No. 14-555

IN THE

Supreme Court of the United States

ANGELICA C. NELSON,

Petitioner,

v.

WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER

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The State does not dispute that the question presented here – whether a complete denial of the constitutional right to testify is amenable to harmless-error analysis – is an important one. And while the State nibbles around the edges of the conflict over that issue, it fails to diminish the force of the conflict in any meaningful way. Nor do the State's vehicle or merits arguments provide any reason to forego review. Certiorari should be granted.

1. The Wisconsin Supreme Court's holding conflicts with the decisions from four state courts of last resort.

First, the State points out that certain background facts in *State v. Rivera*, 741 S.E.2d 694 (S.C. 2013), were different than here. BIO 16-17. True enough. But none of those facts provides any basis for distinguishing that case from this one. In both cases, the defendant sought to testify but was completely prevented from doing so. And the South Carolina Supreme Court held – in direct contrast to the Wisconsin Supreme Court here – that "the error [was] structural." *Rivera*, 741 S.E.2d at 707.

Second, the State maintains that the Louisiana Supreme Court's analysis in *State v. Dauzart*, 769 So. 2d 1206 (La. 2000), that a defendant's right to testify is not subject to harmless error, was "cursory." BIO 13. The Louisiana Supreme Court's opinion, however, speaks for itself. It applied this Court's precedent concerning the dignity interest in testifying to hold that the denial of that right cannot be deemed harmless. *Dauzart*, 769 So. 2d at 1210-11.

Consequently, the Louisiana Supreme Court reversed the defendant's conviction. *Id.* This decision obviously conflicts with the Wisconsin Supreme Court's here.

Third, the State asserts that the Minnesota Supreme Court's determination in *State v. Rosillo*, 281 N.W.2d 877, 879 (Minn. 1979), that denying the right to testify can never be harmless was "dicta" because the court there ultimately "found that no error occurred." BIO 14. But appellate courts commonly announce rules of law in opinions in which they later conclude those rules do not afford relief on the facts of the case. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228 (2005). When, as in *Rosillo*, those rules are integral to the court's analysis, they bind lower courts going forward – which is why the Minnesota courts continue to follow that precedent. *See* Pet. 10.

The State also notes that *Rosillo* predates *Arizona v. Fulminante*, 499 U.S. 279 (1991). BIO 14. But the harmless/structural error dichotomy long predates both *Fulminante* and *Rosillo*. *See Fulminante*, 499 U.S. at 306-10 (reciting precedent dating back to 1967). And the State points to nothing in *Fulminante* that changed that jurisprudence in any meaningful way as applied to the right to testify.

Fourth and finally, the State tries to distinguish *Boyd v. United States*, 586 A.2d 670 (D.C. 1991). The State asserts that the trial court there violated the defendant's right to testify by failing to ask her if she wanted to testify, whereas here the defendant asked to testify and the trial court said no. BIO 15. This is a distinction without difference. In *Boyd*, the D.C. Court of Appeals held that the harmless error

doctrine is inapplicable to the denial of the right to testify, 586 A.2d at 678, whereas here the Wisconsin Supreme Court held the opposite. The specific circumstances under which the trial courts in those cases denied the right did not matter to either outcome.

2. The State contends that this is an imperfect vehicle for addressing the question presented because "neither of the Wisconsin appellate courts made a reasoned determination that the trial court violated Nelson's right to testify." BIO 9.

It takes some chutzpah for the State to make this claim. The State "d[id] not dispute" in the Wisconsin appellate courts "that the circuit court erred." Pet. App. 10a. Rather, the State expressly asked the Wisconsin courts to "assum[e] that the circuit court violated Nelson's right to testify." BIO R-Ap. 103. And for good reason. The trial court refused to allow petitioner to testify because she said that she was not going to dispute any elements of the charged crimes. Yet as every appellate court to address such a ruling had held – and as the State still does not dispute – this is an impermissible basis to preclude a defendant from taking the stand. Pet. 17.[1]

In any event, this Court need not render any definitive holding concerning whether petitioner's right to testify was violated. Where, as here, the

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[1] The State also recites the trial court's observation that petitioner's lawyer advised her against testifying. BIO 6-7. But this Court has squarely held that a defendant has a right to testify against the advice of counsel. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983).

prosecution declines on appeal to defend a trial court's ruling but contests the defendant's access to a remedy, this Court typically assumes that the defendant's rights were violated for purposes of assessing the proper remedy. *See, e.g.*, *Herring v. United States*, 555 U.S. 135, 139 (2009) ("For purposes of deciding this case" concerning access to an exclusionary remedy, "we accept the parties' assumption that there was a Fourth Amendment violation."); *Fry v. Pliler*, 551 U.S. 112, 116 n.1 (2007) ("assum[ing] (without deciding)" that defendant's rights were violated in order to determine whether harmless-error review applied); *Murray v. United States*, 487 U.S. 533, 536 (1988) ("assuming," like the appellate court below, "for purposes of . . . decision" that the defendant's rights were violated); *Chapman v. California*, 386 U.S. 18, 20 (1967) (assuming defendant's rights were violated for purposes of deciding whether harmless-error review applied). The State offers no reason why this Court cannot follow the same course here. If this Court holds that denying the right to testify is not subject to harmless-error analysis, it can then remand for further proceedings consistent with that decision.

3. The State's merits argument provides no basis to deny review in the face of the stark conflict over the question presented. At any rate, the State's defense of the Wisconsin Supreme Court's holding does little more than echo that court's reasoning – which petitioner has already shown to be faulty. *See* Pet. 17-24.

In brief: The State argues that denying the right to testify is subject to harmless-error analysis because denying a right designed to protect a

defendant's "dignity and personal autonomy" does not automatically warrant a new trial. BIO 21. This Court's precedents respecting the right to self-representation, however, say otherwise. *See* Pet. 20-21. And contrary to the State's suggestion (BIO 21-22), the right to testify is "[*e*]*ven more fundamental* to a personal defense than the right of self-representation," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (emphasis added), or any other criminal-procedure right.

The State also contends that denying the right to testify can be meaningfully assessed in isolation when defendants indicate in proffers that they would not have disputed any elements of the charged offenses. BIO 22-23. But this contention ignores this Court's supposition in *Luce v. United States*, 469 U.S. 38 (1984), that appellate courts cannot deem denials of the right to testify harmless based on proffers. "[T]he precise nature of the defendant's testimony," when obstructed, "is unknowable" because it "could, for any number of reasons, differ from the proffer." *Id.* at 41 & n.5; *see also* Pet. 22 (discussing *Luce* at greater length). This Court should grant certiorari to instruct the Wisconsin Supreme Court and others accordingly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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