**No: _____**

**IN THE**
# SUPREME COURT OF THE UNITED STATES

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**SCOTT RAY BISHOP,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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## PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Whether the exclusion of a defendant's testimony based on first-hand, personal knowledge of a technical element of the offense charged is structural error.

2. Whether a defendant's testimony based on first-hand, personal knowledge of a technical element of the offense charged is subject to Federal Rule of Evidence 702 governing expert testimony.

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## Petition for a Writ of Certiorari

Petitioner Scott Ray Bishop respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

## Opinions Below

The Tenth Circuit Court of Appeals decision is reported at 926 F.3d 621 (10th Cir. 2019) and included in the appendix at A1. The relevant proceedings and orders from the trial court are unpublished.

## Jurisdiction

The Tenth Circuit Court of Appeals issued its decision on June 10, 2019. Justice Sotomayor extended the time for the filing of a petition for a writ of certiorari to and including December 16, 2019. See NO19A392. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## Constitutional and Evidentiary Provisions Involved

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ..."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

Federal Rule of Evidence 601 provides that "[e]very person is competent to be a witness unless these rules provide otherwise."

Federal Rule of Evidence 602 provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."

Federal Rule of Evidence 701 provides that:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Federal Rule of Evidence 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

## Introduction

The Fifth and Sixth Amendments protect a defendant's right to tell his version of what happened, in his own words. A defendant who testifies based on first-hand, personal knowledge about events in the indictment offers lay testimony and such testimony is admissible on two levels: first, as one of the most fundamental rights afforded criminal defendants, and second as a matter of course under the ordinary rules of evidence. This does not change even when the subject-matter of the testimony is technical or based on the defendant's specialized knowledge: so long as the defendant has first-hand knowledge, it is appropriate lay testimony.

Constitutional errors generally are structural error, yet this Court has to resolve if denying a defendant's right to testify can be reviewed using the lesser harmless-error approach. Ordinary evidentiary errors are typically reviewed using the harmless-error standard. That cannot be the case when an evidentiary ruling eliminates a defendant's right to testify. The rules of evidence do not prevail over fundamental rights, such as a defendant's right to testify, when the defendant's testimony goes directly to an element of the charged offense.

This Court has repeatedly recognized the importance of clarifying categories of constitutional violations that are structural error. But this Court has yet to answer the question of whether completely extinguishing a defendant's right to testify constitutes structural error, or whether it is amenable to harmless-error review. This Court declined take up the issue of the standard of review when a defendant's right to testify is completely extinguished in *Nelson v. Wisconsin*, 14-555. The Tenth Circuit's determination that the exclusion of a defendant's testimony because it was technical should assessed for harmless error, rather than structural error, is incorrect. Excluding a defendant's testimony as an ordinary evidentiary matter cannot be a mere abuse of discretion or harmless error, but must be structural error.

Whenever a defendant's ability to tell his version of events in his own words is eliminated by a trial court, he is deprived of "an opportunity to be heard." *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). This case provides an opportunity for this Court to clarify that denying a defendant the right "to present his own version of events in his own words[,]" *Id*. at 52, is structural error.

**Statement of the Case**

1. Mr. Bishop was charged with one count of possessing and transferring a machinegun and one count of unlawfully engaging in the business of manufacturing machineguns.

2. Petitioner went to trial and represented himself. After the close of the government's case-in-chief, Petitioner testified. The government objected, arguing

Petitioner's testimony presented "both technical and specialized knowledge and under Rule 702 it would be required to come in through a qualified expert." Pet. App. A5-6. The district court agreed with the government. *Id*.

3. The Tenth Circuit Court of Appeals affirmed the district court's decision. Starting from the premise that "[a] defendant's right to present a defense is cabined by the Federal Rules of Evidence and Criminal Procedure[,]" the court noted that the United States filed a Federal Rule of Criminal Procedure 16(b)(1)(C) notice disclosing its intended reliance on an expert and requested the same disclosure from the defense. *Id*., A7. This "request triggered [Petitioner's] obligation" to disclose any intended expert or expert testimony. *Id*. Because Petitioner did not use any experts, he did not provide a summary of intended expert testimony to the government. *Id*.

4. Because the appellate court viewed the district court's decision as an ordinary evidentiary ruling, it was reviewed for abuse of discretion. *Id*., A9. According to the court of appeals, only when "opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person[,]" *Id*., A8, is it lay testimony. In contrast, the court determined that expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." *Id*.

5. That Petitioner invented the device at the heart of the indictment, the design of which formed the basis for the criminal indictment, did not affect the court's conclusion that Petitioner was not exempted from Fed. R. Evid. 702. The

court's reasoning was that because Petitioner's testimony required the jury to "understand the significance of [Petitioner's] reference," his testimony involved knowledge not "readily accessible to any ordinary person," and was therefore was expert testimony. *Id.*, A9.

6. Moreover, it did not matter that Petitioner was the inventor of the device at the heart of the indictment. *Id.*, A8-10. While the court noted that cases allow inventors to testify as lay witnesses to the fact of their inventions, it ruled it was not an abuse of discretion for the district court to exclude the technical but factual portion of Petitioner's testimony. *Id.*

7. The court found that the district court's "limitation" on Petitioner's testimony did not prevent Petitioner from addressing a core issue, his intent. *Id.*, A10. The court determined that Petitioner's right to testify was not affected because the district court still allowed Petitioner to say "it is my absolute 100-percent belief that I did not make a machine gun[.]" *Id.*

8. The court admitted that had Petitioner's testimony not been cabined, Petitioner's testimony "might have strengthened [Petitioner's] argument regarding intent[.]" *Id.*, A11.

9. The Tenth Circuit denied rehearing.

**Reasons for Granting the Writ**

The Tenth Circuit Court of Appeals affirmed the district court's decision excluding Petitioner's testimony on an element of the offense under an abuse-of-discretion standard and held that a defendant cannot testify if his testimony

includes technical or specialized knowledge. The holding conflicts with this Court's Fifth and Sixth Amendment decisions that guarantee a defendant the right to testify. This Court has repeatedly recognized the paramount importance of allowing a defendant to tell his version of events in his own words to the jury. *Rock,* 483 U.S. at 52. It is a right "essential to due process of law in a fair adversary process." *Id*. at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The accused is "the most important witness for the defense" and his testimony is "[l]ogically included in [his] right to call witnesses whose testimony is "material and favorable to his defense." " *Id*. (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). If the accused is deprived of "an opportunity to be heard," we simply cannot say he has been afforded his "day in court." *Id.* (emphasis omitted) (quoting *In re Oliver,* 333 U.S. 257, 273 (1948)).

That right is unaffected if the accused offers testimony arising from his first-hand, personal knowledge of technical or scientific facts that go to the heart of the government's accusations. Restricting a defendant's right to testify about his first-hand, personal knowledge of an element of the offense because the prosecution labels it 'expert' is an inappropriate and arbitrary diminution of a defendant's fundamental right to present a defense.

This holding also conflicts with judgements of all other federal courts of appeals, which have consistently recognized the distinction between lay and expert testimony depends on the witness having first-hand knowledge of a fact in issue,

creating a circuit split. Indeed, the difference between lay and expert testimony is not dependent on the subject-matter of the testimony. So long as the testimony is relevant and based on first-hand experience or knowledge, it is lay testimony. Only when testimony is based on prior knowledge, independent of the case, and such knowledge is applied to the facts of the case is it appropriately labeled as expert.

This Court has repeatedly recognized the importance of establishing which categories of constitutional violations are not amenable to harmless-error review. Regardless of an appellate court's weighing of the likely effects of a defendant's testimony, when a defendant's ability to tell his version of events in his own words is arbitrarily curtailed or eliminated by a trial court, he is deprived of "an opportunity to be heard." *Rock*, 483 U.S. at 52. It is a cornerstone of criminal justice that a defendant has the right "to present his own version of events in his own words." *Id*.

The Tenth Circuit's reviewing the exclusion of a defendant's testimony under an abuse-of-discretion standard typically reserved for non-constitutional evidentiary issues is incorrect. Testimony based on first-hand, personal knowledge is the very definition of lay testimony; it matters not at all that the testimony is technical or specialized in nature. A defendant's testimony based on first-hand, personal knowledge of a critical and disputed fact cannot be excluded by labeling it as an ordinary evidentiary ruling and reviewed as such. The Tenth Circuit erred in applying the ordinary rules of evidence. But even if it had not, the rules must give

way to the superior constitutional rights embodied in the Fifth and Sixth Amendments and the Due Process Clause.

A deep split exists among both state and federal courts, and additional litigation at lower courts will only sharpen the divide without resolving the issue. This case arises on direct review and no further developments will occur that could clarify the issue. The issue is ripe for review.

## I. Courts are widely and intractably divided over whether denying a defendant his right to testify is structural error.

1. The Tenth Circuit applied a harmless-error analysis to the district court denying Petitioner his right to testify. It joins nine other courts in holding the denial of a defendant's right to testify is amenable to harmless-error analysis. The split is as follows:

a. Six courts - including at least four state courts of last resort - have ruled that a court's denial of a defendant's right to testify constitutes structural error. The most recent court to take this position is the South Carolina Supreme Court. In *State v. Rivera,* 741 S.E.2d 694 (S.C. 2013), the defendant, as here, repeatedly expressed his wish to testify in his defense. But the trial court refused to allow it, reasoning that taking the stand would not have been in the defendant's "best interest." *Id.* at 700-01. In a thorough analysis of this Court's precedent, the South Carolina Supreme Court held that when a defendant is denied the opportunity to present any testimony whatsoever, "the error is structural in that it is 'so basic to a fair trial

that [its] infraction can never be treated as harmless error.' " *Id.* at 707 (alteration in original) (quoting *Arizona v. Fulminante,* 499 U.S. 279, 289 (1991)).

Decisions from the Louisiana Supreme Court, the Minnesota Supreme Court, and the District of Columbia Court of Appeals are in accord. In *State v. Dauzart,* 769 So.2d 1206 (La. 2000), the Louisiana Supreme Court held that "[a]s with the right to self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis. The right 'is either respected or denied; its deprivation cannot be harmless.' " *Id.* at 1210-11 (quoting *McKaskle v. Wiggins,* 465 U.S. 168, 177 n.8 (1984)).

In *State v. Rosillo,* 281 N.W.2d 877 (Minn. 1979), the Minnesota Supreme Court held that "the right to testify is such a basic and personal right that its infraction should not be treated as harmless error." *Id.* at 879. That case concerned the defendant's attorney, rather than the court, precluding the defendant from testifying. But the Minnesota courts have consistently employed *Rosillo*'s automatic reversal rule in cases in which, as here, trial courts denied defendants their right to testify. *See State v. Corrigan,* 2012 WL 612313 (Minn. Ct. App. 2012); *State v. Rohner,* 1996 WL 438821 (Minn. Ct. App. 1996); *State v. Rounds,* 1995 WL 25258 (Minn. Ct. App. 1995).

And the D.C. Court of Appeals concluded that the denial of a defendant's right to testify is not amenable to harmless error. *Arthur v. United States,* 986 A.2d 398 (D.C. 2009). The D.C. Court of Appeals ultimately "found it unnecessary to

decide the question" because the error unquestionably "affected appellant's substantial rights." *Id.* at 416. "[T]he harmless error doctrine," the D.C. Court of Appeals reasoned, is simply "inapplicable to those rights designed to serve individual dignity interests." *Boyd v. United States,* 586 A.2d 670, 678 (D.C. 1991).

Finally, two federal district courts have held that a defendant's right to testify is "so basic to a fair trial that its infraction can never be treated as harmless error." *United States v. Butts,* 630 F.Supp. 1145, 1148 (D. Me. 1986); *see also Paradise v. DuBois,* 188 F.Supp.2d 4, 9 (D. Mass. 2001).

b. The Tenth Circuit joins nine other courts to hold the denial of a defendant's right to testify is amenable to harmless-error analysis. *State v. Sevigny,* 722 N.W.2d 515, 522 (N.D. 2006); *Quarels v. Commonwealth,* 142 S.W.3d 73, 82 (Ky. 2004); *United States v. Books,* 914 F.3d 574, 580 (7th Cir.), *cert. denied*, 139 S. Ct. 2682 (2019); *United States v. Hung Thein Ly,* 646 F.3d 1307, 1318 n.8 (11th Cir. 2011); *Solomon v. Curtis,* 21 Fed. Appx. 360, 363 (6th Cir. 2001) (unpublished opinion), *cert. denied sub nom. Solomon v. McLemore,* 534 U.S. 1137 (2002); *People v. Solomon,* 560 N.W.2d 651, 655 (Mich. Ct. App. 1996), *cert. denied,* 524 U.S. 930 (1998); *Nelson v. Wisconsin*, 849 N.W.2d 317, 321 (Wisc. 2014), *cert. denied*, 135 S.Ct. 1699 (2015); *Wright v. Estelle*, 549 F.2d 971, 974 (5th Cir. 1977); *United States v. Leggett*, 162 F.3d 237, 248-49 and n.11 (3rd Cir. 1998).

c. The remaining federal courts of appeals that confronted the matter recognize uncertainty exists and have yet to definitely decide the issue. *Frey v. Schuetzle*, 151

F.3d 893, 898 n.3 (8th Cir. 1998); *Lema v. United States*, 987 F.2d 48, 53 n.4 (1st Cir. 1993); *United States v. Ferrarini*, 219 F.3d 145, 154 n.6 (2d Cir. 2000); *United States v. Gillenwater*, 717 F.3d 1070, 1083 (9th Cir. 2013).

2. These conflicts will not resolve without this Court's intervention. Until now, this Court has not been presented with the full extent of consequences that flow from the splits created by this case. This Court recognized that the ordinary administration does not allow for a witness capable of "testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense" to be excluded. *Rock*, 483 U.S. at 55. But this Court has yet to confront the matter when it is the defendant exercising his right to testify, and an appellate court relies on the ordinary rules of evidence as the basis for refusing to allow a defendant to tell his story, in his own words, of the events underlying the indictment.

## II. The Questions Presented Are Critically Important to the Administration of Criminal Justice.

The questions presented merit this Court's attention. This Court has repeatedly granted certiorari to define and protect a defendant's Fifth and Sixth Amendment rights.

1. When the question of remedy has presented itself at the same time that this Court announced or clarified a constitutional right, this Court has immediately resolved whether the right is subject to harmless-error analysis or whether

structural error applies. *See, e.g., United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006) (violation of right to choice of counsel is structural error); *Arizona v. Fulminante,* 499 U.S. 279 (1991) (improper admission of involuntary confession is subject to harmless-error analysis); *Satterwhite v. Texas,* 486 U.S. 249 (1988) (admission of improperly obtained psychiatric evaluation is subject to harmless-error analysis); *Pope v. Illinois,* 481 U.S. 497 (1987) (jury instruction misstating element of offense is subject to harmless-error analysis); *Batson v. Kentucky,* 476 U.S. 79 (1986) (racial discrimination in jury selection is structural error); *Holloway v. Arkansas,* 435 U.S. 475 (1978) (conflicted joint representation is structural error); *Herring v. New York,* 422 U.S. 853 (1975) (denial of opportunity to give closing statement is structural error).

2. The defendant's right to testify is a bedrock principle of due process. This Court has often declared that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois,* 484 U.S. 400, 408 (1988); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). The defendant's "opportunity to be heard in his defense - a right to his day in court - [is] basic in our system of jurisprudence." *Rock,* 483 U.S. at 51 (emphasis omitted) (quoting *In re Oliver,* 333 U.S. 257, 273 (1948)).

Moreover, the Court's cases have emphasized the unique significance of a criminal defendant's own testimony. "The most persuasive counsel may not be able to speak for a defendant as the defendant himself might, with halting eloquence,

speak for himself." *Green v. United States,* 365 U.S. 301, 304 (1961). Indeed, "the [defendant's] right to testify on his own behalf … [is] essential to our adversary system." *Riggins v. Nevada,* 504 U.S. 127, 144 (1992) (Kennedy, J., concurring in judgment) (citing *In re Oliver,* 333 U.S. 257, 273 (1948)).

In protection of this fundamental right, this Court has consistently reversed convictions where an accused was denied the opportunity to present relevant, probative evidence in his defense based on the mechanistic applications of *per se* exclusionary rules. The rules of evidence - even rules with long common-law pedigree - must yield when necessary to effectuate a criminal defendant's Sixth Amendment or due process rights. In *Chambers v. Mississippi,* 410 U.S. 284 (1978), for example, the Court held that the Fifth and Sixth Amendments and Due Process Clause trump the hearsay rule and the common-law rule categorically prohibiting a party from impeaching his own witness insofar as those rules bar reliable testimony vital to ascertaining guilt. *Id.* at 302. Even though "perhaps no rule of evidence has been more respected or more frequently applied" over the centuries than the hearsay rule, this Court explained, the rule "may not be applied mechanistically to defeat" the constitutional right to present a defense. *Id.; see also Holmes v. South Carolina,* 547 U.S. 319, 324-26 (2006) (reaffirming *Chambers*).

Similarly, in *Rock v. Arkansas,* 483 U.S. 44 (1987), this Court held that the categorical rule shared by many states "excluding a criminal defendant's hypnotically refreshed testimony" must yield to the "constitutional right to testify in

[one's] own defense" when the rule would "disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 49, 61. Finally, in *Washington v. Texas,* 388 U.S. 14 (1967), this Court held that the Sixth Amendment trumps the common-law rule precluding defendants from calling alleged accomplices to testify on their behalf. *Id.* at 20-23. Despite the rule's venerable origins predating the founding era, this Court explained that the rule must give way when necessary to vindicate the right enshrined in the Compulsory Process Clause allowing defendants to secure testimony "relevant and material to the defense." *Id.* at 23.

The Supreme Court declared long ago that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use." *Washington v. Texas,* 388 U.S. at 23 (Sixth Amendment violated by arbitrary denial of accomplice testimony in favor of the defense). An accused's right to present his own testimony that is relevant and material may not be denied arbitrarily. *Id.*

Lower courts, therefore, should not be left in the dark as to whether denials of a defendant's right to testify can ever be justified as an ordinary evidentiary ruling and then reviewed accordingly. This is particularly so in light of serious costs involved in applying the wrong rule in this context. If a defendant's ability to tell his version of the events upon which the charge is based is susceptible to evidentiary challenges that demand pre-trial disclosure of the defendant's testimony, then the Fifth and Sixth Amendments and due process rights – right to present a defense,

right to be heard, right to his day in court, right against self-incrimination – no longer have meaning. Treating the denial of a fundamental right as an ordinary evidentiary issue should not be allowed to persist without this Court's review.

3. A witness is always competent to offer lay testimony on matters he personally observed. This must be so when the defendant is the witness and so waives his right against self-incrimination to provide the jury with his version of events in his own words. Any restriction that "virtually prevent[s]" a defendant "from describing any of the events" relevant to the defense violates the defendant's Fifth and Sixth Amendment rights. *Rock*, 483 U.S. at 57. When a defendant is not allowed to provide "detailed testimony...on all of the allegations" in an indictment, due process is violated. *United States v. Castro*, 788 F.2d 1240, 1249 (7th Cir. 1986); *see also Stephens v. Miller*, 13 F.3d 998, 1006 (7th Cir. 1994) (Flaum, J. concurring) ("it is apparent that a defendant cannot be denied the opportunity to elicit the core of operative facts that comprise his theory of defense.").

An expert need not have first-hand, personal knowledge, but must have the requisite training or specialized knowledge or experience that enables him to opine on the matter. Fed. R. Evid. 601, 602, 701. It is only when a witness other than the defendant "offers opinions, including those that are not based on firsthand knowledge or observation" that it is properly deemed expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). The narrow exception to the first-hand, personal-knowledge requirement has been recognized for over 100

years and is limited: "Men who have made questions of skill or science the object of their particular study...are competent to give their opinions in evidence. Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence[.] ... Judicial tribunals have in many instances held that medical works are not admissible, but they everywhere hold that men skilled in science, art, or particular trades may give their opinions as witnesses in matters pertaining to their professional calling." *Spring Co. v. Edgar*, 99 U.S. 645, 657 (1878).

The federal courts of appeals recognize the distinction and consistently rule that a witness offers lay testimony when he has first-hand, personal knowledge, even if the testimony includes technical or scientific matters. For example, all of the federal courts of appeals allow lay testimony from police officers who are personally involved in the criminal investigation that forms the basis of the indictment. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213 (10th Cir. 2007); *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011); *United States v. Moreland*, 703 F.3d 976 (7th Cir. 2012); *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007); *United States v. Albertelli*, 687 F.3d 439 (1st Cir. 2012); *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010); *United States v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015); *United States v. Fulton*, 837 F.3d 281 (3rd Cir. 2016); *United States v. Grinage*, 390 F.3d 746 (2d Cir. 2004); *United States v. Cheek*, 740 F.3d 440 (7th Cir. 2014); *United States v. Perkins*, 470 F.3d 150 (4th Cir.

2006); *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001). The opposite is true as well: federal courts of appeals label as expert the testimony from officers *not* based on real-time, first-hand, personal observations, but instead grounded on prior experience and knowledge. *See, e.g., United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010); *United States v. Lomas*, 826 F.3d 1097 (8th Cir. 2016); *United States v. Oriedo*, 498 F.3d 593 (7th Cir. 2007); *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013).

The same rules applies in patent ligation: witnesses with first-hand, personal knowledge, even though the topic is highly technical or nuanced, provide lay testimony.[1] For example, the Federal Circuit Court of Appeals explained that "an inventor is a competent witness to explain the invention and what was intended to be conveyed by the specification and covered by the claims. The testimony of the inventor may also provide background information, including explanation of the problems that existed at the time the invention was made and the inventor's solution to these problems." *Voice Technologies Group v. VMC Systems*, 164 F.3d 605, 615 (Fed. Cir. 1999). A decade later, the Federal Circuit reaffirmed that an inventor, often of a highly technical or scientific invention, testifies as a lay witness when talking "about the patents they invented based on their personal

[1] The converse is true as well in the context of patent litigation. A witness lacking first-hand experience cannot apply his specialized or technical knowledge to a disputed fact *unless* he is identified as an expert witness.

knowledge[.]" *Verizon Services Corp. v. Cox Fibernet Virginia, Inc.*, 602 F.3d 1325, 1339 (Fed. Cir. 2010).

The First Circuit adopted similar reasoning in *Gomez v. Rivera Rodriguez*, 344 F.3d 103 (1st Cir. 2003), a contract dispute case between a municipal mayor and municipal employees. The mayor identified a legal advisor as a witness, and the district court excluded the advisor's testimony; in reversing the district court, the First Circuit recognized that the triggering mechanism for expert disclosures "is not the status of the witness, but, rather the essence of the proffered testimony." *Id.* at 113. As such, "a party need not identify a witness as an expert so long as the witness played a personal role in the unfolding of the events at issue and the anticipated questioning seeks only to elicit the witness's knowledge of those events." *Id.* at 113-4.

In ruling that a witness who has first-hand, personal knowledge of a critical and disputed fact is not competent to offer lay testimony as to that fact, the Tenth Circuit has departed from the uniform course of all other federal courts of appeals to have ruled on the issue. Any lingering confusion that a witness is competent to offer relevant lay testimony on matters of which he has first-hand, personal knowledge should not be allowed to persist without this Court's review.

4. This Court has long recognized that some constitutional rights are "so basic to a fair trial," *Chapman v. California,* 386 U.S. 18, 23 (1967), that violating them "strikes at the fundamental values of our judicial system and our society as a

whole[.]" *Vasquez v. Hillery,* 474 U.S. 254, 262 (1986) (quoting *Rose v. Mitchell,* 443 U.S. 545, 556 (1979)) (internal quotation marks omitted). Such constitutional violations "can never be treated as harmless error." *Chapman,* 386 U.S. at 23.

Chief among those constitutional rights are those designed to safeguard "the dignity and autonomy of the accused." *McKaskle v. Wiggins,* 465 U.S. 168, 176-77 (1984). The right to self-representation, for example, is grounded in "the inestimable worth of free choice" and the right "personally to decide" how to defend oneself, even if "ultimately to his own detriment." *Faretta v. California,* 422 U.S. 806, 834 (1975). "A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action." *Chapman v. United States,* 553 F.2d 886, 891 (5th Cir. 1977). In *McKaskle,* therefore, this Court held that the right to self-representation is "not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." 465 U.S. at 177 n.8.

In other words, when a constitutional right is grounded in dignity and autonomy, harmless-error analysis cannot be sensibly applied. Harmless-error analysis is designed to assess whether a criminal trial "reliably serve[d] its function as a vehicle for determination of guilt or innocence." *Arizona v. Fulminante,* 499 U.S. at 310 (quotation omitted). But when a right exists to protect a defendant's dignity and autonomy in the overall context of the fair administration of justice, it makes no sense to apply this sort of results-focused analysis: the defendant's choice to exercise the right must be respected, regardless of a court's view of the wisdom of

that decision. Even when exercising the right would have "increase[d] the likelihood of a trial outcome *unfavorable* to the defendant," its denial still cannot be deemed harmless. *McKaskle,* 465 U.S. at 177 n.8 (emphasis added); *see also Rose v. Clark,* 478 U.S. 570, 587 (1986) (Stevens, J., concurring) (structural-error doctrine must "protect important values that are unrelated to the truth-seeking function of the trial").

5. Given that harmless-error analysis does not apply to denials of the right to self-representation, it must be inapplicable here as well. Like the right to self-representation, the right to testify is founded in dignity and autonomy; it furthers the defendant's right "to conduct *his own* defense" as he sees fit. *Rock,* 483 U.S. at 52 (emphasis added). And this Court has explained that, like the right to self-representation, the right to testify is grounded in a defendant's "freedom of choice." *Faretta,* 422 U.S. at 834 n.45; *see also Jones v. Barnes,* 463 U.S. 745, 751 (1983) (the choice to testify is among the "fundamental decisions" a defendant has the "ultimate authority" to make). Testifying allows a defendant to "inject his own acts, voice and personality into the process." *Wright v. Estelle*, 572 F.2d 1071, 1081 (5th Cir. 1978) (en banc) (Godbold, J., dissenting).

This Court is clear that the right to testify in one's own defense is "fundamental" to our system of criminal justice. *Rock,* 483 U.S. at 52. This is because the right is essential to preserving personal dignity and autonomy; if the accused is deprived of "an opportunity to be heard," we simply cannot say he has

been afforded his "day in court." *Id.* at 51 (emphasis omitted) (quoting *In re Oliver,* 333 U.S. 257, 273 (1948)). Indeed, the right to testify is "*even more fundamental* to a personal defense than the right to self-representation." *Rock,* 483 U.S. at 52 (emphasis added). The right to testify is the true essence of the right to be heard: it alone allows the accused the right to present his "version of events in his own words" to the jury on the witness stand. *Id.*

The inescapable implication is that the complete denial of the right to testify constitutes structural error. Since a defendant's right to testify is even more fundamental than the defendant's right of self-representation and the right of self-representation is not subject to harmless-error analysis, it follows that denial of the right to testify is not subject to harmless-error analysis.

## III. This Case Presents An Excellent Vehicle For Resolving the Question Presented.

Two aspects of this case make it a particularly suitable vehicle for resolving the question of whether denying a defendant the right to testify is anything but structural error.

1. This case arises on direct review and in an otherwise ideal procedural setting. Petitioner raised these issues at each level of the federal court system. Each court resolved the dispute on the merits. Furthermore, there is a fully developed record to consider the nature of the court's rulings and the effect it had on Petitioner's ability to testify in his own defense.

2. If this Court holds that denying a defendant the right to testify as to events in the indictment is not amenable to anything less than de novo review, that holding would be outcome determinative. Petitioner would be entitled to a new trial.

**IV. The Tenth Circuit Decision Is Incorrect.**

1. The Tenth Circuit's analysis finds no support in this Court's Fifth and Sixth Amendments jurisprudence. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . .deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." By protecting the defendant's right to confront the witnesses against him, to present the testimony of his own witnesses, and to enjoy the assistance of counsel, the Sixth Amendment spells out "the basic elements of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts[.]" *Washington v. Texas,* 388 U.S. 14, 19 (1967); *Rock,* 483 U.S. at 52.

The combined effect of the Amendments is a "require[ment] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). An accused is guaranteed a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In re Oliver,* 333 U.S. 257, 273 (1948). This

right "entails more than the opportunity to add one's voice to a cacophony of others." *McKaskle*, 465 U.S. at 177.

There can be no question that a defendant's Fifth and Sixth Amendment rights are violated when a defendant is precluded from testifying to his first-hand, personal knowledge simply because the testimony goes to a technical subject. The Tenth Circuit slighted those rights because it believed the jury would need specialized knowledge to understand Petitioner's testimony. Pet. App. A9. But this is an incorrect analytical starting point. The question is not whether the jury will understand the defendant's testimony, something impossible to determine until after the defendant has testified in any event. Rather, the only question for determining whether the defendant may testify is whether he has first-hand, personal knowledge of events that make up the indictment.

The ordinary justifications for pre-trial disclosure of expert testimony – prevent surprise, allow the opposing party to prepare for cross-examination and challenge the expert's conclusions and opinions – are wholly inapposite when the defendant is the witness. There can be no surprise as to what a defendant will say when he takes the stand: the testimony will address the charges the government levied against him.

Moreover, prosecutors cannot claim surprise about the contents of a defendant's testimony after indicting him on a charge involving technical elements. The very nature of the indictment invites a defendant to offer his first-hand,

personal knowledge of the technicalities at issue in the indictment. Any failure by the prosecution to prepare for a defendant's testimony weighs solely on the government; the government enjoys the power to indict and it alone is responsible for the charges levied against the accused. All prosecutors know that a "defendant's interest in testifying in his own defense" is "particularly significant," *United States v. Scheffer*, 523 U.S. 303, 315 (1998) (relying on *Rock*, 483 U.S. at 52, 57), and are thus prepared for a defendant to take the stand.

A defendant enjoys the Fifth Amendment right against self-incrimination. *Harris v. New York,* 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."). There is never an obligation upon a defendant to decide whether or not to exercise this right in advance of trial simply because his potential testimony may be technical. As this Court observed, "failure to afford the petitioner a reasonable opportunity to defend himself...[is] a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. at 273. Elementary due process includes a defendant having "a reasonable opportunity to meet [the charges against him] by way of defense or explanation, have the right to be represented by counsel,

and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." *Id*. at 275.

There is no legitimate justification for excluding a defendant's testimony on the grounds it is technical or involves specialized knowledge when the testimony goes to the very allegations in the indictment. The denial of such a right is structural error.

2. The Harm Resulting From Forcing a Defendant to Disclose His Testimony Before Trial Cannot Be Quantified.

The Tenth Circuit concluded that the district court's restriction on Petitioner's testimony did not prevent Petitioner from addressing a core issue, his intent. Pet. App. A10-11. Because Petitioner did not identify himself as an expert and disclose the substance of his intended testimony to prosecutors in advance of trial, the court held it was not an abuse of discretion for the district court to preclude his testimony. As a result, Petitioner was allowed to say no more than "I am not guilty of the charges leveled against me by the government[,]" clearly a arbitrary limitation that violated his Fifth and Sixth Amendment rights. *Id.*, A10.

The Tenth Circuit's analysis cannot be squared with this Court's decision in *Luce v. United States,* 469 U.S. 38 (1984). There, this Court considered whether defendants must testify at trial to challenge on appeal a pretrial ruling allowing the prosecution to introduce impeachment evidence against them. *Id.* at 39-40. This

Court held that a defendant must indeed testify to preserve such a claim for appeal. *Id.* at 43.

The reason this Court gave for its holding was that allowing defendants to challenge pretrial impeachment rulings when they failed to take the stand would have amounted to a rule of "automatic reversal" whenever the pretrial ruling was incorrect. *Luce,* 469 U.S. at 42. That is, "the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." *Id.* And this would be so, this Court explained, regardless of whether the defendant made a proffer of his testimony. "[T]he precise nature of the defendant's testimony … is unknowable when, as here, the defendant does not testify," because it "could, for any number of reasons, differ from the proffer." *Id.* at 41 & n.5.

Other cases involving structural error reinforce this analysis. In *Herring v. New York,* 422 U.S. 853 (1975), this Court held that denying the defense an opportunity to make a closing argument requires reversal: although "[s]ome cases may appear to the trial judge to be simple," this Court explained that there is "no way to know" whether closing argument "might have affected the ultimate judgment in [a] case." *Id.* at 863-64. This Court also has observed that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. . . . regardless of how overwhelmingly the evidence may point in that direction." *Rose v. Clark,* 478 U.S. at 578 (internal quotation marks and citation omitted).

Denying the right to testify produces the same inherent uncertainty as denying closing argument or directing a verdict for the prosecution. Even where the record suggests that a defendant's testimony would not have significantly undermined the prosecution's case, an appellate court cannot know how the testimony would have influenced the jury.

This case illustrates the point. The United States had the burden to prove Petitioner intended to, and did in fact, manufacture a machinegun. Petitioner took the stand to tell the jury what he intended to accomplish and why he intended as much. Petitioner's testimony was to be his version of events, in his own words. It was essential for Petitioner to explain his own knowledge base before his intent as to give necessary context to his intent. That he was not allowed to say anything beyond "it is my absolute 100-percent belief that I did not make a machinegun" meant Petitioner could not tell his version of events, in his own words to the jury Pet. App. A10. Despite holding harmless the district court's evidentiary ruling that resulted in denying Petitioner the right to testify, the Tenth Circuit acknowledged that had Petitioner been able testify freely, Petitioner's complete testimony "might have strengthened [Petitioner's] argument regarding intent[.]" *Id*., A11.

Though a defendant's testimony occurs at a discrete point in a trial, "the most important witness for the defense in many criminal cases is the defendant himself." *Rock,* 483 U.S. at 52. Indeed, "[s]ince the defendant is the person on trial, the jury eagerly anticipates his denial or explanation of the charges leveled against him." 1

McCloskey, Schoenberg & Shapiro, *Criminal Law Deskbook* § 16.18 (rev. ed. 2014). *Rock* itself found constitutional error when the defendant was not precluded from testifying at all, but only restricted as to what evidence he could give concerning his defense. See *Scheffer,* 523 U.S. at 315 (noting that in *Rock*, "the defendant was unable to testify about *certain* relevant facts …" (italics added)). If a court forbids a defendant from having that chance to speak to the jury, there simply is no way the Constitution can tolerate any ensuing conviction.

## Conclusion

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

Respectfully submitted,

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Salt Lake City, Utah
December 16, 2019

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2019**

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**SCOTT RAY BISHOP,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

**AFFIDAVIT OF SERVICE**

Jessica Stengel, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Noel Franscisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with UPS on December 16, 2019 and all parties required to be served have been served.

/S/ Jessica Stengel
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Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

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