

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CR-20-00232

FOSTER BATES,)	
)	
PETITIONER,)	
)	ORDER
v.)	
)	
STATE OF MAINE,)	
)	
RESPONDENT,)	
)	

Before the Court is the Respondent, State of Maine’s (“State”) Motion to Dismiss Foster Bates’ (“Bates”) Petition for Post Conviction Review (“PCR”) filed on January 14th, 2020. On June 10th, 2021, this court issued an order granting the State’s Motion in part, dismissing Counts II, IV and V of the PCR petition. The court did not dismiss Counts I and III of the petition and invited further briefing from the parties on the merits of each. For the reasons set forth herein, the court denies the State’s Motion to Dismiss as to the remaining counts and reconsiders Count V to the extent that it offers Bates a gateway through which he can revive his procedurally defaulted claims.

FACTUAL BACKGROUND

In 2001, Foster Bates was convicted by jury of the 1994 rape and murder of Tammy Dickson. Bates received a sentence of life in prison for the murder conviction and a concurrent thirty year sentence on an associated sexual assault conviction. In 2003, the Law Court affirmed the jury’s verdict. *See State v. Bates*, 2003 ME 67, ¶ 21, 822 A.2d 1129.

In April of 2008, Bates, represented by Attorney Peter Cyr and Boston based Attorney Neil Raphael, filed a motion seeking to have some of the evidence against Bates tested using newly available DNA technologies. *See State v. Bates*, 2018 ME 5, ¶ 3, 177 A.3d 621. One of the items of evidence Bates sought to have tested was a green sock that was found in the victim's mouth at the time she was discovered. *Id.* at ¶ 3. The court granted the motion, but, for some reason, the sock itself was not tested. *Id.* In 2011, Bates secured independent DNA testing of the sock by a lab based in Virginia. *Id.* at ¶ 4. The testing conducted by the lab ruled out Bates as a contributor of DNA on the sock, but also failed to attribute the DNA to another person. *Id.*

In February 2014, Bates moved for a new trial pursuant to 15 M.R.S. § 2138(10), asserting that the DNA found on the sock, when considered with all of the other evidence in the case, made it probable that a retrial would result in a different verdict. *Id.* at ¶ 6. The court held an evidentiary hearing on June 13, 2016 and ultimately denied the motion, concluding that Bates had “not presented such clear and convincing evidence that the new evidence, in light of all of the evidence already in the record, would create a different result in a new trial.” *Id.* at ¶ 7.

The evidentiary hearing that took place on June 13th, 2016, was originally scheduled for December of 2014 but, after the filing of an affidavit under seal by Attorney Raphael which indicated the existence of an alternative suspect, the hearing was continued. *Id.* at ¶ 6. This information came to Attorney Raphael by way of a woman named Melody Higgins (“Higgins”) (Petitioner's Supplemental Brief (“Pet.'s Supp. Br.”) 4.) In the fall of 2014, Higgins had contacted Bates' father to report that she had some information that may help his son. (Pet.'s Supp. Br. 4.) Bates' father referred her to Attorney Raphael who retained a private investigator (“Investigator”) to help vet the information. (Pet.'s Supp. Br. 4.) The Investigator interviewed Higgins, who told him, that on the morning after the Dickson murder, a man named Michael

Bridges (“Bridges”) returned home after a night out and confessed to the crime.(Petitioner’s Supplemental Brief Exhibit (“Pet.’s Supp. Br. Ex.”) 1.3.) Higgins said that Bridges told his wife Cindy that he “killed a girl” and that “there was a baby in the playpen.” (Petitioner’s Supplemental Brief Exhibit 1.3.) The now deceased Cindy Bridges was Higgins’ sister and had called her on the morning after the murder to report what Bridges had said. (Pet.’s Supp. Br. Ex. 1.3.)

In the interview with Higgins, the Investigator also identified a number of people who may have more information about Bridges, his apparent confession, and the possibility that he murdered Tammy Dickson. One such individual identified as having more information was Shawna Waterman (now known as Shawna Poulin) (“Poulin”). Another woman, identified later, was named Amanda Indigo (“Indigo”).¹

The Investigator identified Poulin, along with her boyfriend at the time Brian Higgins, as potential eyewitnesses to Bridges’ apparent confession. (Pet.’s Supp. Br. Ex. 2.3.) According to Higgins, both Brian Higgins and Poulin were at the apartment the morning after the murder. (Pet.’s Supp. Br. Ex. 2.3.) Bates contends that on several occasions, Attorney Peter Cyr and the Investigator attempted to speak with Poulin to discover exactly what she knew, but they were unable to do so. (Pet.’s Supp. Br. 6.) They also were never able to speak with Indigo. (Pet.’s Supp. Br. 6.)

Prior to the June 13th, 2016, hearing on Bates’ Motion for a New Trial, Attorney Cyr subpoenaed both Poulin and Indigo to testify. (Pet.’s Supp. Br. 8.) Poulin was never served with the subpoena and did not show up. (Pet.’s Supp. Br. 8.) Indigo did appear on the morning of the

¹ Poulin was identified as part of the Investigator’s interview with Higgins. Indigo was not identified until later stages of the proceedings after some messages were exchanged on social media between her and Higgins. This was clarified at the hearing held on September 27th, 2021 in response to a question asked of Bates’ attorneys by the court.

hearing, and Attorney Cyr met briefly with her to discuss what her testimony would be. (Pet.'s Supp. Br. 8.) After meeting with Indigo, Attorney Cyr and Assistant Attorney General Donald Macomber met with the presiding justice in chambers to discuss a recent Law Court decision that limited presentable evidence in DNA hearings to (1) evidence relevant to the DNA testing and analysis conducted on the sample, and (2) new evidence relevant to the identity of the source of the DNA sample. (Pet.'s Supp. Br. 27.) *See State v. Dechaine*, 2015 ME 88, ¶ 39, 121 A.3d 76. Accordingly, counsel agreed that any testimony provided by Indigo that day would be irrelevant to the court's ultimate decision in a DNA proceeding. (Pet.'s Supp. Br. 27.)

Despite this, Attorney Cyr called Indigo to testify in order to make an offer of proof. Indigo's offer included exculpatory testimony which inferred that Bates was not Dickson's killer. (Pet.'s Supp. Br. Ex.'s 6.13-.14.) She said that on the night of the Dickson murder, she had witnessed Bates enter Dickson's apartment and then leave. (Pet.'s Supp. Br. Ex.'s 6.13-.14.) After she saw Bates leave, Indigo said that she knocked on Dickson's door to ask if she could use her phone. (Pet.'s Supp. Br. Ex.'s 6.13-.14.) Dickson apparently answered the door and said no. (Pet.'s Supp. Br. Ex.'s 6.13-.14.) The inference, of course, being that Dickson was alive after Bates left her apartment on the night of the murder. (Pet.'s Supp. Br. Ex.'s 6.13-.14.)

Since Indigo's testimony was not relevant to the operative motion, the Court ultimately denied Bates' Motion for a New Trial without considering it. *Bates*, 2018 ME 5, ¶ 7, 177 A.3d 621. The Law Court then affirmed that denial on appeal. *Id.*

After the hearing, Bates asked Attorney Cyr to file a new PCR Petition based on the substance of Indigo's offer because it was allegedly the first time Bates and his defense team had heard her testimony, which if true, meant that it could be a ground for relief under 15 M.R.S. § 2128-B. Bates asked Attorney Cyr orally and in writing to file the new petition on several

different occasions, the first of which came five days after the hearing. (*See, e.g.*, Pet.'s Supp. Br. Ex.'s 7.1, 7.2, 8.1, 10.1, 12.1, 15.1, 15.2, 16.1, 16.2, 16.3). After experiencing some frustration with Attorney Cyr's failure to file the PCR Petition, Bates also wrote the court seeking guidance on how to handle his frustrations. (*See* Pet.'s Supp. Br. Ex.'s 9.1, 11.1.) On exactly the one year anniversary of Indigo's testimony, Attorney Cyr filed a PCR petition on Bates' behalf alleging the discovery of new evidence in the form of Indigo's testimony. (Pet.'s Supp. Br. 14.)

The State immediately filed a motion to dismiss the petition alleging that it was untimely (Pet.'s Supp. Br. 14.) The court granted the State's Motion, holding that Bates or his defense team knew something about Indigo's testimony prior to the hearing. (Order on Respondent's Motion to Dismiss and Petitioner's Motion to Supplement Petition, July 15th, 2019, CR-17-03233.)

On March 15th, 2019, in response to Bates' objection to the State's motion to dismiss, the State filed a responsive pleading attempting to cast doubt on Bates and Attorney Cyr's assertions that they did not know what Indigo would say prior to the DNA hearing. (Pet.'s Supp. Br. 6.) Attached to that pleading was State's Exhibit C which contained a summary of a State Police detective's interview with Shawna Poulin. (Pet.'s Supp. Br. Ex. 18.8.)² The summary confirmed what Bates already knew, that Poulin was at Cindy and Michael Bridges' apartment the morning after Tammy Dickson's murder. (Pet.'s Supp. Br. Ex. 18.9.) It also included something Bates asserts he did not know, that Poulin, in fact, heard comments by Bridges that could be construed as a confession. (Pet.'s Supp. Br. Ex. 18.9)

² This interview was conducted pursuant to Higgins' report to police that her former brother in law, Michael Bridges, may have been the man who actually killed Tammy Dickson. (Pet.'s Supp. Br. 6.) Higgins reported this information to police around the same time that she spoke to Bates' father. (Pet.'s Supp. Br. 6.) Maine State Police detectives conducted a number of interviews investigating the information she provided. (Pet.'s Supp. Br. 6.)

After the dismissal of Bates' PCR petition grounded on Indigo's testimony, Attorney Cyr withdrew from his representation of Bates on July 15th, 2019, foreseeing a potential conflict arising if his representation continued. (Pet.'s Supp. Br. 15.) On January 6th, 2020, Bates filed the instant PCR Petition pro se, alleging three grounds for relief. (Pet.'s PCR Petition 3-4.) The first alleged newly discovered evidence in the substance of Shawna Poulin's testimony, discovered on March 15th, 2019. The second, alleged a violation of Bates' constitutional right to due process of law. The third raised an ineffective assistance of counsel claim, claiming that Attorney Cyr's failure to timely file a PCR petition based on Indigo's testimony at the Section 2137 hearing on a Motion for a New Trial was prejudicially ineffective representation.

On January 15th, 2021, Bates filed an amended petition, this time through counsel, that raised two additional grounds for relief: a second and separate newly discovered evidence claim, and a claim of "actual innocence" pursuant to the Maine and the United States constitutions. All tolled, the instant petition stated five grounds for relief.

In an order dated June 10th, 2021, this court dismissed grounds II, IV and V, and invited the parties to submit further briefing on grounds I and III. After further briefing, a hearing was held on September 27th, 2021 to hear arguments from both parties.

DISCUSSION

With Grounds II, IV and V of the instant PCR Petition already dismissed by this court, the parties submitted further briefing on ground I which is based on newly discovered evidence from Poulin, and ground III which claims ineffective assistance of counsel by Attorney Cyr during the Motion for a New Trial. After briefing and arguments offered by the parties at hearing, the court now addresses those remaining grounds and pursuant to the Petitioner's request, reconsiders Ground V.

I. Timeliness of Shawna Poulin Evidence

Ground I of the PCR Petition alleges that March 15th, 2019 was the first time Bates knew the substance of what Shawna Poulin witnessed the morning after the Dickson murder. Although Bates and his defense team knew of her likely presence at Bridges' apartment, they had never been able to confirm it. Despite efforts to speak with Poulin on multiple occasions, they were never successful in doing so. Once Bates saw the State's Exhibit C, stating that Poulin was indeed at the apartment and overheard Bridges' apparent confession, Bates felt he had a new ground for relief that could serve as a basis for a third PCR petition.

15 M.R.S. § 2128-B provides:

A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a criminal judgment under section 2124, subsection 1 or 1-A. The limitation period runs from the latest of the following:

...

C. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The operative question here is when the factual predicate that led to Bates' claim based on the Poulin evidence arose. The parties set forth different interpretations. Bates contends that the factual predicate arose on March 15th, 2019, when the State filed its pleading with the attached Exhibit C which, he asserts, confirmed for the first time that Poulin was indeed at Bridges' apartment and heard Bridges' apparent confession. The State contends that the factual predicate arose back in 2014, when the Investigator and Bates' defense team first learned that Michael Bridges may have made incriminating statements and that Poulin may have been present when he did.

The term “factual predicate” is not defined by the legislature in statute, nor has it ever been interpreted by the Law Court. However, because Maine’s PCR statutes are analogous to the federal habeas corpus statutory scheme, some helpful guidance is found in the Habeas jurisprudence of federal courts. *See* 28 U.S.C. § 2244(d)(1)(D)(“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”); *see also Burr v. State*, 2007 Me. Super. LEXIS 68 (Mar. 28, 2007)(“the statute of limitations provisions in post-conviction review matters are patterned after similar federal legislation concerning writs of habeas corpus.”)

Congress did not provide a definition of the term ‘factual predicate,’ as used in § 2244(d)(1)(D), but those courts that have given meaning to the term agree that a factual predicate consists only of the ‘vital facts’ underlying the claim. *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012) (citing *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007); *see Vega v. Stephens*, No. 3:14-cv-551-P-BK, 2015 WL 4459262, at *3 (N.D. Tex. July 20, 2015) (defining “the factual predicate” as “the vital or principal facts underlying [a petitioner’s] claims” (citing *McAleese*, 483 F.3d at 214; *Rivas*, 687 F.3d at 535)); *see also Fact*, Black's Law Dictionary (11th ed. 2019)(defining a “predicate fact” as a fact from which a presumption or inference arises).

The vital fact which informs the instant analysis is the mere presence of Poulin at Bridges’ apartment when Bridges’ reported confession was made. What exactly Poulin heard or observed on that morning are derivative facts which flow from the paramount facts: the existence of the alleged confession and her presence at the time. Moreover, consistent with Black’s

definition of the term, her presence at the time the apparent confession was made gave rise to an inference that she, in fact, heard what Bridges said.

It is worth noting that Higgins' statement regarding Bridges' confession and the existence of both Poulin and Brian Higgins as potential corroborating witnesses could have served as the basis for a PCR petition back in 2014. Oftentimes, such petitions are filed asserting claims much less persuasive and developed than the claim Bates could have brought at that time.

Because the factual predicate underlying the Poulin claim arose more than a year prior to the petition, the court would normally dismiss Ground I. However, because the untimeliness of Bates' claim premised on Poulin's observations may either be a direct result of counsel's ineffectiveness or could potentially be saved by Bates' actual innocence claim, the court declines to dismiss Ground I at this time.

II. Ineffective Assistance

Bates' third ground of his PCR Petition asserts ineffective assistance of his counsel, Attorney Peter Cyr, during the Motion for a New Trial brought pursuant to 15 M.R.S. § 2137. At the outset, the court acknowledges that ineffective assistance of counsel during a PCR proceeding may not serve as a ground for relief in a subsequent PCR petition. *See Reese v. State*, 2017 ME 40 ¶ 9, 157 A.3d 215. However, a motion for a new trial brought pursuant to 15 M.R.S. § 2137 is not a collateral challenge to a conviction but is instead a motion brought in the underlying criminal proceeding. *See* 15 M.R.S. § 2137(1). Thus, the holding of *Reese* and other cases like it, are not applicable here. Attorney Cyr's alleged ineffectiveness occurred during his representation of Bates in connection with a Section 2137 motion, not a PCR petition.

Bates' ineffective assistance claim raises two important issues. The first, a threshold question, is whether Bates had a right to effective assistance of counsel in a post-conviction

motion for a new trial brought pursuant to 15 M.R.S. § 2137. The second is, if so, was counsel's assistance prejudicially ineffective under a *Strickland* analysis.

A. Right to Effective Assistance of Counsel

Bates' ineffective assistance claim centers on Attorney Cyr's failure to timely bring, or advise his client to bring, a PCR petition based on either the Indigo or Poulin evidence. The essential question is: Did Attorney Cyr's failure to file a timely PCR petition, based on the evidence he uncovered of Bridges potential guilt or Indigo's potentially exculpatory testimony, while representing Bates in the Section 2137 proceeding, constitute ineffective assistance of counsel?

1. Is there a right?

It has long been recognized that the right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The Supreme Court has established that a defendant's right to counsel attaches "at or after the time that judicial proceedings have been initiated against him," *Kirby v. Illinois*, 406 U.S. 682, 688 (1972), and that right continues to apply "at every stage of a criminal proceeding where substantial rights of a criminally accused person may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

Whether a Section 2137 movant has a right to effective assistance of counsel has never been explicitly addressed by the Law Court, but the Court has established a right to effective assistance in a number of other non-criminal or post conviction proceedings where a party has a right to court appointed counsel. See *In re Henry B.*, 2017 ME 72, 159 A.3d 824; *Petgrave v. State*, 2019 ME 72, 208 A.3d 371; see also *In re M.P.*, 2015 ME 138, 126 A.3d 718 (establishing a right to effective assistance of counsel in termination of parental rights proceedings); *In re*

Children of Kacee S., 2021 ME 36, 253 A.3d 1053(establishing a right to effective assistance of counsel in litigation of post judgment motions after termination of parental rights proceedings).

In *In re Henry B.*, the Law Court conclusively established a right to the effective assistance of counsel at all stages of involuntary commitment proceedings. *In re Henry B.*, 2017 ME 72 at ¶ 6, 159 A.3d 824. The Law Court reached this conclusion by noting that “where a state statute affords an individual subject to involuntary commitment the right to counsel, the legislature could not have intended that counsel be prejudicially ineffective.” *Id.*

In *Petgrave*, the Law Court similarly established a due process right to the effective assistance of counsel in probation revocation proceedings. *Petgrave v. State*, 2019 ME 72, ¶ 6, 208 A.3d 37. The Court again held that, because a state statute affords a person accused of violating probation the right to counsel—including the right to court appointed counsel if the person is indigent—the legislature could not have intended that counsel to be prejudicially ineffective. *Id.*

In the instant case, similar to the authoritative statutes in both *In re Henry B.*, and *Petgrave*, 15 M.R.S. § 2138(3) provides a right to counsel in motions brought pursuant to Section 2137. Specifically, section 2138(3) reads “if the court finds that the person filing a motion under section 2137 is indigent, the court may appoint counsel for the person at any time during the proceedings under this chapter.” Consistent with the Law Court’s reasoning in cases where similar statutes exist, this court agrees that the legislature could not have intended any counsel appointed pursuant to Section 2138(3) to be prejudicially ineffective. This is true even if such an appointment is discretionary. The parties agree, as does this court, that where there exists a statutory right to counsel, there exists a right to that counsel’s effectiveness.

However the court cannot conclusively say that such a right extends past the hearing phase of a Section 2137 proceeding. While the court agrees that a Section 2137 movant is

entitled to effective assistance of his counsel, the court stops short of extending that right beyond pre-hearing stages and the hearing itself. Such an extension requires a factual inquiry to obtain more information about Attorney Cyr's relationship with Bates and whether the particular circumstances would impose a continuing obligation on Attorney Cyr to provide effective assistance.

The State contends that Bates' right to effective assistance ended when the hearing on the Section 2137 motion concluded on June 13th, 2016. Relying primarily on *Roque v. State*, and on cases from other jurisdictions, the State asserts Bates' counsel had no duty to inform Bates of his option to file a PCR petition grounded on Indigo's hearing testimony or the Poulin evidence, and further contends that such a failure does not constitute ineffective assistance. 2019 ME 99 ¶¶ 7-8, 210 A.3d 824; *see also Sutton v. State*, 606 S.E. 2d 799 (S.C. 2004); *People v. Alexander*, 129 P.3d 1051 (Colo. App. 2016); *State v. Halliwell*, 732 N.E. 2d 405 (Oh. Ct. App. 1995).

If Bates' counsel simply failed to inform him of the availability of a PCR petition or the one year filing deadline after the Section 2137 hearing and the circumstances did not obligate Attorney Cyr to do so, then the court agrees the reasoning of *Roque* would be applicable. However, if the alternative is true and the circumstances in fact gave rise to a continuing obligation on the part of Cyr to provide effective assistance then *Roque* could be distinguished from the instant case in three respects.

First, *Roque* absolves an attorney of a duty to inform a defendant of his PCR rights where the Defendant has not expressed interest in pursuing further remedies. *Roque*, 2019 ME 99 ¶ 9, 210 A.3d 824. *Roque* reached this conclusion in part, because the defendant there had not "demonstrated to his trial counsel that he was interested in pursuing any post-conviction motions, appeals, or petitions." *Id.* Here, Bates has provided evidence that he had an interest in

filing a PCR petition based on Indigo and Poulin's testimony. He sent multiple letters imploring counsel to do so, even correctly citing the limiting language of the law within.

Second, Bates also claims he received assurances from Attorney Cyr that he would, in fact, file a petition on Bates' behalf. (*See e.g.* Pet.'s Supp. Br. Ex.'s 8.1, 9.1, 10.1, 12.1., 16.1, 16.2, 16.3.) While *Roque* may be instructive as to whether trial counsel has a duty to inform a defendant of his PCR options, it is not instructive where, as is potentially the case here, the attorney did inform the client of his option to file a PCR Petition, represented that he would, and yet failed to timely do so.

Third and finally, the instant case may be distinguishable because the new evidence which gave rise to the PCR petition premised on Indigo's testimony may have occurred *during* the hearing on the motion for a new trial. Indigo was called to the stand during the DNA hearing. When the decision in *Deschaine* rendered it irrelevant, the appropriate response would have to have been formulated during representation in the DNA proceeding.

At an evidentiary hearing, Bates may be able to establish that these in fact are the circumstances the Law Court had in mind when it stated, in *Roque*, that "there might be a circumstance where counsel could perform ineffectively" in failing to consult with or advise a defendant of his statutory right to collaterally challenge his conviction. *Id.* at ¶ 8.

2. Proper Procedure for raising ineffective assistance in Section 2137 Motion

The court briefly notes that, while there is a right to effective assistance in a motion for a new trial brought under 15 M.R.S. § 2137, the proper procedure for raising such an ineffective assistance claim has never been clearly established. In recent years, the Law Court has been called upon multiple times, not only to establish a right to effective assistance, but also to establish proper procedure for raising such a claim. *See Petgrave*, 2019 ME 72 ¶ 1, 208 A.3d 371 ("For the third time in recent years we are called upon to establish a procedure for bringing a

claim of ineffective assistance of counsel in a specific context where a party has the right to the effective assistance of counsel and where no statutory procedure to enforce that right exist[s.]”).

The court is mindful that no statutory procedure for bringing a claim of ineffective assistance in a Section 2137 proceeding exists. However, the court is satisfied that the Petitioner may raise such a claim in a PCR petition. 15 M.R.S. § 2122 provides that a PCR petition “provides a comprehensive and, except for direct appeals from a criminal judgment, exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences.”

Here, Bates’ motion for a new trial brought pursuant to Section 2137 is a post-sentencing proceeding which occurred during Bates’ serving of his life sentence. Thus, Bates’ ineffective assistance claim is procedurally proper.

B. Effective Representation

After establishing that Bates may have had a right to effective assistance of counsel in the 365 day period following the Section 2137 hearing, the next question is whether that counsel was ineffective.

Although the standard to be applied to ineffective assistance claims in the Section 2137 context has never been clearly established, the Law Court has long held that the standard for assessing ineffective assistance claims is the *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* is the “seminal case” that establishes the standards controlling the disposition of claims of ineffective assistance of counsel. *Manley v. State*, 2015 ME 117, ¶ 12, 123 A.3d 219. The *Strickland* standard governs ineffectiveness claims in state court post-conviction proceedings. *Therriault v. State*, 2015 ME 137 ¶ 13, 125 A.3d 1163. Accordingly, to prevail on his ineffective assistance claim, Bates must show deficient performance resulting in prejudice. *Strickland*, 466 U.S. at 468.

In evaluating ineffective assistance claims raised in a PCR Petition, the court must determine whether counsel's representation (1) fell below an objective standard of reasonableness, and whether (2) errors of counsel ... actually had an adverse effect on the defendant. *Theriault*, 2015 ME 137 ¶ 14, 125 A.3d 1163.

On the record currently before the court, a determination of whether Attorney Cyr provided ineffective assistance to Bates cannot be made. Legitimate questions remain as to both prongs of the *Strickland* analysis that require a hearing.

C. Conclusion

The court finds that a movant who brings a motion for a new trial pursuant to 15 M.R.S. § 2137 does have a right to effective assistance of counsel. However, the court is unable to conclude whether, in this instance, that right extended beyond the close of the Section 2137 hearing, or whether Attorney Cyr's representation was prejudicially ineffective. Accordingly, the State's Motion to Dismiss ground III is denied and an evidentiary hearing will be scheduled pursuant to M.R. Crim. P. 73(a), to hear relevant evidence concerning Attorney Cyr's representation.

III. Actual Innocence

In this court's order dated June 10th, 2021, it dismissed Ground V of Bates' petition which asserted actual innocence pursuant to the Maine and United States constitutions. Because the Petitioner cited no other authority than the constitutional provisions which he believed supported his actual innocence claim, the court failed to see why an independent avenue of relief should exist for the Petitioner outside of the post-conviction review statutory framework.

In his supplemental brief, Bates invited the court to reconsider its dismissal of ground V. (Pet.'s Supp. Br. n.14.) After a review of the briefs and hearing the arguments of the parties, the

Court accepts the Petitioner's invitation only to the extent that his claims of actual innocence seek to serve as a gateway to revive otherwise procedurally barred claims.

The Petitioner argues that any claims he has asserted which have been held to be untimely, may nonetheless proceed because he can make a gateway showing of "procedural actual innocence" which entitles him to a post conviction review proceeding on his time barred claims regardless.

Because the Law Court has provided no guidance or direction on actual innocence claims, Bates' argument rests primarily on case law which has arisen in the federal habeas context. In federal courts, claims of actual innocence have taken two different forms. The first, "freestanding actual innocence," asserts actual innocence as the sole basis for habeas relief, and has never been recognized as a cognizable claim within a habeas petition. *See Herrera v. Collins*, 506 U.S. 390 (1993). The second, "complementary actual innocence," allows a habeas petitioner to utilize an actual innocence claim to revive a prior, procedurally barred habeas petition. *See Mcquiggin v. Perkins*, 569 U.S. 383 (2013). Although some states have adopted "freestanding actual innocence" claims, *see, e.g., Miller v. Comm'r of Correction*, 700 A.2d 1108 (Conn. 1997), the Law Court has never done so. *See State v. Dechaine*, 2015 ME 88 ¶¶ 36-42, 121 A.3d 76 (discussing post conviction due process jurisprudence in Maine and acknowledging that Maine has never recognized a "freestanding" claim of actual innocence). Thus, to the extent that the court allows Bates' claim of actual innocence, it is only as a gateway claim which may allow Bates to revive any of Bates' prior, time-barred claims if he makes the requisite threshold showing. To the extent the Defendant asserts a freestanding actual innocence claim, Ground V would be dismissed.

In adopting the complementary actual innocence doctrine, however, the Supreme Court has held that procedurally barred habeas petitions may nonetheless be brought if the Petitioner

can make a “colorable showing of factual innocence.” See *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006). In *Kuhlmann*, the Court stated that the “ends of justice” require courts to entertain procedurally barred petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. *Kuhlmann*, 477 U.S. at 454. Such a standard “effectuates the clear intent of Congress that [procedurally barred] habeas petitions” should only be heard in rare cases. *Id.*

In *Schlup*, the Court provided some framework for evaluating claims of actual innocence, stating that such claims will save other procedurally barred claims, when new, reliable evidence such as “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence” makes it “more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.” *Schlup*, 513 U.S. at 327. This standard does not charge the court with determining whether reasonable doubt exists, but rather requires the court to make a probabilistic determination about what reasonable, properly instructed jurors would do. *Id.* at 329.

When it comes to Bates’ ground of actual innocence, the operative inquiry is whether Bates can make a threshold showing that no objectively reasonable juror could have found him guilty beyond a reasonable doubt. If he can, then Bates may proceed with his otherwise time barred grounds for relief.

To date, there are a number of known pieces of ‘new evidence’ which are time barred by the PCR statutory filing deadlines. Among them are the Indigo testimony, which was held to be untimely by this court previously and the Poulin evidence which was determined to be untimely, *supra* at 9. Thus, at hearing, if Bates can make a colorable showing of factual innocence, then Bates’ ground for relief premised on what Poulin heard at Bridges’ apartment and what Indigo observed on the night of the murder may be revived from their procedural grave. If the Petitioner

presents evidence which meets the complementary actual innocence standard, then this court will consider all claims, both those time barred and not, in making its determination of what relief is appropriate.

At this juncture, the court cannot conclude, on the record before it, whether the Petitioner has met the actual innocence standard developed by the Supreme Court. However, the court does find that the Petitioner has set forth enough evidence to warrant an evidentiary hearing on this claim. Accordingly, the court orders an evidentiary hearing to be held pursuant to M.R. Crim. P. 73(a), where Bates may present all relevant evidence in support of his actual innocence claims.³

CONCLUSION

The court hereby denies the State's Motion to Dismiss as to both pending grounds for relief and reverses, in part, its prior decision dismissing Ground V. The result of this Order is that Bates is left with two legally cognizable theories of relief. First is Bates' ineffective assistance claim which entitles Bates to present evidence that Attorney Cyr was ineffective in his representation of Bates during the Section 2137 proceeding. Second is Bates' claim of actual innocence which, if Bates satisfies the associated standard, allows Bates to assert any previous claims that are in procedural default as grounds informing the court's ultimate order of relief.

Pursuant to M.R. Crim. P. 73(a) the court hereby orders an evidentiary hearing to address whether either of Bates' surviving claims allow him to revive any of his previous procedural defaults. The hearing is intended to be a final hearing on all remaining issues. Therefore, the hearing will also decide whether Bates is entitled any of the relief available pursuant to 15

³ The State's objections based on the admissibility of evidence and the credibility of the witnesses are better decided at the final hearing in this matter.

MRSA § 2130 in the event he clears the procedural issues that will also be decided at the hearing.

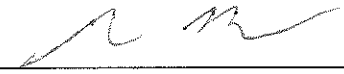
The Court also orders the parties to confer and submit an estimated amount of time for the evidentiary hearing within thirty days from the date of this order. Upon receipt of the estimated time for hearing, the clerk will schedule a prehearing conference and a final hearing and give notice to the parties. Either party may request a status conference if necessary to discuss the amount of time necessary for trial or any other issue raised by this order.

Entry is:

The State's Motion to Dismiss is DENIED as to Grounds I and III

The court's order dismissing Ground V of the Petition is reversed in part and the State's Motion to Dismiss as to Ground V is DENIED to the extent it alleges there is sufficient evidence of actual innocence to overcome the untimeliness of the petitions for relief.

DATED: 10/15/12



Thomas R. McKeon
Justice, Superior Court