No. _____

In the
Supreme Court of the United States

NOBLE U. EZUKANMA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GARY A. UDASHEN
Counsel of Record
BRETT ORDIWAY
UDASHEN | ANTON
8150 N. Central Expressway
Suite M1101
Dallas, Texas 75206
(214) 468-8100
Fax (214) 468-8104
gau@udashenanton.com
brett@udashenanton.com

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

How do the standards for judging ineffective assistance of counsel apply to the question of what advice defense counsel gives to a defendant concerning whether he should testify at trial?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED PROCEEDINGS

1. *United States of America v. Noble U. Ezukanma*, Criminal No. 3:15-CR-00254-1, Civil No. 3:20-CV-00318, in the United States District Court for the Northern District of Texas, Dallas Division.

2. *United States of America v. Noble U. Ezukanma*, No. 23-10329, in the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Noble U. Ezukanma, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

I.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fifth Circuit denying Ezukanma's Motion for Certificate of Appealability was issued on August 17, 2023, and is unpublished. The order is included with this Petition as Appendix A. The Order of the United States District Court for the Northern District of Texas denying Ezukanma's Motion Under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody and the Order Accepting Magistrate Judge's Findings were issued on March 9, 2023, and are unpublished. Those documents are included with this Petition as Appendix B and C. The Findings, Conclusions and Recommendation of the Magistrate Judge were entered on February 3, 2023, and are included with this Petition as Appendix D.

II.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Ezukanma's Motion for Certificate of Appealability from the District Court's denial of his Motion Under 28 U.S.C. §2255. The issue Ezukanma sought a certificate of appealability concerning was related to ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. Therefore, the Supreme Court has jurisdiction pursuant to 28 U.S.C. §1254.

III.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to… have the Assistance of Counsel for his defence."

IV.

STATEMENT OF THE CASE

i. Procedural History

This case involves Noble U. Ezukanma's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence By a Person in Federal Custody. The focus of this motion was ineffective assistance by defense counsel related to the advice, or lack of advice, given to Ezukanma's by his attorney on whether he should testify at his trial. On February 3, 2023, the Magistrate issued a recommendation that Ezukanma's

motion be denied. Ezukanma timely filed objections to the Magistrate's Report and on March 9, 2023, the District Court rejected Ezukanma's objections and entered judgment denying the 2255 motion. Ezukanma gave notice of appeal and asked the United States Court of Appeals for the Fifth Circuit to issue a certificate of appealability. On August 17, 2023, this request was denied.

ii. Factual Summary

Noble Ezukanma, a practicing medical doctor, was indicted on one count of conspiracy to commit health care fraud and six counts of health care fraud for his alleged role in a scheme to bill Medicare for home visits by a physician (1) that failed to comply with Medicare regulations, (2) were medically unnecessary, and (3) overstated services rendered. Ezukanma pleaded not guilty and exercised his right to a jury trial. At trial, the government presented evidence that Ezukanma attended meetings in which employees of the relevant home health company were instructed to overbill, had billing paperwork in his home, admitted knowledge of the companies submitting claims under his provider number for visits performed by others, and signed certifications without reading them. *United States v. Ezukanma*, 756 Fed. Appx. 360, 366 (5th Cir. 2018). Additionally, the government presented evidence that blank Form 485 certification forms were found with Ezukanma's signature, and that he allegedly signed these forms without reading them. *Id*. at 366-67. A jury convicted Ezukanma on all seven counts, and the District Court sentenced him to 200 months' imprisonment. *Id*. at 363.

On appeal to the Fifth Circuit Court of Appeals, Ezukanma argued that the evidence was insufficient to support his convictions, that the District Court erred in failing to include Medicare regulations in the jury instructions, and that the District Court incorrectly calculated the loss amount. *Ezukanma*, 756 Fed. Appx. at 362. The Fifth Circuit affirmed, noting that Ezukanma had not testified in his defense. *Id*. at 368.

V.

ARGUMENT

a. Reasons For Granting the Writ

This Petition Under 28 U.S.C. § 2255 raises the very important question of what advice is adequate from defense counsel to a defendant concerning the decision on whether to testify at trial. *See*, Supreme Court Rule 10. The specific question raised is, under what circumstances is counsel ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) in the advice, or lack of advice, given a defendant on whether he should testify. This Petition also involves the question of the application of the standards for issuance of a certificate of appealability on this important constitutional question.

The record before the court shows that Ezukanma's counsel either gave him no useful advice concerning the decision on whether to testify, or he gave Ezukanma incorrect advice. At various points in the evidentiary hearing, trial counsel stated he did not give Ezukanma any assessment of the strength of the Government's case or the likelihood of a conviction without Ezukanma testifying. However, trial counsel admitted,

both in his affidavit, and at other points in his testimony at the evidentiary hearing, that he told Ezukanma that a reasonable doubt had been raised. Nevertheless, the Magistrate, and later the District Court, did not find trial counsel's representation deficient.

Moreover, trial counsel says that Ezukanma himself told trial counsel that his own assessment of the evidence was that the Government had failed to prove its case beyond a reasonable doubt, and, based on that belief, he was not going to testify.[1] Trial counsel said that he did not correct Ezukanma's clear misunderstanding of the state of the evidence, and did not tell him that a conviction was a certainty without Ezukanma's testimony because he did not want him to testify for other reasons. Thus, according to trial counsel, he allowed Ezukanma's misunderstanding of the evidence to stand because the result was one that counsel was seeking, which was for Ezukanma to not testify.

According to Ezukanma, it was trial counsel who told him that the Government had failed to prove the case beyond a reasonable doubt and, for that reason, he should not testify. If trial counsel told Ezukanma this, then his assessment of the evidence was egregiously wrong. In fact, the evidence, without Ezukanma's testimony, ensured a conviction. Regardless, whether trial counsel told Ezukanma this, or Ezukanma told trial counsel this was his opinion, the result was the

[1] Ezukanma strongly denied ever saying this to his counsel.

same. Ezukanma chose to not testify based on erroneous information.

Faced with this conflict in testimony between trial counsel and Ezukanma, the Magistrate chose to believe one version of trial counsel's testimony. However, in reaching this conclusion, the Magistrate failed to address several crucial questions. These questions include:

1. Does trial counsel have a duty to provide a defendant an assessment of the strength of the Government's case and the likelihood of conviction in order to assist the defendant in making an informed decision on whether to testify?

2. If the evidence before a jury ensures a conviction without the defendant's testimony, does trial counsel have an obligation to tell the defendant this in order to assist the defendant in making an informed decision on whether to testify?

3. If the defendant tells trial counsel that he does not believe the Government has proven his guilt beyond a reasonable doubt, and that assessment is clearly wrong, does trial counsel have a duty to correct the defendant's misunderstanding?

4. If the defendant is making a decision on whether to testify based on a misunderstanding of the strength of the Government's evidence against him, does trial counsel have a duty to correct this misunderstanding?

b. A Certificate of Appealability Should Have Been Issued

In order to appeal from the denial and dismissal of his §2255 Motion, Ezukanma must first obtain a certificate of appealability. *See*, 28 U.S.C. §2253(1)(B); *Miller-El v. Cockrell*, 537 U.S. 322 (2003). A certificate of appealability should issue if the Court finds that Ezukanma made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). This does not mean that Ezukanma was required to establish that he will prevail on the merits. In fact, a full consideration of the merits is not required nor even permitted by §2253(c)(2). *Miller-El v. Cockrell*, 537 U.S. at 336. Instead, Ezukanma must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issue (in a different manner); or that questions are adequate to deserve encouragement to proceed further." *Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir.), *cert. denied*, 117 S.Ct. 1114 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)); *accord*, *Lozada v. Deeds*, 498 U.S. 430 (1991). "[A] claim can be debatable even though every jurist of reason might agree, after the certificate of appealability has been granted and the case has received full consideration, that (the Petitioner) will not prevail." *Miller-El v. Cockrell*, 537 U.S. at 337.

The Supreme Court addressed the standards for issuing a certificate of appealability in *Buck v. Davis*, 580 U.S. 100 (2017). In *Buck*, the Court reversed the Fifth Circuit based on the Fifth Circuit's failure to issue a certificate of appealability. In discussing the requirements for the issuance of a certificate of

appealability, the Court emphasized that the question of issuing a certificate of appealability is not the same as the question of the proper resolution of the issue itself. The court restated the rule that the certificate of appealability should issue if jurists of reason could disagree on the proper resolution of a case.

c. Factual Background on Issue

The allegations in this case involved a conspiracy to defraud Medicare. The only question was whether Ezukanma agreed to join the conspiracy with intent to defraud Medicare – whether he knowingly and willingly agreed to defraud Medicare - or whether he was unwittingly and unknowingly used by the co-conspirators.

However, even though Ezukanma explained to investigators that he did not know how home-visit billing worked, at trial, Ezukanma did not testify and explain his mental state. *United States v. Ezukanma,* 756 Fed. Appx. at 366. The government, by contrast, presented "copious" circumstantial evidence against Ezukanma. *Id*. at 369.

Ezukanma desperately wanted to testify. His "belief was that [his] testimony would be necessary in order for the jury to understand things [he] did and the information [he] had or did not have and to see that [he] had no intent to violate the law or to do anything wrong." Affidavit from Ezukanma, Appendix 2 from 2255 record. And at first, trial counsel supported the idea and the plan was for Ezukanma to testify in his defense.

But according to trial counsel, after the government rested, Ezukanma himself – not trial counsel – "said something to the effect of no, [the government has not] proven their case beyond a reasonable doubt."[2] And because counsel feared that, if Ezukanma testified, the government would introduce evidence that he willfully and intentionally failed to obey a child-support order, allegedly lied in a 2009 child-support proceeding, and spent a short time in jail because of it, counsel urged Ezukanma not to testify.

Ezukanma vehemently denied that it was his own estimation of the government's case that persuaded him not to testify. In his affidavit filed in the District Court, he swears it was trial counsel's estimation:

> There was nothing about [the government's witnesses'] testimony that changed my opinion concerning the necessity of me testifying. In fact, it appeared to me that the testimony from the government's witnesses, if not addressed by me, would result in me being convicted.
>
> During an evening break in the trial, I met with Mr. Padian. This meeting was close to the time when it would be my turn to testify, so one of the things we spoke about was my testimony. Much to my surprise, in this meeting, Mr. Padian said he did not think I should testify. He said that he did not believe the government had presented evidence that would convince the jury, beyond a reasonable doubt, that I was guilty. I was

[2] At the evidentiary hearing on the 2255 motion, trial counsel testified about this.

> surprised by Mr. Padian's statement because it seemed to me that the government had presented enough evidence that the jury was highly likely to convict me. However, Mr. Padian told me that his assessment was that the government had not proven their case and, therefore, I should not testify. (Appendix 2, attached to Brief in Support of 2255 Motion).

d. The *Strickland* Standard

A criminal defendant has a Sixth Amendment right to effective assistance of counsel at every critical stage of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). To obtain relief on the basis of ineffective assistance of counsel, a defendant generally bears the burden to meet two standards. First, the defendant must show deficient performance – that counsel's representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, the defendant must show that the attorney's error "prejudiced the defense." *Id.* "In the ordinary . . . case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Weaver v. Massachusetts*, 582 U.S. 286 (2017) (quoting *Strickland*, 466 U.S. at 694). But the *Strickland* court cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. *Strickland*, 466 U.S. at 696. The ultimate inquiry must concentrate on "the fundamental fairness of the proceeding." *Id.*

e. How To Review Claims of Deficient Performance Related to Interference with a Defendant's Right to Testify.

i. Magistrate's Report

Beginning on page 11 of the findings, the Magistrate addresses Ezukanma's argument that counsel was ineffective in his advice (or lack of advice) concerning testifying at trial. This discussion involved the first prong of *Strickland*: deficient performance.

Initially, the Magistrate recognized that criminal defendants have the right to testify in their own defense and that only the defendant may waive this right. *See Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); *United States v. Brown*, 217 F.3d 247, 258 (5th Cir. 2000). The Magistrate also noted that a claim that trial counsel interfered with a defendant's right to testify is governed by the standards set out in *Strickland v. Washington,* 466 U.S. 668 (1984). (p. 12).

In fact, it is a criminal defendant's absolute right to decide whether to testify. *See, e.g., United States v. Flores-Martinez*, 677 F.3d 699, 711 (5th Cir. 2012) ("It is undisputed that the right to testify is a fundamental and personal constitutional right that only the criminal defendant himself may waive."). It is a criminal defense attorney's duty to advise him about it. The Eleventh Circuit has "specifically delineated" the duties of a defense attorney to include advising the defendant of the "strategic implications" of testifying or not. *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc) (emphasis added). The Seventh Circuit has explained that it is a defense

attorney's responsibility "to advise the defendant on whether or not to testify and to explain the tactical advantages and disadvantages of doing so." *United States v. Goodwin*, 770 F.2d 631, 637 (7th Cir. 1985). The Tenth Circuit has said counsel should "discuss with the defendant the strategic implications of choosing whether to testify and should make a recommendation to the defendant." *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004) (citing *Teague*, 953 F.2d at 1533-34). And the Sixth Circuit has said that "[a]ssuring that the defendant's decision [whether to testify] is an informed one .. . . necessitates that counsel discuss the strategic implications involved in the decision to testify." *Rayborn v. United States*, 489 Fed. Appx. 871, 880 (6th Cir. 2012).

State courts, too, have recognized counsel's duty to consult with a defendant on the decision whether to testify. *See Burton v. State*, 438 S.E.2d 83, 86 (Ga. 1994); *State v. Savage*, 120 N.J. 594, 630-31, 577 A.2d 455, 473 (1990); *Brown v. State*, No. 08-12-00026-CR, 2014 WL 172521, at *5 (Tex. App. – El Paso Jan. 15, 2014, pet. ref'd).

And not for nothing, the American Bar Association's Standards for Criminal Justice provide that it is up to the client to decide, *after full consultation with defense counsel*, whether to testify in his or her own behalf. *Standards for Criminal Justice* Standard 4-5.2(b); *see Strickland*, 466 U.S. at 688 ("[p]revailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable" representation by an attorney").

Incorrect advice does not amount to a discussion of the advantages and disadvantages of testifying.

Indeed, "a number of cases have held that *incorrect* advice that induces a defendant to waive his right to testify can constitute ineffective assistance." *Starkweather v. Smith*, 574 F.3d 399, 403 (7th Cir. 2009), *as corrected on denial of reh'g* (Aug. 7, 2009) (emphasis in original) (citing *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir. 1993), *rev'd on other grounds en banc*, 39 F.3d 873 (8th Cir. 1994); *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992); *United States v. Poe*, 352 F.2d 639, 640 (D.C. Cir. 1965); *Santillan v. Beto*, 371 F.Supp. 194, 196 (S.D. Tex. 1974)).

In some cases, the necessity of testimony from the defendant is clearly necessary. When it's undisputed that criminal activity took place, but "the very point of a trial is to determine whether an individual was involved in [the] criminal activity, the testimony of the individual himself must be considered of prime importance." *United States v. Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985); *People v. Cuccia*, 97 Cal. App. 4th 785, 792, 118 Cal. Rptr. 2d 668, 673 (2002) ("Although several of his witnesses testified to receiving cash payments from him on occasion, defendant's testimony was nonetheless necessary to show the source of that cash. In sum, his testimony was necessary to defend against some elements of the charges against him.").

Among the questions Ezukanma's testimony could address: What did Ezukanma hear in those meetings in which employees were instructed to overbill? Did Ezukanma know that the home health companies were submitting claims under his provider number for visits

performed by others? Did Ezukanma sign certifications without reading them? And was Ezukanma's actual signature on blank Form 485s?

In many ways, this case is the mirror reflection of *Carter v. Lee*, 283 F.3d 240 (4th Cir. 2002), and *People v. Burden*, 288 A.D.2d 821, 732 N.Y.S.2d 758 (2001). In *Carter*, the court held that "the advice of Carter's lawyers that he testify in his trial's guilt phase was a sound strategy," and his attorneys "were not constitutionally deficient in recommending that [the defendant] testify," because "his testimony was necessary for success of the diminished capacity defense." 283 F.3d at 252. Similarly, in *Burden*, the court held that the defendant "received [the] effective assistance of counsel" where counsel advised defendant to testify because "[d]efendant's testimony was necessary to attempt to establish the agency defense, and thus defendant failed to demonstrate the lack of a strategic basis for the decision to allow defendant to testify[.]" 732 N.Y.S.2d at 759.

Here, like "in many criminal cases," "the most important witness for the defense . . . [was] the defendant himself." *Rock v. Arkansas*, 483 U.S. 44, 52 (1987). And indeed, on appeal, the Fifth Circuit distinguished this case from *United States v. Ganji*, 880 F.3d 760 (5th Cir. 2018) – a similar case, in which the court held that there was insufficient evidence to prove a physician agreed to defraud Medicare – by noting the absence of testimony from Ezukanma. *Ezukanma*, 756 Fed. Appx. At 368. The court acknowledge that there were "factual similarities between Dr. Ganji and Dr. Ezukanma's cases: both were hired by home health

agencies as medical directors, the agencies committed Medicare fraud, and both physicians allege there was insufficient evidence to prove their role in the conspiracies beyond a reasonable doubt." *Id*. What's more, "both cases had evidence of blank, signed certification forms." *Id*. Ultimately, however, the court rejected the comparison because, "unlike Ezukanma, who did not testify and argued the signatures could be forgeries, Ganji testified that these blank forms were preceded by medical records she reviewed before signing the forms." *Id*. In advising Ezukanma that his testimony was unnecessary, then, counsel was simply incorrect.

The Magistrate ultimately concluded that there was no deficiency in trial counsel's representation concerning Ezukanma's right to testify. (pp. 15-18). Ezukanma's objection to this finding was rejected by the District Court.

However, in reaching the conclusion that counsel was not deficient in this regard, the Magistrate failed to address the argument that, ". . . if it was Ezukanma - not trial counsel - who 'said something to the effect of no (the Government has not) proven that case beyond a reasonable doubt," it was unreasonable of counsel not to dispel Ezukanma's massive misconception." (Movant's Brief in Support of Motion to Vacate, Set Aside, or Correct A Sentence By A Person in Federal Custody, p. 14). Ezukanma, therefore, objected to the failure of the Magistrate to address his argument that, even if the facts were as the Magistrate found, counsel still was ineffective in not correcting the statements made by Ezukanma. This is an important argument

concerning a key question of the application of the *Strickland* standards that the Magistrate failed to address.

Nevertheless, among the reasons cited by the Magistrate in finding no deficiency in counsel's representation was that the Magistrate found that counsel did not tell Ezukanma that a reasonable doubt had been raised and, therefore, he did not need to testify. However, the Magistrate's findings in this regard are directly contrary to the following statements in trial counsel's affidavit. (*See* Appendix to Response to Ezukanma's 28 U.S.C. § 2255 Motion, Affidavit of Defense Counsel).

> "I spoke to Noble Ezukanma during the break about the case the Government had presented to that point, the reasonable doubts that I believed had been raised, and the burden of proof. We also discussed proof beyond a reasonable doubt, its definition and application, not only then, but in the lead up to trial as well. I was thorough in our discussions. I did say to him that I thought that reasonable doubts were raised and if the jury had those doubts, then the Government had not proven their case beyond a reasonable doubt." (Appendix to Government Response).

Additional testimony from trial counsel at the evidentiary hearing shows that he was deficient in his advice to Ezukanma about testifying. At the hearing, trial counsel testified:

> "Q. So I'm -- I'm -- I want to make sure it's clear. What was your assessment to him of the

> strength of the Government's case at the time the Government rested?
> A. I -- I did not make an assessment to him at the time." (Evidentiary Hearing, p. 43).
> . . .
> "A. . . he said something like, "It hasn't been proven beyond a reasonable doubt," or "There is a reasonable doubt," something like that.
> Q. And you disagreed with his assessment, right?
> A. No, I -- I didn't have an opinion about his assessment. All I was trying to figure out was whether he was going to testify or not.
> Q. So when he said that, did it seem to you like you needed to give him your assessment since he was giving you his assessment?
> A. No, I didn't feel that need at the time.
> Q. Did it seem to you that his assessment might be wrong?
> A. Yes, his assessment might be wrong.
> Q. Did you tell him his assessment might be wrong?
> A. No, I didn't have those thoughts going through my mind at the time.
> Q. So in retrospect, do you think you should have told him his assessment might be wrong?
> A. No. No, I don't." (Evidentiary Hearing, pp. 61-62).

Despite this evidence being before the Court, the Magistrate failed to address the question of whether it was deficient conduct for the trial attorney to not provide Ezukanma with a professional assessment of the case in order for Ezukanma to have all of the

necessary information on which to base a decision whether to testify. Additionally, the Magistrate failed to address the question of whether the defense attorney had a duty to correct a massive misconception allegedly expressed by Ezukanma concerning what the Government had established at trial.

In fact, the Magistrate incorrectly failed to recognize that trial counsel was ineffective in not giving Ezukanma his professional assessment of the evidence in order that an informed decision could be made by Ezukanma on whether to testify. The failure of trial counsel to give this assessment to Ezukanma, or correct any misunderstanding Ezukanma had, is ineffective assistance. Likewise, if trial counsel told Ezukanma that there was a reasonable doubt in the case, then he was ineffective in telling Ezukanma something that was objectively incorrect.

Additionally, all of trial counsel's reasons for advising Ezukanma to not testify are invalid for one simple reason. The evidence that the Government had introduced at trial was certain to result in a conviction. The only hope Ezukanma had of not being convicted was that his testimony could convince the jury that he was not guilty. The failure of trial counsel to tell Ezukanma this is ineffective assistance.

ii. District Court's Order

In addition to accepting the findings and recommendation of the United States Magistrate Judge, the District Court added the following comments:

> ". . . Movant objects to the FCR on the bases that it failed to address whether counsel's performance was constitutionally deficient with respect to Movant's right to testify where counsel did not (1) give Movant a specific assessment of the strength of the Government's case and the likelihood of conviction; (2) tell Movant that the evidence before the jury ensured a conviction without his testimony; (3) correct a "clearly wrong" assessment by Movant regarding whether the Government had proven his guilt beyond a reasonable doubt; and (4) correct Movant's misunderstanding of the strength of the Government's evidence. (doc. 27 at 5-6). Movant has not directed the Court to any binding case law supporting the imposition of such duties on defense counsel under the Sixth Amendment, especially where, as here, counsel testified that he discussed with Movant, before and during the trial, the Government's burden of proof, the credibility of the witnesses at trial, problems with the Government's case, and the sufficiency of the Government's evidence to satisfy its burden, that Movant's assessment of the case *might* have been wrong, and that he could not predict what the jury would do or whether they had a reasonable doubt." (Doc. 28).

In these comments, the District Court expressed doubt as to whether it is even part of the duties of defense counsel to give a defendant an assessment of the likelihood of conviction to assist the defendant in deciding whether to testify. This is certainly a question

on which other reasonable jurists could come to a different conclusion, and for this reason, a certificate of appealability should have issued. Moreover, these comments by the District Court illustrate why the Supreme Court should grant this Petition for Writ of Certiorari.

Additionally, the District Court questioned whether a defense counsel should tell a defendant that the evidence ensured his conviction without his testifying (if those are the facts) in order to assist the defendant in deciding whether to testify. Likewise, the District Court doubted whether it was within the duty of defense counsel to correct a defendant's expressed misunderstanding of the strength of the government's evidence. These matters seem like the type of things that defense counsel should discuss with a defendant and jurists of reason could certainly disagree with these comments by the District Court. For this additional reason, a certificate of appealability should have issued and this Petition should be granted.

Moreover, the District Court's statement that counsel discussed with Ezukanma that his assessment of the case "might have been wrong," is not supported by the record. In fact, defense counsel did not do this and he made no effort to let Ezukanma know that the jury would certainly find him guilty without his testimony.

Additionally, the record does not support the District Court's conclusion that counsel discussed with Ezukanma the credibility of the witnesses and the problems with the government's case. In fact, defense counsel did not discuss these things with Ezukanma.

The District Court also took the position that a general discussion with a defendant of the government's burden of proof suffices in place of a real discussion of the likelihood of conviction. Again, this is a point on which reasonable jurists could disagree, making both the granting of a certificate of appealability and this Petition for Writ of Certiorari appropriate.

The District Court also characterizes the argument that the jury's guilty verdict "was a foregone conclusion," as being based on the "distorting lens of hindsight." However, that is not at all the situation in this case. Here, it was clear that Ezukanma would be convicted based on the evidence before the jury and the only hope of changing that inevitable outcome was testimony from Ezukanma himself. This was not at all based on hindsight – rather, it was obvious at the time of the trial.

f. Application of the Prejudice Prong of *Strickland*

The second prong of *Strickland* requires a showing that, but for counsel's errors, there was a reasonably probability of a different outcome.

Under *Strickland*, the defendant, ". . . must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The *Strickland* court made it clear that a "reasonable probability" of a different outcome is but a probability sufficient to undermine confidence in the

outcome. *Strickland*, 466 U.S. at 692-94. "[*Strickland*] specifically rejected the proposition that the [applicant] had to prove it more likely than not that the outcome would have been altered." *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002). Instead, a reviewing court's adjudication of an ineffective assistance claim should ultimately focus on "the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produce a just result. *Id*. at 686.

In *Weaver v. Massachusetts*, 582 U.S. 286 (2017), the court discussed ineffective assistance claims as related to structural errors. In this regard, the court said that, when a defendant raises a structural error in the context of an ineffective assistance claim, *Strickland* prejudice is not shown automatically. The court said, in these circumstances, the defendant must show either a reasonable probability of a different outcome or, "as the court has assumed for these purposes," . . . to show that the structural error violation "was so serious as to render his or her trial fundamentally unfair." *Id*. at 301. Based on *Weaver*, Ezukanma argued below that the denial of his right to testify was structural error, and therefore the modified *Strickland* prejudice approach applied to an ineffective assistance claim related to the right to testify.

The Magistrate rejected Ezukanma's argument that a showing of a reasonable probability of a different outcome under *Strickland* is unnecessary because

counsel's interference with the right to testify constitutes the type of structural error identified in *Weaver*. The District Court adopted the Magistrate's findings and denied Ezukanma's 2255 motion.

In his 2255 motion, Ezukanma pointed out that errors that infringe on a defendant's right to testify are structural. The Supreme Court has recognized that the right to testify at trial is a right granted to the accused "personally" that is "essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 820 (1975). The right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), and in *McCoy v. Louisiana*, 138 S.Ct. 1500, 1511 (2018), the court concluded that denial of a "protected autonomy right" or decision that is "within [the defendant's] sole prerogative" ranks as structural error. Given that both rights are premised on the principle of safeguarding the dignity and autonomy of the defendant, it follows that if violation of one right is structural error, violation of the second must be structural error too. *State v. Rivera*, 402 S.C. 225, 249 (South Carolina 2013) (reversing and remanding conviction in denial of right to testify case because "the right of an accused to testify in his defense is fundamental to the trial process . . [and] its deprivation cannot be harmless . . . As such, the error is structural[.]") (citation omitted).

When raised in a claim of ineffective assistance, *Weaver* suggests that errors that always result in fundamental unfairness are immune from requiring an outcome-determinative showing of prejudice. *Weaver*,

582 U.S. 286 (2017). *Strickland* prejudice is shown automatically if the structural error will always "lead to a fundamentally unfair trial" or "deprive[ ] the defendant of a reasonable probability of a different outcome." *Weaver*, 582 U.S. 286 (2017). *See also*, *McCoy v. Louisiana*, 138 S.Ct. 1500, 1511 (2018) (not applying normal ineffective assistance jurisprudence when question concerns client's autonomy, not counsel's competence).

However, the Magistrate stated that neither "*Weaver* nor the Fifth Circuit have classified Movant's ineffective assistance claim as *Strickland* error requiring automatic reversal." (p. 14). Ezukanma objected to this conclusion because the Magistrate failed to recognize that *Weaver* changes any previous analysis concerning this issue. Under *Weaver*, counsel's failure to properly advise his client about his right to testify is the kind of structural constitutional error that is subject to automatic reversal - whether it always "lead to a fundamentally unfair trial" or "deprives the defendant of a reasonable probability of a different outcome." But like the right to self-representation, the right to testify in one's own defense is "basic to our system of justice" and rooted in decisions made decades ago to respect the autonomy and competency of the individual defendant. *Rock*, 483 U.S. at 49-51 (explaining that right to testify in one's own defense is "essential to due process of law in a fair adversary process") (quoting *Faretta*, 422 U.S. at 819, n.15). And the right to testify in your defense is deemed "even more fundamental to a personal defense than the right of self-representation." *Rock*, 483 U.S. at 52; *see also McCoy*, 138 S.Ct. at 1507 (recognizing

that "[t]he right to defense is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law"). Indeed, denying a defendant the opportunity to testify robs him of the "right to present his own version of events in his own words" to the jury. *Rock*, 483 U.S. at 52. And it cuts against foundational promises of the criminal justice system: that every accused deserves his or her day in court, and that every defendant will be afforded an opportunity to be heard. Until a defendant who wants to testify is permitted to do so, the opportunity to conduct one's own defense is "incomplete." *Id.*

Nevertheless, the Magistrate rejected this argument, stating:

> "Even assuming that the underlying constitutional violation of the denial of the right to testify constitutes structural error requiring automatic reversal without a prejudice inquiry in the direct review context, under *Weaver*, Movant must still show *Strickland* prejudice in the context of a claim of ineffective assistance of counsel because it does not appear that interference with that right always results in a fundamentally unfair trial or always deprives the movant of a reasonable probability of a different outcome. *See*, *e.g.*, *United States v. Flores-Martinez*, 677 F.3d 699, 708-09 (5th Cir. 2012) (discussing limits to the right to testify); *see also Weaver*, 137 S.Ct. at 1911. In the absence of controlling precedent obviating or modifying the *Strickland* prejudice inquiry, the

> Court declines to apply *Weaver* as proposed by Movant in this habeas action." (Doc. 24, pp. 14-15).

Ezukanma objected to these findings by the Magistrate and submits this as a reason the certificate of appealability and this Petition for Writ of Certiorari should be granted.

First, the Magistrate is incorrect in stating that the interference with the right to testify does not always result in a fundamentally unfair trial or deprive the Movant of a reasonable probability of a different outcome. Since the right to testify has been recognized by *Faretta v. California*, *supra*, as "essential to due process," the Magistrate's conclusion that interference with the right to testify does not always result in a fundamentally unfair trial is incorrect. Likewise, when *Rock v. Arkansas*, *supra*, recognized that the right to testify is, "[e]ven more fundamental to a personal defense than the right of self-representation," the court was recognizing that interference with that right always results in a fundamentally unfair trial.

Likewise, the denial of his right to testify always deprives the defendant of a reasonable probability of a different outcome. When a defendant, such as Ezukanma, is allowed to testify and present his side of the story, a jury would have substantial evidence on which to base an acquittal. Thus, when the defendant is denied this right, there is always a probability of a different outcome.

The Magistrate's analysis of this argument, as adopted by the District Court and how *Weaver* affects

this question, is something on which reasonable jurists could disagree. For this reason, a certificate of appealability should have issued and this Petition should be granted.

Ezukanma also objected to the Magistrate's conclusion that, ". . . he fails to show a reasonable probability that the outcome of his trial would have been different, but for counsel's alleged deficiencies." (p. 19). The District Court also rejected this objection.

As the Supreme Court emphasized in *Weaver*, the court in *Strickland*, immediately after setting out its outcome - determinative test, cautioned that "[a] number of practical considerations are important for the application of the standards we have outlined." *Strickland*, 466 U.S. at 696. "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules." *Id*. And "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*. The Supreme Court in *Weaver* thus "assumed" "that under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered *the trial* fundamentally unfair." *Weaver*, 582 U.S. 286 (2017) (emphasis added) (citing *Strickland*, 466 U.S. at 969, 698).

Put another way, the Supreme Court assumed that even if the underlying error won't always lead to a fundamentally unfair trial, if in the case at issue it *did* lead to a fundamentally unfair trial, relief must be

granted, no matter whether there is a showing of a reasonable probability of a different outcome. And indeed, since the *Weaver* court's assumption, numerous state and federal courts have continued to embrace this theory of *Strickland* prejudice.[3]

Here, counsel's unreasonable advice, affecting Ezukanma's decision to testify, rendered Ezukanma's trial fundamentally unfair. The testimony of a criminal defendant at his own trial is unique and inherently significant. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961). When the defendant testifies, the jury is given an opportunity to observe his demeanor and to judge his credibility firsthand. Again, as the Supreme Court noted in *Rock*, 483 U.S. at 52, the "most important witness for the defense in many criminal cases is the defendant himself." Further, in a case like this – where the question was not whether a crime was

---

[3] *See Dixon v. Burt*, No. 17-2292, 2018 WL 2016252, at *2 (6th Cir. Apr. 30, 2018); *Pirela v. Horn*, 710 Fed. Appx. 66, 83 n. 16 (3d Cir. 2017); *Newton v. State*, 455 Md. 341, 168 A.3d 1, 10 (2017); *State v. Calvert*, 2017 UT App. 212, 407 P.Ed 1098, 1111 (Utah App. 2017); *Ledet v. Davis*, No. 4:15-CV-882-A, 2017 WL 2819839, at *14 (N.D. Tex. June 28, 2017); *Monreal v. State*, 546 S.W.3d 718, 728 (Tex. App. – San Antonio 2018, pet. ref'd); *Guzman-Correa v. United States*, CR 07-290 (PG), 2018 WL 1725221, at *6 (D.P.R. Mar. 29, 2018); *Commonwealth v. Gaines*, 577 WDA 2017, 2018 WL 2188978, at *3 (Pa. Super. Ct. May 14, 2018); *Roberts v. State*, 535 S.W.3d 789, 797 (Mo. Ct. App. 2017); *Matter of Salinas*, 189 Wash. 2d 747, 761, 408 P.3d 344, 350 (2018); *Njonge v. Gilbert*, No. C17-1035 RSM, 2018 WL 1737779, at *12 (W.D. Wash. Apr. 11, 2018).

committed, but whether the defendant was the person who committed the crime – the defendant's testimony takes on even greater importance. Again, "[w]here the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." *Walker*, 772 F.2d at 117.

Courts and empirical studies have long recognized that testimony from a defendant exerts a powerful influence on jury members, who expect the defendant to testify and who often punish a defendant who does not. *See, e.g., Cannon v. Mullin*, 383 F.3d 1152, 1172 (10th Cir. 2004) (recognizing the significance of defendant testimony and the "power of a face-to-face appeal," and observing that the defendant's "demeanor while testifying, could have special significance to the jury"); Michael E. Antonio & Nicole E. Arone, *Damned If They Do, Damned If They Don't: Jurors' Reaction to Defendant Testimony or Silence During a Capital Trial*, 89 Judicature 60, 62 (2005) (reporting that jurors "reacted negatively" when a defendant did not testify and that "[m]any believed not testifying was an obvious admission of guilt"). Jurors often draw adverse inferences from a defendant's decision not to testify, despite having been explicitly instructed by the court not to do so. *See id.*; Mitchell J. Frank & Dr. Dawn Broschard, *The Silent Criminal. Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 Lewis & Clark Rev. 237, 263-65 (2006) (reporting that even after having been instructed on a defendant's Fifth Amendment privilege and that it is a defendant's fundamental right not to testify, almost 40% of jurors still discussed the

defendant's failure to testify). Over 20% of jurors admitted that "it mattered" that the defendant did not testify, and almost the same number concluded that the defendant "had an obligation to testify." *Id.* at 265.

Jurors' deeply held presumptions about defendant testimony increase the likelihood that the jurors in Ezukanma's case considered it significant that he did not testify. The effects this might have had on the jury members are myriad and unknowable; they could have affected how jurors framed the evidence they received throughout the trial, or how they interpreted the testimony they heard, undermining the framework of the entire trial. Even if unreasonable advice as to the right to testify does not always lead to a fundamentally unfair trial, then, in this case it did. Under *Strickland*, relief thus should be granted, no matter whether there is a showing of a reasonable probability of a different outcome.

For all of the reasons previously stated, the deficient performance by trial counsel in advising Ezukanma to not testify rendered this trial fundamentally unfair. This is a highly important issue on which this Petition should be granted.

CONCLUSION

This Petition for Writ of Certiorari raises important questions that should be addressed by the Supreme Court. For this reason, Ezukanma prays that his Petition be granted.

Respectfully submitted,

GARY A. UDASHEN
Counsel of Record
BRETT ORDIWAY
UDASHEN | ANTON
8150 N. Central Expressway
Suite M1101
Dallas, Texas 75206
(214) 468-8100
Fax (214) 468-8104
gau@udashenanton.com
brett@udashenanton.com

Attorneys for Petitioner