STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2013 AP 000467 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A COURT OF APPEALS DECISION AFFIRMING JUDGMENT OF CONVICTION IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

Issue One: Whether the Circuit Court erred when it stripped Anthony of his right to testify, pursuant to ***Illinois v. Allen***, when Anthony's behavior was never so disruptive, obscene, or violent to merit removing him from his trial.

The Circuit Court and Court of Appeals both answered: NO.

Issue Two: Whether the Circuit Court's error in denying Anthony his constitutional right to testify in his own defense to facts relevant to elements of the charged crimes and defenses was subject to harmless error review.

The Court of Appeals answered:
YES.

POSITION ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by this court for full briefing, both oral argument and publication appear warranted.

STATEMENT OF THE CASE

Defendant Eddie Lee Anthony was convicted by a jury, the Hon. Richard J. Sankovitz presiding, of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a). (R. at 29.) At trial, Anthony presented no defense to the State's allegations that he stabbed the mother of his children 47 times. (R. at 59-67.) He had intended to defend from the charge of first-degree intentional homicide by arguing that he acted in self-defense. (R. 40 at 2.) However, the Circuit Court stripped him of his right to testify after the State rested. (R. at 66.)

Anthony filed an appeal, which argued that the Circuit Court committed error by denying him his right to testify in his own defense. (Pet'r's Appellate Br. at 9-12). The Court of Appeals denied the appeal. ***State v. Anthony***, No. 2013AP467-CR, unpublished slip opinion (Wis. Ct. App. Jan. 14, 2014). Specifically, the Court of Appeals relied on ***Illinois v. Allen*** to conclude that Anthony forfeited his right to testify in his own defense when he exhibited "defiant and agitated behavior, and rant[ed] about irrelevant topics." ***Id.*** at 6; ***Illinois v. Allen***, 397 U.S. 337, 90 S. Ct. 1057 (1970). . The Court of Appeals then concluded that, "even if the trial court should have permitted Anthony to testify, the refusal to do so was harmless." ***Id.*** at 7.

During the litigation of this case, Anthony could not find nor has the State identified one single other case, even merely persuasive, where a defendant was stripped of his right to testify without having been so disruptive as to render it impossible to carry on the trial in his presence. Therefore, this case presents the question of whether Wisconsin wants to go further than any other court has gone, and allow displeased trial judges to strip away a defendant's right to testify in his own defense as a preemptive and

protective measure, when the standard for disruptiveness set by the United States Supreme Court in ***Illinois v. Allen*** is not met.

After Anthony's appeal was decided, this Court decided ***State v. Nelson***, which held that a harmless error analysis applied when a Circuit Court improperly stripped a defendant of her right to testify as to facts irrelevant to the elements of the crimes charged or any proffered defense. No. 2012AP2140-CR, (Wis. Sup. Ct., July 16, 2014) at ¶28. Accordingly, the stark issue in this appeal is whether it is harmless or plain error when the excluded testimony is directly relevant to the elements of the crimes charged and the defendant's only intended defense. In other words, it considers whether there is a distinction between a defendant's right to testify generally, and his right to testify in his own defense.

STATEMENT OF FACTS

Anthony, an African-American, lived with Sabrina Junior and their children. (R. 62 at 5-6.) On August 20, 2010, Anthony stabbed and killed Sabrina with an icepick. (R. 59 at 11; R. 64 at 54.) Anthony was convicted of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a). (R. 29.)

At trial, the State presented evidence of the following. Anthony and Sabrina were walking through their neighborhood and began arguing. (R. 62 at 10-11.) The couple returned to their home where the argument escalated. (*Id.* at 16, 18.) Their eldest daughter entered the apartment to find Sabrina's body as Anthony was leaving. (*Id.* at 21, 24.) Anthony fled and was arrested in Illinois. (R. 64 at 11, 14.)

Anthony did not contest these allegations during the State's case-in-chief. Instead, he intended to defend

against the charges by arguing that he acted in self-defense, and to provide a neutral explanation for his subsequent flight. (R. 66 at 35-37.)

After the State rested, trial counsel advised the court that Anthony would be taking the stand. (*Id.* at 23.) The court addressed Anthony directly, explaining that if he were asked about whether he was convicted of a crime, he should respond that he had been convicted of two crimes. (*Id.* at 24.) Anthony responded directly to the court that he had been convicted three times. (*Id.* at 25.) The Circuit Court corrected Anthony, indicating that he would only be allowed to say that he had been convicted twice. (*Id.* at 25-26.) Anthony indicated that this was not factually true, as he had served 12 years for a third conviction from 1966 which was later deemed wrongful. (*Id.* at 25-28.)[1] The Circuit Court instructed him that he would not be allowed to mention this third conviction, because it was "irrelevant" to whether Anthony killed Sabrina Junior. (*Id.* at 28.) Anthony was insistent that the jury should "know the truth, the whole truth." (*Id.* at 28-29.) The court had difficulty understanding Anthony's logic at times, due in large part to insisting on conversing with him personally rather than with his counsel. (*Id.* at 27-35.)

In order to prevent Anthony from mentioning the wrongful conviction, the court ordered that Anthony would not be allowed to testify in his own defense. (*Id.* at 33.) The court explained:

[1] Previous pleadings mistakenly asserted that Anthony was the victim in the 1966 robbery. As noted by the State in its Brief of Respondent, filed in the Wisconsin Court of Appeals, this was inaccurate. (R. at 40:3; State's Reply Brief at 3-4.) The only robbery at issue in this case was the 1966 wrongful conviction that resulted in 12 years incarceration for Anthony.

> The difficulties [if Anthony testified] would be visited on your head. First of all, the jury would hear the part about the armed robbery but not all the rest of the story and so they might think oh, this is the guy who's not only accused of killing Miss Junior but he's also an armed robber and they wouldn't get the rest of the facts. That's one problem. I want to avoid that.
>
> The other problem is this: You're going to be shackled to the witness stand. I can't easily remove you from the courtroom. I'll have to remove the jury from the courtroom instead, and removing the jury from the courtroom is not something I can do effortlessly or quietly or without them seeing that you would be making a ruckus on the stand. When I say "ruckus" what I'm referring to is the way that you were very, you know, very animated way talking before [sic]. I don't want you to look worse in the eyes of the jury because of the way you're behaving on the stand… I don't want to make this worse for yourself than it is already [sic]…
>
> I don't want [the jury] to see you acting in a way that shows you might be a person who easily loses his temper or can't follow the rules other people follow because they might use that evidence to convict you…
>
> If it was a simple balancing test, if somebody told me that they were intentionally going to violate one of the rules that we set for the court and it carried only a little bit of prejudice… We don't know for sure whether this is something that would make a difference to this jury that might up-end this very carefully constructed process we have of getting the truth which is why I've said this can't come in.

(*Id.* at 34-46.) When trial counsel suggested that Anthony be permitted to testify and the State could argue and the court could instruct as necessary as to any irrelevant information, the court refused, explaining, "That's putting the inmates in charge of the asylum; so I'm sorry, I'm not going to go that

route." (*Id.* at 47.) The court further characterized Anthony's having been imprisoned for 12 years for a crime he did not commit as "[Anthony's] sorry tale about what happened in the sixties." (*Id.* at 46.)

Trial counsel made an offer of proof that Anthony would have testified that he acted in self-defense when he killed Sabrina. (*Id.* at 35-37.) Trial counsel further objected that the probative value of Anthony's self-defense testimony outweighed the prejudicial value of any potentially irrelevant testimony he might attempt to give. (*Id.* at 45-47.)

Anthony has consistently maintained that he would have testified that Sabrina was a heavy user of crack cocaine. (R. 40 at 4.) Sabrina had a history of being aggressive while high on crack cocaine, and was exhibiting severe aggression in connection with being high of crack cocaine on the night of her death. (*Id.*) According to Anthony, in the physical confrontation that ultimately resulted in her death, Sabrina threatened and attempted to kill Anthony, who was defending himself and their children against her attack. (*Id.*) The jury that convicted Anthony never heard this information, and no defense was presented.

Trial counsel further explained that Anthony would have explained why fleeing was not indicative of guilt, because he has a special fear of police in Illinois and Wisconsin due to events in his past including the wrongful conviction from 1966 with which the court took issue, so flight was a natural response. (*Id.* at 36-37.) Again, the jury that convicted Anthony never heard this information.

During closing arguments, the State repeatedly referenced the fact that Anthony fled the scene in order to prove that Anthony intended to kill the victim. (R. 67 at 24, 26-28, 51-52.) The State argued:

> Did he call the police? Did he call the fire department? Did he tell Larina let alone anyone upstairs? Did he do any of that? ***No, he lets her die and he goes to Illinois.*** That's what he does. ***That again shows his intent, the state of mind, that he wanted to kill her***.

(R. 67 at 51.)

Anthony remained in the courtroom for the entirety of his trial. (*See generally,* R. 66.) To the extent that one could conclude that Anthony's reasonable expression of frustration upon denial of his right to testify in his own defense was "disruptive," even then the trial process was never impeded and he was not at risk of being removed from the courtroom. (*See, e.g., Id.* at 30-33.) Even when most strained, the Circuit Court only believed it necessary to suggest Anthony take a deep breath (*Id.* at 30), allow him a minute to collect his thoughts (*Id.* at 32), and to talk to his attorney off the record (*Id.* at 33).

Anthony anticipated that his defense would be one of self-defense, but he was the only surviving witness to his confrontation with Sabrina. In a feeble attempt to mount a defense, he called his daughters to the stand, but they just testified they had not seen and could not testify as to what occurred between Sabrina and Anthony. (R. 66 at 59-67.) In effect, Anthony failed to present any defense at all.

Accordingly, the jury convicted Anthony of one count of 1st Degree Intentional Homicide, and Anthony was sentenced to life imprisonment.

Anthony appealed, arguing that the Circuit Court erred when it denied him his right to testify in his own defense, because this obliterated Anthony's only defense, and there is nothing on record to indicate that Anthony either was disruptive or did not intend

to tell the truth. (*See Generally* Pet'r's Appellate Br.) Anthony concluded that, no matter what standard of review the court deemed appropriate, Anthony should have been granted a new trial because of "the Circuit Court's denial of Anthony's constitutional rights to testify in his own defense and to present a meaningful defense." (Pet'r's Appellate Br. at 12-13.)

In considering Anthony's arguments, the Court of Appeals first looked to ***Illinois v. Allen***, noting, "by refusing to comply with the trial court's order, exhibiting defiant and agitated behavior, and ranting about irrelevant topics, Anthony forced the trial court to decide whether the jury should be allowed to hear Anthony discuss irrelevant matters and potentially see Anthony lose his temper on the stand." ***State v. Anthony***, No. 2013AP467-CR, unpublished slip opinion (Wis. Ct. App. Jan. 14, 2014) at 6-9. However, the court did not directly address whether Anthony was properly denied his right to testify. ***Id.*** Instead, it held that the denial was subject to a harmless error analysis, and that the denial was harmless because of an "overwhelming amount of evidence would have undermined his theory."

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT STRIPPED ANTHONY OF HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE BECAUSE HIS BEHAVIOR WAS NEVER SO DISRUPTIVE, OBSCENE, OR VIOLENT AS TO INTERFERE WITH HIS TRIAL

A criminal defendant's due process right to testify in his own defense is fundamentally important, as it cuts to the very heart of the fact-finding process. As

former Judge Godbold of the Fifth Circuit once explained:

> To deny a defendant the right to tell his story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of his voice.

Wright v. Estelle, 572 F.2d 1071 (5th Cir. (en banc) (Godbold, J., dissenting.) The United States Supreme Court has held that criminal defendants have a right to testify in their own defense under the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. ***Rock v. Arkansas***, 483 U.S. 44, 49-53, 107 S.Ct. 2704 (1987); ***Wisconsin v. Albright***, 96 Wis.2d 122, 129, 291 N.W.2d 48 (1980).

In determining that a criminal defendant has a due process right to testify in his own defense, the Wisconsin Supreme Court cited ***Harris v. New York***, in which the U.S. Supreme Court correlated the absolute right of a defendant to refuse to testify with the right to affirmatively testify: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." ***Harris v. New York,*** 401 U.S. 222, 225, 91 S.Ct. 643, 645, (1971) (cited by ***Albright***, 291 N.W. 2d at 490). In ***Albright***, the Wisconsin Supreme Court concluded, "There is a constitutional due process right on the part of the criminal defendant to testify in his own behalf." ***Id.***

Across the country, there are very few limitations to a criminal defendant's right to testify in his own defense, such as knowing, intelligent and voluntary waiver. ***Albright***, 96 Wis.2d at 129. The right to testify is also subject to the defendant telling the truth. *See, eg,* ***State v. McDowell***, 272 Wis.2d 488,

681 N.W.2d 500 (2004). The U.S. Supreme Court has indicated that limitations on the right to present relevant testimony are permissible, but those limitations "may not be arbitrary or disproportionate to the purposes which they are designed to serve." ***Rock v. Arkansas***, 483 U.S. at 55-6. That is, in all cases in which a right to testify has been limited, the Circuit Court was *required* to balance the decision with the effect on the defendant.

Federal appellate courts agree that this is a personal and fundamental constitutional right, and that only a "knowing, voluntary and intelligent" waiver by the defendant himself is sufficient to relinquish this right. For example, in ***United States v. Leggett***, the Third Circuit declared, "If a defendant does waive the right [to testify], the waiver must be knowing, voluntary, and intelligent." 162 F.3d 237, 246 (3rd Cir. 1998), *see also* ***U.S. v. Stark***, 507 F.3d 512, 517 (7th Cir. 2007); ***U.S. v. Hung Thien Ly***, 646 F.3d 1307, 23 Fla. L. Weekly Fed. C 141 (11th Cir. 2011); ***Chang v. U.S.***, 250 F.3d 79, 82, 86 (2nd Cir. 2001).

The primary conflict between the circuits has, until recently, focused on what constitutes waiver, and whether it need be affirmative. In ***Galowski v. Murphy***, the defendant alleged that his attorney unilaterally waived his right to testify. 891 F.2d 629, 636 (7th Cir. 1989). After noting "the right to testify is a personal right that belongs to the accused and may be waived only by the accused," the court found that the defendant's attorney did not unilaterally waive the defendant's right to testify because she and the defendant "discussed several times whether the defendant should take the stand," and that they "mutually decided" that he should not. ***Id***. at 636. In ***United States v. Bernloehr***, the Eighth Circuit Court of Appeals determined that a "mature and sophisticated businessman" properly waived his right to testify where, although he told the court he wanted

to testify, he made no objection when his attorney rested without calling him to the stand. 833 F.2d 749, 751, 752-53 (8th Cir. 1987). Finally, in ***United States v. Teague***, the Eleventh Circuit found that the defense attorney did not act deficiently where she did not have her client testify because, when she rested in the case, she "clearly had advised [the defendant] that it would be unwise and unnecessary for him to testify." 953 F.2d 1532, 1535 (11th Cir. 1992) (en banc).

In recent years, however, another issue has come to the forefront: Under what circumstances a disruptive defendant may be stripped of his right to testify.

A handful of courts, including the Wisconsin Court of Appeals in this case, have looked to ***Illinois v. Allen*** for guidance. ***Illinois v. Allen***, 397 U.S. 337, 90 S. Ct. 1057 (1970). In ***Allen***, the defendant refused to work with an attorney and insisted on representing himself. ***Allen*** at 339. He was unruly in his *pro se voir dire*, and eventually resorted to "abuse" and swearing at the judge. ***Id.*** at 339-40. When warned that he might be removed from the courtroom, he threatened that the judge was "going to be a corpse" then tore up legal files. ***Id.*** at 340. Allen persisted in his disruption throughout the trial and had to be removed multiple times. ***Id.*** at 340-41. After the State's case-in-chief, the judge reiterated his offer to Allen that he could return to the courtroom if he could agree to conduct himself properly. ***Id.*** at 341. Allen gave the judge "some assurances of proper conduct," and was therefore permitted to remain in the courtroom for the remainder of the trial. ***Id.*** He appealed his conviction based on infringement of his Sixth Amendment right to be present at his trial. ***Id.*** at 342. The United States Supreme Court upheld his conviction, explaining:

> We explicitly hold today that ***a defendant can lose his right to be present*** at trial ***if, after he has been warned*** by the judge that he will be removed if he continues his disruptive behavior, ***he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the Court that his trial cannot be carried on with him in the courtroom***.

Id. at 343 (emphasis supplied.)

A. Relevant Federal Rulings

The Ninth and Eighth Circuits have considered the potential impact of ***Allen*** on the right to testify.

In ***United States v. Ives***, the Ninth Circuit held that the standard set forth in ***Allen*** for removing a defendant from his own trial was "equally applicable to those who wish to testify." ***United States v. Ives***, 504 F.2d 935, 937 (9th Cir.1974), *vacated on other grounds,* 421 U.S. 944, 95 S.Ct. 1671, (1975), *opinion reinstated in relevant part,* 547 F.2d 1100 (1976). Ives' first trial ended in a mistrial due to his continual disruptions of the proceedings. ***Id.*** at 937. In his second trial, Ives was repeatedly removed from the courtroom because he disrupted opening statements, shouted obscenities, and violently attacked both his and the State's attorney, going as far to throw a book at his attorney, all in front of the jury. ***Id.*** at 942-46. On a recess, Ives punched his attorney in the face. ***Id.*** at 943. Ives was given the opportunity to take the stand on at least three occasions, and in every instance refused to cooperate either with his own lawyer or the judge. ***Id.*** at 942-45. Despite the quantity and severity of Ives' disruptions, the court made multiple attempts to reintegrate Ives into the trial and maintain his right to testify, but these attempts proved unsuccessful. ***Id.***

On appeal, the Ninth Circuit held that the abrogation of Ives' right to be present under ***Allen*** was equally applicable to Ives even if he had wanted to testify. ***Id.*** at 941-42. The Ninth Circuit explained that a defendant's right to testify is "fundamental to our judicial process . . . [and] cannot be lost unless it is clearly necessary to assure the orderly conduct of the trial." ***Id.***

In ***United States v. Ward***, the defendant exhibited behavior that, of all the cases discussed herein, is most similar to the behavior exhibited by Anthony, as Ward was "going off on tangents" and was experiencing difficulty following the court's instruction. 598 F.3d 1054, 1056 (8th Cir. 2010). Unlike in Anthony's case, Ward was repeatedly admonished for interrupting the court and the prosecutor, rendering it difficult to continue the trial, so he had to be removed. ***Id.*** at 1056. Even so, Ward was given the opportunity to come back if he promised to keep quiet, but he informed counsel that he could not write fast enough to meaningfully participate in that manner, so he was not returned to trial. ***Id.*** at 1057. On appeal, Ward's conviction was overturned on the grounds that the court erred in removing Ward from the trial without affording him a reasonable opportunity to return to see if he wanted to testify. ***Id.*** at 1060. The Eighth Circuit held, "A defendant may be removed if he insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom… Behavior that is merely disruptive is insufficient under ***Allen*** to justify removal." ***Id.*** at 1058.

B. Relevant State Rulings

The Supreme Courts of Alaska and Washington, as well as the Minnesota and Iowa Courts of Appeals,

have addressed how ***Illinois v. Allen*** can impact the right to testify.[2]

In ***Douglas v. State***, the Circuit Court dealt with a defendant who called the prosecutor a "Nazi bastard," the victim a liar, and struck at least one of the seven attorneys he went through before trial in the face. ***Douglas v. State***, 214 P.3d 312 (Alaska, 2009). He was repeatedly removed for interrupting the proceedings, insulting the attorneys and judge, and ranting about irrelevant subjects. ***Douglas*** at 315-16. The court abrogated Douglas' right to be present pursuant to ***Allen***, but even then allowed him to testify in his own defense by phone. ***Id.*** at 318.

State v. Chapple dealt with an inmate defendant on trial for rape and assault who was deemed to possess "extraordinary physical strength." 145 Wash.2d 310, 36 P.3d 1025 (Wash. 2001). One corrections officer testified that Chapple "could break handcuffs and had once pulled a cell door from a concrete wall." ***Chapple*** at 1028. A newspaper had, a few years earlier, described Chapple as, "as perfect a creature of destruction as either Heaven or Hell could produce."[3] At trial, his verbal outbursts, hostility, and offensive language were gravely disruptive, and he declared the proceedings were a "Klu [sic] Klux Klan meeting." ***Id.*** at 1030. With the jury removed, he told the judge, "Fuck the jury; fuck the trial; fuck all you motherfuckers. I don't give a fuck about you or this trial or this jury." ***Id.*** at 1027. A security officer testified, "As Chapple left the courtroom, he was adamant that he would not cooperate, he would continue to disrupt the proceedings if allowed back

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[2] Unfortunately, none of these cases discuss the right to testify to relevant versus irrelevant information.

[3] Jim DeFede, ***The County Bully***, Mimi New Times, December 1996, available at http://www.miaminewtimes.com/1996-12-12/news/the-county-bully/.

into the courtroom, and, because he already had a 125-year sentence, there was nothing more that could be done to punish him." ***Id.*** at 1028. Further, Chapple "had boasted that he would make the news that day." ***Id.*** Corrections testimony revealed, "Chapple was a threat to court personnel, even when bound to a chair, gagged, wearing a taser belt and guarded." ***Id.*** Given the foregoing, Chapple was not permitted to attend the second day of his trial, but the court allowed defense counsel to make use of his testimony from his first trial for the same crime. ***Id.*** at 1028. The Washington Court of Appeals looked to ***Allen*** to uphold the conviction, noting that both cases dealt with behavior of "an extreme and aggravated nature." ***Id.*** The court further reasoned that Chapple had been adequately warned that he was forfeiting his rights by disrupting the proceedings, to which he responded, "Take me back to Clallum [sic] Bay if you want to. I wouldn't give a fuck." ***Id.*** at 1030.

In the unpublished Minnesota Court of Appeals case, ***State v. Wylie***, the defendant had caused persistent problems throughout the trial process. ***State v. Wylie***, No. A12-0107, unpublished slip opinion (Minn. App. Feb. 19, 2013) (Att'd at Appx. D.) During jury selection, he left counsel table and charged the bench, and had to be removed by deputies. ***Id.*** at 3. In the holding cell, he took off his pants and attacked deputies with his belt. ***Id.*** He was returned to the courtroom and made an obscene gesture at the judge. ***Id.*** When he went to testify, he attempted to shoehorn inadmissible evidence in front of the jury – namely, that the victim had made another allegation of assault against someone else. ***Id.*** at 4-5. Wylie was removed from the stand. ***Id.*** at 5. The Minnesota Court of Appeals held that this removal was proper under ***Allen***, even though he was testifying at the moment it took place. ***Id.*** at 7-9.

In ***State v. Carey***, the defendant insisted on representing himself, and caused persistent problems while doing so. No. 12-0230 (Iowa Ct. App., filed Aug. 13, 2014). Before the jury was empaneled, Cary "engaged in a heated exchange with the court" over the nature and extent of his past convictions, and was found in contempt. ***Id.*** at 5-6. When Carey was later cross-examining the State's first witness, the State made a hearsay objection that was sustained. ***Id.*** at 6. When it became clear that Carey either did not understand – or refused to accept – the ruling, the Court ordered that Carey's standby counsel would take over for the defense. ***Id.*** at 6. Carey began a "heated exchange" with the court over this, and refused to sit down although the court instructed him to do so on six separate occasions. ***Id***. at 6. The Court warned Carey that if he could not comply with orders, he would be removed from the courtroom. ***Id***. at 6-7. Carey responded that if Milder was going to represent him, "we're not going to have a trial." ***Id.*** at 7. Carey was then removed from the courtroom, and never given the opportunity to return. ***Id.*** at 7. On Appeal, the Iowa Court of Appeals found that Carey's removal was proper under ***Allen***, but granted Carey a new trial because he was never given the opportunity to return. ***Id***. at 25. The court explained, "We believe the failure to conduct a hearing with Carey present invites questions regarding whether Carey wished to have witnesses called in his defense or wished to testify in his own behalf." ***Id***. at 25.

C. Discussion

There is no precedent, in Federal or State Law, for extending Allen to strip a defendant of his right to testify on grounds of disruptiveness where he was not first removed from his trial. Even in the jurisdictions where ***Allen*** has been extended to potentially abrogate a defendant's right to testify, it is not being applied in the same manner as it was for Anthony. In

those jurisdictions, defendants are removed from the courtroom for behavior such as cursing, yelling, property destruction, disrobing, and outright assault on attorneys and court personnel. The courts attempt temporary removals as a means to maintain orderliness of proceedings with minimal intrusion on the defendant's rights. In Anthony's case, his behavior never rose to the level where the court even considered removal, and his right to testify was stripped as a precautionary measure. Anthony could not find nor has the State identified a case, even merely persuasive, where a defendant was stripped of his right to testify based on "disruptive" behavior when he was never so disruptive as to render it impossible to carry on the trial in his presence.

In fact, every case that has examined the intersection between ***Allen*** and the right to testify is consistent that in instances of extreme disruption, a defendant can be removed from the court. This removal should be a last resort – only if the trial truly cannot be continued in his presence. Further, the disruptive defendant is always afforded the opportunity to reform his behavior and return – usually repeatedly. Finally, if he insists on grave disruption of an offensive and obscene character, then his right to be present can be abrogated, even if it has an ancillary impact on his right to testify. Simply put, there are *no* cases which support the approach that the Circuit Court took here in Anthony's case, which allows a defendant to "forfeit" the right to testify by way of exhibiting mere agitation and stating his intention to mention something irrelevant in the context of presenting otherwise relevant defense testimony.

In the instant case, the Circuit Court and the Court of Appeals relied on ***Allen*** to hold that stripping Anthony of his right to testify in his own defense was within the court's authority. In its discussion, the court explained that the right to testify could be or

forfeited under ***Allen*****,** noting, "By refusing to comply with the trial court's order, exhibiting defiant and agitated behavior, and ranting about irrelevant topics, Anthony forced the trial court to decide whether the jury should be allowed to hear Anthony discuss irrelevant matters and potentially see Anthony lose his temper on the stand." ***State v. Anthony*** at 7.

The Circuit Court and Court of Appeals reasoned that if ***Allen*** could waive his Sixth Amendment right to be present by way of repeated severe disruption and obscene, abusive conduct, then Anthony could waive his right to testify under the Fifth, Sixth, and Fourteenth Amendments by way of: (1) expressing his intention to mention during his testimony a 1966 wrongful conviction which the court deemed a mere irrelevant, "sorry tale;" and (2) becoming "quite agitated" when the court informed Anthony that he would not be able to testify in his own defense. (R. 66 at 46; R. 46 at 16.)

However, the Court of Appeals did not decide whether Anthony satisfied the ***Allen*** standard for disruptiveness in this particular case. It further declined to address whether the wrongful conviction was relevant as a neutral explanation for his fleeing. Instead, it applied a harmless error analysis and concluded that, even if the denial of Anthony's right to testify was in error, the error was harmless.

The Court of Appeals' use of ***Allen*** in an attempt to justify Anthony's denial of his right to testify was misguided for two reasons. First, the standard articulated in ***Allen*** was developed with respect to a defendant's right to be present at all stages of his trial. The effect of the expulsion on a defendant's right to testify was never at issue or discussed. Second, although a small handful of courts have followed the Ninth Circuit in extending the ***Allen***

standard to be equally applicable to a defendant's right to testify, Anthony has not identified a single case where – as here – a court applied the ***Allen*** standard preemptively where the court merely *feared* that the defendant *may* become disruptive.

Accordingly, Anthony's case does *not* present the question of whether Wisconsin wants to join the few courts who have extended ***Allen*** to justify denial of the right to testify to truly disruptive defendants. More accurately, the issue is whether Wisconsin wants to go further than any other court has gone, allowing displeased trial judges to strip away a defendant's right to testify as a preemptive and protective measure, when the ***Allen*** standard for disruptiveness has not even been met. Or, considering Judge Godbold's inquiry, is it fair to ask a jury to condemn a defendant who has not first been permitted to testify in defense to the elements of the crime charged?

Anthony has not identified any case where a court prevented a defendant from testifying in his own defense as a protective measure where the defendant indicated that his testimony would be both truthful and relevant to the proceedings. The closest case on point is ***U.S. v. Gleason***, 980 F.2d 1183 (8th Cir. 1992), where a defendant was ordered not to present irrelevant evidence. However, the ***Gleason*** defendant decided that, without the evidence that the court deemed irrelevant, his testimony would not serve any purpose and, in that case, waived his right to testify. ***Id.*** at 1185.

Anthony never waived his right to testify or indicated that he would testify in anything but a truthful and relevant manner. Rather, counsel explained that Anthony wanted to present the only available evidence to support his self-defense theory. (R. 66 at 35.) Other than Anthony, no living witness saw what

occurred between Anthony and Sabrina on August 20, 2010. (R. 66 at 60-61, 66.) The only way for Anthony to present his argument that he acted in self-defense was to testify in his own defense. He never waived his right to testify. (R. 66 at 35-38.) Instead, Anthony prepared for trial and sat through the State's entire case, relying on his right to testify in order to offer testimony that would both rebut the State's argument that Anthony intended to kill Sabrina Junior, as well as offer facts tending to prove that Anthony was acting in self-defense, only to have this opportunity taken away from him at the very last moment. Anthony was therefore tried for and convicted of intentional homicide without having presented *any defense at all* to the charges.

Perhaps most alarming about the mechanical application of ***Allen*** to the facts at hand is that Anthony's behavior never rose to the level indicated wherein his "trial [could not] be carried on with him in the courtroom." ***Allen***, at 343. In fact, the court minimized the potential harm of the anticipated testimony for which it ultimately stripped Anthony of his right to testify for, noting, "At this point it seems like there's nothing that serious about Mr. Anthony telling his sorry tale about what happened in the sixties." (R. 66 at 46:11-13.) However, the court concluded that it didn't "know for sure whether that is something that would make a difference to this jury," so concluded that, by wishing to testify as to his wrongful conviction and incarceration, Anthony "forfeited his right to testify." (R. 66 at 46:13-19.)

Unlike the defendants in ***Ives***, ***Douglas***, ***Chapple***, and ***Wylie***, Anthony never assaulted anyone during the trial process. Unlike the defendants in ***Ives***, ***Chapple***, and ***Wylie***, Anthony never threatened physical violence to anyone involved in the proceedings. Unlike the defendants in ***Ives***, ***Douglas***, ***Chapple***, and ***Wylie***, Anthony never shouted abusive

language or directed obscene gestures to the court. Rather, Anthony respectfully[4] dissented to the court's death-blow ruling that he could not testify. In fact, all Anthony did was respond to the court's questions with the very argument that counsel makes herein, albeit in more rudimentary terms. Further, Anthony should not have been preemptively questioned regarding his intended testimony at trial; his attorney was the one who was sufficiently educated, positioned, and prepared to do so. (R. 66 at 22-47.) Anthony was preemptively denied his right to testify based on the Court's inclination that, if permitted to take the stand, Anthony *may* become disruptive, would likely mention his wrongful conviction which the court found irrelevant, and inappropriately decided the testimony might prejudice the jury against him. Contributing to a cumulative error of sorts, the inquiry of whether the jury might think badly of Anthony if he testified should have been left to the strategy of defense counsel.

Anthony was never removed from the courtroom at all, nor does it appear the court ever even considered removing him. Rather, his conduct was contemporaneously described by the court as being a "very animated way [of] talking." (R. 66 at 34.) There is nothing on the record to indicate that Anthony engaged in any "scurrilous, abusive language and conduct." ***Allen***, 397 U.S. at 347. Rather, Anthony fervently indicated his strong desire to testify in his own defense and tell the jury "the whole truth." (R. 66 at 29.) The Circuit Court additionally indicated that, after Anthony became agitated, the "courtroom bailiffs called for additional deputies," however

[4] In his disagreement with the court concerning what information the jury could hear concerning his prior convictions, Anthony repeatedly told the trial judge that, despite the disagreement, he respected him. *See, e.g.* (R. 66 at 30:23-24.)

Anthony never threatened or exercised violence. (R. 46 at 4.)

Perhaps most importantly, the Circuit Court emphatically relied on the decorum of the tribunal to support its written order. (R. 46 at 12-13.) The decorum of the tribunal is a phrase from ethical rules designed to quickly and efficiently administer a case. *See, e.g.,* SCR 60.04(c)("A judge shall require order and decorum in proceedings before the judge"); *see also* SCR 20:3.5 (titled "Impartiality and decorum of the tribunal").

However, the instant case of a defendant testifying in his own defense is profoundly different. It is axiomatic that ethical rules fail to preempt the U.S. Constitution. Under ***Rock***, *supra*, limits may be placed on this right only if the limits are not "arbitrary or disproportionate to the purposes which they are designed to serve." ***Rock,*** 483 U.S. at 55-6. That is, as a legal issue, it is both arbitrary and disproportionate to use ethical rules to intrude on the province of evidentiary rules.

Moreover, the Circuit Court's reasoning as stated in its order denying Anthony's post-conviction motion that Anthony posed a threat to persons in the courtroom may have arisen *post-hoc*. (R. 66 at 34; *also cited as a significant phrase by* R. 46 at 6 *cf.* R. 46 at 14.) During the trial, the Circuit Court limited its ruling to three primary reasons. First, it reasoned that the jury would be biased by Anthony's potential mention of a 1966 robbery into believing that Anthony was a criminal and convict him on that basis. (R. at 66:34; *see* Appx. C.) Second, the Circuit Court stated it suspected that the jury would be biased against Anthony by any "ruckus" that he caused if he became agitated on the stand, amplified by the fact that Anthony was "going to be shackled to the witness stand." (*Id*. at 34.) Finally, the Circuit

Court indicated that it did not want the jury to see anything that would suggest that Anthony was someone "who easily loses his temper or can't follow the rules other people follow." (*Id*. at 42.) In addition to the reasons that seemed to focus on protecting Anthony from his own testimony, the Circuit Court was concerned with providing "a person carte blanch [*sic*] to break the court's rules." (*Id*. at 46.)

Anthony has a "fundamental" due process right to testify in his own defense. ***Rock,*** 483 U.S. at 53 n. 10; U. S. CONST. amend XIV, § 1; WI CONST. art. I, § 7. There is no authority to support the proposition that this right can be circumscribed by principles of decorum. The harm to Anthony by the court's disregard for constitutional rights is amplified here because the only way to present Anthony's self-defense theory was through his own testimony; no other person saw what happened between Sabrina and Anthony.

Anthony's behavior in court was not "so disorderly, disruptive, and disrespectful that his trial [could not] be carried on with him in the courtroom." ***Allen***, 397 U.S. at 343. By preemptively stripping Anthony of his right to testify, the court stripped Anthony of his only defense, a far too severe punishment for Anthony's minor disruption and dissent. The court should have minimally allowed Anthony the opportunity to testify to see if he would disobey the court's order not to explain why he fled from police. By allowing courts to strip criminal defendants of their right to testify due solely to suspicion or fear of disobedience affronts the constitutional right to due process and casts a pervasive shadow on the judicial process.

II. THE COURT'S ERROR IN DENYING ANTHONY HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE WAS NOT SUBJECT TO HARMLESS ERROR REVIEW, BECAUSE THE EXCLUDED TESTIMONY PERTAINED TO LEGAL ELEMENTS OF THE OFFENSE AND DEFENSE, AND THE ERROR WAS THEREFORE STRUCTURAL

In ***Arizona v. Fulminante***, the United States Supreme Court divided constitutional errors into two classes to determine which errors are subject to harmless error review. 499 U.S. 279, 307-10 (1991). 'Trial Errors' are the less serious class of errors, and "occur[] during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 148 (2006). 'Structural errors' "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply . . . errors in the trial process itself." ***Id***. When a structural error occurs, "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." ***Fulminante***, 499 U.S. at 310, 111 S. Ct. 1246.

Structural errors are not subject to harmless error review, because they undermine confidence in the trial process itself. For example, the denial of the right to a jury verdict of guilt beyond a reasonable doubt is a structural error because the jury is a "'basic protection' whose precise efforts are

immeasurable, but without which a criminal trial cannot reliably serve its function." ***Sullivan v. Louisiana***, 508 U.S. 275, 281, 113 S. Ct. 2078 (1993), *citing* ***Rose v. Clark***, 478 U.S. 570, 577, 10 S. Ct. 3101, 3105 (1986). Other examples of structural errors include the denial of counsel, the denial of the right of self-representation, and the denial of the right to a public trial. ***U.S. v. Gonzalez-Lopez***, 548 U.S. 140 at 149.

A. Relevant Federal Rulings

The United States Supreme Court has yet to directly address whether a trial court's improper refusal to permit a defendant to testify in his own defense is a structural or trial error. However, in ***Luce v. United States***, the court did determine that an "appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." 469 U.S. 38, 105 S. Ct. 460 (1984). The issue in ***Luce*** was whether a defendant must testify in order to raise and preserve a claim of improper impeachment with a prior conviction. ***Id.*** at 40. In determining that a defendant must testify in order to raise and preserve this issue, the court noted:

> Even if these difficulties could be surmounted, the reviewing court would still face the question of harmless error. *See generally* ***United States v. Hasting***, 461 U.S. 499, 103 S. Ct. 1974, 76 L.Ed.2d 96, (1983). Were *in limine* rulings under 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; ***the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying.***

Id. at 42 (*emphasis added*).

B. Relevant State Rulings

In ***State v. Rivera***, defendant was charged with brutally murdering a woman. No. 2010-162706, (South Carolina Sup. Ct., Feb. 13, 2013) at 2. Defendant informed the trial court that he intended to testify. ***Id.*** at 3. Defense counsel then informed the court that he did not believe it would be in Rivera's best interest to testify, and that he would "refuse to call him to the stand." ***Id.*** at 5. After an *in camera* examination with the defendant during which he refused to give the details of his intended testimony, the court determined that the defendant "declined to testify to anything that would be helpful to the jury in reaching the issues," and did not allow him to testify in front of the jury. ***Id***. at 9-10. The defense rested without presenting any evidence. ***Id***. at 11.

Rivera appealed, arguing that the trial court erred in failing to allow him to testify in his own defense. ***Id***. at 13. The South Carolina Supreme Court first acknowledged that the right to present testimony may be limited to "accommodate other legitimate interests." ***Id***. at 16. However, because Rivera intended to testify concerning the exact matter he was on trial for – the killing of the victim – "the relevancy of Appellant's testimony is self-evident – it pertained to the killing of the victim, which was the precise basis for the prosecution." ***Id***. at 17. The court concluded:

> The right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify "is either respected or denied; its deprivation cannot be harmless." ***McKaskle***, 465 U.S. at 177 n.8. As such, the error is structrual in that it is "so basic to a fair trial that [its] infraction can never be treated as harmless error." ***Fulminante***, 499 U.S. at 298 (quoting ***Chapman***, 366 U.S. at 23.)

Id. at 22. Having found that the error in denying Rivera his constitutional right to testify in his own defense was structural, the court reversed Rivera's conviction and remanded the case for a new trial. ***Id***. at 23.

In ***State v. Hampton***, the defendant was indicted with second-degree murder. ***State v. Hampton***, 818 So.2d 720, 722 (La., 2002). Hampton wanted to testify at his trial, however his defense counsel informed him that he "controlled that decision," and the defendant was never called to testify. ***Id***. at 726. The Supreme Court of Louisiana determined that the defendant's constitutional rights were violated when he was prevented from testifying, and that the error was structural. ***Id***. at 726-27. The court explained:

> As this Court previously indicated, "[n]o matter how daunting the task, the accused ... has the right to face jurors and address them directly without regard to the probabilities of success. ***As with the right to self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis***" . . . Therefore, we find the trial court was correct in granting defendant post-conviction relief because he had a constitutional right to testify in his own defense.

The Court continued that, the denial of a criminal defendant's "fundamental right" to testify in his own defense is "a 'structural defect' and much more than a mere 'trial error.'" ***Id***. at 729.

In ***State v. Rosillo***, the defendant was charged with third-degree sexual assault. 281 N.W.2d 877 (Minn., 1979.) At trial, counsel for defendant advised him not to testify. ***Id***. at 879. The defendant followed this advice. ***Id***. The defendant appealed, arguing that he was impermissibly denied his right to testify. ***Id***. at 877. In considering whether the harmless error rule applied to this case, the Supreme Court of Minnesota

concluded, "Our opinion is that the right to testify is such a basic and personal right that its infraction should not be treated as harmless error." ***Id.***

In ***State v. Nelson***, the Defendant was convicted of three counts of sexual assault of a child – a strict liability crime under Wisconsin law. *See* Wis. Stat. § 948.02; ***State v. Nelson***, No. 2012AP2140-CR, (Wis. Sup. Ct., July 16, 2014) at ¶1. In order to convict Nelson, the State only had to prove that Nelson had sex with the victim, and that he was underage. Wis. Stat. §948.02(2). Nelson readily admitted to both of these elements (and, more candidly, to having sex with the minor victim on numerous occasions). During trial, however, Nelson indicated that she wanted to testify in order to clarify "the days and other things that were said," and to dispute the victim's testimony that Nelson had unbuckled his pants because "she thinks it looks bad." Brief for Plaintiff-Respondent at 18, ***State v. Nelson***, No. 2012AP2140-CR, (Wis. Sup. Ct., July 16, 2014). The Circuit Court determined that Nelson's proffered testimony was "irrelevant" to whether Nelson was guilty of the strict liability crime of statutory rape, and informed her that she would not be able to testify as to these details. ***Nelson*** at ¶16. In reviewing this decision, this court determined that the alleged error was a trial error and concluded that the "denial of a defendant's right to testify is [a trial error] subject to harmless error review under ***Fulminante***. ***Id.*** at ¶5.

C. Discussion

The cases above do not make an explicit distinction between a defendant's right to testify in his own defense, and a defendant's desire to testify to irrelevant matters. However, the decisions in ***Rivera***, ***Hampton***, and ***Rosillo*** demonstrate an understanding that the denial of a defendant's constitutional right to testify in his own defense is a

separate and more pervasive error than denying a defendant the ability to testify as to irrelevant matters, as was the case in ***Nelson***. Indeed, there is no constitutional right to testify to irrelevant evidence. *See, e.g.* ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process.") However, when a defendant is denied the right to testify in his own defense, this must be deemed a structural error. *See, e.g.*, ***Rivera*** at 22, ***Hampton*** at 729, ***Rosillo*** at 877.

In the instant case, the defendant was denied the ability to testify in defense of the State's allegations. Anthony wanted to defend himself from the charge of first-degree intentional homicide by arguing that he acted in self-defense. In denying his right to do so, the Circuit Court excluded Anthony's only defense to this serious charge. This decision undermined the entire trial because the jury was not able to hear Anthony's testimony concerning self-defense. Moreover, because Anthony is the only living person who was present the night Sabrina Junior died, he is the only person who could have offered defensive testimony in response to the State's allegations. "There is no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecutors case." ***Ferguson v. Georgia***, 365 U.S. 570, 582, 81 S. Ct. 756 (1961).

In contrast to the defendant in ***Nelson***, Anthony's testimony would have gone directly to the question of whether he was acting in self-defense. The issue in ***Nelson*** was evidentiary in nature because the defendant admitted to the elements of a strict liability offense and was denied the opportunity to

testify just to give details of her admitted crimes. The denial of Nelson's right to testify was properly classified as a trial error, because it did not permeate the entire trial. Nelson merely wanted "[her] side to be heard," and would have only disputed the dates and details of the interludes so she would not "look bad." ***Id.*** at ¶ 2.

Although other state courts have held that denial of a criminal defendant's right to testify in his own defense is a structural error, ***Nelson*** need not be inconsistent with those holdings. This Court may conclude that the "in one's own defense" aspect of the right to testify requires strictly protected testimony be relevant to legal elements of the charged crimes and defenses, and that a harmless error review is only appropriate if the intended testimony is irrelevant as to all legal elements at issue.

Additionally, the right to testify in one's own defense has been found to be even more important than the right of self-representation, which is classified as a structural error not amenable to harmless error review. ***Rock***, 483 U.S. at 51. The United States Supreme Court has recently determined that the right to self-representation is a structural error not subject to harmless error review. ***Faretta v. California***, 422 U.S. 806, 819 n. 15 (1975). In ***Rock***, the United States Supreme Court determined that a criminal defendant's right to testify in his own defense is "even more fundamental to a personal defense than the right of self-representation." ***Rock***, 483 U.S. at 52. Therefore, logic dictates that the denial of the right to testify in one's own defense cannot be subject to *less* protection than the right of self-representation.

Even if harmless error review apples to the court's decision to strip Anthony of his right to testify in his own defense, the error was not harmless beyond a

reasonable doubt. The Court of Appeals did not rule whether the Circuit Court erred in preventing Anthony from testifying in his defense because it held that any error was harmless. ***State v. Anthony***, No. 2013AP467-CR, unpublished slip opinion (Wis. Ct. App. Jan. 14, 2014). However, as the United States Supreme Court has explained, a reviewing court "could not logically term 'harmless' an error that presumptively kept the defendant from testifying." ***Luce v. United States***, 469 U.S. 38, 105 S.Ct. 460 (1984).

To prove that the error was harmless, the State must prove that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 254 Wis.2d 442, ¶ 46 647 N.W.2d 189 (2002) (internal quotations omitted.) Because Anthony was prevented from mounting any defense at all against the State's allegations, it cannot be shown beyond a reasonable doubt that his testimony could not have presented *some* jury question as to whether he intended to kill Sabrina Junior or was defending himself, or whether his subsequent flight was persuasive evidence of guilt, as the State argued.

If permitted to take the stand, Anthony would have testified that Sabrina was a heavy user of crack cocaine and was high on crack cocaine on the night in question. (R. 40 at 4.) Anthony would have further testified that Sabrina had a history of being aggressive while high on crack cocaine, and was exhibiting severe aggression in connection with use on the night of her death. (*Id*.) Additionally, as to the physical confrontation that ultimately resulted in her death, Anthony would have testified that Sabrina threatened and attempted to kill Anthony, who was defending himself and his children against her attack. (*Id*.)

Anthony would also have testified that he was wrongly convicted of a robbery in 1966 and as a result served 12 years in prison from ages 19 to 31. (R. 66 at 27-28.) Due to this, Anthony had a special and legitimate fear of police. (*Id.*) This potential testimony would have been relevant to rebut the State's cornerstone argument that Anthony's fleeing the scene was indicative of his intent. (R. 66 at 28 (arguing that fleeing showed he "mean[t] to… kill[] her"); R. 66 at 51, ("go[ing] to Illinois… shows his intent, the state of mind that he wanted to kill her); R. 66 at 51-52, ("If he didn't want to kill, he could have stayed there and helped.")) Evidence that Anthony harbored a fear of police due to the false conviction and subsequent 12-year incarceration was relevant to rebut the State's use of fleeing as proof of intent. (R. 66 at 35-37.)

The jury was instructed that it was to find Anthony guilty of first degree intentional homicide if it found that he (1) caused the death of Sabrina Junior, and (2) acted with intent to kill Sabrina Junior. (R. 67 at 12.) The jury was not instructed that, under Wisconsin's self defense statute, an actor may use "force which is intended or likely to cause death or great bodily harm" where he "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." Wis. Stat. § 939.48(1). Absent Anthony's testimony or a relevant instruction, the jury never even knew Anthony wished to argue self-defense.

Because Anthony was denied his right to testify in is own defense, he was unable to lay the groundwork for an instruction on self-defense under Wis. Stat. § 939.48(1). As the Wisconsin Appeals Court explained in ***State v. Powell***, "[A] defendant seeking a jury instruction on perfect self defense to a charge of first-degree intentional homicide must satisfy an objective threshold showing that she *reasonably* believed that

she was preventing or terminating an unlawful interference with her person and *reasonably* believed that the force she used was necessary to prevent imminent death or great bodily harm." 266 Wis. 2d 1062, 668 N.W.2d 563 (2003). The only witness that could have shown this reasonable belief was Anthony, himself, who the court barred from taking the stand. In doing so, the Circuit Court denied Anthony his constitutional right to present a defense to the State's charges, and all but guaranteed his conviction.

CONCLUSION

The purpose of a trial is not just to determine guilt, but to provide a mechanism for the constitutional adjudication of that guilt. We should not selectively apply constitutional rights, and no man is more deserving of them than any other. The American notion of justice affords all criminal defendants the opportunity to offer relevant defensive testimony as part of the prosecutorial process. This opportunity is further critical to allow convicted criminals to develop a narrative that results in the healthiest possible future relationship with the State, the criminal justice system, and society in general. Preservation of the right to testify should not be viewed only with reference to the adjudication of guilt, but also with concern over the fair administration of justice and a genuine respect for people – all people, even Anthony.

Dated September 4, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 9,612 words.

_____
Kimberly L. Alderman
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this __ day of September, 2014.

_____
Kimberly L. Alderman
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CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

_____

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TABLE TO APPENDIX