

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK A. PITZKA,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the admissibility of “other acts” evidence that is the subject of a pending, unresolved criminal prosecution in another contemporaneous criminal trial violate a defendant’s constitutional rights afforded by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution?

LIST OF PARTIES

The parties to this action include the petitioner, Mark A. Pitzka, and the State of Wisconsin, the respondent.

All proceedings in other courts directly related to this case are as follows:

- *State of Wisconsin vs. Mark A. Pitzka*, No. 20-CF-1787, Waukesha County. Judgment of Conviction entered May 26, 2022. Order denying Postconviction Motion entered March 14, 2024.
- *State of Wisconsin vs. Mark A. Pitzka*, No. 24-AP-650-CR, Wisconsin Court of Appeals, District II. Judgment entered June 25, 2025.
- *State v. Pitzka*, No. 24-AP-650-CR. Supreme Court of Wisconsin. Judgment entered February 12, 2026.

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OPINIONS BELOW

The Supreme Court of Wisconsin, in an order issued on February 12, 2026, denied Mr. Pitzka's petition to review the decision of District II of the Wisconsin Court of Appeals. That order has been reprinted in the appendix. (A-002). The decision of District II of the Wisconsin Court of Appeals was issued on June 25, 2025, and was a per curiam, unpublished decision and has been reprinted in the appendix. (A-003). The decision and order of the Circuit Court of Waukesha County denying Mr. Pitzka's request for a new trial was likewise unpublished and has been reprinted in the appendix. (A-028).

JURISDICTIONAL GROUNDS

Mr. Pitzka seeks review of the Supreme Court of Wisconsin's denial of his petition seeking review and reversal of the decision of the District II of the Wisconsin

Court of Appeals. The order denying Mr. Pitzka's petition for review was issued by the Supreme Court of Wisconsin, the highest court in Wisconsin, on February 12, 2026, and the issue presented in this matter is rooted in the Due Process protections afforded by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. As such, this court has jurisdiction over this case pursuant to 28 U.S. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The instant case involves the application of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution.

The relevant portion of the Fifth Amendment provides:

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 relevant portions of the Sixth Amendment provide:

In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

From 2018 to 2020, three house fires were tied to homes occupied by or associated with A.V., the ex-girlfriend of Mark Pitzka, the petitioner. The first fire occurred sometime between 5 p.m. on June 28 through 9 a.m. on June 29, 2018, at a home in the process of renovation by A.V. This home was located in Waukesha County, Wisconsin. The next fire occurred on July 1, 2018, at the residence of A.V.'s boyfriend, D.L., where a garage fire started around 10 p.m. This home was in Dodge County, Wisconsin. Two years later, a third fire occurred at another residence related to A.V., this time at a townhouse she owned. That fire took place on May 27, 2020 in Waukesha County, Wisconsin.¹

¹ In his appeal in the Wisconsin courts, Mr. Pitzka alleged that trial counsel was ineffective for failing to introduce evidence that following the two

*The Investigation into Three Fires**1. The June 28-29, 2018 Fire*

The residence in question was owned by A.V., but was not where she was living at the time. Just one week prior to the fire, A.V. bought the home as a purported investment opportunity with a plan to renovate the home and sell it for profit. In the days prior to the fire, A.V. had started the process of looking for bids for remodeling, which came back at much more than she could afford. A.V. even specifically told one contractor she could not afford his

2018 fires for which he was charged with starting, A.V. experienced a third fire in a condo she owned, which once again provided her with a large insurance payout. While Mr. Pitzka continues to assert that trial counsel erred in his representation by failing to introduce this evidence and such errors caused him prejudice, this issue involves the application of well-settled law and fact finding already completed at the lower courts, and thus, this issue is not proper for a writ of certiorari to this court.

quote and did not know how she would find the money to complete the planned remodel.

Following the fire, A.V. received an insurance payout of \$191,000 for updates and repairs to the house, which A.V. then completed as she had originally planned. Following the fire and resulting renovation, A.V. sold the house for a profit of approximately \$100,000.

Nothing tied Mr. Pitzka directly to the fire. The initial investigation revealed that only A.V. had keys to the house, that it was secured at the time the fire was discovered, and there was no evidence of forced entry. A.V. reported that she was painting the home on June 28, 2018, and left around 5 p.m. A.V. returned to the house around 9:00 a.m. the next morning and called 911 upon allegedly observing the fire.

During the investigation, it was reported that law enforcement obtained surveillance footage of the home from the night of the fire and that footage confirming A.V. was the last to leave the evening of the fire and the first to return the next morning, allegedly in time for her to discover the home ablaze. Police ultimately did not preserve the evidence, concluding that because it showed only A.V. and she was not their suspect, doing so was unnecessary.

In the month that followed, A.V. and her contractors continued to regularly access the flip-house. During that time, remnants of four *suspected* fire starter logs that had mostly been burned were found in A.V.'s basement. A later search warrant of Mr. Pitzka's home discovered that he had fire starter logs and later investigation revealed that on June 27, 2018, he had purchased starter logs from a local Farm and Fleet store.

2. The July 1, 2018 Fire

On July 1, 2018, D.L. went to bed at his Hustisford residence in Dodge County, Wisconsin, around 8:30-8:45 p.m. Later that evening, he allegedly awoke to a small, minimally damaging fire in his garage and called 911 around 10:15 p.m.

At the scene of the fire, law enforcement recovered one intact and one partially burned Pine UltraStart fire starter log. Dodge County recovered no DNA or fingerprints at the scene tying Mr. Pitzka to the fire. During the initial investigation, A.V. came to the scene and informed law enforcement she believed the fire had been started by Mr. Pitzka. From then on, the police sought evidence linking Mr. Pitzka to the fires.

Investigators learned that D.L.'s neighbor had observed a suspicious vehicle near D.L.'s driveway. Police

photographed its tire tracks but never connected it to Mr. Pitzka.

3. The May 27, 2020 Fire

Prior to Mr. Pitzka being charged in the Waukesha case, the third fire linked to A.V. occurred, this time at a Hartland townhouse she owned in Waukesha County, Wisconsin. At the time of trial, defense counsel stipulated that the fact of this fire was irrelevant and inadmissible because it had been ruled accidental after being linked to a faulty hairdryer. (A-030).

Criminal Charges Against Mark Pitzka & Waukesha County Trial

Despite the lack of evidence and after nearly two years had passed, Mr. Pitzka was charged with arson for intentionally starting the fires, contrary to Wis. Stat. §943.02(1)(a), in both Waukesha and Dodge Counties for the first and second fires, respectively. No charges were filed related to the third fire at A.V.'s condominium.

Throughout the pendency of the proceedings, Mr. Pitzka maintained his innocence in both the Waukesha and Dodge County prosecutions. Prior to the two scheduled trials, the prosecutors in both Dodge and Waukesha Counties moved to admit as an “other act” the other pending criminal case, despite the fact that Mr. Pitzka’s Fifth and Sixth Amendment rights had attached upon the filing of each case. Trial counsel in Waukesha County did not object to the admissibility of Dodge County allegations, citing the fact that the court in Dodge County had already granted admissibility of the Waukesha allegations in that case.²

² Due to trial counsel’s agreement that the evidence of the Dodge County fire could be properly admitted, Mr. Pitzka, in addition to arguing that admission was improper on a base-level because the presumption of innocence had attached in the associated criminal case, asserted on appeal that counsel was deficient for agreeing to admission and that prejudice ensued accordingly. The court of appeals determined that trial counsel

Additionally, the Waukesha prosecutor sought admissibility of evidence related to a prior bad end to a romantic relationship that Mr. Pitzka had had with a woman, specifically seeking to introduce a restraining order that had been granted related to another unrelated woman.

The Waukesha trial court granted the admission of both requested “other acts” – the Dodge County fire and the old, unrelated restraining order. The Waukesha County case proceeded to trial ahead of the Dodge County case, with the prosecution arguing that Mr. Pitzka was unhappy with the breakup and started fires at A.V. and her boyfriend’s homes as revenge. The only evidence supporting his guilt was that Mr. Pitzka had purchased fire

was not ineffective because admission of the Dodge County case was proper.

starter logs similar to those found at the scenes on June 27, 2018, the day before the first fire in A.V.'s flip-house.

Despite the lack of evidence, A.V. testified: "I knew ...who did it" because there was "always retaliation" by Mr. Pitzka throughout their relationship. The prosecution referenced Mr. Pitzka's alleged retaliatory character and the Dodge fire extensively in support of his guilt. The prosecution argued that Mr. Pitzka set both fires in retaliation for the break-up in her opening, closing and rebuttal.

The only question at trial before the jury was who set A.V.'s mid-renovation home on fire. There was no dispute, based on the evidence discovered in the home related to the origin and cause of the fire, that the fire was intentionally started. Mr. Pitzka argued that there was no evidence that he started the fire and that A.V. had a realized financial motive to it, one which was realized with

the insurance payout that permitted her to complete the renovation she previously could not afford.

Following the conclusion of evidence, the Waukesha jury found Mr. Pitzka guilty of arson as charged. After the guilty verdict, the criminal prosecution in Dodge County was dismissed in its entirety against Mr. Pitzka.

On direct appeal, the Wisconsin circuit court found that the Dodge fire was properly admissible and that trial counsel's failure to adequately object to its admission was not prejudicial as a result. (A-043).

The court of appeals agreed, affirming the lower court's decision. (A-012-018) Despite arguments that this evidence is different than traditional "other acts" evidence in that the presumption of innocence and other constitutional protections had attached, the court of appeals reviewed the matter only under the general "other

acts” admissibility test, declining to comment at all on the propriety of the admission of a pending criminal charge as other acts evidence. (*Id.*)

REASONS FOR GRANTING THE WRIT

A grant of a writ of certiorari by the Supreme Court of the United States is an extraordinary measure reserved only for the most pressing and impactful of legal matters facing this nation and its people. Such review is to be granted only when necessary to protect a litigant from a substantial harm or unjust outcome of a legal matter. This is such a case.

The central issue of this petition is whether a criminal trial court may permit the admission of “other acts” evidence that underlies a separate *pending* criminal case proceeding prior to resolution of that matter or whether doing so violates a defendant’s Fifth Amendment right to remain silent and Sixth Amendment rights to the

presumption of innocence and right to counsel as afforded to the defendant in the pending matter.

Appellate review of this issue is necessary to reinvigorate the protections of the Fifth and Sixth Amendment rights afforded to all criminal defendants and to avoid future harm to all criminal litigants whom prosecutors seek to unconstitutionally force them to answer a pending criminal matter prior to empanelment of a jury on that case.

The practice of introducing “other acts” evidence of pending criminal matters is widespread in the State of Wisconsin and is likely an ongoing issue in other jurisdictions. Doing so is in direct violation of a criminal defendant’s Fifth, Sixth and Fourteenth Amendment due process rights attached the moment a criminal complaint or charge was issued. Those privileges and protections

include the right to the presumption of innocence, the right to remain silent and the right to counsel.

As of the filing of this writ seeking review, there appears to be no clear legal precedent either approving or disproving of the practice of permitting a pending criminal case to be admitted for the jury's consideration as an "other act" in a cooccurring, but not properly joined, criminal prosecution. While this practice may be common-place in courthouses across the nation, that does not mean that it is proper or in accordance with the protections provided by the U.S. Constitution, and as such, review in this matter would provide practitioners and jurists alike with the necessary framework for considering the admissibility of this type of evidence. Mr. Pitzka moves this court for a writ of certiorari on this issue accordingly.

- I. The admissibility of “other acts” evidence that is the subject of a pending, unresolved criminal prosecution in another criminal proceeding violates a criminal defendant’s constitutional rights afforded by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, and admission of such evidence results in a structural error.

It is the courts' solemn duty to diligently guard a criminal defendant’s constitutionally-protected right to the presumption of innocence and all of the rights that attach upon the filing of a criminal prosecution, regardless of the crime charged, the reputation of the accused, or the pressure to convict. *See Boyd v. United States*, 116 U.S. 616, 635 (1886) (“It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon”). The U.S. Supreme Court has long recognized that “...the presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the

foundation of the administration of our criminal law.”
Coffin v. United States, 156 U.S. 432, 453 (1895).

Every person accused of a crime is constitutionally presumed innocent, due process of law, and the opportunity to present a defense. *Estelle v. Williams*, 425 U.S. 501, 503 (1976)(“The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment” and “(t)he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice”); *Crane v. Kentucky*, 476 U.S. 683, 690 (1985)(“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense’ ”), *quoting California v. Trombetta*, 467 U.S. 479, 485 (1984).

With the presumption of innocence comes several other rights protected by the Fifth and Sixth Amendments and extended to state litigants through the Fourteenth Amendment, such as the right to remain silent and the right to counsel at all critical stages of criminal litigation. “The Fifth Amendment stands between the citizen and his government...” and the “guarantee against self-incrimination... is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well.” *Ullmann v. United States*, 350 U.S. 422, 454, 455 (1956). Because “it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon,” the Fifth Amendment is to be “broad[ly] constru[ed] in favor of the right which it was intended to secure.” *Boyd v. United States*, 116 U.S. 616, 636 (1886); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

A defendant has the right “to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty...for such silence.” *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Requiring a defendant to decide whether to testify at any point in the litigation ahead of the close of evidence will deny him the “unfettered exercise of his own will” and is therefore a violation of his Fifth Amendment right to remain silent and his privilege against self-incrimination. *Brooks v. Tennessee*, 406 U.S. 605, 610-612 (1972).

A fundamental requisite of due process is the opportunity to be heard. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). And an integral part of that due process is the right to offer testimony, including the defendant's own story. *In re Oliver*, 333 U.S. 257, 273 (1948); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The right to testify on one's own behalf at a criminal trial

is among those that “are essential to due process of law in a fair adversary process.” *Faretta v. California*, 422 U.S. 806, 819, n. 15, (1975); *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987); *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); *Pointer v. Texas*, 380 U.S. 400, 403- 406 (1965); *Olden v. Kentucky*, 488 U.S. 227 (1988)(*per curiam*); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (“The core of [the Sixth Amendment] right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and *prepare a defense for trial*”) (emphasis added) (internal citations omitted); *See also Chambers*, 410 U.S. at 302 (“Few rights are more fundamental than that of an accused to present witnesses in his own defense.”).

Just as the right to not speak to law enforcement or the prosecution is protected by the U.S. Constitution until

the final hour of a jury trial, so is the right to permit a criminal defendant to testify and personally present his defense to the jury for its consideration. That right is necessarily intertwined with the right to the effective assistance of counsel on whether testifying at trial is in a criminal defendant's best interests, assessing the case and the facts before the jury at the time of trial.

“Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right” and requiring a defendant and his counsel to decide whether the accused should testify “without the opportunity to evaluate the actual worth of their evidence” violates one's right to “the guiding hand of counsel at every step in the proceedings against him.” *Id.* at 612-613, *citing Powell v. Alabama*, 287 U.S. 45, 69 (1932).

The decision to testify is personal to the defendant and can only be waived by the defendant upon consultation

with counsel. *State of Wisconsin v. Wilson*, 179 Wis. 2d 660, 670-672, 508 N.W.2d 44, 48 (Ct. App. 1993), *cert. denied*, 115 S. Ct. 100; *see also State of Wisconsin v. Simpson*, 185 Wis. 2d 772, 778-779, 519 N.W.2d 662, 663-664 (Ct. App. 1994).

Recently, in *Villareal v. Texas*, the U.S. Supreme Court expounded on the boundaries of the Sixth Amendment and right to counsel, and the need for contemporaneous counsel through all stages of the trial. 146 S.Ct. 756 (2026). There, the defendant opted to testify but his testimony was interrupted by an overnight recess. *Id.* at 761. The court allowed defendant and his attorney to engage in discussion relating to all matters in the case during the recess but strictly prohibited “management” of defendant’s testimony. *Id.* Counsel for defendant objected on the basis of the Sixth Amendment, despite indicating he understood order’s scope. *Id.* After the trial resumed and

defendant finished testifying, defendant was convicted of murder and received a 60-year sentence. *Id.*

In its decision, the high court emphasized that while a defendant has the absolute right to confer with his attorney prior to testifying and following the conclusion of the government's case, the scope narrows only slightly and only once he takes the stand. *Id.* at 768. When testimony begins, the defendant does not have a constitutional right to receive advice about the testimony but does have a constitutional right to discuss matters that go beyond the content of the testimony. *Id.* One such example being that the court cannot prohibit a defendant from obtaining advice on is whether and why a guilty plea should be accepted, even if the "why" includes the impact of ongoing testimony on the trial's prospective outcomes. *Id.* at 767.

Admission of evidence that is the subject of a pending criminal prosecution necessarily denies the

criminal defendant each of these constitutional protections discussed above. From the outset, in order to even consider the admissibility of such evidence, the court must first determine whether there has been a demonstration by the preponderance of the evidence that the defendant in fact committed the “other act” being offered by the prosecution. Doing so requires the court to determine that the defendant has very likely committed the act alleged, denying him the right to be presumed innocent absent a determination by a jury that they are guilty beyond a reasonable doubt.

For example, the applicable test in Wisconsin calls upon the court to engage in such an exercise. In *State of Wisconsin v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the Supreme Court set forth a three-pronged analysis for admission of other acts evidence. The test asks:

- (1) Is the “other acts” evidence offered for an acceptable

purpose under Wis. Stat. §904.04, such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) Is the “other acts” evidence relevant under Wis. Stat. §904.01; (3) Is the probative value of the “other acts” evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *Id.* at 772-773.

Before even reaching that analysis, however, the proponent of the evidence must first demonstrate to the court that the “other act” is in fact true and correct by a preponderance of the evidence, or in other words that the “other act” is more likely than not to have occurred and that the defendant is the one to have committed it. *Dowling v. United States*, 493 U.S. 342, 356 (1990), citing *Huddleston v. United States*, 485 U.S. 681, 689 (1989); See also *State of*

Wisconsin v. Landrum, 191 Wis. 2d 107, 117, 528 N.W.2d 36 (Ct. App. 1995), citing *State of Wisconsin v. Schindler*, 146 Wis. 2d 47, 53-55, 429 N.W.2d 110 (Ct. App. 1988) (“Under 904.04(2), *Stats.*, evidence of other acts is admissible if the evidence is such that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act.”). Thus, to even perform the “other acts” analysis in Wisconsin courts related to the propriety of admitting a charged criminal case as evidence in another non-joined criminal proceeding, the court must violate the defendant’s rights tied to the other criminal matter.

Likewise, using such evidence against a criminal defendant in an effort to establish guilt in another cooccurring proceeding forces a criminal defendant to prematurely make a decision on whether to answer the allegations offered as the “other act” at the time he chooses

to testify regarding the allegations at issue before the jury. If he wishes to answer and testify to about the facts of the case at issue before the jury, he will necessarily be subjected to cross-examination on the “other act” before the trial even commences on that case. This violates his right to remain silent, and also his right to the effective assistance of counsel regarding the decision to testify in the pending criminal matter that has not yet proceeded to trial.

Mr. Pitzka contends this type of error is necessarily structural, and should not be subject to a harmless error analysis. harmless error standards because they affec[t] the framework within which the trial proceeds, and are not simply ... error[s] in the trial process itself.” *United States v.. Gonzalez– Lopez*, 548 U.S. 140, 148 (2006) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307–310 (1991)(internal quotation marks omitted).

These errors are known as structural errors and are those that are “so intrinsically harmful as to require automatic reversal.” *Neder v. United States*, 527 U.S. 1, 7 (1999). This court and other federal circuits have found that the denial of certain rights cannot be tolerated no matter the outcome, as assessment of the harm is often too hard to measure where the error will inevitably signal fundamental unfairness in the impacted proceeding. *See McCoy v. Louisiana*, 584 U.S. 1511 (2018). As such, courts must indulge every reasonable presumption against the loss of constitutional rights. *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

This court has considered at length in other contexts what type of constitutional violation constitutes a structural error. In *Weaver v. Massachusetts*, 582 U.S. 286, 291 (2017), the defendant alleged on appeal that he been denied the right to a public trial and that despite the fact

that counsel did not object to the closure of the courtroom to facilitate jury selection, the error was structural. In *Weaver*, the panel of possible jurors was quite large, approximately 60 to 100 people, and many did not have. *Id.* The judge noted on the record that there was not enough room in the courtroom. *Id.* at 292. All of the seats in the courtroom were filled by the venire panel, and a court officer asked any member of the public to leave the courtroom to ensure there was space for the panel. *Id.* Ultimately, a jury was empaneled and following the presentation of evidence, the jury convicted the defendant of homicide, and he was sentenced to life in prison. *Id.*

The defendant appealed his case, challenging the courtroom closure and stated that he was entitled to public trial. *Id.* at 292-293. The Massachusetts Supreme Court recognized that a “violation of the Sixth Amendment right to a public trial constitutes a structural error,” but that the

defendant failed to show that trial counsel's conduct was ineffective and that a new trial was warranted. *Id.* at 293.

This court granted review and held that purpose of the structural error doctrine "is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* at 295. Moreover, the Court stated that structural error analysis "def[ies] analysis by harmless error standards" and there are three broad rationales as to why some errors are so significant that a new proceeding is always warranted. This court opined:

First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest. This is true of the defendant's right to conduct his own defense, which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." That right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own

liberty. Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error.

Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise "effect of the violation cannot be ascertained." Because the government will, as a result, find it almost impossible to show that the error was "harmless beyond a reasonable doubt," the efficiency costs of letting the government try to make the showing are unjustified.

Third, an error has been deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. It therefore would be futile for the government to try to show harmlessness.

(internal citations omitted). *Id.* at 295-296.

Moreover, this court emphasized the flexibility that exists when determining whether a structural error exists, stating:

These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case.

(internal citations omitted). *Id.* at 296.

In a similar context, the District of Columbia Court of Appeals found that erroneous comments by the trial court implicating the right of a defendant to testify and his decision to take the stand were reversible error. In *Arthur v. United States*, the defendant was indicted for distribution of marijuana and possession with intent to distribute marijuana, subject to an enhanced penalty due to him having prior drug convictions for distribution. 986 A.2d 398, 401 (D.C. 2009).

During trial, the court made comments about the propriety and dangers of Arthur's already expressed decision to testify arrived at following consultation with his

counsel. *Id.* at 403. Arthur, after the commentary and further discussions with his attorney, changed his mind and opted not to testify. *Id.* at 404. At the conclusion of trial, the jury convicted Arthur of both distribution and possession of marijuana

On appeal, Arthur argued that the court's improper comments regarding the negative potential outcomes of his testimony resulted in a structural error in his trial, as it caused him to doubt his decision to testify and infringed on his absolute right to choose to testify. The D.C. Court of Appeals agreed, concluding that a harmless-error analysis generally did not fit such a scenario. The Court of Appeals ultimately concluded that there was a reasonable likelihood of a different outcome had Arthur testified but took time to discuss whether this is such an error that should be deemed structural. *Id.* at 416. The court commented:

The Supreme Court has yet to decide whether the denial of the right to testify is structural in nature, but there would appear to be sound arguments to support the proposition that, like a violation of the right to represent oneself, violation of the right to take the stand in one's defense is also structural in nature.

As highlighted in the *Arthur* case, this court has yet to decide whether the denial of one's right to testify or consult with counsel about that right is a structural error, a plain error or subject to the harmless error analysis, and the time has come for a decision on that issue. Additionally, this court has never addressed the propriety of the admission as an "other act" an unresolved pending criminal matter in another prosecution and whether such a practice runs afoul with the presumption of innocence and due process rights afforded by the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. As such, Mr. Pitzka

implores this court to accept this case for review and to issue binding legal authority on the question posed in this writ.

CONCLUSION

This petition for a writ of certiorari should be granted by this court.

Dated this 13th day of May, 2026.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN LLP

By:

A handwritten signature in black ink, appearing to read "Jason D. Luczak", is written over a horizontal line.

JASON D. LUCZAK

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