

No. 23-

IN THE
Supreme Court of the United States

ROLAND CUMMINGS,

Petitioner,

v.

THE STATE OF MAINE,

Respondent.

**On Petition for a Writ of Certiorari to the
Maine Supreme Judicial Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a post-conviction review of a murder trial leading to a sentence of life imprisonment finds that there was ineffective assistance of counsel but, through *sua sponte* reasoning, the PCR Court denies that there was prejudice resulting from the ineffective assistance of counsel for failing to investigate the case and review the state's discovery with the defendant, is the Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process satisfied by an appellate court's summary conclusion, without any elaboration or analysis, that there was no prejudice to the defendant?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Roland Cummings, the defendant-appellant below. Respondent is the State of Maine, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Roland Cummings (Mr. Cummings) raises an important issue as to the minimum standards of review that should be afforded to criminal defendants facing life sentences, and the appropriate procedural recourse for an appellant whose State-appointed counsel materially and adversely impacted his criminal defense.

In this case, the deficiencies of Mr. Cummings' Trial Counsel fundamentally affected Mr. Cummings' decision—and his very ability to make a reasonably informed decision—to not testify in his murder trial, in addition to impacting the overall effectiveness of his defense. Upon challenging the effectiveness of his trial attorneys, the Post-Conviction Review Court ("PCR Court") found that his counsel was ineffective, citing several deficiencies, but perhaps the standout issue was the near-total failure to review discovery with Mr. Cummings prior to the trial. Despite finding ineffective assistance of counsel, and after additional briefing, the PCR Court ruled that the ineffective assistance of counsel did not impact the outcome of the trial, because Mr. Cummings had "with the requisite knowledge and intention, voluntarily waived his right when he stated that he would not testify," although the PCR Court's conclusion about there not being presumptive prejudice was solely focused on Mr. Cummings' one operative choice: to testify or not. The PCR Court was silent as to whether the failure to properly prepare Mr. Cummings for trial, by for example preparing him to testify, gave rise to a presumption of prejudice.

In Maine, an appeal of a post-conviction review goes to the Supreme Court of Maine sitting as the Law Court ("the Law Court") through a request for a certificate

of probable cause. *See* Maine Rule of Appellate Procedure 19. There is no other body with appellate jurisdiction over the PCR Court’s ruling. Upon appealing the PCR Court’s decision, the Law Court issued a summary order denying the request for a certificate of probable cause, stating in substantive part: “Cummings contends that the court erred in denying his petition for post-conviction review. After review of the record, which demonstrates that Cummings’s counsel did not prejudice him at trial, the Court has determined that no further hearing or other action is necessary to a fair disposition.” The Law Court did not further engage with the pertinent law or facts relevant to the case.

OPINIONS BELOW

The Maine Supreme Judicial Court issued a memorandum of decision rejecting the request for a certificate of probable cause on October 26, 2022. The PCR Court issued an order denying petition for post-conviction review on June 15, 2022.

JURISDICTION

The Maine Supreme Judicial Court issued its memorandum of decision on October 26, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution’s Sixth Amendment provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The United States Constitution’s Fourteenth Amendment in relevant part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .”

INTRODUCTION

The *Strickland* test presents an abstract challenge in dividing a continua of conduct into two categories (ineffective or effective counsel), and then dividing a continua of ineffectiveness into categories of prejudicial or non-prejudicial impact. See *Strickland v. Washington*, 466 U.S. 688 (1984). Accepting this test for what it is, courts reviewing this conduct are mandated to analyze the efforts of trial counsel accordingly. The question raised in this case is whether, after a PCR Court finds ineffective assistance of State-appointed counsel but does not find prejudicial impact for *sua sponte* reasons not briefed by either party, and the appellate review of that PCR Court offers no analysis under *Strickland* whatsoever, have the courts adequately engaged with the prejudice prong of the *Strickland* test in reviewing the conduct and performance of an ineffective State-appointed attorney.

STATEMENT OF THE CASE

Mr. Cummings was accused of murdering Aurele Fecteau. He was an indigent defendant and appointed counsel by the State of Maine (“the State”). Maine does not have public defenders, but rather, the State reimburses private attorneys who take on indigent clients in need of representation. In the course of his pre-trial preparation, Mr. Cummings met his attorneys rarely, they did not answer any of his phone calls from prison, and they did not review the State’s discovery with Mr. Cummings, choosing instead to describe the prosecution’s major “themes” and “narratives” at some of those infrequent meetings. After a relatively brief jury trial, during which Mr. Cummings was advised not to testify and in fact

did not testify, the jury found Mr. Cummings guilty of murder. A criminal jury verdict must be unanimous. M.R. Crim. P. 31(a).

Mr. Cummings challenged the performance of his State-appointed attorneys through Post-Conviction Review (“PCR”). Following that challenge, the PCR Court found, cumulatively, that the assistance of counsel was ineffective insofar as it did not allow Mr. Cummings to “meaningfully participate in his defense.” Yet, with those broad findings, the PCR Court considered the impact of his counsel’s ineffectiveness only through whether Mr. Cummings’ decision not to testify was affected by his counsel’s unacceptable efforts, and further, whether the decision to testify would have materially impacted the outcome of the trial. Looking only at that narrow question, the PCR Court further ignored its own findings of ineffectiveness and ruled on an argument that it raised from the bench. Mr. Cummings timely appealed to the Maine Supreme Judicial Court (the “Law Court”), pursuant to Maine Rule of Appellate Procedure 19(a)(2)(F) and 15 M.R.S.A. §2131(1).

On appeal to the Law Court, Mr. Cummings argued that the colloquy with the PCR Court did not absolve trial counsel’s ineffectiveness; that the colloquy did not address the PCR Court’s own findings of myriad acts and omissions that would have prejudiced the trial; and that the colloquy did not address either “actual” or “presumptive” prejudice prongs of the *Strickland* test.

The Maine Supreme Judicial Court, upon review, did not analyze the *Strickland* prongs, either. Rather, the court summarily issued a memorandum of

decision, stating simply that there was no prejudice to Mr. Cummings. The court did not even gesture at engaging with or justifying the PCR Court's reasoning, nor was there an analysis of the facts or applicable law.

This Court has held other appellate courts to task for failing to analyze the prejudice factors under *Strickland*. See e.g. *Andrus v. Texas* ("*Andrus I*"), 590 U.S. ___, 140 S. Ct. 1875, 1887 (2020) (*per curiam*) (noting that an appellate court's one-sentence denial of post-conviction review appeal was "unclear" as to whether the petitioner "failed to demonstrate deficient performance under *Strickland*'s first prong, [or] had failed to demonstrate prejudice under *Strickland*'s second prong, or . . . had failed to satisfy both prongs of *Strickland*"). While the prejudice prong of the *Strickland* test may be tough to satisfy, the path leading Mr. Cummings to this petition for certiorari raises doubts as to whether the PCR Court or the Law Court have done justice to *Strickland* in testing whether Mr. Cummings was prejudiced by his unquestionably deficient legal representation. The Law Court's analysis, in particular, utterly fails to engage in prejudice analysis. For that reason, Mr. Cummings respectfully asks this Honorable Court to vacate the Law Court's terse decision and remand the case for prejudice analysis consistent with the mandates of *Strickland*.

STATEMENT OF FACTS

On November 19, 2015, Petitioner Roland Cummings (“Mr. Cummings”) was convicted of murder, burglary, and theft in connection to the death of Aurele Fecteau. Mr. Fecteau died in his bed, having been stabbed several times. On January 21, 2016, Mr. Cummings was sentenced to life imprisonment for the murder charge, and concurrent ten- and two-year terms for the remaining charges. In a Petition for Post-Conviction Review (“PCR”) filed January 2, 2018, Mr. Cummings alleged that his Trial Counsel was ineffective.

A PCR hearing was held on January 20, 2021. In its Findings and Order for Further Briefing dated November 8, 2021 (see Appendix C at APP008-14), the PCR Court found the following facts about the performance of Mr. Cummings’ Trial Counsel, who were court-appointed through the Maine Criminal Indigent Legal Services (“MCILS”) program:

- Trial Counsel did not provide Mr. Cummings, who was incarcerated before and through trial, with discovery: no police reports, no transcribed interviews, and no recordings of interviews of witnesses. APP009.
- The discovery in this case consisted of 1,408 physical pages and numerous recordings. APP009.
- Trial Counsel stated that they conveyed discovery information to Mr. Cummings “through narrative,” and “informed [him] of the major themes” of the case. APP010.

- At the PCR hearing, Trial Counsel explained that the decision not to provide discovery to the Petitioner was strategic insofar as they were concerned about “jail house snitches.” APP011.
- Trial Counsel took just seven opportunities—between early June of 2014 until the first day of trial in November of 2015—to render advice and convey pertinent information from these 1,408 pages of documents and numerous recordings. APP010.
- Over that 17-month timeframe, only five of the billing entries from Trial Counsel pertaining to visits with Mr. Cummings reference *any* discussion of discovery, and the total duration of these visits came to 10.5 hours APP009.
- Mr. Cummings testified that Trial Counsel were not willing to and in fact did not accept his collect phone calls from the jail. APP009. Trial Counsel did not explain why they did not accept collect phone calls from him during the 17 months he was awaiting trial. APP009.
- Mr. Cummings also testified that in the seven times he met with counsel before the initial trial, their meetings lasted only 20 to 30 minutes. APP009. He testified that he wanted to see the State’s discovery, but was told by Trial Counsel it was not in his best interest to have it in the jail. APP009-10.
- Trial Counsel took no steps to inform the Court about their concern about jailhouse informants, nor did they request accommodation from the Court

to ensure that Mr. Cummings could meaningfully review and understand the voluminous discovery that the State had provided to Trial Counsel; an accommodation, had it been requested, would have been freely granted. APP010.

- Trial Counsel “essentially decided that only they needed to know the amount and quality of evidence against Cummings, that he should just follow their lead, and that is what happened.” APP010.
- After seeing discovery for the first time (after trial), Mr. Cummings’ outlook on the testimony presented at the trial changed such that he would have demanded that certain witnesses be called, and his own decision whether to testify would have been different. APP012.
- Mr. Cummings also testified that: “a lot of witnesses that actually know me and that actually would have testified on my behalf, where no witnesses were called on my behalf, to testify on my behalf, about my character or anything, that would have benefitted, you know, my case. And I believe me testifying and telling the truth about what happened would have helped my case. Whether or—whether or not you would have made me look bad on the stand or not, I do believe now that—yes, I should have testified.” APP011.

Applying those findings to the standards of ineffective counsel, including American Bar Association Standard for Criminal Justice, Maine Rules of Professional Conduct, and MCILS rules, the PCR Court held that “Trial Counsel’s preparation

with Cummings and failure to provide direct access to discovery before trial fell below an objectively reasonable performance under these circumstances.” APP013. The PCR Court went on to observe that people in Maine “who are accused of crimes—even when there is no risk of jail—usually receive at the first appearance physical copies of discovery. And they are guaranteed access to all recordings.” APP013. Crucially, the PCR Court also found that: “Trial Counsel’s communications missed important facts, *including the location of the alleged murder weapon and the identity of potential and critical witnesses for the State.*” APP013 (emphasis added). The PCR Court also found that Trial Counsel “breached their duty to keep their client sufficiently informed such that he could meaningfully participate in his defense.” APP013.

Having concluded that there was, in fact, ineffective assistance of counsel, the PCR Court requested further briefing from the parties on the specific question of whether Trial Counsel’s performance prejudiced Mr. Cummings’ trial. After that briefing, on June 15, 2022, the PCR Court issued its Order Denying Petition for Post-Conviction Review (the “Order”), in which it found neither actual nor presumed prejudice.

The PCR Court ruled that Mr. Cummings had not shown actual prejudice because he “did not adequately detail at hearing on the Petition what testimony he would have given at the original trial.” APP005. However, Mr. Cummings testified that, had he reviewed discovery, he could have accounted for the location of a fishing knife he owned. See APP007. During the trial, there was no murder

weapon produced, but there was testimony about Mr. Cummings owning a fishing knife. There was no weapon that the jury could connect to Mr. Fecteau's homicide. Mr. Cummings testified at the PCR Hearing that he could have told the jury that his knife had been located, or could be located, if he had reviewed paper discovery. Further, Mr. Cummings' Trial Counsel did not produce evidence regarding the fishing knife that might have cast doubt upon its use in the murder. Nevertheless, the PCR Court found Mr. Cummings' testimony about how he had been prejudiced to be "vague," and determined that, if "[w]eighed against the potential for damaging cross-examination," his decision to not testify did not affect the outcome of the trial. APP005.

In considering whether there was presumptive prejudice, the PCR Court held that Mr. Cummings was not deprived of his right to testify because the Trial Court went through the process of explaining to Mr. Cummings, in the usual manner, his rights to testify and deemed that his decision was a "valid waiver" of his rights. APP005. The PCR Court concluded that Mr. Cummings had "with the requisite knowledge and intention, voluntarily waived his right when he stated that he would not testify," although the PCR Court's conclusion about there not being presumptive prejudice was solely focused on Mr. Cummings' one operative choice: to testify or not. The PCR Court was silent as to whether the failure to properly prepare Mr. Cummings for trial, including preparing him to testify, gave rise to a presumption of prejudice.

On June 20, 2022, Appellant timely filed a notice of appeal and duly filed a request for certificate of probable cause to the Supreme Judicial Court of Maine, sitting as the “Law Court,” pursuant to M.R. App. P. 19. Mr. Cummings raised concerns over the PCR Court’s ruling that Mr. Cummings was not prejudiced solely because there was a colloquy between the trial court and Mr. Cummings about his informed decision not to testify, despite the fact that his decision would be predicated on advice from, and preparation with, his trial counsel—who the PCR Court had already found deficient in their pretrial preparation with Mr. Cummings.

The Law Court, in summary fashion, denied the request, stating simply: “After review of the record, which demonstrates that Cummings’s counsel did not prejudice him at trial, the Court has determined that no further hearing or other action is necessary to a fair disposition.” APP001. It is unclear—completely unstated, in fact—whether, in the eyes of the Law Court, Mr. Cummings’ counsel did not prejudice him either actually, presumptively, or both.

REASON TO GRANT THE PETITION

I. The uncertainty as to whether the Law Court adequately reviewed the record to determine whether Mr. Cummings was prejudiced by his ineffective counsel strongly favors remand.

This Petition goes to an important issue as to the minimum standards that should be afforded to criminal defendants facing serious charges, and the appropriate remedy for a defendant whose counsel materially and adversely impacted his defense. In this case, the deficiencies of Mr. Cummings' Trial Counsel actually and fundamentally affected Mr. Cummings' decision—and his very ability to make a reasonably informed decision—to not testify in his murder trial, in addition to impacting his overall ability to participate in his own defense.

As the Court knows well, the *Strickland* test applies to a convict's request for a new trial. To prevail on a claim of ineffective assistance of counsel, Mr. Cummings would have to demonstrate (1) that trial counsel's representation fell below an objective standard of reasonableness and (2) that the errors of counsel actually had an adverse effect on the defense. *See Ford v. State*, 2019 ME 47, ¶ 11, 205 A.3d 896 (quoting *Strickland v. Washington*, 466 U.S. 668, 693 (1984)).

The PCR Court, following a hearing, found that Trial Counsel at Mr. Cummings' murder trial violated their duty to Mr. Cummings when they proceeded to trial without allowing Mr. Cummings to review any discovery in the case, leaving Mr. Cummings surprised by the evidence at trial and ill-equipped to make an informed choice about his decision not to testify. The PCR Court found further, however, that the failures of Trial Counsel did not actually or presumptively prejudice the trial outcome.

The PCR Court did not appear to appreciate that the utter lack of communication with Mr. Cummings, coupled with the failure to meaningfully review the government's voluminous discovery materials with Mr. Cummings in the context of a murder trial, rendered him uninformed and unprepared in waiving his fundamental right to testify, even if his rights were explained in passing by a judge. These failures amounted to a fundamental deprivation of Mr. Cummings' constitutional right to counsel, and further, precipitated an unfair trial. The record further supported finding actual prejudice in this case, as Mr. Cummings addressed how his testimony might have dispelled inferences that he used his fishing knife as a murder weapon in the homicide of Mr. Fecteau. The State pointed to no other possible murder weapons at trial, but Mr. Cummings was not equipped to testify on the subject because he was not afforded the opportunity to review written discovery.

Notwithstanding the above, the Law Court unfortunately creates that impression that it gave Mr. Cummings' appeal a cursory review. The entirety of the Maine Supreme Judicial Court's summary order is as follows:

Pursuant to M.R. App. P. 19, Roland Cummings has filed a memorandum seeking a certificate of probable cause permitting an appeal to the Law Court of the court's denial of his petition for post-conviction review.

Cummings contends that the court erred in denying his petition for post-conviction review. After review of the record, which demonstrates that Cummings's counsel did not prejudice him at trial, the Court has determined that no further hearing or other action is necessary to a fair disposition.

It is therefore ORDERED that the request for a certificate of probable cause to proceed with the appeal is hereby DENIED.

APP001. This sort of cursory review raises grave concerns. In *Andrus I*, this Court expressed concern where a court does not “conclusively reveal” whether a *Strickland* test is failed due to actual or presumptive prejudice. See *Andrus v. Texas*, 140 S. Ct. at 1887 (2020). In fact, in *Andrus I*, the Texas Court of Criminal Appeals decision that was subject to appeal (and deemed inadequate by this Court) expressly mentioned *Strickland*, noting that the convicted appellant had “fail[ed] to meet his burden under *Strickland*, and went on to state that he further failed “to show by a preponderance of the evidence that his counsel’s representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different, but for counsel’s deficient performance.” See *Andrus I*, 140 S. Ct. at 1887-88 (Alito, J., dissenting). The Texas appellate court’s declination to find prejudice in that case is a loquacious monologue compared to the Law Court’s bare conclusion in the instant case.

Further, the order of the Law Court defied its own jurisprudence, as the Law Court has set out for itself the following standard of review: The Law Court reviews a PCR Court’s “legal conclusions de novo and its factual findings for clear error,” though the Law Court has recognized that the two prongs of the test “often present mixed questions of law and fact,” and “that such a ‘mix’ of legal and factual questions can be difficult to tease apart.” *Fortune v. State*, 2017 ME 61, ¶¶ 12-13, 158 A.3d 512. Here, the Law Court does not tease apart the aspects of the PCR Court’s ruling that are more fact-oriented or law-oriented. It does not explain whether there was any reasonable probability that one juror might have been

swayed in a different fact pattern not marred by inadequate representation by Mr. Cummings' Trial Counsel. The simple fact is that the Law Court offers no analysis at all, not even stating whether the PCR Court's own prejudice analysis was correct or incorrect. This is not adequate review, and thus, Mr. Cummings' PCR Order should be duly remanded for proper analysis of the prejudice prong of the *Strickland* test.

II. This case demonstrates prejudice caused by trial counsel's ineffective assistance of counsel, and is a strong vehicle for clarifying *Strickland* standards.

This case warrants remand because there is clear evidence that Mr. Cummings was, in fact, prejudiced by his Trial Counsel's ineffective preparation. To establish prejudice—that counsel's errors had an adverse effect on the defense—a petitioner “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Ford v. State*, 2019 ME 47, ¶ 14, 205 A.3d 896 (quoting *Strickland*, 466 U.S. at 694). The *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a “mechanical” fashion. *Strickland*, 466 U.S. at 694. “When a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on ‘the fundamental fairness of the proceeding.’” *Weaver v. Massachusetts*, 582 U.S. ___, 137 S. Ct. 1899, 1911 (2017).

There are two categories to the prejudice prong: either the representation was so deficient as to be deemed presumptively prejudicial to the outcome of the

trial, or the representation did, with reasonable probability, actually prejudice the criminal defendant. Answering either inquiry, Trial Counsel's conduct prejudiced Mr. Cummings' right to a fair trial.

1. The failure to communicate with Mr. Cummings and/or to provide written discovery presumptively prejudiced the murder trial.

In cases where the ineffectiveness of counsel amounts to the "constructive denial of the assistance of counsel," prejudice is "legally presumed" and need not be affirmatively proved. *Strickland*, 466 U.S. at 692; *see also United States v. Cronin*, 466 U.S. 648, 659, (1984). In the case at hand, the presumption of prejudice may be inferred.

In the "rare" cases where the ineffectiveness of counsel rises to a presumption of prejudice, *see Laferriere v. State*, 1997 ME 169, ¶ 11, 697 A.2d 1301, a recurrent issue is where there exists a constructive denial of counsel, typically where the government or courts limit a defendant's access to counsel. *See Geders v. U.S.*, 425 U.S. 80 (1976) (presumptive prejudice when court barred on attorney consultation with client during overnight recess); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (presumptive prejudice for denial of counsel at preliminary hearing); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (presumptive prejudice for denial of counsel at arraignment). The constructive denial of access to counsel need not only be the result of government action, as when trial counsel represents a defendant while having a conflict of interest, the presumption is also triggered without any governmental or court intervention causing a literal denial of access. *See Cuyler v.*

Sullivan, 446 U.S. 335, 344 (1980). These types of cases bear more similarity to the underlying facts in Mr. Cummings’ case than allegations of ineffective assistance of counsel arising out of a discrete strategic choice at a certain point in the criminal case. *See, e.g., Philbrook v. State*, 2017 ME 162, 167 A.3d 1266 (denying ineffective assistance of counsel claim where counsel’s optimism about trial led the client to reject a plea deal that was more favorable than the trial outcome).

The PCR Court erred in approaching the “presumptive prejudice” question with too narrow a focus on a factual issue—namely, did Mr. Cummings “validly waive” his right to testify following a colloquy between the judge and the defendant—rather than looking at whether the gestalt of Trial Counsel’s failures amassed a fundamental deprivation of Mr. Cummings’ right to a fair trial. The PCR Court concluded, while noting that the parties briefing the issue did not address this particular exchange with respect to the issue of presumptive prejudice, that Mr. Cummings had “with the requisite knowledge and intention, voluntarily waived his right when he stated that he would not testify.” APP006. Respectfully, this *sua sponte* reasoning does not address the presumption of prejudice issue.¹ Mr. Cummings’ statement to the Trial Court does not weigh whether the course of conduct by Trial Counsel amounted to a “constructive deprivation of counsel” such that a presumption of prejudice should be triggered, and to the extent that the PCR

¹ The focus on whether Mr. Cummings validly waived his right to testify after a rote exchange with the judge frames the issue as: ‘did Trial Counsel physically prevent Mr. Cummings from testifying,’ which is not quite the issue of *constructive* denial of counsel under the presumptive prejudice analysis. Mr. Cummings’ decision was informed—or misinformed—by his inadequate grasp of the facts and the inadequate preparation by Trial Counsel, so the fact Mr. Cummings was not literally gagged does not negate the harm done by his counsel.

Court's conclusion is a legal one, the Law Court had an obligation to review the decision, analyze the PCR Court's reasoning, and to reverse the conclusion.

Critical facts found by the PCR Court suggest that the actions of Trial Counsel created circumstances where Mr. Cummings was actually or constructively denied access to counsel. The most obvious denial of access is reflected in Trial Counsels' unwillingness to accept any phone calls from Mr. Cummings and the rarity of meetings between counsel and defendant over the 17-month period leading to trial. See APP003. As for those meetings, Mr. Cummings met with Trial Counsel five times before trial to discuss discovery (in any capacity), and those meetings lasted approximately 20-30 minutes each. APP003. Trial Counsel *spent only a couple hours reviewing discovery with a client on trial for murder*; and even worse, they used this limited time to convey pertinent discovery through "major themes" and "narrative." APP003-4. The PCR Court's findings go on to spell out the consequences of this ineffective advocacy. Due to the limited communication and the failure to share discovery with Mr. Cummings, Trial Counsel "missed important facts, *including the location of the alleged murder weapon and the identity of potential and critical witnesses for the State.*" APP007 (emphasis added). Both counsel and client were denied the opportunity to formulate meaningful defenses due to Trial Counsel's weak efforts to convey discovery information to Mr. Cummings. The net result, according to the PCR Court, was that Mr. Cummings could not "meaningfully participate in his defense." APP007.

The inability to “meaningfully participate” in his own murder trial defense goes beyond a single moment where Mr. Cummings was asked whether he wished to testify at his trial. The chronic and foundational failures of Trial Counsel, as played out over the course of 17 months, fundamentally prejudiced Mr. Cummings’ ability to defend himself at trial—and reciprocatively, left Trial Counsel unprepared to defend him adequately. Trial Counsel consistently stonewalled Mr. Cummings, as seen by (a) refusing to let him review any of the voluminous written discovery in this case, (b) limiting their communications to him about the discovery in the case to a handful of conversations about “themes,” and (c) failing to communicate with Mr. Cummings, evidence by their refusal to accept any of his calls from prison. These failures caused Mr. Cummings such a fundamental disadvantage in his trial that they should be deemed structural deprivations of his right to counsel, and thus, presumptive prejudice should apply.

The PCR Court supplied factual findings necessary to compel a retrial. The PCR Court took a misstep in its *sua sponte* legal analysis of the presumptive prejudice element of the *Strickland* test. And, finally, the Law Court did not expressly review the record or apply the record to the *Strickland* test in its denial of Mr. Cummings’ appeal. These facts compel remand.

2. The failure to communicate with Mr. Cummings and/or to provide written discovery actually prejudiced the murder trial.

When prejudice cannot be presumed in a post-conviction challenge based on ineffective representation, the actual prejudice that a petitioner must prove “is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* On the issue of criminal defendant testimony, the Law Court has positively noted the potential impact that a defendant's decision to testify can have: "When 'the defendant takes the stand . . . his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy.'" *Ford*, 2019 ME 47, ¶ 18, 205 A.3d 896 (quoting *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring)).

As to the actual impact of Trial Counsel's ineffective performance, the PCR Court's Order was inconsistent with its own findings. The PCR Court found, uncharitably, that Mr. Cummings "did not adequately detail at hearing on the Petition what testimony he would have given at the original trial." APP005. The PCR Court also found, absent any clear evidence as to how the State might have impeached or undermined Mr. Cummings on cross-examination, that any benefit of his testimony must be "[w]eighed against the *potential* for damaging cross-examination." APP005. The PCR Court found that *any* imagined cross-examination was *potentially* detrimental to the defendant, and gave it greater weight than Mr. Cummings' actual testimony. To the extent that those findings are

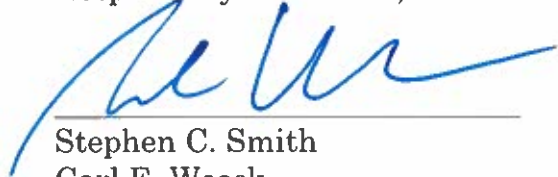
simply contradicted or unsupported by the record evidence, that reasoning does not comport with actual prejudice analysis.

Mr. Cummings' decision to not testify was significant and its repercussions are undeniable. His hypothetical testimony squarely addresses a major element of the prosecution's case against him—namely his possession of a possible murder weapon—, and any potential cross-examination might have been mitigated with adequate preparation from his attorneys. The PCR Court's ruling on the actual prejudice question was factually erroneous and legally flawed, and the Law Court did not appear to analyze the question of actual prejudice at all. The Law Court's summary decision should be vacated.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Stephen C. Smith', is written over a horizontal line.

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Dated at Augusta, Maine on January 24, 2023.