

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of General Sessions

Alexander Macaulay, Circuit Court Judge

Case No. 2007-GS-04-649

 ORIGINAL

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S.C. Supreme Court

STATE OF SOUTH CAROLINA *Respondent*

v.

RAYMONDEZE RIVERA *Appellant*

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Appellant, Raymondeze Rivera, submits this Reply to the Initial Brief of Respondent. As explained below, while the State has produced a document of considerable length, much of it has little or nothing to do with the operative issues in this case. Where the State does attempt to address those issues, it offers nothing from which this Court could properly conclude that the errors Rivera has identified did not occur or do not require reversal.

I. APPELLANT’S RIGHTS, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, § 14 OF THE SOUTH CAROLINA CONSTITUTION, WERE VIOLATED BY THE TRIAL COURT’S REFUSAL TO PERMIT HIM TO TESTIFY ON HIS OWN BEHALF AT THE GUILT-OR-INNOCENCE PHASE OF HIS CAPITAL TRIAL.¹

The State’s initial observations, that “this appears to be a simple case of error of reversal [sic],” and that “[a] survey of any lawyers would easily suggest that there was error here ...,” Resp. Br. 5, are its most accurate. It is, after all, indisputable that Rivera possessed a personal and fundamental right to testify on his own behalf at his capital trial, that he asserted that right unambiguously, and that the trial court barred him from the stand on the implausible basis that testimony about “the killing of Kwana Burns,” Tr. 2200, l. 14, 16, in a trial about the murder of Kwana Burns, was insufficiently probative to satisfy Rule 403, SCRE. Rather than accept the outcome dictated by these circumstances, however, the State concentrates on re-casting the issue –

¹Although the State devotes approximately 37 pages of its brief to the violation of Rivera’s right to testify, it offers a paucity of actual analysis. Moreover, as noted further *infra*, undersigned counsel’s research indicates that at least nine of the State’s 37 pages were copied – verbatim and without attribution – from published opinions by other courts. Compare Resp. Br. 15-19 with *Brown v. Artuz*, 124 F.3d 73, 77-78 (2nd Cir. 1997); Resp. Br. 31 with *State v. Momon*, 18 S.W.3d 152, 165 n.14 (Tenn. 2000); Resp. Br. 32 with *State v. Garrison*, 40 S.W.3d 426, 433 n. 9 (Tenn. 2000); Resp. Br. 32-33 with *Momon*, 18 S.W.3d at 166; Resp. Br. 33-34 with *Momon*, 18 S.W.3d at 166-67; Resp. Br. 34-35 with *People v. Johnson*, 62 Cal.App.4th 608, 635 (Cal. App. 4 Dist. 1998).

as one of the dereliction of trial counsel's obligations, as a question of judicial discretion to call a court's witness, and, finally, as a matter for harmless error analysis. While the State may view these reformulations as more attractive terrain from which to defend the judgment against Rivera, they do not match the record of the proceedings in the trial court, and they fly in the face of settled law.

A. The mechanisms by which Rivera was, or might have been, brought to the witness stand are irrelevant.

According to the State, "the actual error – if any – was that defense counsel failed to call Rivera to testify upon his request," which, in turn, "put the trial court in the impossible situation to act as a mediator over a situation that rested solely between counsel and the defendant." Resp. Br. 24-25. This is not an accurate characterization. Whether or not defense counsel were professionally obligated to call Rivera themselves, their announcement that they were unwilling to do so met with no hint of resistance from the trial judge. *See* Tr. 2194-95 (readily accepting defense counsel's refusal to call Rivera as a witness). If the judge had seen himself in the "impossible situation" imagined by the State, nothing prevented him from saying so, or from insisting that trial counsel accede to their client's decision and call him to the stand. As the record conclusively shows, the judge did not select that course of action, and instead chose to call Rivera as a court's witness. In so doing, the judge effectively negated any error that might otherwise have been attributable to trial counsel, and assumed for himself the responsibility of safeguarding Rivera's right to testify.

The State also seeks to frame the exclusion of Rivera's testimony as resting on a permissible discretionary determination under Rule 614, SCRE, "that extraordinary circumstances had not been met" Resp. Br. 26. Once again, the record does not match the characterization. While the judge did indicate that he was calling Rivera "as a Court's witness under [Rule] 614," Tr. 2198, 1.11, the

subsequent determination that Rivera would not be permitted to testify was expressed exclusively in the terms of Rule 403. *See* Tr. 2201, ll. 16-23 (“[T]he Court finds that whatever probative value the generalization without any specificity [sic] ... is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, and also undue delay, waste of time, and needless presentation. Rule 403, South Carolina Rules of Evidence.”); Tr. 2204, ll. 16-21; Tr. 2205, ll. 4-8. Thus, Rivera’s testimony was excluded, not for lack of “extraordinary circumstances,” but for lack of sufficient probative value.² Rivera’s opening brief addresses the errors in that determination, *see* App. Br. 14-18, and the State has made no effort to defend it.

In the final analysis, it is irrelevant whether responsibility for giving effect to Rivera’s decision to testify properly rested with defense counsel or the trial court. What does matter is that the fundamental right to testify was Rivera’s, the decision to exercise it belonged to him alone, and someone – either counsel or the court – was obligated to see it through. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 49 (1987); *Harris v. New York*, 401 U.S. 222, 225 (1971). As the State has all but conceded, the trial court’s refusal to honor Rivera’s decision to exercise his right was error.

B. The violation of Rivera’s right to testify is not subject to harmless error analysis.

The State also seeks to avoid the consequences of the trial court’s error by suggesting that the refusal of a capital defendant’s well-articulated, unambiguous invocation of his right to testify should be subjected to harmless error analysis. Acceptance of that suggestion would require this Court to overrule its own long-settled precedents in favor of a position that conflicts with the

²Moreover, even if the trial court’s decision had turned on Rule 614, defense counsel’s refusal to facilitate their own client’s decision to testify would easily have qualified as an “extraordinary circumstance.”

Supreme Court's approach to harmless error. There is nothing to be gained by taking such an extraordinary step in this case.

The State claims that "[t]his Court has not specifically addressed whether a denial of the right to testify is always automatic reversible error." Resp. Br. 31. That is not correct. In fact, the rule applied in *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993), could not have been stated more clearly: "The denial of the right to testify at either phase of a capital trial, absent a showing on the record of a knowing and voluntary waiver, constitutes reversible error." Thus, the State is not asking this Court to write on a clean slate, but to instead abandon a considered and established position.

The State is also wrong to suggest that *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001), raises any doubt about the continuing vitality of the rule applied in *Ray*. As the State's own description of *Franklin* notes, the issue there was whether a post-conviction relief applicant alleging ineffective assistance of counsel for failure to advise him of his statutory right to make a closing argument was required to satisfy the "prejudice" requirement of *Strickland v. Washington*, 466 U.S. 688 (1984). In holding that such prisoners are required to show *Strickland* prejudice, this Court emphasized the distinction between direct appellate review of properly preserved errors, and post-conviction review facilitated through joining unpreserved errors to claims of ineffective assistance of counsel. *See Franklin*, 346 S.C. at 572, 552 S.E.2d at 723 ("In the instant case, Franklin's counsel failed to make an objection, and the proper review of this alleged error is in an application for post conviction relief. In a post conviction proceeding, the applicant's burden has always been to

demonstrate prejudice.”).³ The error in this case plainly falls in the direct review category which, unlike the ineffective assistance category, has never included a prejudice or harmlessness component.⁴

Moreover, if there were any remaining question about *Franklin*'s inapplicability to a direct appeal asserting a properly preserved error related to the burdening of a capital defendant's right to testify, it would be conclusively put to rest by *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005). Decided four years after *Franklin*, *Crisp* reversed a capital defendant's guilty plea on the ground that

³In *State v. Robinson*, 982 P.2d 590, 598-99 (Wash. 1999), which appears in one of the sections of the *Momon* opinion copied by the State, see Resp. Br. 33, the Washington Supreme Court noted this material distinction: “In contrast to the defendant in *Hill*, [in which the court reversed without assessing for actual harm,] Robinson's right to testify was abridged, not by the court, but by actions of his defense counsel. We decline to address the question of a remedy for defendants whose right to testify is abridged by the court, but note that that question is different from the one presented here.”

⁴Most of the decisions listed by the State in support of a harmlessness or prejudice analysis, see Resp. Br. 33-34, involve claims that a defendant's right to testify was compromised by ineffective assistance of counsel, and they are therefore inapposite for the same reason as is *Franklin*. See *United States v. Tavares*, 100 F.3d 995, 999 (D.C. Cir. 1996) (requiring showing of prejudice where prisoner claimed trial counsel was ineffective under *Strickland* for failing to preserve right to testify); *State v. Robinson*, *supra* (same); *Commissioner of Correction v. Rodriguez*, 610 A.2d 631, 635-36 (Conn. 1992) (describing right to testify claim as “inextricably bound up in the issue of the effectiveness of [prisoner's] trial counsel,” and noting that “prejudicial impact” was part of “the required *Strickland* analysis”); *State v. Paulsen*, 726 A.2d 902, 908 (N.H. 1999) (requiring showing of prejudice in connection with prisoner's claim that trial counsel was ineffective under *Strickland* for failing to “adequately inform him of his absolute right to testify”); *State v. Arguelles*, 921 P.2d 439, 442 (Utah 1996) (declining to presume *Strickland* prejudice for prisoner's claim that trial counsel provided inaccurate advice on whether to testify, and observing that “[a]lthough Arguelles now claims that he relied on his counsel's advice in deciding not to testify, we find nothing in the record which suggests that Arguelles would have decided to testify in the absence of that advice”); *State v. Flynn*, 527 N.W.2d 343, 351-52 (Wis.App. 1994) (requiring showing of *Strickland* prejudice to support claim that trial counsel provided ineffective assistance by threatening to withdraw from representation if defendant testified).

the trial judge had made improper comments during the plea colloquy.⁵ Significantly, this Court supported its conclusion with references to a series of cases applying a rule of automatic reversal where trial judges had made inappropriate remarks when advising capital defendants on their right to testify. *See Crisp*, 362 S.C. at 416, 608 S.E.2d at 432 (relying upon *State v. Gunter*, 286 S.C. 556, 335 S.E.2d 542 (1985); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986); *State v. Cooper*, 291 S.C. 332, 353 S.E.2d 441 (1986), and *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (1990)).⁶ If a trial judge's *comments* discouraging exercise of the right to testify are subject to a rule of automatic reversal, then surely a judge's refusal of a defendant's repeated, affirmative *assertions* of the right to testify must also constitute reversible error.

The settled rule applied in *Ray* and other decisions by this Court is also consistent with the views expressed by the Supreme Court of the United States. While the Court has not yet had occasion to squarely hold that a denial of the right to testify cannot be harmless, it has strongly suggested it would do precisely that if the issue were presented. *See United States v. Luce*, 469 U.S. 38, 42 (1984) (“Were *in limine* rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term ‘harmless’ an error that presumptively kept the defendant from testifying.”). This is in line with the Court’s express ranking of “an accused’s right to present his own version of events in his own

⁵In *State v. Silva*, 890 P.2d 702, 711-12 (Haw. App. 1995), which appears in the State’s brief at 34, the Intermediate Court of Appeals of Hawaii addressed a similar error involving a trial judge’s improper comment to a defendant concerning the right to testify, and held that the error was not harmless.

⁶As this Court recognized in *Crisp*, two of these cases – *Pierce* and *Cooper* – ended in reversal even though the record contained no suggestion that the trial judge’s improper remarks had any discernable effect on the defendant’s decision whether to exercise his right to testify.

words” as “[e]ven more fundamental ... than the right of self-representation.” *Rock*, 483 U.S. at 52. Given that a violation of the latter right may never be disregarded as harmless, *see McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984), it follows that the same would be true with respect to the former.

The State’s argument in favor of harmless error analysis relies on the purported quantifiability of a violation of the right to testify, and the assertedly corresponding assignment of such an error to the category of “trial error” rather than “structural error.” *See* Resp. Br. 32-35 (copying without attribution from *Momon*, *Garrison* and *Johnson*, *supra*). As the Supreme Court has explained, however, this method for determining susceptibility to harmless error analysis is not appropriate where the constitutional right that has been violated promises “not that a trial be fair, but that a particular guarantee of fairness be provided” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); *see also id.* at 149 n.4 (discussing limitations of the “trial error / structural defect dichotomy”).

Like the right to counsel of choice addressed in *Gonzalez-Lopez*, the right to testify is not merely a means to a fair trial, but is instead a “particular guarantee” made to every criminal defendant – one which promises not only that the defendant will be heard if he so chooses, but also that he, as the individual whose life or liberty is at stake, will be afforded the autonomy to make that choice.⁷ *See Faretta v. California*, 422 U.S. 806, 833-34 & 834 n.45 (1975) (observing that

⁷As noted *supra*, most of the cases relied upon by the State involve ineffective assistance of counsel claims asserted under the two-part test prescribed by *Strickland v. Washington*. Of the remaining cases appearing in the State’s brief, only three take a position at odds with Rivera’s position here, and none of them reflect any consideration of the non-quantifiable interests uniquely served by a defendant’s personal right to testify. *See Momon*, 18 S.W.3d 152, 165-66 (Tenn. 2000); *People v. Johnson*, 62 Cal.App.4th 608, 635-36 (Cal.App.4.Dist. 1998); *People v. Solomon*, 560 N.W.2d 651, 656 (Mich. App. 1996); *see also United States v. Taylor*, 128 F.3d 1105, 1109 (7th Cir.

“whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice,” and citing right to testify as proof that “[f]reedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding”).⁸ Because the right to testify encompasses far more than a mere chance to contribute to the body of evidence placed before a trier of fact, and in fact serves fundamental interests held by a defendant even when its exercise might be strategically unwise, a trial judge’s refusal to honor the right simply defies ordinary harmless error analysis. *See, e.g., State v. Dautart*, 769 So.2d 1206, 1210 (La. 2000) (“No matter how daunting the task, the accused ... has the right to face jurors and address them directly without regard to the probabilities of success. As with the right of self-representation, denial of the accused’s right to testify is not amenable to harmless-error analysis.”); *United States v. Butts*, 630 F.Supp. 1145, 1148 (D.Me. 1986) (“This

1997) (rejecting appellant’s challenge to trial counsel’s “view that he should not testify,” and later observing in *dictum* that error would have been harmless). The remaining two decisions are easily distinguishable in other ways. *See Ortega v. O’Leary*, 843 F.3d 258, 263 (7th Cir. 1988) (denying federal habeas corpus relief on claim that Illinois trial court erred by refusing to allow defendant to testify after defense counsel rested, but “emphasiz[ing] that a defendant’s request to testify should never be summarily dismissed by a trial court,” and that, “were this issue before us on direct review of a federal criminal case another outcome might obtain”); *Alicea v. Gagnon*, 675 F.2d 913, 915 (7th Cir. 1982) (finding state trial court’s partial exclusion of defendant’s testimony for violation of Wisconsin alibi notice rule harmless where defendant did testify, and “did manage to testify that on the morning of the robbery he was at home at 11:45 a. m., the time the crime was committed. He also denied committing the robbery.”)

⁸*See also, e.g., Wright v. Estelle*, 572 F.3d 1071, 1074-82 (5th Cir. 1978) (en banc) (Godbold, J., dissenting) (collecting and discussing historical and contemporary authority demonstrating that right to testify transcends ordinary trial procedure and implicates core interests of the individual and public confidence in the administration of justice); *United States v. Dougherty*, 473 F.2d 1113, 1128 (C.A.D.C. 1972) (“Even if the defendant will likely lose the case anyway, he has the right – as he suffers whatever consequences there may be – to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.”).

Court, as others have, finds particularly persuasive the dissenting opinion of Judge Godbold in *Wright v. Estelle*, 572 F.2d 1071, 1074 (5th Cir.1978). ... This Court considers a defendant's right to testify in a criminal proceeding against him so basic to a fair trial that its infraction can never be treated as harmless error); *State v. Rosillo*, 281 N.W.2d 877, 879 (Minn. 1979) (noting that *Chapman v. California*, 386 U.S. 18, 23 (1967), identified the rights to counsel and an impartial judge as “so basic to a fair trial that their infraction can never be treated as harmless error,” and expressing belief that “the defendant’s right to testify is another such right”); *cf. McKaskle*, 465 U.S. at 177 n.8 (“Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis. The right is either respected or denied; its deprivation cannot be harmless.”).

C. Even if harmless error analysis were appropriate, the violation of Rivera’s right to testify requires reversal.

Finally, even if it were appropriate to assess a trial court’s refusal to permit a capital defendant to testify for harmlessness, the record in this case could not support a finding that the error here was harmless beyond a reasonable doubt. The State suggests the concessions made by defense counsel make this an open and shut case, but that is a misleading oversimplification.⁹ While it is true that defense counsel acknowledged the likelihood of a guilty verdict based on the evidence of Rivera’s activities, they also made clear that they would be pursuing a strategy designed to prepare the jurors for a penalty phase presentation built around Rivera’s mental ill ness. *See, e.g.*, Tr. 1893, ll. 11-25; 1895, l. 22 - 1896, l. 3; *Florida v. Nixon*, 543 U.S. 175, 190-91 (2004). Had the trial judge

⁹It is also a gross distortion of the harmless error doctrine. If the State were correct, a trial judge impressed with the prosecution’s proof of guilt would be free to direct a verdict for the government. The Constitution, however, does not permit such one-sided assessments. *See, e.g.*, *Holmes v South Carolina*, 547 U.S. 319, 329 (2006).

not barred him from testifying, it is quite possible that Rivera's appearance and performance on the witness stand would have, at the very least, provided the jurors with information and insights about him that were both highly material and unavailable from any other source. Given that there is no record of the testimony Rivera would have given, the possibility that he would have contributed probative, and even favorable, evidence for the jury's consideration cannot be discounted, and its exclusion cannot be deemed harmless beyond a reasonable doubt.¹⁰ *See, e.g., Luce*, 469 U.S. at 41 ("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. ... To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.").

II. APPELLANT'S RIGHT TO SELF-REPRESENTATION, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. 1, § 14 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S REPEATED REFUSALS TO PERMIT HIM TO DISCHARGE APPOINTED COUNSEL AND PROCEED *PRO SE*.

The State makes little effort to defend the trial court's denials of Rivera's assertions of his right to self-representation on their own terms, and instead concentrates on persuading this Court to embrace the highly fact-bound alternative ground that Rivera was actually mentally incompetent to represent himself under *Indiana v. Edwards*, 554 U.S. 164 (2008). Given that neither of the judges below – *i.e.*, the judges who observed and interacted with Rivera for substantial periods of time – saw fit to so much as question his fitness under *Edwards* before denying his requests to proceed *pro*

¹⁰Having apparently recognized that the absence of a record forecloses the possibility of an informed harmless error inquiry, the State invites this Court to take judicial notice of Rivera's testimony at the trial for the Wiley homicide. *See* Resp. Br. 7 n.4. Doing so, however, would not render an attempt at harmless error analysis in this case any less speculative. There is no basis from which to safely assume that either the substance of Rivera's testimony or other factors observable only in-person, *e.g.*, demeanor, tone, appearance, would have been identical at each trial.

se on different grounds – the State’s request that this Court do so based on a cold record is extraordinary. *See Edwards*, 554 U.S. at 177 (“[T]he trial judge ... will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.”).¹¹

According to the State, “[p]rior to trial, Dr. Donna Schwartz-Watts expressed an opinion to Judge Nicholson ... that Raymondeze Rivera was not competent to represent himself due to a combination of mental illnesses that he suffered” Resp. Br. 43 (citing 12/1/2009 Tr. p. 6, l. 6-19). If that were an accurate description Dr. Schwartz-Watts’ testimony, it would be scant evidence from which this Court could infer a competency question that somehow eluded two circuit court judges. As the record shows, however, the doctor did not inform the court that Rivera was “not competent.” Instead, the closest she came to offering an opinion supportive of the State’s arguments to this Court was the following: “[Rivera] does have a mental illness and has symptoms at times, and in my opinion [self-representation is] not a good idea and I would have concerns about him being competent to do so.” Supp. Tr. E 6, ll. 16-19. Having “concerns” is not the equivalent of an opinion, held to a reasonable degree of psychiatric certainty, that a defendant is incompetent. It was plainly insufficient to inspire either trial judge to find Rivera incompetent to represent himself, and it is even

¹¹That the trial judges perceived no basis for an inquiry into competency is unsurprising given the lucidity and rationality with which Rivera conducted himself during his efforts to waive the right to counsel and proceed *pro se*. *See* Supp. Tr. D 11-19; Tr. 68-69, 75; Tr. 1000. Rivera’s capacity for such conduct is in line with the assessment provided by Dr. Schwartz-Watts at a hearing on May 27, 2009, where she explained that adjustments to his medications had “improved his mental state”: “It’s helped him be less impulsive. It’s helped him calm down. It’s helped him be more rational.” Supp. Tr. B 9, ll. 7-11.

less capable of raising a legitimate doubt in this appeal.¹²

The State's brief discussion of the trial judges' rulings also fails to identify any ground upon which the denials of Rivera's requests to proceed *pro se* could be sustained. As to the refusal of Rivera's first request on Nov. 10, 2009, the State credits Judge Nicholson with having relied on "a combination of factors," including his own prior experience with Rivera, Rivera's "obstructionist behavior" in response to questioning by the court, and testimony from Dr. Schwartz-Watts. Resp. Br. 74. This, too, is a distortion of the record. While Rivera did refuse to answer the judge's questions because they did not "have anything to do with proceeding *pro se*," Supp. Tr. D 19, ll. 13, 19-20, he was correct in that assessment, and should not be penalized for his reaction to improper provocation. And while Dr. Schwartz-Watts did provide testimony (discussed above) about Rivera's mental condition, that testimony was not given until more than three weeks *after* Judge Nicholson ruled on Rivera's assertion of his right to self-representation.

The State's defense of the later rulings by Judge Macaulay is even thinner. While the State muses about possible interpretations of the judge's statements, Resp. Br. 74-77, those interpretations either lack support in the record or contradict *Faretta* and this Court's decisions applying it in ways Rivera explained in his opening brief. The question before this Court is whether the rulings actually made by Judge Macaulay violated the Sixth Amendment. On that question, the State's brief is both candid and correct: "Respondent agrees that if this Court limited its review to Judge Macaulay's stated reason that the only right [Rivera] had to self-representation was [sic] 'only if it did not prejudice' ... it would be an improper basis for the denial." Resp. Br. 75.

¹²For these same reasons, the State's alternative suggestion that this case be remanded for a retrospective assessment of Rivera's competency under *Edwards*, see Resp. Br. 77-79, is unworthy of serious consideration.

III. APPELLANT’S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 3, 14 AND 15 OF THE SOUTH CAROLINA CONSTITUTION, WAS VIOLATED AS A RESULT OF THE QUALIFICATION AND SEATING OF THREE JURORS WHOSE VIEWS PREVENTED OR SUBSTANTIALLY IMPAIRED THEIR ABILITY TO IMPOSE A SENTENCE LESS THAN DEATH, OR TO CONSIDER EVIDENCE IN MITIGATION OF PUNISHMENT.

Contrary to the State’s suggestions, there is a profound difference between a prospective juror’s ability to declare impartiality in the abstract, and that person’s ability to remain impartial when faced with certain facts or circumstances. While the former is desirable, it is the latter which determines whether a juror is constitutionally fit to serve. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (“As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed.”); *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring) (recognizing that particular circumstances may justify finding “implied bias,” and stating that, “[w]hether or not the state proceedings result in a finding of ‘no bias,’ the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances”); *Ham v. South Carolina*, 409 U.S. 524, 526 (1973) (holding that *voir dire* on “three general questions as to bias, prejudice, or partiality” was constitutionally insufficient in light of risk that particular circumstances of the case could engender disqualifying views among jurors).

This principle is perhaps best illustrated in *Turner v. Murray*, 476 U.S. 28 (1986). There the prospective jurors had been asked “whether any person was aware of any reason why he could not render a fair and impartial verdict, to which all answered ‘no.’” *Id.* at 31. The Supreme Court, however, found that inquiry “inadequa[te]” because it failed to address whether a particular feature of case to be tried – *i.e.*, the races of the defendant and alleged victim – would arouse bias in

otherwise suitable jurors. *Id.* at 37. Recognizing that the jurors' answers to the general questions on fairness and impartiality did not preclude the presence of disqualifying bias created by the circumstances to which jurors would be exposed once the trial was underway, the Court established the rule that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37. If the jurors' answers to the "fair and impartial verdict" question were constitutionally sufficient, this rule would have been unnecessary.

While the question in this case is not whether the trial court impermissibly limited the *voir dire*,¹³ but instead whether it improperly failed to act on what the *voir dire* revealed, the principle illustrated in *Turner* still controls. If the jurors at issue here had said death was the only acceptable punishment in a case involving a black defendant, or that mitigation would be irrelevant to them if the defendant were black, this Court would unquestionably be obligated to find disqualifying bias under *Turner* (as well as *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Morgan v. Illinois*, *supra*). There is no rational distinction between that scenario and the one before the Court in this case. While the prejudgements revealed by Jurors 29, 222 and 247 concerned the existence of two intentional murders rather than race, the constitutional infirmity was identical: in each circumstance, jurors who could perhaps be impartial in *other* types of cases could *not* be impartial in the type of case about to be tried. Rivera was entitled to a jury capable of impartially judging *his* case, and the trial judge's retention of three jurors whose views "prevent[ed] or substantially impaired" their

¹³While the State devotes pages of its brief to arguments about the extent of the *voir dire* conducted at trial and complaints about "staking out" prospective jurors, none of that is relevant to the claim Rivera has raised. As set forth clearly in Rivera's opening brief, his challenges go only to the trial court's qualification of Jurors 29, 222 and 247 based on the answers they gave to the questions they were asked.

consideration of the evidence and sentencing options violated that fundamental guarantee. *Morgan*, 504 U.S. at 728 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)); *see also Turner*, 476 U.S. at 34 (observing that “every capital sentencer must be free to weigh relevant mitigating evidence before deciding whether to impose the death penalty”); *cf. Ham*, 409 U.S. at 532-33 (Marshall, J. concurring in part and dissenting in part) (“It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict.”).

Finally, notwithstanding the State’s persistent reminders that trial judges possess wide discretion in the qualification of jurors, the errors in accepting Jurors 29, 222 and 247 cannot be forgiven as mere exercises of a trial court’s prerogative. For while it is certainly true that a trial judge is uniquely positioned to gather and assess information for use in applying the legal standard for qualification, it is also true that rulings based on misapprehension of that legal standard command no deference. *See, e.g., State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”). Such was the case here. The defect in the qualification of Jurors 29, 222 and 247 was not that the trial judge misconstrued the content of what was said on *voir dire*, but that he refused to acknowledge the import of that content under the governing legal rule. Instead, the judge satisfied himself with the jurors’ statements that, in the abstract, they would not “always” or “automatically” vote for a death sentence, and would wish to “hear” all the facts and

circumstances.¹⁴ That was an error of law, not an assessment of fact, and it does not warrant any deference.

IV. THE SOLICITOR’S PEREMPTORY CHALLENGE OF JUROR 64, WHICH HE CLAIMED WAS BASED ON THE JUROR’S CATHOLICISM, WAS PRETEXTUAL GIVEN THAT THE JUROR DECLARED HER RELIGIOUS AFFILIATION WOULD NOT AFFECT HER, AND THAT THE SOLICITOR DECLINED TO CHALLENGE A WHITE CATHOLIC JUROR.

This Court determined more than a decade ago that “it is inappropriate to apply the dual motivation doctrine in the *Batson* context.” *Payton v. Kearsse*, 329 S.C. 51, 59, 495 S.E.2d 205, 210 (1998). This is because “[o]nce a discriminatory reason has been uncovered – either inherent or pretextual – this reason taints the entire jury selection procedure.” *Id.* Although the State acknowledges this Court’s refusal “[t]o excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike,” it fails to recognize the consequence of that acknowledgment. Two of the Solicitor’s purported reasons for striking Juror 64 were “because of her hesitation on some of her answers. And additionally, the fact that she was Catholic” Tr. 1858. Both of these reasons are demonstrably false, as the main brief’s comparative juror analysis demonstrates. Jurors 248 and 33 – both of whom were white – were accepted by the prosecution despite greater hesitation regarding capital punishment. “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.” *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (*Miller-El II*); *see also State v. Cochran*, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006) (pretext “is generally established

¹⁴Like the jurors in this case, the trial judge in *Eddings, supra*, heard the evidence of the defendant’s youth offered as mitigation, but refused to *consider* it as such, and the Supreme Court held that this violated the Eighth Amendment.

by showing similarly situated members of another race were seated on the jury.”).

Even more telling, however, was the State’s acceptance of a white Catholic. When the Solicitor questioned Juror 64 about her Catholicism, she clearly answered that it would not inhibit her imposition of the death penalty. Under those circumstances, it is implausible that her Catholicism was the true reason for the Solicitor’s strike; where a juror’s answer addresses and resolves a potential concern, it is unlikely that that concern is the true reason for a strike. *See Snyder v. Louisiana*, 552 U.S. 472, 480-82 (2008) (discounting reliance on juror’s earlier concern about missing course work obligations because after the clerk obtained information from the dean that it would pose no problem, the juror “did not express any further concern about serving on the jury, and the prosecution did not choose to question him more deeply about this matter”). This is especially so because Juror 104 was also Catholic, and expressed concern over whether the Catholic Church might exile her if she voted for a death sentence – yet the State did not challenge her.¹⁵

¹⁵The State cites answers to the juror questionnaires that purportedly distinguish Hispanic Jurors 64 from white Juror 164. However, the Solicitor did not refer to those answers, and so they are irrelevant for the purpose of determining pretext. The question is not whether some hypothetical prosecutor might have struck a juror for a nondiscriminatory reason, but whether a given prosecutor in fact relied upon race in exercising his or her peremptory challenge.

But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

Miller-El II, 545 U.S. at 252.

Because pretext is established with respect to two of the reasons proffered by the Solicitor, this Court need go no further. There is no need to revisit *Payton*; to permit the “excuse [of] such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection.” *Payton*, 329 S.C. at 60, 495 S.E.2d at 210.

V. APPELLANT’S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE SOLICITOR’S INDUCEMENT OF A CONFESSION THROUGH PROMISES TO SEEK THE DEATH PENALTY AGAINST HIM, TO PROVIDE HIM WITH A CELL TO HIMSELF, AND TO PERMIT HIM TO SEE A CHAPLAIN.

Rivera, arrested and charged with two murders, initially invoked his right to counsel and refused to speak. A week later, he asked that the Solicitor promise in writing “to seek the death penalty;” to house him “in jail alone by self;” and to permit him to “see chaplain when he gets to jail,” Tr. 2055, assurances that the Solicitor was only too happy to supply. She wrote a letter to Rivera promising “Myself, along with the Anderson City Police Department, have made arrangements for you to meet with a chaplain upon your return, for you to be held in a private cell pending trial. And furthermore, this Office intends to seek the death penalty against you as long as the investigation and evidence supports such a penalty under the laws of the State of South Carolina.” Tr. 2058. When Rivera received the letter, he confessed. Tr. 2059-2061. Rivera contends that under this Court’s precedents, the claim that this confession was involuntary is both procedurally defaulted and without merit. Both contentions fail to acknowledge a crucial fact, and misstate the law of this jurisdiction.

A. Rivera’s voluntariness claim is not procedurally defaulted.

The State argues that Rivera’s voluntariness claim is procedurally defaulted because trial

counsel alluded to his confession during his opening statement, thereby “opening the door” to its admission. Remarkably, the State’s recitation of the facts completely omits the fact that renders this argument ridiculous: Prior to opening statements, the trial court ruled that Rivera’s confession was admissible.

None of the cases cited by the State concerns an opening statement that addresses unfavorable evidence that the court has, in a pretrial ruling, held to be admissible. Indeed, only one of the cases cited by the State involved an opening statement at all; the rest concern the elicitation of favorable testimony that “opens the door” to otherwise inadmissible, but closely related, unfavorable testimony. *See, e.g., State v. Taylor*, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (where appellant’s testimony addressed his relationship with his wife, solicitor was entitled to cross-examine him about the relationship, even though the questions elicited proof of an otherwise inadmissible prior domestic violence conviction).

In *State v. Dunlap*, 353 S.C. 539, 541, 579 S.E.2d 318, 319 (2003), the single case in which this Court has held that an opening statement “opened the door,” defense counsel made misleading assertions by defense counsel that the defendant was merely an addict, rather a drug dealer. Not surprisingly, this Court held the State was entitled to correct the misimpression created by defense counsel, even though the defendant’s prior convictions otherwise would have been inadmissible. Here, however, defense counsel was not attempting to take unfair advantage of a rule (or ruling) that *precluded* the prosecution from introducing evidence. Rather, defense counsel was attempting to respond to the fact that the trial court had already determined that the prosecution *would* be permitted to introduce the evidence. Both prosecution and defense were free to both describe the confession in their opening statements, and to urge whatever inferences they wished to from the fact of the

confession.

Put differently, it mattered not at all whether defense counsel alluded to the confession or not in his opening statement; the prosecution was free to discuss it in its opening statement, and free to introduce it. No door was opened by defense counsel's statement because the court's ruling had already opened the door. Consequently, nothing in this Court's precedents would have given warning to trial counsel that referring to the confession in opening statement would constitute default of the voluntariness claim, and nothing in this Court's precedents suggests a rationale for adopting such a pointless default rule.

B. The State's bargain with Rivera was overreaching that overbore Rivera's will.

The State emphasizes that the bargain struck between itself and Rivera that resulted in his confession was one initiated by Rivera. But that initiation, when considered with the terms of the bargain, confirms rather than diminishes the State's overreaching. At no point does the State's brief respond to Rivera's basic point: because the suicidal nature of this request put the State on notice that they were bargaining with a mentally ill person, it was overreaching for the State to take advantage of Rivera's vulnerability. In contrast to *Colorado v. Connelly*, 479 U.S. 157 (1986), where the Supreme Court of the United States found no overreaching by the state, Rivera's mental illness was apparent in his seeking the Solicitor's promise that she would seek the death penalty. The State blithely cites case after case in which the defendant bargained for lenience, and the resulting confession was found voluntary, but there was no bargain for lenience here. In no case cited by the State has the defendant bargained *for* death, and indeed, in no case of which Rivera is aware, has the defendant bargained for a death sentence. It is the extraordinary and self-destructive nature of this

bargain that revealed Rivera's complete inability to protect himself, and rendered the State's exploitation of that inability overreaching.

VI. APPELLANT'S RIGHT TO PRESENT EVIDENCE IN MITIGATION OF PUNISHMENT, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO ADMIT PROOF THAT QUALIFIED MENTAL HEALTH PROFESSIONALS HAD DIAGNOSED HIM WITH A SERIOUS MENTAL ILLNESS ON THE GROUND THAT THEY DID NOT HOLD "MEDICAL" DEGREES.

The State goes on at some length attempting to recast the exclusion of Rivera's mitigating evidence as resting on the trial court's discomfort with admitting a diagnosis that did not originate with Rivera's own trial witnesses. *See* Resp. Br. 159; 175-79. As is plain from the face of the record, however, that simply was not the basis for the rulings challenged here. Rather, the trial court repeatedly made clear that testimony alerting the jury to Rivera's diagnosis of bipolar disorder was excluded for one reason, and one reason only: in the judge's view, bipolar disorder was a "medical condition" that could only be conveyed to the jury by "a psychiatrist or somebody else in the medical field." Tr. 2594, l. 24; *see also* Tr. 2597, ll. 4-7; Tr. 2602, ll. 22-24; Tr. 2632, ll. 23-25; Tr. 2636, ll. 17-23. The State has conceded that the trial court "was in error in his conclusion that only a medical doctor or psychiatrist could testify about the existence of a defined mental condition," Resp. Br. 183, and it was correct to do so.

The State also contends that while the trial judge was wrong to insist upon a medical doctor, it nevertheless reached the right result – *i.e.*, exclusion – because any references to the South Carolina Department of Corrections' diagnosis of Rivera's bipolar disorder would have been inadmissible hearsay. *See* Resp. Br. 183-87. Neither the prosecution nor the trial court raised any such objection, however, and had the question come up, the Rules of Evidence would have provided

multiple options for overcoming it. See Rule 801(d)(2), SCRE (defining as “not hearsay” a “statement offered against a party [that] is (A) the party’s own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”); *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50-51 (Ct. App.2000) (construing Rule 703, SCRE, to provide that “an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value”); Rule 803(6) (treating as “not excluded by the hearsay rule” “[a] memorandum, report, record, or data compilation, in any form, of ... diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record”).

The State concludes with a brief suggestion that the error in excluding the evidence of bipolar disorder was harmless because the jury heard some other evidence in mitigation, and because Rivera gave a closing statement indicating that he did not “want to live no more.” See Resp. Br. 187-88. These assertions do not come close to meeting the State’s burden of proving “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967). As explained in his opening brief at 52-58, Rivera’s mental illness – and not merely the facts and circumstances surrounding it – was a centerpiece of the mitigation case counsel had prepared and attempted to present. They featured it in their opening statements, and they relied upon it to support the two statutory mitigating circumstances submitted

to the jury, both of which turned on facts about Rivera's mental state. *See* Tr. 1893, ll. 11-25; 1895, l. 22 - 1896, l. 3; Tr. 2788, ll. 4-8. And to the extent Rivera's own closing statement conflicted with defense counsel's efforts, a properly informed jury could well have understood his remarks as reflective of his mental illness. By excluding any reference to bipolar disorder, the trial court reduced the likelihood that the jury would draw that inference, and increased the likelihood of a death sentence. Under such circumstances, the trial court's error cannot be harmless.

VII. APPELLANT'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND S.C. CODE § 16-3-25(C)(1), WERE VIOLATED WHEN THE PROSECUTION WAS PERMITTED TO URGE THE JURY, THROUGH ARGUMENT AND EVIDENCE, TO IMPOSE A SENTENCE OF DEATH FOR A HOMICIDE AS TO WHICH HE HAD NOT – AND COULD NOT HAVE – BEEN FOUND DEATH-ELIGIBLE.

The State's main contention with respect to the merits of this issue is that the prosecution merely relied upon the evidence of the Wiley homicide as proof of a statutory aggravating circumstance, and of Rivera's "character," both of which are entirely permissible. *See* Resp. Br. 194-96. If that were an accurate reading of the record, Rivera would not have raised this ground for review. As the record makes plain, however, the prosecution insisted not merely that the jurors consider both homicides as indicative of Rivera's character, but that they *sentence* him for both homicides. That request went far beyond what the law permits, and violated fundamental principles of the Eighth Amendment and South Carolina law. While it is true – as Rivera has already acknowledged – that trial counsel did not raise a contemporaneous objection to the Solicitor's improper assertions, the State has come forward with no legitimate reason to omit this error from this Court's mandatory review under S.C. Code § 16-3-25(C).

CONCLUSION

WHEREFORE, for these additional reasons, Rivera's conviction and death sentence should be reversed, and the matter remanded for a new trial.

Respectfully submitted,

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