STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
May 26 2021
S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
John C. Hayes, III, General Sessions Judge
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2020-001265

MARCUS DWAIN WRIGHT, #289646

Petitioner

vs.

THE STATE OF SOUTH CAROLINA

Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Petitioner's Statement of the Issue

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

Respondent's Counterstatement of the Issue

> Whether the PCR court properly found that Petitioner's counsel was not ineffective for failing to move to reopen the record where Petitioner had expressed his desire not to testify, his testimony would have undercut their trial strategy, his decision to testify was not made until after the charging conference had begun, and where there is no reasonable probability that a motion to reopen the record would have been granted because the trial court had already begun the charging conference when the motion would have been made, no constitutional violation was found on direct appeal, and where Petitioner has not shown he was prejudiced by his counsel's performance.

STATEMENT OF THE CASE

Petitioner, Marcus Dwain Wright, is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for murder (2012-GS-26-02551), trafficking cocaine between 28-100 grams (2012-GS-26-02552), and possession with intent to distribute cocaine base (2012-GS-26-02553) by the Horry County Grand Jury at its June 2012 term. Petitioner was subsequently indicted for possession of a weapon during the commission of a violent crime (2013-GS-26-02339) at the Horry County Grand Jury's May 2013 term. Petitioner was represented by Attorneys L. Morgan Martin and Edward M. Brown, and Assistant Solicitor Donna Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

Petitioner proceeded to a jury trial before the Honorable John C. Hayes, III on June 17, 2013. On June 20, 2013, the jury convicted Petitioner, as indicted, and Judge Hayes sentenced him to a term of life imprisonment for murder. Judge Hayes additionally sentenced Petitioner to a term of 25 years' imprisonment for trafficking cocaine, 15 years' imprisonment for possession with intent to distribute cocaine base, and five years' imprisonment for the weapon charge. These three sentences were set to be served consecutive to the life sentence and concurrent with each other.

Petitioner appealed and the appeal was perfected by Attorney J. Falkner Wilkes. Assistant Attorney General J. Anthony Mabry represented the State as Respondent. Petitioner raised the following issues on appeal:

1. Did the court err in admitting evidence from the search of residence?
2. Did the defendant have a reasonable expectation in the residence searched?
3. Did the court apply the proper analysis?
4. Was the search warrant affidavit was sufficient?
5. Could the affidavit be supplemented by oral evidence where the affidavit contained false information?
6. Did the court err in admission of SCDMV records?
7. Did the court err in the admission of evidence which was the result of illegal search of the defendant's hotel room?

8. Did the court err in excluding evidence of witness's prior inconsistent statement?
9. Did the court err in denying defendant's request to testify?
10. Does the court have to make specific findings as to prior convictions before it can sentence under LWOP?
11. Does the record support sentencing under LWOP?
12. If life is imposed and it is not clear whether or not it is under LWOP, should this Court remand for re-sentencing?
13. Did the trial court err in refusing to charge the jury on the law of self-defense and manslaughter?

The parties proceeded to oral arguments before the South Carolina Court of Appeals on November 10, 2015. By opinion decided April 27, 2016, the South Carolina Court of Appeals affirmed the Petitioner's convictions. *State v. Wright*, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016). The remittitur was sent on May 13, 2016.

Petitioner filed an application for post-conviction relief on April 24, 2017. In his application, Petitioner alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
    a. Failure to timely produce letter(s) and/or statement(s) from Lanard Powell to the State
    b. losing and/or misplacing evidence
    c. failing to question Powell regarding letter(s) and/or statement(s)
    d. failing to question Powell if he told McCray that he saw a gun and/or failing to give Powell an opportunity to admit or deny statement(s)
    e. failing to enter letter(s) and/or statement(s) into evidence
    f. failing to proffer evidence and/or make an offer of proof, including an offer of proof of Powell's testimony
    g. indicating that counsel was satisfied with his cross-examination of Powell
    h. acquiescing to court's ruling(s), including the court's rulings regarding Powell and the letter(s) and/or statement(s)
    i. failing to refute objection(s) made by the State and/or requesting that the Court and/or the State make a complete record and give reasons for their objection(s) and/or rulings
    j. failing to object when the state articulated no basis for its objection(s) and the Court articulated no reasons for its ruling(s)
    k. failure to adequately investigate the case

l. failing to elicit and/or introduce favorable evidence during motions, trial, and/or sentencing
m. failing to object to misstatements during motions
n. failing to lay the proper foundation to introduce evidence
o. failing to object to the Court's instruction(s) (including curative instruction(s)) and/or charge(s) when proposed, when given to jury, and/or after given to jury
p. failure to timely inform the trial court that the petitioner wanted to testify
q. failing to discuss with the petitioner regarding his right to testify
r. failing to consult with petitioner regarding his right to testify prior to resting
s. failing to introduce prior inconsistent statement(s) of Veronica Chandler
t. failing to use prior inconsistent statement(s) of Chandler to support self-defense charge
u. failure to make adequate argument for leniency at sentencing
v. failure to prepare the petitioner for sentencing
w. seating a former assistant solicitor on the jury
x. failing to be prepared for and introduce evidence to establish the petitioner's reasonable expectation of privacy in the Kate's Bay residence
y. failing to object to life without parole or require that certified copies of convictions be admitted into the record
z. in failing to elicit, follow up on, and/or clarify testimony to establish jury charges for self-defense and/or voluntary manslaughter
aa. failing to subpoena and/or call witness(es) to testify during motions, trial, and/or sentencing, including Kelly Phoenix
bb. failure to cross examine witness(es) on prior conviction(s)
cc. failing to investigate, follows up on, or bring to the court's attention Brady violations
dd. failure to object to Ms. Eichenmiller's qualifications as an expert and/or further question her qualifications
ee. failure to object to Ms. Eichenmiller's methodology and/or lack of methodology
ff. failure to object to State's failure to lay an adequate foundation for Ms. Eichenmiller's testimony
gg. failure to object to Ms. Eichenmiller's testimony and opinions
hh. failure to object due to the lack of testing and/or error rate in Ms. Eichenmiller's identification
ii. failure to move to strike Ms. Eichenmiller's testimony and opinions
jj. and other such issues that may be determined through the discovery process

2. Due Process Violations

a. State's failure to make disclosures of material and/or preserve material pursuant to *Brady v. Maryland*, *Kyles v. Whitley*, and related case law
b. prosecutorial misconduct in failing to make disclosures of material and/or preserve material pursuant to *Brady v. Maryland*, *Kyles v. Whitley*, and related case law
c. upon information and belief, prosecutorial misconduct in failing to correct false evidence
d. the petitioner's attorneys' actions and inactions, as more specifically described above, so infected the case with unfairness resulting in a denial of due process,
e. the State's actions and inactions, including the actions and inactions of the prosecutor, along with the actions and inactions of the petitioner's attorneys, as more specifically described above, so infected the case with unfairness resulting in a denial of due process
f. and other such issues that may be determined through the discovery process

3. Other such issues that may be determined through the discovery process

Respondent made its return and requested an evidentiary hearing on the allegations of ineffective assistance of counsel and prosecutorial misconduct. An evidentiary hearing was convened on December 14, 2018, before the Honorable William H. Seals, Jr., at the Georgetown County Courthouse. Petitioner was represented by Attorney Beattie Ashmore and Assistant Attorney General Johnny E. James, Jr., represented the State. On August 13, 2020, Judge Seals dismissed the application, via written order.

STATEMENT OF THE FACTS

At trial, Roy James Sinclair testified that he had several people gathered at his Socastee residence on the night of April 30, 2012. (App. 777, 20 – App. 778, 16). He had been smoking in a back room when his cousin, J.J. Green, came to the door. (App. 778, 13-19). His cousin briefly entered the house, expressed concern about the state of the place, and then left while promising to return later for some drinks. (App. 778, 16-24). Petitioner was sitting in the living room with a gun at the time. (App. 779, 22 – App. 780, 2). A disagreement broke out between Sinclair and Petitioner. (App. 780, 7 – App. 781, 11). Green returned, and again expressed concern about the people present in Sinclair's home. (App. 782, 14-17). Petitioner, overhearing their conversation, confronted Green, who tried to calm the tensions by saying everything was cool. (App. 782, 17-19). Petitioner then began shooting at Green, causing Sinclair to flee to a neighbor's house. (App. 782, 20 – App. 783, 10). Sinclair heard Petitioner tell another guest to "get your shit" because he had just murdered someone. (App. 783, 11-18). Sinclair then called the police. (App. 783, 20 – App. 785, 9).

Veronica Denise Chandler testified that she was present at the scene because she was going to buy drugs from one of Sinclair's guests. (App. 801, 23 – App. 802, 19). She was waiting in the den area of the house when Green arrived. (App. 803, 4-13). He came into the house, annoyed that Sinclair was allowing people to answer the door for him, but spoke with everyone present. (App. 803, 20 – App. 804, 4). Green began to speak to her when she heard gunshots coming from the kitchen. (App. 804, 6-22). She ran for the back door, looked over her shoulder, and saw Green lying on the floor with blood covering his shirt. (App. 806, 9-19).

The State concluded its case and the defense moved for a directed verdict. (App. 1044, 3-23). The Court denied the motion to each charge, before questioning Petitioner about whether he

wished to testify in his defense. (App. 1045, 5-20). The Court informed Petitioner that he was free to present, or not present, evidence in his defense and that he was presumed innocent until proven guilty beyond a reasonable doubt. (App. 1045, 23 – App. 1046, 5). Petitioner was also informed of his right to remain silent as well as the risks inherent in testifying in his defense. (App. 1046, 6 – App. 1047, 15). Petitioner indicated he understood his rights and had discussed it with his trial counsel. (App. 1047, 16 – App. 1048, 3). The Court informed him that his decision to testify was his alone, and that he was not bound at that point. (App. 1048, 4-12). Petitioner stated that he wished to exercise his right to remain silent. (App. 1048, 13). The defense called one witness, whose testimony was deemed inadmissible, before resting. (App. 1050, 23 – App. 1068, 11).

After the defense rested the jury was excused and the defense moved for a directed verdict as to each indictment. (App. 1070, 2-6). The motion was denied and the State waived its opening argument. (App. 1070, 7 – App. 1071, 3). A discussion then began about the request that jury be charged with a voluntary manslaughter and self-defense instruction. (App. 1071, 7-11). The court pointed out that the only evidence supporting either charge was a self-serving comment Petitioner made as he fled the scene. (App. 1071, 12-17). Specifically, Petitioner had stated someone had "tried to pull a jack" which the court found to be unintelligible, and insufficient to support either charge. (App. 1071, 18-23).

Trial counsel explained that the phrase was that someone had "tried a jack move," meaning that someone had pulled a gun. (App. 1072, 9-13). The court remained unconvinced, stating that it may mean something like "hijack" and did not necessarily mean someone pulled a gun. (App. 1072, 14-16). Trial counsel agreed that it was ambiguous, and then pointed to other testimony that the victim had reached for something and was generally combative prior to the shooting. (App. 1072, 17 – App. 1074, 3). The court stated that words alone would not be sufficient to support the

instructions, and went on to explain that the law required Petitioner to be in fear in order to support voluntary manslaughter. (App. 1074, 4 – App. 1075, 18). Furthermore, the court explained that self-defense required Petitioner to be in reasonable fear of imminent harm or danger. (App. 1075, 19-23).

Trial counsel then stated that Petitioner himself had not testified on these points, but that the evidence had been provided by another witness. (App. 1075, 24 – App. 1076, 6). Trial counsel went on to explain that someone other than Petitioner could not know his state of mind. (App. 1075, 7-12).

A more thorough charging conference was held the next morning. (App. 1078, 17 – App. 1083, 9). After the conference, just prior to the jury being brought into the courtroom, Petitioner spoke up and asked to "say something for the record." (App. 1083, 17-18). His trial counsel informed the Court that Petitioner had told him that morning that he wished to testify, but he believed the opportunity had passed when he invoked his right to remain silent and the defense rested its case. (App. 1083, 22 – App. 1084, 4). The court agreed, stating that the record was closed and that Petitioner could not adjust his strategy after seeing how the court ruled on the charging instructions. (App. 1084, 7-12). The court recognized that Petitioner had been told he did not have to make his decision when he did, but that any reasonable person would recognize that the right to testify ends when the defense rests its case. (App. 1084, 19 – App. 1085, 5).

Petitioner's trial counsel stated that he had made the decision overnight, and did not indicate that he wanted to testify until that morning. (App. 1086, 17-23). When asked why this change of heart was not brought to the court's attention prior to the charging conference, his attorney stated that he believed the opportunity had already passed. (App. 1087, 3-24). Ultimately, the court decided against allowing Petitioner to testify in his defense because Petitioner had already

seen its charging decisions. (App. 1088, 2-4). Petitioner was not allowed to testify because he knew "what the Judge says is missing and now that he's got it all mapped out, and he can come up and just make whatever—and fit his testimony into the parameters required." (App. 1087, 12-15).

The PCR hearing saw testimony from Petitioner's trial counsels, himself, and Assistant Solicitor Donna Barton. Trial counsel Morgan Martin testified that he represented Petitioner alongside Attorney Ed Brown. (App. 179, 13-17). He stated that the trial finished up on an afternoon and the trial judge asked the defendant if he wished to testify. (App. 181, 6-15). He recalled that he did not speak with Petitioner the next morning in the holding area, but believed Attorney Brown did. (App. 182, 16-21). He was not made aware of Petitioner's wish to testify until they were sitting at the table in the courtroom. (App. 182, 21-23). Martin stated that their position had always been that it would be best for him not to testify, which Petitioner understood. (App. 183, 2-11; App. 206, 17-23).

Martin explained that Petitioner had raised his hand at the end of the charging conference to express his desire to testify. (App. 183, 22 – App. 184, 6). He recalled that the day before the judge had "talked about what he was looking for in terms of self-defense and manslaughter" and that the request to testify was denied because Petitioner "would've known what he was looking for in terms of testimony. . . ." (App. 184, 13-22). He viewed this as an exercise of the court's discretion. (App. 185, 1-7). He stated that the judge never said he would have allowed the testimony had it been brought to the court's attention that morning. (App. 185, 17-3).

Martin testified that the case was difficult, and it was not a case of self-defense. (App. 186, 9-13). He stated that he did not believe Petitioner would be a good witness, due partially to his criminal record. (App. 186, 21 – App. 187, 2). The defense's strategy going into the case was that Petitioner did not commit the shooting, and the State's only proof was the uncorroborated, suspect

word of drug addled witnesses. (App. 187, 1-22; App. 207, 5-22). The case never struck Martin as one of self-defense. (App. 187, 20-22; App. 209, 5-6). Furthermore, he explained that Petitioner fled the scene and did not tell the police he acted in self-defense, instead he insisted that the witnesses were unreliable. (App. 187, 23 – App. 188, 5). The victim was also shot ten times, including several times while lying on the floor, did not have a gun, and Petitioner was not in his own home. (App. 188, 6-18). This theory of the case determined counsels' decisions on how to examine witnesses and elicit testimony. (App. 189, 3 – App. 190, 25; App. 194, 4-20). The defense nevertheless requested an instruction on self-defense because they were "looking for whatever [they] could find." (App. 191, 1-3).

Trial counsel Edward Brown testified that Petitioner told the court he did not want to testify, but told him the next morning that he had changed his mind and wanted to testify. (App. 227, 5-22). He informed Attorney Martin at the time, but did not recall how the issue was brought to the court's attention. (App. 227, 23 – App. 229, 7). He stated that he did not know what was in the judge's mind when he denied Petitioner's request to testify, but confirmed that the testimony was not allowed. (App. 229, 8 – App. 230, 2).

Brown confirmed Martin's testimony that self-defense was not one of their theories of the case, and instead they intended to "punch enough holes in the state's presentation to get [Petitioner] a not guilty verdict." (App. 230, 5-7; App. 241, 13-15). Self-defense simply was not viable, because the evidence showed that the victim had been shot ten times, including a couple shots in the back. (App. 230, 10-13; App. 231, 4-10). Brown stated that Petitioner had told him that he kept shooting because the victim kept moving. (App. 231, 9-10). Brown stated that Petitioner never said that he fired out of fear for his own life, instead he said the shooting was motivated by a drug

dispute. (App. 236, 3-5; App. 237, 9-21). He could not recall the case ever being presented on the record as self-defense. (App. 235, 22-23).

Petitioner testified that he told the court that he did not wish to testify "based on me getting my witnesses in because they always told me, it's better to let somebody else testify to what happened." (App. 255, 13-19). He stated that he did not change his mind until the next morning, after thinking about how his case "wasn't murder." (App. 256, 2-10). He said that his trial counsel told him he would not be allowed to testify at that point, so he spoke up and told the court himself. (App. 256, 15-22). He recalled the court being concerned with allowing him to testify after what he had heard. (App. 257, 2-3).

He explained that had he been allowed to testify he would have explained that he shot the victim in self-defense. (App. 257, 17-20). Petitioner claimed that he had been at the house and had tried to prevent Sinclair from answering the door because he was concerned about who was knocking. (App. 258, 1-7). When Sinclair did answer the door, the victim was agitated at the number of people in the house and said he was going to "put the squeeze" on someone. (App. 259, 2-4). Petitioner interpreted this to mean he was going to squeeze a gun, and claimed that the victim then pulled out a firearm and turned towards him. (App. 259, 4-10). Petitioner then fired and kept firing until the victim hit the floor. (App. 259, 10-19). He shot him "because [he] was scared" and because he feared for his life and was defending himself. (App. 259, 24 – App. 260, 5; App. 271, 18-19). He explained that self-defense was the defense's entire theory of the case. (App. 260, 8-23; App. 267, 20-23; App. 270, 19 – App. 271, 16).

On cross-examination, Petitioner explained that he fled the scene after the shooting because he had his "own issues with the police" relating to an incident from his childhood. (App. 274, 12-20; App. 277, 15-19). He continued by explaining that he did not live the sort of life where he

would cooperate with law enforcement. (App. 281, 1-5; App. 282, 8-9). He stated that a "jack move" is "like a robbery or something" and admitted to telling the police that a jack move had gone wrong shortly after the shooting (App. 280, 16 – App. 281, 1). He did not tell the police that he shot the victim in self-defense, because he believe the police were only interested in making an arrest. (App. 282, 11-19). He stated that a codefendant had taken the victim's gun from the scene and buried it. (App. 276, 16 – App. 277, 6). He unsuccessfully tried to locate the guns to give his story more credence. (App. 277, 24 – App. 278, 18).

The PCR court found that Petitioner was afforded an opportunity to testify and declined to do so, fully aware of his rights. The PCR court also found that his trial counsels properly informed him that it was too late to change his mind the following morning because the charging conference had already begun. Finally, the PCR court found that given trial counsels' theory of the case, they would have had no reason to know Petitioner wanted to testify when they rested their case. (App. 26 – App. 27).

As for prejudice, the PCR court found that even if Petitioner's trial counsels had promptly informed the court of his change of heart, there was no reasonable probability that the outcome would have been different. The court had begun discussing what testimony would support a charge of self-defense the previous day, and therefore would not have granted Petitioner's motion to reopen the record. Furthermore, Petitioner's testimony would have damaged his case because it would have shown he was the shooter, confirmed the events after the shooting, admitted dishonest and duplicitous interactions with law enforcement, relied on hearsay, lacked evidentiary support, and just generally did not make any sense. The PCR court found Petitioner's testimony to lack credibility, and could not envision a jury finding otherwise. Therefore, the PCR court found no prejudice counsels' performance and dismissed the allegation. (App. 27 – App. 28).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. *Id.* at 180, 810 S.E.2d at 839. (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. §17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691-92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id.* at 687 (emphasis added).

Strickland "does not guarantee perfect representation . . . only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. 687). Representation is constitutionally ineffective only if counsel's conduct so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."

Strickland, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspectives at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-90; see also *Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance

of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Petitioner asserts that the PCR court's dismissal of his application is contrary to this Court's decision in *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). That case found that a criminal defendant's Fifth Amendment right to testify in his defense at trial was violated when he expressed a desire to testify, but counsel nevertheless refused to call him to the stand, and the Court misapplied the rules of evidence to prevent his testimony. *Id.* This error was not subject to the harmless error doctrine and required reversal on direct appeal, without an inquiry into the prejudicial effect it may have had on the defendant. *Id.* 402 S.C. at 247, 741 S.E.2d at 706.

Petitioner argues that his trial counsel was ineffective for failing to make a timely motion to reopen the defense to allow Petitioner to testify. This failure was driven by a misunderstanding of the applicable law, because such a motion would have been "overwhelmingly supported by law"

if it had been made in a timely fashion. Denial of such a motion, he argues, would serve no legitimate state interests whereas allowing it would have not prejudiced the State.

A. Petitioner's trial counsel was not ineffective because his decision to not move to reopen the defense was not made in ignorance of the law because, as the PCR court properly found, such a motion would not have been granted.

"The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments." *State v. Wright*, 416 S.C. 353, 372, 785 S.E.2d 479, 489 (Ct. App. 2016) (citing *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987)). However, the right to present testimony is not without limitation. *Rivera*, 402 S.C. at 242, 741 S.E.2d at 703; *Rock*, 483 U.S. at 55. This right may be waived, and all that is necessary for a defendant to waive the right is to know that a right to testify exists. *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991). The right to testify may, in appropriate cases, be restricted to accommodate other legitimate interests in the criminal trial process, so long as the restrictions imposed are not arbitrary and are proportionate to the purposes they are designed to serve. *Rock*, 483 U.S. at 56.

"A motion to reopen the evidentiary record and to allow additional evidence is addressed to the sound discretion of the trial court, and the trial court's ruling will not be reversed absent an abuse of discretion." *Wright*, 416 S.C. at 371, 785 S.E.2d at 489 (quoting *State v. Wren*, 470 S.E.2d 111, 112 (Ct. App. 1996)). Reopening the record after the defense closes may be proper when "no significant information was brought forth that [the defendant] had not already learned during the government's case-in-chief." *United States v. Walker*, 772 F.2d 1172, 1181 (5th Cir. 1985). In exercising its discretion, the court must consider the timeliness and character of the motion, as well as the effect of granting the motion. *Id*. Therefore, a PCR Petitioner alleging that counsel was ineffective for failing to move the court to invoke its discretion can show deficiency and prejudice by showing that counsel failed to move the court, and that a denial of the motion would amount to

an abuse of discretion. *See Morris v. State*, 371 S.C. 278, 639 S.E.2d 53 (2006) (finding that failure to move for a continuance amounted to ineffective assistance where trial counsel did not request a continuance in the "rare case" where the court's refusal of the request would have been an abuse of discretion).

Here, Petitioner claims trial counsel was ineffective because a motion to reopen the record would have been granted if it had been made immediately after learning Petitioner had changed his mind and wished to testify. As evidence that the motion would have been granted, Petitioner points to the court's comments after it was made aware of Petitioner's change of heart. Specifically, the court said that Petitioner wanted to adjust his strategy after the court ruled on the charging instructions, upon hearing what evidence the judge believed was missing from the record to support charges of voluntary manslaughter and self-defense.

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

Sure enough, that is exactly what Petitioner would have provided. At the PCR hearing, Petitioner stated that the night after the charging conference had begun, he felt that he had not committed murder. He then decided he wanted to testify that the victim had a weapon and that he feared for his life, despite there being scant evidence supporting this point. In other words,

Petitioner heard the court opine that additional, specific evidence was needed to show that he did not commit murder. He went back, thought it over, and decided he wanted to testify to provide that very evidence.

Preventing the testimony that morning clearly served a legitimate interest in maintaining the integrity of the proceedings. Petitioner would have effectively been told how to testify by the court after hearing the charging discussions. This would have improperly prejudiced the State's case against him, contrary to Petitioner's assertions. This is not a case, like *Walker*, where a criminal defendant wanted to testify only after the state had presented rebuttal witnesses. There, those witnesses did not provide the defendant with any new, advantageous information. Here, Petitioner learned from the court itself that crucial evidence was lacking. At no point did the trial court indicate that such a motion would have been granted had it been brought to its attention that morning, but rather, that the morning was the *proper time for the motion to be considered.* A motion to reopen the record at Petitioner's suggested point in this trial would not have been granted, in fact, it would have been entirely improper and likely would have itself amounted to an abuse of discretion. Therefore, trial counsel's belief that it was too late for Petitioner to testify was correct, and was based upon a proper understanding of the law.

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

The decision not to inform the court about his desire to testify the morning after the defense rested was therefore both strategic and legally proper. Given the circumstances of the case and

what Petitioner had heard the previous day, trial counsel correctly determined it was too late for him to testify. His right to testify at that juncture did not override the legitimate, competing interests in preventing Petitioner from tailoring his testimony to fill the court-identified holes in his defense. Therefore, his trial counsels' decision not to inform the court of the change of heart, and instead proceed with the charging conference under their theory of the case was objectively reasonable under the circumstances as it was based upon a correct interpretation of the law. The PCR court's findings that this was a reasonable trial strategy, not one based upon a misunderstanding of the law, is clearly supported by the record. The PCR court's findings that trial counsel was not ineffective for failing to move to reopen the record must be upheld, Petitioner has not met his burden of proving his counsel was deficient, and this Court should deny certiorari.

B. The PCR Court properly found that Petitioner was not prejudiced by his counsel's performance because the standard in *Rivera* does not apply to claims of ineffective assistance of counsel raised in post-conviction relief proceedings, rather, the proper standard is provided by *Strickland*.

Petitioner does not disagree with the PCR court's finding that he was not prejudiced by trial counsel's performance. Instead, he seeks to sidestep the two-pronged *Strickland* requirement that he show deficiency and prejudice by relying on *Rivera*. *Rivera* found that a complete denial of a criminal defendant's right to testify by the trial court does not warrant an inquiry into prejudice because the right to testify in one's defense is so fundamental that it cannot be harmlessly denied. 402 S.C. at 249, 741 S.E.2d at 707. *Rivera* presented the issue on direct appeal, as a claim of trial court error, rather than couched within a claim of ineffective assistance of counsel raised in a post-conviction relief. The *Rivera* Court explicitly recognized this dichotomy, stating that it "fully appreciated" the State's argument that the matter should be raised in a PCR proceeding as a claim of ineffective assistance of counsel, but decided it on direct appeal given the circumstances of the case justifying direct review. *Id.* 401 S.C. at 240, 741 S.E.2d at 702. Specifically, the Court stated

that "Appellant's claim is (and has consistently been) presented not as an ineffective assistance of counsel claim, but rather, as an error committed by the trial court. . . ." *Id.* The Court explained that "the issue of the failure of a defendant to testify may be viewed either as a claim of ineffective assistance of counsel or as a claim of a deprivation of a constitutional right; the appropriate inquiry depends on how the claim is pled and argued." *Id.* 401 S.C. at 241, 741 S.E.2d at 702 (citing *Rossignol v. State*, 152 Idaho 700, 274 P.3d 1, 7 (Ct. App. 2012)). It went on to find that a trial court's improper refusal to permit a defendant to testify in his own defense is a structural error, is not subject to a harmless-error analysis, and therefore requires reversal on direct appeal without a particularized prejudice inquiry. *Id.* 402 S.C. at 247, 741 S.E.2d at 706.

When a structural error is preserved and raised on direct review, the balance between the necessity for fair and just trials and the importance of finality of judgments is in the defendant's favor. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1913 (2017). However, when a structural error is raised in the context of an ineffective assistance of counsel, finality concerns are more pronounced and a petitioner must show prejudice. *Id.*

Petitioner's claim that he was denied his right to testify by the trial court was itself reviewed by the South Carolina Court of Appeals, and it found that the trial court did not abuse its discretion in refusing to reopen the record to allow him to testify. *Wright*, 416 S.C. at 373-74, 785 S.E.2d 479, 489 (2016). This claim was reviewed under *Rivera*, and the court did not inquire into whether Petitioner had been prejudiced, because such an inquiry was irrelevant in determining whether his right to testify had been violated. *Id.* The Court of Appeals found that the trial court's refusal to reopen the record was legitimate because of concerns Petitioner would tailor his testimony to support a charge on self-defense, after hearing the court's opinion of whether the evidence supported such a charge. *Id.*

Petitioner does not, has not, and cannot allege that his right to testify was denied by the trial court at this juncture. That issue has been litigated and a final decision on the merits has been reached. Given that Petitioner's right to testify was not violated under the *Rivera* standard, he cannot now prevail under that standard on post-conviction relief by alleging ineffective assistance of counsel. Petitioner must show that he was prejudiced by his counsel's failure to move to reopen the record, as required by *Strickland*. Petitioner has made no such showing. He only argues that the PCR court applied the wrong standard, not that it made improper findings under *Strickland*.

The PCR court properly reviewed the issue under the *Strickland* standard. It found that trial counsel testified credibly, but that Petitioner's testimony was self-serving and not credible. It further found that Petitioner failed to show prejudice from his counsel's performance because he had not shown a reasonable probability that the outcome would have differed had his counsel moved to reopen the record. The trial court had already explained what testimony was needed to support an instruction on voluntary manslaughter and self-defense the day before Petitioner decided to testify. The court refused to permit him to testify on this basis. Clearly, the opportunity for testifying had passed the previous afternoon, not that morning. This is sufficient to uphold the decision of the PCR court, as it shows that there is no reasonable probability the court's decision would have been different had his counsel acted with greater haste. Even under *Rivera*, as the Court of Appeals found, this shows that the trial court's refusal to allow Petitioner's testimony was not done arbitrarily. Instead, it was legitimately and proportionately tailored to the interest of preventing Petitioner from providing self-serving testimony, tailor made to provide evidence the court believed was not present, in order to get additional, beneficial jury instructions.

Furthermore, the PCR court found that Petitioner's testimony would have been detrimental to his case. Had he taken the stand, he would have testified that he was the shooter, confirmed the

sequence of events surrounding the shooting, and jeopardized his credibility. He would have relied on inadmissible evidence to support his claims that otherwise lacked evidentiary support. Simply put, the PCR court found that his testimony did not make any sense, and that no reasonable jury would have believed him. This finding is supported by trial counsel's testimony that Petitioner's proposed testimony would have defeated their attempts to cast doubt on whether Petitioner was actually the shooter.

The question to be answered is not whether Petitioner's right to testify was violated. The proper question is whether he was prejudiced by trial counsel's failure to move to reopen the record. Petitioner failed to show his right was violated on direct appeal, and has failed to show that he was prejudiced by trial counsel's failure to move to reopen the record, as required by *Strickland*. Petitioner's claims are not subject to review under *Rivera*, and even if they were, they would not prevail because the court's refusal to permit Petitioner's testimony was proportional to the court's legitimate concerns about effectively allowing his testimony after telling him what he needed to say. Therefore, Petitioner has failed to meet his burden of proof and this Court should deny his petition for writ of certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari. However, should this Court grant certiorari, Respondent requests permission to fully brief the issues discussed herein.

Respectfully submitted,

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