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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Horry County
Honorable William H. Seals, Jr., Circuit Court Judge
Appellate Case No. 2020-001265

MARCUS WRIGHT,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

“Is the PCR court’s decision contrary to the Fifth Amendment and in direct conflict with the analysis and holding in State v. Rivera, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013)?”

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge err by determining Wright failed to meet his burden of establishing trial counsel were constitutionally ineffective for failing to move to reopen the record when Wright neither demonstrated trial counsel’s performance was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the trial would have been different but for counsel’s actions surrounding his belated reconsideration of his earlier expressed decision not to testify?

STATEMENT OF THE CASE

In May of 2012, Petitioner Marcus Wright was arrested following an investigation into a fatal shooting that occurred a few days earlier at a residence located in Socastee, South Carolina. In June of 2012, the Horry County Grand Jury indicted Wright for murder, trafficking in cocaine, and possession of cocaine base with intent to distribute. In May of 2013, the Horry County Grand Jury additionally indicted Wright for possession of a weapon during the commission of a violent crime. On June 17, 2013, a jury trial was commenced in the Horry County Court of General Session with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Wright as indicted. Following the verdict, the trial judge sentenced Wright to consecutive terms of imprisonment of life without parole for murder, twenty-five years for trafficking in cocaine, fifteen years for possession of cocaine base with intent to distribute, and five years for possession of a weapon during the commission of a violent crime. Wright then timely filed and perfected an appeal.

On appeal, the Court of Appeals—following briefing and oral argument—affirmed Wright’s convictions in a published decision. State v. Wright, 416 S.C. 353, 785 S.E.2d 479 (2016). Thereafter, on May 13, 2016, remittitur was issued.

Subsequent to the issuance of the remittitur, Wright timely filed an application for post-conviction relief (“PCR”), and, in response, the State filed a return requesting an evidentiary hearing. On December 14, 2018, an evidentiary hearing was conducted in the Georgetown County Court of Common Pleas with the Honorable William H. Seals, Jr., circuit court judge, presiding. At the conclusion of the hearing, the PCR judge took the matter under advisement. Thereafter, through an order filed on August 14, 2020, the PCR judge denied and dismissed Wright’s PCR application with prejudice. Following that ruling, Wright filed a motion seeking

for the PCR judge to alter or amend the judgment, and the State filed a return. On October 13, 2020, the PCR issued an order partially granting Wright's motion along with an amended order of dismissal. Through that amended order, the PCR judge again denied and dismissed Wright's PCR application with prejudice. Wright then timely filed a notice of appeal.

After initiating his appeal, Wright filed a petition for a writ of certiorari with the Supreme Court, and the State filed a return.¹ Shortly thereafter, the Supreme Court transferred the matter to this Court. Subsequently, on October 17, 2022, this Court granted the petition.

¹ The State acknowledges the work of William H. Ray, who previously served as an Assistant Attorney General with the South Carolina Attorney General's Office and who prepared the return to the petition for a writ of certiorari in the case sub judice. (Return to Cert., pp. 1-25). In its Brief of Respondent, the State has now incorporated a substantial portion of that return.

STATEMENT OF THE FACTS

At trial, Roy James Sinclair testified he had several people gathered at his Socastee residence on the night of April 30, 2012. (App'x pp. 777-778). That night, he had been smoking in a back room when his cousin, J.J. Green, came to the door. (App'x p. 778). His cousin briefly entered the house, expressed concern about the state of the place, and then left while promising to return later for some drinks. (App'x p. 778). Wright was sitting in the living room with a gun at the time. (App'x pp. 779-780). A disagreement broke out between Sinclair and Wright. (App'x pp. 780-781). Green returned and again expressed concern about the people present in Sinclair's home. (App'x p. 782). Wright, overhearing their conversation, confronted Green, who tried to calm the tensions by saying everything was cool. (App'x p. 782). Wright then began shooting at Green, causing Sinclair to flee to a neighbor's house. (App'x pp. 782-783). Sinclair heard Wright tell another guest to "get your shit" because he had just murdered someone. (App'x p. 783). Sinclair then called the police. (App'x pp. 783-785).

Veronica Denise Chandler testified she was present at the scene because she was going to buy drugs from one of Sinclair's guests. (App'x pp. 801-802). She was waiting in the den area of the house when Green arrived. (App'x p. 803). He came into the house, annoyed Sinclair was allowing people to answer the door for him, but spoke with everyone present. (App'x pp. 803-804). Green began to speak to her when she heard gunshots coming from the kitchen. (App'x p. 804). She ran for the back door, looked over her shoulder, and saw Green lying on the floor with blood covering his shirt. (App'x p. 806).

The State concluded its case, and the defense moved for a directed verdict. (App'x p. 1044). The court denied the motion to each charge and then proceeded to question Wright about whether he wished to testify in his defense. (App'x p. 1045). In doing so, the court informed

Wright he was free to present—or not present—evidence in his defense and was presumed innocent until proven guilty beyond a reasonable doubt. (App’x pp. 1045-1046). Wright was also informed of his right to remain silent as well as the risks inherent in testifying in his defense. (App’x pp. 1046-1047). Wright indicated he understood his rights and had discussed it with his trial counsel. (App’x pp. 1047-1048). The court informed him his decision to testify was his alone and he was not bound at that point. (App’x p. 1048). Ultimately, Wright stated he wished to exercise his right to remain silent. (App’x p. 1048). Following that, the defense called one witness whose testimony was deemed inadmissible before resting. (App’x pp. 1050-1068).

After the defense rested, the jury was excused, and the defense again moved for a directed verdict as to each indictment. (App’x p. 1070). The motion was again denied, and the State waived its opening argument. (App’x pp. 1070-1071). A discussion then began about the request for the jury to be charged with voluntary manslaughter and self-defense instructions. (App’x p. 1071). The court pointed out the only evidence supporting either charge was a self-serving comment Wright made as he fled the scene. (App’x p. 1071). Specifically, Wright had stated someone had “tried to pull a jack,” which the court found to be unintelligible and insufficient to support either charge. (App’x p. 1071).

Trial counsel explained the phrase was someone had “tried a jack move,” meaning someone had pulled a gun. (App’x p. 1072). The court remained unconvinced, stating it could mean something like “hijack” and did not necessarily mean someone pulled a gun. (App’x p. 1072). Trial counsel agreed that it was ambiguous and then pointed to other testimony suggesting the victim had reached for something and was generally combative prior to the shooting. (App’x pp. 1072-1074). The court responded words alone would not be sufficient to

support the instructions. (App’x pp. 1074-1075). Furthermore, the court explained self-defense required Wright to be in reasonable fear of imminent harm or danger. (App’x p. 1075).

Trial counsel then acknowledged Wright himself had not testified on these points but argued the evidence had been provided by another witness. (App’x pp. 1075-1076). Trial counsel went on to explain someone other than Wright could not know his state of mind. (App’x p. 1075).

A more thorough charging conference was held the next morning. (App’x pp. 1078-1083). After that conference and just prior to the jury being brought into the courtroom, Wright spoke up and asked to “say something for the record.” (App’x p. 1083). Trial counsel informed the court Wright had told him that morning he wished to testify, but trial counsel believed the opportunity had passed when Wright invoked his right to remain silent and the defense rested its case. (App’x pp. 1083-1084). The court agreed, stating the record was closed and Wright could not adjust his strategy after seeing how the court ruled on the charging instructions. (App’x p. 1084). The court recognized Wright had been told he did not have to make his decision when he did but concluded any reasonable person would recognize the right to testify ends when the defense rests its case. (App’x pp. 1084-1085).

Trial counsel stated Wright had made the decision overnight and did not indicate he wanted to testify until that morning. (App’x p. 1086). When asked why this change of heart was not brought to the court’s attention prior to the charging conference, trial counsel stated he believed the opportunity had already passed. (App’x p. 1087). Ultimately, the court decided against allowing Wright to testify in his defense because Wright had already heard its charging decisions. (App’x p. 1088). Wright was not allowed to testify because he knew “what the Judge

says is missing and now that he's got it all mapped out, and he can come up and just make whatever—and fit his testimony into the parameters required.” (App’x p. 1087).

Later on, testimony from Wright’s trial counsel, Wright himself, and Assistant Solicitor Donna Barton was presented during the PCR evidentiary hearing. (App’x pp. 179-292). Trial counsel Morgan Martin testified he represented Wright alongside Edward Brown. (App’x p. 179). He stated the trial finished up on an afternoon and the trial judge asked the defendant if he wished to testify. (App’x p. 181). He recalled he did not speak with Wright the next morning in the holding area but believed Brown did. (App’x p. 182). He was not made aware of Wright’s wish to testify until they were sitting at the table in the courtroom. (App’x p. 182). Martin stated their position had always been that it would be best for him not to testify, which Wright understood. (App’x p. 183; p. 206).

Martin explained Wright had raised his hand at the end of the charging conference to express his desire to testify. (App’x pp. 183-184). He recalled the judge had “talked about what he was looking for in terms of self-defense and manslaughter” on the day before and the request to testify was denied because Wright “would’ve known what he was looking for in terms of testimony[.]” (App’x p. 184). He viewed the that ruling as an exercise of the court’s discretion. (App’x p. 185). He stated the judge never explicitly said he would have allowed the testimony had it been brought to his attention that morning. (App’x p. 185).

Martin testified the case was difficult and was not one of self-defense. (App’x p. 186). He stated he did not believe Wright would be a good witness due in part to his criminal record. (App’x pp. 186-187). The defense’s strategy going into the case was Wright did not commit the shooting and the State’s only proof he did was the uncorroborated suspect word of drug-addled witnesses. (App’x p. 187; p. 207). The case never struck Martin as one of self-defense. (App’x

p. 187; p. 209). Furthermore, he explained Wright fled the scene, did not tell the police he acted in self-defense, and instead insisted the witnesses were unreliable. (App’x pp. 187-188). The unarmed victim was also shot ten times, including several times while lying on the floor, and Wright was not in his own home at that time. (App’x p. 188). This theory of the case determined counsel’s decisions on how to examine witnesses and elicit testimony. (App’x pp. 187-190; p. 194). The defense nevertheless requested an instruction on self-defense because they were “looking for whatever [they] could find.” (App’x p. 191).

Brown, Wright’s other trial counsel, testified Wright told the court he did not want to testify but told him personally the next morning he had changed his mind and wanted to testify. (App’x p. 227). He informed Martin at the time but did not recall how the issue was brought to the court’s attention. (App’x pp. 227-229). He stated he did not know what was in the judge’s mind when he denied Wright’s request to testify but confirmed the testimony was not allowed. (App’x pp. 229-230).

Brown confirmed Martin’s testimony self-defense was not one of their theories of the case and, instead, they intended to “punch enough holes in the state’s presentation to get [Wright] a not guilty verdict.” (App’x p. 230; p. 241). In Brown’s view, self-defense simply was not viable because the evidence showed the victim had been shot ten times, including several times in the back. (App’x pp. 230-231). Brown stated Wright had told him he kept shooting because the victim kept moving. (App’x p. 231). Brown stated Wright never said he fired out of fear for his own life and, instead, reported the shooting was motivated by a drug dispute. (App’x pp. 236-237). He could not recall the case ever being presented on the record as self-defense. (App’x p. 235).

Wright testified he told the court he did not wish to testify “based on me getting my witnesses in because they always told me, it’s better to let somebody else testify to what happened.” (App’x p. 255). He stated he did not change his mind until the next morning after thinking about how his case “wasn’t murder.” (App’x p. 256). He said his trial counsel told him he would not be allowed to testify at that point so he spoke up and told the court himself. (App’x p. 256). He recalled the court being concerned with allowing him to testify after what he had heard. (App’x p. 257).

Wright explained he would have explained he shot the victim in self-defense had he been allowed to testify. (App’x p. 257). Wright claimed he had been at the house and had tried to prevent Sinclair from answering the door because he was concerned about who was knocking. (App’x p. 258). When Sinclair did answer the door, the victim was agitated about the number of people in the house and said he was going to “put the squeeze” on someone. (App’x p. 259). Wright interpreted that to mean he was going to squeeze a gun and claimed the victim then pulled out a firearm and turned towards him. (App’x p. 259). Wright then fired and kept firing until the victim hit the floor. (App’x p. 259). He shot him “because [he] was scared” and because he feared for his life and was defending himself. (App’x pp. 259-260; p. 271). He explained self-defense was the defense’s entire theory of the case. (App’x p. 260; p. 267; pp. 270-271).

On cross-examination, Wright asserted he fled the scene after the shooting because he had his “own issues with the police” relating to an incident from his childhood. (App’x p. 274, p. 277). He continued by explaining he did not live the sort of life where he would cooperate with law enforcement. (App’x pp. 281-282). He stated a “jack move” is “like a robbery or something” and admitted to telling the police a jack move had gone wrong shortly after the

shooting. (App'x pp. 280-281). He did not tell the police he shot the victim in self-defense because he believed the police were only interested in making an arrest. (App'x p. 282). He stated a co-defendant had taken the victim's gun from the scene and buried it. (App'x pp. 276-277). He unsuccessfully tried to locate the guns to give his story more credence. (App'x pp. 277-278).

The PCR court found Wright was afforded an opportunity to testify and declined to do so with full awareness of his rights. (App'x pp. 26-27). The PCR court also found Wright's trial counsel properly informed him it was too late to change his mind the following morning because the charging conference had already begun. (App'x pp. 26-27). Finally, the PCR court found trial counsel also would have had no reason to know Wright wanted to testify when they rested their case given trial counsel's theory of the case. (App'x pp. 26-27).

As for prejudice, the PCR court found even if Wright's trial counsel had promptly informed the court of Wright's change of heart, there was no reasonable probability the outcome would have been different. (App'x pp. 27-28). The court had begun discussing what testimony would support a charge of self-defense the previous day and, therefore, would not have granted Wright's motion to reopen the record. (App'x pp. 27-28). Furthermore, Wright's testimony would have damaged—as opposed to aided—his case because it would have shown he was the shooter, confirmed the events after the shooting, admitted dishonest and duplicitous interactions with law enforcement, relied on hearsay, lacked evidentiary support, and been nonsensical. (App'x pp. 27-28). The PCR court found Wright's testimony lacked credibility and concluded it could not envision a jury finding otherwise. (App'x pp. 27-28). Therefore, the PCR court found no prejudice resulted from trial counsel's performance and denied the allegation. (App'x pp. 27-28).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR judge correctly determined Wright failed to meet his burden of establishing trial counsel were constitutionally ineffective for failing to move to reopen the record because Wright neither demonstrated trial counsel's performance was objectively unreasonable under the circumstances involved nor showed there was a reasonable likelihood the result of the trial would have been different but for counsel's actions surrounding his belated reconsideration of his earlier expressed desire not to testify.

Wright contends the PCR judge reversibly erred by failing to find trial counsel were constitutionally ineffective for failing to move reopen the record in order to allow him to testify on his own behalf during trial. As support for that contention, Wright maintains the PCR judge should have determined trial counsel were deficient because they mistakenly believed it was too late to move to reopen the record when he first conveyed his desire to exercise his right to testify to them and, thus, did not make such a motion, which allegedly would have been successful if timely made. Likewise, Wright maintains the PCR judge purportedly erroneously conducted a harmless error analysis when considering whether prejudice had been demonstrated. Because trial counsel's performance allegedly resulted in him being denied his right to testify, Wright avers he was not actually required to demonstrate *any* prejudice in order to be entitled to relief in light of our Supreme Court's decision in State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013). To the contrary, Wright's trial counsel was not deficient because their decision not to move to reopen the record to allow testimony from Wright was neither objectively unreasonable nor made in ignorance of the law since—just as the PCR judge correctly concluded—such a motion would not have been granted under the particular circumstances involved. Furthermore, the PCR Court properly found Wright was not prejudiced by his trial counsel's performance because the standard identified in Rivera—which involved a direct appeal allegation of error on the part of the trial judge—was not applicable to Wright's PCR claim of ineffective assistance of counsel, which was instead governed by the standard identified in Strickland v. Washington, 466 U.S. 668

(1984).² Under such circumstances, the PCR judge correctly determined Wright was not entitled to relief since he failed to meet his burden of establishing either deficiency or prejudice as required. The PCR judge's order denying relief to Wright should be affirmed.

Standard for Analyzing a Claim of Ineffective Assistance of Trial Counsel

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”). Significantly though, effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 1910 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’ ” (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when “counsel's conduct so undermined the proper functioning

² Throughout his brief, Wright repeatedly characterizes the Strickland standard's prejudice prong as a harmless error analysis. (Pet. Br. p. 3; pp. 11-12).

of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) (“Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.” (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel’s representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a “high mountain a defendant must climb”); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing “the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment” and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining “the rules governing ineffective-assistance claims must be applied with scrupulous care” (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence

required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis “calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind”). When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel’s performance in a highly deferential manner, will make every effort “to eliminate the distorting effects of hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687. Thus, counsel’s performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply “deviated from best practices or most common custom.” Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n 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.”³ Strickland, 466 U.S. at 691. In order for

³ Notably, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective

that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Application of Applicable Standard to Wright's Case

- A. Wright's trial counsel was not deficient because their decision not to move to reopen the record to allow additional testimony from Wright was neither objectively unreasonable nor made in ignorance of the law since—just as the PCR judge correctly concluded—such a motion would not have been granted under the particular circumstances involved.**

"The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments." State v. Wright, 416 S.C. 353, 372, 785 S.E.2d 479, 489 (Ct. App. 2016) (citing Rock v. Arkansas, 483 U.S. 44, 51-52 (1987)). However, the right to present testimony is not without limitation. State v. Rivera, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013). This right may be waived, and all that is necessary for a defendant to be equipped to waive the right is knowledge a right to testify exists. United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991). The right to testify may in appropriate cases be restricted to accommodate

assistance of counsel claim on the grounds of lack of sufficient prejudice "[i]f it is easier" to do so. Id.

other legitimate interests in the criminal trial process so long as the restrictions imposed are not arbitrary and are proportionate to the purposes they are designed to serve. Rock, 483 U.S. at 56.

“A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial court, and the trial court’s ruling will not be reversed absent an abuse of discretion.” Wright, 416 S.C. at 371, 785 S.E.2d at 489 (citations, brackets, and internal quotations omitted). Reopening the record after the defense closes may be proper when “no significant information was brought forth that [the defendant] had not already learned during the government’s case-in-chief.” United States v. Walker, 772 F.2d 1172, 1181 (5th Cir. 1985). In exercising its discretion, the court must consider the timeliness and character of the motion as well as the effect of granting the motion. Id. Therefore, a PCR applicant alleging counsel was ineffective for failing to move the court to invoke its discretion can show deficiency and prejudice by proving counsel failed to make the motion *and* that motion’s denial would have amounted to an abuse of discretion. See Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (finding trial counsel’s failure to move for a continuance amounted to ineffective assistance because Morris’s case was a “rare” one where the trial court’s refusal of a request for a continuance would have constituted an abuse of discretion if such a request had been made).

Here, Wright claims trial counsel was ineffective because a motion to reopen the record would have been granted if it had been made immediately after learning Wright had changed his mind and wished to testify. To support his claim the motion would have been granted, Wright points to the court’s comments after it was made aware of Wright’s change of heart.

Specifically, the court said Wright wanted to adjust his strategy after the court ruled on the charging instructions and upon hearing what evidence the judge believed was missing from the record to support charges of voluntary manslaughter and self-defense.

Wright's certainty a motion to reopen the record would have been successful if it had been made first thing that morning is misplaced. First, this Court expressly found Wright's right to testify was not violated by the trial judge's refusal to reopen the record. Wright, 416 S.C. at 374, 785 S.E.2d 490. Also, the judge's express reasons for denying Wright's testimony were equally present that morning. Wright had heard the court explain there was insufficient evidence to support self-defense or voluntary manslaughter the previous day. Specifically, the court stated it believed it needed evidence Wright was afraid or under reasonable belief of imminent bodily harm or death to support the charges.

Sure enough, that was exactly what Wright—after hearing the trial judge's remarks—would have provided based on his testimony during the PCR evidentiary hearing. At that hearing, Wright stated the night after the charging conference had begun, he felt he had not committed murder. He then decided he wanted to testify the victim had a weapon and he feared for his life despite there being scant evidence supporting those points. In other words, Wright heard the trial judge opine specific additional evidence was needed to show Wright did not commit murder. Wright then went back, thought it over, and decided he wanted to testify to provide that very missing evidence.

Preventing the testimony that morning clearly served a legitimate interest in maintaining the integrity of the proceedings. Wright would have effectively been told how to testify by the trial judge after hearing the charging discussions. That would have improperly prejudiced the State's case against him, contrary to Wright's assertions. Wright's case is not like the one involved in the Fifth Circuit Court of Appeals's decision in United States v. Walker, 772 F.2d 1172 (5th Cir. 1985), where a criminal defendant wanted to testify only after the state had presented rebuttal witnesses. There, the rebuttal witnesses did not provide the defendant with

any new or advantageous information. Cf. Walker, 772 F.2d at 1180-1181 (recognizing a trial judge could properly refuse to reopen the record to allow the defendant to testify when doing so could result in prejudice to the prosecution but concluding no such prejudice existed under the specific circumstances of Walker's case *because* "[n]o significant information was brought forth that Walker had not already learned during the government's case-in-chief" prior to him seeking for the record to be reopened). Contrastingly, here, Wright learned from the court itself that crucial evidence was lacking. At no point did the trial court indicate such a motion would have been granted had it been brought to its attention that morning and, rather, it merely indicated the morning was the proper time for the motion *to be considered*. A motion to reopen the record at Wright's suggested point in his trial would not have been granted, and, in fact, a grant of such a motion under the circumstances involved likely would have itself amounted to an abuse of discretion. Therefore, trial counsel's belief it was too late for Wright to testify was correct and was based upon a proper understanding of the law.

Furthermore, the PCR court found trial counsel credible in reviewing the testimony. Trial counsel stated Wright's testimony of self-defense was not their theory of the case and they had made a strategic decision to not call him to testify on that point. It is clear doing so would have led to an admission he was the shooter, which had repeatedly been called into question during the examination of the State's witnesses based on the strategy being pursued by the defense.

Therefore, the decision not to inform the court about Wright's desire to testify the morning after the defense rested was both strategic and legally proper. Given the circumstances of the case and what Wright had heard the previous day, trial counsel correctly determined it was too late for him to testify. His right to testify at that juncture did not override the legitimate

competing interests in preventing Wright from tailoring his testimony to fill the court-identified holes in his defense. Therefore, his trial counsel's decision not to inform the court of the change of heart and, instead, proceed with the charging conference under their theory of the case was objectively reasonable under the circumstances as it was based upon a correct interpretation of the law. The PCR court's finding that was a reasonable trial strategy as opposed to one based upon a misunderstanding of the law was clearly supported by the record. For those reasons, Wright failed to meet his burden of proving his counsel was deficient. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a PCR judge's factual finding will be upheld if supported by any evidence and a PCR judge's decisions will only be reversed where controlled by an error of law). Accordingly, the PCR judge's order denying relief to Wright should be affirmed.

B. The PCR Court properly found Wright was not prejudiced by his trial counsel's performance because the standard for evaluating a trial judge's error on direct appeal identified in the South Carolina Supreme Court's decision in State v. Rivera, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013), was not applicable to and did not govern Wright's ineffective assistance of counsel claim raised in a PCR action, which was instead governed by the standard identified in Strickland v. Washington, 466 U.S. 668, 685 (1984).

Wright does not refute the PCR court's finding he was not prejudiced by trial counsel's performance. Instead, he seeks to sidestep the two-pronged Strickland requirement he show deficiency *and* prejudice by relying on Rivera. Rivera found a complete and erroneous denial of a criminal defendant's right to testify by the trial court does not warrant an inquiry into prejudice because the right to testify in one's defense is so fundamental that—in the setting of a direct appeal—it cannot be considered harmless. Rivera, 402 S.C. at 249, 741 S.E.2d at 707. Importantly though, Rivera involved a claim of trial court error raised on direct appeal rather than a claim of ineffective assistance of counsel raised in the setting of PCR. The Rivera Court explicitly recognized that dichotomy, stating it “fully appreciated” the State's argument the

matter should be raised in a PCR proceeding as a claim of ineffective assistance of counsel but nonetheless decided to address the matter on direct appeal in the context of trial error given the circumstances of the case justifying direct review. Id. at 240, 741 S.E.2d at 702. Specifically, the Rivera Court stated “[Rivera]’s claim is (and has consistently been) presented not as an ineffective assistance of counsel claim, but rather, as an error committed by the trial court[.]” Id. The Rivera Court recognized the issue of the failure of a defendant to testify may be viewed either as a claim of ineffective assistance of counsel or as a claim of a deprivation of a constitutional right while the appropriate inquiry would depend on how the claim is pled and argued. Id. at 241, 741 S.E.2d at 702 (citing Rossignol v. State, 274 P.3d 1, 7 (Idaho Ct. App. 2012)). It went on to find a trial court’s erroneous refusal to permit a defendant to testify in his own defense is a structural error, is not subject to a harmless-error analysis, and therefore requires reversal *on direct appeal* without a particularized prejudice inquiry. Rivera, 402 at 247, 741 S.E.2d at 706.

When a structural error is preserved and raised on direct review, the balance between the necessity for fair and just trials and the importance of finality of judgments is in the defendant’s favor. Weaver, 137 S. Ct. at 1913. However, as the United States Supreme Court made clear through its decision in Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899 (2017), finality concerns are more pronounced in the context of an ineffective of counsel claim and, therefore, a petitioner must ordinarily still show prejudice when a structural error is raised in such a context. See id. at 1911 (explaining the Strickland standard requiring a showing of both deficiency and prejudice is ordinarily applicable to an ineffective assistance of counsel claim, expressly declining to decide whether a different standard should be applied to an ineffective assistance of counsel claim predicated on a purported structural error, and affirming a ruling finding Weaver

was not entitled to relief even assuming his trial counsel’s performance resulted in the occurrence of a structural error during trial); see also Richter, 562 U.S. at 111 (“In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the result would have been different.” (citations and internal quotations omitted)); Williams, 363 S.C. at 343, 611 S.E.2d at 233 (“A PCR applicant claiming trial counsel rendered ineffective assistance must demonstrate that (1) counsel’s representation fell below an objective standard of reasonableness and (2) but for counsel’s error, there is a reasonable probability that the outcome of the proceeding would have been different.”).

Wright’s claim he was denied his right to testify by the trial court was itself reviewed by this Court on direct appeal, and it found the trial court did not abuse its discretion by refusing to reopen the record to allow him to testify. Wright, 416 S.C. at 373-374, 785 S.E.2d at 489. That claim was reviewed under Rivera, and this Court did not inquire into whether Wright had been prejudiced since such an inquiry was irrelevant in determining whether his right to testify had been violated. Id. This Court found the trial court’s refusal to reopen the record was legitimate because of concerns Wright would tailor his testimony to support a charge on self-defense after hearing the court’s opinion of whether the evidence supported such a charge. Id.

Wright does not, has not, and cannot allege his right to testify was erroneously denied *by the trial court* at the current juncture. That issue has been litigated and a final decision on the merits has been reached. Id.

Meanwhile, in the setting of PCR, Wright—contrary to his current views—was required to and must show he was prejudiced by his counsel’s failure to move to reopen the record as set

out in Strickland in order to be entitled to any relief. See Matylinsky v. Budge, 577 F.3d 1083, 1097 (9th Cir. 2009) (“The Strickland standard is applicable when a petitioner claims his attorney was ineffective by denying him his constitutional right to testify.”); cf. Rossignol, 274 P.3d at 10-11 (“We . . . address Rossignol’s claim that he was deprived of the right to testify as an ineffective assistance of counsel claim. Pursuant to Strickland, . . . to prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney’s performance was deficient and that the defendant was prejudiced by the deficiency. To establish a deficiency, the applicant has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the trial would have been different.” (citations omitted)). Importantly though, Wright—just as the PCR judge correctly concluded—wholly failed to make such showing. Moreover, on appeal, Wright is not even arguing he made such a showing of prejudice but, instead, is solely arguing—incorrectly—the PCR court applied the wrong standard by conducting a prejudice analysis pursuant to the applicable Strickland standard.

The PCR court properly reviewed the issue pursuant to the Strickland standard. It found trial counsel testified credibly while Wright’s testimony was self-serving and not credible. It further found Wright failed to show prejudice from his counsel’s performance because he had not shown a reasonable probability the outcome would have differed had his counsel moved to reopen the record earlier.

Supporting such a conclusion, the trial court had already explained what testimony was needed to support an instruction on voluntary manslaughter and self-defense the day before Wright communicated any desire to testify. In light of that, the opportunity for testifying had

passed the previous afternoon and not the morning Wright first communicated his wish to testify since the trial court's concern in refusing to permit Wright's testimony was focused on him hearing its views of what was necessary to support self-defense and voluntary manslaughter jury charges. Due to that, there was no reasonable probability the court's decision would have been different had his counsel acted with greater haste.

Furthermore, the PCR court found Wright's testimony would have been detrimental to his case. Had he taken the stand, he would have testified he was the shooter, confirmed the sequence of events surrounding the shooting, and jeopardized his credibility along with the credibility of the defense that had been pursued up to that point. He would have relied on inadmissible evidence to support his claims that otherwise lacked evidentiary support. Simply put, the PCR court found his testimony did not make any sense and no reasonable jury would have believed him. That finding was supported by trial counsel's testimony. Wright's proposed testimony would have defeated their attempts to cast doubt on whether Wright was actually the shooter. Because Wright's testimony would have hurt—as opposed to aided—the defense had it been presented during trial, Wright could not establish—as required—there was a reasonable probability the result of his trial would have been different but for trial counsel's performance in his case. Cf. Matylinsky, 577 F.3d at 1097-1098 (“Matylinsky fails to meet the prejudice prong. He insists that his testimony would demonstrate to the jury that he neither premeditated nor deliberated, as required for first-degree murder. However, the state court was not unreasonable in finding that this testimony would not have assisted Matylinsky's case. Had he taken the stand, he would have been subjected to damning cross-examination on his prior convictions. The jury also would have witnessed his matter-of-fact delivery regarding his wife's death and general disinterested nature. Additionally, his desire to discuss how Peggy instigated the fight that

ultimately left her dead would have undermined the established theory of the case. Matylinsky has not shown how his counsel acted unreasonably. And, to the extent [trial counsel] might have infringed on Matylinsky's right to testify, Matylinsky has not proven prejudice." (citation omitted)).

The question to be answered was not and is not whether Wright's right to testify was violated. Instead, in the PCR setting, the proper question was and is whether Wright was prejudiced by trial counsel's failure to move to reopen the record at an earlier point. Wright failed to make such a showing as required by Strickland. Therefore, Wright has failed to meet his burden of proof as to the prejudice prong, and, resultantly, the PCR judge correctly declined to grant relief in Wright's case. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."); see also Strickland, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). The PCR judge's order denying relief to Wright should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

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