No. 21-6481

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL GRANT WILSON

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for Writ of Certiorari
to the Wisconsin Court of Appeals

PETITIONER'S REPLY BRIEF

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REPLY IN SUPPORT OF THE PETITION

This Court has no greater office than to ensure enforcement of "bedrock constitutional protections afforded to criminal defendants." *Hemphill v. New York*, No. 20-637, slip op. at 8 (U.S. Jan. 20, 2022). The Court has made clear that the role amply reaches the conduct of trials, including evidentiary rules.[1]

This case is in that important tradition. To be sure, the issues here are not the same as in *Hemphill*, cited for the general point, or precisely as in any of the other cases noted in the margin on this page. Nor is this the exact same "scenario" (as the Wisconsin Supreme Court might say) as that of *Holmes v. South Carolina*, 547 U.S. 319 (2006), and petitioner has never so maintained.

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[1] *See*, *e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308–09, 329 (2009) (holding that under *Crawford v. Washington*, 541 U.S. 36 (2004), defendant had a constitutional right to call to stand laboratory analysts who prepared certificates, used by the state as evidence, that material seized by police was cocaine of a certain quantity); *Olden v. Kentucky*, 488 U.S. 227, 231–33 (1988) (holding state court criminal conviction unconstitutional where trial judge prohibited cross-examination going to impeachment of state's key witness, as "the exposure of a witness' motivation in testifying is a proper and important function"); *Rock v. Arkansas*, 483 U.S. 44, 53, 62 (1987) (ruling that state's *per se* rule excluding all hypnotically refreshed testimony violated defendant's rights under various provisions of the Constitution to testify on her own behalf); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (setting aside as violative of the Due Process Clause a judgment affirming conviction where trial court had "mechanistically" applied state's hearsay rule to exclude exculpatory testimony of a third party whom the state itself had called in separate trial of petitioner's alleged accomplice); *Chambers v. Mississippi*, 410 U.S. 284, 294–95, 298 (1973) (ruling that due process rights were violated when, under state law evidentiary "voucher" rule on impeachment, the state court would not allow defendant either to question his own witness, whom the prosecutor had refused to call, about the witness's oral admissions to friends that witness himself had committed the murder or to call other witnesses about the same matter); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (ruling that state court had acted unconstitutionally when it "arbitrarily" applied the state's rule prohibiting defendant from calling as a witness his alleged co-participant in the crime whom the state had already tried and convicted); *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (declaring it a violation of the Due Process Clause for the state to prohibit a defendant from testifying under oath in his own behalf).

Rather, in particular (in question 1), petitioner asks whether Wisconsin's evidentiary requirements for the introduction of a third-party-perpetrator defense are unreasonable and thus violative of the Due Process Clause.

The Court should grant the petition. The state's opposition does not contest that Wisconsin has developed an unusual approach to limiting the introduction of evidence in support of a third-party-perpetrator defense. The arguments presented by petitioner disclose that the approach violates due process. Such a decision by this Court will not only put Wisconsin back on a constitutional path but also stand as an important milestone for other courts. And if, on the merits, the Court ultimately should hold otherwise, the decision would stand as an important counterpoint to the particular result in *Holmes*. Even (or especially) if the number of ways that a state might regulate the introduction of third-party-perpetrator evidence is "infinit[e]," Opp. 7 (internal quotation marks omitted), most approaches are constitutional, but others will have ranged so far as to violate due process.

There is strong reason here to decide where—on which side of the line—this one falls.[2]

[2] *Cf.* Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction,* 1965 Sup. Ct. Rev. 241, 283 (explaining that the workability of this Court's generalized due process test for the constitutionality of an exercise of personal jurisdiction benefits from "particularization" by the Court in individual cases).

1. The primary question presented is whether Wisconsin's restriction on a defendant's introduction of third-party-perpetrator evidence is consistent with the Due Process Clause. It is true that various jurisdictions state their tests for admitting third-party-perpetrator evidence in different ways, as befits a federal system. Yet Wisconsin (along with Vermont, per the opposition) has developed a test that will nearly always ensure against a defendant's ever being able to introduce such evidence (outside perhaps of DNA evidence, *see* Petition for a Writ of Certiorari ("Pet.") 25) if that is the mere intuition or preference of the trial and appellate judges.

Wisconsin's approach is outside the range prevailing across the states. Just about all jurisdictions require some balancing of the probative value of a defendant's proffered evidence against its potential to mislead a jury. This is not simply because (or where) these states have adopted some version of Federal Rule of Evidence 403. It is because, first, the Due Process Clause itself enables criminal defendants to introduce evidence "to show that someone else committed the crime with which they are charged." *Holmes*, 547 U.S. at 327.[3]

[3] Thus, for example, respondent is simply wrong in this important statement: "The decisions Petitioner has cited from Hawaii, Kentucky, and New York appellate courts (Pet. 27–29) merely reflect those courts' decisions as to state evidentiary rules . . . ." Opp. 7. In fact, for example, the Hawaii Supreme Court, which in *State v. Kato*, 465 P.3d 925, 940–41 (Haw. 2020), overruled its precedent relying on Wisconsin's approach—to the unhappiness of the dissent, which explicitly endorsed both *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), and *Wilson*, the decision presented for review here, *see* 465 P.3d at 957–58 (Nakayama, J., dissenting)—cited this Court's decision in *Holmes* multiple times in its decision. *See id.* at 943, 944. And the Kentucky Supreme Court introduced its legal analysis by noting that "[t]he Due Process Clause of the Fourteenth Amendment guarantees a

At the same time (or second), "the Constitution permits judges to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." *Id*. at 326–27 (internal quotation marks omitted, ellipses and brackets in original). They may not do so through "rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote." *Id*. at 326.

No such meaningful balancing occurs in Wisconsin, as this case shows. What could have been of greater relevance to petitioner's defense than evidence that Willie Friend, undisputedly "the State's primary witness [who alone] identified Petitioner as the shooter" (Opp. 3), was himself involved in committing the crime? There was nothing *marginal* about such evidence. This was not some generalized assertion that "some other dude did it"[4] or even, as

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criminal defendant the opportunity to present a full defense, and that guarantee includes the right to introduce evidence that an alternate perpetrator committed the offense." *Gray v. Commonwealth*, 480 S.W.2d 253, 266 (Ky. 2016). To be sure, those courts ultimately grounded their particular *tests* in interpretations of their evidentiary rules balancing relevancy and risk of prejudice, *see, e.g., id.* at 267, but, quite evidently, on pain of knowing that their discretion—the range of possible approaches—was limited by the Due Process Clause.

This is an important reason to have and follow rules: so that there is dramatically less possibility that any case—let alone every case—will become a constitutional contest. For perhaps the most basic example, the reason that state rules so limit notice by publication (and so promote personal service) has much to do with this Court's interpretation of the Due Process Clause in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). For an especially recent example, see the Due Process Protections Act, Pub. L. 116-182, 134 Stat. 894 (2020) (among other things adding Fed. R. Crim. P. 5(f)(1) to ensure compliance with "*Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny").

[4] *Cf.* Edward J. Imwinkelried, *Evidence of a Third Party's Guilt of the Crime That the Accused Is Charged With: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 Loy. U. Chi. L.J. 91 (2015).

often, an attempt to introduce *other-acts* evidence suggesting that a particular other person may have been involved. Nor did the Wisconsin Supreme Court or the state here maintain that there would have been harassment, prejudice, or confusion of the issues.

Rather, the Wisconsin Supreme Court invoked a test that artificially limits what evidence is relevant or that expands beyond reason the category of prejudicial (it is not at all clear which one it more largely is, but the result is the same in either event). The Wisconsin test is stated to involve three parts: a defendant must introduce evidence of the third party's motive, opportunity, and direct connection with respect to the crime. No matter that the state in its case-in-chief against defendant does not have to show motive. Indeed, no matter if, as here, the state has "has conceded [that defendant] satisfied the motive and direct connection prongs of the *Denny* test": For then the court can simply "discus[s] . . . factors under the heading of opportunity that arguably belong under direct connection—and vice versa," as it unapologetically did here. Pet. App. 77.[5] This shape-shifting test has become arbitrary and no

[5] Yet the state supreme court here also somehow maintained (elsewhere in its opinion) that "'opportunity' and 'direct connection' have distinct meaning." Pet. App. 70. If a further sense of just how extreme and fetishized the *Denny* test has become under the decision below (the *Denny–Wilson* test would now be a more accurate name), one may take up the concurrence of two justices. They joined the court's opinion (else there would have been no majority, as two others of the seven justices dissented) but wrote separately to *emphasize* that under the majority opinion it is not possible for a defendant to "sometimes introduce *Denny* evidence without satisfying all three prongs of the *Denny* test," that "the *Denny* test

longer bears any family resemblance to the "legitimate tendency" rule of *Alexander v. United States*, 138 U.S. 353, 356 (1891), from which it claims parentage. In short, whatever this Court might once passingly have thought of the *Denny* test as abstractly stated or as demonstrated in *Denny* itself, *see* Opp. 4, 6, 8 (citing *Holmes*, 547 U.S. at 327 n.*), there now can be no doubt that Wisconsin's approach is, indeed, "'extreme.'"[6]

This becomes clearer yet through an example that is a variation on the facts of this case. What would Wisconsin say and do if ten people—including, say, "'the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor'"[7]—had been prepared to testify for petitioner that they had heard Willie Friend say, *that very day*, that he was going to shoot Eva Maric, that very evening? Petitioner's attempt to introduce *any* such testimony would still have failed under the reasoning of the state courts here. For there would have

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is a three-prong test," that it "never becomes a one- or two-prong test," etc. Pet. App. 86, 89, 91 (internal quotation marks omitted).

[6] Opp. 1 (quoting Pet. 1). Respondent thinks it a point in its favor that petitioner cited a law review article whose authors would like a much broader rule than *Holmes*. *See id.* Yet the pertinence of the article, as petitioner made clear, is simply that (a) no one doubts third-party-perpetrator evidence to be relevant and (b) that Wisconsin outstrips most other states in its unreceptiveness—indeed, hostility—to such evidence. *See* Pet. 1. *Petitioner's* essential point is that *Wisconsin's* approach is outside the broad latitude afforded to the states under *Holmes* and the Due Process Clause.

[7] *Compare Branzburg v. Hayes*, 408 U.S. 665, 688 n.26 (1972) (quoting 4 The Works of Jeremy Bentham 320–21 (J. Bowring ed. 1843)).

remained no "*evidence* demonstrating that Friend had the *opportunity* to arrange a hit on Maric." Pet. App. 82. How can this be a just rule?

In this regard, it is ***essential*** to appreciate just how crabbed a view the Wisconsin Supreme Court took of what is meant by *opportunity* (again, the only *Denny* prong that the state had not conceded in this case). Recall that, on the night in question, Willie Friend, unlike petitioner, was in an illegal afterhours club, operated out of a residence by his brother, together with the victim and others (recall also that he lied about this both to the police and in earlier court testimony, *see* Pet. 5). And Friend and the victim were together, outside the club, in a car for "about an hour or two," which ended when the victim was shot and killed even as Friend somehow evaded the bullets. R.51:57. *All of this*, with respect to "*opportunity* to arrange a hit on [the victim]," the Wisconsin Supreme Court reduces (not just incompletely but inaccurately on its face) to "the relatively short time they were in [the victim's] car." Pet. App. 82. The court's use of the "opportunity" prong of its test to justify denying petitioner the right to introduce such evidence crucial to his case is nothing short of arbitrary.

Here is the reality: The trial judge, intensely skeptical in a pre-*Holmes* world as to whether any relevant constitutional right existed (*see* Pet. 24 n.7), rejected the parties' agreement that the third-party-perpetrator evidence should be admitted. For he thought that it "will lead to speculation, that it's

not a proper procedure." *See* Pet. 9 (quoting R.58:4–5). Then, the Wisconsin Supreme Court, though in a post-*Holmes* world and notwithstanding the state's having conceded motive and direct connection, insisted—merely for the right to maintain the defense—on evidence such as Friend's contacts, influence, and finances to quickly engage a shooter (outside his brother's club); telephone records; gun ownership; etc.[8] Such insistence under the guise of requiring a demonstration of "opportunity" is an unreasonable burden to impose on a criminal defendant seeking to introduce undisputedly relevant evidence—including statements by the witness that he would kill the victim.

More generally, with its "opportunity" prong, the Wisconsin Supreme Court has lost sight of the legitimate purpose of the third-party-perpetrator defense—which is to introduce reasonable doubt of the state's theory. The Wisconsin rule, in practice, asks instead whether the defendant has offered enough evidence to show that the third party likely committed the crime.

It is worse even than already stated: the Wisconsin Supreme Court demanded that the defendant provide *direct* evidence of the third-party perpetrator (as through things previously noted such as telephone records), with no consideration given to inferences or to the strengths of circumstantial

[8] Indeed, while respondent now maintains that such matters are "some *examples* of evidence that would suffice" (Opp. 10) (emphasis added), that is scarcely clear from the Wisconsin Supreme Court's opinion. *See* Pet. 22. So it will be unclear also to any future court or parties.

evidence. *See* Pet. App. 77. The *state*, by contrast, received considerable such consideration from the jury here. After all, there was no physical evidence (e.g., fingerprints, murder weapons) connecting petitioner to the crime.[9]

In short, Wisconsin *may* not have gone as far as Maine in *Mullaney v. Wilbur*, 421 U.S. 684, 700–04 (1975) (holding that explicitly shifting a burden to the defendant to prove "the critical fact in dispute" violates the Due Process Clause), but it has crossed into unconstitutional territory. Petitioner had no "meaningful opportunity" (rather an ironic word here) "to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted). Not just *Holmes* but also the various approaches of many states, not all identical to one another but materially different from Wisconsin, support this conclusion.

2. The secondary question involves Wisconsin's standard for assessing prejudice for a claim of ineffective assistance of counsel in the context of a third-party-perpetrator defense. Perhaps it should not be a surprise that a state court system so unconcerned about such a defense is so lenient in its assessment of counsel's plainly deficient performance here.

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[9] Petitioner is at a loss to understand how the Wisconsin Supreme Court's requirement that he "engineer [the] scenario" showing Willie Friend's involvement (a phrase that the court used twice, Pet. App. 51, 84) can be laid off on "Petitioner's unique theory of the case." Opp. 10. "The facts of every case are unique," *Dean Kearney's Remarks on the Wisconsin Court System*, Marquette Lawyer Magazine, Summer 2005, at 50, so in that sense every "theory of the case" will be also. Nor was there anything especially "complex" (Opp. 10) about what petitioner wished to maintain to the jury.

With respect, the opposition does not engage with the petition's fundamental critique of the ineffective-assistance-of-counsel ruling below: "[T]he combination of the court of appeals' conception of the 'ultimate' question and its *application* of the standard, however articulated, set the bar inappropriately high." Pet. 33. To dismiss the analysis as "highly fact-driven" (Opp. 12) is to say no more than that this is another case and no less than that the Court should never lay down another milestone for future courts and parties.

CONCLUSION

The petition, squarely and cleanly, presents important questions and should be granted.

Respectfully submitted,

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