STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2013 AP 000467 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A COURT OF APPEALS DECISION AFFIRMING JUDGMENT OF CONVICTION IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

Issue One: Whether the Circuit Court erred when it stripped Anthony of his right to testify, pursuant to ***Illinois v. Allen***, when Anthony's behavior was never so disruptive, obscene, or violent to merit removing him from his trial.

The Circuit Court and Court of Appeals both answered: NO.

Issue Two: Whether the Circuit Court's error in denying Anthony his constitutional right to testify in his own defense to facts relevant to elements of the charged crimes and defenses was subject to harmless error review.

The Court of Appeals answered:
YES.

POSITION ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by this court for full briefing, both oral argument and publication appear warranted.

STATEMENT OF THE CASE

Defendant Eddie Lee Anthony was convicted by a jury, the Hon. Richard J. Sankovitz presiding, of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a). (R. at 29.) At trial, Anthony presented no defense to the State's allegations that he stabbed the mother of his children 47 times. (R. at 59-67.) He had intended to defend from the charge of first-degree intentional homicide by arguing that he acted in self-defense. (R. 40 at 2.) However, the Circuit Court stripped him of his right to testify after the State rested. (R. at 66.)

Anthony filed an appeal, which argued that the Circuit Court committed error by denying him his right to testify in his own defense. (Pet'r's Appellate Br. at 9-12). The Court of Appeals denied the appeal. ***State v. Anthony***, No. 2013AP467-CR, unpublished slip opinion (Wis. Ct. App. Jan. 14, 2014). Specifically, the Court of Appeals relied on ***Illinois v. Allen*** to conclude that Anthony forfeited his right to testify in his own defense when he exhibited "defiant and agitated behavior, and rant[ed] about irrelevant topics." ***Id.*** at 6; ***Illinois v. Allen***, 397 U.S. 337, 90 S. Ct. 1057 (1970). . The Court of Appeals then concluded that, "even if the trial court should have permitted Anthony to testify, the refusal to do so was harmless." ***Id.*** at 7.

During the litigation of this case, Anthony could not find nor has the State identified one single other case, even merely persuasive, where a defendant was stripped of his right to testify without having been so disruptive as to render it impossible to carry on the trial in his presence. Therefore, this case presents the question of whether Wisconsin wants to go further than any other court has gone, and allow displeased trial judges to strip away a defendant's right to testify in his own defense as a preemptive and

protective measure, when the standard for disruptiveness set by the United States Supreme Court in ***Illinois v. Allen*** is not met.

After Anthony's appeal was decided, this Court decided ***State v. Nelson***, which held that a harmless error analysis applied when a Circuit Court improperly stripped a defendant of her right to testify as to facts irrelevant to the elements of the crimes charged or any proffered defense. No. 2012AP2140-CR, (Wis. Sup. Ct., July 16, 2014) at ¶28. Accordingly, the stark issue in this appeal is whether it is harmless or plain error when the excluded testimony is directly relevant to the elements of the crimes charged and the defendant's only intended defense. In other words, it considers whether there is a distinction between a defendant's right to testify generally, and his right to testify in his own defense.

STATEMENT OF FACTS

Anthony, an African-American, lived with Sabrina Junior and their children. (R. 62 at 5-6.) On August 20, 2010, Anthony stabbed and killed Sabrina with an icepick. (R. 59 at 11; R. 64 at 54.) Anthony was convicted of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a). (R. 29.)

At trial, the State presented evidence of the following. Anthony and Sabrina were walking through their neighborhood and began arguing. (R. 62 at 10-11.) The couple returned to their home where the argument escalated. (*Id.* at 16, 18.) Their eldest daughter entered the apartment to find Sabrina's body as Anthony was leaving. (*Id.* at 21, 24.) Anthony fled and was arrested in Illinois. (R. 64 at 11, 14.)

Anthony did not contest these allegations during the State's case-in-chief. Instead, he intended to defend

against the charges by arguing that he acted in self-defense, and to provide a neutral explanation for his subsequent flight. (R. 66 at 35-37.)

After the State rested, trial counsel advised the court that Anthony would be taking the stand. (*Id.* at 23.) The court addressed Anthony directly, explaining that if he were asked about whether he was convicted of a crime, he should respond that he had been convicted of two crimes. (*Id.* at 24.) Anthony responded directly to the court that he had been convicted three times. (*Id.* at 25.) The Circuit Court corrected Anthony, indicating that he would only be allowed to say that he had been convicted twice. (*Id.* at 25-26.) Anthony indicated that this was not factually true, as he had served 12 years for a third conviction from 1966 which was later deemed wrongful. (*Id.* at 25-28.)[1] The Circuit Court instructed him that he would not be allowed to mention this third conviction, because it was "irrelevant" to whether Anthony killed Sabrina Junior. (*Id.* at 28.) Anthony was insistent that the jury should "know the truth, the whole truth." (*Id.* at 28-29.) The court had difficulty understanding Anthony's logic at times, due in large part to insisting on conversing with him personally rather than with his counsel. (*Id.* at 27-35.)

In order to prevent Anthony from mentioning the wrongful conviction, the court ordered that Anthony would not be allowed to testify in his own defense. (*Id.* at 33.) The court explained:

[1] Previous pleadings mistakenly asserted that Anthony was the victim in the 1966 robbery. As noted by the State in its Brief of Respondent, filed in the Wisconsin Court of Appeals, this was inaccurate. (R. at 40:3; State's Reply Brief at 3-4.) The only robbery at issue in this case was the 1966 wrongful conviction that resulted in 12 years incarceration for Anthony.

> The difficulties [if Anthony testified] would be visited on your head. First of all, the jury would hear the part about the armed robbery but not all the rest of the story and so they might think oh, this is the guy who's not only accused of killing Miss Junior but he's also an armed robber and they wouldn't get the rest of the facts. That's one problem. I want to avoid that.
>
> The other problem is this: You're going to be shackled to the witness stand. I can't easily remove you from the courtroom. I'll have to remove the jury from the courtroom instead, and removing the jury from the courtroom is not something I can do effortlessly or quietly or without them seeing that you would be making a ruckus on the stand. When I say "ruckus" what I'm referring to is the way that you were very, you know, very animated way talking before [sic]. I don't want you to look worse in the eyes of the jury because of the way you're behaving on the stand… I don't want to make this worse for yourself than it is already [sic]…
>
> I don't want [the jury] to see you acting in a way that shows you might be a person who easily loses his temper or can't follow the rules other people follow because they might use that evidence to convict you…
>
> If it was a simple balancing test, if somebody told me that they were intentionally going to violate one of the rules that we set for the court and it carried only a little bit of prejudice… We don't know for sure whether this is something that would make a difference to this jury that might up-end this very carefully constructed process we have of getting the truth which is why I've said this can't come in.

(*Id.* at 34-46.) When trial counsel suggested that Anthony be permitted to testify and the State could argue and the court could instruct as necessary as to any irrelevant information, the court refused, explaining, "That's putting the inmates in charge of the asylum; so I'm sorry, I'm not going to go that

route." (*Id.* at 47.) The court further characterized Anthony's having been imprisoned for 12 years for a crime he did not commit as "[Anthony's] sorry tale about what happened in the sixties." (*Id.* at 46.)

Trial counsel made an offer of proof that Anthony would have testified that he acted in self-defense when he killed Sabrina. (*Id.* at 35-37.) Trial counsel further objected that the probative value of Anthony's self-defense testimony outweighed the prejudicial value of any potentially irrelevant testimony he might attempt to give. (*Id.* at 45-47.)

Anthony has consistently maintained that he would have testified that Sabrina was a heavy user of crack cocaine. (R. 40 at 4.) Sabrina had a history of being aggressive while high on crack cocaine, and was exhibiting severe aggression in connection with being high of crack cocaine on the night of her death. (*Id.*) According to Anthony, in the physical confrontation that ultimately resulted in her death, Sabrina threatened and attempted to kill Anthony, who was defending himself and their children against her attack. (*Id.*) The jury that convicted Anthony never heard this information, and no defense was presented.

Trial counsel further explained that Anthony would have explained why fleeing was not indicative of guilt, because he has a special fear of police in Illinois and Wisconsin due to events in his past including the wrongful conviction from 1966 with which the court took issue, so flight was a natural response. (*Id.* at 36-37.) Again, the jury that convicted Anthony never heard this information.

During closing arguments, the State repeatedly referenced the fact that Anthony fled the scene in order to prove that Anthony intended to kill the victim. (R. 67 at 24, 26-28, 51-52.) The State argued:

> Did he call the police? Did he call the fire department? Did he tell Larina let alone anyone upstairs? Did he do any of that? ***No, he lets her die and he goes to Illinois.*** That's what he does. ***That again shows his intent, the state of mind, that he wanted to kill her***.

(R. 67 at 51.)

Anthony remained in the courtroom for the entirety of his trial. (*See generally,* R. 66.) To the extent that one could conclude that Anthony's reasonable expression of frustration upon denial of his right to testify in his own defense was "disruptive," even then the trial process was never impeded and he was not at risk of being removed from the courtroom. (*See, e.g., Id.* at 30-33.) Even when most strained, the Circuit Court only believed it necessary to suggest Anthony take a deep breath (*Id.* at 30), allow him a minute to collect his thoughts (*Id.* at 32), and to talk to his attorney off the record (*Id.* at 33).

Anthony anticipated that his defense would be one of self-defense, but he was the only surviving witness to his confrontation with Sabrina. In a feeble attempt to mount a defense, he called his daughters to the stand, but they just testified they had not seen and could not testify as to what occurred between Sabrina and Anthony. (R. 66 at 59-67.) In effect, Anthony failed to present any defense at all.

Accordingly, the jury convicted Anthony of one count of 1st Degree Intentional Homicide, and Anthony was sentenced to life imprisonment.

Anthony appealed, arguing that the Circuit Court erred when it denied him his right to testify in his own defense, because this obliterated Anthony's only defense, and there is nothing on record to indicate that Anthony either was disruptive or did not intend

to tell the truth. (*See Generally* Pet'r's Appellate Br.) Anthony concluded that, no matter what standard of review the court deemed appropriate, Anthony should have been granted a new trial because of "the Circuit Court's denial of Anthony's constitutional rights to testify in his own defense and to present a meaningful defense." (Pet'r's Appellate Br. at 12-13.)

In considering Anthony's arguments, the Court of Appeals first looked to ***Illinois v. Allen***, noting, "by refusing to comply with the trial court's order, exhibiting defiant and agitated behavior, and ranting about irrelevant topics, Anthony forced the trial court to decide whether the jury should be allowed to hear Anthony discuss irrelevant matters and potentially see Anthony lose his temper on the stand." ***State v. Anthony***, No. 2013AP467-CR, unpublished slip opinion (Wis. Ct. App. Jan. 14, 2014) at 6-9. However, the court did not directly address whether Anthony was properly denied his right to testify. ***Id.*** Instead, it held that the denial was subject to a harmless error analysis, and that the denial was harmless because of an "overwhelming amount of evidence would have undermined his theory."

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT STRIPPED ANTHONY OF HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE BECAUSE HIS BEHAVIOR WAS NEVER SO DISRUPTIVE, OBSCENE, OR VIOLENT AS TO INTERFERE WITH HIS TRIAL

A criminal defendant's due process right to testify in his own defense is fundamentally important, as it cuts to the very heart of the fact-finding process. As

former Judge Godbold of the Fifth Circuit once explained:

> To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of his voice.

Wright v. Estelle, 572 F.2d 1071 (5th Cir. (en banc) (Godbold, J., dissenting.) The United States Supreme Court has held that criminal defendants have a right to testify in their own defense under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. ***Rock v. Arkansas***, 483 U.S. 44, 49-53, 107 S.Ct. 2704 (1987); ***Wisconsin v. Albright***, 96 Wis.2d 122, 129, 291 N.W.2d 48 (1980).

In determining that a criminal defendant has a due process right to testify in his own defense, the Wisconsin Supreme Court cited ***Harris v. New York***, in which the U.S. Supreme Court correlated the absolute right of a defendant to refuse to testify with the right to affirmatively testify: "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, 91 S.Ct. 643, 645, (1971) (cited by ***Albright***, 291 N.W. 2d at 490). In ***Albright***, the Wisconsin Supreme Court concluded, "There is a constitutional due process right on the part of the criminal defendant to testify in his own behalf." ***Id.***

Across the country, there are very few limitations to a criminal defendant's right to testify in his own defense, such as knowing, intelligent and voluntary waiver. ***Albright***, 96 Wis.2d at 129. The right to testify is also subject to the defendant telling the truth. *See, eg,* ***State v. McDowell***, 272 Wis.2d 488,

681 N.W.2d 500 (2004). The U.S. Supreme Court has indicated that limitations on the right to present relevant testimony are permissible, but those limitations "may not be arbitrary or disproportionate to the purposes which they are designed to serve." ***Rock v. Arkansas***, 483 U.S. at 55-6. That is, in all cases in which a right to testify has been limited, the Circuit Court was *required* to balance the decision with the effect on the defendant.

Federal appellate courts agree that this is a personal and fundamental constitutional right, and that only a "knowing, voluntary and intelligent" waiver by the defendant himself is sufficient to relinquish this right. For example, in ***United States v. Leggett***, the Third Circuit declared, "If a defendant does waive the right [to testify], the waiver must be knowing, voluntary, and intelligent." 162 F.3d 237, 246 (3rd Cir. 1998), *see also* ***U.S. v. Stark***, 507 F.3d 512, 517 (7th Cir. 2007); ***U.S. v. Hung Thien Ly***, 646 F.3d 1307, 23 Fla. L. Weekly Fed. C 141 (11th Cir. 2011); ***Chang v. U.S.***, 250 F.3d 79, 82, 86 (2nd Cir. 2001).

The primary conflict between the circuits has, until recently, focused on what constitutes waiver, and whether it need be affirmative. In ***Galowski v. Murphy***, the defendant alleged that his attorney unilaterally waived his right to testify. 891 F.2d 629, 636 (7th Cir. 1989). After noting "the right to testify is a personal right that belongs to the accused and may be waived only by the accused," the court found that the defendant's attorney did not unilaterally waive the defendant's right to testify because she and the defendant "discussed several times whether the defendant should take the stand," and that they "mutually decided" that he should not. ***Id***. at 636. In ***United States v. Bernloehr***, the Eighth Circuit Court of Appeals determined that a "mature and sophisticated businessman" properly waived his right to testify where, although he told the court he wanted

to testify, he made no objection when his attorney rested without calling him to the stand. 833 F.2d 749, 751, 752-53 (8th Cir. 1987). Finally, in ***United States v. Teague***, the Eleventh Circuit found that the defense attorney did not act deficiently where she did not have her client testify because, when she rested in the case, she "clearly had advised [the defendant] that it would be unwise and unnecessary for him to testify." 953 F.2d 1532, 1535 (11th Cir. 1992) (en banc).

In recent years, however, another issue has come to the forefront: Under what circumstances a disruptive defendant may be stripped of his right to testify.

A handful of courts, including the Wisconsin Court of Appeals in this case, have looked to ***Illinois v. Allen*** for guidance. ***Illinois v. Allen***, 397 U.S. 337, 90 S. Ct. 1057 (1970). In ***Allen***, the defendant refused to work with an attorney and insisted on representing himself. ***Allen*** at 339. He was unruly in his *pro se voir dire*, and eventually resorted to "abuse" and swearing at the judge. ***Id.*** at 339-40. When warned that he might be removed from the courtroom, he threatened that the judge was "going to be a corpse" then tore up legal files. ***Id.*** at 340. Allen persisted in his disruption throughout the trial and had to be removed multiple times. ***Id.*** at 340-41. After the State's case-in-chief, the judge reiterated his offer to Allen that he could return to the courtroom if he could agree to conduct himself properly. ***Id.*** at 341. Allen gave the judge "some assurances of proper conduct," and was therefore permitted to remain in the courtroom for the remainder of the trial. ***Id.*** He appealed his conviction based on infringement of his Sixth Amendment right to be present at his trial. ***Id.*** at 342. The United States Supreme Court upheld his conviction, explaining:

> We explicitly hold today that ***a defendant can lose his right to be present*** at trial ***if, after he has been warned*** by the judge that he will be removed if he continues his disruptive behavior, ***he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the Court that his trial cannot be carried on with him in the courtroom***.

Id. at 343 (emphasis supplied.)

A. Relevant Federal Rulings

The Ninth and Eighth Circuits have considered the potential impact of ***Allen*** on the right to testify.

In ***United States v. Ives***, the Ninth Circuit held that the standard set forth in ***Allen*** for removing a defendant from his own trial was "equally applicable to those who wish to testify." ***United States v. Ives***, 504 F.2d 935, 937 (9th Cir.1974), *vacated on other grounds,* 421 U.S. 944, 95 S.Ct. 1671, (1975), *opinion reinstated in relevant part,* 547 F.2d 1100 (1976). Ives' first trial ended in a mistrial due to his continual disruptions of the proceedings. ***Id.*** at 937. In his second trial, Ives was repeatedly removed from the courtroom because he disrupted opening statements, shouted obscenities, and violently attacked both his and the State's attorney, going as far to throw a book at his attorney, all in front of the jury. ***Id.*** at 942-46. On a recess, Ives punched his attorney in the face. ***Id.*** at 943. Ives was given the opportunity to take the stand on at least three occasions, and in every instance refused to cooperate either with his own lawyer or the judge. ***Id.*** at 942-45. Despite the quantity and severity of Ives' disruptions, the court made multiple attempts to reintegrate Ives into the trial and maintain his right to testify, but these attempts proved unsuccessful. ***Id.***

On appeal, the Ninth Circuit held that the abrogation of Ives' right to be present under ***Allen*** was equally applicable to Ives even if he had wanted to testify. ***Id.*** at 941-42. The Ninth Circuit explained that a defendant's right to testify is "fundamental to our judicial process . . . [and] cannot be lost unless it is clearly necessary to assure the orderly conduct of the trial." ***Id.***

In ***United States v. Ward***, the defendant exhibited behavior that, of all the cases discussed herein, is most similar to the behavior exhibited by Anthony, as Ward was "going off on tangents" and was experiencing difficulty following the court's instruction. 598 F.3d 1054, 1056 (8th Cir. 2010). Unlike in Anthony's case, Ward was repeatedly admonished for interrupting the court and the prosecutor, rendering it difficult to continue the trial, so he had to be removed. ***Id.*** at 1056. Even so, Ward was given the opportunity to come back if he promised to keep quiet, but he informed counsel that he could not write fast enough to meaningfully participate in that manner, so he was not returned to trial. ***Id.*** at 1057. On appeal, Ward's conviction was overturned on the grounds that the court erred in removing Ward from the trial without affording him a reasonable opportunity to return to see if he wanted to testify. ***Id.*** at 1060. The Eighth Circuit held, "A defendant may be removed if he insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom… Behavior that is merely disruptive is insufficient under ***Allen*** to justify removal." ***Id.*** at 1058.

B. Relevant State Rulings

The Supreme Courts of Alaska and Washington, as well as the Minnesota and Iowa Courts of Appeals,

have addressed how ***Illinois v. Allen*** can impact the right to testify.[2]

In ***Douglas v. State***, the Circuit Court dealt with a defendant who called the prosecutor a "Nazi bastard," the victim a liar, and struck at least one of the seven attorneys he went through before trial in the face. ***Douglas v. State***, 214 P.3d 312 (Alaska, 2009). He was repeatedly removed for interrupting the proceedings, insulting the attorneys and judge, and ranting about irrelevant subjects. ***Douglas*** at 315-16. The court abrogated Douglas' right to be present pursuant to ***Allen***, but even then allowed him to testify in his own defense by phone. ***Id.*** at 318.

State v. Chapple dealt with an inmate defendant on trial for rape and assault who was deemed to possess "extraordinary physical strength." 145 Wash.2d 310, 36 P.3d 1025 (Wash. 2001). One corrections officer testified that Chapple "could break handcuffs and had once pulled a cell door from a concrete wall." ***Chapple*** at 1028. A newspaper had, a few years earlier, described Chapple as, "as perfect a creature of destruction as either Heaven or Hell could produce."[3] At trial, his verbal outbursts, hostility, and offensive language were gravely disruptive, and he declared the proceedings were a "Klu [sic] Klux Klan meeting." ***Id.*** at 1030. With the jury removed, he told the judge, "Fuck the jury; fuck the trial; fuck all you motherfuckers. I don't give a fuck about you or this trial or this jury." ***Id.*** at 1027. A security officer testified, "As Chapple left the courtroom, he was adamant that he would not cooperate, he would continue to disrupt the proceedings if allowed back

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[2] Unfortunately, none of these cases discuss the right to testify to relevant versus irrelevant information.

[3] Jim DeFede, ***The County Bully***, Mimi New Times, December 1996, available at http://www.miaminewtimes.com/1996-12-12/news/the-county-bully/.

into the courtroom, and, because he already had a 125-year sentence, there was nothing more that could be done to punish him." ***Id.*** at 1028. Further, Chapple "had boasted that he would make the news that day." ***Id.*** Corrections testimony revealed, "Chapple was a threat to court personnel, even when bound to a chair, gagged, wearing a taser belt and guarded." ***Id.*** Given the foregoing, Chapple was not permitted to attend the second day of his trial, but the court allowed defense counsel to make use of his testimony from his first trial for the same crime. ***Id.*** at 1028. The Washington Court of Appeals looked to ***Allen*** to uphold the conviction, noting that both cases dealt with behavior of "an extreme and aggravated nature." ***Id.*** The court further reasoned that Chapple had been adequately warned that he was forfeiting his rights by disrupting the proceedings, to which he responded, "Take me back to Clallum [sic] Bay if you want to. I wouldn't give a fuck." ***Id.*** at 1030.

In the unpublished Minnesota Court of Appeals case, ***State v. Wylie***, the defendant had caused persistent problems throughout the trial process. ***State v. Wylie***, No. A12-0107, unpublished slip opinion (Minn. App. Feb. 19, 2013) (Att'd at Appx. D.) During jury selection, he left counsel table and charged the bench, and had to be removed by deputies. ***Id.*** at 3. In the holding cell, he took off his pants and attacked deputies with his belt. ***Id.*** He was returned to the courtroom and made an obscene gesture at the judge. ***Id.*** When he went to testify, he attempted to shoehorn inadmissible evidence in front of the jury – namely, that the victim had made another allegation of assault against someone else. ***Id.*** at 4-5. Wylie was removed from the stand. ***Id.*** at 5. The Minnesota Court of Appeals held that this removal was proper under ***Allen***, even though he was testifying at the moment it took place. ***Id.*** at 7-9.

In ***State v. Carey***, the defendant insisted on representing himself, and caused persistent problems while doing so. No. 12-0230 (Iowa Ct. App., filed Aug. 13, 2014). Before the jury was empaneled, Cary "engaged in a heated exchange with the court" over the nature and extent of his past convictions, and was found in contempt. ***Id.*** at 5-6. When Carey was later cross-examining the State's first witness, the State made a hearsay objection that was sustained. ***Id.*** at 6. When it became clear that Carey either did not understand – or refused to accept – the ruling, the Court ordered that Carey's standby counsel would take over for the defense. ***Id.*** at 6. Carey began a "heated exchange" with the court over this, and refused to sit down although the court instructed him to do so on six separate occasions. ***Id***. at 6. The Court warned Carey that if he could not comply with orders, he would be removed from the courtroom. ***Id***. at 6-7. Carey responded that if Milder was going to represent him, "we're not going to have a trial." ***Id.*** at 7. Carey was then removed from the courtroom, and never given the opportunity to return. ***Id.*** at 7. On Appeal, the Iowa Court of Appeals found that Carey's removal was proper under ***Allen***, but granted Carey a new trial because he was never given the opportunity to return. ***Id***. at 25. The court explained, "We believe the failure to conduct a hearing with Carey present invites questions regarding whether Carey wished to have witnesses called in his defense or wished to testify in his own behalf." ***Id***. at 25.

C. Discussion

There is no precedent, in Federal or State Law, for extending Allen to strip a defendant of his right to testify on grounds of disruptiveness where he was not first removed from his trial. Even in the jurisdictions where ***Allen*** has been extended to potentially abrogate a defendant's right to testify, it is not being applied in the same manner as it was for Anthony. In

those jurisdictions, defendants are removed from the courtroom for behavior such as cursing, yelling, property destruction, disrobing, and outright assault on attorneys and court personnel. The courts attempt temporary removals as a means to maintain orderliness of proceedings with minimal intrusion on the defendant's rights. In Anthony's case, his behavior never rose to the level where the court even considered removal, and his right to testify was stripped as a precautionary measure. Anthony could not find nor has the State identified a case, even merely persuasive, where a defendant was stripped of his right to testify based on "disruptive" behavior when he was never so disruptive as to render it impossible to carry on the trial in his presence.

In fact, every case that has examined the intersection between ***Allen*** and the right to testify is consistent that in instances of extreme disruption, a defendant can be removed from the court. This removal should be a last resort – only if the trial truly cannot be continued in his presence. Further, the disruptive defendant is always afforded the opportunity to reform his behavior and return – usually repeatedly. Finally, if he insists on grave disruption of an offensive and obscene character, then his right to be present can be abrogated, even if it has an ancillary impact on his right to testify. Simply put, there are *no* cases which support the approach that the Circuit Court took here in Anthony's case, which allows a defendant to "forfeit" the right to testify by way of exhibiting mere agitation and stating his intention to mention something irrelevant in the context of presenting otherwise relevant defense testimony.

In the instant case, the Circuit Court and the Court of Appeals relied on ***Allen*** to hold that stripping Anthony of his right to testify in his own defense was within the court's authority. In its discussion, the court explained that the right to testify could be or

forfeited under ***Allen*****,** noting, "By refusing to comply with the trial court's order, exhibiting defiant and agitated behavior, and ranting about irrelevant topics, Anthony forced the trial court to decide whether the jury should be allowed to hear Anthony discuss irrelevant matters and potentially see Anthony lose his temper on the stand." ***State v. Anthony*** at 7.

The Circuit Court and Court of Appeals reasoned that if ***Allen*** could waive his Sixth Amendment right to be present by way of repeated severe disruption and obscene, abusive conduct, then Anthony could waive his right to testify under the Fifth, Sixth, and Fourteenth Amendments by way of: (1) expressing his intention to mention during his testimony a 1966 wrongful conviction which the court deemed a mere irrelevant, "sorry tale;" and (2) becoming "quite agitated" when the court informed Anthony that he would not be able to testify in his own defense. (R. 66 at 46; R. 46 at 16.)

However, the Court of Appeals did not decide whether Anthony satisfied the ***Allen*** standard for disruptiveness in this particular case. It further declined to address whether the wrongful conviction was relevant as a neutral explanation for his fleeing. Instead, it applied a harmless error analysis and concluded that, even if the denial of Anthony's right to testify was in error, the error was harmless.

The Court of Appeals' use of ***Allen*** in an attempt to justify Anthony's denial of his right to testify was misguided for two reasons. First, the standard articulated in ***Allen*** was developed with respect to a defendant's right to be present at all stages of his trial. The effect of the expulsion on a defendant's right to testify was never at issue or discussed. Second, although a small handful of courts have followed the Ninth Circuit in extending the ***Allen***

standard to be equally applicable to a defendant's right to testify, Anthony has not identified a single case where – as here – a court applied the ***Allen*** standard preemptively where the court merely *feared* that the defendant *may* become disruptive.

Accordingly, Anthony's case does *not* present the question of whether Wisconsin wants to join the few courts who have extended ***Allen*** to justify denial of the right to testify to truly disruptive defendants. More accurately, the issue is whether Wisconsin wants to go further than any other court has gone, allowing displeased trial judges to strip away a defendant's right to testify as a preemptive and protective measure, when the ***Allen*** standard for disruptiveness has not even been met. Or, considering Judge Godbold's inquiry, is it fair to ask a jury to condemn a defendant who has not first been permitted to testify in defense to the elements of the crime charged?

Anthony has not identified any case where a court prevented a defendant from testifying in his own defense as a protective measure where the defendant indicated that his testimony would be both truthful and relevant to the proceedings. The closest case on point is ***U.S. v. Gleason***, 980 F.2d 1183 (8th Cir. 1992), where a defendant was ordered not to present irrelevant evidence. However, the ***Gleason*** defendant decided that, without the evidence that the court deemed irrelevant, his testimony would not serve any purpose and, in that case, waived his right to testify. ***Id.*** at 1185.

Anthony never waived his right to testify or indicated that he would testify in anything but a truthful and relevant manner. Rather, counsel explained that Anthony wanted to present the only available evidence to support his self-defense theory. (R. 66 at 35.) Other than Anthony, no living witness saw what

occurred between Anthony and Sabrina on August 20, 2010. (R. 66 at 60-61, 66.) The only way for Anthony to present his argument that he acted in self-defense was to testify in his own defense. He never waived his right to testify. (R. 66 at 35-38.) Instead, Anthony prepared for trial and sat through the State's entire case, relying on his right to testify in order to offer testimony that would both rebut the State's argument that Anthony intended to kill Sabrina Junior, as well as offer facts tending to prove that Anthony was acting in self-defense, only to have this opportunity taken away from him at the very last moment. Anthony was therefore tried for and convicted of intentional homicide without having presented *any defense at all* to the charges.

Perhaps most alarming about the mechanical application of ***Allen*** to the facts at hand is that Anthony's behavior never rose to the level indicated wherein his "trial [could not] be carried on with him in the courtroom." ***Allen***, at 343. In fact, the court minimized the potential harm of the anticipated testimony for which it ultimately stripped Anthony of his right to testify for, noting, "At this point it seems like there's nothing that serious about Mr. Anthony telling his sorry tale about what happened in the sixties." (R. 66 at 46:11-13.) However, the court concluded that it didn't "know for sure whether that is something that would make a difference to this jury," so concluded that, by wishing to testify as to his wrongful conviction and incarceration, Anthony "forfeited his right to testify." (R. 66 at 46:13-19.)

Unlike the defendants in ***Ives***, ***Douglas***, ***Chapple***, and ***Wylie***, Anthony never assaulted anyone during the trial process. Unlike the defendants in ***Ives***, ***Chapple***, and ***Wylie***, Anthony never threatened physical violence to anyone involved in the proceedings. Unlike the defendants in ***Ives***, ***Douglas***, ***Chapple***, and ***Wylie***, Anthony never shouted abusive

language or directed obscene gestures to the court. Rather, Anthony respectfully[4] dissented to the court's death-blow ruling that he could not testify. In fact, all Anthony did was respond to the court's questions with the very argument that counsel makes herein, albeit in more rudimentary terms. Further, Anthony should not have been preemptively questioned regarding his intended testimony at trial; his attorney was the one who was sufficiently educated, positioned, and prepared to do so. (R. 66 at 22-47.) Anthony was preemptively denied his right to testify based on the Court's inclination that, if permitted to take the stand, Anthony *may* become disruptive, would likely mention his wrongful conviction which the court found irrelevant, and inappropriately decided the testimony might prejudice the jury against him. Contributing to a cumulative error of sorts, the inquiry of whether the jury might think badly of Anthony if he testified should have been left to the strategy of defense counsel.

Anthony was never removed from the courtroom at all, nor does it appear the court ever even considered removing him. Rather, his conduct was contemporaneously described by the court as being a "very animated way [of] talking." (R. 66 at 34.) There is nothing on the record to indicate that Anthony engaged in any "scurrilous, abusive language and conduct." ***Allen***, 397 U.S. at 347. Rather, Anthony fervently indicated his strong desire to testify in his own defense and tell the jury "the whole truth." (R. 66 at 29.) The Circuit Court additionally indicated that, after Anthony became agitated, the "courtroom bailiffs called for additional deputies," however

[4] In his disagreement with the court concerning what information the jury could hear concerning his prior convictions, Anthony repeatedly told the trial judge that, despite the disagreement, he respected him. *See, e.g.* (R. 66 at 30:23-24.)

Anthony never threatened or exercised violence. (R. 46 at 4.)

Perhaps most importantly, the Circuit Court emphatically relied on the decorum of the tribunal to support its written order. (R. 46 at 12-13.) The decorum of the tribunal is a phrase from ethical rules designed to quickly and efficiently administer a case. *See, e.g.,* SCR 60.04(c)("A judge shall require order and decorum in proceedings before the judge"); *see also* SCR 20:3.5 (titled "Impartiality and decorum of the tribunal").

However, the instant case of a defendant testifying in his own defense is profoundly different. It is axiomatic that ethical rules fail to preempt the U.S. Constitution. Under ***Rock***, *supra*, limits may be placed on this right only if the limits are not "arbitrary or disproportionate to the purposes which they are designed to serve." ***Rock,*** 483 U.S. at 55-6. That is, as a legal issue, it is both arbitrary and disproportionate to use ethical rules to intrude on the province of evidentiary rules.

Moreover, the Circuit Court's reasoning as stated in its order denying Anthony's post-conviction motion that Anthony posed a threat to persons in the courtroom may have arisen *post-hoc*. (R. 66 at 34; *also cited as a significant phrase by* R. 46 at 6 *cf.* R. 46 at 14.) During the trial, the Circuit Court limited its ruling to three primary reasons. First, it reasoned that the jury would be biased by Anthony's potential mention of a 1966 robbery into believing that Anthony was a criminal and convict him on that basis. (R. at 66:34; *see* Appx. C.) Second, the Circuit Court stated it suspected that the jury would be biased against Anthony by any "ruckus" that he caused if he became agitated on the stand, amplified by the fact that Anthony was "going to be shackled to the witness stand." (*Id*. at 34.) Finally, the Circuit

Court indicated that it did not want the jury to see anything that would suggest that Anthony was someone "who easily loses his temper or can't follow the rules other people follow." (*Id*. at 42.) In addition to the reasons that seemed to focus on protecting Anthony from his own testimony, the Circuit Court was concerned with providing "a person carte blanch [*sic*] to break the court's rules." (*Id*. at 46.)

Anthony has a "fundamental" due process right to testify in his own defense. ***Rock,*** 483 U.S. at 53 n. 10; U. S. CONST. amend XIV, § 1; WI CONST. art. I, § 7. There is no authority to support the proposition that this right can be circumscribed by principles of decorum. The harm to Anthony by the court's disregard for constitutional rights is amplified here because the only way to present Anthony's self-defense theory was through his own testimony; no other person saw what happened between Sabrina and Anthony.

Anthony's behavior in court was not "so disorderly, disruptive, and disrespectful that his trial [could not] be carried on with him in the courtroom." ***Allen***, 397 U.S. at 343. By preemptively stripping Anthony of his right to testify, the court stripped Anthony of his only defense, a far too severe punishment for Anthony's minor disruption and dissent. The court should have minimally allowed Anthony the opportunity to testify to see if he would disobey the court's order not to explain why he fled from police. By allowing courts to strip criminal defendants of their right to testify due solely to suspicion or fear of disobedience affronts the constitutional right to due process and casts a pervasive shadow on the judicial process.

II. THE COURT'S ERROR IN DENYING ANTHONY HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE WAS NOT SUBJECT TO HARMLESS ERROR REVIEW, BECAUSE THE EXCLUDED TESTIMONY PERTAINED TO LEGAL ELEMENTS OF THE OFFENSE AND DEFENSE, AND THE ERROR WAS THEREFORE STRUCTURAL

In ***Arizona v. Fulminante***, the United States Supreme Court divided constitutional errors into two classes to determine which errors are subject to harmless error review. 499 U.S. 279, 307-10 (1991). 'Trial Errors' are the less serious class of errors, and "occur[] during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 148 (2006). 'Structural errors' "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply . . . errors in the trial process itself." ***Id***. When a structural error occurs, "A criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." ***Fulminante***, 499 U.S. at 310, 111 S. Ct. 1246.

Structural errors are not subject to harmless error review, because they undermine confidence in the trial process itself. For example, the denial of the right to a jury verdict of guilt beyond a reasonable doubt is a structural error because the jury is a "'basic protection' whose precise efforts are

immeasurable, but without which a criminal trial cannot reliably serve its function." ***Sullivan v. Louisiana***, 508 U.S. 275, 281, 113 S. Ct. 2078 (1993), *citing* ***Rose v. Clark***, 478 U.S. 570, 577, 10 S. Ct. 3101, 3105 (1986). Other examples of structural errors include the denial of counsel, the denial of the right of self-representation, and the denial of the right to a public trial. ***U.S. v. Gonzalez-Lopez***, 548 U.S. 140 at 149.

A. Relevant Federal Rulings

The United States Supreme Court has yet to directly address whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural or trial error. However, in ***Luce v. United States***, the court did determine that an "appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." 469 U.S. 38, 105 S. Ct. 460 (1984). The issue in ***Luce*** was whether a defendant must testify in order to raise and preserve a claim of improper impeachment with a prior conviction. ***Id.*** at 40. In determining that a defendant must testify in order to raise and preserve this issue, the court noted:

> Even if these difficulties could be surmounted, the reviewing court would still face the question of harmless error. *See generally* ***United States v. Hasting***, 461 U.S. 499, 103 S. Ct. 1974, 76 L.Ed.2d 96, (1983). Were *in limine* rulings under 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; ***the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying.***

Id. at 42 (*emphasis added*).

B. Relevant State Rulings

In ***State v. Rivera***, defendant was charged with brutally murdering a woman. No. 2010-162706, (South Carolina Sup. Ct., Feb. 13, 2013) at 2. Defendant informed the trial court that he intended to testify. ***Id.*** at 3. Defense counsel then informed the court that he did not believe it would be in Rivera's best interest to testify, and that he would "refuse to call him to the stand." ***Id.*** at 5. After an *in camera* examination with the defendant during which he refused to give the details of his intended testimony, the court determined that the defendant "declined to testify to anything that would be helpful to the jury in reaching the issues," and did not allow him to testify in front of the jury. ***Id***. at 9-10. The defense rested without presenting any evidence. ***Id***. at 11.

Rivera appealed, arguing that the trial court erred in failing to allow him to testify in his own defense. ***Id***. at 13. The South Carolina Supreme Court first acknowledged that the right to present testimony may be limited to "accommodate other legitimate interests." ***Id***. at 16. However, because Rivera intended to testify concerning the exact matter he was on trial for – the killing of the victim – "the relevancy of Appellant's testimony is self-evident – it pertained to the killing of the victim, which was the precise basis for the prosecution." ***Id***. at 17. The court concluded:

> The right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." ***McKaskle***, 465 U.S. at 177 n.8. As such, the error is structrual in that it is "so basic to a fair trial that [its] infraction can never be treated as harmless error." ***Fulminante***, 499 U.S. at 298 (quoting ***Chapman***, 366 U.S. at 23.)

Id. at 22. Having found that the error in denying Rivera his constitutional right to testify in his own defense was structural, the court reversed Rivera's conviction and remanded the case for a new trial. ***Id***. at 23.

In ***State v. Hampton***, the defendant was indicted with second-degree murder. ***State v. Hampton***, 818 So.2d 720, 722 (La., 2002). Hampton wanted to testify at his trial, however his defense counsel informed him that he "controlled that decision," and the defendant was never called to testify. ***Id***. at 726. The Supreme Court of Louisiana determined that the defendant's constitutional rights were violated when he was prevented from testifying, and that the error was structural. ***Id***. at 726-27. The court explained:

> 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***" . . . 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.

The Court continued that, the denial of a criminal defendant's "fundamental right" to testify in his own defense is "a 'structural defect' and much more than a mere 'trial error.'" ***Id***. at 729.

In ***State v. Rosillo***, the defendant was charged with third-degree sexual assault. 281 N.W.2d 877 (Minn., 1979.) At trial, counsel for defendant advised him not to testify. ***Id***. at 879. The defendant followed this advice. ***Id***. The defendant appealed, arguing that he was impermissibly denied his right to testify. ***Id***. at 877. In considering whether the harmless error rule applied to this case, the Supreme Court of Minnesota

concluded, "Our opinion is that the right to testify is such a basic and personal right that its infraction should not be treated as harmless error." ***Id.***

In ***State v. Nelson***, the Defendant was convicted of three counts of sexual assault of a child – a strict liability crime under Wisconsin law. *See* Wis. Stat. § 948.02; ***State v. Nelson***, No. 2012AP2140-CR, (Wis. Sup. Ct., July 16, 2014) at ¶1. In order to convict Nelson, the State only had to prove that Nelson had sex with the victim, and that he was underage. Wis. Stat. §948.02(2). Nelson readily admitted to both of these elements (and, more candidly, to having sex with the minor victim on numerous occasions). During trial, however, Nelson indicated that she wanted to testify in order to clarify "the days and other things that were said," and to dispute the victim's testimony that Nelson had unbuckled his pants because "she thinks it looks bad." Brief for Plaintiff-Respondent at 18, ***State v. Nelson***, No. 2012AP2140-CR, (Wis. Sup. Ct., July 16, 2014). The Circuit Court determined that Nelson's proffered testimony was "irrelevant" to whether Nelson was guilty of the strict liability crime of statutory rape, and informed her that she would not be able to testify as to these details. ***Nelson*** at ¶16. In reviewing this decision, this court determined that the alleged error was a trial error and concluded that the "denial of a defendant's right to testify is [a trial error] subject to harmless error review under ***Fulminante***. ***Id.*** at ¶5.

C. Discussion

The cases above do not make an explicit distinction between a defendant's right to testify in his own defense, and a defendant's desire to testify to irrelevant matters. However, the decisions in ***Rivera***, ***Hampton***, and ***Rosillo*** demonstrate an understanding that the denial of a defendant's constitutional right to testify in his own defense is a

separate and more pervasive error than denying a defendant the ability to testify as to irrelevant matters, as was the case in ***Nelson***. Indeed, there is no constitutional right to testify to irrelevant evidence. *See, e.g.* ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process.") However, when a defendant is denied the right to testify in his own defense, this must be deemed a structural error. *See, e.g.*, ***Rivera*** at 22, ***Hampton*** at 729, ***Rosillo*** at 877.

In the instant case, the defendant was denied the ability to testify in defense of the State's allegations. Anthony wanted to defend himself from the charge of first-degree intentional homicide by arguing that he acted in self-defense. In denying his right to do so, the Circuit Court excluded Anthony's only defense to this serious charge. This decision undermined the entire trial because the jury was not able to hear Anthony's testimony concerning self-defense. Moreover, because Anthony is the only living person who was present the night Sabrina Junior died, he is the only person who could have offered defensive testimony in response to the State's allegations. "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 prosecutors case." ***Ferguson v. Georgia***, 365 U.S. 570, 582, 81 S. Ct. 756 (1961).

In contrast to the defendant in ***Nelson***, Anthony's testimony would have gone directly to the question of whether he was acting in self-defense. The issue in ***Nelson*** was evidentiary in nature because the defendant admitted to the elements of a strict liability offense and was denied the opportunity to

testify just to give details of her admitted crimes. The denial of Nelson's right to testify was properly classified as a trial error, because it did not permeate the entire trial. Nelson merely wanted "[her] side to be heard," and would have only disputed the dates and details of the interludes so she would not "look bad." ***Id.*** at ¶ 2.

Although other state courts have held that denial of a criminal defendant's right to testify in his own defense is a structural error, ***Nelson*** need not be inconsistent with those holdings. This Court may conclude that the "in one's own defense" aspect of the right to testify requires strictly protected testimony be relevant to legal elements of the charged crimes and defenses, and that a harmless error review is only appropriate if the intended testimony is irrelevant as to all legal elements at issue.

Additionally, the right to testify in one's own defense has been found to be even more important than the right of self-representation, which is classified as a structural error not amenable to harmless error review. ***Rock***, 483 U.S. at 51. The United States Supreme Court has recently determined that the right to self-representation is a structural error not subject to harmless error review. ***Faretta v. California***, 422 U.S. 806, 819 n. 15 (1975). In ***Rock***, the United States Supreme Court determined that a criminal defendant's right to testify in his own defense is "even more fundamental to a personal defense than the right of self-representation." ***Rock***, 483 U.S. at 52. Therefore, logic dictates that the denial of the right to testify in one's own defense cannot be subject to *less* protection than the right of self-representation.

Even if harmless error review apples to the court's decision to strip Anthony of his right to testify in his own defense, the error was not harmless beyond a

reasonable doubt. The Court of Appeals did not rule whether the Circuit Court erred in preventing Anthony from testifying in his defense because it held that any error was harmless. ***State v. Anthony***, No. 2013AP467-CR, unpublished slip opinion (Wis. Ct. App. Jan. 14, 2014). However, as the United States Supreme Court has explained, a reviewing court "could not logically term 'harmless' an error that presumptively kept the defendant from testifying." ***Luce v. United States***, 469 U.S. 38, 105 S.Ct. 460 (1984).

To prove that the error was harmless, the State must prove that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 254 Wis.2d 442, ¶ 46 647 N.W.2d 189 (2002) (internal quotations omitted.) Because Anthony was prevented from mounting any defense at all against the State's allegations, it cannot be shown beyond a reasonable doubt that his testimony could not have presented *some* jury question as to whether he intended to kill Sabrina Junior or was defending himself, or whether his subsequent flight was persuasive evidence of guilt, as the State argued.

If permitted to take the stand, Anthony would have testified that Sabrina was a heavy user of crack cocaine and was high on crack cocaine on the night in question. (R. 40 at 4.) Anthony would have further testified that Sabrina had a history of being aggressive while high on crack cocaine, and was exhibiting severe aggression in connection with use on the night of her death. (*Id*.) Additionally, as to the physical confrontation that ultimately resulted in her death, Anthony would have testified that Sabrina threatened and attempted to kill Anthony, who was defending himself and his children against her attack. (*Id*.)

Anthony would also have testified that he was wrongly convicted of a robbery in 1966 and as a result served 12 years in prison from ages 19 to 31. (R. 66 at 27-28.) Due to this, Anthony had a special and legitimate fear of police. (*Id.*) This potential testimony would have been relevant to rebut the State's cornerstone argument that Anthony's fleeing the scene was indicative of his intent. (R. 66 at 28 (arguing that fleeing showed he "mean[t] to… kill[] her"); R. 66 at 51, ("go[ing] to Illinois… shows his intent, the state of mind that he wanted to kill her); R. 66 at 51-52, ("If he didn't want to kill, he could have stayed there and helped.")) Evidence that Anthony harbored a fear of police due to the false conviction and subsequent 12-year incarceration was relevant to rebut the State's use of fleeing as proof of intent. (R. 66 at 35-37.)

The jury was instructed that it was to find Anthony guilty of first degree intentional homicide if it found that he (1) caused the death of Sabrina Junior, and (2) acted with intent to kill Sabrina Junior. (R. 67 at 12.) The jury was not instructed that, under Wisconsin's self defense statute, an actor may use "force which is intended or likely to cause death or great bodily harm" where he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." Wis. Stat. § 939.48(1). Absent Anthony's testimony or a relevant instruction, the jury never even knew Anthony wished to argue self-defense.

Because Anthony was denied his right to testify in is own defense, he was unable to lay the groundwork for an instruction on self-defense under Wis. Stat. § 939.48(1). As the Wisconsin Appeals Court explained in ***State v. Powell***, "[A] defendant seeking a jury instruction on perfect self defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she *reasonably* believed that

she was preventing or terminating an unlawful interference with her person and *reasonably* believed that the force she used was necessary to prevent imminent death or great bodily harm." 266 Wis. 2d 1062, 668 N.W.2d 563 (2003). The only witness that could have shown this reasonable belief was Anthony, himself, who the court barred from taking the stand. In doing so, the Circuit Court denied Anthony his constitutional right to present a defense to the State's charges, and all but guaranteed his conviction.

CONCLUSION

The purpose of a trial is not just to determine guilt, but to provide a mechanism for the constitutional adjudication of that guilt. We should not selectively apply constitutional rights, and no man is more deserving of them than any other. The American notion of justice affords all criminal defendants the opportunity to offer relevant defensive testimony as part of the prosecutorial process. This opportunity is further critical to allow convicted criminals to develop a narrative that results in the healthiest possible future relationship with the State, the criminal justice system, and society in general. Preservation of the right to testify should not be viewed only with reference to the adjudication of guilt, but also with concern over the fair administration of justice and a genuine respect for people – all people, even Anthony.

Dated September 4, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 9,612 words.

_____
Kimberly L. Alderman
State Bar No. 1081138

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this __ day of September, 2014.

_____
Kimberly L. Alderman
State Bar No. 1081138

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

_____

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TABLE TO APPENDIX

STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, AFFIRMING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

1. Despite being fundamental, some constitutional rights may be forfeited by a defendant's conduct. Here, after the trial court ruled that evidence of Anthony's wrongful conviction for a 1966 armed robbery conviction was irrelevant and that Anthony could not mention it while testifying, Anthony repeatedly said he would not comply with the trial court's ruling. Although the trial court painstakingly explained that the evidence Anthony wanted to present was inadmissible and would prejudice him, Anthony threatened that he would have to be carried from the courtroom if he were not allowed to

testify as he wanted. Did Anthony forfeit his right to testify?

The trial court said yes and barred Anthony from testifying.

The court of appeals did not decide the issue.

2. Alternatively, is the violation of the right to testify a structural error that is not subject to harmless-error review?

The trial court did not address this question.

In finding that any error was harmless, the court of appeals implicitly decided that violation of the right to testify is not a structural error.

3. Assuming that violation of the right to testify is not a structural error, was any error in barring Anthony from testifying harmless?

The trial court did not address this question.

The court of appeals said yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication of the court's opinion are warranted.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those presented in Anthony's brief will be set forth where necessary in the Argument.

ARGUMENT

I. ANTHONY FORFEITED THE RIGHT TO TESTIFY BY REPEATEDLY INSISTING THAT HE WOULD VIOLATE THE TRIAL COURT'S RULING BARRING EVIDENCE OF HIS WRONGFUL CONVICTION AND THREATENING THAT HE WOULD HAVE TO BE CARRIED FROM THE COURTROOM IF HE COULD NOT TESTIFY AS HE WISHED.

A. General principles regarding forfeiture of constitutional rights.

The United States Supreme Court has never addressed the issue whether a criminal defendant through misconduct may forfeit the right to testify. The Court has, however, held that a defendant's constitutional right to be present during all material stages of his trial may be forfeited if the defendant conducts himself "in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Given that forfeiture of the right to testify inheres in forfeiture of the right to be present, logically the Court would apply forfeiture doctrine to a criminal defendant's right to testify as well.

Likewise, this court and the court of appeals have held that a defendant through his manipulative or disruptive conduct may forfeit constitutional rights, including the right to counsel, *State v. Cummings*, 199 Wis. 2d 721, 752-57, 546 N.W.2d 406 (1996), and the right to confront the witnesses against him. *State v. Rodriguez*, 2007 WI App 252, ¶ 20, 306 Wis. 2d 129, 743 N.W.2d 460. As the court of appeals recently observed, "a defendant in a criminal case may lose fundamental rights

(such as the right to appear at the trial and confront the accusers) when the defendant forfeits those rights by interfering with the ability of the trial court to protect those rights." *State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543 (citations omitted).

Whether a defendant forfeited a constitutional right through his misconduct presents a question of constitutional fact that this court reviews de novo.[1] *See Cummings*, 199 Wis. 2d at 758-59.

As the State will show below, Anthony forfeited his right to testify by repeatedly insisting that he would not comply with the trial court's evidentiary rulings and by threatening that he would have to be physically removed from the courtroom if he did not get his way.

B. Anthony's behavior and body language caused the trial court to reasonably fear that Anthony might become violent were the court to enforce its evidentiary ruling during his testimony.

In accusing the trial court of violating his right to testify, Anthony downplays the seriousness of his misconduct, describing his behavior as "exhibiting mere agitation and stating his intention to mention something irrelevant in the context of presenting otherwise relevant defense testimony." Anthony's brief at 19.

Contrary to Anthony's characterization of his behavior as fairly innocuous, the trial transcript and the lower court's post-trial findings of fact tell another story.

[1] Because the court of appeals declined to decide whether Anthony forfeited the right to testify (*see* A-Ap. A:¶ 16), it is the trial court's forfeiture ruling that is subject to review.

After the court advised Anthony that he should answer "two" when asked how many convictions he had (66:27), Anthony indicated that he planned to tell the jury about an allegedly wrongful conviction for a 1966 crime that netted him twelve years in prison:

> [I]n 1966 I was convicted of an armed robbery of a white man. I was only 19 and I was innocent. I stayed like 12 mother-fucking years for something I didn't do. I'm going to tell it to the jury.

(*id.*:27-28).

The court told Anthony that the conviction was irrelevant, but Anthony insisted he had a right to bring it up (*id.*:28). After expressing sympathy for what had happened to Anthony, the court explained that "whether you were wrongfully accused and convicted or not doesn't make any difference" (*id.*). Anthony continued to insist that he could tell the jury whatever he wanted:

> I think to my benefit for them to know the truth, the whole truth. . . I talk to the jury. I know how to get to them without Anpu Aungk[2] so I don't care. I want to bring everything out. I'm serious. . . I'm telling them that, too. I want to bring everything out.

(66:28-29) (footnote omitted).

Anthony then went off on a rambling tangent (*see* 66:29), causing the court to twice implore him to "stop for a second" (*id.*:30). The court encouraged Anthony to "take a deep breath and calm down" (*id.*). The court started to explain that if Anthony were to "go into detail about the armed robbery" he claimed to be wrongly convicted of, the court would cut him off (*id.*). Anthony retorted:

> Cut me off. They judge of the facts. That's a fact that happened that's true. I'm going to keep

[2] Anthony explained that "Anpu Aungk" is "my Egyptian protector, the high priest" (66:29).

> saying it. *You got to carry me out of here.* I'm going to say it, Your Honor. . . I have a right to say that the police come up there and close my mouth up. . . .

(66:30) (emphasis added).

The court warned Anthony that if he went into detail about the armed robbery, "I'm directing you to stop talking and if you don't stop talking I will take you off the stand" (66:31). Anthony replied, "Okay, all right"; the court reiterated that "[i]f you go into that[,] that's the end of your testimony. I'll find you've blatantly violated my rule . . . and they will take you off the stand. That will be the end of it" (*id.*).

After an additional colloquy between the court and Anthony (66:31-33), the court again advised him that if he started talking about the armed robbery while on the stand, the court would remove him and that would end his chance to tell his side of the story (*id.*:33). There was then a four-to-five-minute break during which Anthony conferred with trial counsel (*id.*). After this break, the following colloquy occurred:

> THE COURT: . . . If you take the stand you're going to avoid the armed robbery issue from the sixties?
>
> THE DEFENDANT: I can't avoid it.
>
> THE COURT: Then I'm going to order you right now you can't take the stand.
>
> THE DEFENDANT: Okay.
>
> THE COURT: I could put you on the stand but if you went into that, I try to cut off that line of questioning I'd have a difficult situation for two reasons.
>
> THE DEFENDANT: I understand.

(66:33-34.)

The court painstakingly explained the ways in which Anthony would hurt his cause by flouting the court's order (66:34). Defense counsel then provided an offer of proof regarding the testimony Anthony would have given had he been permitted to testify (*id.*:35-37). The court interrupted counsel's recitation:

> I just want to find out what he's going to say on the stand. I want to be clear from Mr. Anthony what he's giving up if he decides he's going to tell the jury about the armed robbery, his wrongful conviction.

(66:37.)

Shortly thereafter, the court asked if Anthony planned to "take the stand and tell the jury about this matter which I said you can't talk about" (66:38). Anthony replied that he wanted the jury "to know everything I can remember all the way back to when I was five years old" (*id.*). The court again explained that he could not do so and that it was excluding testimony regarding Anthony "being convicted of armed robbery, wrongfully serving time in prison" (*id.*). The court unambiguously cautioned him that "[i]f you're telling me right now you're going to break my rule I'm not even going to let you take the stand" and asked if Anthony understood (*id.*). Anthony said he did, at which point the court inquired "What's your decision? Are you going to talk about that or not?" (*id.*). Anthony replied "I got to do it," prompting the court to order that he could not testify because he said he was going to break the court's rules (*id.*).

Anthony then launched into what can only be described as a stream-of-consciousness narrative (66:39-40). Speaking of his life experiences since the age of five, Anthony told the court, "I want the jury to know that. I want them to know everything" (*id.*:40).

Exhibiting tremendous patience, the court told Anthony that its ruling was not based on respect for the court but rather on its concern that the jury's decision would be made more difficult by injecting irrelevant matters into the trial (66:41). The court told Anthony that if it were required to enforce its ruling during his testimony, "it is going to put you in a very, very, very poor light in front of this jury" (*id.*). Giving Anthony yet another chance, the court inquired if he had changed his mind (*id.*:42). He replied, "I can't, Your Honor" (*id.*). The court then thoroughly explained the ramifications of Anthony's decision (*id.*:43) and engaged him in a colloquy to make sure nobody had pressured him into insisting on telling the jury about his Illinois conviction (*id.*:44).

The court concluded by making sure Anthony understood the consequences of his decision:

> So you understand what you've now decided is because you want to break my rule I'm not going to let you do that, you're giving up your chance to tell your side of the story to the jury. Do you understand that?

(66:45.) Anthony confirmed that he did understand (*id.*).

The court expressed its concern that allowing Anthony to testify about what happened to him in the sixties would interfere with the jury's ability to get at the truth (66:46). The court remarked that if Anthony tried to get the evidence in, "he's forfeited his right to testify" (*id.*).

In its written decision denying Anthony's postconviction motion, the trial court recalled the tense atmosphere surrounding Anthony's insistence that he be allowed to tell the jury about his 1966 conviction:

> Mr. Anthony became quite agitated about the matter, so agitated in fact that the courtroom bailiffs called for additional deputies. In short order,

> six additional deputies arrived, they handcuffed Mr. Anthony and their sergeant suggested to me that he be ordered to wear a stun belt. . . I described Mr. Anthony's demeanor for the record. I said "he was speaking very forcefully" and that "there was a good deal of anger in his voice" and that "[h]is voice was at a high pitch," and that, to me, these were signs of a disturbance about to erupt. I recall how enraged he was, how tensely coiled he became the more he insisted on telling the jury about the 1966 conviction, and how close he seemed to a breaking point. (I did not state these additional observations in so many words at the time. I was hoping not to produce another outburst.)

(46:4.) The record supports the court's recollection of its description of Anthony's demeanor (*see* 66:52).[3]

The State will show below that under the factual backdrop recounted above, the trial court correctly found that Anthony had forfeited his right to testify.

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[3] This court should dismiss out of hand Anthony's suggestion that the trial court's post-trial expressions of concern about jury security due to Anthony's behavior (46:6, 14) was a post hoc rationalization. *See* Anthony's brief at 24. The trial court explained that it purposely omitted describing the extent of Anthony's threatening behavior to avoid further provoking him (46:4).

That the court was truly concerned about Anthony's potential for violence is also reflected in its comments at sentencing:

> You're sitting there in a wheelchair with 1, 2, 3, 4, 5 extra deputies because of that once [sic] incident in my court where you couldn't contain your rage, and that's what I'm concerned about.

(68:38.)

C. The cases Anthony invokes are inapposite, while cases finding forfeiture of the right to counsel by virtue of a defendant's conduct support the trial court's decision here.

To support his claim that the trial court erred in barring him from testifying, Anthony relies on a host of cases from other jurisdictions, none of which involved a situation in which the defendant was prevented from testifying although not removed from the courtroom.

For example, in *United States v. Ward*, 598 F.3d 1054 (8th Cir. 2010), Ward was removed from the courtroom for his entire trial after refusing to heed the judge's command to stop talking to his attorney. Unlike Judge Sankovitz here, the judge in *Ward* did not personally address the defendant to see whether he wanted to testify and to explain that he could lose that right via his conduct. *Id.* at 1059. Under these circumstances, the court found a violation of Ward's constitutional right to be present at trial. *Id.* at 1060.

Likewise, in *United States v. Ives*, 504 F.2d 935 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975), *opinion reinstated in relevant part*, 547 F.2d 1100 (9th Cir. 1976), Ives was repeatedly removed from the courtroom for behavior that admittedly was more violent and disruptive than Anthony's behavior here, e.g., he struck defense counsel in the face during a recess and attacked federal prosecutors while in the jury's presence. 504 F.2d at 943-44. Not surprisingly, the court upheld the trial court's decision to bar Ives from testifying. *Id.* at 946.[4]

[4] While Anthony applauds the *Ives* judge for making "multiple attempts to reintegrate Ives into the trial and maintain his right to testify," *see* Anthony's brief at 14, the Ninth Circuit suggested that the judge may have been overly solicitous toward Ives. *See United States v. Ives*, 504 F.2d 504, 944 n.20 ("At some point there is *(Continued on next page)*

The four state cases Anthony discusses are equally inapposite. In *Douglas v. State*, 214 P.3d 312, 321 (Alaska 2009), the defendant was removed from the courtroom on the first day of trial but allowed to testify via speaker phone. In *State v. Chapple*, 36 P.3d 1025, 1034 (Wash. 2001), the appellate court found the defendant had waived both his right to be present and his right to testify by virtue of his disruptive conduct. And in *State v. Wylie*, No. A12-0107, 2013 WL 599146, *3-4 (Minn. Ct. App. Feb. 19, 2013),[5] the defendant was in the midst of testifying when the trial court ordered him off the stand due to his repeated references to previously excluded evidence. As for *State v. Carey*, No. 12-0230, 2014 WL 3928873 (Iowa Ct. App. Aug. 13, 2014),[6] there the appellate court found that the trial court had properly removed Carey from the courtroom on the first day of trial but abused its discretion by continuing his exclusion without conducting an on-the-record colloquy to determine whether he could be returned. *Id.* at *13.

Anthony correctly observes that the conduct of the defendants in the above cases was more disruptive than his conduct during trial. But that does not mean – as Anthony contends – that a trial court can only bar a defendant from testifying when his conduct justifies his removal from the courtroom.

Anthony argues that only behavior justifying a defendant's removal from trial will justify barring a

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always the one extra straw that breaks the camel's back. After reviewing the record, we think that point may have been reached sooner than the judge decided it was reached in this case").

[5] Because Anthony has included a Fastcase version of *Wylie* as Appendix D to his brief, the State will not append a copy of Westlaw's version of *Wylie* to its brief.

[6] Because Anthony cites *Carey* but does not provide a copy in his brief appendix, the State has included a copy of the *Carey* decision at R-Ap. 101-12.

defendant from testifying. That argument ignores the fact that complete removal from trial is a more serious interference with a defendant's constitutional rights than barring a defendant from testifying.

As the Eighth Circuit observed in *Ward*, 598 F.3d at 1057-58, "The right to be present, which has a recognized due process component, is an essential part of the defendant's right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence." Removing the defendant from the courtroom therefore infringes all of those other rights. In contrast, stripping a defendant of the right to testify does not infringe his right to confrontation, his right to assist in jury selection and conducting the defense (other than presenting his own testimony), or his right to appear before the jury. This is a significant difference between the two sanctions.

Also significant is the jury's awareness that the defendant has been barred from attending his own trial as opposed to its ignorance of a decision to prevent him from testifying. Whereas a jury cannot help but notice a defendant's absence from a criminal trial, a jury will not know that the defendant's failure to testify was due to a trial court ruling rather than a strategic decision. Importantly, here the jury was instructed that the fact Anthony did not testify "must not be considered by you in any way and must not influence your verdict in any matter" (67:18).

In short, there are important differences between removing a defendant from trial and preventing him from testifying. Anthony's contention that only conduct justifying the former will justify the latter ignores these differences, and this court should reject it.

While the State agrees with Anthony that there does not appear to be a case where a defendant was prevented from testifying but never removed from the

courtroom at any point in the proceedings, cases finding that a defendant relinquished his constitutional right to counsel based on conduct rather than an explicit waiver indirectly support the trial court's finding that Anthony forfeited his right to testify.

Chief among these cases is *State v. Cummings*, 199 Wis. 2d 721. There this court held that Newton[7] had forfeited his Sixth Amendment right to counsel where he continuously refused to cooperate with a succession of court-appointed attorneys, constantly complained about their performance, and never tried to contact the State Public Defender to request new counsel after his last court-appointed attorney withdrew. *Id.* at 756-59.

Similar to *Cummings*, the court in *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995), recognized that a defendant can forfeit his right to counsel under the doctrine of "'waiver by conduct,'" a concept that "combines elements of waiver and forfeiture." The *Goldberg* court explained that "[o]nce a defendant is warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel." *Id.*

Along the same lines as *Cummings* and *Goldberg* is *State v. Carruthers*, 35 S.W.3d 516, 548-49 (Tenn. 2000), where the court found that "an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings[,] . . . [and] the distinction between these two concepts is slight[.]"

If a defendant can be found to have forfeited or "waived by conduct" the right to counsel without an explicit waiver and absent any violent behavior, it logically follows that a defendant can also be found to

[7] Newton's appeal was consolidated with that of Cummings.

have forfeited his right to testify without engaging in behavior that merits removal from the courtroom. After all, the right to counsel pervades every aspect of trial and is so important that its violation amounts to structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006). In contrast, the right to testify is not as all-encompassing, and this court has held that its violation is trial error subject to harmless-error review. *State v. Nelson*, 2014 WI 70, ¶ 46, 355 Wis. 2d 722, 849 N.W.2d 317.

Although indirectly supporting the State's argument, the above cases admittedly deal with a far different scenario than the one confronting the court in Anthony's trial. More factually analogous to our case – although certainly not on all fours – is *Smith v. Green*, No. 05 Civ. 7849 (DC), 2006 WL 1997476 (S.D.N.Y. July 18, 2006).[8]

There, after receiving multiple warnings from the judge, Smith would not agree to limit his trial testimony to the charged conduct. Rather, Smith's attorney told the court that Smith wanted to testify "'for the sole purpose of discussing the verdict of the previous trial and the fact that it was unconstitutionally obtained.'" *Smith*, 2006 WL 1997476 at *11; R-Ap. 122. Finding that the state trial-court judge "had every reason to believe that Smith meant what he said and that he would not limit the scope of his testimony as instructed," the federal habeas court found that the judge had properly prevented Smith from testifying:

> The judge's decision was not "arbitrary or disproportionate" relative to the court's purpose of protecting the sanctity of the trial. *Rock* [*v. Arkansas*], 483 U.S. [44,] 56 [(1987)]. Smith's proffered testimony was irrelevant to the charges. In fact, evidence that he had already been convicted and sentenced for substantially similar conduct

[8] The State has included a copy of the decision in the appendix to its brief (R-Ap. 113-25).

> would likely have prejudiced the jury against him. Under these circumstances, including petitioner's clearly articulated purpose of continuing to disrupt the proceedings and ignore the court's instructions, it was well within the judge's discretion to prevent him from testifying. Accordingly, the court's decision did not violate Smith's Fifth Amendment rights.

(*Id.* at *11; R-Ap. 123.)

As in *Smith*, here Anthony failed to heed the trial court's numerous warnings and repeatedly insisted that he would violate the trial court's evidentiary ruling, going so far as to threaten that he would have to be carried out of the courtroom if he were not allowed to tell the jury what he wanted them to hear (66:30). While the fifth and sixth amendments guarantee a criminal defendant the right to testify at his trial, the right is not absolute. *See Rock v. Arkansas*, 483 U.S. 44, 49, 55 (1987). Rather, *Rock* teaches that limitations on a defendant's right to testify are permissible as long as they are not "arbitrary or disproportionate to the purposes which they are designed to serve." *Id.* at 55-56.

Preventing Anthony from telling the jury about his allegedly wrongful conviction in Illinois four decades earlier, even if it meant he could not give testimony to support a self-defense theory, was not arbitrary or disproportionate to the trial court's goals. Those goals were to exclude irrelevant evidence that would have worked to Anthony's detriment and to head off an expected outburst from Anthony when the court tried to enforce its rulings during his testimony.

For all these reasons, this court should find that Anthony through his misconduct forfeited the right to testify at trial. Faced with Anthony's defiant behavior, the trial court gave Anthony numerous chances to forsake his plan to violate the court's evidentiary ruling and repeatedly warned him that he would lose his right to tell his side of the story if he persisted in doing so. The trial

court was not required to let Anthony testify and gamble that he would carry out his threat of having to be removed from the courtroom were he prevented from saying whatever he wanted during his testimony.

II. *STATE V. NELSON*'S HOLDING THAT VIOLATION OF THE RIGHT TO TESTIFY IS SUBJECT TO HARMLESS-ERROR REVIEW IS NOT LIMITED TO SITUATIONS WHERE ALL OF THE DEFENDANT'S PROPOSED TESTIMONY IS IRRELEVANT.

Three weeks before granting Anthony's petition for review, this court in *Nelson*, 355 Wis. 2d 722,[9] held that the denial of a defendant's right to testify is subject to harmless-error review. *Id.*, ¶ 43. Undeterred by this holding, Anthony contends that *Nelson* is limited to situations in which a defendant wants to testify about irrelevant matters. *See* Anthony's brief at 30-32. Specifically, he perceives "a distinction between a defendant's right to testify generally, and his right to testify in his own defense" *Id.* at 5. Because he wanted to testify that he was acting in self-defense when he killed

[9] Nelson, through her new counsel, Stanford law professor Jeffrey L. Fisher, has signaled her intention to file a petition for writ of certiorari with the United States Supreme Court. According to the Supreme Court's website, Justice Kagan on September 22, 2014, granted Fisher's request to enlarge the time for filing Nelson's petition to November 13, 2014 (http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14a319.htm, last visited September 24, 2014). Nelson plans to raise the question "whether a denial of a defendant's constitutional right to testify is amenable to harmless-error review." Application for Extension of Time Within Which to File a Petition for Writ of Certiorari in *Nelson v. Wisconsin*, No. 14A319 (U.S. Sup. Ct.), at 1.

S.J.,[10] Anthony believes he can escape *Nelson*'s holding. *Nelson* notwithstanding, he claims that a violation of his right to testify is structural error[11] entitling him to automatic reversal.

For the following reasons, Anthony is wrong.

Nothing this court said in *Nelson* suggests the narrow holding that "harmless error review is only appropriate if the intended testimony is irrelevant as to all legal elements at issue," as Anthony claims. *See* Anthony's brief at 32. Rather, throughout its opinion, this court without using any qualifying language held that the denial of a defendant's right to testify is subject to harmless-error review. *See Nelson*, 355 Wis. 2d 722, ¶¶ 5, 43, 52. So while Anthony is correct that Nelson's putative testimony was irrelevant to the elements of sexual assault of a child, there is no indication this court intended to limit *Nelson*'s holding to that type of situation. This is one reason Anthony is wrong in advocating a narrow reading of *Nelson*.

Anthony is effectively arguing that the denial of the right to testify can be structural *or* trial error depending on the quality of the proposed testimony. But that is like saying that the denial of the right to self-representation may be structural or trial error depending on how skillful a job the defendant would have done in presenting his case. Neither the United States Supreme Court nor this court has ever taken that approach in deciding whether the

[10] Unlike Anthony, the State is following the court of appeals' lead and using initials to identify the homicide victim and her children.

[11] In his petition for review, Anthony raised one issue: "May a criminal defendant be stripped of his right to testify pursuant to ***Illinois v. Allen*** when his behavior is never so disruptive, obscene, or violent that he must be removed from his trial?" Petition for Review in *State v. Anthony*, 2013AP467-CR (Wis. Sup. Ct.), at iv. Although Anthony did not raise the separate issue of whether the violation of his right to testify was structural error, the State believes that issue is subsumed in the question of whether any error was harmless.

violation of a specific constitutional right is amenable to harmless-error review. Nor has Anthony cited a single case that supports his proposed dichotomy. This is a second reason Anthony is wrong in reading *Nelson* narrowly.

In arguing that *Nelson* should be confined to situations in which a defendant's proposed testimony is wholly irrelevant, Anthony confuses the initial determination of whether harmless-error analysis applies with the separate question of whether the exclusion of particular testimony is harmless or prejudicial. The relevance or irrelevance of a defendant's proposed testimony should not affect the threshold determination of whether a particular constitutional violation amounts to structural error; logically, it only factors into the harmless-error analysis. This is because the wrongful exclusion of irrelevant testimony is almost certainly harmless error, whereas the wrongful exclusion of relevant testimony is more likely prejudicial. Asserting, as Anthony does, that violation of the same constitutional right may be structural *or* trial error depending on the quality of the excluded testimony is an unwitting concession that the violation is amenable to harmless-error review. This is a third reason this court should reject his proposed narrowing of *Nelson*'s holding.

Finally, insofar as Anthony relies on language in *Luce v. United States*, 469 U.S. 38 (1984), to support his view that wrongful exclusion of a defendant's relevant testimony may be structural error, that reliance is misplaced. As Anthony acknowledges, the question in *Luce* was whether a defendant must testify to preserve the claim that the trial court erred in allowing the government to impeach him with a prior conviction. In answering yes, the Supreme Court remarked that "the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." *Id.* at 42. Anthony takes this language as a sign that the Supreme Court would eschew harmless-error review for a violation of the right to testify. *See* Anthony's brief at 27.

But all the *Luce* Court meant was that without knowing the content of the defendant's testimony, a trial court could not logically conclude that error in allowing impeachment via a prior conviction was harmless where the erroneous ruling caused the defendant to forego testifying. In contrast to the situation in *Luce*, here Anthony's proposed testimony was made known to the trial court and court of appeals via an offer of proof.

For all of the above reasons, *Nelson*'s holding that violation of the right to testify is trial error amenable to harmless-error review applies across the board and not just to situations in which the defendant's proposed testimony is irrelevant to the elements of the charged crime. The State therefore will not address Anthony's arguments for why any error in preventing him from testifying was structural error because *Nelson* forecloses that argument. Instead, the State will show below why any error in preventing Anthony from testifying was harmless beyond a reasonable doubt.[12]

III. ANY ERROR IN PREVENTING ANTHONY FROM TESTIFYING WAS HARMLESS BEYOND A REASONABLE DOUBT.

A. General principles governing harmless-error analysis and standard of review.

For an error to be harmless, the State, as beneficiary of the error, must prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Nelson*, 355 Wis. 2d 722, ¶ 44.

[12] Needless to say, if the Supreme Court were to grant Anthony's certiorari petition in *Nelson* (*see* fn.9, *supra*) and hold that violation of the right to testify is structural error, the State's harmless-error argument would be moot.

In *State v. Norman*, 2003 WI 72, ¶ 48, 262 Wis. 2d 506, 664 N.W.2d 97, this court instructed reviewing courts to consider the following non-exhaustive factors in assessing whether an error is harmless:

> the frequency of the error, the nature of the State's case, the nature of the defense, the importance of the erroneously included or excluded evidence to the prosecution's or defense's case, the presence or absence of evidence corroborating or contradicting the erroneously included or excluded evidence, whether erroneously admitted evidence merely duplicates untainted evidence, and the overall strength of the prosecution's case.

(footnote omitted.)

More recently, this court in *Nelson*, 355 Wis. 2d 722, ¶ 46, identified the following factors as meriting consideration when deciding whether the denial of the right to testify was harmless error: 1) the importance of the defendant's testimony to the defense case; 2) the cumulative nature of the testimony; 3) the presence or absence of evidence corroborating or contradicting the defendant on material points; and 4) the overall strength of the prosecution's case (citations omitted).

Whether an error was harmless presents a question of law subject to this court's independent review. *Nelson*, 355 Wis. 2d 722, ¶ 18.

B. Given the strength of the State's case and the evidence undermining his self-defense claim, there is no reasonable probability the jury would have acquitted Anthony had he testified to killing S.J. in self-defense.

1. Because Anthony decided to forego the submission of second-degree intentional homicide, the State must show only that his testimony would not have created a reasonable probability of a not-guilty verdict.

In deciding whether any error in barring Anthony from testifying was harmless, this court must not lose sight of Anthony's decision to pursue an all-or-nothing strategy at the close of the case. This strategy was confirmed during the instructions conference, when the trial court informed counsel that out of an abundance of caution, it had included an instruction on self-defense, second-degree intentional homicide, in the packet of instructions it had prepared (67:4). The court recalled that defense counsel earlier had said Anthony's preference was to forego the submission of any lesser-included offense and inquired if that was still Anthony's position (*id.*:5). Counsel and Anthony confirmed that it was (*id.*). The court then explained to Anthony what was meant by a lesser-included crime and asked if he understood (*id.*:5-6). Anthony replied "Yes, I do" (*id.*:6). The court gave Anthony time to consult with defense counsel (*id.*:6-7), after which the court asked Anthony:

> What you want is just to have the jury choose between first-degree intentional homicide or not guilty; that would be their choice?

(67:7.) Anthony said "Yes, sir. Thank you" (*id.*).

The court then made a record on whether anyone had threatened Anthony to force him to give up his right to request a lesser-included instruction; whether defense counsel had discussed the choices available; and whether counsel thought Anthony understood them (67:7-8).

In light of Anthony's decision to adopt an all-or-nothing strategy at the close of the case, the test for harmless error is whether there is a reasonable probability Anthony would have been acquitted had he been permitted to testify. Because counsel – and Anthony personally – declined the submission of any lesser-included crime, the test for harmless error is not whether there is a reasonable probability he would have been convicted of second-degree intentional homicide, unnecessary defensive force, under Wis. Stat. §§ 940.01(2)(b) and 940.05(1)(a) had he testified. Even without Anthony's testimony, the trial court was willing to instruct the jury on this lesser offense based on testimony "about the fighting that had gone on between Mr. Anthony and [the victim] before the ultimate struggle and based on the comment that [Janet] Mayfield made about how Mr. Anthony told her that he had snapped" (67:4).

Despite the trial court's offer, Anthony made an informed decision to limit the jury's options to first-degree intentional homicide and not guilty. It was that informed decision to forego submission of any lesser-includedcrimes, rather than the court's ruling barring him from testifying, that limited the jury's options to first-degree intentional homicide and not guilty. Under these circumstances, Anthony would be judicially estopped from now arguing that the trial court's ruling prejudiced him by preventing the jury from convicting him of a less serious type of homicide. *See State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (defendant judicially estopped from arguing evidence was insufficient to convict him of manslaughter, heat of

passion, where he requested an instruction on that offense).

Implicitly recognizing this, Anthony argues only that the exclusion of his testimony prevented him from requesting and obtaining an instruction on perfect self-defense. *See* Anthony's brief at 34-35.[13] While the State disputes Anthony's suggestion that his testimony would have merited such an instruction (*see* section III.B.2., *supra*), the State will assume for purposes of its harmless-error discussion that the trial court would have been willing to instruct the jury on perfect self-defense without also instructing on second-degree intentional homicide, unnecessary defensive force.[14] Indulging this assumption, the State will show below why there is no reasonable probability the jury would have found Anthony not guilty had he been permitted to testify.

[13] To support this argument, Anthony improperly relies on an unpublished per curiam opinion of the court of appeals, *State v. Powell*, No. 02-2918-CR (Dist. II), 2003 WL 21524810 (Wis. Ct. App. July 8, 2003). *See* Anthony's brief at 34-35. Anthony's citation to *Powell* violates Wis. Stat. § (Rule) 809.23(3)(a).

[14] This is a fanciful assumption. Had the trial court planned to give a perfect self-defense instruction, the prosecutor certainly would have sought an instruction on second-degree intentional homicide. And such a request would have been granted, given that the reasonableness of Anthony's belief that he needed to stab S.J. forty-five times was in doubt. Submission of a lesser-included offense at the prosecutor's request – even over Anthony's objection – would have been proper. *See State v. Moua*, 215 Wis. 2d 511, 519, 573 N.W.2d 202 (Ct. App. 1997); *State v. Fleming*, 181 Wis. 2d 546, 555, 559-62, 510 N.W.2d 837 (Ct. App. 1993).

2. Given the choice of convicting Anthony of first-degree intentional homicide or acquitting him, there is no reasonable probability the jury would have found him not guilty had he testified.

According to counsel's offer of proof, had Anthony been allowed to testify, he would have said that he "became fearful and afraid" in the victim's bedroom because of the physical altercation between the two of them; that he believed she had picked up a knife; and that he then used the ice pick he had brought into the room to defend himself (66:35). When the trial court asked how Anthony intended to explain "why he had to plunge the ice pick into [S.J.'s] body so many times," counsel said Anthony would testify that "he did not realize or understand that the threat had previously been terminated" (*id.*:36).

Defense counsel also represented that Anthony would testify that the reason he fled after killing S.J. was his fear of police based on his prior experiences (66:36-37).

Although Anthony now asserts that he would have testified that S.J. was a heavy crack cocaine user; had exhibited "severe aggression" on the night she died; and threatened to kill him (Anthony's brief at 8, 33), those assertions were not included in his offer of proof. Rather, those assertions first surfaced in Anthony's postconviction motion (40:4). That information therefore cannot be used to determine whether the exclusion of Anthony's testimony was harmless error. Rather, such an assertion would be relevant only to a claim of ineffective counsel for not including this information in the offer of proof. Anthony is not advancing such a claim, however.

Had Anthony provided the testimony counsel summarized during trial, there is no reasonable probability the jury would have found him not guilty. The brutal nature of the crime, Anthony's statements immediately after the murder, and other evidence belie any self-defense claim.

The victim, S.J., stood five feet, seven inches tall and weighed 139 pounds (65:39). She suffered from rheumatoid arthritis in her hands, causing them to cramp up (63:41). S.J. used a walker and sometimes had a limp (*id.*:77). The autopsy revealed she had been stabbed approximately forty-three times (65:60) and had four broken ribs (*id.*:46). Her body showed evidence of blunt force trauma as well as cutting and puncturing injuries (*id.*:40). Some of the sixteen puncture wounds to her left breast penetrated three to four inches into her body (*id.*:55). Five of the wounds caused 400 milliliters of blood to pool on the left side of her chest and 250 milliliters of blood to surround her heart (*id.*:56). A piece of metal later determined to be the tip of an ice pick was recovered from S.J.'s left shoulder (*id.*:54; 66:14-15).

Immediately after the murder, Anthony went to the home of Janet Mayfield, the mother of his fourteen-year-old son (64:19, 27). Anthony confessed to Mayfield that he had stabbed S.J. forty to fifty times because she was "messing around with the dude next door and the 'B' upstairs had something to do with it and Anubis told him to do it" (*id.*:21). Mayfield testified she thought Anubis was "[s]ome ancient Egyptian voodoo god" (*id.*:22). Anthony also told Mayfield that S.J. "had fronted him off" and "called him all kinds of names," causing him to snap (*id.*:24). He announced that he was going to return and kill the man next door and the woman upstairs (*id.*:24-25). Anthony said absolutely nothing to Mayfield about self-defense or being attacked (*id.*:25).

Sandra Rasco, the upstairs tenant Anthony told Mayfield he wanted to kill (63:36), testified that on August 18 – the day before the murder – S.J. told Rasco

that Anthony said he would take her (S.J.) to the woods and kill her (*id.*:37). S.J. said he had put an ice pick to her throat at the time (*id.*).

Rasco's daughter, Tiera Patterson Hogans, testified similarly that on the same day she was killed, S.J. said Anthony told her he would take her to the woods and kill her (63:81, 83-84).

R.J., the daughter of S.J. and Anthony (*see* 66:63), testified that while hiding in a closet, she saw Anthony enter her mother's room carrying an ice pick (*id.*:66). After that, she heard her mother yelling "'stop, please stop'" and "'I'm sorry'" (*id.*).

L.J., the victim's eighteen-year-old daughter (62:3), testified that earlier that evening Anthony told her mom that if she left out the front door, he was going to kill her (*id.*:10). While uttering this threat, Anthony had an ice pick in his hand (*id.*).

While Anthony in his offer of proof said he would testify to seeing S.J. arm herself with a knife during their altercation, none of the police witnesses testified to having found a knife at the murder scene. And when he was apprehended in Illinois hours after the murder, Anthony had no visible injuries on his body (*see* 65:18-23).

Under the third and fourth factors this court identified as relevant to the harmless-error inquiry in *Nelson*, 355 Wis. 2d 722, ¶ 46, any error in excluding Anthony's testimony was harmless beyond a reasonable doubt. The third factor – the presence or absence of evidence corroborating or contradicting the defendant on material points – weighs heavily in the State's favor. This is because evidence corroborating Anthony's self-defense claim – such as the discovery of a knife at the murder scene or any injury to Anthony – is absent. At the same time, the testimony of Sandra Rasco, Janet Mayfield, and S.J.'s daughters contradict Anthony's claim that he killed S.J. in self-defense.

Likewise, the fourth *Nelson* factor, the overall strength of the State case, dictates a harmless-error finding. The evidence recounted above illustrates that the strength of the State's case was overwhelming. It showed that Anthony killed S.J. because he thought she was consorting with another man and had called him names and "fronted him off" (64:24); self-defense had nothing to do with it.

If this court finds that the trial court violated Anthony's right to testify when it prevented him taking the stand, this court should find the error harmless beyond a reasonable doubt.

CONCLUSION

This court should affirm the decision of the court of appeals.

Dated this 7th day of October, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7103 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 7th day of October, 2014.

_____
Marguerite M. Moeller
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2013 AP 000467 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A COURT OF APPEALS DECISION AFFIRMING JUDGMENT OF CONVICTION IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

Defendant Eddie Lee Anthony, by Attorney Kimberly Alderman, filed a brief in the Wisconsin Supreme Court ("Anthony's Brief") asking the court to overturn the court of appeals decision affirming his conviction because (1) the Circuit Court erred when it stripped Anthony of his right to testify to material facts and in his own defense because his behavior was never so disruptive, obscene, or violent as to interfere with his trial, and (2) the Circuit Court's error in denying Anthony his constitutional right to testify was not subject to harmless error review, because the excluded testimony pertained to legal elements of the charges and defense, and the error was therefore structural. The State filed a brief in opposition. Anthony herein replies.

REPLY ARGUMENT

The State argues that a criminal defendant may waive his right to testify through conduct in the same way that a defendant can implicitly waive his right to be present for his trial under ***Illinois v. Allen***. 397 U.S. 337, 90 S. Ct. 1057 (1970); (St.'s Br. at 3.) However, the State never overcomes its own admission that "there does not appear to be a[nother] case where a defendant was prevented from testifying but never removed from the courtroom." (St.'s Br. at 12.) That is because no other court has held a defendant can waive his right to testify to material facts and in his own defense when his conduct never rises to a level necessitating his removal from the courtroom.

In the many cases where a defendant is removed from a courtroom for disruptive conduct, the court attempts to allow the ejected defendant to testify in his own defense. *See, e.g.* ***Douglas v. State***, 214 P.3d

312, 315-16, (Alaska, 2009) (allowing defendant ejected from trial to testify via telephone); ***State v. Chapple***, 145 Wash.2d 310, 36 P.3d 1025, 1028 (Wash. 2001) (allowing trial counsel of an ejected defendant to present defendant's testimony from his first trial for the same crime); ***State v. Carey***, No. 12-0230 (Iowa Ct. App., filed Aug. 13, 2014) (granting defendant a new trial where, although he was properly ejected from his trial, he was not permitted the opportunity to return and indicate whether he wished to testify in his own defense.) The case law is clear that a criminal defendant's right to testify in his own defense is a separate and more protected right than his right to be present during trial.

In support of its novel argument that criminal defendants can implicitly waive their right to testimony by displaying agitation, the State relies on cases involving the forfeiture of the right to counsel. In these cases, however, the defendants were afforded the constitutional right before waiving it via conduct. ***State v. Cummings***, 546 N.W.2d 406, 199 Wis. 2nd 721 (1996); ***United States v. Goldberg***, 67 F.3d 1092, 1100 (3rd Cir. 1995); ***State v. Carruthers***, 35 S.W.3d 516, 548-49 (Tenn. 2000). It is also critical to note that all of the State's right to counsel cases involve *appointed* counsel, not the right to be represented generally.

The right to appointed counsel is a relatively new right, born of the Sixth amendment right to representation in combination with the due process clause as to funding for indigent defendants. ***Powell v. Alabama***, 287 U.S. 45, 53 S. Ct. 55 (1932); ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792 (1963). In none of the State's cases did the court say the defendant could not be represented by *any* counsel. Rather, each defendant waived his right to have representation paid for on the taxpayer's dime because he manipulated the right to counsel to create

a delay in the proceedings. *See* ***Cummings***, 546 N.W.2d at 417; ***Goldberg***, 67 F.3d at 1100; ***Carruthers***, 35 S.W.3d at 548-49.

Unlike in the right to appointed counsel cases cited by the State, Anthony was never afforded the constitutional right which was stripped from him, nor did his behavior ever rise to the reprehensibility demonstrated by the defendants in those cases. In the State's right to appointed counsel cases, the criminal defendants never sincerely begged the court to allow them to exercise a constitutional right, as did Anthony. None of the courts denied the defendants the right entirely; rather, after warning, courts simply took away the instrument of the defendants' delay tactics – *appointed* counsel. Further, it makes no sense to use right to appointed counsel cases when there are many right to testify cases that give tailored guidance, as explored thoroughly in the opening brief.

Yet, the State offers no meaningful response to Anthony's exploration of cases where the right to testify was at issue. (Pl.'s Br. at 11); ***Douglas v. State***, 214 P.3d 312 (Alaska, 2009); ***State v. Chapple*** 145 Wash.2d 310, 36 P.3d 1025 (Wash. 2001); ***State v. Wylie***, No. A12-0107, unpublished slip opinion (Minn. App. Feb. 19, 2013; ***State v. Carey***, No. 12-0230 (Iowa Ct. App., filed Aug. 13, 2014.) The State does discuss one right to testify case, ***Smith v. Green***. No. 05 Civ. 7849 (DC), 2006 WL 1997476 (S.D.N.Y. July 18, 2006). In ***Smith***, the defendant had two outbursts in front of the jury. ***Id.*** In one such outburst, he called the judge a "dirty, lying racists [sic] fool." ***Id***. He was removed from the courtroom, but in an effort to allow him to participate in his trial, he was brought back three separate times. ***Id***. After the defendant was expelled from the trial for good, the court still brought him back to determine whether he wanted to exercise his right to

testify. ***Id.*** However, because the defendant indicated that he only wanted to testify concerning irrelevant matters – not to material facts in his own defense – the court determined that he would not be permitted to testify. ***Id***.

Smith is dissimilar to Anthony's because (1) the right to be present was never implicated in Anthony's case as it was in ***Smith***, (2) Anthony did not display anything close to the disruptive conduct of the defendant in ***Smith***, (3) the trial court in Anthony's case did not make meaningful efforts to protect the right to testify as did the court in ***Smith***, and (4) critically, the ***Smith*** defendant wished to testify to irrelevant evidence, whereas Anthony went so far as to make an offer of proof as to the relevance of his desired testimony. Additionally, by not arguing otherwise, the State concedes that Anthony's testimony was relevant to the elements at issue in the case.

To the extent that ***Smith*** informs the decision in this case, it should support a ruling in favor of Anthony, who did not act as disruptively yet was afforded a lower level of protection. Notably, in ***Smith,*** as in ***Douglas***, ***Chapple***, ***Wylie***, and ***Carey***, the right to testify to material facts remained in tact even after the right to be present was implicitly waived.

Even if a defendant could implicitly waive his right to testify to material facts without having waived his right to be present, Anthony did not display conduct egregious enough to merit a complete denial of the right to testify in his own defense. Throughout the legal proceedings for this case, Anthony never threatened physical violence, shouted abusive language, made obscene gestures, assaulted anyone, or suggested he was considering doing any of these things. (*See generally*, Trial Tr.) The State's brief, therefore, necessarily focused on Anthony's

"agitation" over the denial of his right to testify, and unjustified conjecture that the then-63-year-old, interminably respectful Anthony could hypothetically erupt. (St.'s Br. at 4-9.)

Moreover, the circuit court's rationale of Anthony's potential to be dangerous appears to have arisen *post-hoc*. (R. 66 at 34, 42.) At the time of the ruling, the circuit court focused exclusively on the protective aspect, explaining that Anthony should not be allowed to testify because it might bias the jury against him for three reasons: (1) without hearing more, the jury may think he was criminally involved in the 1966 robbery, (2) the jury may be biased against Anthony if he caused a "ruckus," and (3) the jury may be biased against Anthony if they saw behavior suggesting that Anthony is a person who "easily loses his temper or can't follow the rules other people follow." (*Id*.) The rationale as to protecting those in the courtroom was not professed until the Circuit Court issued its order denying Anthony's post-conviction motion. (R. 46 at 12-14.)

The record in this case speaks for itself, however. Anthony was adamant he wanted to testify in his own defense, but ultimately compliant and cooperative with the judge's order prohibiting him from doing so.

The State next argues that the circuit court's error is subject to harmless-error review based on this court's holding in ***State v. Nelson***. (Pl.'s Br. at 16); No. 2012AP2140-CR (Wis. Sup. Ct., July 16, 2014.) In making this argument, however, the State fails to acknowledge the vital distinction that makes ***Nelson*** inapplicable to the facts at hand. In ***Nelson***, the defendant wanted to testify as to matters wholly irrelevant to the elements of the charged crimes or any valid defense. (Pl.'s Br. at 17.) The right to testify to irrelevant evidence is not constitutionally

protected, so any error in ***Nelson*** was necessarily subject to harmless error review. In contrast, Anthony wanted to testify to relevant facts that would have presented a defense to the elements of the crimes charged.

It is worth nothing that the right to testify in one's own defense has been found more important than the right of self-representation, the denial of which the United States Supreme Court has determined is a structural error. ***Rock v. Arkansas***, 483 U.S. 44, 52, 107 S. Ct. 2704 (1987) (noting the right to testify in one's own defense is "more fundamental to a personal defense" than the right of self-representation); ***State v. Imani***, 326 Wis.2d 179, 786 N.W.2d 40 (Wis. 2010) ("an improper denial of a defendant's constitutional right to self-representation is a structural error subject to automatic reversal.") Given the facts at hand, a finding that the instant error was structural remains consistent with the ***Nelson*** holding.

Finally, as a factual matter, the circuit court's error in denying Anthony his constitutional right to testify was not harmless. The State argues that the error was harmless because Anthony chose to pursue an "all-or-nothing strategy" by not asking for an instruction on second-degree intentional homicide. (Pl.'s Br. at 21.) This argument is akin to the Arkansas Supreme Court rationale rejected by the Supreme Court in ***Rock***. ***Rock***, at 49 (*internal citations omitted*) ("any prejudice or deprivation [defendant] suffered was minimal and resulted from her own actions and not by any erroneous ruling of the court.") Anthony's strategy was to present a defense of self-defense, and this was ripped from him at the last possible moment – when the State rested. His trial counsel's attempt to cobble together what remained of the trial does not somehow justify the court's denial of Anthony's right to testify. The court's last-minute order preventing Anthony from

presenting his intended defense to first-degree intentional homicide does not somehow obligate Anthony to take a lesser-included offense instruction.

To prove that the court's error was harmless, the State is required to prove that it is "clear beyond a reasonable doubt that a rational jury would have found [Anthony] guilty absent the error." ***State v. Harvey***, 254 Wis.2d 442, ¶ 46 647 N.W.2d 189 (2002). Where Anthony was prevented from presenting *any* defense to the charges against him, it is disingenuous for the State to suggest that it has proven beyond a reasonable doubt that a rational jury would have found Anthony guilty had he been permitted to present his defense.

The State asks this Court to extend ***Allen*** to an impermissible degree, allowing trial courts to question criminal defendants individually rather than through counsel, then deprive them of any defense when their answers are difficult to understand or express frustration with the prosecutorial process. Extending the law in this manner would serve no legitimate purpose and would pervert the already eroded constitutional guarantee of the right to testify. What the trial court in this case should have done was (1) interacted with Anthony's counsel, rather than relying on Anthony's ability to meaningfully debate legal relevancy, (2) not engaged in a protective inquiry, where it was deciding for Anthony and his counsel whether it would be in Anthony's best interest to testify, (3) allowed Anthony to testify to material facts or at least explored alternatives to depriving him of his entire defense, and (4) not adapted its stated justification for the deprivation after the fact and in light of a post-conviction challenge.

As the United States Supreme Court explained in ***Rock***:

> [The right to testify] is one of the rights that are essential to due process of law in a fair adversary process… The most important witness for the defense in many criminal cases is the defendant himself… Restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.

Rock at 51, 52, 56 (*internal citations omitted*). In the instant case, Anthony was denied this essential right, the denial was arbitrary and disproportionate to both the contemporaneous and *post hoc* rationales, and the error was structural due to the conceded relevancy of the intended testimony. The error can be neither cured nor justified now that the conviction is in place and Anthony is serving what amounts to a lifetime sentence.

CONCLUSION

Anthony respectfully requests the Court decline to extend ***Allen*** to permit "waiver by agitation" of the right to testify to material facts, overturn his conviction, and grant him a fair trial where he is afforded the opportunity to meaningfully defend himself.

Dated October __, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,273 words.

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