

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**DENNIS M. VAUGHAN,** )  
 )  
 **Petitioner** )  
 )  
 **v.** ) **Civil No. 94-0028-B**  
 )  
 **STATE OF MAINE,** )  
 )  
 **Respondent** )

**PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS**

On January 20, 1994 the petitioner filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. ' 2254 in which he attacks his conviction in the Maine Superior Court (Waldo County) (Criminal Docket No. CR-89-30) for drug trafficking and possession of a firearm by a felon. On March 30, 1994 this court ordered that a hearing be held on the petition. On May 19, 1994 the petitioner, through counsel, moved to amend the petition to include a claim of ineffective assistance of counsel ``due to the cumulative effect of the errors committed by Trial Counsel." The motion was granted, with the limitation that the court would consider only those errors that were already alleged in the petition.

Hearing was had on the amended petition (hereinafter, the ``petition") on June 6, 1994. The petitioner testified, as did James Horton, his trial counsel. The claims remaining for resolution are whether the petitioner was deprived of the effective assistance of counsel on the basis of: (i) counsel's failure to call the petitioner to testify on his own behalf; (ii) counsel's failure to research or adequately prosecute a motion *in limine* to exclude from trial any testimony concerning statements

made during the drug transaction for which the petitioner was convicted; (iii) counsel's alleged intoxication during trial; and (iv) the cumulative effect of counsel's errors.<sup>1</sup>

## **I. Background**

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<sup>1</sup> A fifth ground, ineffective assistance of counsel, based on counsel's failure to file appropriate post-trial motions including an appeal, was withdrawn by the petitioner at the close of the hearing.

The petitioner was named in a five-count indictment by a Waldo County grand jury on February 23, 1989. *See* Indictment (Docket No. CR-89-30).<sup>2</sup> At issue were certain transactions, involving illegal drugs, that allegedly took place between the petitioner and undercover drug agents. *See* Trial Transcript, Vol. I ("Trial Tr. I") at 22-25. Attorney Julio DeSanctis initially entered an appearance on behalf of the petitioner, but withdrew on June 8, 1989 in favor of attorney Stanley W. Brown, Jr. Docket Record (CR-89-30) at 1,2. Brown filed a motion *in limine* on behalf of the petitioner, seeking to exclude from trial any evidence relating to tape-recorded conversations involving undercover drug agents. *See* Motion in Limine filed on January 8, 1990 in Docket No. CR-89-30.<sup>3</sup> The petitioner did not appear for trial as scheduled on January 10, 1990, and was

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<sup>2</sup> The key documents from the underlying state court criminal proceeding, including the trial transcript, as well as key documents from the state court post-conviction proceeding, appear in the record as an appendix to the state's answer to the petition. *See* Docket No. 4.

<sup>3</sup> The written motion appears in the record as "Defendant's Exhibit 1" to the hearing before this court of June 6, 1994 (Docket No. 13). The asserted bases for the motion were: (1) that the tape of one of the conversations was lost, thus denying the defendant the opportunity to discover it, and that the conversation itself was excludable evidence of a prior bad act; and, (2) that evidence of subsequent conversations involving three other undercover agents should have been excluded because the tapes were unintelligible, because testimony concerning the conversations was excludable as hearsay, because the best evidence rule limits testimony about the conversations to those directly involved in them, and because two of the undercover agents lacked personal knowledge of the conversations as required by M.R. Evid. 602.

subsequently arrested in Montana and returned to Maine. *See* Docket Record (CR-89-30) at 4-5; ' 2254 Hearing Tr. at 4-5, 9, 30.

On March 7, 1990 Brown withdrew and Horton entered his appearance as counsel for the petitioner. Docket Record (CR-89-30) at 5. At issue in the present proceeding are certain allegations made by the petitioner concerning the assistance he received from Horton during his trial, which began with jury selection on May 21, 1990. *Id.* Immediately following empanelment of the jury, counsel met in chambers with the presiding justice for argument on the motion *in limine*. *See* Trial Tr. I at 1-23. As to the conversations recorded on the lost tape, the court ruled that testimony from the undercover agent of statements made by the defendant would be admissible, as long as that testimony did not "make it clear to the jury that an illegal drug buy was in progress or happened at that time." *Id.* at 14-15. As to the other conversations, the court ruled that the jury would not listen to any unintelligible tapes, *id.* at 23, but that the testimony of the agents who participated in the conversations would be admissible, *id.* at 22. At no time during this chambers discussion, or during the trial, did Horton advance the argument that the unintelligible tapes would have been exculpatory because the petitioner was not present for the conversations contained in them. On May 24, 1990 the jury returned verdicts of guilty in connection with the four counts then pending: trafficking in cocaine, two counts of trafficking in marijuana, and possession of a firearm by a felon. Docket Record (CR-89-30) at 5. The court thereafter sentenced the petitioner to incarceration for ten years in connection with the cocaine trafficking charge, with concurrent sentences of three years in connection with the firearms charge and 364 days in connection with the two counts of trafficking in marijuana. *Id.* at 6. As of June 6, 1994 the petitioner was incarcerated at the Maine Correctional Institution in Warren, Maine. ' 2254 Hearing Tr. (Docket No. 13) at 3.

Horton withdrew as counsel to the petitioner in November 1990. Thereafter, represented by new counsel, the petitioner sought post-conviction review in the Maine Superior Court, alleging ineffective assistance of counsel at trial, based on: (1) Horton's alleged failure to inform the petitioner of his right to testify, (2) Horton's alleged failure to prosecute the motion *in limine* adequately, (3) Horton's alleged intoxication during trial, (4) Horton's failure to file any post-trial motions with the trial court, and (5) Horton's alleged failure to prepare adequately for trial because he was preoccupied with certain bar disciplinary proceedings then pending against him.<sup>4</sup> Petition for Post-Conviction Review (CR-91-270). At the heart of the petitioner's contentions regarding the motion *in limine* is his assertion that he was not present when undercover agents recorded certain conversations at his home, and that if the jury had been able to hear those conversations it would have concluded that he did not participate in the transactions memorialized on the tapes. *See, e.g.,* ' 2254 Hearing Tr. at 8; Post-Conviction Hearing Tr. (CR-91-270) at 23-24.

After a hearing at which the petitioner and Horton both testified, the Superior Court denied the petition for post-conviction review and made the following findings of fact that are relevant to the present proceedings:

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<sup>4</sup> The petitioner also asserted six other grounds in his state court petition, but withdrew them prior to hearing. Two were based on Horton's failure to prosecute a direct appeal of the petitioner's criminal convictions; these were withdrawn when the petitioner was permitted to prosecute his direct appeal despite the expiration of the prescribed time period for doing so. The four other counts were withdrawn prior to the post-conviction hearing in state court. *See* Post Conviction Hearing Tr. (CR-91-270) at 3-5.

[Horton's] conduct in both the research and the prosecution of the Motion in Limine was based upon the information given to him by the Petitioner at that time. This Court finds that at that time the Petitioner never told his attorney that he was not present in his house when the tapes were made. From his evaluation of the facts presented to him counsel concluded that it was in the Petitioner's best interest that the tapes remain unintelligible. As [Horton] stated at this hearing, had Petitioner told him that he wasn't present when the tapes were made then the entire defense would have been different.

\* \* \*

[Horton] was not to any degree under the influence of alcohol at any time during the trial of this case.

Order and Decision (CR-91-270) at 3. Additionally, the Superior Court determined that there was "no evidence" to support the petitioner's contention that Horton was unprepared for trial because he was preoccupied with other matters. *Id.* at 4. The Court found that

[Horton's] actions in this case were largely controlled by the factual situation which was presented to him. His waiving of opening argument was indeed explained best by [Horton] when he testified that, "I didn't have anything to say."

*Id.* at 5. The court was unpersuaded by the petitioner's contention that Horton failed to represent him adequately during a discussion of how to inform the jury that the petitioner was a convicted felon (a necessary element of unlawful possession of a firearm by a felon) without exposing the jury to any details about the previous felony. The court found that

the discussion between the [trial] Court and [Horton] concerning the Petitioner's stipulating to being a convicted felon is not proof of lack of understanding or incompetence upon the part of counsel. [Horton] was reluctant to admitting to an element of one of the charges against the Petitioner until later in the trial when it then became apparent that the State was in a position to prove the out-of-state conviction. When faced with that reality [Horton] readily stipulated to that fact to prevent the jury from learning what the felony conviction was for.

*Id.* The petitioner sought review by the Maine Supreme Judicial Court of his conviction and the Superior Court's denial of his post-conviction petition. The Law Court affirmed both judgments, *see Vaughan v. State*, 634 A.2d 449 (Me. 1993), and the instant proceedings in this court followed.

## II. Review of State Court Factual Findings

The first issue before this court is the presumption of correctness, if any, to be accorded the state court factual findings. The statute governing habeas corpus proceedings in federal court provides that when a state court of competent jurisdiction has made factual determinations after a hearing in a proceeding to which the petitioner and the state were parties, the written findings of the state court "shall be presumed to be correct" absent a showing that at least one of eight possible circumstances is present. 28 U.S.C. ' 2254(d). The petitioner does not base his petition on any of the first seven grounds.<sup>5</sup> Section 2254 further provides, however, that a state court's factual finding also does not enjoy the presumption of correctness when

that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced [by the petitioner], and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.]

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<sup>5</sup> These grounds are: (1) the merits of the factual dispute were not resolved in the state proceeding, (2) the state court's factfinding procedure did not provide a full and fair hearing of the issue, (3) the material facts were not adequately developed before the state court, (4) the state court lacked subject matter or personal jurisdiction, (5) the petitioner was indigent and deprived of his or her right to counsel, (6) the petitioner did not receive a full, fair and adequate hearing in the state court, and (7) the petitioner was otherwise denied due process. 28 U.S.C. ' 2254(d)(1-7).

28 U.S.C. ' 2254(d)(8). If none of the circumstances described above are present, ``the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous," 28 U.S.C. ' 2254(d).

Three of the post-conviction justice's key factual findings are fairly supported by the record. The first is the justice's finding that attorney Horton was not intoxicated at any point during the petitioner's trial. The court made this finding after considering the testimony of the prosecuting attorney, who found no reason to suspect alcohol use by Horton during the trial, Post-Conviction Hearing Tr. at 57-58, as well as the testimony of the trial justice, who stated that he never raised this issue with Horton during trial because he suspected, but never found sufficient evidence of, alcohol use, Unsworn Statement of Justice Bruce A. Chandler Tr. at 7-9, 12.<sup>6</sup>

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<sup>6</sup> Justice Chandler presided at the petitioner's criminal trial and, in connection with the post-conviction proceedings, held a chambers conference with counsel on September 28, 1992 in which he discussed his recollections of Horton's behavior at trial. The conference resembled a deposition, except that the judge's statement was unsworn. The parties agreed that Justice Chandler's unsworn testimony was largely admissible in the post-conviction hearing. *See* Post-Conviction Hearing Tr. at 6-7.

Second is the post-conviction justice's finding that the petitioner never told Horton that he was not present in his house at the time the agents purchased the drugs that became the basis for his drug trafficking conviction. The court made this finding after Horton testified that he did not discuss defense theories with the petitioner, Post-Conviction Hearing Tr., Horton Excerpt (hereafter, "Horton Excerpt"), at 8-9,<sup>7</sup> and that he did not remember ever having discussed the petitioner's belief that the tapes, if electronically enhanced, would have been exculpatory, *id.* at 21-22. The petitioner stated that he thought "at first" that the tapes would prove his innocence, then realized that the tapes were "useless." Post-Conviction Hearing Tr. at 23. He testified that he consulted with Horton about "possibly talking to an audio technician," but that Horton told him not to worry about it. *Id.* at 23-24. Although the petitioner indicated that he and attorney Brown parted company because Brown seemed uninterested in his theory that the tapes were exculpatory, *id.* at 32, missing from the petitioner's testimony is any assertion that he ever discussed this theory with Horton. Thus, the record fairly supports the finding that the petitioner never brought this assertion to Horton's attention.

Finally, after considering the contradictory testimony of the petitioner and of Horton, *see id.* at 20, 40 and Horton Excerpt at 9-10, the post-conviction justice rejected the petitioner's assertion that he had expressed his desire to testify to Horton during the trial before Horton had rested the defense case. The post-conviction justice made his determination based upon his assessment of the credibility of the two witnesses, a determination that I will not disturb for that reason alone, but also because Horton's testimony fairly supports this factual finding. Therefore, the petitioner may overcome these three factual findings only by presenting to this court convincing evidence to the contrary. *Sumner v. Mata*, 449 U.S. 539, 551 (1981).

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<sup>7</sup> Horton's testimony at the post-conviction hearing appears in the record as a separately transcribed volume. *See* Post-Conviction Hearing Tr. at 52.

I conclude, however, that there is not fair support in the record as developed before the state court for the post-conviction justice's findings on the issue of whether Horton explained to the petitioner his rights with respect to testifying on his own behalf at trial.

The evidence before the post-conviction justice on this issue consisted of the testimony of the petitioner and of Horton. The petitioner testified that he repeatedly expressed his desire to testify, but that Horton never "explained . . . the details" concerning the petitioner's right to do so, and "always went on to a different subject or different matter that he presumed was more important." Post-Conviction Hearing Tr. at 40. The petitioner further indicated that he "presume[d he] had to [testify] and ... wanted to" testify, *id.*, and that he continued telling Horton of his desire to testify even after Horton had rested the defense's case, to which Horton replied, "[D]on't worry about it." *Id.* at 22. Horton testified as follows:

- Q. Did you talk with [the petitioner] about testifying on his own behalf during the trial?
- A. I'm sure I probably did.
- Q. Can you describe those conversations?
- A. I really can't remember them, but I don't -- I don't believe that Dennis ever actually said to me in our conversations -- he might have, but I can't remember this. But to the best of my recollection, he never really said to me that he wanted to testify.

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- Q. You also testified on direct [examination] that you don't recall, but had Mr. Vaughan asked you to testify, you would have discouraged him?
- A. That's correct.
- Q. You also testified on direct that you don't recall Mr. Vaughan ever telling you what he would testify to?
- A. That's correct.
- Q. Well, I guess what I'm wondering is, how could you know to discourage him if you never knew what he was going to say? You didn't know if he was going to say things that would help his case.
- A. See, the way -- I simply had my own ideas about how to handle the defense. And as I indicated to the district attorney, I felt that that was a proper way to

do it was [sic] to cross-examine these agents and to try and win or create the reasonable doubt, try to win the case that way.

Q. Without even interviewing your own client as to, now, if you take the stand what would you say, before you ruled that out? Didn't you pin him down, what would you say, Dennis?

A. No, we didn't discuss that.

\* \* \*

Q. [I]s that your habit to sit down [before resting your case] and say this is it, do or die, this is your chance, Mr. Vaughan, if you want to testify?

A. I don't recall having that conversation with him.

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Q. And as we discussed before with asking Mr. Vaughan if he were to testify, what he would say, you didn't feel like that was an avenue . . . . Instead, you said I was running -- I was the one running the case and I was going to do it my way?

A. I agree with you.

Horton Excerpt at 9, 16-17, 26, 33.

The post-conviction justice concluded that Horton explained to the petitioner his right to testify and, implicitly, that he did so adequately. Order and Decision (CR-91-270) at 2. I conclude that the record does not support this factual finding. To the contrary, Horton's testimony indicates that he did not fully understand that the right to choose whether to testify belonged to the defendant, not to him as his attorney. There is no basis in the record upon which to find that Horton adequately explained that right to the petitioner. Accordingly, pursuant to section 2254(d), this factual finding of the state court is entitled to no presumption of correctness in the present proceeding, *see Burden v. Zant*, 498 U.S. 433, 437-38 (1991), *appeal after remand*, 126 L.Ed 611 (1994), and the petitioner's burden of persuasion on this issue is by a preponderance of the evidence. *See Estock v. Lane*, 842 F.2d 184, 188 (7th Cir. 1988) (once presumption of correctness is overcome, standard of proof is preponderance of evidence).

### **III. Findings of Fact**

Having determined the degree to which this court must be persuaded on the factual issues material to the petitioner's claims, I now turn to the evidence presented at the hearing before me on June 6, 1994. The following are my recommended findings of fact.

The petitioner testified that prior to his trial he and Horton conferred twice in person and several more times over the telephone. ' 2254 Hearing Tr. at 5-7. During these discussions, according to the petitioner, Horton deferred any discussion of the audio tapes and the possibility that the petitioner would testify, focussing instead on the discovery provided by the prosecution. *Id.* at 6, 8-11. The petitioner further testified that, during trial, at no time did Horton explain the ramifications to him of testifying in his own behalf, or recommend that he not take the stand. *Id.* at 11-12.

In his own testimony, Horton repeatedly made clear that he felt himself to be in charge of the case, that he had determined the defense strategy would be to bring out and highlight inconsistencies in the state's case through cross-examination, and that his strategy did not include the petitioner's testifying in his own behalf. *Id.* at 48-49, 51, 53, 58-59, 64. Horton's assessment of the petitioner's ability to "hold up" under cross-examination seems to have been made only at the time of the hearing before this court, using "hindsight." *Id.* at 51. He does not recall ever discussing with the petitioner what his proposed trial testimony would have been. *Id.* at 58. He did not ask the petitioner questions in an effort to simulate a cross-examination and evaluate the petitioner's ability to withstand a cross-examination. *Id.* at 59. He testified variously that he cannot recall advising the petitioner of his right to testify, and that he must have done so consistent with his general practice.

*Id.* at 47-48, 56-58. He also stated that he cannot recall the petitioner's response, whether he recommended to the petitioner that he not testify or whether he discussed his trial tactics with the petitioner. *Id.* at 56-58, 66. He specifically did not ask the petitioner for his consent before resting the petitioner's case at trial. *Id.* at 64. Horton indicated that he "probably" did not ask the petitioner if he wanted to testify prior to resting his case. *Id.* Clearly, in Horton's view -- a view he held even as recently as the hearing before this court -- it is the attorney's decision whether a criminal defendant should testify in his own behalf. Horton testified, "I don't believe I've ever asked a client for permission as to how to handle a criminal defense," *id.* at 59, and I believe him in this regard.

At the close of Horton's recross examination, he had the following colloquy with the petitioner's current counsel:

- Q: If Dennis Vaughan had told you that he wanted to testify regardless of your recommendation that he not testify and even though his prior convictions could come in[to evidence], would you have put him on the stand?
- A: No.
- Q: Even if he told you he wanted to testify?
- A: That's correct.

*Id.* at 67. This exchange demonstrates a fundamental lack of understanding concerning the criminal defendant's absolute right to testify. The record supports the inference that these are views Horton also held at the time of the petitioner's trial.

Based on the foregoing, I find by a preponderance of the evidence that, to the extent Horton stated anything to the petitioner concerning his right to testify, he never made clear to him that the right to decide whether to testify was the petitioner's alone to exercise. I find that Horton acted in the mistaken belief that it was the attorney and not the petitioner who had the right to make the ultimate decision about whether the petitioner should take the stand. With respect to the other factual issues

raised by the petitioner, the findings of the state trial court are fairly supported by the record and the petitioner has not met his burden of presenting convincing evidence such that this court should disturb those findings.

#### IV. Conclusions of Law

I conclude the petitioner is entitled to a writ of habeas corpus on the ground that he was denied the effective assistance of counsel as a consequence of his attorney's failure to advise him adequately of his constitutional right to testify in his own behalf. The right of a criminal defendant to testify on his own behalf is fundamental. *United States v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986). Accordingly, an ineffective assistance of counsel claim of this type is not analyzed in terms of whether the error prejudiced the defense. *Id.*; *cf. Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance of counsel found where attorney's performance was deficient *and* the defense was thereby prejudiced). Rather, "prejudice is sufficiently proven, if not to be presumed from, the resulting denial of the defendant's right to testify."<sup>8</sup> *Butts*, 630 F. Supp. 1149.

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<sup>8</sup> The Court of Appeals for the First Circuit has reserved both the question of whether the right to testify is fundamental, and the related question of whether the denial of that right should be subjected to a "harmless error" analysis. *See Lema v. United States*, 987 F.2d 48, 52 n.3, 53 n.4. However, as the First Circuit has recognized, the Supreme Court has described this right as "fundamental" in dictum. *See Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987) ("On numerous occasions this Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right"). "To deny a defendant the right

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to tell his story from the stand dehumanizes the administration of justice." *Wright v. Estelle*, 572 F.2d 1071, 1078 (5th Cir. 1978) (Godbold, J., dissenting).

The right to testify in one's own behalf may be abrogated not only by counsel's refusal to call a defendant to testify, but also by counsel's failure to provide adequate information about the right to testify, and competent legal advice about whether to exercise the right, to allow a defendant to make an informed decision. *Lema v. United States*, 987 F.2d 48, 52-53 (1st Cir. 1993) (citing *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir.), cert. denied, 121 L.Ed.2d 82 (1992); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987); *United States v. Poe*, 352 F.2d 639, 640-41 (D.C. Cir. 1965); *United States v. DiSalvo*, 726 F. Supp. 596, 598 (E.D.Pa. 1989)). Only with sufficient information may a defendant be said to have "voluntarily and knowingly" waived the right. *Lema*, 987 F.2d at 52-53 (quoting *Bernloehr*, 833 F.2d at 751); see also *Wogan v. United States*, 846 F. Supp. 135, 141 (D.Me. 1994). The advice of counsel is "crucial because there can be no effective waiver of a fundamental constitutional right unless there is an intentional relinquishment or abandonment of a known right or privilege." *Teague*, 953 F.2d at 1533 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis in original)). And, as the Court of Appeals for the Ninth Circuit has noted, the proper discharge of counsel's responsibility to advise a criminal defendant of the right to testify is all the more important because it would be improper for the court itself to discuss the matter with the defendant. *United States v. Martinez*, 883 F.2d 750, 757 (9th Cir. 1989). These cases make clear that central to the right to testify is the knowledgeable exercise of the choice of whether to take the stand, that defense counsel is vested with the sole responsibility of assuring such knowledgeable exercise, and the failure to discharge that responsibility is ineffective assistance of counsel of unconstitutional dimensions.

The record before this court reflects that Horton does not, even now, understand that it is the defendant's decision whether to testify in his own behalf. He thus could not have adequately

explained to his client something he failed to understand himself. Horton had formulated his strategy for the petitioner's defense, and his strategy did not include the petitioner's testimony. Accordingly, Horton did not ask the petitioner what he would say if he testified. He did not assess the petitioner's effectiveness as a witness. Accepting the state court's determination that the petitioner did not actively assert his right to testify, Horton still had an obligation to advise the petitioner of this right in a manner sufficient to assure that its waiver was voluntary and knowing.<sup>9</sup>

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<sup>9</sup> It is instructive in this regard to compare the instant case with *Lema*, in which the First Circuit, affirming a judgment of this court, found that a vigorous disagreement between a criminal defendant and his attorney over whether the defendant would testify did not prevent through coercion the defendant's meaningful waiver of the right. *Lema*, 987 F.2d at 53. In rejecting Lema's habeas corpus petition, the First Circuit noted that the petitioner was aware of his right to testify and that "the apparent vehemence with which Lema at first insisted on testifying ... fairly may have reflected Lema's clear awareness that the ultimate decision was his to make." *Id.* Conversely, in the instant case, the state court's finding that the petitioner did not assert his right to testify supports the conclusion that he lacked any awareness of the right, that Horton did not act to correct the lack of awareness, and that the petitioner's waiver was therefore not knowing or intelligent.

As for the claim that Horton was intoxicated during trial, I noted above my conclusion that the state court's finding that Horton was not intoxicated is entitled to the presumption of correctness. The petitioner has not met his burden, pursuant to section 2254(d), by establishing through convincing evidence that this finding should be disturbed. Moreover, even if I were to assume that Horton had been under the influence of alcohol during the trial, there is no evidence from which the court could conclude that the petitioner was prejudiced by his attorney's alleged alcohol consumption. The petitioner testified that Horton often seemed confused and distracted, and that it appeared to him that Horton's responses often did not address the question asked. ' 2254 Hearing Tr. 24-25. Although the petitioner also described an incident where he alleged attorney Horton had indicated he needed a few drinks over lunch ``to calm his nerves," *id.* at 23, he conceded that as far as he could determine the drinks *had* apparently calmed Horton's nerves, *id.* at 29. With the exception of the events surrounding the motion *in limine*, which I discuss below, missing from the record is any evidence connecting the alleged intoxication with specific actions or inactions by Horton that had a material bearing on the outcome of the trial.<sup>10</sup> Without such a showing of prejudice, it cannot be said that the petitioner was unconstitutionally deprived of the effective assistance of counsel, even if the attorney's performance was deficient. *Strickland*, 466 U.S. at 687; *see also Singleton v. United*

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<sup>10</sup> The trial justice stated that it occurred to him on several occasions that Horton might be intoxicated. Unsworn Statement of Justice Bruce A. Chandler Tr. at 7, 8, 12. However, the justice stated that he noticed no physical evidence, such as odor on the breath, to corroborate his belief. *Id.* at 12. Further, while the trial justice expressed the belief that Horton's performance ``did in fact fall short of my understanding of the standard . . . for competent assistance of counsel," he also noted that he was of the opinion that the petitioner's rights were protected. *Id.* at 11, 12-13.

*States*, 26 F.3d 233, 239 (1st Cir. 1994) (Constitution does not guarantee defendant a perfect defense).

The petitioner's allegations concerning the motion *in limine* are unpersuasive in light of the trial court's finding, which is fairly supported by the record of the state court proceedings, that he never told Horton that he was not present when the disputed tape recordings were made. In his post-section 2254 hearing memorandum of law and closing argument, the petitioner contends that he was denied effective assistance of counsel with respect to the motion *in limine* because, during the chambers conference, Horton ``was incapable of comprehending what the Judge was saying and improperly responded to the Judge's questions." Petitioner's Memorandum of Law and Closing Argument (``Petitioner's Memorandum") (Docket No. 12) at 5. He concludes, ``Because of the lack of comprehension, the argument was mishandled and damaging testimony was let in." *Id.* Assuming that Horton had no knowledge that the petitioner was not present at the taped conversations, Horton had no reason to argue that the tapes should be electronically enhanced and presented to the jury. Instead, Horton argued, albeit in somewhat desultory fashion, that evidence concerning the taped conversations should have been excluded. The petitioner now offers no specific argument as to what legal basis exists for a ruling on this evidence other than the one made by the trial court. The mere fact that a trial court makes a ruling that is unfavorable to the defense is not, in itself, a basis for alleging ineffective assistance of counsel. The petitioner's vague and conclusory allegations concerning the motion *in limine* do not warrant the requested relief. *See, e.g., Spillers v. Lockhart*, 802 F.2d 1007, 1010 (8th Cir. 1986).

The petitioner's remaining contentions are similarly flawed. He refers to Horton's ``failure to make an opening statement, [Horton's] lack of comprehension during discussions about stipulating

that Petitioner was a felon, the misunderstanding with respect to the Judge's ruling on evidence on counsel table and the dangerous cross examination of two [undercover] officers." Petitioner's Memorandum at 5. The petitioner offers no specifics as to how he was prejudiced by what occurred during any of these aspects of his trial. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

Finally, I reject the separate contention, raised in the amended petition, that the "cumulative effect" of Horton's alleged errors in itself constitutes a ground for the relief requested. *See* Motion to Amend Petition for Writ of Habeas Corpus (Docket No. 9). On the same day that the Supreme Court decided *Strickland*, it noted in a separate case that there are some circumstances in which a habeas corpus petitioner need not demonstrate specific prejudice. *United States v. Cronin*, 466 U.S. 648, 658 (1984). For example, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659; *see also Smith v. Wainwright*, 777 F.2d 609, 620 (11th Cir. 1985), *cert. denied*, 477 U.S. 905 (1986) (burden of proof under *Cronin* is "very heavy.")

Although cited by the petitioner, *Cronin* does not provide authority for the notion that when specific allegations as to defense counsel's performance fail, a habeas corpus petitioner may have recourse to a generalized contention of cumulative impacts from defense counsel's allegedly deficient representation. Rather, *Cronin* stands for the proposition that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Cronin*, 466 U.S. at 662. In fact, the Court in *Cronin* vacated a circuit court ruling that granted habeas corpus relief, determining that the

surrounding circumstances relied upon by the circuit court ``do not demonstrate that counsel failed to function in any meaningful way as the Government's adversary."<sup>11</sup> *Id.* at 666. The Court concluded that the petitioner there could ``therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id.* Similarly, particularly in light of the state court's properly supported factual finding that Horton was not intoxicated during the trial, the petitioner has not demonstrated that Horton failed to function as a meaningful adversary to the prosecution. Therefore, the petitioner's claim can only be based on specific errors made by Horton.

## **V. Conclusion**

Although I have concluded that this court should defer to the state court's factual findings on the issues of Horton's intoxication at trial and his handling of the evidentiary issues raised in the petition, and although the petitioner's separate ``cumulative impacts" allegation does not form the legal basis for the requested relief, I conclude that Horton's failure to advise the petitioner adequately of his right to testify on his own behalf at trial amounted to an unconstitutional deprivation of the petitioner's right to the effective assistance of counsel. Accordingly, I recommend that a writ of habeas corpus issue, and that it do so sixty (60) days from the date upon which the court's order becomes final and unappealable, unless within that period the state trial court orders a new trial.

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<sup>11</sup> These circumstances were the short time given to court-appointed defense counsel for trial preparation, the inexperience of counsel, the gravity of the charge, the complexity of the case and the inaccessibility of witnesses. *Cronic*, 466 U.S. at 663, 665-66.

NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated at Portland, Maine this 29th day of September, 1994.*

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*David M. Cohen  
United States Magistrate Judge*