

No. _____

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

GUADALUPE PELAYO — PETITIONER

VS.

THE STATE OF ARIZONA — RESPONDENT(S)

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE ARIZONA COURT OF APPEALS, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

This Court's decision in *Rock v. Arkansas* firmly embedded the right of defendants to testify at their trial based on the fifth, sixth, and fourteenth amendments. Since *Rock* affirmatively pronounced the right this Court has not conclusively answered the issues that this Petition presents for consideration.

- I. Does the United States Constitution require a colloquy between the judge and a criminal defendant regarding the accused's decision on whether to testify at trial?
- II. If an inquiry by the trial judge is required, does the colloquy need to determine whether the benefits and risks of that decision have been discussed between the defendant and his or her attorney for the judge to find that the defendant's decision on whether to testify was made "intelligently"?
- III. If the court violated the Constitution when it found that Petitioner's waiving his right to testify at trial was made "intelligently" is the error structural

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no other parties to the case.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest court to review the merits, the Arizona Court of Appeals, Division One, appears at Appendix A to the petition and is unreported.

JURISDICTION

The date the Arizona Supreme Court, the highest court in Arizona, denied review of this case was November 23rd, 2025. The deadline for filing this Writ is February 23, 2026. The Arizona Supreme Court's Order denying review appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment:

No person shall . . . be compelled in any criminal case to be a witness against himself

Sixth Amendment:

In all criminal prosecutions , the accused shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, § 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. §2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1)

resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2)

resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1)

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2)If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A)the claim relies on—

(i)

a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii)

a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B)

the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2255**(a)**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b)

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(e)

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

The Petitioner shot the two victims in the parking behind a bar where they earlier had a dispute. The victims left the bar about 15 minutes before the petitioner but lingered in the parking lot. While still in the bar the petitioner texted his wife and asked her to bring his gun to him. When the petitioner left the establishment he continued to argue with the victims after they confronted him in the back parking lot that was shared with several businesses. The petitioner's wife arrived and he took the gun from her car. Seeing this, the victims turned to run away. He fired a total of 11 shots at the two victims, striking the first victim seven or eight times and striking the second victim three times. (App A, ¶2). Subsequent investigation showed that the victims were struck by the gunfire from behind. (App. A, ¶2).

An independent eyewitness reported the petitioner took the "final shots" at the victims while they were on the ground. Petitioner's wife testified that she heard one of the victims approach the petitioner and say, "what's up now, motherfucker?" She witnessed her husband chase the victims and saw one of them trip. She testified that she heard one gunshot but did not see the actual shooting.

At trial, the petitioner asserted self-defense. This defense required the State to prove that it was not objectively reasonable for the petitioner to protect himself from the victims by shooting them.¹ The State argued that he did not act in self-defense because he shot the two victims from behind while they were running away. (App A, ¶3)

The petitioner declined to testify. There was scant evidence of self-defense without the petitioner providing more detail regarding what had occurred that might not be readily apparent, and which would make his actions objectively reasonable. The only evidence regarding self-defense was general testimony of the confrontation inside the bar and the statements from the petitioner's wife regarding a profanity uttered toward him.

After the State rested, the petitioner acknowledged to the judge that he had discussed his right to testify with his attorney, although it was never specified whether that discussion took place before, during or after the State finished presenting its evidence. The judge did not ask him whether he felt that he had sufficient understanding of the

¹ A.R.S. §13-404(A); A.R.S. §13-205(A); *State v. King*, 225 Ariz. 87, 90, ¶12 (2010)

advantages and disadvantages of testifying, or if the attorney discussion that did occur included anything more than an advisement that the petitioner could not be compelled to testify. The judge never ascertained whether the petitioner felt that he sufficiently understood the ramifications of his decision.

This was the verbal exchange in which the judge felt that there was an “intelligent” waiver of the petitioner’s right to testify.

The Court: Mr. Pelayo, the State has rested. As you have been advised, and as the jury has been advised, you have the right to remain silent. You have the right to not testify.

Are you aware of that right?

The Defendant: Yes.

The Court: You are *entitled to testify if you would like to testify, but you cannot be compelled*—compelled to testify. *Have you discussed this with your attorney?*

The Defendant: Yes

The Court: And at this time are you making this decision whether to testify or not on your own?

The Defendant: Yes

The Court: Are you under any threat or force or coercion to make a decision today?

The Defendant: No

The Court: Have you had any drugs, alcohol, or medication in the past 24 hours?

The Defendant: No

The Court: And what is your decision today?

The Defendant: Not to testify.

The Court: Okay. Thank you. That is all.

The Court finds that the defendant has been advised of his right, and he has made his decision today knowingly, *intelligently*, and voluntarily.

(Appendix C (*emphasis added*)).

The petitioner was convicted for two counts of first-degree murder. The court imposed two consecutive life terms in the Arizona Department of Corrections, Rehabilitation and Reentry. (App. A, ¶6).

The Arizona Court of Appeals affirmed his sentences. It rejected his argument that the plea colloquy was deficient and that the judge abused her discretion in finding that the waiver of his right to testify was “intelligently” made. (App. A, ¶¶ 14-17)

He petitioned the Arizona Supreme Court for review, which was denied. (App., B)

REASONS FOR GRANTING THE WRIT

INTRODUCTION: IS A COLLOQUY BY THE TRIAL JUDGE REQUIRED AT TRIAL TO SAFEGUARD CRIMINAL DEFENDANTS' RIGHT TO TESTIFY?

Does the right to testify *at trial* require trial judges to directly ask defendants, or their attorney, whether they have been adequately *advised of the risks and benefits* of this choice before resting? This Petition presents this precise issue which, in turn, depends on the fundamental unanswered question that has lingered for nearly forty years since this Court's decision in *Rock v. Arkansas*²: is a direct canvass of the defense by the trial judge never required, sometimes required or always required before the defense rests its case?

The time is now to settle this important issue of federal constitutional law because leaving it open has only created uncertainty and inconsistent decisions. This is an important federal constitutional issue that must be decided by this Court. The opinions from the lower federal courts (and most of the states) differ from a significant minority

² 483 U.S. 44, 52 (1987)

of state courts regarding whether there is this federal constitutional duty upon trial judges. The varied opinions on this issue assert apparent contradictory reasoning which has meant that similarly situated defendants are treated differently.

Further, this Court's reluctance to issue a clear decision is inconsistent with defendants' pretrial rights that this Court has traditionally protected by requiring a canvass. Regarding federal review of state criminal convictions, a definitive decision is needed to open federal courthouse doors to state litigants seeking initial direct relief and to equalize them with federal prisoners by conclusively unifying this issue. 28 U.S.C. §2254(d)(1), 28 U.S.C. § 2254(e) and (i) and 28 U.S.C § 2255(b).

All the pertinent arguments, both for a colloquy and against it, have been fully litigated in the lower circuits and the states. This case sets a fine table for this Court to issue either a simple one-course decision or, instead, provide a gourmet feast in this area of trial rights of defendants.

ARGUMENTS SUPPORTING THE GRANTING OF CERTIORARI

- I. **The presented primary issue is an important question for both the federal circuits and the states that only this Court can decide: does the right to testify at trial deserve inclusion with the other fundamental trial rights that may only be waived by an affirmative canvass.**

This is a recurring important issue that deserves resolution by this Court now. The right to testify at one's own criminal trial is part of the right to a complete defense, due process and a corollary to the fifth amendment right to silence. *Rock v. Arkansas*, supra. Waivers of fundamental rights must be knowing, intelligent, and voluntary. Whether that waiver must be affirmatively waived for the right to testify continues to be undecided, despite forty years of litigation³.

³ *State v. Gulbrandson*, 184 Ariz. 46, 64 (1995) ("However, the Supreme Court has not stated whether the defendant must make a knowing, intelligent, and voluntary waiver of this right. Cf. *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (holding that fundamental right to counsel requires trial judge to determine whether defendant has made 'an intelligent and competent waiver'").

A. Is the right to testify included in the pantheon of rights that are protected by requiring trial judge colloquies with defendants or their attorneys?

This Court has recognized and protected other fundamental trial rights by requiring a trial court advisement to the defendant. Boykin, 395 U.S. 238 (1969); Faretta v. California, 422 U.S. 806 (1975), Adams v. United States ex rel. McCann, 317 U.S. 269, 277-279 (1942). This Court identified the right to testify as one of the most fundamental constitutional rights; even greater than the right to self-representation, which itself requires a specific inquiry for any waiver of it to be valid. Rock, supra, citing Faretta, supra; accord; State v. Bey, 161 N.J. 469; 736 A.2d 469, 513 (N.J. 1999). It appears anomalous to protect waiver of rights decisions *before* trial but not extend those same protections to waivers made at the *actual trial*.

B. This Court may make a narrow or broad decision for ensuring that defendants knowingly, intelligently and voluntarily waive their right to testify at trial.

Because the trial court engaged in a colloquy with the petitioner, the narrow issue presented by this Petition is whether the trial court

correctly found that the waiver of the petitioner's right to testify was "intelligently" made. Alone, this is an important issue that itself warrants accepting this Writ. The trial judge never discussed with the petitioner or his counsel whether he had been advised of the risks and benefits of waiving his right to testify.

But before reaching that narrow issue, this Court will need to address the lingering underlying fundamental question regarding any duty for trial judges: whether they are *ever* obligated to make this inquiry of either the defendant or counsel. A legally correct but incomplete judicial inquiry would presumably not lead to a violation of the federal constitution if there were no explicit duty to canvass the defense, unless this Court opts to fashion this requirement through its rule-making powers. (*See, Mistretta v. United States, 488 U.S. 361, 386-388 (1989); State v. Morel-Vargas, 273 A.3d 661 (Conn 2022)*).

C. There are many related issues that this Court can resolve from this petition.

Because the question of a colloquy has been festering for nearly four decades, many related questions are also ripe for a decision. This Petition provides the opportunity for guidance on these other matters:

1. What evidence can a court look to in determining a knowing, intelligent, and voluntary waiver if a colloquy is not the sole means to find a valid waiver⁴?
2. If a colloquy is required, is there a parallel mandatory advisement of the right to remain silent when defendants opt to testify⁵?
3. Should alleged violations of this right to testify be reviewed on direct appeal or in post-conviction relief⁶?

⁴ Ohio v. Robinette, 519 U.S. 33, 40 (1996) (“The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and ‘voluntariness is a question of fact determined by all of the circumstances.’” (quoting Schneckloth v. Bustamonte, 412, U.S. 218, 248-249 (1973); State v. Allie, 147 Ariz. 320, 328 (1985); but see Moore v. People, 318 P.3d 511 (Colo 2014); State v. Lotches, 331 Or. 455, 17 P.3d 1045 (Or. 2000)).

⁵ Brown v. Artuz, 124 F.3d 73, 79 (2nd Cir. 1997) (“Just as the trial judge need not stop a defendant called by defense counsel to the stand and explain the right not to testify, the judge need not intervene when counsel announces that the defendant rests and the defendant has not testified.”); People v. Nakahara, 134 Cal.Rpt.2d 223, 230-231, 30 Cal.4th 705, 68 P.3d 1190 (Cal. 2003).

⁶ Moore v. People, supra, at 516-517, ¶¶11-14, discussing Colorado Supreme Court overruling prior decision for direct appeal and now requiring challenges limited to post-conviction relief under ineffective assistance of counsel).

4. Would an inquiry with defendants on the risks and benefits of testifying also protect their right to control the objective of the defense⁷?

By granting certiorari, this Court will be able to answer these questions in addition to the two fundamental issues presented by this case.

II. Decisions between most courts and the minority of state courts are split, and this Court's jurisprudence for many pretrial rights is apparently inconsistent with the majority position.

- A. There is a split between state courts of last resorts and the federal circuit courts, with the minority of state courts.

Most states agree with the federal circuits that no court colloquy is required. (see, *e.g.*, Texas, Michigan, Kansas⁸) But a significant minority

⁷ *McCoy v. Louisiana*, 584 U.S. 414 (2018).

⁸ *Johnson*, *supra*; *People v. Sinnott*, 836 N.W.2d 689, 689-690 (2020); *State v. Anderson*, 276 P.3d 200, 212 (Kan. 2012)

of states extend the protections of a colloquy for other fundamental rights to an advisement of the right to testify in at least some, if not all cases (see, *e.g.*, Alaska, Hawaii and Tennessee⁹). This divide has been justified by those courts utilizing several conflicting arguments. Juxtaposed are the following theories, along with the counterarguments, that have been advanced by each side of the debate.

1. Waiver of the right to testify is presumed¹⁰, but waiver is not presumed of other fundamental personal rights, including those contained in the sixth and fourteenth amendments.¹¹
2. Courts have warned that the risk of intruding into the attorney and client relationship is too great¹², but others have found that an inquiry is not only both

⁹ *LaVigne v. State*, 812 P.2d 217 (Alaska 1991); *Tachibana v. State*, 79 Hawai'i 226, 900 P.2d 1293 (Haw. 1995); *Momon v. State*, 18 S.W.3d 152 (Tenn 1999)

¹⁰ *Allie*, supra; *State v. Cantu*, 547 P.3d 477 (Kan. 2024); *U.S. v. Pennycooke*, 65 F.3d 9, 12 (1995).

¹¹ *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938); *Carnley v. Cochran*, 469 U.S. 506 (1962)

¹² *United States v. Anderson*, supra, at 1259.

permissible¹³ but even standard practice in federal and state courts¹⁴

3. By advising defendants of their right to testify *during trial* the judge may improperly influence defendants' decision to testify or remain silent¹⁵. However, innocuous advisements by the court do not violate defendants' constitutional rights¹⁶.

4. Some courts have analogized this decision to tactical decisions¹⁷ (by attorney) while recognizing this

¹³ *State v. Denson*, 799 N.W.2d 831 (Wisc. 2011); *State v. Ford*, 82 A.3d 75 (Me 2013); *LaVigne v. State*, supra); *United States v. Anderson*, 1 F.4th 1244 (11th Cir. 2021).

¹⁴ *Thompson v. Battaglia*, 458 F.3d 614, 619 (7th Cir. 2006).

¹⁵ *Thomas v. State*, 293 A.3d 139 (Del. 2023).

¹⁶ *US v. Stark* 507 F.3d 512, 514, 516 (7th Cir. 2007) “There is nothing wrong, however, with a district court's asking a defendant directly if he intends to testify.”; *United States v. Anderson*, supra, at 1259.

¹⁷ *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972); *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir.) (en banc) (cert denied, 506 U.S. 842) (1992) (“In *Rock*, the Supreme Court did not need to decide whether the constitutional right to testify was fundamental in character, and therefore personal to the defendant, or whether it could be waived by the defense attorney.”).

right as a personal one that is not waivable by the attorney.¹⁸

5. Trial judges should not usurp the primary responsibility of trial counsel¹⁹, yet the same responsibility is on attorneys for *pretrial waivers* that avoid trials, as discussed in the next section.

B. This Court traditionally protects many *pretrial* rights by requiring a colloquy to ensure a valid waiver of them.

This Court protects many pretrial rights by requiring the trial court to canvass the defendant directly to determine if any waiver is knowing, intelligent, and voluntary. *Zerbst*, supra, *Boykin*, supra; *Missouri v. Frye*, 566 U.S. 134, 146-147 (2012), *Adams*, supra.

These competing inconsistent justifications need clarification. This petition squarely presents the issue so that this Court can begin a

¹⁸ *Teague*, supra, at 1532; *Brown v. Artuz*, 124 F.3d 73, 77 (2nd Cir. 1997) (“Arguments are available to support either (waivable by the attorney or a personal right not waivable by the attorney). . . However, every circuit that has considered this question has placed the defendant's right to testify in the "personal rights" category — *i.e.*, waivable only by the defendant himself regardless of tactical considerations.”).

¹⁹ *Brown*, supra, at 79; *Teague*, supra at 1533.

resolution as to which approach and justifications are constitutionally correct.

III. A decision by this Court is needed to finally open the door to federal court to state prisoners to challenge the right to testify issues directly, and to remediate an additional barrier in ineffective assistance of counsel claims that federal prisoners do not have.

A. Initial Petitions to Federal Court by State Prisoners challenging alleged errors solely depend on this Court's jurisprudence.

Until this Court definitively decides if or when a colloquy by the trial judge is constitutionally required then *all* state court petitioners in their first filing in federal court are barred from raising this issue. Because of finality, comity and federalism concerns, initial allegations of federal constitutional violations are restricted to clearly established federal law *as decided by this Court's decisions*. 28 U.S.C. § 2254(d)(1).

Federal prisoners do not have the same exclusivity to United States Supreme Court decisions in their initial motion when seeking initial federal review under 28 U.S.C. §2255(a). Federal prisoner may move the

court for review of their sentence “. . . upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States.” Reviewing federal courts must use this Court’s precedent and may use those of lower federal courts. (see, e.g., *Bear Stops v. U.S.*, 339 F.3d 777, 781-782 (8th Cir. 2003) which did not limit examination of the confrontation clause to United States Supreme Court precedent, relying, in part, on other precedent from its circuit).

The right to testify is a fundamental right applicable to all defendants and should be applied equally. Identical claims should not be treated differently depending on the status of state versus federal convictions.

B. Federal courts give state court decisions on ineffective assistance of counsel claims greater deference than federal criminal convictions.

If the complaint to the federal court involves ineffective assistance of counsel, state court litigants in federal court face more hurdles for relief than their federal counterparts. *Renico v. Lett*, 599 U.S. 766 (2010) (This distinction creates "a substantially higher threshold" for obtaining relief than *de novo* review. (*citation omitted*)). AEDPA thus imposes a

‘highly deferential standard for evaluating state-court rulings,’ (*citation omitted*), and ‘demands that state-court decisions be given the benefit of the doubt,’ (citation omitted).”

Previously, this Court sought to equalize claims for ineffective assistance of counsel for both state and federal when the federal review is the first opportunity to raise it. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court specifically carved a narrow exception into *Coleman v. Thompson*, 501 U.S. 702 (1991) which had provided the general rule procedurally barring state claims for ineffective assistance of counsel that were either ignorantly or negligently not presented to the state courts for relief. But this Court notched an exception into that general statutory rule to give state prisoners potential relief “. . . to protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel.” *Ryan*, at 9 (*emphasis added*).

This Petition will, likewise, permit this Court to equalize state and federal petitioners making identical claims. If federal constitutional law is violated by the majority practice, this Court needs to clearly and conclusively identify the parameters of the violation. A more decisive opinion than the current one in *Rock* will lead to conformity by all courts

which will give state and federal prisoners the same constitutional law to apply to identical claims.

IV. This petition presents the ideal vehicle for this Court to bring clarity to this long-festering issue and it is well-suited for this Court to guide lower federal and state courts on other issues that directly flow from the issue presented.

A. Clarifying this issue regarding fundamental constitutional rights is consistent with this Court's prior jurisprudence.

In *Iowa v. Tovar*, 541 U.S. 77 (2004) this Court answered the same specific question for the issue of self-represented defendants as the one presented here for right to testify. In *Tovar*, the petitioner asked this court to require specific, rather than generic, advisements for the right to be represented by an attorney. *Tovar* argued that the scope of the inquiry required that the trial judge specifically: "(1) advise the defendant that 'waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked'; and (2) 'admonis[h]' the defendant 'that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether,

under the facts and applicable law, it is wise to plead guilty””? *Id.*, at 81. This Court clarified that only a general advisement is constitutionally required²⁰. This petition presents the same inquiry regarding the right to testify during trial; does it require a specific inquiry to advise defendants of the risks and benefits of testifying.

Likewise, this Court requires general advice to be given by attorneys to defendants regarding potential immigration consequences before accepting waivers of their right to a trial. *Padilla v. Kentucky*, 559 U.S. 356 (2010). The well-known *Boykin* and *Faretta* rights require pre-trial protections of any waiver of rights to a trial or representation.

This Court should finally settle the question regarding whether or when defendants’ actual *trial rights* ever warrant a less-stringent standard of protection than their *pretrial rights*. Deciding this issue will not open the floodgates for review of decisions already decided unless this

²⁰ *Id.*, at 81. (“We hold that neither warning is mandated by the Sixth Amendment. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.”).

Court determines that violations of any new decision is to be applied retroactively.²¹

B. This petition requires a decision on the fundamental question: whether the trial colloquy for the right to testify is required as a matter of federal law. But this Court can also define the parameters of how trial courts can identify an “intelligent” waiver of rights.

Before deciding the narrow issue of this Petition regarding an “intelligent” waiver, it entails a decision whether trial courts are ever required to make the advisement to defendants at trial, as either a matter of routine or because of the specific facts of the individual case. Because the court engaged the petitioner regarding whether his waiver was knowing and voluntary, the second issue to decide is whether that colloquy was adequate for the trial court to find an *intelligent* waiver.

Most of the litigation in this area only concerns a failure of trial courts to make *any* inquiry of the defense, not just an incomplete canvass. Here, the Petition alleges that the colloquy omitted a required

²¹ *Williams v. Taylor*, 529 U.S. 362, 381 (2000); *Carey v. Musladin*, 549 U.S. 70, 77 (2006).

“intelligent” aspect of valid waivers of rights; specifically, whether the finding that the waiver was “intelligent” can be justified without determining if the risks and benefits of testifying had been discussed with the defendant.

If there is no duty upon the trial court, any incomplete but accurate advisement given that does not mislead defendants would answer the question that is presented in this petition. But if a colloquy should be required, this Court can opine on those circumstances that mandate it, what any advisement or inquiry must contain for it to be a valid waiver and if other factors from the trial can impact the waiver’s validity, either alone or in conjunction with statements from the defendant.

C. This petition presents the important question of whether errors that deprive defendants of the right to testify are reviewed as structural or harmless.

The third issue to resolve is whether any error should be viewed as structural. In *Alvarez-Perdomo v. State*, 454 P.3d 998 (Alaska 2019) the court found that a court compelling a defendant to testify is structural error while confirming that trial courts must advise defendants of their right to testify. Since the right to remain silent is a corollary right to the

right to testify, it seems that the same logic for structural error should apply. Kansas and South Carolina also analyze these right-to-testify violations as structural error. *State v. Cantu*, 318 Kan. 759, 547 P.3d 477, 479 (2024); *State v. Rivera*, 402 S.C. 225, 249, 741 S.E.2d 694 (S.C. 2013)

On the other hand, *Bey*, *supra*, 488-491 analyzed violations of right to testify for ineffective assistance of counsel. It did not find any error to be structural. Texas, in *Johnson v. State*, 169 S.W.3d 223, 232-235 (Tex. Crim. App. 2005) found that trial judges have no duty to inform defendants of right to testify and reviewed alleged errors for post-conviction relief for ineffective assistance of counsel.

The decision to testify or remain silent is one of the most important decisions that criminal defendants make at trial. How to ensure that this decision is made “intelligently” needs to be clarified by this Court.

CONCLUSION

This is the time and this is the petition for the Court to put this issue on the right to testify to rest. All the arguments in favor of or against the current majority rule have been fully vetted. The Court can justify an expansive opinion should it be warranted. Both federal and state courts need clear guidance to bring uniformity to this recurring

important fundamental right of criminal defendants. A clear decision will put state applicants on an equal footing with federal movants when they seek relief in federal courts. Granting the writ will provide context for this Court's decisions in other trial rights cases.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 23rd day of February 2026.

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