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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No. 2025-001691

William H. Seals, Jr., Circuit Court Judge

Marcus Dwain Wright, ... Petitioner,

v.

State of South Carolina, ... Respondent.

APPENDIX

VOLUME IV

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Volume IV (Court of Appeals Writ of Cert. Documents)

The South Carolina Court of Appeals

Marcus Wright, Petitioner,

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Appellate Case No. 2020-001265

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

In keeping with the dissent, I would vote to grant the petition.

_____ J.

Columbia, South Carolina

cc:
J. Falkner Wilkes, Esquire
Mark Reynolds Farthing, Esquire
The Honorable William H. Seals, Jr.

FILED
Aug 20 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marcus Wright, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2020-001265

ON WRIT OF CERTIORARI

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 6119
Heard June 6, 2024 – Filed July 23, 2025

AFFIRMED

J. Falkner Wilkes, of Oakland, Mississippi, for Petitioner.

Senior Assistant Attorney General Mark Reynolds Farthing, of Columbia, for Respondent.

TURNER, J.: Marcus Dwain Wright (Petitioner) appeals the denial of his application for post-conviction relief (PCR). He argues the PCR court erred by not finding trial counsel[1] ineffective for failing to immediately inform the trial court he

[1] Petitioner was represented by two attorneys at trial, Morgan L. Martin and Edward M. Brown. We will refer to them generally as counsel.

had changed his mind about testifying and failing to move to reopen the record. He contends counsel was deficient and he did not need to prove prejudice because this was a structural error pursuant to *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). We affirm.

FACTS/PROCEDURAL HISTORY

Petitioner was indicted for murder in the shooting death of Jerome Green, Jr. (Victim) at the home of Roy James Sinclair on April 30, 2012.

At trial, after the State rested, the trial court began discussing Petitioner's right to testify in his defense. When the trial court asked if Petitioner had any questions about his rights, Petitioner replied, "Not exactly." The trial court clarified, and Petitioner responded that he understood his rights. The trial court then explained,

> Now, this is your decision, to testify or not. You can obtain such advice as you wish from your attorney or from others. Of course, it's not the State's, it's not mine, and it's really not your attorneys'. It's your decision, [Petitioner], and it's up to you to determine whether you wish to testify or not.
>
> And I ask you now -- you're not bound at this point, but have you determined whether you wish to testify or exercise your right to remain silent?

Petitioner responded that he wished to "[e]xercise [his] right to remain to silent."

Trial counsel then proffered the testimony of Christopher McCray. Petitioner sought to introduce McCray's testimony regarding a purported inconsistent statement by one of the State's witnesses about seeing a gun near Victim following the shooting. Following McCray's proffer, the trial court determined the testimony was not admissible because it was hearsay and no exception applied. Trial counsel then stated the defense had no additional witnesses; the jury returned to the courtroom, and the defense rested on the record.

After the trial court dismissed the jury, the parties and the court proceeded with the charge conference. The trial court stated:

I'm going to let you both research this tonight some more, has to do with the voluntary manslaughter and self-defense request. We can talk about it some more today, but I'm going to give each of you the opportunity to do some further research.

And I have asked the [c]ourt [r]eporter to isolate what I recall being the only testimony that -- or I guess it's the testimony based on what has been said earlier upon which the [d]efense relies to support both of those charges, and that is a comment by a self-serving, of course, comment by [Petitioner] as he fled.

My recollection is that the comment was something to the effect is the n****r tried to pull a jack. I don't know that that means anything to anybody outside of whatever community those are intelligible phrases, so with that being if that's the only thing, then I don't know that that's substantial enough to support either of those charges. If there's other -- if there's more stuff, I'll look at it, but my recollection is, of course, the testimony of -- I can't remember her name now, but the driver of the car was that he said, brother, go pick up some shells, and that's certainly of no help to the [d]efense, but -- and I stand to be corrected, but I've asked the [c]ourt [r]eporter to try to find that.

. . . .

THE COURT: If the [d]efense think there's some other comments ---

COUNSEL: Yeah, Judge, I can. Lanard Powell testified that . . . [Petitioner] said he tried a jack move, a jack move, which in their world is pull a gun and rob him.

THE COURT: Well, we don't know -- I think jack means something like hijack, and that doesn't necessarily mean a gun was pulled.

. . . .

COUNSEL: In addition to that, it is my recollection that . . . Powell testified that in some other conversations that [Petitioner] said that he thought he was pulling a gun, because the question was asked, well, did he say he ever saw a gun, to which the answer was no, but it's clear that . . . Powell testified that [Petitioner] told him that he came in, made those comments about who's up -- and you're letting these boys up in your place, and was moving around, and that he reached for something. That's in there.

You've got Mildred Small who testified to the effect that . . . the [V]ictim in the case reached for something, and you've got Veronica Chandler who testified. Now, I've got to go back and look at her statement so I can tell you exactly what she did testify to. Now, she denied that she said some- -- one thing that I asked her, but she admitted that she said the other that I asked her, which was that she thought something, and I can get the exact testimony, or the [c]ourt [r]eporter can, but something to the effect that he reached or went for something.

And I think, you know, all of that independent or cumulatively, under the standard that we have, and that is the evidence must be viewed in the light most favorable to [Petitioner] and if there's any evidence whatsoever, then the Court should charge manslaughter as well.

Of course, you know the law better than I do, but I think that there [are] other references in there that would get us to that, including the conversation . . . about him coming in and say, hey, you got these boys up in your place, and doing it in a confrontive or combative manner, so I know I those things there. I can think about more overnight, ---

THE COURT: Well, words alone wouldn't be sufficient, but ask the [c]ourt [r]eporter . . . .

. . . .

COURT REPORTER: It's something to the effect, you've got these young boys in your house now, and [Victim] looks as if he's going for a gun, took three steps and he's reaching by his abdomen.
. . . .

COURT REPORTER: Your question was, did he say [Victim] threatened him in any way? And his answer was no.

THE COURT: So he asked if he was threatened in any way, and he said no?

THE STATE: That's correct.

THE COURT: Well, that's interesting because -- so that one case we've been looking at, *State [v.] Starnes*, . . . talks about whether or not the person seeking voluntary manslaughter -- in this one, the State agreed that self-defense was applicable, but it talks about there having to be fear, and if he wasn't afraid, under *Starnes* it does not look like he would, be entitled to voluntary manslaughter. And under the general self-defense, he's got to be in reasonable fear of imminent harm, imminent danger. He must be either actually -- was actually in imminent danger of death or bodily injury or believed he was, and if he testified he was not, then that might end the inquiry, ---

COUNSEL: Well, Judge, I don't believe it's that simple. [Petitioner] didn't testify to that. [Powell] -- there was a testimony that he said that's what he answered in the question, but that is not definitive on the issue because you've got his other statements, which she also read into the record, which was, again, I believe, paraphrasing, that he came in, that he had that conversation, that he reached for something.

Now, for -- you can't take that away just simply because this co-defendant testifying to the State, said, I well, did

he say he was afraid of him? No. The reverse of that is, well, do you know whether, he was afraid of him or not? The fact he didn't say it doesn't mean he wasn't afraid of him . . . . [B]ut it's clear . . . in my opinion that there is several witnesses who testified about [Petitioner] coming in and reaching or making a move for something, and I think that there has to be an implication from that that if the response to that is to pull a gun and to shoot, that there was circumstantial evidence, which is good evidence, of fear, even to the extent that it raise -- rise to the level of self-defense.

So I'll look at these cases tonight, as you've asked, and be willing to look at it, but I do -- did want to make the point I don't think it's definitive of anything, the answer he said, Well, did he tell you he was afraid? And the answer was no. That doesn't mean he wasn't afraid. It just said he didn't say that to me.

THE COURT: He said no.
. . . .

COUNSEL: If [Petitioner] had have said -- if you asked him were you afraid, and he said no, then you're right. That would end the inquiry, but for Powell to say he didn't tell me he was afraid doesn't end the inquiry in my mind at least.

THE COURT: All right. Let me listen to the question and answer again.

THE REPORTER: The question by the [State] was did he say [Victim] threatened him in any way? And the answer was no.

COUNSEL: Well, and that goes to my point, because that don't mean he didn't. Now, that's -- matter of fact, that's inconsistent with the other statements that he said [Petitioner] made to him.

> **THE COURT:** All right. Well, we'll take a look at it overnight.

When the proceedings reconvened the next morning, the trial court heard arguments from both sides. It then ruled that it would not give either charge because no evidence was presented of the crucial element of any fear of imminent danger by Petitioner at the time the shots were fired.

Petitioner then personally tried to speak to the trial court. Trial counsel informed the court Petitioner had told him that morning he had changed his mind and wanted to testify. Trial counsel stated he had informed Petitioner "that in [his] opinion that matter has passed us by as based on his assertion to the [c]ourt that he wished to remain silent. We have rested, but out of an abundance of precaution for the record, I don't want to cut him off, and I'll tell the [c]ourt that is what he wants to address with the [c]ourt." The trial court stated:

> No. The record is closed. We're at this stage of the trial. He had his opportunity. Now that he has seen how the [c]ourt has ruled, he wants to adjust his strategy, I guess. I don't know what he wants to do, quite frankly, but it would appear that the desire now to testify is the result of rulings by the [c]ourt.
>
> He's had his chance, and I explained his rights to him, and [c]ounsel indicated they did, so I -- I deny any motion to re-open the record for any testimony by [Petitioner].

Counsel pointed out that the trial court had told Petitioner the previous day that he was not bound by his decision, and the trial court agreed. The trial court admitted it "did not emphasize" that Petitioner had to decide during the trial whether to testify; however, the trial court thought "any reasonable person would believe the right to testify was extinguished after the defense rest[ed]." Counsel stated "this is a thought that [Petitioner] has had overnight apparently." The trial court again stated that Petitioner would not be allowed to testify because the record was closed. The trial court asked counsel why he had not brought Petitioner's change in wanting to testify to the court's attention before the trial court ruled on the jury charges. The trial court stated:

> I just ruled on the two, voluntary manslaughter and self-defense, just a few minutes ago, and he did not, when he

> came in here, neither he, nor you, nor [co-counsel] made any . . . overture to the [c]ourt that he wanted to change his mind and testify. That would have been the time, before the [c]ourt ruled.
>
> What he did, waited till I ruled, found out he wasn't going to have the benefit of these two defenses, and then he decided, well, maybe I better take the stand and tell them I was afraid to death, now that he knows what the [j]udge 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. That ain't going to happen.

Counsel then attempted to clarify that Petitioner raised his change of heart to counsel before the ruling, but counsel advised him "that time had passed him by, that we had rested based on his assertion that he didn't want to testify[,]" and counsel "didn't bring it up before we got into the motion." The trial court stated, "[I]t wasn't called to the [c]ourt's attention until that point . . . . So I'm not going to allow him to testify. The record is closed."

The jury convicted Petitioner of murder, trafficking in cocaine, possession with intent to distribute cocaine base, and possession of a weapon during the commission of a violent crime. The trial court sentenced him to life imprisonment for murder and concurrent sentences of five years' imprisonment for possession of a weapon, twenty-five years' imprisonment for trafficking in cocaine, and fifteen years' imprisonment for possession with intent to distribute, to be served consecutively to the murder sentence.

Petitioner appealed his conviction and sentence. On direct appeal, Petitioner "argue[d] the trial court erred in denying his request to testify, which he made after the defense had rested and the trial court had ruled it would not charge the jury on voluntary manslaughter or self-defense." *State v. Wright*, 416 S.C. 353, 371, 785 S.E.2d 479, 489 (Ct. App. 2016). This court found that "[a]lthough [Petitioner] asserts on appeal that his counsel erred in failing to timely inform the trial court that he wished to testify—which would be an ineffective assistance of counsel claim—he also asserts the trial court erred in denying his request to testify after the defense rested—which would be a claim of constitutional error." *Id.* at 373, 785 S.E.2d at 490. This court determined Petitioner was "ultimately asserting the trial court deprived him of his right to testify by refusing to reopen the record and allow him to testify after the defense rested." *Id.* at 373-74, 785 S.E.2d at 490.

This court affirmed and held:

> [T]he trial court did not abuse its discretion in refusing to reopen the record to allow [Petitioner] to testify after the defense had rested and the trial court had ruled it would not charge the jury on voluntary manslaughter and self-defense. The trial court was concerned that if it permitted [Petitioner] to testify after hearing its ruling on the voluntary manslaughter and self-defense jury charges and learning which supporting evidence the trial court said was missing, [Petitioner] would be able to fit his testimony into the required parameters for those charges by testifying that he shot the Victim because he feared for his life. This was a legitimate ground for refusing to reopen the record, and the trial court's restriction of [Petitioner's] right to testify was not arbitrary.

Id. at 374, 785 S.E.2d at 490.

Petitioner then filed a PCR application. The PCR court held an evidentiary hearing and ultimately denied and dismissed Petitioner's application with prejudice. Petitioner filed a Rule 59(e), SCRCP, motion to alter or amend, which the PCR court partially granted. It issued an amended order, which again denied and dismissed Wright's application with prejudice. This appeal followed.

ISSUE ON APPEAL

Is the PCR court's decision denying relief 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)?

LAW/ANALYSIS

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) counsel was deficient and (2) counsel's deficiency prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either

deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

"The prejudice showing is in most cases a necessary part of a *Strickland* claim." *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017). Generally, a petitioner "must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary." *Id.* at 308 (Alito, J., concurring in judgment). "In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "In post-conviction proceedings, the burden of proof is on the [petitioner] to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008).

A. Deficiency

Petitioner contends the PCR court erred in finding counsel was not ineffective for failing to immediately inform the trial court he wished to testify and moving to reopen the record. He argues counsel did not recognize the fundamental nature of a defendant's right to testify and counsel's failure to act created a structural error. However, even if counsel's conduct was deficient, we do not agree that the deficiency caused a structural error.

First, we acknowledge *Rivera*'s holding that a *trial court's improper refusal* to permit a defendant to testify is a structural error. 402 S.C. at 247, 741 S.E.2d at 706. In *Rivera*, the defendant clearly communicated his desire to testify to both the court and trial counsel during his presentation of evidence, but his counsel "actively thwarted" his vehement and consistent requests. *Id.* at 243, 741 S.E.2d at 703. Our South Carolina supreme court noted that Rivera "unambiguously indicated to the trial court that he wished to take the stand and vociferously objected to the trial court's decision not to permit him to testify." *Id.* The trial court's decision not to allow Rivera to testify was based on its erroneous determination that Rivera's testimony was prejudicial to his own case and irrelevant under Rule 403, SCRCP; as our supreme court noted, the trial court was motivated by "a paternalistic desire to protect [Rivera] from himself." *Id.* at 244-45, 741 S.E.2d at 704.

However, the *Rivera* court acknowledged that "the right to present testimony is not without limitation." *Id.* at 242, 741 S.E.2d at 703. In a footnote, the court clarified

that its "findings should not be taken as a restriction of the trial court's ability to constrain a defendant's testimony based on a *proper* application of the evidentiary rules." *Id.* at 246 n.3, 741 S.E.2d at 705 n.3. Thus, *Rivera* recognizes that there are situations in which a trial court may properly deny a defendant the right to testify, without causing a structural error. We find Petitioner's case is an example of this principle.

Here, Petitioner initially informed the trial court that he did not want to testify. Petitioner changed his mind overnight, after the defense rested and the parties and the court had begun discussing jury charges, but the trial court refused his request to testify. Notably, Petitioner raised this issue on direct appeal, and after considering *Rivera*, our court held that the denial of the right to testify in this case was not erroneous because "[t]he trial court was concerned that if it permitted [Petitioner] to testify after hearing its ruling on the voluntary manslaughter and self-defense jury charges and learning what supporting evidence the trial court said was missing, [Petitioner] would be able to fit his testimony into the required parameters for those charges." *Wright*, 416 S.C. at 374, 785 S.E.2d at 490. Accordingly, this court found the trial court had "a legitimate ground for refusing to reopen the record" to permit Petitioner to testify and the trial court's denial of Petitioner's request to testify was not improper. *Id.* Therefore, in contrast to *Rivera*, there was no structural error in this case because only the *erroneous* deprivation of the right to testify results in a structural error.

We understand Petitioner's contention now is slightly different—that if counsel had moved to reopen the record earlier, the trial court would have allowed the testimony. Indeed, the trial court itself appeared to consider that possibility in denying Petitioner's request to testify. However, we note that the standard here is whether counsel's "representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). Moreover, courts "considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689). In the exchange with the trial court, counsel stated he had informed Petitioner "that in [his] opinion that matter has passed us by as based on his assertion to the [c]ourt that he wished to remain silent." We cannot say that no reasonable attorney would have made that same calculation. Accordingly, we find counsel was not deficient.

Normally, our finding that counsel was not deficient would end our inquiry. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). However, because Petitioner contends the PCR court erred in applying the *Strickland* standard to this issue and in response to the well-reasoned dissent, we address the question of prejudice.

B. Prejudice

Petitioner maintains the PCR court not only erred in failing to find counsel deficient, but it also erroneously conducted a prejudice analysis under the second prong of *Strickland*. He asserts that in doing so, the PCR court applied a harmless-error analysis to the denial of Petitioner's right to testify, contrary to *Rivera*. We find that even if counsel's alleged deficiency led to a structural error, it was not one that always renders a trial fundamentally unfair; therefore, we hold Petitioner was still required to prove prejudice pursuant to *Weaver*. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) ("Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)."); *id.* ("Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced."); *see also Hartsfield v. Dorethy*, 949 F.3d 307, 314 (7th Cir. 2020) ("The Supreme Court's recent precedents are not to the contrary; in fact, they too draw a distinction between *a court's* denial of a defendant's constitutional right and *counsel's* denial of that same right." (emphasis added)).

Generally, "constitutional error does not automatically require reversal of a conviction." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). However, structural errors are those constitutional errors that "should not be deemed harmless beyond a reasonable doubt." *Weaver*, 582 U.S. at 294. "[T]he defining feature of a structural error is that it 'affects the framework within which the trial proceeds' rather than being 'simply an error in the trial process itself.'" *Id.* at 295 (quoting *Fulminante*, 499 U.S. at 310) (alterations omitted)). "For the same reason, a structural error 'defies analysis by harmless error standards.'" *Id.* (quoting *Fulminante*, 499 U.S. at 309 (alterations omitted)).

Initially, we acknowledge *Rivera*'s holding that "*a trial court's* improper refusal to permit a defendant to testify in his own defense . . . is not amenable to harmless-error analysis" and "requires reversal without a particularized prejudice inquiry." 402 S.C. at 247, 741 S.E.2d at 706 (emphasis added). Importantly, this holding is not in conflict with *Weaver*, which reinforced existing jurisprudence

holding that "in the case of a structural error where there is an objection at trial and the issue is raised on *direct appeal*, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" 582 U.S. at 299 (emphasis added). However, *Weaver* examined a slightly different question: "whether invalidation of the conviction is required . . . or if the prejudice inquiry is altered when the structural error is raised in the context of an ineffective assistance of counsel claim." *Id.* at 290. The Supreme Court concluded that there is indeed a different calculus when a structural-error claim is preserved and raised on direct review as opposed to when it is raised in the context of ineffective assistance of counsel.[2] *Id.* at 302.

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[2] We acknowledge that *Weaver* states its holding is limited to "the context of trial counsel's failure to object to the closure of the courtroom during jury selection," and not to all structural errors. *Id.* at 294. However, multiple federal and state courts have since interpreted and applied *Weaver*'s framework in other structural error contexts, as we do here. *See, e.g.*, *Parks v. Chapman*, 815 F. App'x 937, 944 (6th Cir. 2020) (applying *Weaver* in the context of "a violation of the fair-cross-section right" and finding it "stands for the idea that finality and judicial economy can trump even structural error; so, when a defendant raises a structural error on collateral review rather than on direct review, he must prove actual prejudice, even though he would not have had to prove actual prejudice if he had raised it on direct review"); *Hartsfield*, 949 F.3d at 314-15 ("In our view, the best reading of the Supreme Court's decisions in this realm is that *Strickland* controls because defense counsel allegedly interfered with Hartsfield's right to testify. Accordingly, the state appellate court's decision to apply *Strickland* was not contrary to clearly established federal law."); *Baxter v. Superintendent Coal Twp. SCI*, 998 F.3d 542, 547 (3d Cir. 2021) (applying *Weaver* and holding "[a] showing of structural error, however, does not always trigger a presumption of prejudice"); *Yannai v. United States*, 346 F. Supp. 3d 336, 346-47 (E.D. N.Y. 2018) ("A defendant's right to testify falls within the first of these three [*Weaver*] categories . . . . Thus, even though Yannai's right to testify at his trial is a fundamental right and any denial of that right may have been 'structural error,' he is still required to show prejudice here."); *Carter v. Clarke*, 667 F. Supp. 3d 163, 199 (W.D. Va. 2023) ("*Weaver* forecloses Carter's argument that the denial of his right to testify was structural error and not subject to a prejudice analysis."), *appeal dismissed*, No. 23-6382, 2023 WL 7128469 (4th Cir. June 9, 2023); *Cabrera v. State*, 173 A.3d 1012, 1022-23 (Del. 2017) (applying *Weaver* and holding the defendant's ineffective assistance of counsel claim based on a *Batson* violation—a structural error—"was properly dismissed for failure to show prejudice"); *Newton v. State*, 168 A.3d 1, 10 (Md. 2017) (applying *Weaver* to a defendant's claim that

"The prejudice showing is in most cases a necessary part of a *Strickland* claim." *Id.* at 300. "In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). The reason for placing the burden on the petitioner, rather than the State, in postconviction proceedings is, in part, because "when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent." *Id.* at 302. For example, "if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost." *Id.* However, "[w]hen an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases." *Id.* Additionally, "[t]he finality interest is more at risk[,] . . .and direct review often has given at least one opportunity for an appellate review of trial proceedings." *Id.* at 302-03 (internal citations omitted). These important differences between direct appellate review and collateral review "justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." *Id.* at 303.

"[T]he rules governing ineffective-assistance claims 'must be applied with scrupulous care.'" *Id.* (quoting *Premo v. Moore*, 562 U.S. 115, 122 (2011)). Accordingly, in an ineffective-assistance claim, even when a defendant raises a structural error, "the defendant generally bears the burden to show deficient performance and that the attorney's error 'prejudiced the defense.'" *Id.* at 287 (quoting *Strickland*, 466 U.S. at 687); *see also id.* at 309 (Alito, J., concurring) ("Weaver's theory conflicts with *Strickland* because it implies that an attorney's error can be prejudicial even if it 'had no effect,' or only 'some conceivable effect,' on the outcome of his trial. That is precisely what *Strickland* rules out." (citations omitted)).

Weaver further explains that structural errors fall into one of three categories based on the rationale underlying their classification as structural: whether (1) "the right at issue is not designed to protect the defendant from erroneous conviction but

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trial counsel was ineffective for failing to object to the presence of an alternate juror during deliberations and concluding "that to succeed on his ineffective-assistance-of-counsel claim, [the defendant] must establish *Strickland*'s deficient performance and prejudice prongs").

instead protects some other interest," (2) "the effects of the error are simply too hard to measure," or (3) "the error always results in fundamental unfairness." *Id.* at 295-96. These categories "are not rigid" and "more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* at 296. However, "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* The crucial determination for this court is whether the particular structural error at issue here "counts as structural because it *always* leads to fundamental unfairness or for some other reason." *Id.* at 296 (emphasis added). We find that it does not.

First, the right to testify in one's defense "is not designed to protect the defendant from erroneous conviction" but rather is "based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* at 295; *see also Mccoy v. Louisiana*, 584 U.S. 414, 427-28 (2018) (finding "counsel's admission of a client's guilt over the client's express objection" was a structural error falling under the first and second *Weaver* categories because it impacted "the defendant's right to make the fundamental choices about his own defense"); *Yannai*, 346 F. Supp. 3d at 346 ("[T]he right to testify falls within the first category of structural rights laid out in *Weaver* because it 'is not designed to protect the defendant from erroneous conviction but instead protects some other interest,'—namely, the defendant's right to choose how best to protect his liberty." (quoting *Weaver*, 582 U.S. at 295)); *Boyd v. United States*, 586 A.2d 670, 673 (D.C. Ct. App.1991) ("Although a defendant who chooses to testify may actually decrease his or her chance of acquittal, nonetheless, 'the wisdom or unwisdom of the defendant's choice does not diminish his right to make it.'" (quoting *People v. Curtis*, 681 P.2d 504, 513 (Colo. 1984))); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (stating "an accused's right to present his own version of events in his own words" is "fundamental to a *personal* defense" (emphasis added)). Thus, the improper denial of a defendant's right to testify falls under the first *Weaver* category. *See* 582 U.S. at 295 (explaining the first category encompasses structural errors involving rights that are "not designed to protect the defendant from erroneous conviction but instead protect[] some other interest").

Additionally, as noted in *Rivera*, the denial of a defendant's right to testify in the direct-appeal context rises to the level of a structural error, in part, because of the difficulty in measuring the effects of the error. 402 S.C. at 247-48, 741 S.E.2d at 706-07. This rationale implicates the second *Weaver* category. *See* 582 U.S. at 295 (stating structural errors fall into the second category when "the effects of the error are simply too hard to measure"). *Rivera*, for example, relied on *Luce v. United States*, which states that ascertaining prejudice requires "the court [to] know

the precise nature of the defendant's testimony, which is unknowable when . . . the defendant does not testify." 402 S.C. at 248, 741 S.E.2d at 706 (quoting *Luce*, 469 U.S. 38, 41-42 (1984)). We note that this concern—that a court cannot fairly evaluate prejudice without knowing the precise nature of the defendant's testimony—is eliminated in PCR where, unlike in a direct appeal, the court has the benefit of hearing the defendant's testimony, further supporting the argument that Petitioner must establish prejudice in the ineffective-assistance context.

Further, *Rivera* itself acknowledged that "the right to present testimony is not without limitation," and "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Id.* at 242, 741 S.E.2d at 703 (quoting *Rock*, 483 U.S. at 55). Similarly, in *Weaver*, the Supreme Court stated that "[t]he fact that the [structural error at issue] is subject to . . . exceptions suggests that not every . . . violation results in fundamental unfairness."[3] 583 U.S. at 298. This suggests that the erroneous denial of the right to testify would fall into the first and/or second *Weaver* categories, not the third. *See* 582 U.S. at 296 (explaining the third category of structural errors encompasses those that "always result[] in fundamental unfairness").

Finally, we are also concerned that finding, as the dissent does, that a violation of the right to testify *always* creates fundamental unfairness such that prejudice must be presumed is a misreading of *Rivera* that would lead to its unintentional

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[3] Throughout our discussion, we use the terms "fundamental right" and "fundamental unfairness." However, we note that the meaning of "fundamental" varies depending on the context. A structural error results in "fundamental unfairness" because "[s]uch errors 'infect the entire trial process'" such that the trial becomes an "unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993)). On the other hand, the right to testify is a "fundamental" right in that it is a personal right only the defendant can decide to exercise (or not). *See, e.g.*, *Johnson v. State*, 169 S.W.3d 223, 236 (Tex. Crim. App. 2005) ("The footnote in *Rock* in which the Supreme Court labeled the right to testify as 'fundamental' suggested that the right was fundamental in the sense that the defendant possessed the ultimate authority to decide whether to invoke it."); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (labeling the right to testify as "fundamental" because "[t]his right is personal to the defendant and cannot be waived either by the trial court or by defense counsel"). Therefore, simply because a right is "fundamental" does not equate to an automatic exemption from an evaluation of harm or prejudice.

expansion. As discussed above, *Rivera* is clear that the right to testify is not without limitation. 402 S.C. at 242, 741 S.E.2d at 703. Moreover, the *Rivera* court specifically acknowledged that Rivera's claim was "consistently . . . presented not as an ineffective assistance of counsel claim, but rather, as an error committed by the trial court." *Id.* at 241, 741 S.E.2d at 702. It further noted that such claims may often be presented either as a claim of trial court error or a claim of ineffective assistance of counsel. *Id.* at 240. Thus, we believe *Rivera* itself implicitly acknowledges its holding applies only in the direct appeal context, and it does not compel a finding of prejudice in an ineffective assistance claim. *Id.* at 241.

Accordingly, we find that the denial of the right to testify does not fall within *Weaver*'s third class of structural errors, which always result in fundamental unfairness; rather, we find that the improper denial of a defendant's right to testify falls into the first and second categories. *Weaver* instructs that if the structural error is one that does not fall into the third category then prejudice will not be presumed, and therefore, we hold Petitioner is required to make the traditional *Strickland* prejudice showing.[4] *See* 582 U.S. at 300-01 (holding that because the structural error at issue would not always lead to a "fundamentally unfair trial" nor did it "always deprive[] the defendant of a reasonably probability of a different outcome[,] . . . *Strickland* prejudice is not shown automatically").

With all of these principles in mind, we turn to the analysis of prejudice in Petitioner's case.

C. Application to Petitioner's case

Petitioner asserts he was prejudiced by counsel's deficient performance; however, he argues that a "particularized analysis of specifics and [the] degree of that prejudice is not necessary under the facts of this case and the holding of" *Rivera*.

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[4] We note that *Weaver* explicitly declined to rule on whether a petitioner must prove prejudice when the structural error at issue falls in the third category. *See* 582 U.S. at 301-02 (explaining that "[n]either the reasoning nor the holding" in *Weaver* "calls into question the Court's precedents determining that certain errors are deemed structural and require reversals because they cause fundamental unfairness" when raised on direct appeal, but stating the "opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review"). Therefore, even if the denial of Petitioner's right to testify was a structural error that falls into the third *Weaver* category, the law is far from clear that prejudice should be presumed.

Instead, he asserts "[t]he prejudice lies in the violation of [his] right to testify." We disagree.

At the PCR hearing, Petitioner admitted that he did not change his mind about wanting to testify until the next morning after the defense rested, having thought about his case overnight and concluding that it "wasn't murder." Petitioner asserted that he shot Victim in self-defense, which he claimed was the defense's primary theory of the case. He testified that when Sinclair, the homeowner, let Victim back in the house, Victim stated he was going to "put the squeeze" on someone because Victim was upset about the number of people there. Petitioner explained he interpreted that to mean Victim was going to "squeeze a gun." He testified Victim then pulled a gun and turned towards him; Petitioner then fired until Victim fell to the floor. Petitioner asserted he shot Victim "because [he] was scared" for his life and he was defending himself. However, he acknowledged that he was not interested in cooperating with law enforcement, and importantly, he did not tell the police he shot Victim in self-defense and instead claimed that a "jack move"—i.e. a robbery—had gone wrong.

The PCR court found counsel was not deficient by informing Petitioner that it was too late to change his mind about testifying because the charge conference had begun. The PCR court further found Petitioner's testimony was not credible and noted it would have hurt his case, not helped it, because it confirmed he was the shooter, was not supported by the evidence, was illogical, and he admitted to lying in his interactions with law enforcement afterwards. Finally, the PCR court also noted the trial court had discussed what testimony would support the self-defense charge and was therefore unlikely to have granted Petitioner's motion. The PCR court concluded that even if counsel had immediately informed the trial court of Petitioner's change of heart, there was no reasonable probability the outcome of the proceeding would have been different, and thus, Petitioner had failed to prove prejudice. We agree with the PCR court.

During the initial charge conference, well before Petitioner informed counsel of his change of heart, the trial court explicitly stated it did not believe there was enough evidence to support either a voluntary manslaughter instruction or a self-defense instruction. Further, the trial court repeatedly noted that one of the State's witnesses had testified that Petitioner never told him that Petitioner feared for his life at the time of the shooting. Specifically, the trial court stated, "[U]nder the general self-defense, [Petitioner]'s got to be in reasonable fear of imminent harm, imminent danger. He must be either . . . actually in imminent danger of death or bodily injury or believed he was, and if [the witness] testified [Petitioner] was not,

then that might end the inquiry." Ultimately, because of the long discussion regarding the law and the trial court's candid assessment of the evidence *before* Petitioner ever informed counsel of his desire to testify, we find the trial court likely would not have changed its ruling. *Cf. United States v. Walker*, 772 F.2d 1172, 1881 (5th Cir. 1985) (noting that reopening the record after the defense rests may be proper if "[n]o significant information was brought forth that [the defendant] had not already learned during the government's case-in-chief"). Its stated rationale for denying the motion to reopen—the possibility that Petitioner could tailor his testimony—would have still applied had counsel informed the trial court of Petitioner's change of heart immediately when court reconvened the next morning.

Moreover, even without the deference we give to the PCR court's credibility findings, we agree with the PCR court's assessment of Petitioner's credibility and the likely effect of his testimony on the jury. *See Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) (explaining that appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court"). First, counsel both testified that self-defense was *not* a main theory of their case, nor was it a primary focus of the defense strategy; thus, we find Petitioner's assertion that he wanted to testify to explain he had shot in self-defense was a new development motivated by the trial court's comments during the charge conference, seriously diminishing his credibility. More importantly, we agree that Petitioner's testimony undermined his defense, rather than bolstered his innocence, as it confirmed his identity as the shooter, was contradicted by other testimony and evidence, and contained admissions that he was dishonest with law enforcement and uninterested in cooperating to resolve the investigation.

Thus, we find Petitioner failed to prove he was prejudiced by counsel's failure to immediately inform the trial court of his newfound desire to testify. We agree with the PCR court that the trial court would not have changed its ruling, and, in any event, a jury was unlikely to find Petitioner's version of events persuasive. Therefore, we hold Petitioner failed to prove he was prejudiced by counsel's delay in moving to reopen the record. *See Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."); *id.* at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

CONCLUSION

Based on the foregoing, the decision of the PCR court is

AFFIRMED.

WILLIAMS, C.J., concurs.

KONDUROS, J., dissenting: I respectfully dissent. Petitioner contends the PCR court erred in finding trial counsel was not ineffective for failing to immediately inform the trial court he wished to testify. He argues trial counsel, by not making a timely motion to reopen the case, was deficient because trial counsel did not recognize the fundamental nature of a defendant's right to testify. He further maintains the PCR court, despite having found trial counsel was not deficient, erroneously proceeded to conduct a prejudice analysis under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). He asserts that in doing so, the PCR court applied a harmless-error analysis to the denial of Petitioner's right to testify on his own behalf, contrary to *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). I agree.

To establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) counsel was deficient and (2) counsel's deficiency prejudiced the defendant's case. *Strickland*, 466 U.S. at 687. "The prejudice showing is *in most cases* a necessary part of a *Strickland* claim." *Weaver v. Massachusetts*, 582 U.S. 286, 300 (2017) (emphasis added). "[T]he concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). However, "the prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Id.* (quoting *Strickland*, 466 U.S. at 696). "[T]he ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Id*. (quoting *Strickland*, 466 U.S. at 696). "A defendant must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary." *Id.* at 308 (Alito, J., concurring in judgment).

I. Deficiency

To meet the first prong of *Strickland*, a PCR applicant must demonstrate trial "counsel's performance was deficient." 466 U.S. at 687. This requires "show[ing] that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead 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." *Id.* "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*; *see also Brown v. State*, 340 S.C. 590, 593, 533 S.E.2d 308, 309 (2000) ("[A]n applicant . . . must show . . . his counsel failed to render reasonably effective assistance under prevailing professional norms . . . .").

"Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant . . . ." *Strickland*, 466 U.S. at 688. "From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Id.* "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* "The purpose [of the effective assistance guarantee] is simply to ensure that criminal defendants receive a fair trial." *Id.* at 689.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*; *see also Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" (quoting *Strickland*, 466 U.S. at 690)).

In *Stone v. State*, our supreme court analyzed whether trial counsel was deficient when it failed to object to several pieces of testimony made during the victim

impact stage of a sentencing proceeding, noting that the admission or exclusion of that testimony was within the trial court's discretion. 419 S.C. 370, 380-90, 798 S.E.2d 561, 566-72 (2017). While the alleged deficiency here was not due to trial counsel's failure to object, both *Stone* and the present case involve a failure by trial counsel to raise an issue to the trial court, which the trial court had the discretion to decide. In *Stone*, the supreme court examined each piece of testimony with which the petitioner took issue but explained it did "not intend with this discussion to define which of the [pieces] would have been permissible for the trial court to admit within its discretion. Rather, [the supreme court explained it would] discuss them to demonstrate that, with varying degree, the admission of each one was debatable." *Id.* at 386, 798 S.E.2d at 569-70. The supreme court provided, "Without an objection, however, there can be no debate[,] and the trial court has no opportunity to exercise its discretion." *Id.* at 386, 798 S.E.2d at 570. The supreme court stated, "[E]ven if the trial court was being 'liberal' in allowing . . . testimony, trial counsel should have objected to those components of the . . . testimony as to which counsel felt he had a reasonably persuasive argument for exclusion." *Id.* The supreme court explained, "If [trial counsel] had objected in those instances, the trial court may have sustained the objection. But in any event, counsel would have at least tested the trial court's discretion." *Id.* The supreme court noted, "The fact the trial court has such wide discretion does not justify the decision not to object. Rather, the debate that precedes the exercise of that discretion is part of the adversarial process *Ard* and *Strickland* require trial counsel to test." *Id.* The supreme court found, "Trial counsel failed to articulate any valid strategic reason for not objecting to important . . . testimony the trial court had the discretion to exclude." *Id.* at 387, 798 S.E.2d at 570. Accordingly, the supreme court determined "the decision not to object d[id] not meet an objective standard of reasonableness, and [the PCR applicant] . . . satisfied the first prong of *Strickland*." *Id.*

In this case, Petitioner argues trial counsel acted deficiently by not moving to reopen the record to allow Petitioner to testify at the first opportunity after Petitioner had informed trial counsel he wanted to testify. "'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.'" *State v. Wright*, 416 S.C. 353, 371, 785 S.E.2d 479, 489 (Ct. App. 2016) (alteration in original) (quoting *State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996)). "[L]iberality is the linchpin of" a determination of whether to reopen the case because "[a] trial is a search for the truth." *Wren*, 322 S.C. at 105, 470 S.E.2d at 112. The trial court has the discretion "to grant or refuse an application for the reopening of a case and the introduction of

additional evidence by a litigant who has rested, even after the commencement of arguments to the jury and later." *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 351-52, 32 S.E.2d 5, 10 (1944) (per curiam).

I have found no South Carolina appellate decision discussing a criminal defendant's motion to reopen the record to allow that defendant's testimony. In most of our state's appellate decisions in criminal cases examining a motion to reopen the record, the State, not a defendant, made the motion. In one such appeal, our supreme court reviewed a trial court's grant of the State's motion to reopen the case to present more evidence. *See State v. Hammond*, 270 S.C. 347, 355-56, 242 S.E.2d 411, 415 (1978). In that case, following the defendant's decision to not present evidence, the defendant requested a jury charge allowing the jury to presume a witness who had information about the case and was available to testify but did not, would have testified contrary to the State's position. *Id.* at 355, 242 S.E.2d at 415. The trial court indicated the requested charge would be proper but allowed the State to reopen its case and present the witness's testimony over the defendant's objection. *Id.* The supreme court affirmed the decision to reopen the case, noting the decision was within the trial court's discretion and finding because the additional testimony merely corroborated the previous testimony and presented no new evidence, the decision did not prejudice the defendant. *Id.* at 355-56, 242 S.E.2d at 415.

In this case, Petitioner's motion to reopen the case, which Petitioner alleges trial counsel was deficient by not making earlier, was for the purpose of his testifying on his own behalf. "The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments. 'It is one of the rights that are essential to due process of law in a fair adversary process.'" *Wright*, 416 S.C. at 372, 785 S.E.2d at 489 (citation omitted) (quoting *Rock v. Arkansas*, 483 U.S. 44, 51 (1987)). "The right . . . to testify or not to testify is fundamental." *Rivera*, 402 S.C. at 241, 741 S.E.2d at 702. "However, the right . . . is not without limitation." *Id.* at 242, 741 S.E.2d at 703. In some circumstances, "[t]he right may . . . bow to accommodate other legitimate interests in the criminal trial process." *Id.* (quoting *Rock*, 483 U.S. at 55). "But restrictions of [the] right . . . may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (quoting *Rock*, 483 U.S. at 55-56). "In applying its evidentiary rules[,] a [s]tate must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* (quoting *Rock*, 483 U.S. at 56). "Evidence rules [that] 'infringe upon a weighty interest of the accused' but fail to serve any legitimate interest are arbitrary." *Id.* (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)).

In *Rivera*, discussed in depth below, our supreme court looked at several other jurisdictions' decisions concerning a criminal defendant's right to testify. *Id.* at 248-49, 741 S.E.2d at 706-07. One of those cases was *State v. Dauzart*, a direct appeal in which the Louisiana Supreme Court reversed a defendant's conviction, holding the trial court abused its discretion by denying the defendant's motion to reopen the case to allow him to testify in his own defense. 99-3471, p. 2 (La. 10/30/00); 769 So. 2d 1206, 1208 (per curiam). In *Dauzart*, the trial court relied on a statute in the Louisiana Code of Criminal Procedure concerning the order of trial when it denied the motion to reopen. *Id.* The Louisiana Supreme Court noted a trial court has "the discretion under the statute to reopen the evidence at any time before closing arguments to permit the taking of additional testimony." *Id.* The supreme court recognized that "[t]o the extent that an accused's 'right to present his own version of events in his own words' derives in part from the Due Process Clause of the Fourteenth Amendment, . . . a trial court must exercise this discretion in a manner which accords with 'the fundamental standards of due process.'" *Id.* (first quoting *Rock*, 483 U.S. at 51; then quoting *Rock*, 483 U.S. at 55).

In *Dauzart*, the following events preceded the defendant's motion to reopen the case: at the close of the State's case, the defense called a witness to identify medical records. *Id.* at p. 4; 769 So. 2d at 1209. During a recess, defense counsel spoke to the defendant and others about testifying. *Id.* When the jury returned, the defense rested, "subject to introducing the medical records." *Id*. The trial court "ordered the records introduced but then excused the jurors . . . and spent over half an hour with counsel" to streamline the medical records. *Id.* "Toward the end of this process, with the jury still out and with discussion about the court's general charge to the jury also underway, counsel informed the court that [the defendant] 'ha[d] thought about it and decided he wishe[d] to take the witness stand.'" *Id.*

The supreme court reversed the trial court's denial of the defendant's motion to reopen; the supreme court noted the defendant's testimony was essential, the State would not have been prejudiced and had not objected, and the defendant made the request before the matter had progressed past the final witness. *Id.* at p. 5; 769 So. 2d at 1209. The supreme court recognized that while "taking the testimony of any witness out of [the] normal sequence may give the evidence 'distorted importance merely b[y] being introduced after a reopening'" and the State could be prejudiced "if it has already presented rebuttal testimony by providing the defendant with an opportunity to review the evidence before deciding whether to take the stand," neither of those concerns applied there. *Id.* at p. 5; 769 So. 2d at 1209-10 (quoting *United States v. Larson*, 596 F.2d 759, 779 (8th Cir. 1979)). The court noted that

because the jurors had not been allowed to view the defense exhibits when the defense moved to reopen the case, the "jurors would not likely have understood the timing of [the defendant's] testimony as out of turn and therefore extraordinary." *Id.* at p. 5; 769 So. 2d at 1210. Additionally, the State had indicated it had no rebuttal testimony and "even assuming [the defendant's] testimony may have changed" that decision, nothing in the record suggested the State "could not have reassembled its witnesses in rebuttal after the lapse of no more than an hour it took . . . to sort out the" medical documents and "the most important potential rebuttal witness[] remained available." *Id.* The supreme court found "[the defendant's] testimony likely would have had no impact on the course of the proceedings as trial in any event continued into the next day with closing arguments and the court's jury instructions, giving the [S]tate an adequate opportunity to respond to [the defendant's] testimony." *Id.* Additionally, the *Dauzart* court noted trial counsel had told the jury and the trial court that the defendant would testify, thus exposing the defense "to the ridicule of the prosecutors during closing argument," in which the State made several derogatory remarks. *Id.* at p. 6; 769 So. 2d at 1210.

The *Dauzart* court further explained the importance of a defendant's testimony: "Because 'the most important witness for the defense in many criminal cases is the defendant himself,' *Rock* deemed the accused's right to present his or her testimony at trial '[e]ven more fundamental to a personal defense than the right of self-representation' under the Sixth Amendment." *Id.* at p. 6-7; 769 So. 2d at 1210 (alteration in original) (quoting *Rock*, 483 U.S. at 52). The supreme court found the trial court had abused its discretion because it "arbitrarily refus[ed] to allow the defense to reopen its case under circumstances in which the slight deviation from normal practice would have had no impact on the orderly flow of trial from jury selection to verdict and in which strict adherence to the order of trial specified by" the statute cost the defendant "his only opportunity to face jurors and persuade them of his version of events." *Id.* at p. 2; 769 So. 2d at 1208.

As noted above, our supreme court cited to *Dauzart* in *Rivera*. In *Rivera*, the matter of allowing the defendant to testify arose in a different manner than a motion to reopen the record. In that case, the defendant "disagreed with counsel's recommendation not to testify, unambiguously indicated to the trial court that he wished to take the stand, and vociferously objected to the trial court's decision not to permit him to testify." *Rivera*, 402 S.C. at 243, 741 S.E.2d at 703. On direct appeal, our supreme court found "defense counsel actively thwarted [the defendant's] desire to testify. Although, as a practical matter, preventing [the defendant] from testifying may have been an advantageous strategic decision, it

had no basis in the law." *Id.* The supreme court observed, "[T]he trial judge appeared willing to call [the defendant] as a court's witness, but ultimately declined to do so because during the peculiar proffer procedure, [the defendant] indicated his intention to testify about the crime." *Id.* The supreme court found "the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect [the defendant] from potentially undermining his own defense." *Id.* The supreme court noted the defendant's "testimony may have been prejudicial to his case but that cannot serve as a basis for the trial court to prevent him from taking the stand." *Id.* The supreme court stated, "The trial court's thorough colloquy with [the defendant] demonstrate[d] the trial court well understood the fundamental nature of the right to testify and that the decision rested solely with [the defendant]." *Id.* "Regardless of whether a defendant's decision to testify is to his own detriment, 'it must be honored out of that respect for the individual which is the lifeblood of the law.'" *Id.* at 245, 741 S.E.2d at 704 (quoting *Dearybury v. State*, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006)).[5]

While South Carolina has not done so, some federal and state appeals courts have used a set of factors provided by the Fifth Circuit Court of Appeals to determine whether a trial court has abused its discretion in denying a defendant's motion to reopen the record to exercise his right to testify. *See United States v. Walker*, 772 F.2d 1172 (5th Cir. 1985) (utilizing a set of factors to determine if the trial court abused its discretion in denying a defendant's motion to reopen the evidence to allow his testimony when the defendant made the motion after he rested but before closing arguments or jury instructions were given); *see also United States v. Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (using the *Walker* factors "to determine whether a district court abused its discretion in denying a motion to reopen to allow a defendant to testify"); *United States v. Byrd*, 403 F.3d 1278, 1283 (11th Cir. 2005) ("We, like the First Circuit, will consider the factors developed in . . . *Walker* in assessing whether the district court abused its discretion in deciding not to reopen the evidence so that [the defendant] could testify." (citation omitted)); *United States v. Peterson*, 233 F.3d 101, 106-07 (1st

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[5] In *Rivera*, after determining the trial court's decision to not allow the defendant's testimony violated the United States Constitution, our supreme court considered whether the error required reversal. 402 S.C. at 245, 741 S.E.2d at 705. The supreme court ultimately found the denial of a defendant's right to testify was a structural error, meaning a harmless-error analysis could not apply because prejudice would be presumed. *Id.* at 249-50, 741 S.E.2d at 707. The next section of this dissent will look at that holding as it applies to the prejudice prong of *Strickland*.

Cir. 2000) (applying the *Walker* factors to the district court's decision not to reopen the evidence to allow the defendant to testify); *People v. Martin*, 2014 COA 112, ¶ 37, 338 P.3d 1106, 1116 ("We are persuaded that [the *Walker*] factors articulate part of an appropriate test for Colorado trial courts to employ when exercising their discretion to determine whether to allow revocation of the waiver and reopening of the evidence for a defendant to testify."); *Bloomquist v. State*, 832 P.2d 177, 180 (Alaska Ct. App. 1992) ("Where the defendant moves to reopen his case to testify on his own behalf, we believe that the standards which the Fifth Circuit set out in . . . *Walker* are appropriate for resolving this issue."). Our supreme court cited to *Walker* in *Rivera*. 402 S.C. at 249, 741 S.E.2d at 706.

The Eleventh Circuit Court of Appeals summarized the *Walker* factors as "(1) the timeliness of the motion to reopen, (2) the character of the testimony to be offered, (3) the effect of granting the motion to reopen, and (4) the reasonableness of the excuse for the request to reopen." *Byrd*, 403 F.3d at 1284. Additionally, the Eleventh Circuit noted, "These factors were not chosen specifically because the case dealt with the failure to reopen the evidence in order to allow a defendant to testify; instead, these were the factors used by the Fifth Circuit to evaluate all challenges to a district court's refusal to reopen the evidence." *Id.*

Other circuits and jurisdictions have looked at similar factors emphasizing the importance of whether the nonmoving party would be prejudiced by the grant of the motion to reopen. *See United States v. Trant*, 924 F.3d 83, 88 (3d Cir. 2019) ("When considering a party's motion to reopen its case at trial, 'the district court's primary focus should be on whether the party opposing reopening would be prejudiced if reopening is permitted.'" (quoting *United States v. Coward*, 296 F.3d 176, 181 (3d Cir. 2002))); *id.* ("[T]wo principal considerations for the district court's inquiry are the timing of the moving party's request to reopen (whether, if the motion is granted, the opposing party will have a reasonable opportunity to rebut the moving party's new evidence) and 'the effect of the granting of the motion' (whether granting the motion will cause substantial disruption to the proceedings or result in the new evidence taking on 'distorted importance')." (quoting *Coward*, 296 F.3d at 181)); *id.* ("[D]istrict courts should assess the reasonableness of the moving party's explanation for failing to introduce the desired evidence before resting and whether the new evidence is admissible and has probative value."); *id.* at 89 ("In adopting this standard, we join eight other circuits that have issued essentially the same guidance on how district courts should approach deciding motions to reopen at trial."); *United States v. Nunez*, 432 F.3d 573, 579 (4th Cir. 2005) (instructing a district court to consider the following factors in deciding whether to reopen a case to admit additional evidence: "the

timeliness of the motion, the character of the testimony, and the effect of granting the motion" (quoting *United States v. Peay*, 972 F.2d 71, 73 (4th Cir. 1992))); *id.* ("The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. The evidence proffered should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining the guilt or innocence of the accused. The belated receipt of such testimony should not imbue the evidence with distorted importance, prejudice the opposing party's case, *or preclude an adversary from having an adequate opportunity to meet the additional evidence offered.*" (quoting *Peay*, 972 F.2d at 73)); *United States v. Abbas*, 74 F.3d 506, 510-11 (4th Cir. 1996) (providing that appellate courts, in determining whether a trial court abused its discretion in deciding not reopen a case, "examine (1) whether the party moving to reopen provided a reasonable explanation for failing to present the evidence in its case-in-chief; (2) whether the evidence was relevant, admissible, or helpful to the jury; and (3) whether reopening the case would have infused the evidence with distorted importance, prejudiced the opposing party's case, or precluded the opposing party from meeting the evidence").

In *Byrd*, the Eleventh Circuit summarized the *Walker* court's findings for each factor. 403 F.3d at 1284-85. The court provided, "With respect to the first factor, the Fifth Circuit concluded that [the defendant's] motion to reopen was made in a reasonably timely fashion [because] it had been made on the first day the proceedings reconvened after the evidence had closed." *Id.* at 1284 (citing *Walker*, 772 F.2d at 1177-78). "As to the second factor, the [c]ourt presumed the character of the testimony that would have been offered to be of 'prime importance' because it was the testimony of the defendant himself." *Id.* (quoting *Walker*, 772 F.2d at 1179). "Examining the third factor, the [c]ourt concluded that there was 'no indication' that reopening the evidence would have prejudiced the government; however, there was reason to believe that the defendant had been prejudiced by the failure to reopen." *Id.* at 1284-85 (quoting *Walker*, 772 F.2d at 1179).

The *Byrd* court looked at the *Walker* court's explanation of the four possible ways the government could have been—but was not—prejudiced by the granting of the defendant's motion to reopen the record in *Walker*. *Id.* at 1285 (citing *Walker*, 772 F.2d at 1180-81). First, no interruption of the "orderly flow" of the proceedings occurred, as neither closing arguments nor the jury instruction had been given. *Id.* (quoting *Walker*, 772 F.2d at 1180). Second, none "of the government's witnesses had been released or had otherwise become unavailable." *Id.* (citing *Walker*, 772 F.2d at 1180). Third and fourth, "the testimony of the government's rebuttal witnesses": "the [*Walker*] [c]ourt theorized that" a defendant "having heard the

testimony of the rebuttal witnesses . . . might have been able to 'work his testimony around theirs,' explaining any discrepancies between the rebuttal witnesses' testimony and the defense's case." *Id.* (quoting *Walker*, 772 F.2d at 1180). The *Walker* court "also reasoned that, because the defendant had learned what the rebuttal witnesses did not know, he could have 'decide[d] as a strategic matter that it would be safe . . . to testify to certain matters.'" *Id.* (alteration and omission in original) (quoting *Walker*, 772 F.2d at 1180). However, "[o]n rebuttal, the government had presented 'two comparatively insignificant witnesses'" and the testimonies could not have "'affected [the defendant's] decision to testify or revealed significant information that would aid him in formulating his own testimony.'" *Id.* (quoting *Walker*, 772 F.2d at 1181). The Fifth Circuit determined the defendant, unlike the government, had been prejudiced by not being allowed to reopen the record. *Id.* (citing *Walker*, 772 F.2d at 1183). The court found the defendant's attorney had told the jury he would testify, which could "have made a negative impression on the jury" when he ultimately did not, thus prejudicing him. *Id.* (citing *Walker*, 772 F.2d at 1183).

For the last factor, the *Walker* court "concluded that the reasonableness of [the defendant's] excuse for requesting to reopen 'mildly favor[ed] [the defendant's] position, or at least [did] not point in the other direction.'" *Id.* (second and fourth alterations in original) (quoting *Walker*, 772 F.2d at 1183). The defendant's explanation of why he chose not to testify was that he had a "'nervous condition'" and he "had been 'emotionally unable' to testify on the day the evidence closed." *Id.* (quoting *Walker*, 772 F.2d at 1184).

The Eleventh Circuit also looked at how the First Circuit had applied the *Walker* factors in *Peterson*, 233 F.3d 101. *Byrd*, 403 F.3d at 1286-87. First, as to timeliness, although recognizing defense counsel moved to reopen approximately half an hour after the defense had rested, "the First Circuit still concluded that 'the potential for disruption . . . was not insignificant,' noting that the jury was expecting to hear closing arguments—not further testimony." *Id.* at 1286 (omission in original) (quoting *Peterson*, 233 F.3d at 107). Second, for "the character of the testimony to be offered," the First Circuit found it weighed against the defendant because although "the testimony of a criminal defendant is presumed to be inherently significant" in that case, the defendant's counsel provided "that ethical concerns would prevent him from" conducting an examination, leading the First Circuit to conclude the "testimony would not have been particularly valuable." *Id.* (citing *Peterson*, 233 F.3d at 107). Third, as to "the effect of granting the motion," the First Circuit briefly stated "the jury would have been confused by the timing of [the defendant's] testimony and the fact that he was not

questioned by defense counsel." *Id.* (citing *Peterson*, 233 F.3d at 107). Fourth, as to the reasonableness of the defendant's excuse, the First Circuit found that "weighed strongly against" the defendant because he gave no excuse at all. *Id.* at 1287 (citing *Peterson*, 233 F.3d at 107).

The Eleventh Circuit, applying the *Walker* factors to its case, found the trial court had not abused its discretion in denying the defendant's request to reopen the record. *Id.* It found the first two factors favored the defendant because he made the motion "the day after the evidence had closed and before both closing arguments and the jury instructions. And, because it was the defendant himself who would have testified, we must consider the character of the testimony to have been of 'inherent significance.'" *Id.* (quoting *Walker*, 772 F.2d at 1179). However, the Eleventh Circuit found the next two factors established the district court had not abused its discretion because reopening "could have prejudiced the prosecution because [the] request came after the government's witnesses had been released." *Id.* Also, the Eleventh Circuit noted because the government's rebuttal witnesses had already testified, the defendant could have "'work[ed] his testimony around theirs,' changing his story in order to avoid discrepancies between the rebuttal witnesses' testimony and the defense's case." *Id.* (quoting *Walker*, 772 F.2d at 1180). The Eleventh Circuit found "[t]he potential prejudice to the government had the evidence been reopened weigh[ed] strongly against [the defendant's] position." *Id.* For the final factor, the court noted the defendant offered "no reasonable explanation for his newly found desire to testify. He merely changed his mind." *Id.* The Eleventh Circuit expressed that it could not "foresee how a district court could abuse its discretion by refusing to reopen the evidence to allow a defendant to testify where the defendant has given no valid reason for not testifying at the proper time." *Id.* at 1288. Accordingly, the Eleventh Circuit affirmed the district court's denial of the defendant's request to reopen the evidence. *Id.*

One district of the Appellate Court of Illinois has also noted when considering an appeal from the denial of a motion to reopen the record to allow a criminal defendant to testify, "Though it is within the discretion of the trial court to determine the question of whether to grant a defendant's motion to reopen . . . , a trial court should not exclude defense testimony except in the most extreme circumstances." *People v. Johnson*, 504 N.E.2d 178, 181 (Ill. App. Ct. 1987). The Appellate Court of Illinois explained, "It is a fundamental constitutional right for a defendant to testify in his own defense. Society's interest in the efficient administration of justice has to be balanced with a defendant's constitutional right to a fair opportunity to defend." *Id.* (citations omitted).

Other decisions in which a state appellate court has reversed the trial court's denial of defendant's motion to reopen the record have made similar determinations. In *Ephraim v. State*, prior to the presentation of the defendant's case, he indicated he did not wish to testify. 627 So. 2d 1102, 1103 (Ala. Crim. App. 1993). At a charge conference, the trial court was notified the defendant had changed his mind and wanted to testify. *Id.* The defendant "told the court that he wanted to tell his side of the story." *Id.* Closing arguments "had not been made and nothing had occurred in the presence of the jury after the defense rested its case." *Id.* The trial court refused to allow the defendant to testify. *Id.* On appeal from that refusal, the appellate court recognized the trial court had discretion whether to allow the testimony but found "the exercise of that discretion result[ed] in the denial of a basic constitutional right," meaning that discretion had been abused. *Id.* at 1105. The court noted that when closing arguments have "been made before [a] defendant reassert[s] his right to testify, a court's reluctance to reopen the case would perhaps be more excusable" but found that in the case before it, "[n]o closing arguments had been made and the only action that had been taken was a charge conference, which occurred off the record and outside the presence of the jury." *Id.*

In the case of *Mayfield v. State*, a Maryland appellate court reversed the trial court's refusal to permit a defendant to reopen his case to testify on his own behalf the morning after the defense had rested. 468 A.2d 400, 402, 409 (Md. Ct. Spec. App. 1983). The court noted the "defendant assert[ed] his right to testify after both sides had rested." *Id.* at 409. The court found the defendant "was a willing, available witness with testimony relevant to the central issue of his guilt or innocence." *Id.* at 409-10. The court determined the defendant was able to "justifiably explain his delay in asserting his desire to testify." *Id.* at 410. The court recognized, "There may be cases where . . . the assertion of the right to testify is merely an attempt at some subterfuge." *Id.* Additionally, the court noted "situations may arise where, although the recantation is sincere, the length of delay causes undue prejudice to the State or disruption to the orderly process of the trial." *Id.* In those cases, the court noted, the trial "court must consider the effects on both the defendant and the State to the end that justice may be served." *Id.* However, in the case before it, the appellate court determined "justice would have been served by permitting the [defendant] to reopen his case." *Id.* Accordingly, the appellate court found "the trial court [had] abused its discretion in failing to permit [the defendant] to reopen his case." *Id.* at 403.

In *People v. Burke*, defense counsel had advised a defendant not to take the stand. 574 N.Y.S.2d 859, 860 (N.Y. App. Div. 1991). The defendant vacillated with the decision but acquiesced with his counsel's recommendation to not testify. *Id.* However, "[a]fter the defense rested and during the charge conference, [the] defendant . . . sought to testify [and] counsel moved to reopen for that purpose." *Id.* The appellate court reversed the trial court's denial of the defendant's motion to reopen to allow his testimony. *Id.* The appellate court noted, "The circumstances here are distinguishable from . . . whe[n] the refusal to reopen the defense to permit the defendant to testify occur[s] after summations ha[ve] been completed." *Id.*

Initially, I note that *Rivera*, in which our supreme court determined depriving a defendant of his right to testify was a structural error, differs from the present case not just because it was a direct appeal but also because the trial court denied the defendant his right to testify based on the court's erroneous application of an evidentiary rule. 402 S.C. at 246, 741 S.E.2d at 705. This case involves the additional consideration of needing to reopen the record to allow a defendant to testify after the defense has rested. Despite the differences in procedure and timing, the principles expressed by our supreme court in *Rivera* are still very much on point.

In this case, trial counsel was deficient by not moving to reopen the record to allow Petitioner to testify at the start of the morning's proceedings. Instead trial counsel waited until Petitioner brought the matter up himself, which was after the trial court made its final ruling it would not charge the jury on self-defense and voluntary manslaughter. If trial counsel had moved to reopen the record at the first opportunity after Petitioner informed Brown he wished to testify—before the charge conference resumed—the trial court would have made its decision based on what had transpired at that time.[6] However, trial counsel did not move to reopen until after the trial court had made its ruling on the jury charges, and the trial court's decision to deny the motion was based on the facts then—namely that Petitioner could craft his testimony to fill in the gaps as pointed out by the court in ruling on the charges.[7] If trial counsel had made a motion to reopen at the start of

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[6] In Petitioner's direct appeal, this court based its decision on the trial court's having made a final ruling before Petitioner moved to reopen the record. *See Wright*, 416 S.C. at 374, 785 S.E.2d at 490.

[7] Trial counsel had a vast amount of experience between the two attorneys. Martin acknowledged in his PCR testimony they already recognized what needed to be shown for self-defense and voluntary manslaughter charges before the trial court stated it during the jury charge conference. The discussion between the trial court,

the morning's hearing, that motion could have been decided before the trial court made its final ruling. Thus, the trial court's reliance on the fact that it had already ruled would not have been a factor, although the court may have still considered that it had expressed some thoughts on the jury charges the previous day. The trial court's statements in denying the motion to reopen indicates the trial court may have viewed the circumstances differently if the motion had been made prior to its ruling on the jury charges. South Carolina courts have often found no abuse of discretion when the trial court allowed a party, normally the State, to reopen the record to present additional witnesses or admit evidence. *See, e.g.*, *State v. Humphery*, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981) ("The trial court did not abuse its discretion in allowing the State to reopen and prove . . . an essential element . . . ."); *State v. Harrison*, 236 S.C. 246, 251, 113 S.E.2d 783, 785 (1960) (finding the trial court had not abused its discretion when after the close of the testimony, the court permitted the State to reopen the case and prove an essential fact to be established, which the court when it ruled on the motion for a directed verdict indicated had been omitted and the court informed the defendants they would be permitted to offer further testimony if they wished, which they declined); *Wren*, 322 S.C. at 106, 470 S.E.2d at 113 ("[T]he trial court did not abuse its discretion in admitting . . . [additional] evidence after the State rested."); *see also id.* at 105, 470 S.E.2d at 112 ("Simplistic as it may seem, the imbroglio posited within this singular trial issue[, the State moving to reopen the evidentiary record after it has rested,] is an oft-occurring event."). *But cf. Bessinger v. Bi-Lo, Inc.*, 329 S.C. 617, 620-21, 496 S.E.2d 33, 35 (Ct. App. 1998) (affirming a circuit court's refusal to reopen a summary judgment hearing to allow the plaintiffs to proffer depositions and evidence because "[t]he decision to reopen the record to allow additional evidence is a matter within the sound discretion of the trial judge").

As described above, other jurisdictions have provided scenarios in which a defendant could expect to be successful in moving to reopen the record. In applying *Walker* factors to the present case, not much time had passed between when Petitioner rested and when he informed counsel he wished to testify—about thirty minutes of a charge conference transpired before proceedings ended for the day. Thus, the first factor weighs in favor of reopening the record. *See Martin*, 2014 COA 112, ¶ 41, 338 P.3d at 1117 ("[W]hen considering the *Walker* factors, these courts still appear to agree that a slight delay weighs in favor of granting the motion."); *Byrd*, 403 F.3d at 1287 (finding a defendant's motion to reopen the

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trial counsel, and the State prior to the court's ruling did not give Petitioner a substantial advantage.

evidence that is made the day after the evidence has closed and before closing arguments and jury instructions favors granting the motion); *Peterson*, 233 F.3d at 106 (finding the half hour between when the defendant rested and made the motion to reopen during which a "very simple charging conference" took place was a small delay posing "a relatively small threat" of disruption or prejudice). Also, the trial court and parties were still in the middle of the charge conference—closing arguments had not been made, no jury charges had been given, and the jury had not started its deliberations. *See Martin*, 2014 COA 112, ¶ 42, 338 P.3d at 1117 ("[W]hen analyzing the timeliness factor, courts should consider whether a jury instruction conference has taken place and whether the defendant was present for any such conference. A defendant's awareness of the instructions to be given to the jury, or the evidence necessary to obtain a particular instruction, may affect whether the defendant should be allowed to testify after hearing the colloquy between counsel and the trial court."); *Burke*, 574 N.Y.S.2d at 860 ("The circumstances here are distinguishable from . . . [a] refusal to reopen the defense to permit the defendant to testify occur[ring] after summations ha[ve] been completed."); *Dauzart*, 99-3471, p. 5; 769 So. 2d at 1210 (explaining because "jurors had not yet had the opportunity to view the defense documentary exhibits when counsel 'rested' and then moved to 'reopen' its case," "the defense case was still underway and jurors would not likely have understood the timing of [the defendant's] testimony as out of turn and therefore extraordinary").

As to the second factor, the character of the testimony to be offered, as the defendant, Petitioner's testimony would be of great importance. *See Walker*, 772 F.2d at 1179 ("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."). Trial counsel never stated they believed Petitioner planned to lie to the stand, which would prevented them from conducting an examination. *Cf. Byrd*, 403 F.3d at 1286 (noting although a criminal defendant's testimony "is presumed to be inherently significant," the First Circuit had found the second *Walker* factor weighed against a defendant when counsel expressed he could not conduct an examination of the defendant due to ethical concerns, concluding the "testimony would not have been particularly valuable").

As to the third factor, the effect of granting the motion, the State did not indicate it had any rebuttal witnesses that it had released. *See Dauzart*, 99-3471, p. 5; 769 So. 2d at 1210 (noting because the State had indicated it had no rebuttal testimony and "even assuming [the defendant's] testimony may have changed" that decision, nothing in the record suggested the State "could not have reassembled its witnesses in rebuttal after the lapse of no more than an hour it took . . . to sort out the"

medical documents and "the most important potential rebuttal witness[] remained available"). Additionally, although the trial court later expressed it believed Petitioner would have been able to craft his testify to fill in the holes in his self-defense case the trial court had noted when denying the charge request, trial counsel could have undertaken the same analysis: it was not a revelation. Also, at the time when Petitioner told trial counsel he wanted to testify, the trial court had not made any ruling on that matter. *See id.* (finding the defendant's "testimony likely would have had no impact on the course of the proceedings as trial in any event continued into the next day with closing arguments and the court's jury instructions, giving the [S]tate an adequate opportunity to respond to [the defendant's] testimony")

Finally, Petitioner provided a reason for expressing his desire to testify late: he thought he could change his decision about testify because at the time the trial court asked him if he wished to testify, the trial court had stated he was not bound by the decision. *Cf. Byrd*, 403 F.3d at 1288 (stating it did not "foresee how a district court could abuse its discretion by refusing to reopen the evidence to allow a defendant to testify where the defendant has given no valid reason for not testifying at the proper time").

Therefore, trial counsel acted unreasonably by not moving to reopen the record to allow Petitioner to testify in his own defense, when the trial court had not made a final ruling on the jury charges; counsel had an obligation to test the trial court's discretion. *See Strickland*, 466 U.S. at 688 ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."); *id.* at 690 ("The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."); *Ard*, 372 S.C. at 331, 642 S.E.2d at 597 ("When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" (quoting *Strickland*, 466 U.S. at 690)); *cf. Stone*, 419 S.C. at 386, 798 S.E.2d at 570 ("Without an objection, . . . there can be no debate[,] and the trial court has no opportunity to exercise its discretion."); *id.* ("If [trial counsel] had objected . . . , the trial court may have sustained the objection. But . . . counsel would have at least tested the trial court's discretion."); *id.* ("The fact the trial court has such wide discretion does not justify the decision not to object. Rather, the debate that precedes the exercise of that discretion is part of the adversarial process *Ard* and *Strickland* require trial counsel to test."). In light of the fundamental importance of a criminal defendant's right to testify in his

own defense as pronounced by our supreme court in *Rivera*, viewing the particular facts in this case, trial counsel was deficient in failing to move to reopen the record at the start of the morning's proceedings. *See Rivera*, 402 S.C. at 245, 741 S.E.2d at 704 ("[A] defendant's decision to testify . . . 'must be honored out of that respect for the individual which is the lifeblood of the law.'" (quoting *Dearybury*, 367 S.C. at 39, 625 S.E.2d at 215)); *id.* at 242, 741 S.E.2d at 703 ("In applying its evidentiary rules[,] a [s]tate must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." (quoting *Rock*, 483 U.S. at 56)); *id.* ("Evidence rules [that] 'infringe upon a weighty interest of the accused' but fail to serve any legitimate interest are arbitrary." (quoting *Holmes*, 547 U.S. at 324)); *Wright*, 416 S.C. at 372, 785 S.E.2d at 489 ("The right [to testify] may . . . bow to accommodate other legitimate interests in the criminal trial process. But restrictions of [the] right . . . may not be arbitrary or disproportionate to the purposes they are designed to serve." (quoting *Rivera*, 402 S.C. at 242, 741 S.E.2d at 703)). Accordingly, the PCR court erred in not finding trial counsel deficient.

II. Prejudice

The analysis cannot end with deciding trial counsel was deficient by preventing Petitioner from asserting his right to testify in his own defense. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also Brown*, 340 S.C. at 593, 533 S.E.2d at 309 ("In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different."). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

Rivera was a direct appeal, while the case before us arises out of PCR. In *Rivera*, the supreme court stated "the narrow issue before the [c]ourt is this: Does the erroneous application of evidentiary rules which results in the wholesale exclusion of a defendant's testimony constitute a structural error not subject to harmless-error analysis?" *Rivera*, 402 S.C. at 246, 741 S.E.2d at 705. The supreme court disagreed with the State's contention "that the denial of a defendant's right to testify

does not in all cases render a criminal trial fundamentally unfair or call into question the reliability of the trial as a vehicle for determining guilt or innocence" and that "such an error is appropriately characterized as a 'trial error' which is subject to the harmless-error doctrine." *Id.* The supreme court recognized, "Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis." *Id.*

However, the supreme court qualified that statement, explaining "despite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are 'so basic to a fair trial that their infraction can never be treated as harmless error.'" *Id.* at 246-47, 741 S.E.2d at 705 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991)). The supreme court stated, "'These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards' and which 'affect [ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* at 247, 741 S.E.2d at 705 (alteration in original) (quoting *Fulminante*, 499 U.S. at 309-10). "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.* (quoting *Fulminante*, 499 U.S. at 310). "Essentially, an error is structural if it is 'the type of error which transcends the criminal process.'" *Id.* (quoting *Fulminante*, 499 U.S. at 311).

Our supreme court explained, "The [United States] Supreme Court has found 'an error to be "structural," and thus subject to automatic reversal only in a very limited class of cases.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). Our supreme court noted, "The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis." *Id.* at 247, 741 S.E.2d at 706. However, our supreme court determined such an "error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry." *Id.*

Ultimately, the *Rivera* court held "the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify 'is either respected or denied; its deprivation cannot be harmless.'" *Id.* at 249, 741 S.E.2d at 707 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). "As such, the error is structural in that it is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Id.* at 249-50, 741 S.E.2d at 707 (alteration in original) (footnote omitted) (quoting *Fulminante*, 499 U.S. at 289).

The United States Supreme Court has considered how the concepts of a structural error and ineffective assistance of counsel are both applied in a postconviction proceeding. The Supreme Court in *Weaver* specified it needed to discuss and properly apply "two doctrines [in that case]: structural error and ineffective assistance of counsel. The two doctrines are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." 582 U.S. at 294.

The *Weaver* Court provided "a constitutional error does not automatically require reversal of a conviction." *Id.* (quoting *Fulminante*, 499 U.S. at 306). "If the government can show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' . . . then the error is deemed harmless and the defendant is not entitled to reversal." *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). However, the Court cautioned "some errors should not be deemed harmless beyond a reasonable doubt. These errors . . . [are] known as structural errors." *Id.* (citation omitted). The Court explained, "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* at 294-95. "Thus, the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Id*. at 295 (alteration in original) (quoting *Fulminante*, 499 U.S. at 310). "For the same reason, a structural error 'def[ies] analysis by harmless error standards." *Id.* (alteration in original) (quoting *Fulminante*, 499 U.S. at 309).

The Court further specified, "The precise reason why a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error. There appear to be at least three broad rationales." *Id.*

The Court indicated the first type of structural error occurs when "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* "This is true of the defendant's right to conduct his own defense, which, when exercised, 'usually increases the likelihood of a trial outcome unfavorable to the defendant.'" *Id.* (quoting *McKaskle*, 465 U.S. at 177 n.8). "That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error." *Id.*

Next, the Court described the second type of structural error, which arises when "the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise 'effect of the violation cannot be ascertained.'" *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). "Because the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' the efficiency costs of letting the government try to make the showing are unjustified." *Id.* at 295-96 (quoting *Chapman*, 386 U.S. at 24).

The Court provided the third type of structural error happens when "the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. It therefore would be futile for the government to try to show harmlessness." *Id.* at 296 (citations omitted). However, the Court noted, "These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* "For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* "[T]he term 'structural error' carries with it no talismanic significance as a doctrinal matter." *Id.* at 299. "It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Id.* (quoting *Chapman*, 386 U.S. at 24). "Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Id.* (quoting *Neder*, 527 U.S. at 7).

The Court then addressed what happens when a structural error is not preserved for direct appeal and instead is raised in a postconviction proceeding: "The question . . . becomes what showing is necessary when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim." *Id.* "To obtain relief on the basis of ineffective assistance of counsel, the defendant as a general rule bears the burden to meet two standards." *Id.* "First, the defendant must show deficient performance—that the attorney's error was 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' Second, the defendant must show that the attorney's error 'prejudiced the defense.'" *Id.* at 299-300 (quoting *Strickland*, 466 U.S. at 687).

"The prejudice showing is in most cases a necessary part of a *Strickland* claim. The reason is that a defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" *Id.* at 300 (quoting *Gonzalez-Lopez*, 548 U.S. at 147). "As a rule, therefore, a 'violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.'" *Id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 147). "That said, the concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). "But the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Id*. (quoting *Strickland*, 466 U.S. at 696).

In *Weaver*, the petitioner argued "that under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." *Id.* However, the Court determined that based on its ultimate holding in that case, it did not need to decide if that argument was correct. *Id. Weaver* involved an allegation of ineffective assistance of counsel for the failure to object to a public-trial violation. *Id.* at 292-93. The *Weaver* Court explained that "not every public-trial violation will in fact lead to a fundamentally unfair trial" and "the failure to object to a public-trial violation [does not] always deprive[] the defendant of a reasonable probability of a different outcome." *Id.* at 300. Accordingly, the Court held that "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically." *Id.* at 300-01. Instead, the Court explained that in that situation, "the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair." *Id.* at 301 (citation omitted).

The Court clarified nothing in its reasoning or holding called into question its "precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Id.* The Court provided examples of those decisions, such as the failure to give a reasonable-doubt instruction, a proceeding with a biased judge, and the exclusion of grand jurors on the basis of race. *Id.*

Additionally, it noted it had granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, even though it had not yet explicitly labeled those errors structural. *Id.* The Court stated, "The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. *And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.*" *Id.* at 301-02 (emphasis added).

The *Weaver* Court then explained why, in a public-trial violation case, whether the violation is preserved and raised on direct appeal or raised in a post-conviction proceeding alleging ineffective assistance of counsel dictates whether or not the defendant is required to show prejudice. *Id.* at 302. The Court provided that in the direct appeal situation, the trial court had the opportunity to correct the violation. *Id.* Also, the amount of time and costs before a direct appeal are small when compared to the later postconviction proceeding. *Id.* The Court stated, "When an ineffective-assistance-of-counsel claim is raised in post[-]conviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases." *Id.* "The finality interest is more at risk, *see Strickland*, 466 U.S. at 693-94 (noting the 'profound importance of finality in criminal proceedings'), and direct review often has given at least one opportunity for an appellate review of trial proceedings." *Id.* at 302-03. "[T]he rules governing ineffective-assistance claims 'must be applied with scrupulous care.'" *Id.* at 303 (quoting *Premo v. Moore*, 562 U.S. 115, 122 (2011)).

At the outset of *Weaver*, the Court provided that "the Federal Courts of Appeals and some state courts of last resort [disagree] about whether a defendant must demonstrate prejudice in" ineffective assistance of counsel claims involving structural errors. *Id.* at 293. The Court stated it had granted certiorari to resolve this disagreement but noted it had done "so specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id.* at 294.

Recently, when reviewing the grant of PCR application, this court examined *Weaver* in order to determine if the error in that case was structural. *Carrier v. State*, 441 S.C. 547, 554, 558-60, 895 S.E.2d 679, 683, 685-86 (Ct. App. 2023), *cert. denied*, S.C. Sup. Ct. Order dated Nov. 14, 2024. This court stated, "Prejudice in ineffective-assistance-of-counsel claims is typically analyzed using a harmless error framework. However, a class of errors known as structural defects are not analyzed under the harmless error framework and are sometimes presumed prejudicial." *Id.* at 558, 895 S.E.2d at 685 (citation omitted). "[D]espite the strong

interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* (alteration in original) (quoting *Rivera*, 402 S.C. at 246-47, 741 S.E.2d at 705). "These 'structural defects' only occur when an error affects 'the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* (quoting *Fulminante*, 499 U.S. at 310). "Structural defects comprise 'a very limited class of cases.'" *Id.* (quoting *Rivera*, 402 S.C. at 247, 741 S.E.2d at 705). "When a structural error is raised in the context of an ineffective . . . assistance claim, . . . finality concerns are far more pronounced." *Id.* (omissions in original) (quoting *Weaver*, 582 U.S. at 305). This court recognized Justice Alito's concurrence in *Weaver* had described two ways for a criminal defendant to meet "the *Strickland* prejudice requirement[:] [a] defendant must demonstrate either that the error at issue was prejudicial or that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary." *Id.* (quoting *Weaver*, 582 U.S. at 308 (Alito, J., concurring in judgment)).

This court summarized the Supreme Court's guidance in *Weaver* for classifying structural errors,[8] stating: "The Supreme Court has identified a narrow set of scenarios that are structural errors as a matter of law and automatically warrant a presumption of prejudice." *Carrier*, 441 S.C. at 558-59, 895 S.E.2d at 685 (citing *Weaver*, 582 U.S. at 301 (noting three examples of structural errors: biased judges, exclusions of grand jurors based on race, and failures to give reasonable-doubt instructions)). "Beyond this, the Court has identified three '*Weaver*' categories in which structural errors tend to fall: (1) violations of rights designed to protect some interest of the defendant other than his interest against erroneous convictions; (2) errors with unmeasurable effects; and (3) errors that necessarily result in fundamental unfairness." *Id.* at 559, 895 S.E.2d at 685 (citing *Weaver*, 582 U.S. at 295-96).

This court further explained, "The first *Weaver* category encompasses violations of rights designed to protect some interest of the defendant other than his interest against an erroneous conviction." *Carrier*, 441 S.C. at 559, 895 S.E.2d at 685. "The classic example of such a right is the right to testify at one's own criminal

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[8] "Before *Weaver* . . . , courts often treated structural errors as immune to the need for a prejudice analysis." *Carrier*, 441 S.C. at 558 n.9, 895 S.E.2d at 685 n.9. "However, in *Weaver*, the Court found that violation of the right to a public trial, although structural, 'does not always lead to a fundamentally unfair trial,' meaning the burden of proving prejudice remained." *Id.* (quoting *Weaver*, 582 U.S. at 304).

trial, which when exercised 'usually increases the likelihood of a trial outcome unfavorable to the defendant' and thus is designed to protect an interest *other than* the interest against an erroneous conviction." *Id.* at 559, 895 S.E.2d at 685-86 (quoting *Weaver*, 582 U.S. at 295). "[T]he second category . . . encompasses errors that result in effects too difficult to measure . . . ." *Id.* at 559, 895 S.E.2d at 686. "[T]he third category includes errors that 'always result in fundamental unfairness.'" *Id.* at 560, 895 S.E.2d at 686 (quoting *Weaver*, 582 U.S. at 296).

This court also looked at the *Weaver* decision in a direct appeal, noting "an error is structural if: (1) the right at issue is designed to protect an interest other than the defendant's interest in being wrongly convicted; (2) the effects of the error are 'simply too hard to measure'; or (3) the error always results in fundamental unfairness." *State v. Wright*, 432 S.C. 365, 371, 852 S.E.2d 468, 471-72 (Ct. App. 2020) (quoting *Weaver*, 582 U.S. at 295), *aff'd*, 439 S.C. 101, 886 S.E.2d 206 (2023). This court found the error in that case "b[ore] all three of these traits." *Id.* at 371, 852 S.E.2d at 472.

Rivera provides the denial of a defendant's right to testify on his own behalf is a structural error. *Weaver* explains that for a certain type structural error, the normal *Strickland* prejudice examination may not apply. *Weaver*, 582 U.S. at 300. *Weaver* reiterates *Strickland*'s instruction that "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Weaver*, 582 U.S. at 300 (quoting *Strickland*, 466 U.S. at 696). As *Rivera* was decided before *Weaver*—and because it was a direct appeal—our supreme court did not classify the type of structural error the denial of the right to testify. The error here falls into more than one of the categories of structural errors provided by *Weaver*. *See Weaver*, 582 U.S. at 296 (providing the "categories are not rigid" and "more than one of these rationales may be part of the explanation for why an error is deemed to be structural"). Specifically, I believe, relying on our supreme court's reasoning in *Rivera*, denying a defendant his right to testify on his own behalf falls into the category of structural error that always results in fundamental unfairness. *See Weaver*, 582 U.S. at 296 (providing the third type of structural error happens when "the error always results in fundamental unfairness"); *id*. at 300 ("[T]he *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" (quoting *Strickland*, 466 U.S. at 696)); *Rivera*, 402 S.C. at 249, 741 S.E.2d at 707 ("[T]he right of an accused to testify in his defense is fundamental to the trial process . . . ."); *id.* at 249-50, 741 S.E.2d at 707 ("[T]he error . . . is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" (last

alteration in original) (quoting *Fulminante*, 499 U.S. at 289)); *id.* at 246, 741 S.E.2d at 705 (disagreeing with the assertion "that the denial of a defendant's right to testify does not in all cases render a criminal trial *fundamentally unfair* or call into question the reliability of the trial as a vehicle for determining guilt or innocence" (emphasis added)); *see also State v. Loher*, 398 P.3d 794, 813 (Haw. 2017) ("A trial court's interference with the defendant's ability to make an informed, unrestricted decision whether to waive a critical constitutional privilege undermines 'that fundamental fairness essential to the very concept of justice.'" (quoting *State v. Grindles*, 777 P.2d 1187, 1190 (Haw. 1989))); *State v. Cantu*, 547 P.3d 477, 482 (Kan. 2024) (stating that the United Stated Supreme "Court has identified the right to testify as . . . essential to a fair trial"); *id.* at 487 ("[W]here the impairment [of a defendant's right to testify] is closer to absolute, it 'implicates the basic consideration of fairness' expected in a criminal trial." (quoting *State v. McDaniel*, 395 P.3d 429, 439 (Kan. 2017))); *id.* ("[A]n analysis of whether the outcome of the trial would have been different if [the defendant] had been allowed to testify is irrelevant because he [wa]s prejudiced by this lack of essential due process which rendered his criminal trial fundamentally unfair."); *State v. Hampton*, 2000-0522, p. 13 (La. 3/22/02); 818 So. 2d 720, 729 ("*Rock* . . . spoke of the right to testify as among those rights that '*are essential to due process of law in a fair adversary process*.' Therefore, such language unmistakably places the defendant's right to testify among those protections without which a criminal trial is 'structurally flawed.'" (quoting *Rock*, 483 U.S. at 51)); *Irwin v. State*, 400 N.W.2d 783, 785 (Minn. Ct. App. 1987) (recognizing that "a criminal defendant['s] . . . right to testify in his own defense" "is a basic right, fundamental to a fair trial").

Accordingly, the traditional method of proving prejudice described in *Strickland*—which requires a PCR applicant to prove but for counsel's error, the result would have been different—is not appropriate here. *See Weaver*, 582 U.S. at 300 ("[T]he concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (quoting *Strickland*, 466 U.S. at 694)); *id.* at 308 (Alito, J., concurring in judgment) (explaining a defendant may meet "the *Strickland* prejudice requirement" two ways: by demonstrating either (1) "that the error at issue was prejudicial or [(2)] that it belongs to the narrow class of attorney errors that are tantamount to a denial of counsel, for which an individualized showing of prejudice is unnecessary"); *see also id.* at 300 (majority opinion) ("[W]hen a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" (quoting

Strickland, 466 U.S. at 696)). Therefore, because trial counsel was deficient as described previously and the prejudice requirement is met due to the fundamental unfairness in denying a criminal defendant his right to testify, the PCR court erred in denying Petitioner's PCR application.

III. Conclusion

The PCR court erred in finding trial counsel was not ineffective. The PCR court incorrectly determined trial counsel was not deficient for failing to inform the trial court of Petitioner's change in desire to testify at the beginning of the morning proceeding before the trial court ruled on the jury charges. As expressed in *Rivera*, the defendant's right to testify impacts the fundamental fairness of the proceeding. Accordingly, the PCR court erred in applying the traditional *Strickland* prejudice requirement. Therefore, I would reverse the PCR court's decision and send the case to general sessions.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF GENERAL SESSIONS

Appellate Case No. 2020-001265

William H. Seals, Jr., Circuit Court Judge

Marcus Dwain Wright, ... Appellant,

v.

State of South Carolina, ... Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. 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)?

STATEMENT OF THE CASE

The Appellant, Marcus Dwain Wright, was indicted for Murder, Trafficking Powder Cocaine, Possession with Intent to Distribute Cocaine Base, Possession of a Weapon During a Violent Crime. A jury trial was held in Horry County on June 17-21, 2013, the Honorable John C. Hayes presiding. The Appellant was represented by L. Morgan Martin and Edward M. Brown. The State was represented by Donna E. Elder, Assistant Solicitor for the Fifteenth Judicial Circuit. The jury returned a verdict of guilty on all charges. The Appellant was sentenced to life on the murder, five years on the weapons charge, twenty-five years on the trafficking charge, and fifteen years for the possession with intent to distribute cocaine base. All sentences were run concurrent to each other and consecutive to the life sentence. Appellant timely filed notice of appeal. On appeal this Court affirmed the Appellant's convictions and sentences in State v. Marcus Dwain Wright, Opinion No. 5401, filed April 27, 2016. The Appellant timely filed an action for post conviction relief. A hearing was held on December 14, 2018, the Hon. ___ presiding. Beattie Ashmore represented Appellant at the PCR hearing. Johnny Ellis James of the South Carolina Attorney General's Office represented the State. From that hearing an order was entered denying Appellant relief. Appellant filed a motion to alter or amend judgment from which the circuit court entered an order denying relief in part and granting relief in part. Based on that ruling the court then issued the AMENDED ORDER OF DISMISSAL on which this appeal is based. J. Falkner Wilkes represents Appellant on appeal. Chelsey F. Marto, of the South Carolina Attorney General's Office represents the Respondent, State of South Carolina.

ARGUMENT

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (*citing* Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d [**840] at 527 (*citing* Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))." Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

I. THE DECISION OF THE PCR COURT IS 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).

Prior to the defense putting up its case in the Appellant's trial the court advised the Appellant of his Fifth Amendment rights. With the *proviso* that he was not bound by his decision the court inquired as to whether or not the Appellant had decided to testify. The Appellant responded that he would exercise his right to remain silent. The defense case proceeded and after failing to introduce the testimony of a single witness the defense rested without consulting with the Appellant. After brief discussions about charges, and without any ruling, court concluded for the day. Prior to the trial resuming on the following morning the Appellant advised trial counsel that he wanted to testify. Apparently unfamiliar with the relevant law, and despite the trial court's earlier *proviso*, trial counsel informed the Appellant that it was too late for him to testify. Counsel failed to inform the court prior to the trial resuming that the Appellant wanted to testify on his own behalf. When the trial resumed counsel still failed to inform the court that the

Appellant wanted to testify. Instead of moving immediately to reopen the defense case counsel proceeded to continue the discussions about jury charges. This led to a ruling denying the defense requests to charge manslaughter and self-defense. When the defense indicated that it was ready to proceed with closing arguments the Appellant interrupted and asked to speak. Knowing what the Appellant wanted to say defense counsel informed the court that Appellant had changed his mind overnight and wanted to testify. The court denied the Appellant the right to testify stating that counsel should have brought the issue to the court's attention first thing in the morning prior to the court's ruling on the requests to charge.

Despite the record being clear that counsels' misunderstanding of the law and failure to act timely led to the denial of the Appellant's right to testify, the PCR court found no deficiency on the part of trial counsel under the first prong of its *Strickland* analysis. Then, in its application of *Strickland's* second prong the PCR court applied a harmless error analysis despite our Supreme Court having clearly held that the issue "is not amenable to harmless-error analysis and is reversible without a particularized prejudice inquiry." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

Relevant Facts from the Criminal Trial

After the State rested its case in the Appellant's trial defense counsel made motions for directed verdicts on all charges. (A. p. 1044). The motions were denied and the court's ruling was followed by a discussion of the Appellant's potential impeachment offenses. (A. p. 1046). The court then advised the Appellant as to his basic rights, including his right to testify or remain silent. Immediately after advising the Appellant of his rights the court inquired as to whether or not at that point the defendant thought he would testify: "And I ask you now -- *you're not bound*

at this point, but have you determined whether you wish to testify or exercise your right to remain silent?" The Appellant responded "Exercise my right to remain silent." (A. p. 1048, l. 10-12). The case proceeded with the defense calling Christopher McCray as a witness. McCray was presented *in camera* to first determine the admissibility of his testimony. (A. p. 1051). The court ruled McCray's testimony inadmissible and immediately after its ruling the court inquired whether the defense had any additional witnesses. Without conferring with the Appellant trial counsel immediately responded: "We have no further witnesses." (A. p. 1067, l. 13-15). Then, still without a break, the jury was brought back in and the defense rested on the record. (A. pp. 1067-1068). The jury was then released for the day. (A. p. 1069). After the jury had been released the prosecutor initiated a discussion about potential jury charges. (A. p. 1069). No rulings were made and court concluded for the day with the trial judge indicating that the discussions would continue the following morning. (A. p. 1078).

Prior to the trial resuming the following morning the Appellant informed defense counsel Brown that he wanted to testify. Brown immediately informed his co-counsel Martin. (A. pp. 227-228; 1083-1084). Prior to the trial resuming neither Brown nor Martin immediately informed the court that the Appellant wanted to testify. (A. pp. 1078-1079). When the trial did resume neither Brown nor Martin informed the court that the Appellant had changed his mind and wanted to testify. (A. pp. 1078-1079). Instead, when the trial resumed and the case turned over to the defense, trial counsel engaged in lengthy discussions about requests to charge. (A. pp. 1078-1082). After those discussions the court entered a ruling denying the defense's requests to charge self-defense and manslaughter. (A. pp. 1082-1083). Still neither Brown nor Martin alerted the court that the Appellant had informed them that he wanted to testify. When asked if the defense

was ready to proceed with closing arguments Martin replied "Yes". (A. p. 1083, l. 14). At that point the Appellant interrupted and asked permission to speak. (A. p. 1083, ll. 17-18). Martin, knowing what Wright wanted to say, finally informed that court that Wright wanted to testify:

> Mr. Martin: "Judge, let me say for the record our client has come out this morning and tells me that he's changed his mind and he wants to testify. I have informed him that in my opinion that matter has passed us by as based on his assertion to the Court that he wished to remain silent. We have rested, but out of an abundance of precaution for the record, I don't want to cut him off, and I'll tell the Court that is what he wants to address with the Court." (A. pp. 1083, l. 12 - 1084, l. 4).

The trial court immediately responded: "No. The record is closed." (A. p. 1084, ll. 7-8).

A review of the record of the court's comments immediately following its ruling shows that the court initially based its ruling on the mistaken belief that the Appellant had only decided to testify after hearing the court's ruling on the requests to charge: "Now that he has seen how the Court has ruled, he wants to adjust his strategy, I guess. I don't know what he wants to do, quite frankly, but it would appear that the desire now to testify is the result of rulings by the Court." (A. p. 1084, ll. 8-12). Martin reminded the court that when it asked Appellant whether he would testify that it specifically told him that he was not bound by that decision. (A. p. 1084, ll. 16-18). The discussion then focused on the timing of the Appellant's decision to testify:

> The Court: Did he indicate to you, Mr. Brown, prior to coming in here that he wished to testify?
>
> Mr. Brown: He indicated -- I went back to see him, and Mr. Wright did indicate that he wanted to testify, and ---.
>
> The Court: All right. *And why wasn't that called to the Court's attention before the Court ruled*?
>
> Mr. Brown: Well, Your Honor, no, that was this morning, not ---.

> The Court: I know, but I just ruled on the two voluntary manslaughter and self-defense, just a few minutes ago, and he did not, when he came in here, neither he , nor you, nor Mr. Martin made any -- any -- any overture to the Court that he wanted to change his mind and testify. *That would have been the time, before the Court ruled.*

(A. p. 1086, l. 17 - p. 1087, l. 8).

Even after being informed that the Appellant's decision to testify had been made prior to the trial resuming, the trial court restated its belief that the Appellant had waited until the court had made a ruling on the charges before he decided to testify. (A. p. 1087). This time Martin spoke up and was unequivocal: "Well, Judge, let me say this. That is not how it happened." (A. p. 1087, ll. 16-17). Martin went on to explain exactly what happened and how he had informed the Appellant early that morning before the trial resumed that it was too late for him to testify.

> Mr. Martin: For the clarity of the record, when he came out -- Mr. Brown came out, said he wants to testify. The when he came out, we sat here and talked and I told him that time had passed him by, that we had rested based on his assertion that he didn't want to testify, and I -- I didn't bring it up before we got into the motion, so for whatever difference that makes, he did not wait until you ruled to so say anything about that. He said that prior to that.

(A. p. 1087, ll. 17-24). Despite it being clear that the Appellant had not waited until after the Court's ruling before deciding to testify, the trial court again denied the Appellant the right to testify, now citing *counsel's failure* to inform the court prior to the court's ruling on the requested jury charges: "Well, it wasn't called to the Court's attention until that point [after the court's ruling on charges]. So I'm not going to allow him to testify. The record is closed." (A. p. 1087, l. 25 - p. 1088, l. 4).

A. The PCR Court Erred in Failing to Find Trial Counsel's Performance Deficient.

"[T]he right of an accused to testify in his defense is fundamental to the trial process and

transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 n.8. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

In the Appellant's case a timely motion to reopen the defense to allow the Appellant to testify would have been granted. The court's comments make that clear. The only basis stated for denying the Appellant's request to testify was that the court had already ruled on the jury charge requests. The court specifically cited counsel's failure to alert the court as soon as the case resumed that morning stating "that would have been the time, before the Court ruled." Martin specifically stated to the trial court, not once but twice, that at the time the Appellant informed them that he had changed his mind and wanted to testify Martin believed that it was too late and therefore took no action to inform the court. Counsel's inaction was clearly driven by a misunderstanding of the applicable law. Had counsel understood the applicable law they would have known that a motion to reopen would not only have been timely, but overwhelmingly supported by law if the motion had been made immediately upon the trial resumed that morning.

First, counsel failed to appreciate the fundamental nature of the right at issue. "A criminal defendant has a right to testify on his or her own behalf." Rock v. Arkansas, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is rooted in the Fourteenth Amendment due process right, the Sixth Amendment Compulsory Process Clause, and the Fifth Amendment's guarantee against compelled testimony. *Id*. at 51-53. This Court has recognized the importance of a defendant's testimony in his or her own case: "Where the very point of a trial is to determine

whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." State v. Rivera, 402 S.C. 225, 244, 741 S.E.2d 694, 704 (2013) *quoting* United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985).

Second, counsel should have considered whether the denial of the request would serve any purpose or its granting pose any prejudice to the State. “Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.*, at 295. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.” Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711 (1987). At the point that counsel was informed by the Appellant that he wanted to testify counsel should have realized that denying the motion would serve no legitimate interests and allowing it would pose no prejudice to the State. Given the fundamental nature of the right to testify defense counsel should have known that a motion to reopen would have been granted if made immediately upon trial resuming that morning. Clearly counsel failed to conduct a proper analysis of the issue and as a result failed to immediately inform the court that the Appellant wanted to testify. Instead counsel misinformed the Appellant that it was too late to make the request because the defense had rested.[1] Counsel clearly did not understand the law applicable. “An attorney's ignorance of a

[1]To the extent that Martin’s PCR testimony may imply, contrary to his representations to the trial judge, that his inaction was based on Wright’s having “reconciled himself” that testifying was not in his best interests, any alleged decision by the Appellant, or impression that Appellant may have given Martin at that point, would have been tainted by Martin’s incorrect advice that it was already “too late” for Appellant to testify.

point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

Given that counsel's decision not to timely move to reopen was based on an obvious misunderstanding of the law, it can not in any way constitute a valid strategic decision. "No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. *See* Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (*Pleicones, J., dissenting*) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved")." Abney v. State, 408 S.C. 41, 55-56, 757 S.E.2d 544, 551-52 (Ct. App. 2014) *Justice Few dissenting.*

In Rivera this Court emphasized the importance of a defendant's right to testify in his own behalf:

> The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("[F]undamental to a personal defense . . . is an accused's right to present his own version of the events in his own words." (emphasis added)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53 (*quoting* Harris v. New York, 401 U.S. 222, 230, 91 S. Ct. 643, 28 [*242] L. Ed. 2d 1 (1971)). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Id*. at 51. "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id*. (*quoting* Faretta v. California, 422 U.S. 806, 819 *n.*15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id*. at 52 (*citing* Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled

> testimony." *Id.* "'The choice of whether to testify in one's own defense . . . is an exercise of [that] constitutional privilege.'" *Id.* at 53 (*quoting* Harris, 401 U.S. at 230) (*omission in original*). "'A person's right . . . to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; . . . .'" Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (*quoting* In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (*emphasis omitted*)).

State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013).

In Rivera the trial judge relied on Rule 403, SCRE in excluding Rivera's testimony. Although it is unclear what particular rule was relied on by the trial court in the Appellant's case, the analysis should be the same. "Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote . . . ." *Id.*" State v. Rivera, 402 S.C. 225, 245, 741 S.E.2d 694, 704-05 (2013) (*quoting* Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (2006). Although Rivera did not specifically involve a motion to reopen the case to allow the defendant to testify, this Court in Rivera cited United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) in support of its analysis. Walker dealt directly with the denial of a motion to reopen to allow a defendant to testify and reversed based on the same analysis applied by this Court in Rivera. As in the Appellant's case, the motion to reopen in Walker was made after the defense rested but before closing arguments or jury instructions. In its analysis the court in Walker noted that reopening the case for Walker to testify posed no prejudice to the prosecution's case:

> "The . . . testimony [sought to be admitted through the motion to reopen] would not have carried a distorted importance merely by being introduced after a reopening. First of all, since neither closing arguments nor jury instructions had yet been delivered, the . . . testimony would have been heard in the orderly flow, with perhaps an intervening continuance, of the defense testimony. But even assuming that the testimony might have derived undue emphasis from its appearance subsequent to all parties resting, a cautionary instruction by the trial judge might have remedied that potential problem. 596 F.2d at 779."

United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985).

Applying Walker in the Appellant's case shows that a motion prior to the court's ruling on jury charges would not have distorted the importance of the Appellant's testimony. The Appellant's testimony would have been heard by the jury in the orderly flow and the court could have given an instruction for the jury not to put any importance on the fact that the defense reopened its case to offer the Appellant's testimony. Counsel should have been aware that an immediate motion to reopen would have met every criteria to be granted. As a result of trial counsel's clear misunderstanding of the law he informed Appellant that it was too late for him to testify and failed to make a motion to reopen. But for the failure of counsel to understand the applicable law and timely raise the issue the Appellant would have been allowed the opportunity to testify. Trial counsel clearly failed to effectively protect the Appellant's right to testify. The PCR court therefore erred in finding no deficiency in counsel's performance under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

B. The PCR Court Erred in Applying Harmless Error Review Where Appellant Was Denied the Right to Testify.

Despite having found no deficiency on the part of trial counsel the PCR court went on to conduct a prejudice analysis under the second prong of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In doing so the PCR court applied a harmless-error analysis to the denial of the Appellant's right to testify on his own behalf: "As to prejudice, first, the Court finds that even if Counsels had immediately confronted the trial court with Applicant's new found desire to testify, *there is not a reasonable probability the outcome would have been different.*" (A. p. 27). The PCR court's application of a harmless error analysis is in direct conflict with our Supreme

Court's holding in Rivera and therefore constitutes an error of law. In Rivera the Court explicitly held that the improper refusal to permit a defendant to testify in his own defense is a structural error that requires reversal without a particularized prejudice inquiry: "The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis. We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry." (*citations omitted*)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

Here the PCR court clearly applied a harmless-error analysis to the denial of Applicant's right to testify. Based on its own determination of the Applicant's credibility the PCR court found that the outcome of the criminal trial would not have changed even had the Applicant been allowed to testify. This is the precisely the analysis prohibited in Rivera and federal cases:

> "In sum, we are persuaded that the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 *n.8*. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)."

State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013). The PCR court's application of a harmless error analysis in Appellant's case therefore constitutes an error of law.

Conclusion

Based on the foregoing this Court should reverse the decision of the PCR court and remand the case for a new trial.

Respectfully submitted,

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November 12, 2022.

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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 pursed 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,

ALAN WILSON
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Senior Assistant Attorney General

BY:_____
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ATTORNEYS FOR RESPONDENT

April 15, 2023

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
William H. Seals, Jr., Circuit Court Judge

Circuit Court Case No. 2017-CP-26-02564
Appellate Case No.: 2020-001265

Marcus Dwain Wright, 289646, ... Petitioner,

v.

State of South Carolina,. . . . . Respondent.

REPLY BRIEF

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April 23, 2023.

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ARGUMENT IN REPLY

The Respondent argues that trial counsel's failure to notify the court immediately that his client had decided to testify was based on a reasonable strategy. This argument presumes that it can somehow be permissible for a defendant's attorney to decide, over the will of a competent defendant, whether the defendant will be allowed to exercise the right to testify in his or her own behalf. This is repugnant to the constitutional right to testify in one's own behalf in a criminal case. The Respondent is clearly arguing that an attorney can prevent a competent defendant from testifying if it conflicts with the attorney's trial strategy. The Respondent fails to cite authority for the premise that a defendant's right to testify rests on whether or not the defense attorney believes that it fits well with the attorney's trial strategy, or that otherwise that preventing a defendant from exercising the right to testify can in any way be considered a reasonable trial strategy under Strickland. To the extent that a defendant's exercise of his or her right to testify may not appear beneficial to the defense, the decision of whether or not to testify remains a personal right that the defendant alone must be allowed to make. The right to testify in one's own defense is a fundamental right of prime importance. Rock v. Arkansas, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); State v. Rivera, 402 S.C. 225, 244, 741 S.E.2d 694, 704 (2013) *quoting* United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985). If Appellant intentionally misled the Appellant by telling him that it was too late to do anything and refuse to immediately inform the court to prevent the Appellant from testifying

The State argues that there is no evidence that the trial judge would have granted a motion to reopen even had one been made before the trial resumed that morning. This overlooks the fact that at the point the Appellant informed counsel of his desire to testify there was no valid

basis for the court to deny the Appellant the right to testify. The only stated basis for the trial court's refusal to allow the Appellant to testify was that the Appellant had waited until the court had made a ruling before he changed his mind and decided that he wanted to testify thus giving him an unfair opportunity to conform his testimony to the court's rulings. The record is clear that this was not the case and therefore, had counsel immediately informed the court of his client's desire to testify before the trial resumed and the court made rulings on the jury charges, the court would have had to grant the Appellant that right. Had it not, the issue would have been preserved for direct appeal and there would have been no facts to support a denial of Appellant's right to testify. In that case the Appellant would have been entitled to a reversal of any conviction in direct appeal.

The Respondent's statement that Appellant "does not refute the PCR court's finding he was not prejudiced by trial counsel's performance" is a complete mischaracterization of the Appellant's argument. Clearly the Appellant has argued that trial counsel's deficient performance prejudiced him, so much so that a particularized analysis of specifics and degree of that prejudice is not necessary under the facts of the case and the holding of State v. Rivera,, 402 S.C. 225, 741 S.E.2D 694 (2013). It is simply not necessary to engage in a discussion as to how valuable to the case his testimony might have been and therefore how much prejudice might have occurred from its exclusion. The normal analysis under Strickland to evaluate the strength of evidence in light of the overall evidence in a case is not applicable. The prejudice lies in the violation of the Appellant's right to testify. The right to testify is not based in on how good or bad for the case a defendant's testimony is judged to be. "[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to

testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 n.8. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

As to all issues raised in the Respondent's Brief not specifically addressed herein, Appellant relies on those facts and arguments presented in the Appellant's Brief.

Conclusion

Based on the foregoing, and as well as the arguments presented in the Appellant's Brief, the decision of the circuit court should be reversed, the Appellant's convictions reversed, the Appellant's sentences set aside, and a new trial granted.

Respectfully submitted,

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April 23, 2023.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
William H. Seals, Jr., Circuit Court Judge

Circuit Court Case No. 2017-CP-26-02564
Appellate Case No.: 2020-001265

Marcus Dwain Wright, 289646, ... Petitioner,

v.

State of South Carolina,. . . . . Respondent.

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

January 26, 2021.

PETITION

Questions Presented

1. Is the PCR court's decision contrary to the Fifth Amendment and in direct conflict with this Court's ruling in State v. Rivera, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013)?

Procedural History

The applicant, Marcus Dwain Wright, was convicted of murder, trafficking powder cocaine, possession with intent to distribute cocaine base, and possession of a weapon during a violent crime after a jury trial. The applicant was represented by L. Morgan Martin and Edward M. Brown. Wright was sentenced to life on the murder, five years on the weapons charge, twenty-five years on the trafficking charge, and fifteen years for the possession with intent to distribute cocaine base. All sentences were run concurrent to each other and consecutive to the life sentence. The applicant filed a direct appeal. The court of appeals affirmed in State v. Wright, 416 S.C. 353, 374, fn. 2 785 S.E.2d 479, 490, fn. 2 (Ct. App. 2016). The Petitioner then filed a post conviction relief action. A hearing was held, after which an order was entered denying Petitioner relief. Petitioner filed a motion to alter or amend judgment. The circuit court entered an order on the Petitioner's motion denying relief in part and granting relief in part. Based on that ruling the court then issued the AMENDED ORDER OF DISMISSAL from which this petition is taken.

Standard of Review

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (*citing* Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law *de novo*, with

no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d [**840] at 527 (*citing* Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).” Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

I. THE DECISION OF THE PCR COURT IS CONTRARY TO THE FIFTH AMENDMENT AND IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN STATE V. RIVERA, 402 S.C. 225, 247, 741 S.E.2D 694, 706 (2013).

Prior to the defense putting up its case in the Petitioner's trial the court advised the Petitioner of his Fifth Amendment rights. With the proviso that he was not bound by his decision the court inquired as to whether or not the Petitioner had decided to testify. The Petitioner responded that he would exercise his right to remain silent. The defense case proceeded and after failing to introduce the testimony of a single witness the defense rested without consulting with the Petitioner. After brief discussions about charges, and without any ruling, court concluded for the day. Prior to the trial resuming on the following morning the Petitioner advised trial counsel that he wanted to testify. Trial counsel informed the Petitioner that it was too late for him to testify and took no action to inform the court prior to the trial resuming. When trial resumed counsel still failed to inform the court that the Petitioner wanted to testify. Instead, counsel proceeded to continue the discussions about jury charges. This lead to a ruling denying the defense requests to charge manslaughter and self-defense. When the defense indicated that it was ready to proceed with closing arguments the Petitioner interrupted and asked to speak. Counsel then informed the court that Petitioner had changed his mind overnight and wanted to testify. The court denied the Petitioner the right to testify stating that counsel should have brought that to the court's attention first thing in the morning prior to the court's ruling on the requests to charge.

Despite the record being clear that counsel's misunderstanding of the law and failure to act timely led to a denial of the Petitioner's right to testify, the PCR court found no deficiency on the part of counsel. Despite having found no deficiency the PCR court went on to compound its error by conducting a harmless error analysis under Strickland v. Washington, 466 U.S. 668, 671, 104 S. Ct. 2052, 2056 (1984) rather than applying the analysis mandated by this Court in State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 706 (2013). The decision of the PCR court is therefore in direct conflict with the Fifth Amendment and this Court's opinion in Rivera.

Facts

After the State rested its case in the Petitioner's trial defense counsel made motions for directed verdicts on all charges. (A. p. 1044). The motions were denied and the court's ruling was followed by a discussion of the Petitioner's potential impeachment offenses. (A. p. 1046). The court then advised the Petitioner as to his basic rights, including his right to testify or remain silent. Immediately after advising the Petitioner of his rights the court inquired as to whether or not at that point the defendant thought he would testify: "And I ask you now -- *you're not bound at this point*, but have you determined whether you wish to testify or exercise your right to remain silent?" The Petitioner responded "Exercise my right to remain silent." (A. p. 1048, l. 10-12). The case proceeded with the defense calling Christopher McCray as a witness. McCray was presented *in camera* to first determine the admissibility of his testimony. (A. p. 1051). The court ruled McCray's testimony inadmissible and immediately after its ruling the court inquired whether the defense had any additional witnesses. Without conferring with the Petitioner defense counsel immediately responded: "We have no further witnesses." (A. p. 1067, l. 13-15). Then, still without a break, the jury was brought back in and the defense rested on the record. (A. pp. 1067-1068). The jury was then released for the day. (A. p. 1069). After the jury had been

released the prosecutor initiated a discussion about potential jury charges. (A. p. 1069). No rulings were made and court concluded for the day with the trial judge indicating that the discussions would continue the following morning. (A. p. 1078).

Prior to the trial resuming the following morning the Petitioner informed defense counsel Brown that he wanted to testify. Brown immediately informed his co-counsel Martin. (A. pp. 227-228; 1083-1084). Prior to the trial resuming neither Brown nor Martin immediately informed the court that the Petitioner wanted to testify. (A. pp. 1078-1079). When the trial did resume neither Brown nor Martin informed the court that the Petitioner had changed his mind and wanted to testify. (A. pp. 1078-1079). Instead, when the trial resumed and the case turned over to the defense, trial counsel engaged in lengthy discussions about requests to charge. (A. pp. 1078-1082). After those discussions the court entered a ruling denying the defense's requests to charge self-defense and manslaughter. (A. pp. 1082-1083). Still neither Brown nor Martin alerted the court that the Petitioner had informed them that he wanted to testify. When asked if the defense was ready to proceed with closing arguments Martin replied "Yes". (A. p. 1083, l. 14). At that point the Petitioner interrupted and asked permission to speak. (A. p. 1083, ll. 17-18). Martin, knowing what Wright wanted to say, finally informed that court that Wright wanted to testify:

> Mr. Martin: "Judge, let me say for the record our client has come out this morning and tells me that he's changed his mind and he wants to testify. I have informed him that in my opinion that matter has passed us by as based on his assertion to the Court that he wished to remain silent. We have rested, but out of an abundance of precaution for the record, I don't want to cut him off, and I'll tell the Court that is what he wants to address with the Court." (A. pp. 1083, l. 12 - 1084, l. 4).

The trial court immediately responded: "No. The record is closed." (A. p. 1084, ll. 7-8).

A review of the record of the court's comments immediately following its ruling shows that the court initially based its ruling on the mistaken belief that the Petitioner had only decided to testify after hearing the court's ruling on the requests to charge: "Now that he has seen how the Court has ruled, he wants to adjust his strategy, I guess. I don't know what he wants to do, quite frankly, but it would appear that the desire now to testify is the result of rulings by the Court." (A. p. 1084, ll. 8-12). Martin reminded the court that when it asked Petitioner whether he would testify that it specifically told him that he was not bound by that decision. (A. p. 1084, ll. 16-18). The discussion then focused on the timing of the Petitioner's decision to testify:

> The Court: Did he indicate to you, Mr. Brown, prior to coming in here that he wished to testify?
>
> Mr. Brown: He indicated -- I went back to see him, and Mr. Wright did indicate that he wanted to testify, and ---.
>
> The Court: All right. *And why wasn't that called to the Court's attention before the Court ruled*?
>
> Mr. Brown: Well, Your Honor, no, that was this morning, not ---.
>
> The Court: I know, but I just ruled on the two voluntary manslaughter and self-defense, just a few minutes ago, and he did not, when he came in here, neither he , nor you, nor Mr. Martin made any -- any -- any overture to the Court that he wanted to change his mind and testify. *That would have been the time, before the Court ruled.*

(A. p. 1086, l. 17 - p. 1087, l. 8).

Even after being informed that the Petitioner's decision to testify had been made prior to the trial resuming, the trial court restated its belief that the Petitioner had waited until the court had made a ruling on the charges before he decided to testify. (A. p. 1087). This time Martin spoke up and was unequivocal: "Well, Judge, let me say this. That is not how it happened." (A. p. 1087, ll. 16-17). Martin went on to explain exactly what happened and how he had informed

the Petitioner early that morning before the trial resumed that it was too late for him to testify.

> **Mr. Martin**: For the clarity of the record, when he came out -- Mr. Brown came out, said he wants to testify. The when he came out, we sat here and talked and I told him that time had passed him by, that we had rested based on his assertion that he didn't want to testify, and I -- I didn't bring it up before we got into the motion, so for whatever difference that makes, he did not wait until you ruled to so say anything about that. He said that prior to that.

(A. p. 1087, ll. 17-24). Despite it being clear that the Petitioner had not waited until after the Court's ruling before deciding to testify, the trial court again denied the Petitioner the right to testify, now citing *counsel's failure* to inform the court prior to the court's ruling on the requested jury charges: "Well, it wasn't called to the Court's attention until that point [after the court's ruling on charges]. So I'm not going to allow him to testify. The record is closed." (A. p. 1087, l. 25 - p. 1088, l. 4).

Violation of Petitioner's Right to Testify in His Own Behalf

"[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 n.8. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

In the Petitioner's case a timely motion to reopen the defense to allow the Petitioner to testify would have been granted. The court's comments make that clear. The only basis stated for denying the Petitioner's request to testify was that the court had already ruled on the jury charge requests. The court specifically cited counsel's failure to alert the court as soon as the case resumed that morning stating "that would have been the time, before the Court ruled." Martin

specifically stated to the trial court, not once but twice, that at the time the Petitioner informed them that he had changed his mind and wanted to testify Martin believed that it was too late and therefore took no action to inform the court. Counsel's inaction was clearly driven by a misunderstanding of the applicable law. Had counsel understood the applicable law they would have known that a motion to reopen would not only have been timely, but overwhelmingly supported by law if the motion had been made immediately upon the trial resumed that morning.

First, counsel failed to appreciate the fundamental nature of the right at issue. "A criminal defendant has a right to testify on his or her own behalf." Rock v. Arkansas, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is rooted in the Fourteenth Amendment due process right, the Sixth Amendment Compulsory Process Clause, and the Fifth Amendment's guarantee against compelled testimony. *Id*. at 51-53. This Court has recognized the importance of a defendant's testimony in his or her own case: "Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." State v. Rivera, 402 S.C. 225, 244, 741 S.E.2d 694, 704 (2013) *quoting* United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985).

Second, counsel should have considered whether the denial of the request would serve any purpose or its granting pose any prejudice to the State. "Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.*, at 295. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."

Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 2711 (1987). At the point that counsel was informed by the Petitioner that he wanted to testify counsel should have realized that denying the motion would serve no legitimate interests and allowing it would pose no prejudice to the State. Given the fundamental nature of the right to testify defense counsel should have known that a motion to reopen would have been granted if made immediately upon trial resuming that morning. Clearly counsel failed to conduct a proper analysis of the issue and as a result failed to immediately inform the court that the Petitioner wanted to testify. Instead counsel misinformed the Petitioner that it was too late to make the request because the defense had rested.[1] Counsel clearly did not understand the law applicable. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

Given that counsel's decision not to timely move to reopen was based on an obvious misunderstanding of the law it can not in any way constitute a valid strategic decision. "No supposedly strategic decision passes Sixth Amendment scrutiny when it is based on such an obvious misunderstanding of the law. *See* Watson v. State, 370 S.C. 68, 74, 634 S.E.2d 642, 645 (2006) (*Pleicones, J., dissenting*) (stating a valid strategic decision cannot be "grounded in a fundamental misunderstanding of the law"); Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992) (finding a strategic decision invalid where "an error of law was involved")." Abney v. State, 408 S.C. 41, 55-56, 757 S.E.2d 544, 551-52 (Ct. App. 2014) *Justice Few*

[1]To the extent that Martin's PCR testimony may imply, contrary to his representations to the trial judge, that his inaction was based on Wright's having "reconciled himself" that testifying was not in his best interests, any alleged decision by the Petitioner, or impression that the Petitioner may have given Martin at that point, would have been tainted by Martin's incorrect advice that it was already "too late" for Wright to testify.

dissenting.

In Rivera this Court emphasized the importance of a defendant's right to testify in his own behalf:

> The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("[F]undamental to a personal defense . . . is an accused's right to present his own version of the events in his own words." (emphasis added)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.* at 53 (*quoting* Harris v. New York, 401 U.S. 222, 230, 91 S. Ct. 643, 28 [*242] L. Ed. 2d 1 (1971)). "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Id*. at 51. "It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id*. (*quoting* Faretta v. California, 422 U.S. 806, 819 *n.*15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Id*. at 52 (*citing* Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). "The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* "'The choice of whether to testify in one's own defense . . . is an exercise of [that] constitutional privilege.'" *Id.* at 53 (*quoting* Harris, 401 U.S. at 230) (*omission in original*). "'A person's right . . . to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; . . . .'" Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (quoting In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (emphasis omitted)).

State v. Rivera, 402 S.C. 225, 241-42, 741 S.E.2d 694, 702-03 (2013).

In Rivera the trial judge relied on Rule 403, SCRE in excluding Rivera's testimony. Although it is unclear what particular rule was relied on by the trial court in the Petitioner's case, the analysis should be the same. "Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote . . . ." *Id.*" State v. Rivera, 402 S.C. 225, 245, 741 S.E.2d 694, 704-05 (2013) (*quoting* Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (2006). Although Rivera did not specifically involve a motion to reopen the case to allow the defendant to testify,

this Court in Rivera cited United States v. Walker, 772 F.2d 1172, 1179 (5th Cir. 1985) in support of its analysis. Walker dealt directly with the denial of a motion to reopen to allow a defendant to testify and reversed based on the same analysis applied by this Court in Rivera. As in the Petitioner's case the motion to reopen in Walker was made after the defense rested but before closing arguments or jury instructions. In its analysis the court in Walker noted that reopening the case for Walker to testify posed no prejudice to the prosecution's case:

> "The . . . testimony [sought to be admitted through the motion to reopen] would not have carried a distorted importance merely by being introduced after a reopening. First of all, since neither closing arguments nor jury instructions had yet been delivered, the . . . testimony would have been heard in the orderly flow, with perhaps an intervening continuance, of the defense testimony. But even assuming that the testimony might have derived undue emphasis from its appearance subsequent to all parties resting, a cautionary instruction by the trial judge might have remedied that potential problem. 596 F.2d at 779."

United States v. Walker, 772 F.2d 1172, 1177 (5th Cir. 1985).

Applying Walker in the Petitioner's case shows that a motion prior to the court's ruling on jury charges would not have distorted the importance of the Petitioner's testimony. The Petitioner's testimony would have been heard by the jury in the orderly flow and the court could have given an instruction for the jury not to put any importance on the fact that the defense reopened its case to offer the Petitioner's testimony. Counsel should have been aware that an immediate motion to reopen would have met every criteria to be granted. Counsel clearly did not and as a result misinformed the Petitioner that it was too late for him to testify. But for the failure of counsel to understand the applicable law and timely raise the issue the Petitioner would have been allowed the opportunity to testify. The failure to protect the Petitioner's right to testify clearly constitutes an error on the part of counsel. The PCR court therefore erred in finding no deficiency in counsel's performance.

Erroneous Application of Harmless Error Review

Despite having found no deficiency on the part of trial counsel the PCR court went on to conduct a prejudice analysis, and contrary to this Court's decision in Rivera applied a harmless-error analysis to the denial of the Petitioner's right to testify on his own behalf. "As to prejudice, first, the Court finds that even if Counsels had immediately confronted the trial court with Applicant's new found desire to testify, *there is not a reasonable probability the outcome would have been different.*" (A. p. 27). The PCR court's application of a harmless error analysis is in direct conflict with this Court's holding in Rivera and therefore constitutes an error of law. In Rivera this Court explicitly held that the improper refusal to permit a defendant to testify in his own defense is a structural error that requires reversal without a particularized prejudice inquiry. "The Supreme Court has not directly addressed whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error or one which is subject to harmless-error analysis. We find this error is not amenable to harmless-error analysis and requires reversal without a particularized prejudice inquiry") (*citations omitted*)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

Here the PCR court clearly applied a harmless-error analysis to the denial of Applicant's right to testify in his own behalf and based on its own determination of the Applicant's credibility found that the outcome of the trial would not have changed even had the Applicant been allowed to testify. The PCR court's ruling is therefore in direct conflict with this court's opinion in Rivera:

> "In sum, we are persuaded that the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." McKaskle, 465 U.S. at 177 *n.8*. As such, the error is structural in that it is "'so basic to a fair trial that [its] infraction can never be treated as harmless

error.'" Fulminante, 499 U.S. at 289 (*quoting* Chapman, 386 U.S. at 23)." State v. Rivera, 402 S.C. 225, 249-50, 741 S.E.2d 694, 707 (2013).

The PCR court's application of a harmless error analysis in Petitioner's case constituted an error of law and is in direct conflict with Rivera. This Court's holding in Rivera requires that the Petitioner's conviction be reversed and a new trial granted.

Conclusion

Based on the foregoing this Court should reverse the decision of the PCR court and remand the case for a new trial.

Respectfully submitted,

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