised in the first petition for post-conviction review." (T/P. 7 L#19-23) (Appdx. P. 84-107)

The PCR Judge (Judge Anderson) that decided the preliminary/summary review of the 2nd pro se Petition, noted that; "...[Petitioner] intends to make a good-faith argument that his claim should not be 'deemed' waived under § 2128 (3) because doing so would be unconstitutional and he could not reasonably have raised his 'conflict of interest' argument in his 1st Petition for post-conviction relief." (pro se Petition P. 16-17)(See 'Order of 8/1/2022 Assigning Petition for

Post-Conviction Review)(Appdx. P42) Judge Anderson then states; "If Mr. Sexton succeeds on either of those arguments before a post-conviction review court, then his new [Ineffective Assistance of Counsel] I.A.C. would not be deemed waived under 15 MRS § 2128 (3)." id.

Synonymous with Rule 9, of the Rules Governing Section 2254 Cases, "The preliminary screening court therefore holds, for the limited purposes of this proceeding, that Mr. Sexton's Petition meets the threshold requirement of stating at least one cognizable ground for post-conviction review that is not deemed waived under the statute." id.

In anticipation the PCR Court, as well as the Maine State's Attorneys relying on 15 MRS § 2128 (3), to procedurally bar the Petitioner's one-and-only ground, the Petitioner prepared and drafted a pleading which relied on exceptions to waiver which exceptions were fully incorporated into the proceedings by his attorney's filings (See 'Brief Showing Cause Why Procedural Bars On PCR Claim Are Inapplicable, P.1of10), which relied on 'exceptions to waiver' which provisions invoked United States Supreme Court precedent, which were also cognizable under 28 United States Code Sections 2241 to 2254, were;

1). Wainwright v. Sykes, 433 U.S. 72, (1977)(A procedurally defaulted claim in a state proceeding will be barred on federal habeas corpus 'absent a showing of cause and prejudice') See also; FREEMAN V. STATE, 1982 ME. LEXIS 752* (P. *1-*2) (1982); State v. Melvin, NO NUMBER IN ORIGINAL, 390 A. 2d. 1024, 1030 (1978)

Where the Petitioner has asserted that Attorney Bate had mis-advised the Petitioner of the; a). Maine Rules of Professional Conduct (MRPC) regarding conflicted representation, and b). the inherent risks surrounding the dangers of conflicts of interest, and; c). the Petitioner's Constitutional Right, under the United States Constitution and the Maine State Constitution, of the right to

effective representation, as well as representation that is 'conflict-free' (See Argument 1/P.22 supra.)

Attorney Bate's mis-advising the Petitioner was 'deficient performance' under prevailing professional norms, and the Petitioner was 'prejudiced' in that his trial attorney operated under a concurrent conflict of interest, thereby violating his Fifth, Sixth and Fourteenth Amendment U.S. Const, Rights to effective representation. See Strickland v. Washington, 466 U.S. 668 (1984), and Maine State Constitution, Article 1, § 6.

2). Attorney Bate, having mis-advised the Petitioner by letter (See Bate's 'Letter' of November 2, 2012)(Appdx. P.27) that his having represented Nicolle Lugdon, a victim of homicide which was named in the charging indictments in the Petitioner's criminal case, that Bate 'did not believe [I] have a conflict of interest', amounted to a violation of MRPC, Rule 1.7 (Conflict of interest-Current client) and, therefore, the Petitioner could not have made a voluntary, knowing and intelligent waiver of a significant constitutional right against 'conflict-free' representation. (See Mountjoy v. N.H. State Prison, Warden, 245 F.3d 31, 36 (1st Cir 2001), stating; "Even if defense counsel has a conflict, however, the court may sometimes allow the attorney to continue with the representation if the defendant makes a 'voluntary, knowing and intelligent' waiver." id. (quoting Wheat v. United States, 486 U.S. 153, 163 (1988) This informed consent, however, MUST also be 'confirmed in writing'. (MRPC, Rule 1.7 (b) (2))

Though the Petitioner presented these arguments towards exception to waiver, nowhere in the court's hearing transcript does it reflect that the court considered the arguments raised by the Petitioner or his attorney Mehron Buerger, Esq., only that it considered the Maine State's Attorney's Motion to Dismiss (MTD)(See State's MTD, P)(Appdx. P.78) and 15 MRS §2128 (3).

Therefore the Penobscot County Superior Court (PCSC), Post-Conviction Review Judge (PCR), decided an important federal question, cognizable by 15 MRS § 2128-A, in a way that conflicts with decisions of this Court.

In the interest of justice, may this Court reverse and remand this case back to the Maine State Courts; for a ruling consistent with law.

Argument 3

The Maine Supreme Judicial Court, was presented with a Petition for a Certificate of Probable Cause, Docket Number PEN-25-107, (Appdx. P/28), in a one-page 'Order', denied the appeal, stating; "The Court has reviewed the judgment entered in the trial court, and had fully considered the request for a 'Certificate of Probable Cause'. The Court has determined that no further hearing or other action is necessary to a fair disposition of the matter."

After receiving this 'Order', the Petitioner, through counsel, filed for Reconsideration, pointing out that the PCSC PCR Judge overlooked the arguments set out in the appellant's pro se 2nd PCR Petition.

For the same reasons set out above, and in the interest of justice, may this Court reverse and remand this case back to the Maine State Courts, for a ruling consistent with law.

XI. Conclusion

Where the Petitioner's trial attorney represented the Petitioner for the crime of murder, after having had formerly represented the victim, and where the attorney had advised the Petitioner that he did not believe there was a conflict of interest, pursuant to Maine Rules of Professional Conduct ("MRPC"), Rule 1.9 (Duties to former clients), but gave no other advisory language in his 'Letter' (See Attorney Bate's 'Letter' of November 2, 2012, Appdx. P.34) concerning Rule 1.7 (Concurrent conflicts of interest-current client), nor advised him of this Court's Jurisprudence which held that the right to attorney representation, means the right to effective representation, and effective representation means the right to representation that is 'conflict-free'.

Where the State Post-Conviction Court refused to hear this ground in the Petitioner's 2nd PCR Action, on grounds of waiver, instead, based it's ruling on the presumption that Petitioner's trial counsel had provided the November 2nd, 2012 'Letter' to 1st PCR Counsel in the client file, despite the fact that the presumption was rebutted by clear and convincing evidence, and has been verified that Attorney Bate had never notified any other party, because as the attorney stated; "There was no reason to do so." (See Bate's 'Response' to Board of Overseers of the Bar, Appdx. P35)

Where the Petitioner demonstrated 'cause' for the procedural default of the Maine State 'Waiver' provision 15 M.R.S. § 2128 (3), and 15 M.R.S. § 2128-A, as well as demonstrated 'prejudice', in that the conflict of interest rendered trial counsel's representation ineffective assistance of counsel ("I.A.C."), and the ground could not reasonably have been raised in the earlier PCR Action.

Where the Maine State Courts ignored this Court's decisions in refusing to apply well established law, governing 28 United States Code Service 2241 to 2254, which the Maine State Legislature opted-into their criminal justice system the provisions of 'exceptions to waiver', found within Federal Habeas Corpus law, to adhere to.

This Court should GRANT this Petition for Writ of Certiorari and remand this case back to the Maine Supreme Judicial Court for proceedings consistent with the Questions of law presented herein, and thereby Grant any and all other justice this Court deems necessary.:

Respectfully submitted,

Nicholas Sexton

Nicholas J. Sexton 111838*

281 N. State St./P.O. Box 14

Concord, N.H. 03302

XII. Proof of Service

I Certify, that a copy of this Petition for Writ of Certioari, was forwarded this day, via mail, to the Maine State Attorney Generals Office, 6 Statehouse Station, Augusta, Maine, 04333, on this day of May 21, 2026.

Signature: *Nicholas Sexton*
Nicholas J. Sexton 111838 pro se

Date: 5/21/26