03/22/02 "See News Release 24 for Dissents and Concurrences"

SUPREME COURT OF LOUISIANA

No. 00-KP-0522

State of Louisiana

versus

Joseph Hampton

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

JOHNSON, Justice[*]

We granted the defendant's writ application to consider whether he voluntarily waived or suffered a deprivation of his right to testify in his own defense. It is well-settled that a criminal defendant has a constitutional right to testify on his own behalf. However, this right may be waived by a criminal defendant. After considering the record, we find the defendant did not waive his right to testify in his own defense. We therefore reverse the court of appeal's ruling which held that denial of the defendant's right to testify was harmless-error.

FACTS AND PROCEDURAL HISTORY

This case comes before the Court on Joseph Hampton's ("defendant") second writ application. Unlike the first, this application is limited to post-conviction relief alleging denial of the defendant's right to testify. We, nevertheless, find a factual review helpful in examining the defendant's claims.

On June 14, 1992, Ms. Gwendolyn Bannister hosted an outdoor block party in a courtyard of the St. Thomas Housing Development. Mr. Anthony Garrison ("Mr. Garrison") acted as Disc Jockey for the party where, among others, the defendant and

---

[*] Retired Judge Robert L. Lobrano, assigned as Associate Justice *Pro Tempore*, participating in the decision.

Mr. Mark Singer were present. On the evening preceding the party, the defendant and Mr. Durrell Robinson had an argument. On the evening of the party, however, Mr. Garrison brought the defendant and Mr. Robinson together to resolve their differences. Mr. Garrison testified that during the early part of the evening of the party, he saw the defendant and Mr. Robinson shake hands on two occasions. Mr. Garrison also testified that Mr. Robinson told him the matter was "squashed." Nevertheless, Mr. Singer seemingly had problems with such a quick resolution.

The block party ended between 11:30 PM and midnight. Suddenly, as Mr. Garrison was removing his equipment from the front porch of an apartment building, shots rang out. Garrison ducked for cover. He testified that just before the shooting, he saw four or five armed men in an alley across the courtyard. Mr. Garrison recognized Mr. Singer with an assault rifle and the defendant with a handgun. He later testified that he did not see the defendant firing the handgun. He did, however, indicate he saw Mr. Singer firing the assault rifle at Durrell Robinson. Robinson died on the spot.[1]

After the police arrived, they apprehended Mr. Singer. The arresting police officer testified that Mr. Garrison gave a statement, which Ms. Bannister corroborated, describing Mr. Singer as the perpetrator. Although neither witness initially named the defendant, they subsequently did so. Consequently, the defendant and Mr. Singer were both indicted for second degree murder, pursuant to LSA-R.S. § 14:30.1.

In 1993, the Criminal District Court for the Parish of Orleans granted a motion to sever Mr. Singer's and Mr. Hampton's trials.[2] On May 24, 1994, a jury found the

---

[1] The pathologist who performed the victim's autopsy testified that he could not determine what type of gun killed the victim.

[2] On October 6, 1993, Mr. Singer was tried and convicted. The court of appeal affirmed. *State v. Singer*, 94-0953 (La. App. 4 Cir. 6/29/95), 656 So.2d 310.

defendant guilty as charged. Accordingly, the district court sentenced the defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

On appeal, the defendant argued the trial court committed a *Brady* violation[3] by refusing to disclose Ms. Bannister's grand jury testimony because it conflicted with her trial testimony.[4] The court of appeal rejected the defendant's argument. In affirming the trial court, it held that Ms. Bannister's testimony from pre-trial motions was available to the defendant for impeachment purposes and the jury was able to weigh the inconsistencies and make a credibility determination. *State v. Hampton*, 94-1943 (La. App. 4 Cir. 12/27/97), 686 So.2d 1021. This Court denied writs. *State v. Hampton*, 99-2142 (La. 6/13/97), 695 So.2d 986.

The instant case began with a 1999 motion for post-conviction relief. Defendant filed the motion in Criminal District Court, in accordance with LA. CODE CRIM. PROC. ANN. arts. 924 *et seq*. He raised two issues for the district court's consideration: (1) the denial of his right to testify (which he did not waive); and (2) ineffective assistance of counsel. The district court granted the motion and ordered a new trial. In its oral reasons for ruling, the court stated:

> ***There is no question that you have the right to testify on your own behalf. There's no question about that. There is no question that your right to testify was in some***

---

[3] *See generally Brady v. Maryland*, 373 U.S. 83 (1963).

[4] In federal jurisprudence, it is well-settled that the secrecy of grand jury testimony is not absolute. *See, e.g.*, *Dennis v. U.S.*, 384 U.S. 855 (1966) (holding that district court abused its discretion in not ordering the disclosure of grand jury testimony where the witnesses' grand jury and trial testimonies were inconsistent). Moreover, if a witness appears before a grand jury and later testifies at trial, "the minutes of the grand jury testimony relating to the subjects about which the witnesses testified will 'be made available to the defendant for impeachment purposes after a witness has testified against him at trial.'" *In re Grand Jury Testimony*, 1980 U.S. Dist. LEXIS 13432 (S.D.N.Y. 1980) (quoting *United States v. Youngblood*, 379 F.2d 365, 369 (2d Cir. 1967)); *see also U.S. v. Moten*, 582 F.2d 654, 663 (2d Cir. 1978); *U.S. v. Ayers*, 426 F.2d 524, 529 (2d Cir. 1970), *cert. denied*, 400 U.S. 842 (1970).

> ***fashion abridged, that you were not either given an opportunity to testify, or in some ways, you were convinced not to testify in the case.***

Transcript of Trial Court's Ruling (7/26/99) at 2 (emphasis added).

The court of appeal granted the State's subsequent writ application and reinstated the lower court's original conviction and sentence. *State v. Hampton*, 99-2142 (La. App. 4 Cir. 1/18/00), ---So.2d---. The Fourth Circuit relied on *Nix v. Whiteside*, 475 U.S. 157 (1986). The court determined that even if the defendant were allowed to testify, his testimony would only have contradicted that of Garrison and Ms. Bannister. Therefore, while the Fourth Circuit acknowledged the applicant wanted to testify and his attorney prevented him from doing so, it nonetheless concluded he was not prejudiced and received a fair trial.

In his ensuing application to this Court, defendant alleges that his court-appointed trial counsel's refusal of his repeated requests to testify violated his constitutional rights. We agree. Therefore, we granted the writ application, 00-0522 (La. 1/12/01), ---So.2d--- and now reverse.

LAW AND ANALYSIS

I The Constitutional Right to Testify in One's Own Defense

We begin our analysis by reviewing the United States and Louisiana Constitutions and the relevant federal and state jurisprudence. The United States Supreme Court has recognized a criminal defendant's right to testify is fundamental and personal to the defendant. "Only such basic decisions as to whether to plead guilty, waive a jury, or *testify in one's own behalf are ultimately for the accused to make*." *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977) (Burger, C.J., *concurring*) (emphasis added); *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). Accordingly, the Supreme Court has held

"there is no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case." *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961).

Moreover, the U.S. Supreme Court has been unequivocal in holding that the defendant's right to testify is guaranteed by: (1) the Fifth Amendment's privilege against self-incrimination;[5] (2) the Sixth Amendment's Compulsory Process Clause;[6] and (3) the Fourteenth Amendment's Due Process Clause.[7] *See generally Rock v. Arkansas*, 483 U.S. 44 (1987). The Louisiana Constitution also specifically guarantees the defendant the right to testify in his own defense.[8] We, therefore, find it appropriate to first review the federal and state jurisprudence interpreting the aforementioned constitutional provisions.

(A) The United States Constitution's Relevant Provisions

The Fifth Amendment's Privilege Against Self-incrimination

The Fifth Amendment to the United States Constitution encompasses the right to remain silent as well as the right not to do so. "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York*, 401 U.S. 222, 225 (1971) (citations omitted). Furthermore, "[a] defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Rock*,

---

[5] "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

[6] "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI.

[7] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

[8] "[A]n accused is entitled . . . to testify in his own behalf." LA. CONST. art. I, § 16.

483 U.S. at 52. *Cf. Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (noting the 5th Amendment's guarantee against self-incrimination, unless the defendant chooses to speak).

The U. S. Court of Appeals for the Eleventh Circuit, in considering the Supreme Court's holding in *Rock*, held "the Supreme Court has clearly and strongly indicated that the constitutional right to testify should be treated as fundamental." *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992) (en banc). Moreover, in expanding upon *Rock*, the *Teague* court held:

> [u]nder the Supreme Court's reasoning in *Rock*, the right to testify essentially guarantees the right to ultimately choose whether or not to testify . . . . A criminal defendant clearly cannot be compelled to testify by defense counsel who believes it would be in the defendant's best interest to take the stand. ***It is only logical, as the Supreme Court has reasoned, that the reverse also be true. A criminal defendant cannot be compelled to remain silent by defense counsel.***

Teague, 953 F.2d at 1532 (emphasis added). It is, therefore, well-settled that the Fifth Amendment's privilege against self-incrimination encompasses the personal right to testify in one's defense just as it encompasses the right not to do so.

The Sixth Amendment's Compulsory Process Clause

"The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment." *Rock*, 483 U.S. at 52; *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (quoting U.S. CONST. amend. VI and noting the defendant's right to produce favorable witness testimony).

> Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense' is a ***right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for***

> ***the defense in many criminal cases is the defendant himself.*** There is no justification for a rule which denies an accused the opportunity to offer his own testimony.

Rock, 483 U.S. at 52 (citations omitted) (emphasis added). Therefore, "[the Sixth Amendment] grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be . . . accorded compulsory process for obtaining witnesses in his favor." *Faretta v. California*, 422 U.S. 806, 819 (1975).

The Fourteenth Amendment's Due Process Clause

The right to testify on one's own behalf is one of the rights that is essential to due process in a fair adversary proceeding. *See Faretta*, 422 U.S. at 819 n. 15. In interpreting the Due Process Clause, the Supreme Court has held:

> [t]he necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and offer testimony.
>
> A person's right to reasonable notice of a charge against him and *an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence*; and these rights include, as a minimum, a right to examine the witnesses against him, ***to offer testimony***, and to be represented by counsel.

Rock, 483 U.S. at 51 (citations omitted) (emphasis added). Thus, "[t]his right [to offer testimony] reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify." *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldgerg v. Kelly*, 397 U.S. 254, 269 (1970)).

(B) Jurisprudence after *Rock v. Arkansas*

After *Rock*, the U.S. Circuit Courts have almost uniformly held a defendant's right to testify is personal and can only be waived by the defendant and not his

attorney. *See, e.g, Brown v. Artuz*, 124 F.3d 73, 77 (2d Cir. 1997); *United States v. Pennycooke*, 65 F.3d 9, 10-11 (3d Cir. 1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994), *vacated on other grounds*, 53 F.3d 94 (5th Cir. 1995) (en banc); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992) (en banc); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *see also Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993).

Furthermore, in considering the importance of a defendant's constitutional rights, several of our sister states have placed the onus of protecting the criminal defendant's right to testify on the court. *See, e.g., State v. Neuman*, 371 S.E. 2d 77, 81-82 (W. Va. 1988); *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984); *Culbertson v. State*, 412 So.2d 1184, 1186-87 (Miss. 1982).

Although the issue is *res nova* in this court, Louisiana courts of appeal have respected the defendant's right to present his own defense. *See, e.g., State v. Woodfin*, 539 So.2d 645 (La. App. 2 Cir. 1989) (remanding to the district court to allow the introduction of hypnotically refreshed testimony because of the defendant's constitutional rights); *State v. Holden*, 554 So.2d 121 (La. App. 2 Cir. 1989) (reversing a district court's conviction because the court refused to admit the defendant's refreshed testimony after memory loss); *State v. Johnson*, 482 So.2d 146 (La. App. 4 Cir. 1986) (reversing a district court's conviction because defense counsel refused to allow the accused to testify although he made an outburst in court, indicating his desire to do so). We find this line of jurisprudence persuasive.

II Applying the Constitutional and Jurisprudential Standards to the Facts

Using the forgoing constitutional and jurisprudential framework, we now turn to an examination of the facts and circumstances of the instant case. In the post-conviction hearing, the district court considered the following testimony by Charles Lane, the defendant's court-appointed trial counsel:

> Q: During the course of the trial, had you discussed Mr. Joseph Hampton testifying on his own behalf?
> A: Yes. We had a discussion very shortly before the trial ended. Yes.
>
> Q: Had you had those same discussions before the trial?
> A: Yes. We had discussed Mr. Hampton's testimony and his recollection of what happened on numerous occasions.
>
> ***Q: And had he indicated to you whether or not he wished to testify at trial.***
> ***A: From day one Mr. Hampton told me he wanted to tell his story.***
>
> Q: As to the best of your recollection, was that matter discussed previous to the defense resting?
> A: Yes.
>
> Q: Did he testify at trial?
> A: No.
>
> ***Q: And to the best of your recollection, whose decision was [it] that he not testify?***
> ***A: I told him that I controlled that decision.***
>
> Q: When you told him that, what preceded you telling him that you controlled the decision?
> A: Well, I made a mistake, in that, for some reason, at that particular moment in time. I thought that counsel controlled the witnesses. After I made the statement, in probably 20 minutes or at least within an hour, I realized I had made a mistake. And then I think it was the next day that I brought that to the OIDP office's attention.
>
> ***Q: Did you have any reason to believe that Mr. Hampton would perjure himself when he took the stand?***
> ***A: I had no--I had nothing--none of the***

> ***investigation[s] nor the discovery that I had done would indicate that Mr. Hampton was going to perjure himself.***

Transcript of Post-Conviction Relief Hearing (03/05/99) at 3-4 (emphasis added). Therefore, when we consider the facts, circumstances and controlling jurisprudence, we conclude the defendant's rights were clearly violated and the court of appeal erred in holding otherwise.

The trial court unequivocally held the defendant's constitutional rights were violated when he was prevented from testifying. *See* Transcript of Post-Conviction Relief Hearing (07/26/99) at 2. We believe the court was correct in granting a new trial on that basis. As this Court previously indicated, "[n]o matter how daunting the task, the accused . . . has the right to face jurors and address them directly without regard to the probabilities of success. *As with the right to self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis*." *State v. Dauzart*, 99-3471 (La. 11/3/00), 769 So.2d 1206, 1210 (emphasis added). Therefore, we find the trial court was correct in granting defendant post-conviction relief because he had a constitutional right to testify in his own defense.

In reversing the trial court's post-conviction relief, the court of appeal relied on *Nix v. Whiteside*, 475 U.S. 157 (1986). We find such reliance to be misplaced. In *Nix*, an ineffective assistance of counsel case, the issue was whether a criminal defendant's Sixth Amendment right to counsel was violated when his attorney refused to cooperate after the defendant made known his intention to offer perjured testimony. Defense counsel testified:

> [W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it . . . I advised him that if he did do that it would be my duty to advise the court of what he was doing and that I felt he was committing perjury.

Id. at 161. In the case *sub judice*, there was no indication the defendant wanted to perjure himself. See Transcript of Post Conviction Relief Hearing (03/05/99) at 3-4. Therefore, *Nix* is inapplicable. It can only be applied to situations where a defendant intends to offer perjured testimony.

Developing a Reasonable Standard for Louisiana

While we believe the Constitution and jurisprudence are well-settled in that a criminal defendant is guaranteed the right to testify in his own defense, we also believe a broad-based ruling has the potential of opening the flood gates for post-conviction relief petitions in virtually every case where the defendant did not testify. Our intention is to narrow the reach of the case *sub judice* and prevent frivolous claims. To do so, we find it prudent to establish some criteria to aid the trial courts in determining whether a defendant has waived his right to testify or simply chose not to do so for strategic purpose.

In addressing the issue of whether denial of a criminal defendant's right to testify—a right that is fundamental in nature—is subject to harmless-error analysis, we find the U. S. Supreme Court's logic in *Arizona v. Fulminante*, 499 U.S. 279 (1991) persuasive. The case addresses the issue of whether harmless-error analysis is appropriate for "structural defects" or "trial errors."[9]

In *Fulminante*, the defendant informed the Mesa, Arizona police department that his stepdaughter was missing. After a two-day search, her body was found. Fulminante made several inconsistent statements concerning his relationship with his

[9] The *Fulminante* Court distinguished between trial errors, which are amenable to harmless-error analysis, and structural defects to which harmless-error analysis is inapplicable. Trial errors may include: (1) a misstated jury instruction; (2) restriction of a defendant's right to cross-examine a witness for bias; (3) failure to instruct the jury on the presumption of innocence *et seq.* *See generally Arizona v. Fulminante*, 499 U.S. 279 (1991). Such errors are obviously different from structural defects, which address the denial of fundamental rights as guaranteed by the U.S. and Louisiana Constitutions.

stepdaughter and her disappearance. Consequently, he became a suspect in her murder. When no charges were filed against him, however, he left Arizona for New Jersey. There, he was convicted on unrelated federal charges. *See id.* at 282.

During his incarceration, Fulminante befriended another inmate who was actually a paid, Federal Bureau of Investigations undercover informant. After rumor spread about Fulminante's alleged murder of his minor stepdaughter, he became the target of widespread violence from fellow inmates. Consequently, the informant offered to protect Fulminante if he told the truth about his stepdaughter's death. Fulminante accepted the offer and confessed intimate details about the child's death. He was subsequently indicted in Arizona for the child's murder. *See id.* at 283.

After the State moved to introduce evidence of the confession, defendant moved to suppress, alleging it was illegally coerced. The district court rejected defendant's argument and sentenced him to death. The Arizona Supreme Court, however, reversed. The court found that although the confession was coerced and not admissible, it determined the admission of the confession was subject to harmless-error analysis because of the overwhelming evidence against Fulminante. *See id.* at 283-84. The U.S. Supreme Court affirmed the Arizona court's ruling, but differed on the application of harmless-error analysis. It is that logic in which we find merit.

The *Fulminante* Court noted:

> [a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence against him . . . . The admissions of a defendant come from the actor himself, the most knowledgeable and impeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind, even if told to do so.

Id. at 296 (citations omitted). As such, the Court placed great weight on the

defendant's confession because it came from the defendant's own mouth. "[C]ertain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." *Id*. at 295 (quoting *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)).

The *Fulminante* Court found fundamental fairness dictated that coerced confessions are not amenable to harmless-error analysis because of the great impact the jury places on statements made by the accused. "A defendant's confession is probably the most probative and damaging evidence that can be admitted against him, so damaging that a jury should not be expected to ignore it even if told to do so." *Id*. at 292 (citations omitted). Therefore, in applying the same logic the U.S. Supreme Court used in *Rock v. Arkansas* and *Arizona v. Fulminante*, and the same logic the Eleventh Circuit used in *U.S. v. Teauge*, denial of a fundamental right guaranteed by the Constitution cannot be subject to harmless-error analysis. The defendant cannot be denied an opportunity to call himself —the most powerful witness to testify on his behalf.

As *Rock* observed, a defendant's right to testify on his own behalf is a necessary corollary of his Sixth Amendment right to compulsory process because "the most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 52. *Rock* thus spoke of the right to testify as among those rights that "'*are essential to due process of law in a fair adversary process*.'" *Id*., at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975) (emphasis added)). Therefore, such language unmistakably places the defendant's right to testify among those protections without which a criminal trial is "structurally flawed."

In the case *sub judice*, the record clearly indicates the defendant wished to

testify. In addition to the forgoing testimonial excerpts, the defendant's court-appointed trial counsel indicated the following at the post-conviction relief hearing:

> [F]rom my recollection of what happened at trial and when I read the record this kind of happened simultaneously. ***He was pulling my coat. And he asked—I mean, he definitely said he wanted to testify. And I said—used a word of profanity and said no, that he wasn't, and that I controlled it.*** And then we went on with the case.

Transcript of Post-Conviction Relief Hearing (03/05/99) at 14 (emphasis added). Moreover, the defendant's trial counsel unequivocally testified that he erred in usurping the defendant's decision-making power. *See id.* Therefore, denial of this fundamental right is, in the *Fulminante* Court's terms, a "structural defect" and much more than mere "trial error."

We rely on our holding in *State v. Dauzart*, *supra.* In *Dauzart*, we reversed the defendant's convictions and sentence because the trial court prevented the defendant from testifying. The trial court did so, as a matter of procedure, simply because the defense had already rested its case before the defendant made known his desire to testify. In evaluating the court's actions, we held "denial of the accused's right to testify *is not amenable to harmless-error analysis*. The right 'is either respected or denied; *its deprivation cannot be harmless.*'" *Dauzart*, 769 So.2d at 1210-11 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984)) (emphasis added). It is of no consequence that in *Dauzart*, the court prevented the defendant from testifying and here the defendant's lawyer prevented him from doing so. Denial of the right to testify is not amenable to harmless-error. *See id.* Therefore, we hold that whenever a defendant is prevented from testifying, after unequivocally expressing his desire to do so, the defendant has been denied a fundamental right and suffers detrimental prejudice.

In determining whether a defendant's right to testify was violated or waived by

his silence during trial, we can look to *Passos-Paternia v. United States*, 12 F. Supp. 2d 231 (D.P.R. 1998), for guidance. As a guideline, the *Passos-Paternia* court held:

> (1) absent extraordinary circumstances that should alert the trial court to a conflict between attorney and client, the court should not inquire into a criminal defendant's right to testify. The court should assume, that a criminal defendant, by not 'attempting to take the stand,' has knowingly and voluntarily waived his right;
> (2) the court must consider whether the petitioner has waived his right to testify . . . . [The defendant can only] rebut that presumption . . . by showing that his attorney caused him to forego his right to testify [(a) by alleging specific facts, including an affidavit by the defendant's trial counsel] from which the court could reasonably find that trial counsel 'told [the defendant] that he was legally forbidden to testify or in some similar way compelled him to remain silent . . . ' [(b) by demonstrating from the record] that those 'specific factual allegations would be credible . . .'

Id. at 239-40 (citations omitted). We find this framework persuasive. *Passos-Paternia* also lists a third factor for consideration.[10] However, because the third factor employs a harmless-error analysis to denial of a fundamental right, we decline to adopt it from the Puerto Rico District Court. The jurisprudence of both the U.S. Supreme Court and this Court is well-settled in that denial of a fundamental right is not amenable to harmless-error. *See McKaskle v. Wiggins*, 465 U.S. at 177 n. 8; *Fulminante*, 499 U.S. at 302; *State v. Dauzart*, 769 So.2d at 1210.

We believe the facts of this case fall within the narrow class created by the two criterion adopted from *Passos-Paternia* and this Court's previous holding in *Dauzart*.

---

[10]

> (3) if the petitioner successfully rebuts the presumption that, by his silence, he knowingly and voluntarily waived his right to testify, the court must analyze his claim as one of constitutional trial error (as opposed to structural defect requiring automatic reversal of the conviction) and apply harmless-error analysis . . . . [Under which] the petitioner can proffer the testimony he was allegedly prevented from giving at trial, and the habeas court can determine, based on the other evidence, what effect the denial had on the outcome of the trial.

Passos-Paternia, 12 F. Supp. 2d at 239-40 (citations omitted).

Moreover, such criteria is in line with fundamental constitutional rights and fairness in a criminal proceeding. Accordingly, the court of appeal's holding must be reversed. Denial of a criminal defendant's right to testify, after he unequivocally makes known his desire to do so, simply cannot be amenable to harmless-error. *See Dauzart*, *supra*; *see also U.S. v. Butts*, 630 F. Supp. 1145, 1148 (D. Me. 1986) (holding "[t]his Court considers a defendant's right to testify in a criminal proceeding against him so basic to a fair trial that its infraction *can never be treated as harmless-error* . . . .") (emphasis added).

CONCLUSION AND DECREE

For the forgoing reasons, we **REVERSE** the decision of the court of appeal and **REINSTATE** the trial court's grant of the defendant's post-conviction relief petition. This case is **REMANDED** to the district court for action consistent with this opinion.