

In the Supreme Court of the United States

JASIM MOHAMMED HASSI RAMADON,
Petitioner,

– v. –

COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Colorado Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a due process violation grounded in the denial of a defendant's right to testify is structural error.
2. Whether a Sixth Amendment violation grounded in counsel depriving the defendant of the right to testify requires proof of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

Petitioner Jasim Mohammed Hassi Ramadan, *pro se*, was the appellant in the court below. Respondent State of Colorado was the appellee in the court below.

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INTRODUCTION

Petitioner asks this Court to decide uncontroversial issues based on hypothetical facts. In an unpublished and non-precedential opinion, the Colorado Court of Appeals decided that (1) Petitioner's waiver of his right to testify satisfied due process, and (2) counsels' attempt to dissuade Petitioner from testifying did not amount to ineffective assistance because Petitioner proved neither deficient performance nor prejudice.

Now, however, he asks this Court to consider (1) if automatic reversal would have been required, had his testimony waiver violated due process, and (2) whether he had to prove *Strickland* prejudice in his case, if counsel had rendered deficient performance. This Court should not accept Petitioner's invitation to render advisory opinions on these questions.

Even if these issues were properly presented, further guidance from this Court would afford little practical benefit. This Court's precedent already clearly requires *Strickland* prejudice in cases such as this, as illustrated by the reasoning of those circuit courts of appeals that have considered the issue.

For all of these reasons, the Petition should be denied.

STATEMENT OF THE CASE

I. On trial for multiple counts of sexual assault, Petitioner was repeatedly advised of his right to testify and chose not to do so.

In the early morning hours of July 22, 2012, an incapacitated woman was violently sexually assaulted, resulting in traumatic intimate injuries that required surgical intervention once she regained consciousness. CF, pp. 816–20, 2251–52.

Colorado law enforcement officers identified Petitioner as the perpetrator. CF, pp. 1444–45. The State of Colorado charged him with multiple counts each of sexual assault, unlawful sexual contact, and attempted sexual assault; one count of first-degree assault; and thirteen crime-of-violence sentence enhancers. CF, pp. 30–37.

Petitioner went to trial in 2014. CF, pp. 754–59. During that trial and outside the presence of the jury, the trial court spoke with Petitioner about whether he intended to testify on his own behalf. CF, pp. 1964–68. Trial courts in Colorado routinely make such inquiries because under Colorado law “when a defendant waives the right to testify on his own behalf, the trial court has a duty to ascertain on the record whether the defendant makes that waiver with a complete understanding of his rights, including the right to override the advice of his counsel not to testify.” *People v. Curtis*, 681 P.2d 504, 507–08 (Colo. 1984). These “*Curtis* advisements” inform a defendant that:

- They have a right to testify;
 - If they want to testify, no one can prevent them from doing so;
 - If they testify, the prosecution will be allowed to cross-examine them;
 - If they have been convicted of a felony, the prosecutor will be entitled to ask them about it, thereby disclosing it to the jury;
- and

- If a felony conviction is disclosed to the jury, then the jury can be instructed to consider it only as to the defendant's credibility.

Id. at 514.

Here, the trial court gave Petitioner *Curtis* advisements on two separate occasions. During the first, the court told Petitioner that it was going to give him “an advisement of your rights in relation to your choice to testify or not. I want you to think about this overnight. This advisement is kind of giving you information about your rights regarding testifying or not.” CF, p. 1965:16–20.

The court explained that the purpose of this advisement was to help Petitioner understand not only his right to take the stand, “but also the consequences thereof.” CF, pp. 1965:21–23. The court told Petitioner “that you may testify even if your counsel advises you against that,” and Petitioner said, “Yes, ma’am” when asked if he understood. CF, p. 1965:22–25. The court then proceeded to give him a full *Curtis* advisement. CF, pp. 1966–67. Following this initial advisement, the trial court asked Petitioner to “think about that tonight” because it was going to ask him about his decision to testify after the prosecution rested. CF, p. 1967:5–8.

The next day, the trial court gave Petitioner a second *Curtis* advisement. CF, pp. 1503–05. The court again told him that “[n]o one can prevent you from testifying if you want to testify,” and Petitioner again said, “Yes, ma’am” when asked if he understood. CF, p. 1503:15–17. The court then engaged in the following colloquy with Petitioner:

THE COURT: And so I want to ask, are you under the influence of any drugs or alcohol today?

PETITIONER: No, I'm not.

THE COURT: You don't have any mental health issue that you think would impair your ability to understand the advisement today?

PETITIONER: I don't believe so at this time.

DEFENSE COUNSEL: I think Mr. [Ramadon] does have some mental health issues. I think he's saying he doesn't think they will affect his ability to make this decision.

THE COURT: Can you tell me that?

PETITIONER: I got four brain injuries, and I got bad memory.

THE COURT: Do you think those would affect your ability to understand my advisement to you about your right to testify today?

PETITIONER: I'm not good with the law, but I trust my lawyer.

THE COURT: All right. But you understand that?

PETITIONER: Yes.

THE COURT: Even if you trust your lawyers, *that decision to testify or not is solely yours.*

PETITIONER: *Yes, I understand.*

THE COURT: Do you need more time to talk to your attorney about that?

PETITIONER: No, I do not, ma'am.

THE COURT: *What's your decision?*

PETITIONER: *At this time I wish not to testify.*

THE COURT: *And nobody's –*

PETITIONER: *I talked to my counsel, my lawyers and I don't testify. That is a voluntary decision by me.*

THE COURT: *And nobody's forcing you to do that, right?*

PETITIONER: *No, ma'am.*

CF, pp. 1504–05 (emphasis added).

Petitioner did not testify at trial. The jury acquitted him of first-degree assault and its accompanying sentence enhancers, and one count of unlawful sexual contact was dismissed. The jury convicted Petitioner of all remaining charges. The Colorado Court of Appeals, Colorado’s intermediate appellate court, affirmed his convictions in an unpublished opinion, and the Colorado Supreme Court denied his petition for certiorari review. CF, pp. 751, 1326–51.

II. The postconviction court and the Colorado Court of Appeals concluded that Petitioner validly waived his right to testify, had effective counsel, and suffered no prejudice, regardless.

Petitioner timely filed a pro se motion for postconviction relief, which his counsel later supplemented. CF, pp. 1205–16, 1254–57. As relevant here, Petitioner claimed that his waiver of the right to testify was not knowing, voluntary, and intelligent, and that trial counsel was ineffective for advising him not to testify at trial. CF, pp. 1205–16, 1254–57. The postconviction court ordered the prosecution to respond and ultimately set the matter for a hearing. CF, pp. 1258, 2751–52; *see generally* Tr. 12-19-22.¹

At the hearing, Petitioner claimed he told his defense counsel, Chalmers and Hostetler, that he wanted to testify but that they had threatened to withdraw if he decided to take the stand. Tr. 12-19-22, pp. 184:15–186:11. Counsel, on the other

¹ The record contains two transcripts for December 19, 2022. The one named “TR. 12-19-22 – 35c Continued” contains the entirety of the postconviction hearing. Unless otherwise noted, it is this file to which Colorado refers when citing to Tr. 12-19-22.

hand, testified that they strongly encouraged him not to testify but never made any threats. Tr. 12-19-22, pp. 32:24–33:6.

For example, Chalmers said that they “strongly encouraged” but did not threaten him:

Q. When you had the conversations with Mr. Ramadon about whether to testify or not testify, was that pretrial?

A. We had conversation pretrial for sure. He was adamant all along he wanted to testify, and *we were doing everything we could to prevent him from testifying. Apart from actually threatening or something like that*, we were strongly encouraging him not to testify.

...

Q. Now to be clear, you said you never threatened him?

A. No, *I don't think I threatened him. I don't believe I threatened him. That's not generally my practice*. I would have said things that he might have interpreted as a threat. You're going to die in prison if you testify, I have said that to clients before.

Tr. 12-19-22, pp. 32:24–33:6, 69:12–17 (emphasis added). Chalmers also explained why they encouraged him not to testify: Petitioner had “an air of cockiness” and others perceived him as “annoying,” which she feared the jury might have seen if they put him on the stand. Tr. 12-19-22, pp. 33:21–34:5.

Similarly, Hostetler testified that while she could understand how Petitioner may have interpreted her statements to him as a threat to withdraw, she was “sure we never said it like that”:

Q. Did you ever threaten Mr. Ramadon in any way that if he chose to testify that you would terminate your representation of him?

A. I'm sure we never said it like that, but I can remember saying we will not represent you if you testify, we will not. We cannot do this if you testify.

Q. Fair to say that it came out essentially that if he testified, you were saying you would no longer be his attorney; is that correct?

A. I can understand 100% how he would interpret it that way.

...

Q. And what was your purpose of hounding and being adamant that Mr. Ramadon couldn't take the stand?

A. I couldn't see a way to defend the case with him taking the stand. I just thought that it would – I didn't think that the jury was going to have the faith in him and believe in him the way we did.

Tr. 12-19-22, pp. 140:25–142:5.

The court denied the postconviction motion after considering the entire record, including Petitioner's waiver of his right to testify; counsel's pretrial actions and performance at trial; and the evidence presented at the postconviction hearing. *See generally* Supp. Tr. 03-07-23, p. 20:21-24; Pet. App. 15–17. The court acknowledged that “trial counsel strongly discouraged [Petitioner] from testifying” and that, in advance of trial (but not during the course of trial), there was a “not even so veiled suggestion that counsel may actually end their representation of [Petitioner] should he make the decision to testify.” Supp. Tr. 03-07-23, p. 4:2–11. But the court ultimately found that Petitioner knowingly, voluntarily, and intelligently waived his right to testify. Supp. Tr. 03-07-23, pp. 5:3–6:23. The court further concluded that Petitioner failed to demonstrate that he received ineffective counsel or that he was prejudiced. Supp. Tr. 03-07-23, pp. 7:2–8:17.

Petitioner appealed the postconviction court's order to the Colorado Court of Appeals, which affirmed in an unpublished, nonprecedential decision. Pet. App. 1–32. This petition followed.

REASONS FOR DENYING THE PETITION

Petitioner has failed to identify any compelling reason that would justify this Court's intervention. There is no split among the circuits, no conflict with this Court's precedent, no important question that this Court must settle, nor any other persuasive reason to expend the Court's limited resources to hear this matter. Instead, the Petition presents questions that this Court would never reach in an effort to overturn an unpublished decision that is not binding on any other court.

The first question presented asks whether structural error requiring automatic reversal occurs when counsel coerces a defendant to waive their right to testify. But this case is the wrong vehicle to answer that question. The postconviction court made factual findings with ample record support that Petitioner was not coerced and validly waived his right to testify. Petitioner cannot show that those findings are clearly erroneous, and thus, there is no opportunity here to reach the issue on which he seeks review.²

The second question presented is a similarly unpersuasive candidate for review. Again, vehicle problems would keep the Court from reaching the issue. Petitioner's assertion that he need not demonstrate prejudice is being raised for the

² And even if that were not the case, as discussed in the context of Petitioner's ineffective assistance of counsel claim, federal circuit courts have uniformly applied *Strickland's* prejudice framework when determining whether a violation of the right to testify by counsel merits a new trial. There is no circuit split that requires this Court's intervention to resolve.

first time in this Court and should not be considered. Further, he cannot demonstrate that his counsel was ineffective—as both prior courts reviewing that issue concluded—leaving the Court with no reason to address the prejudice-focused question he presents.

And even were that not the case, Petitioner questions whether a waiver of the right to testify resulting from ineffective assistance of counsel is subject to a prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). But there is no circuit split on this issue, and the analysis in the decision below—and the approach taken in every circuit—is consistent with this Court’s precedents.

This Court should deny the Petition.

I. Because Petitioner waived his right to testify in accordance with due process, this case presents no reason to address if an invalid waiver of the right to testify would have been structural error.

Petitioner asks this Court to decide if an invalid waiver of the right to testify, which violates due process, is structural error. Circuit courts that have addressed the issue conclude it is not. *See, e.g., United States v. Barksdale*, 98 F.4th 86, 88–89 (3d Cir. 2024); *Jordan v. Hargett*, 34 F.3d 310, 315 (5th Cir. 1994); *Solomon v. Curtis*, 21 F. App’x 360, 362 (6th Cir. 2001); *United States v. Johnson*, 65 F.4th 932, 942 (7th Cir. 2023); *United States v. Smith*, 433 F. App’x 847, 851 (11th Cir. 2011); *see also United States v. Gillenwater*, 717 F.3d 1070, 1083 (9th Cir. 2013) (assuming that harmless-error analysis applies to a right-to-testify claim under due process); *United States v. Hung Thien Ly*, 646 F.3d 1307, 1318 (11th Cir. 2011) (same). Courts in many states have reached the same conclusion, while others have determined it is

structural error whenever the right to testify is violated. *Compare People v. Spaulding*, 957 N.W.2d 843, 856 (Mich. Ct. App. 2020); *State v. Lute*, 76 N.E.3d 664, 673 (Ohio Ct. App. 2016); *State v. Anthony*, 860 N.W.2d 10, 29 (Wis. 2015), *with State v. Lacourse*, 398 So. 3d 712, 719 (La. Ct. App. 2024); *State v. Rivera*, 741 S.E.2d 694, 707 (S.C. 2013).

Petitioner gives this Court no reason to address this small minority of jurisdictions, however, because the Colorado courts found that he validly waived his right to testify. *See* Pet. App. 6–8. Petitioner’s case is the wrong vehicle to address the issue that he raises.

True, Petitioner disputes the state courts’ findings. *See, e.g.*, Pet. App. 7–8. But “the rule is well settled”—and has been for over a century—“that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous.” *Tex. & P.R. Co. v. R.R. Comm’n*, 232 U.S. 338, 339 (1914). And to do so, the record as a whole must leave this Court with the “definite and firm conviction that a mistake has been committed.” *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (citation modified); *see also Stafford v. Int’l Harvester Co.*, 668 F.2d 142, 147 (2d Cir. 1981) (the party asserting clear error bears the burden of proving it). Because Petitioner cannot satisfy that standard here, the Court will never reach the question he presents.

Defendants have a right to testify in their own defense. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). While this right may be waived, a defendant must do so voluntarily. *See Godinez v. Moran*, 509 U.S. 389, 400 (1993) (discussing in a different

context that the waiver of the defendant’s “constitutional rights” must be “knowing and voluntary”); *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are similarly subject to waiver.”).

As discussed above—and unlike federal law—Colorado law requires courts to advise criminal defendants outside the jury’s presence:

that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him, that if he has been convicted of a felony the prosecutor will be entitled to ask him about it and thereby disclose it to the jury, and that if the felony conviction is disclosed to the jury then the jury can be instructed to consider it only as it bears upon his credibility. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.

Compare Curtis, 681 P.2d at 514 (footnote omitted), *holding modified by People v. Blehm*, 983 P.2d 779, 786 (Colo. 1999), *with United States v. Pennycooke*, 65 F.3d 9, 13 (3d Cir. 1995) (recognizing that “a trial court has no affirmative duty to advise the defendant of the right to testify or to obtain an on-the-record waiver of such right”).

Here, Petitioner was twice advised of, and stated that he understood, his right to testify. Pet. App. 15, 17–18. Petitioner also “indicated on the record that he trusted his lawyers and that he did not need any additional time to speak further with them before deciding to waive his right to testify.” Pet. App. 15. The Colorado Court of Appeals rightly found this advisement highly probative of the validity of Petitioner’s waiver. Pet. App. 17–18. In fact, during trial (and after being advised of his rights by

the court), Petitioner said no one had forced him to waive his right to testify. Pet. App. 8–11.

Years later and after he was convicted, he changed his story and asserted that his defense counsel had coerced him into waiving his right to testify. During the postconviction proceedings, Petitioner was afforded an evidentiary hearing where he had the opportunity to prove he was coerced. Importantly, the Colorado postconviction court heard testimony and received evidence about counsels’ advice against testifying. After considering all of the evidence before it, the court found that Petitioner’s counsel did not “expressly threaten[]” to withdraw if Petitioner testified. Pet. App. 16–17; *see* Supp. Tr. 03-07-23, pp.6–7.

Further, while counsel “strongly discouraged” Petitioner from testifying, they also did so sufficiently before trial that Petitioner was not forced to choose between representing himself at trial or going forward with attorneys whose theory of defense would contradict and undermine his testimony. Pet. App. 16–17. Petitioner’s postconviction characterizations of his attorneys’ actions as coercive was one potential view of the evidence, but it was not the only one. It was also inconsistent with what he had previously told the trial court in the context of the *Curtis* advisements. Ultimately, both the postconviction court and the Colorado Court of Appeals rejected Petitioner’s claim that he was coerced. Pet. App. 14–18;³ Supp. Tr. 03-07-23, pp. 6–7.

³ Because they rejected Petitioner’s factual contentions, those courts also had no reason to consider whether automatic reversal would be required, as Petitioner seeks here. This too counsels against granting the Petition. As this Court has recognized, there is value in other courts addressing a question first before it comes to this Court. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024).

Given the facts, Petitioner cannot demonstrate that these courts clearly erred and that he was coerced into waiving his right to testify. Because his waiver was valid, there is no need for this Court to address whether a due process violation grounded in the denial of a defendant's right to testify is a structural error that requires automatic reversal. Instead, granting the Petition to address the first question presented would result in nothing more than the kind of hypothetical dispute that this Court does not entertain. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (noting that the Article III case or controversy requirement keeps federal courts from becoming nothing more than "roving commission[s]" that "publicly opine on every legal question"). Petitioner's first question presented does not merit this Court's review.

II. There is no factual or legal reason to address whether defendants must show *Strickland* prejudice if they relinquished their right to testify as a result of ineffective assistance of counsel.

Petitioner's second question asks this Court to conclude that courts should presume prejudice when a defendant alleges ineffective counsel deprived him of the right to testify. His question fails to warrant this Court's review for two reasons.

First, as a factual matter, this case does not present a vehicle to address the question. Petitioner's counsel was not deficient, so it is unnecessary to ask whether a prejudice analysis is appropriate. What's more, Petitioner did not raise his question in the lower courts. In fact, he argued that prejudice *should* be evaluated, just under a modified test he does not advocate for here.

Second, this Court has no reason to address the issue that Petitioner presents because the law he challenges is settled. The Colorado Court of Appeals' approach is consistent with a long and unambiguous line of this Court's precedents. And, in light of this precedent, the circuit courts agree that *Strickland* requires a prejudice assessment when the right to testify is violated through deficient counsel. Accordingly, guidance is not needed on this issue.

A. Petitioner's case is a poor vehicle to address the issue that his Petition asserts.

Petitioner asks this Court to determine whether *Strickland's* prejudice analysis applies when counsel's deficient performance violates a defendant's right to testify at trial. But this case does not present the issue: Petitioner's counsel performed adequately, and he did not develop the issue in his state appeal. Petitioner's case is a poor vehicle for this Court's review.

1. Because Petitioner's *Strickland* claim fails for lack of deficient performance, there is no reason to consider the prejudice question.

Defendants seeking to prove ineffective assistance of counsel must show that counsel performed deficiently. *Strickland*, 466 U.S. at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

In this case, Petitioner tried to convince the Colorado courts that his counsel was deficient because (1) they coerced Petitioner into giving up his right to testify, and (2) counsel lacked a reason for discouraging the testimony. Pet. at pp. 11–14. He did not succeed. And for good reason; neither claim holds up under scrutiny.

First, as discussed above, *supra* pp. 12–15, Petitioner’s coercion claim has consistently been rejected, and with ample record support. *See generally* Tr. 12-19-22; Supp. Tr. 03-07-23; Pet. App. at pp. 19–20. As such, that claim does not support Petitioner’s assertion that his counsel were ineffective.

Second, Petitioner now claims his counsel had no valid reason to advise him against testifying, arguing that their concerns over his criminal history were invalid.⁴ Pet. at p. 10. But as the postconviction court and the Colorado Court of Appeals both noted, Petitioner’s counsel were also concerned that he would not present well to a jury. Supp. Tr. 03-07-23, p. 7:2–23; Pet. App. at p. 22. Indeed, that was the only reason the postconviction court cited. Supp. Tr. 03-07-23, p. 7:2–23. Standing alone, counsel’s professional opinion regarding how a jury could react to their client is a valid strategic reason to recommend against testifying. *See Carter v. Kentucky*, 450 U.S. 288, 293, 299–300 (1981).

That may explain why Petitioner previously disavowed any argument challenging whether his counsel’s reasons for not wanting him to testify were valid. Expressly criticizing the postconviction court’s analysis, Petitioner stated below: “With regard to Ramadan’s related ineffective-assistance-of-counsel claim, the People and the lower court misapprehend Ramadan’s claim. Ramadan **did not claim or argue that counsel’s various reasons for advising Ramadan against testifying fell below an objective standard of reasonableness.**” Reply Brief for

⁴ Petitioner does have some juvenile criminal history, but it was not discussed at trial. Because of the limited postconviction record and because Petitioner’s conviction was in juvenile court, Respondents lack the detail necessary to opine on whether his criminal history would have been admissible evidence had he taken the stand.

Appellant at 8, *People v. Ramadon*, No. 2023CA653 (Colo. App. Feb. 19, 2025). There is no need for this Court to grant the Petition so he can attempt to do so now.

Thus, Petitioner’s presupposition that counsel performed deficiently is false. So, even if this Court wanted to address whether *Strickland* prejudice should be presumed when defense counsel violates a defendant’s right to testify, the Court would never reach the question presented. Therefore, his case is a poor vehicle for this Court’s review.

2. Petitioner raises his presumed-prejudice argument for the first time in this Court.

This Court generally will not take up questions that were not “addressed by, or properly presented to, the state court that rendered the decision [the Court] ha[s] been asked to review.” *Adams v. Robertson*, 520 U.S. 83, 86 (1997). And unlike he does here, Petitioner did not argue presumptive prejudice in the Colorado Court of Appeals. Rather, Petitioner said below that he would need to show prejudice on his ineffective assistance claim. Pet. App. 22–23. Relying on Colorado case law, he asserted that it would be sufficient for him to prove that he *would have testified*—not that his testimony *would have changed the outcome of his trial*—to demonstrate prejudice. Pet. App. 22–23. He did not contend, as he does now, that prejudice should be presumed without any further showing. Compare Pet. App. 23–24, with Pet. 14–15. Indeed, *McCoy v. Louisiana*, 584 U.S. 414 (2018), on which Petitioner heavily relies before this Court, did not make an appearance in his briefing before the Colorado Court of Appeals. In fact, with the exception of *Strickland*, none of the

federal cases that Petitioner cites for this argument were raised to the Colorado Court of Appeals.

Petitioner gives no reason to explain—much less justify—his change of horses before this Court. Because this Court has nothing to review below, this Court does not have the foothold necessary to reach the Petition’s second question.

B. The law underlying Petitioner’s argument is settled; there is no circuit split on the prejudice question because the circuits have followed the path set out by this Court.

Strickland is clear: “Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.” *Strickland*, 466 U.S. at 693. And prejudice only exists in this context when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

As discussed above, the Colorado Court of Appeals had no need to address the prejudice question because Petitioner’s claim failed for other reasons. But out of an abundance of caution, the court did so. And its conclusion that prejudice was lacking flowed unremarkably from this Court’s precedent as applied harmoniously among the federal circuit courts. So, even if the facts of Petitioner’s case were amenable to review—which they are not—the settled nature of the law in this area would leave little reason for this Court to intervene.

1. The Colorado Court of Appeals’ approach is consistent with this Court’s existing precedent.

Multiple cases from this Court guide the prejudice issue that Petitioner now raises. And the clear nature of this Court’s guidance makes Petitioner’s request for further clarity unnecessary.

In *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000), this Court echoed its earlier precedent that defendants must show *Strickland* prejudice unless the “violation of the right to counsel rendered the proceeding presumptively unreliable or entirely nonexistent.” The Colorado Court of Appeals rightly recognized this principle. *See* Pet. App. 24. Quoting Colorado case law, the court explained that “the prejudice prong of the *Strickland* test is modified in cases where counsel’s erroneous performance leads to a defendant’s deprivation of legal proceedings.” *Id.* (quoting *People v. Robles*, 74 P.3d 437, 439 (Colo. App. 2003)). Thus, because Petitioner was not deprived of a legal proceeding, the Colorado Court of Appeals rightly applied the second prong of *Strickland* without modification. *See* Pet. App. 24–25.⁵

⁵ Petitioner has also never argued that his criminal trial was presumptively unreliable under *Flores-Ortega*. Nor could he. The circumstances where this Court has found no showing of prejudice necessary are a far cry from those present here. *See United States v. Cronin*, 466 U.S. 648, 659–60 (1984) (holding no showing of prejudice needed for (1) the complete denial of counsel, (2) denial of counsel at a critical trial stage, (3) counsel failing entirely to meaningfully test the prosecution’s case, and (4) counsel provided so little of time to prepare for trial that there is no opportunity to provide effective assistance), *cited with approval by Flores-Ortega*, 528 U.S. at 484; *see also Smith v. Robbins*, 528 U.S. 259, 287 (2000) (noting three categories of ineffective-assistance claims that do not require prejudice: (1) the denial of counsel, (2) certain “state interference with counsel’s assistance,” and (3) when defense counsel has an actual conflict of interest that adversely affected their performance), *cited with approval by Flores-Ortega*, 528 U.S. at 484. That high bar is necessary to ensure that every ineffective assistance claim is not treated as structural error, an approach this Court has never endorsed and would directly conflict with *Strickland*.

This Court’s precedent also clarifies that this analysis holds, whether or not the underlying deprivation of the right to testify is structural error.

In *McCoy*, this Court said that the rights to testify at trial and assert innocence at trial, among others, are personal to the defendant. 584 U.S. at 422. And a court depriving a defendant of the latter right—as had occurred in *McCoy*—is structural error. *See id.* at 427. The same does not hold true, however, if the main issue is “counsel’s competence” in advising the defendant to admit guilt, rather than the “court allow[ing] counsel to usurp control” of the defendant’s personal right. *See id.* at 426–27. In such a case, *McCoy* said that *Strickland* applied and the defendant must show prejudice. *See id.* at 426; *see also Weaver v. Massachusetts*, 582 U.S. 286, 290, 305 (2017) (holding that a constitutional error that would be structural if brought on its own still requires a showing of *Strickland* prejudice if brought as a claim of ineffective assistance).

This framework leaves little path to be cut in this case. Petitioner alleges that “counsels’ coercive actions” rendered the waiver of his right to testify involuntary. Pet. 14. So, even assuming *arguendo* that structural error applies to his alleged right-to-testify violations, his challenge to counsels’ actions falls squarely under *Strickland*’s purview and still requires prejudice. *See McCoy*, 584 U.S. at 426–27.

True, *McCoy* dealt with a defendant’s right to maintain innocence at trial rather than the right to testify at trial. But the two rights are fraternal twins, if not identical; they are both among the “certain fundamental decisions” left to the defendant’s “ultimate authority.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *accord*

McCoy, 584 U.S. at 422; *Florida v. Nixon*, 543 U.S. 175, 187 (2004). This Court has not suggested that these two similar rights should receive disparate analyses, nor does logic supply a reason. Therefore, this Court has all but answered the question of whether Petitioner must show prejudice “[w]hen a defendant is prevented from testifying due to counsels’ coercive actions”: he must. Pet. 2, 11.

2. Because this Court’s precedent is clear, there is no circuit split warranting this Court’s intervention.

In accord with this Court’s precedent, federal circuit courts have uniformly applied *Strickland* to determine whether reversal is warranted when a defendant claims that ineffective assistance of counsel deprived him of the right to testify. See *Miranda v. Kennedy*, 125 F.4th 23, 30 (1st Cir. 2025); *Brown v. Artuz*, 124 F.3d 73, 79–80 (2d Cir. 1997); *Lesko v. Sec’y Pa. Dep’t of Corr.*, 34 F.4th 211, 236–37 (3d Cir. 2022); *United States v. Robinson*, 700 F. App’x 178, 180–81 (4th Cir. 2017); *United States v. Mullins*, 315 F.3d 449, 455–57 (5th Cir. 2002); *Hodge v. Haeberlin*, 579 F.3d 627, 639 (6th Cir. 2009); *Hartsfield v. Dorethy*, 949 F.3d 307, 313 (7th Cir. 2020); *Jackson v. United States*, 956 F.3d 1001, 1006–08 (8th Cir. 2020); *Sinclair v. United States*, 481 F. App’x 354, 354 (9th Cir. 2012); *Becker v. Cline*, 699 F. App’x 783, 785–86 (10th Cir. 2017); *Lisbon v. United States*, 758 F. App’x 780, 782–84 (11th Cir. 2018); *United States v. Tavares*, 100 F.3d 995, 998–99 (D.C. Cir. 1996).

For example, in *Brown*, the Second Circuit reviewed a habeas corpus proceeding in which the defendant contended that he was deprived of his right to testify due to his counsel both affirmatively preventing him from testifying and failing to advise him of his right to testify. 124 F.3d at 79–80. Before applying

Strickland, the court noted that, “[b]ecause the burden of ensuring that the defendant is informed of the nature and existence of the right to testify rests upon defense counsel, we conclude that this burden is a component of the effective assistance of counsel.” *Id.* at 79. And the court explained that “any claim by the defendant that defense counsel has not discharged this responsibility—either by failing to inform the defendant of the right to testify or by overriding the defendant’s desire to testify—must satisfy the two-prong test established in *Strickland*.” *Id.* (citing *Strickland*, 466 U.S. at 668).

In *Lesko*, the Third Circuit applied *Strickland* to review a district court’s determination that, even if the defendant’s counsel was deficient, the defendant was not prejudiced so reversal was not warranted. 34 F.4th at 235–36. In affirming the district court, the Third Circuit explained that it did not intend to downplay the significance of a defendant’s own testimony. *Id.* at 236. But the court noted its previous holding that prejudice should not “be presumed or a reversal automatic when a defendant’s right to testify has been violated,” and explained that a defendant’s simple desire to tell his own story is insufficient for prejudice. *Id.* at 237 (citing *Palmer v. Hendricks*, 592 F.3d 386, 397–98 (3d Cir. 2010)).

Nevertheless, Petitioner argues that tension exists among the federal circuits, citing two district-court decisions as proof. But he makes discord out of harmony. Neither case that Petitioner cites grants relief under *Strickland* without affirmative proof of prejudice.

First, Petitioner points to *Williams v. United States*, No. 3:15-CV-01301, 2018 WL 4656231 (D. Conn. 2018). He correctly asserts that the *Williams* court said it was not aware of authority from this Court holding that the right to testify should be reviewed for structural error when raised in the context of ineffective assistance of counsel. *Id.* at *5. In fact, the *Williams* court agreed with the defendant that it was *possible* such a claim could be reviewed for structural error. *Id.* (noting that the right to testify “implicates the client’s autonomy and freedom ‘to make his own choices about the proper way to protect his own liberty’”) (quoting *McCoy*, 584 U.S. at 427 (citation modified)).

That said, the *Williams* court ultimately noted that applicable circuit precedent “directs courts to consider such claims under the *Strickland* standard.” *Id.* Moreover, the *Williams* court found that, like Petitioner here, the defendant had failed to establish any violation of his right to testify in the first place, rendering its entire discussion of whether violating the right to testify was structural error where prejudice should be presumed *dicta*. *Id.*

Second, Petitioner’s reliance on *Carter v. Clark*, 667 F. Supp. 3d 163 (W.D. Va. 2023), is similarly unavailing. True, again, the district court there concluded that an attorney had committed structural error by not telling the defendant that he had a right to testify. *Id.* at 201. But the court went on to say that, “because the error was made by counsel and not the court, and because [the defendant] raise[d] the issue by means of an ineffective assistance of counsel claim . . . , the court must further determine whether the error was prejudicial under *Strickland*.” *Id.* Accordingly, the

Carter court too acted consistently with circuit precedent and examined the defendant's allegations to ultimately find prejudice. *Id.* at 209; *see Robinson*, 700 F. App'x at 180–81.

In sum, the case law Petitioner cites shows that the Colorado Court of Appeals correctly decided this case. There is no open question as to whether a defendant's ineffective assistance of counsel claim implicating the right to testify requires a showing of prejudice under *Strickland*. It does. Moreover, the circuit courts are following this Court's precedents in applying *Strickland* to claims that ineffective assistance of counsel deprived the defendant of the right to testify. Accordingly, this Court should deny the Petition.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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