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.: 2025-001691

Marcus Dwain Wright, 289646, ... Petitioner,

v.

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

BRIEF OF PETITIONER

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April 27, 2026.

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Statement of Issues on Appeal

1. Are the decisions of the lower courts contrary to the Fifth Amendment, Sixth Amendment, Fourteenth Amendment, Weaver v. Massachusetts, Strickland v. Washington, and this Court's ruling in State v. Rivera?

2. Did Counsel's failure to make a timely motion to reopen the defense constitute a violation of the Petitioner's right to testify under the Fifth Amendment and the Petitioner's right to effective assistance of counsel under the Sixth and Fourteenth Amendments?

3. Is this Court's decision in Rivera that a complete denial of a defendant's right to testify always results in a trial that is fundamentally unfair applicable to a Weaver v. Massachusetts analysis?

4 Was the application of Strickland's standard harmless error analysis contrary to the decision in Weaver v. Massachusetts?

Statement of the Case

The Petitioner, 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 Petitioner 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 Petitioner 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. Petitioner filed a petition for writ of certiorari in this Court. The case was transferred to the court of

appeals. The court of appeals granted the petition and issued an Opinion affirming the circuit court. (Opinion No. 6119). This Petition follows.

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).

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). When court resumed that morning 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 the 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).

ARGUMENT

I. THE VIOLATION OF PETITIONER'S RIGHT TO TESTIFY IN HIS OWN BEHALF AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES REVERSAL.

Constitutional Error:

Counsel's error in failing to immediately notify the court and make a motion to reopen the defense case to allow the Petitioner to testify resulted in a complete denial of the Petitioner's Fifth Amendment right to testify.

> "[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 recognizing a constitutional right to testify in one's own defense, the Supreme Court explained the numerous constitutional foundations for this right. Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). First, the right to testify is derived from the Due Process Clause, applicable to the states through the Fourteenth Amendment, which guarantees that one shall not be deprived of liberty without due process of law. Due process includes, at a minimum, the right to be heard in one's defense. *Id.* at 51, 107 S.Ct. 2704. Second, the Compulsory Process Clause of the Sixth Amendment gives defendants the right to call witnesses in their favor; logically included in this right is the right to testify as a witness in one's own behalf. *Id.* at 52, 107 S.Ct. 2704. This right is personal to the defendant, not to counsel. Finally, the tight to testify is the natural corollary to the Fifth Amendment's protection against compelled testimony; the right to remain silent is not a choice unless a defendant also has the right to speak in his own defense if he chooses to do so. *Id*. at 53, 107 S.Ct. 2704.
>
> The defendant has the ultimate authority to make certain fundamental decisions regarding his case, including whether to plead guilty, waive a jury trial, testify in his own behalf, or appeal his conviction or sentence. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); McCoy v. Louisiana, 584 U.S. 414, 138 S. Ct. 1500, 1508, 200 L.Ed.2d 821 (2018). As the McCoy Court stated, "These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are." 138 S. Ct. at 1508.

> Indeed, the ethical duties of an attorney require a lawyer to "abide by a client's decisions concerning the objectives of representation .... In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." *Va. Rules of Prof. Conduct Rule 1.2(a)*. *American Bar Association Standards for Criminal Justice* also recognize that the decision whether to testify is "to be made by a competent client after full consultation with defense counsel." *Criminal Justice Standards, Standard 4-5.2(b)(vi)* (4th ed. 2017).

Carter v. Clark, 667 F.Supp.3d 163 (March 31, 2023) *at* 197

The record shows that 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 ultimate basis stated for denying the Petitioner's request to testify was that the court had already ruled on the jury charge requests. The court's last comments on the matter 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." Counsel explained 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 Counsel believed that it was too late for him to do anything. Counsel therefore took no action to inform the court or make a motion to reopen. Counsel's inaction was clearly driven by a fundamental misunderstanding of the applicable law and procedure. Had Counsel understood the applicable law and procedure they would have known that a motion to reopen would have been timely and overwhelmingly supported by law if made immediately upon the trial resumed that morning.

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).

"The right . . . to testify or not to testify is fundamental." Rivera, 402 S.C. at 241, 741 S.E.2d at 702. "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. "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.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (*quoting* Strickland, 466 U.S. at 690).

In the Petitioner's case Counsel failed to make a timely motion to reopen the

defense case to allow the Petitioner to testify. Counsel's actions must be judged in light of the fundamental nature of the Petitioner's right to testify. While a trial court has wide discretion in ruling on a motion to reopen, a finding of error does not necessarily turn on whether the court could deny the motion. Error rests in counsel's failure to bring to bear such skill and knowledge and advocate for his client so as to render the trial a reliable adversarial testing process. In Stone v. State, 419 S.C. 370 (S.C. 2017), this Court found counsel deficient for failing to act to protect his client's rights even though, given the wide discretion of the trial court, the court *may not* have granted the relief sought. "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. In Stone this 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.* (*Emphasis added*). In Stone this 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." Stone v. State, 419 S.C. 370 (S.C. 2017). In the Petitioner's case counsel clearly failed to advocate effectively as required under both Ard and Strickland.

The record shows clearly that when the Petitioner informed Counsel that he wanted to testify Counsel were of the opinion that there was nothing they could do at that point to protect the Petitioner's right to testify. "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 the fundamental right to testify any reasonable attorney would have recognized the available remedy and immediately made a motion to reopen the defense case regardless of any prediction as to what the outcome might be. If counsel's failure to advocate for his client was based on a belief that the court would deny the motion, that only further shows that counsel was unaware of the law relevant to situation. At the time Petitioner informed counsel of his desire to exercise his right to testify the potential for success of a motion to reopen was substantial and well supported by case law. "A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial judge. His ruling will not be reversed absent an abuse of discretion. A trial is a search for the truth; concomitantly, liberality is the linchpin of the rule." State v. Wren, 470 S.E.2d 111, 113, 322 S.C. 103 (S.C. App. 1996). "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. *See* the South Carolina cases in point in 32 S.E.Dig., Trial, k65-72." Daniel v. Tower Trucking Co., 205 S.C. 333, 32 S.E.2d 5 (S.C. 1944), 351.

While there is wide discretion in deciding to grant a motion, there is far less so in denying one when a defendant's right to testify is at issue. In United States v. Walker the court reversed the defendant's conviction finding that the trial court abused its discretion in denying a motion to reopen to allow the defendant to testify. In Walker, while the defendant indicated that he wanted to testify, he felt emotionally unprepared to do so at that time. As a result, Walker did not testify that day and the defense rested. Overnight

Walker changed his mind. At the commencement of the trial the next day the defense made a motion to reopen the evidence to allow Walker to take the stand. The trial court denied the motion. On review the court in Walker set forth a framework relevant to the consideration of such a motion: "In passing on the motion a court should consider a number of pertinent factors: the timeliness of the motion; the character of the additional testimony; and the effect of granting the motion." U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985), 1177; *see also* United States v. Larson, 596 F.2d 759, 778 (8th Cir.1979).

The Timeliness of the Motion

In conducting its analysis the court in Walker said that although the delay in making the motion to reopen weighed against Walker's position on appeal, it considered the delay to be minor under all the circumstances. The Walker court said: "the timing of the defense motion to reopen amounted to little more delay than would have been caused by Walker taking the stand on [the preceding day]. U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985), 1178. As in Walker, any delay that would be caused by allowing the Petitioner to testify would have been minimal.

Character of the Testimony

Here as in Walker the testimony at issue was that of a criminal defendant. The Court in Walker said:

> The nature of the evidence the defense wished to present, therefore, was the testimony of the defendant, who had not previously taken the stand, in his own criminal trial and addressed to his own alleged activities that were the subject of the prosecution. As a factor in determining whether the district court abused its discretion, the character of the testimony offered by the defense weighs very heavily in favor of Walker."
>
> Without regard to whether there is a constitutional right to testify and the extent to which it might apply we find that Walker's testimony in his own defense is of

> such inherent significance that the district court, as a matter of fairness, should have permitted him to testify. Walker had not testified at all, and his testimony would be of particular interest to the fact finder because he would be testifying as the alleged active participant in the activities which were the focus of the trial. 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.

U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985). (*Footnote omitted*).

Effect of Granting the Motion

In Walker the Court said: "A third factor which the district court must consider is 'the effect of the granting of the motion' to reopen the evidence. Thetford, 676 F.2d *at* 182; *see also* Larson, 596 F.2d at 778. Here, there is no indication that the effect of granting the motion to reopen would have prejudiced the government's case." U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985), 1183. The Court in Walker noted that the jury had not been charged and closing arguments had not begun. As in Walker, had Counsel made a proper motion immediately upon learning that the Petitioner had changed his mind, no rulings would have been made, the jury not charged, nor closing arguments begun. Granting the motion would have posed no prejudice to the government's case.

Reasonableness of Excuse for Request to Reopen

While the defendant in Walker indicated that he wanted to testify his attorney informed the court that Walker felt that it was not a good idea to take the stand "*today*". U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985), 1176. The defense rested without Walker testifying. In the present case, while the Petitioner initially indicated that he would not testify, he did so after being advised by the court that he was not bound by his response. The court's question can only be interpreted *as what are you thinking right now* combined with *you can think about it and change your mind*, which is exactly what the Petitioner did. This puts his answer more in line

with Walker's equivocal response, making the Petitioner's request reasonable under the circumstances.

Applying all of the factors considered in Walker, had Counsel made a timely motion to reopen the defense case, the court would have granted the request. The Court in Walker said:

> Moreover, we by no means rest our decision that the district court abused its discretion on the character of appellant's excuse, which at least in most instances would not alone suffice to carry the day. Weighing his excuse together with the seriousness of the crimes with which appellant was charged, the nature and potential scope of his testimony, the fact that he had not testified at all, the absence of any prejudice to the government or hardship to the court if reopening were allowed, and the timing of the motion, we find that the district court, on balance, clearly should have allowed the defense to put Walker on the stand on Monday, May 21, and exceeded its discretion in refusing to do so.

U.S. v. Walker, 772 F.2d 1172 (5th Cir. 1985), 1184.

In Petitioner's case, had Counsel understood the applicable law and procedure Counsel would have immediately made a motion to reopen the evidence and argued the applicable law as any reasonable attorney would have. Given the similarities in facts, had Counsel made a timely motion and properly argued the law the court would have had no reason to deny the motion. Counsel's belief that there was nothing he could do led to his failure to advocate for the Petitioner. Counsel's representation was therefore constitutionally deficient.

Erroneous Application of Harmless Error Review Under Weaver:

The court of appeals erred in its application of a harmless error analysis in the Petitioner's case. In Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), the Court addressed what showing is required in a collateral review for an applicant to obtain relief for a structural error. In Weaver counsel unreasonably failed to object to a

violation of the Weaver's right to a public trial when the courtroom was closed during jury *voir dire*. While the Court in Weaver expressly limited its holding to the denial of a defendant's right to a public trial during jury selection, the Court's analysis provides a framework to determine whether other structural errors entitle an applicant to relief without further inquiry or require a showing of prejudice. In its analysis of structural error the Court in Weaver identified three broad categories of reasons for which errors have historically been deemed structural. The Court noted that errors could fall into more than one of the three categories.

> First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. 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." McKaskle v. Wiggins, 465 U.S. 168, 177, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). 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. See Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error. *See* United States v. Gonzalez–Lopez, 548 U.S. 140, 149, n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).
>
> Second, an error has been deemed structural if 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." Ibid. (*quoting* Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)). Because the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt," Chapman, *supra, at* 24, 87 S.Ct. 824, the efficiency costs of letting the government try to make the showing are unjustified.
>
> Third, an error has been deemed structural if 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. *See* Gideon v. Wainwright, 372 U.S. 335, 343–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to an attorney); Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to

try to show harmlessness.

Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), 1908.

Error That is Always Fundamentally Unfair:

Under Weaver an error that always renders a trial fundamentally unfair is reversible without any further showing of prejudice, as prejudice is presumed. In determining whether the right to a public trial during jury selection was the nature of error that always resulted in a fundamental unfairness the Court considered whether the right to a public trial was subject to recognized exceptions. In doing so the Weaver Court made a detailed analysis and gave examples of recognized exceptions it found significant to a defendant's right to a public-trial. The Court noted that it had previously held that under the appropriate circumstances a court could close the courtroom during a suppression hearing over the defendant's objection. *See* Waller v. Georgia Cole v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). It also cited Presley v. Georgia , 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), where the Court expressly noted that courtroom closure may be ordered in some circumstances. Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017), 1909. Based on the exceptions created in its prior rulings dealing with *temporary* closures of the courtroom, the Court in Weaver found that the public-trial error relating to a temporary closure of the courtroom for jury *voir dire* was not the type of error that always results in a fundamentally unfair trial.

While the Weaver Court did not explain any particular criteria that an exception must meet in general, the exceptions that it relied on were substantial in relation to the violation at issue. None of the exceptions noted by the Court in Weaver would likely be seen as sufficient to support the closure of a courtroom for an entire trial. Yet this is exactly what the court of appeals has done in the Petitioner's case by relying on minor exceptions to justify a complete denial of

the Petitioner's right to testify. In Weaver the 'closure' was based on all of the seats in the courtroom being occupied by the *venire* panel causing an officer of the court to exclude from the courtroom any member of the public who was not a potential juror. As a result, when Weaver's mother and her minister came to the courtroom to observe the two days of jury selection, they were turned away based on the lack of seating in the courtroom. The violation of the right to public trial in Weaver was therefore temporary and exceedingly minimal. As a result, the recognized exceptions were substantial in relation to the scope and impact of the particular violation at issue in Weaver.

In the present case the court of appeals failed to point to any case where a *complete* denial of a competent defendant's right to testify to the facts of the case has been upheld or recognized by the Supreme Court. The court of appeals failed to conduct an analysis of any exception or make a determination that any of the exceptions relied on have been applied to a complete denial of the right to testify. Unlike the minimal impact of the denial of the right to a public trial during jury selection in Weaver, the impact of the complete denial of a defendant's right to testify is monumental. The court of appeals failed to point to any exception recognized by the Supreme Court that allows the complete denial of a competent defendant's entire testimony. In Weaver the result would not have been the same had Weaver's entire case been held in secret. The recognized exceptions must therefore rise to the level of the particular denial in any given case. As an example, the rules of evidence that might prohibit a defendant from testifying to hearsay have never been recognized as supporting the complete denial of a defendant's right to testify. In the Petitioner's case the rules against hearsay therefore fail to constitute an 'exception' as contemplated by the Court in Weaver. Absent a recognized and accepted exception allowing the complete bar of a competent defendant's right to testify, the

error in the Petitioner's case falls in Weaver's third category, one that is always results in a fundamentally unfair trial.

In Rivera this Court clearly rejected the State's argument that the complete 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:

> "The State asserts 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. Rather, the State argues, such an error is appropriately characterized as a "trial error" which is subject to the harmless-error doctrine. We disagree.

State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (S.C. 2013). Because the complete denial of a criminal defendant's right to testify has been held by this Court to always result in a fundamentally unfair trial and call into question the reliability of the verdict, it meets Weaver's criteria for inclusion in Weaver's third category, affording the Petitioner a reversal of his conviction without further showing of prejudice.

Error Not Always Fundamentally Unfair in Every Case But Still Fundamentally Unfair in the Petitioner's Case:

Assuming *arguendo* that this Court finds that the complete denial of a competent criminal defendant's right to testify does not always result in an unfair trial under a Weaver analysis, the Petitioner is still entitled to relief because the denial resulted in *his* trial being fundamentally unfair:

> Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically. Instead, 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, *see supra*, at 1910 – 1911, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

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A criminal defendant has the right to testify in his own defense. “It is one of the rights that are essential to due process of law in a fair adversary process.” Rock v. Arkansas, 483 U.S. 44, 51 (1987)). "The right . . . to testify or not to testify is fundamental." State v. Rivera, 402 S.C. at 241, 741 S.E.2d at 702. The right to testify exists independently of the right to counsel and regardless of whether the denial of the right to testify can be ascribed to defense counsel's conduct, the deprivation complained of is not effective assistance but the right to testify, and the right to testify itself is constitutionally protected. State v. Rivera, 402 S.C. at 241, 741 S.E.2d at 240. Counsel put up no witness in the defense case and despite the length of Counsel’s closing it barely addressed the specifics of the Petitioner’s case. The Petitioner’s testimony would therefore have been the only evidence offered in his defense. The denial of the Petitioner’s right to testify therefore prevented him the opportunity to put up a defense. Given the contradictions in the State’s case, the complete denial of the Petitioner’s right to testify resulted in a trial that was fundamentally unfair in the Petitioner’s case.

The State’s harmless error argument that the Petitioner’s self-defense testimony would have jeopardized his credibility and the credibility of the defense “pursued up to that point” is unsupported by the record. While the State sets forth in detail what the Petitioner would have testified to had he been allowed, it fails to explain how that testimony would have conflicted with anything that had been presented to the jury by the defense up to that point in the trial. The State's argument erroneously assumes that self-defense was not a theory of defense in the case. At the Post-conviction relief hearing Counsel did not deny that self-defense was a defense in the case, only that it was not the prime theory of defense. App. 191, l. 23-24. While Counsel chose not to comment on the facts or inform the jury of any particular theory of defense, through the

cross-examination of Veronica Chandler Counsel focused heavily on proving that the deceased was drawing a gun at the time he was shot:

Q. What started the shooting, you said somebody pulled up their shirt.

A. Yeah all I know, like I said with the words that came, and I'm going by what I , I mean I'm quite sure I saw when the dude in the kitchen said something. I'm not quite sure what it was, JJ said yeah, yeah, yeah, I saw when the shirt came up and that's when I heard the pow, pow, pow.

Q. Did you see anything when he pulled his shirt up

A. I'm quite convinced I saw a gun, but I don't know.

Q. Describe it for me

A. I didn't get to look at it like that, I mean everything happened so quick, when he lift up his shirt I'm convinced in my head that I saw a gun.

Q. What color was it was it black, red, orange what color was it I mean. I mean if you saw something you should be able to describe it right

A. But I mean I didn't look at it like that, when he lift up his shirt I mean look like when you pull I mean that's what I'm saying it looked like he had a gun cause he lift up his shirt like like he was reaching for it yeah like he was reaching so I'm quite convinced it was a gun I mean and that's when and when he did that I remember jj turning around and that's when I heard pow, pow, pow, pow I mean and its like I saw like sparks flying and I felt things but I didn't even know jj was on the floor like I said so when I got to the back door and looked in the livingroom that's when I saw the body on the floor and you could of see all the blood from, if ya'll go there now from the point of view that I saw you could of see the blood .

App. 369-370; 811-812.

While repeatedly saying that she did not recall telling the police that she was sure she saw a gun, Chandler did not deny her prior statement to the police:

Q. All right, but you don't recall saying that. You do recall saying that you

thought he had a gun, as we talked about earlier, but you're not sure?

A. I mean, like I say, I don't recall saying that, so I'm not going to answer to that. If they got it in the paper, then I evidently say it, but I don't recall saying it.

App. 811, l. 20-25.

If the sole theory of the case was that Petitioner did not shoot the deceased, whether or not the deceased was drawing a gun at the time he was shot would be irrelevant to the defense. If on the other hand self-defense was *a* theory of the defense, which it was, whether or not the deceased had a gun is not only relevant, but essential to the defense. Counsel clearly made great efforts to establish facts that served no other purpose than to support a theory of self-defense. As a result, the Petitioner's self-defense testimony would not have jeopardized the credibility of the defense. Nor would the Petitioner's testimony have jeopardized his own credibility as there was evidence in record that the Petitioner had claimed self-defense shortly after the shooting. On direct-examination the State's witness Lanard Powell testified that after the shooting the Petitioner told him that the deceased was "going for a gun." App. 876, l. 25-877, l. 15. Petitioner's self-defense testimony would therefore have been consistent with his statement to Powell made shortly after the shooting, which the jury had already heard in the State's case. App. 258-260; 271. As a result, the Petitioner's testimony would not have been detrimental to his case, damaged his credibility, or the credibility of any defense presented up to that point as the State argues. The PCR court therefore erred in finding that the denial of the Petitioner's right to testify was harmless error. "[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)."

Application of Strickland's Harmless-Error Analysis

In the Petitioner's case the court of appeals applied the definition of prejudice applicable in a normal Strickland case. This was error. Applying Weaver, the proper standard in the Petitioner's case allows a showing of either a reasonable probability of a different outcome in his or that the particular violation was so serious as to render the Petitioner's trial fundamentally unfair:

> 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." 466 U.S., at 694, 104 S.Ct. 2052. But the Strickland Court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. *Id*., at 696, 104 S.Ct. 2052. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." Ibid . Petitioner therefore argues 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. For the analytical purposes of this case, the Court will assume that petitioner's interpretation of Strickland is the correct one. In light of the Court's ultimate holding, however, the Court need not decide that question here. As explained above, not every public-trial violation will in fact lead to a fundamentally unfair trial. *See supra*, at 1910. Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, 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, *see supra*, at 1910 – 1911, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

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The denial of the Petitioner's right to testify not only violated his rights under the Fifth and Sixth Amendments, it prevented him from putting up any defense in his case. Testimony by

the Petitioner that the deceased was drawing what the Petitioner believed was a weapon would have been consistent with other evidence in record and supported self-defense, which was one theory in the case. The PCR court's finding that Respondent lacked credibility as to his testimony on self-defense is therefore unsupported by the record and thus constitutes an abuse of discretion. The complete denial of the Petitioner's testimony therefore rendered his trial fundamentally unfair.

Conclusion

Based on the foregoing this Court should grant the Petition and reverse the decision of the lower courts and grant the Petitioner a new trial.

Respectfully submitted,

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