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

APPENDIX

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TABLE OF CONTENTS

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Ken-22-210

ROLAND CUMMINGS

v.

STATE OF MAINE

ORDER DENYING CERTIFICATE OF PROBABLE CAUSE

Panel: STANFILL, C.J., and MEAD, JABAR, HORTON, CONNORS, and LAWRENCE, JJ.

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.

Dated: October 26, 2022

For the Court,

Matthew E. Pollack
Clerk of the Law Court
Pursuant to M.R. App. P. 12A(b)(4)

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-18-11

ROLAND CUMMINGS	)	
	)	
Petitioner	)	**ORDER DENYING PETITION FOR POST-CONVICTION REVIEW**
	)	
v.	)	
	)	
STATE OF MAINE	)	
	)	
Respondent	)	

Before the Court is Petitioner Roland Cummings's Petition for Post-Conviction Review arguing ineffective assistance of counsel. On November 8, 2021, the Court issued findings on the Petition, including a finding 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." The Court also explained that in order to prevail, Petitioner still needed to show either actual prejudice occurred, or that prejudice should be presumed. It directed the parties to further brief the following three issues:

> (1) whether Cummings has proven actual prejudice due to Trial Counsel's deficiency, particularly as it pertains to his decision not to testify;
>
> (2) whether prejudice should be presumed under the circumstances of this case; and
>
> (3) depending on the Court's findings as to the first two issues, what – if any – remedy should be afforded the Petitioner.

The Court has now received the parties' responses, the last having been filed on February 7, 2022. The parties' views differ on the first two issues, but Petitioner and the State agree that, if either actual prejudice occurred or prejudice is presumed, the remedy should be a new trial. After review of the parties' briefs, the Court denies the Petition for the following reasons.

The Court would note at the outset that it is not inclined to reconsider its Nov. 8, 2021 Order as requested by the State. The fact that no Maine court has ever held that an incarcerated defendant has the right to directly access discovery materials is not dispositive, or even persuasive. First, the Court finds it difficult to believe that this practice occurs frequently enough for it to have come to the attention of a reviewing court. And as previously discussed, Trial Counsel did nothing to ask for the Court's assistance in ensuring that Petitioner could review the materials in a way that protected the confidentiality and integrity of the information contained in these materials. Defense counsel have an obligation to provide meaningful access to information which will enable a defendant to make informed decisions about his or her defense, and no such meaningful access was provided here. In addition, the cases newly cited by the State are not on point or persuasive. The conclusion previously made will stand: failure by Trial Counsel to provide the Petitioner with direct access to discovery materials, together with their refusal to accept collect phone calls from the jail, is a failure that fell below the standard of an "objectively reasonable performance."

Standard of Review

It is not of course enough for the Petitioner to have established such a deficiency, as the Petitioner must also establish actual or presumed prejudice. In assessing whether actual prejudice has occurred, the Court must decide "whether the petitioner has demonstrated that trial counsel's performance undermines confidence in the outcome of the case and renders that outcome unreliable." *Theriault v. State*, 2015 ME 137, ¶ 19, 125 A.3d 1163. Courts presume prejudice in some cases, but cases of presumed prejudice are rare. *Strickland*, 466 U.S. at 692; *Laferriere v. State*, 1997 ME 169, ¶ 11, 697 A.2d 1301. Prejudice should be presumed when counsel's

performance "fell so far below constitutional standards" that it need not be proven. *Theriault*, 2015 ME 137, ¶ 18, 125 A.3d 1163.

Defendants have the right to participate in their defense and to make the fundamental decision whether to testify. *Faretta v. Cal.*, 422 U.S. 806 (1975); *Rock v. Ark.*, 483 U.S. 44 (1987). A defendant may, however, make a valid waiver of the right to testify if that waiver is knowing and voluntary. *State v. Tuplin*, 2006 ME 83, ¶ 14, 901 A.2d 792. Where there is no valid waiver, deprivation of the right to testify is a structural error. *McCoy v. Louisiana*, 138 S. Ct 1500, 1508, 1511 (2018). A structural error, when raised in the context of an appeal, generally entitles the defendant to automatic reversal without inquiry into prejudice. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017). And still, in the context of ineffective assistance, a petitioner having experienced a structural error is not in every case entitled to relief. *Id.* at 1907.

Discussion

A. Actual Prejudice

Petitioner argues that Trial Counsel's deficient performance resulted in actual prejudice because Petitioner was not sufficiently informed of the allegations against him and was thereby incapable of making a knowing and voluntary waiver of his fundamental right to testify. Petitioner asserts that he would have testified had he understood more of the discovery, and he argues that this assertion is enough to undermine confidence in the case such that the result of his trial is unreliable. The State responds that Petitioner has not shown actual prejudice because he did not articulate what the contents of his testimony at the underlying trial may have been or about how having been more informed would have changed his decision whether to testify. The

State also notes that Petitioner would have been subject to incriminating inquiry on cross-examination had he testified.

The Court finds that Petitioner has not shown actual prejudice. In *Ford v. State*, 2019 ME 47, 205 A.3d 896, the Law Court considered whether a petitioner was prejudiced when his attorney actually prevented him from testifying. It concluded actual prejudice occurred because the petitioner indicated that he would have testified that during his alleged crimes he was experiencing a Post-Traumatic Stress Disorder (PTSD) episode, which caused him to hallucinate and believe he was entitled to commit the unlawful acts. This evidence was enough to undermine confidence in his convictions. In the case at hand, Petitioner did not adequately detail at hearing on the Petition what testimony he would have given at the original trial. He mentioned only that he would have told "the truth about what happened" and that he believes that "would have helped [his] case." Weighed against the potential for damaging cross-examination, the Court finds this vague testimony does not render the outcome of the trial unreliable.

B. Presumed Prejudice

Petitioner's remaining avenue to success on his Petition is to show that prejudice should be presumed. He argues that prejudice should be presumed because he was effectively deprived of the right to testify due to Trial Counsel's deficient performance. He claims further that deprivation of the right to testify is a structural error, deserving of remedy because of its fundamental unfairness. The State argues that prejudice should not be presumed because Petitioner was not deprived of his right to testify.

Although neither party directly addressed what happened at the close of the State's case at trial, the Court finds that what occurred is an essential consideration in this matter. The Court and Petitioner ("the Defendant") engaged in the following colloquy:

> THE COURT: Okay. So, Mr. Cummings, this is the time where you have to make a very important decision that only you can make, and I trust that you've had time to speak to your attorneys about whether or not you wish to take the stand and testify. I want to make sure you understand that you are not under any obligation whatsoever to make any statement about these allegations, you are not under any obligation whatsoever to testify. In fact you are specifically protected under our constitution, both the state and federal constitution, from having to make any statements or testify in a case where you are the defendant. Do you understand that, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right, on the other hand, if you want to testify this is the time you have to decide whether or not you are going to do it and this is your opportunity to testify. Do you understand that as well?
>
> THE DEFENDANT: Yes.
>
> THE COURT: So you have a right to not testify and you have a right to testify if you choose.
>
> THE DEFENDANT: Yes.
>
> THE COURT: Okay. I want to make sure you understand if you do testify, you understand that you would be subject to cross-examination, which means that the state could ask you anything – any question about the dates in question, the events in question, and they can ask any question to you about your testimony. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Have you had enough time to speak with your attorneys about this decision?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And what is your decision?
>
> THE DEFENDANT: I will not testify.

The Court finds that Petitioner's right to testify was not violated as Petitioner made a valid waiver of his right to testify in the underlying trial. Petitioner now argues that he would

have testified, and he focuses on several alleged surprises in the State's case – for example, testimony discussing the location of his knife and names of individuals on the State's witness list – that influenced his view of the decision. Yet at the time of his decision not to testify, Petitioner had already heard the entirety of the State's case meaning that would have been the time for him to express his concerns about his lack of information. The colloquy demonstrates that Petitioner understood his rights and the potential consequences of his choice and its alternative. Petitioner additionally stated that he had sufficient time to discuss with his counsel whether to testify. The Court concludes that the Petitioner, with the requisite knowledge and intention, voluntarily waived his right when he stated that he would not testify. *See Tuplin*, 2006 ME 83, ¶ 14, 901 A.2d 792 ("A valid waiver must amount to a defendant's intentional relinquishment or abandonment of a known right or privilege.") (citations omitted). Petitioner's right to testify on his own behalf was not violated.

Conclusion

Because Petitioner has not proven either kind of prejudice, the Court finds that Petitioner is not entitled to relief. The Petition for Post-Conviction Review is denied.

The entry is:

Petitioner's Petition for Post-Conviction Review is DENIED.

Date: 6/15/22 **Signed:** _____

M. Michaela Murphy
Justice, Maine Superior Court

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-18-11

ROLAND CUMMINGS	)	
	)	
Petitioner	)	**FINDINGS AND ORDER**
	)	**FOR FURTHER BRIEFING**
v.	)	
	)	
STATE OF MAINE	)	
	)	
Respondent	)	

Before the Court is Roland Cummings's petition for post-conviction review under 15 M.R.S. §§ 2121-2132, in which he argues ineffective assistance of counsel with respect to the handling of DNA evidence, pre-trial preparation with the defendant, failure to provide discovery to the defendant, failure to call Fred Soule as a witness, and failure to adequately advise the Petitioner of his right to testify. Petitioner is represented by Attorney Stephen Smith, and the State is represented by Assistant Attorney General Donald Macomber. In its review of the petition, this Court has considered testimony, exhibits,[1] and written arguments submitted by the parties, and it issues the following Findings and Order for Further Briefing.

Facts and Procedure

Roland Cummings's criminal trial began on November 6, 2015. On November 19th, the jury returned a verdict that Cummings was guilty of murder, burglary, and theft in connection with the death of Aurele Fecteau. On January 21, 2016, Roland Cummings was sentenced to life imprisonment on the murder charge and concurrent ten-year and two-year terms of imprisonment on the remaining charges. The Sentence Review Panel denied Cummings's application for leave to appeal his sentence, and the Law Court affirmed his conviction. On January 2, 2018, Cummings filed a state petition for post-conviction review (PCR), which was amended before trial.

A PCR trial was held on January 20, 2021. The Court took testimony from DNA expert Christine Waterhouse, Petitioner's two Trial Counsel, Fred Soule, and Petitioner Roland Cummings. The Court admitted five exhibits, three from Petitioner Cummings and two from the State. Both parties submitted written closing statements, the last of which was received on March 6, 2021.

[1] Because the hearing was conducted by Zoom, it was not until preparing this Order that the Court learned that the Exhibits had not reached the Clerks Office, or perhaps were misfiled. However, counsel conferred and agreed that the Exhibits admitted at hearing would be filed with the Clerks Office on Nov. 3, 2021. They were received and are now part of the Court's file.

In his post-hearing argument, Petitioner focused on Trial Counsel's pre-trial preparation, including failing to call certain witnesses including Fred Soule, failing to provide discovery, and failing to adequately advise Petitioner of his right to testify. The Court finds at the outset that Trial Court's performance with regard to handling the DNA evidence was able and professional. The Court will consider Petitioner's other arguments.

At the PCR hearing, Trial Counsel both conceded that they did not provide Cummings, who was held without bail from his arrest in early June of 2014 through trial and conviction in November of 2015, with discovery: no police reports, no transcribed interviews, and no recordings of interviews of witnesses. This was a conscious decision, not an oversight. The only exception to this decision was to let Cummings hear audio recordings of his police interviews, which they played to him in the jail on dates that they could not specify. Otherwise, Cummings did not receive what is conventionally understood to be "discovery" until his appellate attorney provided it to him approximately a year and a half after he was convicted. He testified that his appellate attorney expressed surprise he had never received it before then.

The discovery in this case consisted of 1,408 physical pages and numerous recordings. The bills submitted by Trial Counsel contain 11 entries showing that they met with the Defendant at the jail, but the dates suggest that both counsel were at the jail together for some of the visits. Both counsel were compensated for the joint visits. Only one combined bill was submitted to the Maine Commission for Indigent Legal Services (MCILS). One of Petitioner's Trial Counsel testified that he had no involvement at all in the preparation of the bill. He testified that he is a "W-2" employee for the firm and that the other Trial Counsel was fully responsible for the entries.

Counsel for the Petitioner notes, without objection or contrary evidence from the State, that in reality Trial Counsel had 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. Counsel for the Petitioner also points out, without objection or contrary evidence from the State, that only five of the billing entries for these visits reference any discussion of discovery with the Petitioner. The sum total of these visits came to 10.5 hours. By contrast, Trial Counsel billed for over 60 hours, just prior to May of 2015, for their own time spent reviewing this discovery.

In addition, Cummings testified at the PCR trial, without objection or contrary evidence from the State, that Trial Counsel were not willing to and in fact did not accept his collect phone calls from the jail. The bills submitted to MCILS do show several phone calls made and billed, but those calls were not made to the Defendant. Trial Counsel did not explain why they did not accept collect phone calls from him during the approximate 17 months he was incarcerated awaiting trial.

Cummings also testified that in the seven to ten times he met with counsel before the initial trial, their meetings lasted only 20-30 minutes. He also testified that only two of the meetings were face to face, with the rest being through a glass security window. He said that he did want to see his discovery but that he was told by Trial Counsel it was not in his best interest

to have it in the jail. He testified that he would go for stretches of time without seeing his counsel, the longest being approximately six months.

At hearing, Trial Counsel explained that the decision not to provide discovery to the Petitioner was strategic. They claimed they were concerned about aiding "jail house snitches" who might be able to view written discovery and concoct false admissions from the Petitioner. The State asserts that this strategic decision should shield Trial Counsel from being found to have been ineffective. The Law Court has, however, recently held that while strategic decisions of counsel are entitled to significant deference, "a determination that defense counsel's choices amount to trial strategy does not automatically insulate them from review." *Hodgdon v. State,* 2021 ME 22, ¶ 12, 249 A.3d 132 (citing *State v. Watson,* 2020 ME 51, ¶ 20, 230 A.3d 6).

The Court finds that Cummings did not see the discovery because his trial attorneys did not show it to him, not because he was uninterested in it. Having made this strategic decision, Trial Counsel took no steps to inform the Court about their concern about facilitating informants, or to request accommodation from the Court to ensure that the Petitioner could meaningfully review and understand the voluminous discovery that the State had provided to Trial Counsel. Such accommodation, had it been requested, would have been freely granted.

The Court further finds that instead of requesting accommodation from the Court so that Petitioner could review discovery securely and confidentially, Trial Counsel made the decision for him. The decision was that he would not have direct access to discovery. In the words of one Trial Counsel, "We met and had discussions with regard to the issues in discovery that were pertinent to our presentation and we segregated those items that we were aware that Mr. Macomber and Ms. Zainea would be presenting and on those things had him follow our lead, if you will, right or wrong." He also stated they conveyed information "through narrative and et cetera. Through narrative." When asked if these narratives were conducted through glass, he stated, "Sometimes not glass, sometimes contact." Trial Counsel did refer to having "two people who were go-betweens regarding the discovery and a paralegal and an investigator." He clarified, however, that the "go-betweens" were actually just acquaintances of the Petitioner who were not there to discuss the evidence with him, but only to monitor his "well-being." Neither the investigator nor the paralegal were called as witnesses, and the bills submitted do not mention any visits by the investigator and/or paralegal to the jail. No bill from the investigator was admitted in evidence.

When the second Trial Counsel testified, the Court asked how the Petitioner could participate in his defense if he did not have direct access to the materials given to defense counsel by the State, and he stated that Petitioner was "informed of the major themes and the major obstacles and the major pressure points in the case. He had access to the discovery through us. He could have seen that at any time. But our recommendation to him was not to maintain copies of any of that material at the jail." He also stated at one point that Petitioner did not ask to review copies of discovery, but quickly clarified that he could not recall whether that was the case. The Court finds that 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.

After finally receiving and reviewing discovery – after conviction and sentencing – Cummings testified he was surprised by statements in the discovery that he believed to be untrue. He points out that he did not know until the initial trial when his ex-girlfriend testified that his knife had been found in a particular location. That information was in the discovery, which he was not provided. In addition, Cummings did not recognize many of the names on the State's witness list because he did not see the list or know its contents until trial commenced. After seeing discovery, Cummings claims his outlook on the testimony presented at the initial trial changed such that he would have demanded that different witnesses be called. Importantly, he asserts that his decision whether to testify would have been different. When asked on recross examination how receiving his discovery would have affected his decision not to testify, he said:

> "Upon my receiving my discovery and looking through everything and seeing a lot of the statements that people made, particularly people that were on my witness list that didn't get called after my attorneys rested their case – let me collect my thoughts, I'm trying to – that's kind of where that – I'm trying to think of the friggen – I'm all confused here. I lost my train of thought....I'm just basically saying that it would have helped me make my decision, because then 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."

Discussion

Ineffective assistance of counsel violates a defendant's rights under the Sixth Amendment, as extended to the states by the Fourteenth Amendment, and under Article I, section 6 of the Maine State Constitution. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Missouri v. Frye*, 566 U.S. 134, 138 (2012); *McGowan v. State*, 2006 ME 16, ¶ 9, 894 A.2d 493. Maine follows the *Strickland* test for determining whether a counsel's conduct violated the defendant's right to effective assistance. *Theriault v. State*, 2015 ME 137, ¶ 13, 125 A.3d 1163. The test is two parts: (1) whether counsel's representation was deficient, *i.e.* fell below an objective standard of reasonableness, and (2) whether the errors of counsel prejudiced the defendant by depriving him of a fair trial with a reliable outcome. *Strickland*, 466 U.S. at 687.

"Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Ultimately, counsel's representation of a defendant falls below the objective standard of reasonableness if it falls below what might be expected from an ordinary fallible attorney." *Hodgdon*, 2021 ME 22, ¶ 14, 249 A.3d 132 (internal citations omitted). The inquiry "relies [] on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688. Standards like the American Bar Association Standards for Criminal Justice may serve as a guide for determining whether counsel's performance was unreasonable. *Id.*

Defendants have the right to participate in their defense and to make the fundamental decision whether to testify. *Faretta v. Cal.*, 422 U.S. 806 (1975); *Rock v. Ark.*, 483 U.S. 44 (1987). A defendant's exercise of these rights depends on counsel's keeping the defendant informed of the information relevant to a particular decision. *Martin v. State*, No. CR-11-8472, 2013 Me. Super. LEXIS 189, at *20-21 (Sept. 27, 2013) (referencing a comment to M.R. Prof. Conduct 1.4 reproduced in part *infra* note 2); MCILS Rules *infra* note 2; *see Lema v. United States*, 987 F.2d 48, 53 (1st Cir. 1993). Counsel therefore has a duty to keep defendants informed of important developments throughout prosecution. *Strickland*, 466 U.S. at 688; *Martin*, 2013 Me. Super. LEXIS 189, at *21; *Ramsden v. Warden*, No. 02-138-B-S, 2003 U.S. Dist. LEXIS 2377, at *29 (D. Me. Feb. 14, 2003). The ABA Criminal Justice Standards, the Maine Rules of Professional Conduct, and the MCILS Rules all recognize similar rights and duties.[2]

Counsel's violation of a duty to the defendant does not on its own establish unreasonableness or trigger a prejudice presumption. Whether counsel's performance was reasonable must be judged on a case-by-case basis, considering all the circumstances. *Strickland* at 688; *Aldus*, 2000 ME 47, ¶¶ 14-15, 748 A.2d 463.

As to the second prong of the test, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 687. The Law Court has clarified, in line with *Strickland*, that the prejudice test does not ask whether the outcome would have been different with effective assistance, but "whether the petitioner has demonstrated that trial counsel's performance undermines confidence in the outcome of the case and renders that outcome unreliable." *Theriault*, 2015 ME 137, ¶ 19, 125 A.3d 1163. Another formulation by the Law Court asks whether counsel's performance "likely deprived the defendant of an otherwise available substantial ground of defense." *State v. Jurek,* 594 A.2d 553, 555 (Me. 1991) (citing *Lang v. Murch*, 438 A.2d 914, 915 (Me. 1981)).

In some cases, a counsel's performance is so deficient that courts presume prejudice. *Strickland*, 466 U.S. at 692 (reasoning that the presumption is appropriate when prejudice is so likely and identifiable "that case-by-case inquiry into prejudice is not worth the cost"). The *Strickland* Court announced three scenarios in which prejudice should be presumed: "actual or constructive denial of the assistance of counsel," "various kinds of state interference with

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[2] ABA Criminal Justice Standard 4-1.3(d) recognizes a continuing duty to "communicate and keep the client informed and advised of significant developments and potential options and outcomes."
Maine Rule of Professional Conduct 1.4(b) states "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 1 to Rule 1.4 clarifies that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Comment 5 explains that the level of communication necessary "should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."
MCILS Rules, Chapter 102: Standards of Practice for Attorneys who Represent Adults in Criminal Proceedings, Section 5, subsection 7 includes the following two points: "Defense counsel should keep the client informed of any developments in the case and the progress of the preparation of the defense, and provide sufficient information to permit intelligent participation in decision making by the client," and "[d]efense counsel should comply with reasonable requests for information from the client and reply to client correspondence and telephone calls."

counsel's assistance," and, given certain showings by the defendant, "when counsel is burdened by an actual conflict of interest." 466 U.S. at 692. In another case decided on the same day, the Court recognized an additional scenario, when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984). The Law Court has characterized cases warranting presumed prejudice as those in which counsel's representation "fell so far below constitutional standards" that prejudice need not be proven. *Theriault*, 2015 ME 137, ¶ 18, 125 A.3d 1163. The Law Court has also emphasized that cases of presumed prejudice are rare. *Laferriere v. State*, 1997 ME 169, ¶ 11, 697 A.2d 1301.

The Court finds that Trial Counsel's performance in Cummings's 2015 trial was deficient. This is a capital case for which Petitioner received a life sentence. 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. Persons 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.

The fact that Petitioner was incarcerated clearly presented obstacles for his attorneys in making sure he could meaningfully participate in his defense. However, his pre-trial incarceration did not lessen Trial Counsel's obligations to do so. On the contrary, it heightened their duty to him. It is a duty they accept when they agree to represent a defendant in a capital case where it is almost guaranteed that he or she will be incarcerated before trial, sometimes for substantial periods of time. Petitioner could not make appointments to go to his lawyers' offices, and he could not take copies of the discovery home to review on his own time schedule. The fact that Trial Counsel refused to accept collect phone calls from the jail made it even more essential that they take the time and make the effort to provide him with direct access to important evidentiary information.

While the Court is not suggesting that a particular amount of time should have been spent reviewing discovery with the Petitioner. The time necessary for counsel to communicate with and advise a defendant about the evidence the State intends to use at trial will obviously vary from case to case. However, the Court concludes that here, given the amount of information produced by the State, Trial Counsel breached their duty to keep their client sufficiently informed such that he could meaningfully participate in his defense. Their decision to only provide a "narrative" and "themes" and their failure to do anything more than that – including asking for accommodation to assuage their concerns – was unreasonable under these circumstances.

Cumming's ignorance of basic facts before the initial trial supports this finding. 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. It is also not lost on the Court that none of the advice they claim to have given, or whatever judgments they formed about the weight or quality of the State's evidence, was ever provided to the Petitioner in writing.

Petitioner has therefore met his burden of establishing the first prong of his claim for ineffective assistance. However, in order to prevail, he still must show either actual prejudice or

that prejudice should be presumed. At the time of briefing, counsel for the parties could not have known what the Court's findings would be as to the first prong. Therefore, the State and Petitioner shall have the opportunity to further brief whether any actual prejudice has occurred in this case. In addition, the Court requests argument as to whether a structural error, such as deprivation of the right to testify, occurred in this case. In *Bartolo Ford v. State*, an appeal of a post-conviction review petition proceeding arguing ineffective assistance, the petitioner argued that counsel's deprivation of the right to testify constituted a structural error without a showing of actual prejudice. 2019 ME 47, ¶ 20 n.2, 205 A.3d 896; *see McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). The Law Court did not rule on this argument because it found actual prejudice existed in that case. *Ford*, 2019 ME 47, ¶ 20 n.2, 205 A.3d 896. However, the Court directs the parties here to address that issue. Lastly, if either presumed or actual prejudice has been proven, the parties need to address what remedy should be provided, if any.

In sum, the Court requests further briefing on the following issues: (1) whether Cummings has proven actual prejudice due to Trial Counsel's deficiency, particularly as it pertains to his decision not to testify; (2) whether prejudice should be presumed under the circumstances of this case; and (3) depending on the Court's findings as to the first two issues, what – if any – remedy should be afforded the Petitioner.

It is hereby ORDERED that the parties submit further briefing on the above issues. Unless otherwise agreed by the parties, briefs shall be submitted simultaneously to the Court by December 10, 2021.

Dated: November 8, 2021

Justice, Superior Court