No: 19-7018

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT RAY BISHOP,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITIONER'S REPLY BRIEF

SCOTT KEITH WILSON
Federal Public Defender
JESSICA STENGEL
Counsel of Record
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Jessica_stengel@fd.org
Counsel for Petitioner

Table Of Contents

Table of Authorities

Federal Cases

State Cases

Other

Respondent neither disputes nor addresses the deep divisions among state and federal courts on the questions presented in the petition. At stake is nothing less than whether denying the accused the right to testify in his own defense, on the elements of the offense charged, can be anything other than structural error. Respondent tacitly concedes, as it must, that there are clear and direct splits on the questions presented – questions that strike at the core of Due Process. This tells this Court all it needs to know to grant certiorari.

Hanging in the balance is the accused's right to take the stand at trial and tell the jury his version of the very events that prosecutors claim are illegal – even if that story involves technical details. The right of the accused "to present his own version of events in his own words" is "more fundamental to a personal defense than the right of self-representation," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), a violation of which this Court has declared structural error. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017). If no rule of evidence can "permit[] a witness to take the stand, but arbitrarily exclude[] material portions of his testimony," *Rock*, 483 U.S. at 55, the same must hold true for the accused.

Because the division among lower courts on the status of an accused's right to testify is indisputable, Respondent casts the accused's testimony as subject to the ordinary rules of evidence and thus amenable to harmless error review. By doing so, Respondent fails to acknowledge the fundamental nature of the right at stake.

At the heart of Respondent's position lies *United States v. Scheffer*, 523 U.S. 303 (1998), which Respondent believes allows a district court to use the rules of evidence to prevent the accused from telling his version of events, in his own words. BIO, 10-11. *Scheffer* is wholly inapposite to the issues presented here. *Scheffer* did not address a mechanical application of the rules of evidence to prevent the accused from being able to tell his story and contrary to Respondent's position, *Scheffer* remains faithful to *Rock* in that it did nothing to diminish the accused's interest "in testifying in [his] own defense–an interest [this Court] deemed particularly significant[.]" *Scheffer*, 523 U.S. at 315-6 (*quoting Rock*, 483 U.S. at 52).

Even though it concedes Petitioner was not allowed to testify on some of the elements of the offense charged, Respondent argues the error was harmless because Petitioner's "testimony was directly contrary to a wealth of evidence offered by the government at trial." BIO, 14. As such, "this case is a poor vehicle to consider whether" denying the accused the right to testify is structural error. BIO, 17. In every case the prosecution will claim to have a 'wealth of evidence' or 'overwhelming evidence.' The government's faith in its evidence is irrelevant to harm suffered when the accused cannot meet the accusations levied against him head-on and is instead muzzled when it matters most.

In an effort to dissuade this Court from considering the important issues raised in this petition, Respondent suggests Petitioner failed to preserve below the structural error issue. BIO, 17. The record lacks the clarity Respondent seems to

desire, but does not support Respondent's assertions. Petitioner argued that preventing the accused from testify "is a purely constitutional question," Pet. C.A. Opening Br., 7 and that "[e]xcluding [his] testimony deprived [him] of the fundamental right to testify in his own defense." Pet. C.A. Reply Br., 24 and 3 n.1. Notwithstanding Petitioner's arguments, controlling circuit precedent applied the harmless error standard to constitutional violations not yet declared structural error by this Court. Pet. C.A. Opening Br., 7. Moreover, as Respondent noted, the circuit court's opinion "skirted the issue of a defendant's right to testify, starting with "[a] defendant's right to present a defense is cabined by the Federal Rules of Evidence and Criminal Procedure[,]" and traveling only so far as to acknowledge that the district court restricted Petitioner's testimony to nothing more than "[m]y intent for it is completely different than what the prosecution has alleged." *United States v. Bishop*, 926 F.3d 621, 626, 628 (10th Cir. 2019); BIO, 17-18.

There is no doubt in the present case that the Tenth Circuit was presented with "the crucial issue of" the mechanical application of the rules of evidence to defeat a defendant's right to testify, and approved measuring the effect of that error under the harmless error standard. *United States v. Williams*, 504 U.S. 36, 43 (1992). Petitioner challenged the district court's application of the rules of evidence to preclude his testimony, at his trial, in his own defense, though not as meticulously as Respondent implies is necessary. Yet this Court does not demand that level of specificity and the question of structural error vis-a-vis the denial of

the right to testify is properly before this Court. *See United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002) (ripe for review even though there was confusion as to the government's precise position and government did not concede correctness of precedent); *Weaver*, 137 S.Ct. at 1916-17 (Breyer, J. dissenting) (noting the confusion in this Court's harmless error analysis as constitutional errors are divided into two classes, trial errors and structural errors).

No doubt even before *Rock* was decided and certainly since, many lower courts have wrestled with the appropriate remedy when the accused is prevented from telling his story to the trier of fact. This case is a perfect vehicle for this Court to resolve whether excluding the accused's testimony – going directly to the elements of the offense – can be anything other than structural error.

1. Respondent's argument provides no basis to deny review in the face of the undisputed conflict over the questions presented.

This case is an excellent vehicle for this Court to address the issue of whether denying the accused the right to testify is structural error. The evidentiary issue, though important, is secondary to and wholly reliant upon finally deciding what has been this Court's long-standing presumption: "that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." *Rock*, 483 U.S. at 53 n.10. It matters not at all that the heart of the criminal charge is rife with technical details or even that the government used an expert in its prosecution: "A party's explicit disclaimer of knowledge may well have more weight

than an expert's theoretical conclusion." *Casiano-Jimenez v. United States*, 817 F.3d 816, 822 (1st Cir. 2016) (*citing Rock,* 483 U.S. at 52 ("the most important witness for the defense in many criminal cases is the defendant himself")). The accused gets to tell the jury his view of those details, in his own words. Anything short of that is structural error.

History and precedent are on Petitioner's side. This Court has consistently held that some errors "are structural defects in the constitution of the trial mechanism," and defy harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). It is because "these errors deprive defendants of 'basic protections' without which 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." *Neder v. United States,* 527 U.S. 1, 8 (1999). *See also Gideon v. Wainwright,* 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio,* 273 U.S. 510 (1927) (adjudication by a biased judge); *Vasquez v. Hillery,* 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins,* 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia,* 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana,* 508 U.S. 275 (1993) (defective reasonable doubt instruction). It is time to add the right to testify to the list.

This Court does not resolve all Due Process issues with a single opinion. *Rock* has long been the leading case on an accused's right to testify and many

questions unanswered follow in its wake. Until this Court resolves the overarching issue of whether denial of the right to testify can be anything other than structural error, the nature of the remedy for a defendant whose right to testify has been denied will depend on whether the jurisdiction honors the right to testify as a fundamental right or treats it merely as a perfunctory trial requirement.

2. The Tenth Circuit holding conflicts with the other circuit courts of appeals and several state courts of last resort on both questions presented.

Respondent does not address the clear schism between the Tenth Circuit and every other circuit that has spoken to one of the basic premises undergirding the rules of evidence: that a person is competent to testify as a fact witness if he has first-hand knowledge of the contested issues. Instead, Respondent echoes what the prosecution and the Tenth Circuit said: if the subject-matter of the testimony is technical, it does not matter that the witness has first-hand knowledge (and is the accused) – unless qualified as expert, the person cannot testify.

To be sure, constitutional rights are subject to some limits. But Respondent mischaracterizes the holdings of the case it cites in support of those limits. BIO 12-13. Neither the Federal Circuit nor the First Circuit endorsed limits on testimony from a witness with first-hand knowledge of contested matters as an ordinary application of evidentiary rules governing expert witnesses.

The First Circuit was clear that "so long as the witness played a personal role in the unfolding of the events at issue," a party "need not identify [that] witness as

an expert[.]" *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 113-14 (1st Cir. 2003). That rule – that a fact witness must have first-hand knowledge of the events at issue – is why the court made pellucid that the "status of the witness" does not matter; it is "the essence of the proffered testimony" that controls. *Id.*

It is for this very reason that the Federal Circuit held that an inventor is a *fact* witness. The court allowed highly technical testimony "from the witnesses about the patents they invented based on their personal knowledge, and properly excluded these same witnesses" from testifying to matters on which they lacked first-hand knowledge. *Verizon Servs. Corp. v. Cox Fibernet Va., Inc.*, 602 F.3d 1325, 1339-40 (Fed. Cir. 2010). The distinction is easily drawn: expert witnesses lack first-hand, personal knowledge of contested issues while fact witnesses have first-hand, personal experience with the issues. And in a criminal proceeding "a third party's testimony as to what a defendant may have known cannot fairly be equated with the defendant's own first-hand account of what he actually knew." *Casiano-Jimenez*, 817 F.3d at 822.

Respondent points to *Scheffer* for the proposition that this Court's "interest in ensuring that reliable testimony is presented at trial" allows a district court to use the rules of evidence to prevent a defendant from addressing the charges levied against him. BIO, 10. While true that the rules of evidence require early disclosure of expert witnesses for the purposes Respondent identifies, to "minimize surprise that often results from unexpected expert testimony, reduce the need for

continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination," Advisory Committee Notes (1993 amendment), Fed. R. Crim. P. 16, the same concerns do not exist for the accused as a witness in his own defense.

By definition, the accused is the ultimate fact witness as he is the one the prosecution alleges did some illegal act. There can be no surprise or need for a continuance when the accused testifies to the precise allegations the government has made against him. After all, the prosecution knows who it has charged and with what offenses, and the prosecution presumably comes prepared to cross-examine the accused should he take the stand. The accused's right to testify cannot depend on whether a prosecutor is prepared; the Rules of Evidence offer no remedy for ill-prepared prosecutors.

Respondent's argument that the rules of evidence control the exercise of a fundamental right inverts "our hierarchy of laws [by] altering or interpreting a rule of evidence [so as to] work[] a corresponding change in the meaning of the Constitution." *Scheffer*, 523 U.S. at 311 n.7. If the "right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of demoralization of the court's authority[,]" then the rules of evidence may not be used as a means of preventing a defendant telling the trier of fact his version of contested events. *In re Oliver*, 333 U.S. 257, 278 (1948).

3. Respondent's contention that denying the accused the opportunity to meet the allegations against him in his own words is amenable to harmless error review is without support.

Respondent admits that Petitioner "was not permitted to present technical testimony about precisely" how Petitioner's device functioned, even though the device's functionality was the core of the criminal charge. BIO, 14. Respondent then suggests that even if so preventing him was wrong, because Petitioner's "proposed testimony was directly contrary to the wealth of evidence offered by the government at trial[,]" the error was harmless. *Id*. Respondent fails to support this sweeping revision of the right to testify in one's own defense with any pertinent authority.

The two cases Respondent identifies are neither relevant nor do they support assessing the denial of a fundamental right under the harmless error standard. First, *United States v. Books*, 914 F.3d 574 (7th Cir. 2019), is immaterial to the questions presented here for two reasons. One, both parties agreed to the harmless error standard, 914 F.3d at 580, and precedent dictated that the court "decline[] to review the merits of [the accused's] claim" when he did not choose to testify at trial. *Id*., 579-80 (*citing United States v. Wilson*, 307 F.3d 596, 600-01 (7th Cir. 2002)). Two, the case addresses a distinctly different question – a district court's decision to withhold ruling on the question of whether the government could impeach the accused with the fruits of a coerced confession if the accused chose to testify.

Second, Respondent cites to *Wright v. Estelle*, 549 F.2d 971, 974 (5th Cir. 1977), yet that panel did "not consider the question of whether a defendant has a fundamental right to testify in his own behalf that can only be waived by him." When an *en banc* Fifth Circuit affirmed the panel's decision, 572 F.2d 1071 (5th Cir. 1978), it made clear that the question in *Wright* was "not whether the right to testify is a personal or a fundamental right; rather, it involve[d] the proper allocation of authority between the attorney and his client." 572 F.2d at 1072–73. Moreover, the *en banc* majority did not agree with the prior court's reasoning and made that disagreement known: "We believe that the court is here faced foursquare with a constitutional question and, with all deference, we think the court does a disservice in merely assuming for sake of argument the existence of a personal constitutional right to testify and then declaring that in this case any denial of that right is harmless error." 572 F.2d at 1072. The dissent is more vocal still, clarifying that the accused has a fundamental right to testify in his own behalf as part of the due process right to a fair trial and that denying that right cannot be reduced to an equation analyzing the "net amount of evidence necessary to convict." *Id.*, 1081 (Gobold, J. dissenting). Forty years ago, the Fifth Circuit limned the outlines of the debate that has become even more entrenched over time and that this Court now has the opportunity to finally resolve: denying the accused his day in court is an error of constitutional magnitude that defies harmless error review.

Finally Respondent suggests that a substantive difference exists between "trial court rulings that barred all testimony by the defendants" and Petitioner being prevented from explaining "about how precisely [his device]" did not meet the elements of the offense charged. BIO, 16, 14. Respondent's proposed distinction may be sustained only by disregarding this Court's repeated and numerous statements about the substance of the right to testify.

A defendant's decision to testify "entails more than the opportunity to add one's voice to a cacophony of others." *McKaskle,* 465 U.S. at 177. The right to testify, as with the right of self-representation, "affirm[s] the dignity and autonomy of the accused and [allows] the presentation of what may be, at least occasionally, the accused's best possible defense." *Id*., 176-7. *See Weaver*, 137 S.Ct. at 1908 (noting that the exercise of the right of self-representation "usually increases the likelihood of a trial outcome ***un***favorable to the defendant[,]" but "harm is irrelevant to the basis underlying the right, [this] Court has deemed a violation of that right structural error.") (emphasis added).

As one state court of last resort noted:

> In the narrow world of the courtroom the defendant may have faith, even if mistaken, in his own ability to persuasively tell his story to the jury. He may desire to face his accusers and the jury, state his position, and submit to examination. His interest may extend beyond content to the hope that he will have a personalized impact upon the jury or gain advantage from having taken the stand rather than to seek the shelter of the Fifth Amendment. Or, without regard to impact upon the jury, his desire to tell "his side" in a public forum may be of overriding

> importance to him. Indeed, in some circumstances the defendant, without regard to the risks, may wish to speak from the stand, over the head of judge and jury, to a larger audience.

Mebane v. State, 272 P.3d 327, 329 (Wyo. 2012). Denying the accused his right to testify is structural error.

Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

SCOTT KEITH WILSON
FEDERAL PUBLIC DEFENDER

/S/ Jessica Stengel
JESSICA STENGEL
Counsel of Record
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Jessica_stengel@fd.org

Salt Lake City, Utah
May 26, 2020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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 Petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit 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 May 26, 2020, and all parties required to be served have been served.

/S/ Jessica Stengel

JESSICA STENGEL
Counsel of Record
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Jessica_stengel@fd.org

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

SCOTT RAY BISHOP,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

AFFIDAVIT OF MAILING

Jessica Stengel, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29 Petitioner's Reply Brief in Support of Petition for Writ of Certiorari 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:

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

It is further attested that the envelope was deposited with the UPS on May 26, 2020, and all parties required to be served have been served.

/S/ Jessica Stengel
JESSICA STENGEL
Counsel of Record
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
Tel. (801) 524-4010
Jessica_stengel@fd.org