NO. _____

In the

Supreme Court of the United States

RAYMOND ANDREW RICHARDSON, ***Petitioner*****,**

v.

JONATHAN FRAME, Superintendent, ***Respondent.***

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: April 28, 2026

I. QUESTION PRESENTED FOR REVIEW

Petitioner was charged in West Virginia with robbery committed by a particular means – by the threat of the use of force. At trial, the State proceeded on a different theory – that Petitioner had committed robbery by engaging in actual violence against the victim. Petitioner's counsel did not object to this shift in the State's theory and Petitioner was convicted and sentenced to more than a century in prison for that and related offenses. State and federal courts affirmed Petitioner's conviction, concluding he had not received ineffective assistance of counsel.

This Petition presents the issue of whether a criminal defendant receives ineffective assistance of counsel when his counsel fails to object to the State's shift in theory, from one method of committing an offense to another, where that shift deprives the defendant of the notice required by the Due Process Clause of the Fourteenth Amendment.

II. LIST OF ALL PARTIES AND RELATED CASES

PARTIES

- Petitioner – Raymond Andrew Richardson
- Respondent – Jonathan Frame, Superintendent

DIRECTLY RELATED CASES

- *Richardson v. Ames*, No. 2:20-cv-00573, U.S. District Court for the Southern District of West Virginia. Judgment entered October 13, 2023; Certificate of Appealability granted on September 30, 2024.
- *Richardson v. Frame*, Appeal No. 23-7147, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on January 20, 2026.

III. TABLE OF CONTENTS

INDEX TO APPENDICES

IV. TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes

State Statutes

Rules

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, *Richardson v. Frame,* 165 F.4th 187 (4th Cir. 2026), is published and attached to this Petition as Appendix A. The district court's order denying Richardson's petition under 28 U.S.C. § 2254 is attached to this Petition as Appendix B. The district court's order granting Richardson a Certificate of Appealability is attached as Appendix C. The magistrate judge's Proposed Findings and Recommendations that recommended granting Richardson's § 2254 petition is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 20, 2026. No petition for rehearing was filed. This Petition is filed within 90 days of the date of the court's entry of that denial. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of the Sixth Amendment to the United States Constitution, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

As well as interpretation and application of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> **Section 1.** . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

As well as interpretation and application of 28 U.S.C. § 2254, which provides, in pertinent part:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As well as West Virginia Code § 61-2-12, which provides, in pertinent part:

> **(a)** Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree . . .

VIII. STATEMENT OF THE CASE

On August 31, 2020, Raymond Andrew Richardson filed a Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody JA6-29.[1] The district court had subject matter jurisdiction under 28 U.S.C. § 2241. The district court entered its order denying Richardson's petition for relief under § 2254 on October 13, 2023. JA661-692. On November 13, 2023, Richardson filed a timely notice of appeal as well as a motion for a certificate of appealability. JA694-702; JA779. On September 30, 2024, the district court granted Richardson's motion for a certificate of appealability. JA780-781. The Fourth Circuit had appellate jurisdiction under 28 U.S.C. § 2253 and 28 U.S.C. § 1291.

A. Facts Pertinent to the Issue Presented

This case arose from a confrontation between Richardson and Denise Cool in her apartment in South Charleston, West Virginia. As a result of that confrontation, Richardson was charged in Kanawha County Circuit Court with six counts, three of which he eventually took to trial: assault during the commission of a felony, possession with intent to deliver cocaine, and – most relevant to this Petition – robbery. At trial, the State proceeded on a different theory of robbery than the one charged in the indictment and the trial court instructed the jury on that different theory. The issue is whether Richardson's trial counsel was ineffective for failing to object to that variance, leading to a violation of Richardson's due process rights.

[1] "JA" refers to the Joint Appendix that was prepared in this case for the appeal to the Fourth Circuit.

1. Richardson is arrested and charged with committing robbery by "the threat of deadly force."

As set forth by the West Virginia Supreme Court of Appeals ("WVSCA"), on the night of August 23, 2013, Richardson and Cool had agreed to meet at a local bar, where she bought "what she thought was powder cocaine" from him and went home. *State v. Richardson*, 2016 WL 5030312, *1 (W. Va. 2016). This was to help feed her daily drug habit. Cool would testify that the cocaine was "mostly baking soda." *Ibid*. A few hours later, around two in the morning the next day, Richardson called Cool "to tell her that he would make up for selling her bad cocaine." *Ibid*. Richardson arrived and offered Cool "$200 worth of crack cocaine" which she said "was trash and threw it on the table." *Ibid*. The two began arguing, which "escalated . . . when she demanded" Richardson leave her apartment. *Id*. at *2. According to Cool, Richardson then hit her, continuing to do so after she was knocked on the ground. Before leaving, Cool testified, Richardson took "$103 she had earned in tips the previous night." *Ibid*.

Richardson was charged in a six-count indictment and proceeded to trial on three charges: assault during the course of a felony, possession with intent to deliver cocaine, and robbery. As particularly relevant to this Petition, Count Three charged that Richardson did "unlawfully and feloniously use the threat of deadly force upon the person of Denise Cool" as the method of robbery.[2] JA113.

[2] Count Three failed to accurately state the full statutory language, which requires the "threat of deadly force" to be done in a particular way, that is, "by the presenting of a firearm or other deadly weapon." W. Va. Code § 61-2-12(a)(2).

2. A jury convicts Richardson of assault, drug possession, and robbery by the use of actual force.

Richardson's trial began on February 21, 2014. In its opening statement, the State made plain its theory of the case regarding robbery had changed – that it was predicated on the use of actual force, not threats. The State told the jury that the evidence would show that Richardson "punche[d]" Cool "not just once" but "multiple times, beat[] her down to the ground." JA207. That matched Cool's testimony. She testified that after getting furious with Richardson for trying to give her more bad drugs and "maybe" saying "the 'N' word," that "when he knew I wasn't giving him any money, he punched me straight in the face," after which she "dropped to the floor." JA224-225. He then "kept pounding" on her and "hit me so many times in my head I couldn't even think." JA225. The State picked up that theme again in its closing argument, emphasizing that Richardson admitted hitting Cool during the incident. JA488.

The focus on actual, as opposed to threatened, violence continued in the trial court's instructions to the jury. The trial court explained to the jury that robbery occurred when a person takes the property of another "by partial strangulation or suffocation or by striking or beating or by the threat of presenting of firearms, or by other deadly weapon or instrumentality with the intent to deprive the victim permanently of the property." JA474. In reiterating the elements of the offense, the trial court made clear that the State could obtain a conviction by proving that

Richardson committed the robbery "by committing violence against Denise Cool." JA475.

The jury convicted Richardson on all three counts. He was then sentenced to consecutive terms of 100 years in prison for the robbery, two to ten years for assault, and one to 15 years for the drug offense. *Richardson*, 2016 WL 5030312 at *1. The WVSCA affirmed Richardson's convictions and sentence. *Id*. at *5.

3. The state trial court denies Richardson's motion for *habeas corpus* relief.

On October 6, 2017, Richardson filed a motion for *habeas corpus* relief with the trial court, followed by an amended petition in January 2018. JA593; JA595-596. Among the issues raised was that Richardson had received ineffective assistance of counsel at trial because "counsel failed to point out to the Trial court that the State of West Virginia's variance in its evidentiary proof amounted to a constructive amendment[3] of the Indictment" and Richardson "could not have been convicted on the first-Degree Robbery charge as leveled against him in the Indictment." JA593.

On October 23, 2018, the trial court entered an order denying Richardson's motion for *habeas corpus* relief. JA39-99. As to the fatal variance issue, the trial court found that the indictment alleged the threat of deadly force, that the indictment also charged an assault count alleging Richardson had punched, kicked, and wounded Cool, and that Richardson's trial counsel did not raise the issue of a fatal variance either at trial or on appeal. JA40. The trial court ultimately concluded that "no fatal

[3] Courts use the terms "constructive amendment" and "fatal variance" interchangeably. *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999).

variance existed between the robbery count as charged and the proof adduced at trial" and therefore the "State did not engage in a 'constructive' amendment to the indictment." JA78. While noting that trial counsel had conceded that "perhaps he should have addressed any issues with the indictment but simply missed them," the trial court found any failure did not prejudice Richardson, as "the State could have easily presented the case to the grand jury once again or been given leave to add the words 'by violence to the person.'" JA79. The trial court also noted that Richardson's defense at trial had not been based upon whether force or threat was used to commit a robbery, but whether a robbery (the taking of the $103 from the ironing board) occurred at all, and thus any variance in proof as to the nature of the force involved was immaterial. JA80. Therefore, trial counsel was not ineffective for failing to raise the issue. JA79.

The WVSCA affirmed the trial court's denial of Richardson's request for *habeas corpus* relief. *Richardson v. Ames*, 2020 WL 4354920 (W. Va. 2020).

4. After a magistrate judge recommends that Richardson's § 2254 petition be granted, the district court sustains the State's objections to that recommendation and denies relief.

On August 31, 2020, Richardson filed a *pro se* petition under 28 U.S.C. § 2254 seeking reversal of his convictions. JA6-29. Among the issues raised in that petition was that "[t]rial counsel was ineffective in failing to investigate or object to the impermissible, literal, constructive amendment of the robbery count of the indictment." JA21. In an amended petition filed after counsel was appointed, Richardson reasserted that trial counsel failed to object to a "fatal variance between

the indictment . . . and the proof and instructions at trial" and that "counsel's performance . . . was deficient and prejudiced Richardson's defense." JA106-107, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In a memorandum filed the same day, Richardson elaborated on his argument that the State had charged him with one version of robbery but proceeded at trial to convict him of another version of robbery and that trial counsel should have objected to that variance. JA544-550.

In response to Richardson's amended petition, the State filed a motion for summary judgment. JA556-558. In a supporting memorandum, the State argued that trial counsel was "not ineffective in failing to object to a fatal variance, as a fatal variance did not exist in this matter." JA605. The State pointed to the ruling of the WVSCA that any amendment in this case was "merely an amendment of form, not a fatal variance" and that "the indictment properly informed [Richardson] he was charged with first degree robbery as well as assault during the commission of a felony, making [Richardson] well aware that evidence of him causing bodily harm to the victim would be presented." JA606. Richardson replied that the State's focus at trial had been on actual violence, rather than threats, which was bolstered by the jury instructions allowing Richardson to be found guilty on an actual violence theory, thus creating a fatal variance. JA583-587.

On June 2, 2022, the magistrate judge entered Proposed Findings and Recommendations ("PF&R"), recommending that the district court partially grant Richardson's § 2254 petition on the variance issue and deny it as to all other issues.

JA590; JA645. The magistrate judge recognized that the trial court in denying Richardson's state *habeas corpus* motion concluded that there was no variance, a conclusion affirmed by the WVSCA. JA618-619. However, the magistrate judge held that the state courts were incorrect in holding that there had been no error because, had Richardson's trial counsel objected, the State could have fixed any variance. JA620-621; JA621-623. The magistrate judge also concluded that the state courts' holdings that Richardson was not prejudiced were also erroneous. JA621; JA623-624.

On June 16, 2022, the State filed objections to the PF&R. JA647-655. Relying on *Barbe v. McBride*, 740 F. Supp. 2d 759 (N.D. W. Va. 2010), and the unpublished decision of the Fourth Circuit affirming the denial of relief in that case, *Barbe v. McBride*, 477 F. App'x 49 (4th Cir. 2012), the State argued that because there are "two ways of committing robbery, any evidentiary discrepancy in which of those two [Richardson] employed is a simple variance" and Richardson must demonstrate it prejudiced him. JA650. Richardson could not do so, the State argued, because he "was not surprised or hindered in his defense, nor was he exposed to a second prosecution." JA651. In response, Richardson argued that neither of the *Barbe* decisions were applicable to his case, largely because prejudice was evident in his case where the variance occurred during trial, whereas in *Barbe* it occurred well before trial. JA658-659.

On October 13, 2023, the district court sustained the State's objections and denied Richardson's petition. JA661-692. The district court noted that "the parties do not dispute the factual basis for a putative objection" in that Richardson "was charged

by a grand jury under an indictment for the criminal offense of first-degree robbery by threat of deadly force, while he was tried and convicted for the criminal offense of first-degree robbery by commission of violence to the person of another." JA678. It characterized Richardson's argument as "that he was denied effective assistance of counsel by trial counsel's failure to object to the alleged constructive amendment of his indictment and thereby vindicate his rights under the Fifth or Fourteenth Amendments." JA679. Noting that the "Fifth Amendment Grand Jury Clause has not been incorporated against the states," the district court narrowed the issue to whether trial counsel "could have challenged the alleged constructive amendment of his indictment as a procedural due process violation of the Fourteenth Amendment." JA679-680. The district court recognized that "*Barbe* does not resolve [Richardson's] ineffective assistance of counsel claim, but it does illustrate what is required of [Richardson] to show he was prejudiced under the second prong of the *Strickland* test." JA686.

In evaluating prejudice, the district court concluded that Richardson "received actual notice of the prosecution's intent to proceed against him under a first-degree robbery theory of violence against the victim." JA687. That was based on the state court's *habeas corpus* opinion, in which the court "noted trial counsel 'testified that he and [Richardson] knew that he was charged with accomplishing the robbery by beating the victim." JA687. While such notice might not satisfy the Fifth Amendment standard applicable in federal court, "actual notice was sufficient to apprise him of the charges he needed to be prepared to meet at trial, as required by the Fourteenth

Amendment Due Process Clause." JA687-688. The district court reviewed the WVSCA's discussion of West Virginia state variance law, holding that because "the WVSCA adjudged this to be a mere amendment of form, any objection by trial counsel would have been unavailing" and Richardson could not establish prejudice. JA689. Ultimately, the district court concluded that the issues in Richardson's petition "were adequately considered on the merits in the state habeas proceedings" and that those decisions were "neither contrary to nor involved an unconstitutional application of clearly established federal law." JA691.

On November 13, 2023, Richardson filed a notice of appeal and a motion for a certificate of appealability. JA694-702; JA779. In his motion, Richardson argued "reasonable jurists would find debatable" the district court's "conclusion that Richardson received actual notice of the shift in the prosecution's theory from that charged in the indictment to that pursued at trial so that his due process rights were not violated." JA697. Richardson pointed out that the state court's conclusion upon which the district court's decision rested did not include a cite to the record and that the testimony of Richardson and his trial counsel at the state *habeas corpus* hearing instead showed they were surprised by the State's change of theory at trial. JA699-700. Richardson also noted that this testimony highlighted what distinguished his case from *Barbe*, that the shift in the State's theory in that case occurred prior to trial, whereas the change in Richardson's case occurred during trial. JA700-701.

On September 30, 2024, the district court granted Richardson's motion for a certificate of appealability. JA780-781. The district court identified Richardson's

claim as "that due to the change in prosecution theory presented at trial, he did not have sufficient notice of the actual charge against him to satisfy due process." JA780.

5. The Fourth Circuit affirms Richardson's sentence.

The Fourth Circuit affirmed the denial of Richardson's § 2254 petition. *Richardson v. Frame,* 165 F.4th 187 (4th Cir. 2026). Noting that the "Due Process Clause of the Fourteenth Amendment requires that a criminal defendant receive "reasonable notice of a charge against him," the court concluded that "Richardson has not shown that the variance at issue here was so egregiously unfair as to amount to a deprivation of [his] right to due process." *Id.* at 192 (cleaned up). The court concluded that the West Virginia robbery statute provided two means of committing the offense, but that the shift from one theory to the other at trial did not "constitute a broadening of the charges" such as to violate due process. *Id.* at 193 (cleaned up). The court also noted that due process does not require that the method of committing an offense be set forth in an indictment. *Ibid.* In addition, the assault count of the indictment assured "Richardson had actual notice that he was charged with committing violence against Cool," concluding that "[d]ue process requires nothing more." *Id.* at 194. Finally, the court held that even if Richardson had been surprised by the State's change of theory, he could not show that it impacted his defense at trial. *Ibid.*

IX. REASON FOR GRANTING THE WRIT

The writ should be granted to determine whether a criminal defendant receives ineffective assistance of counsel when his counsel fails to object to the State's shift in theory, from one method of committing an offense to another, where that shift deprives the defendant of the notice required by the Due Process Clause of the Fourteenth Amendment.

Richardson was charged with committing robbery in a particular way – by the threat of violence. Without notice or attempting to alter the indictment, the State's evidence proved that Richardson committed robbery in a different way – by actually using violence. The trial court's jury instructions tracked the State's proof. Richardson's counsel objected to none of it. Richardson was thus convicted, and sentenced to a century in prison, for a crime with which he was never charged. Whether such a situation constitutes the denial of a defendant's right to effective assistance of counsel under the Sixth Amendment, because trial counsel failed to address a violation of Richardson's due process rights under the Fourteenth Amendment, is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. West Virginia law recognizes that robbery can be committed in two ways – the State charged Richardson with committing the offense in one way, then tried and convicted him of committing it in the other way.

Count Three of the indictment charged Richardson with robbery under West Virginia Code § 61-2-12(a). That statute lays out two forms of first-degree robbery, one committed by "[c]omitting violence to the person, including, but not limited to, partial strangulation or suffocation," the other by the use of "the threat of deadly force

by the presenting of a firearm or other deadly weapon." W. Va. Code § 61-2-12(a)(1). The distinction then is between an offense that requires the actual use of force and one that requires only the threat of it communicated in a particular way. *See State v. Harless*, 285 S.E.2d 461, 466 n.9 (W. Va. 1981)(it "is clear under our robbery statute that a firearm or other deadly weapon does not have to be used on the victim, its threatened use or presentation is sufficient to constitute aggravated robbery").

The language of Count Three specifically charged Richardson with committing only one form of first-degree robbery, that committed when he used "the threat of deadly force upon the person of Denise Cool." JA113. It did not charge Richardson with the actual use of force as a means of committing robbery. Nonetheless, that was the evidence adduced at trial and described in the State's opening statement, in which it promised that the evidence would show that Richardson "punche[d]" Cool, "not just once" but "multiple times" then "beat[] her down to the ground." JA207. There was no mention of a threat with a deadly weapon. Likewise, Cool's testimony was that when Richardson got angry with her "he punched me straight in the face," after which she fell to the ground and he "kept pounding" and "hit me so many times in my head I couldn't even think." JA224-225. Again, her testimony did not involve any mention of a threat using a deadly weapon. When it instructed the jury, however, the trial court instructed the jury it could find Richardson guilty either because he employed "partial strangulation or suffocation or by striking or beating" or by the "presenting of firearms, or by other deadly weapon or instrumentality." JA474.

Richardson's trial was the classic example of a variance between the charge set forth in the indictment and the proof presented at trial. He was charged only with robbery committed by the threatened of use of a deadly weapon. The trial evidence solely involved Richardson's actual use of force, without any evidence that a weapon of any kind was involved. The trial court's instructions then allowed the jury to convict Richardson on that new theory of the case rather than the one charged in the indictment.

B. The variance between the offense Richardson was charged with committing and the one he was convicted of committing violated his right to due process under the Fourteenth Amendment.

While the Fifth Amendment's guarantee of a right to be charged by indictment (and the related corpus of federal law on variances) does not apply to the states, *Hurtado v. California*, 110 U.S. 516 (1884), that does not mean that the Constitution leaves defendants charged in state courts vulnerable to the whims of changing prosecutorial theories. Such defendants remain protected by the due process protections of the Fourteenth Amendment. "No principle of procedural due process is more clearly established than that ***notice of the specific charge***, and a chance to be heard in a trial of the issues ***raised by that charge*** . . . are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. State of Arkansas*, 333 U.S. 196, 201 (1948)(emphasis added). Thus, a variance can be a basis for relief under § 2254 if "the deficiency makes the trial so egregiously unfair as to amount to a deprivation of the defendant's right to due process." *Ashford v. Edwards*, 780 F.2d 405, 407 (4th Cir. 1985).

The variance in this case is the type that made Richardson's trial "so egregiously unfair." The indictment against Richardson gave him "notice of the specific charge" against him – robbery by "unlawfully and feloniously us[ing] the threat of deadly force." JA113. Richardson elected to "be heard in a trial of the issues raised by that charge," not a different one. However, as set forth above, the State's case at trial, both in terms of evidence and argument, focused on a different charge – robbery by the actual use of violence. Moreover, contrary to the conclusions of the lower courts, Richardson did not have any advance notice of the shift in the State's theory of the case.

In its order sustaining the State's objections, the district court concluded that "the record shows that [Richardson] received actual notice of the prosecution's intent to proceed against him under a first-degree robbery theory of violence." JA687. That, in turn, was based on the state *habeas corpus* court's finding that "trial counsel 'testified that he and [Richardson] knew that he was charged with accomplishing the robbery by beating the victim.'" JA687. The state court's conclusion, however, was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

That is because there are no facts in the record showing that Richardson and his counsel knew, prior to trial, that the State's theory had shifted. Notably, the state court decision making that finding does not cite to any portion of the record, including the transcript of the evidentiary hearing it conducted, as a basis for that finding.

At that hearing, trial counsel did testify that the strategy going into Richardson's trial was to essentially concede that an assault occurred, but argue that no robbery occurred because nothing was taken from the victim's home. JA743; JA756-758. Questioned further, trial counsel answered:

> Q. At any point during the proceedings, either pre-trial, during an argument for a motion for acquittal, post-trial motions or on appeal, did you challenge the validity of the indictment?
>
> A. No.
>
> Q. Looking back, do you think that perhaps that that was something that you ought to have done or maybe should have done in terms of objective performance?
>
> A. Yes.

JA745. Trial counsel also explained that "I think the defense would have been the same." JA745. What trial counsel did not say in his testimony is that he or Richardson had actual notice that the State would prosecute its case on a theory completely different from the one charged in the indictment. When asked "didn't that surprise you?", trial counsel's answer was nonresponsive: "I'll concede that I missed the issue in the indictment, what you're calling a variance." JA758. That trial counsel agreed he "missed" something and "ought to" have made something out of it indicates that trial counsel was surprised at trial. Richardson was more definitive, testifying that "we based our defense on that version of the indictment" that charged robbery by threat of deadly force. JA766. When asked if he had been "surprised when the State

brought the evidence of the actual violence against you in the robbery count?", Richardson answered, "Yes, sir." JA766-767.

That surprise, and lack of notice, is what distinguishes Richardson's case from the case relied upon by the State and the lower courts, *Barbe v. McBride*, 740 F. Supp. 2d 759 (N.D. W. Va. 2010)("*Barbe I*"), and the unpublished Fourth Circuit opinion affirming that decision, *Barbe v. McBride*, 477 F. App'x 49 (4th Cir. 2012) ("*Barbe II*"). *Barbe II* provides the clearest explanation of that petitioner's claims. After being convicted on two counts of sexual assault in state court, the petitioner "filed a federal habeas petition challenging his conviction on due process grounds." *Barbe II*, 477 F. App'x at 49. Specifically, he "sought relief . . . on the grounds that the state court violated his due process rights by instructing the jury on 'sexual intrusion,' rather than 'sexual intercourse' as charged in the original indictment." *Id.* at 51 (cleaned up). In other words, the petitioner argued that his Fifth Amendment and Fourteenth Amendment rights had been violated by a constructive amendment. The Fourth Circuit ultimately affirmed the decision of *Barbe I* that no such Fifth Amendment right existed and any variance, analyzed under the Fourteenth Amendment, did not cause the petitioner any prejudice. *Id.* at 51-53.

The key difference between this case and *Barbe* is when the variance took place. As set out in *Barbe II*, the petitioner was initially charged with two counts of sexual assault by engaging in sexual intercourse. Then, ***prior to trial,*** the prosecution moved to amend those counts to be committed by "sexual intrusion" rather than "sexual intercourse." The trial court granted the motion, concluding that

"the amendment in this case is not substantial." *Id*. at 50. This occurred "well in advance of trial." *Id*. at 52. By contrast, this "was not a case in which the trial court deprived a defendant of adequate notice by instructing the jury on a different offense from the one enumerated in the charging information." *Ibid*. The petitioner thus suffered no prejudice because there was no surprise what the prosecution's theory and proof were when trial began.

This case is the contrast noted by the Fourth Circuit in *Barbe II* because the variance in Richardson's case arose only at trial. He was charged in the indictment with committing robbery in a particular way. The State did not move to amend the indictment prior to trial, but instead presented evidence and argument at trial that supported a different charge than the one in the indictment. The trial court then instructed the jury that it could convict Richardson on the changed basis, which it did. Prejudice is evident from the fact that the State never produced sufficient evidence that Richardson committed the offense actually charged in the indictment: robbery by threat of force. Had the trial court instructed the jury consistent with the indictment – that Richardson could be convicted only if he threatened the use of force with a deadly weapon – the jury would have been required to acquit as there was no proof to support a conclusion, beyond a reasonable doubt, that Richardson acted in such a manner. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

Richardson's case shares more in common with *Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999). There, a defendant was charged with murder specifically by shooting someone during a robbery, but the trial court instructed the jury it could convict the

defendant on either that theory or a felony-murder theory. *Id.* at 415. The Sixth Circuit affirmed the district court's conclusion that such a variance violated the Fourteenth Amendment and that the defendant received ineffective assistance of counsel when trial counsel failed to object to it. *Id.* at 416-419. Or with *Cokeley v. Lockhart*, 952 F.2d 916 (8th Cir. 1991), where the defendant was convicted of rape on an additional theory instructed by the trial court but not charged in the indictment. *Id.* at 917. Such a variance resulted in a trial where "Cokeley was convicted of a distinct and separate crime for which he was not charged, a patent denial of Cokeley's due process rights." *Id.* at 920. In doing so, the court rejected the prosecution's argument that Cokeley had sufficient notice because of "knowledge that the victim would testify to the occurrence of both sexual intercourse and oral sex," noting that it "is not uncommon that a prosecuting authority chooses to file charges and proceed on only a subset of all of the possible claims of which it possesses evidence," but that to "accept the position that a criminal defendant has received reasonable notice . . . merely by the fact that he has knowledge that the state is in possession of and intends to present evidence of such other criminal acts," would "severely undermine the integrity of the fair notice requirements which are one of the most basic ingredients of due process." *Ibid.* (cleaned up).

The Fourth Circuit distinguished those cases by concluding that they left the defendants convicted of different crimes, while the variance here left Richardson convicted only of a different method of committing one crime, robbery. *Richardson*, 165 F.4th at 193-194. That conclusion overlooks the issue. The West Virginia robbery

statute sets forth, in separate subdivisions, different versions of the offense. Even if those are only different means of committing the same offense, the State chose to charge only one of them, putting Richardson on notice that he was required to defend on that particular theory. Changing the theory at the last moment, with no pretrial notice (as in *Barbe*) deprived Richardson of the "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge," *Cole*, 333 U.S. at 201, that the Fourteenth Amendment requires.

Nor is the violation lessened because Richardson was charged, in another count of the indictment, with assault against Cool. *Richardson*, 165 F.4th at 194. Rather than providing notice that the State would pursue a different theory than what was charged in the indictment with regards to robbery, that count indicates that the State's overall case against Richardson was flawed and subject to attack in argument for failing to prove what the indictment sets forth as the allegations against him. A defendant is under no obligation to point out the flaws in the prosecution's case before trial has begun so that it can be strengthened. *See, e.g.*, *United States v. Umeti*, 167 F.4th 687, 699 (4th Cir. 2026)(vacating statutory sentencing enhancement where Government "failed to adduce evidence that" victim companies "suffered response costs that totaled at least $5,000").

A plea of not guilty "puts the prosecution to its proof as to all elements of the ***crime charged***." *Mathews v. United States*, 485 U.S. 58, 64-65 (1988)(emphasis added). Here, the crime charged was not the one the State sought to prove to the jury. Unlike the defendant in *Barbe*, Richardson did not have notice in advance of trial of

the State's change of theory. That type of variance is so egregious that it violated Richardson's right to due process under the Fourteenth Amendment.

C. Richardson received ineffective assistance of counsel when his trial counsel failed to object to the variance between the offense he was charged with and the one he was convicted of committing.

The Sixth Amendment ensures that a person charged with a crime not only has a right to counsel but a right to the effective assistance of that counsel. Convictions sustained by a defendant who was denied that assistance cannot stand. In order to prevail on a claim of ineffective assistance of counsel, a defendant must first prove "that his counsel's efforts were objectively unreasonable when measured against prevailing professional norms," then that "counsel's performance, if deficient, was also prejudicial." *Frazer v. South Carolina*, 430 F.3d 696, 703 (4th Cir. 2005), citing *Strickland v. Washington*, 466 U.S. 668, 688-690, 694 (1984).

Richardson's trial counsel's performance was deficient. As he admitted during the state evidentiary hearing, "I missed the issue in the indictment, what you're calling a variance." JA758. By failing to make not only a variance objection under West Virginia law but an objection that the variance violated Richardson's due process rights, counsel deprived Richardson of an immediate remedy to that violation – the dismissal of the robbery charge under which he was ultimately sentenced to a century in prison.[4] That Richardson's theory of defense did not change is irrelevant

[4] As the magistrate judge correctly explained in the PF&R, by the time the variance occurred it could not have been cured by the State because jeopardy had already attached. JA621-623.

if, as the evidence produced at trial shows, the State could not have obtained a guilty verdict on the theory of robbery actually charged in the indictment.

X. CONCLUSION

For the reasons stated, this Court should grant certiorari in this case.

Respectfully submitted,

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By Counsel

WESLEY P. PAGE
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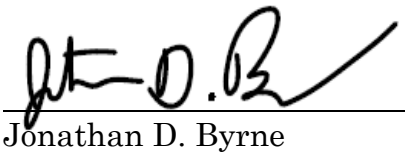

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