STATE OF WISCONSIN

SUPREME COURT

Case No. 2020AP001876-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TOMAS JAYMITCHELL HOYLE,

Defendant-Appellant.

RESPONSE BRIEF

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ISSUE PRESENTED

Whether the prosecutor violated the defendant's Fifth Amendment right not to testify at trial by repeatedly arguing that the jury should convict the defendant because the alleged victim's testimony was "uncontroverted," when the defendant was the only person who could controvert the testimony.

The circuit court granted, over trial counsel's objection, the prosecutor's motion to make such an argument, and further denied the defendant's postconviction motion raising the issue.

The court of appeals held that the prosecutor's repeated arguments violated the defendant's Fifth Amendment rights, and granted a new trial.

STATEMENT OF THE CASE

I. Introduction

A defendant's right not to testify at trial would not be worth much, if anything, if the state could use the defendant's silence as proof of his or her guilt. The privilege would become not so much a shield held by the defendant, but a cudgel wielded by the state.

For this reason, this Court long ago condemned even indirect arguments based on the defendant's silence, holding that it is"

> … highly improper to intimate or argue to the jury that [a defendant's decision not to testify] should raise any presumption against him as to his guilt.

Martin v. State, 79 Wis. 165, 48 N.W. 119, 122 (1891). Even the most modern articulation of the rule against comment on a defendant's silence, adopted by every federal circuit court of appeals, was first uttered almost 100 years ago:

> The test is: Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?

Morrison v. United States, 6 F.2d 809, 811 (8th Cir. 1925). Wisconsin courts later adopted the *Morrison* test. *See, e.g., State v. Johnson*, 121 Wis.2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984).

Relevant here is that every single federal circuit court considering the issue has said that the *Morrison*

test is violated when the prosecutor argues that the evidence is "uncontroverted" (or some similar term) and the defendant is the only person who could controvert the government's case.[1] Indeed, *Morrison* itself held that a comment that the evidence was "not contradicted" did not violate this rule because "[t]estimony by the defendant was not the only method of contradicting the story told by the government's witnesses," contrasting it to a case decided the prior year holding that a similar comment was improper because "the only persons who could possibly contradict their testimony were the defendants themselves." 6 F.2d at 811.

Here, Defendant-Appellant-Respondent Tomas Hoyle was accused of driving "Hannah" [2] to a secluded area and sexually assaulting her. The only person who could dispute Hannah's testimony was Hoyle, but he exercised his right not to testify at trial. The prosecutor took advantage of Hoyle's assertion of his privilege, by repeatedly arguing to the jury that Hoyle should be convicted because Hannah's testimony was "uncontroverted" and that the jury "heard no evidence disputing [Hannah's] account of that sexual assault." (R. 92:18-21). The prosecutor even tied the "uncontroverted" nature of Hannah's testimony with the jury instructions admonishing the jury not to "speculate" and to consider "solely the evidence offered and received at trial," intimating that the jury was

[1] See pages 18-20 below.

[2] This brief adopts the pseudonym used by the State and the Court of Appeals in its opinion below.

forbidden from finding anything other than Hannah's version of events. (*Id*.)

The court of appeals, echoing every federal circuit court that has passed on this issue, correctly concluded that the prosecutor's closing arguments were "manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Johnson*, 121 Wis.2d 237, 246. Hoyle is entitled to a new trial, and the lower court's decision should be affirmed.

II. Procedural History

On October 2, 2017, the Chippewa County District Attorney's Office filed a criminal complaint charging Hoyle with two counts of second-degree sexual assault and two counts of sexual assault of a child under 16 years of age. Wis. Stat. §§ 940.225(2)(a), 948.02(2). (R. 1).

A jury trial was held from December 13-14, 2018. (R. 91-92). The jury found Hoyle guilty on all four counts. (R. 23-26). Hoyle was later sentenced to concurrent 18-year sentences comprised of 8 years initial confinement and 10 years extended supervision. (R. 40).

Hoyle filed a motion for postconviction relief asserting the issue raised in this appeal (among others). (R. 63-65). The court denied the motion after a hearing held on October 16, 2020. (R. 76).

Hoyle appealed, raising four issues. (*See* Brief of appellant, filed March 1, 2021). On April 16, 2022, the court of appeals issued an unpublished opinion ordering a new trial based on the prosecutor's improper closing argument. The court of appeals did not address the other three issues. The State's petition followed.

III. Factual Background

A. The Evidence at Trial

Sometime in February 2017, the 15-year-old Hannah asked her mother if she could spend the night at a friend's house. (R. 91:138-40, 170). Her mother said no, but did allow Hannah to walk over to the friend's house so she could tell her herself. (*Id.*) Hannah testified that on her way to her friend's house, Hoyle "drove through and asked if I wanted to hang out." (R. 91:138, 142, 175-176). Hannah got into the passenger seat of Hoyle's car. (R. 91:142). They drove towards Chippewa Falls, turned around in a marina parking lot, drove back past the trailer court towards Cadott, and then turned down a dead-end road. (R. 91:142-145). According to Hannah, Hoyle then assaulted her, penetrating her vagina with his fingers and his penis. (R. 91:151-159).

Hannah disclosed the alleged assault to the school liaison officer, Officer Nelson. (R. 91:163).[3]

[3] After the trial, and in response to Hoyle's motion for postconviction relief, the state produced the police report of Officer Joseph Nelson of the Chippewa Falls Police Department

Officer Nelson interviewed Hannah, and then turned the investigation over to investigator Kari Szotkowski. (R. 91:163). Investigator Szotkowski interviewed Hannah on March 15, 2017. (R. 91:164). Hannah would not tell Investigator Szotkowski the name of the assailant. (R. 91:165).

Hannah initially testified that it took her a couple of days to have the courage to tell the investigator the name of the assailant. (R. 91:165-166). However, she did not identify Hoyle as the assailant until May 2017, when she told Officer Nelson. (R. 91:166).

Hannah could not narrow down when in February she saw Hoyle, such as whether it was before or after Valentine's Day, *i.e.* February 14th. (R. 91:165). Nor could Hannah recall what day of the week the assault occurred or even if it was a weekday or on the weekend. (R. 91:169). There was no testimony regarding what time of day the assault allegedly occurred.

Investigator Szotkowski was the only other witness for the state. She testified that the road where the alleged assault occurred was in Chippewa County. (R. 91:182). Szotkowski determined the location of the road where the alleged assault occurred based only on Hannah's description of the location. (R. 91:186). Szotkowski did not take Hannah to the location for

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regarding Hannah's initial disclosure of the alleged assault. (R. 74). According to this report, the disclosure occurred on March 13, 2017. (R. 74:4).

Hannah to confirm that Szotkowski had the correct road. (R. 91:186).

After the state rested, Hoyle exercised his right not to testify, and did not otherwise introduce any evidence. (R. 91:190-192).

B. The State's arguments concerning "uncontroverted evidence."

Prior to trial, the state asserted that it was allowed to argue that the evidence was "uncontroverted." Specifically, the state claimed:

> The State is allowed to argue that the evidence is uncontroverted, meaning that you only have heard from [Hannah]. That's not commenting upon the defendant's right to silence but commenting upon the evidence in front of the jurors at that time. I can't say it's uncontroverted because the defendant didn't testify, but I can say that her testimony is uncontroverted and that you haven't heard any testimony to the contrary.

(R. 91:13). Hoyle objected, and the court took the matter under advisement. (*Id.*) The court later granted the state's request at an unrecorded jury instruction conference.[4]

As a result of the court's ruling, the prosecutor repeatedly argued in his closing that Hannah's testimony was "uncontroverted." The prosecutor began his closing by tying the jury instruction against

[4] The state stipulated at the postconviction hearing that the issue was preserved for appeal. (R. 94:16-19).

"speculation" with the "uncontroverted" nature of Hannah's testimony.

> Thank you, Your Honor. Obviously you were just read a lot of instructions. They are not always easy to follow, which is why the judge will give them to you in writing, but a couple of them bear repeating by me here this morning.
>
> The first one is the judge instructed you that you are to decide this case solely, solely on the evidence offered and received at the trial. What that means is you're only to base it upon what you heard yesterday when the evidence was coming in at trial. You're not to speculate about other things that may be out there. You're not to think about other things. You're to focus solely on the evidence that was presented to you yesterday in this trial.
>
> In fact, in order to reemphasize that, it's mentioned again in another instruction where it says, you are to consider only the evidence received during the trial. Once again, not to consider anything else. You're supposed to just focus on what you heard yesterday with the testimony. [Hannah's] testimony that she gave here yesterday is uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing.

(R. 92:18-19).

After recounting Hannah's testimony, the prosecutor argued that:

> All of that is uncontroverted. There is absolutely no evidence disputing her account of what occurred.

(R. 92:20).

The prosecutor then again argued to the jury that "You're not to speculate. You're not to guess. You're to focus on what you heard yesterday[.]" The prosecutor followed that up by arguing:

> You heard her testify here yesterday. None of that was controverted, meaning it was all uncontroverted, meaning there was nothing controverting her statements about what had occurred to law enforcement, at the preliminary hearing, and at the trial.

(R. 92:20-21).

The prosecutor returned to this theme in his rebuttal:

> You're not to focus on speculation. You're to focus on the testimony, the evidence that you heard in this particular case.

(R. 92:39). Finally, the prosecutor again tied the jury instruction admonishing the jury not to "speculate" with Hannah's testimony being "uncontroverted."

> You need to make the decision based upon the uncontroverted testimony of what she says occurred. They don't disagree it's uncontroverted. They just say you should ask for more. It's not my job to give you information I don't have. I'm not going to argue and say this is why you don't have it or that is why you don't have it. You don't have it. I will agree to that, you don't have that additional information, but the jury instruction says you are not to speculate about that.

(R. 92:39).

ARGUMENT

I. The prosecutor's repeated argument that Hoyle should be convicted because the alleged victim's testimony was "uncontroverted" violated Hoyle's Fifth Amendment right not to testify at trial, as he was the only person who could controvert her testimony.

A. The State ignores the broad and long held consensus that arguments that the evidence is "uncontradicted" when only the defendant can contradict the government's case violates the defendant's right not to testify at trial.

1. It has long been the rule that prosecutors cannot even make indirect comment on the defendant's decision not to testify at trial.

Under the English common law, defendants were not allowed to testify on their own behalf, the theory being that their natural interest in the outcome of the trial made them too unreliable as witnesses. *See State v. Albright*, 96 Wis. 2d 122, 126-127 & n. 4-5, 291 N.W.2d 487, 489 (1980). Wisconsin, like most other jurisdictions, did away with this common law rule by statute, providing that defendants were competent to testify on their own behalf. *Id*. The statutes also provided that the prosecutor could not make any arguments based on a defendant's decision not to exercise this statutory right to testify. *Id*.

Accordingly, as far back as 1891, this Court held that

> This [statute] having expressly declared that the omission of the defendant in a criminal action to testify shall create no presumption against him, it was highly improper *to intimate or argue* to the jury that such omission should raise any presumption against him as to his guilt.

Martin v. State, 79 Wis. 165, 48 N.W. 119, 122 (1891) (emphasis supplied). The court frequently addressed whether a prosecutor's comments were a proper remark upon the lack of evidence supporting a defense theory, or had veered over the line to impermissibly "intimate or argue" guilt based on the defendant's failure to testify. *Id.*; *Werner v. State*, 189 Wis. 26, 206 N.W. 898, 903 (1926); *Lam Yee v. State*, 132 Wis. 527, 112 N.W. 425, 426–27 (1907); *Dunn v. State*, 118 Wis. 82, 94 N.W. 646, 648 (1903).

Congress likewise did away with the common law rule against defendant testimony, and provided that any decision not to testify could not create a "presumption" against the defendant. *Morrison v. United States*, 6 F.2d 809, 811 (8th Cir. 1925).[5] When hearing a claim that a comment by the judge that certain evidence was "not contradicted" was a violation of the statute, the *Morrison* court held that

> The test is: Was the language used manifestly intended to be, or was it of such character that the

[5] The current form of the federal statute is found at 18 U.S.C.A. § 3481.

> jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?

6 F.2d 809, 811 (8th Cir. 1925).

The *Morrison* court acknowledged that the instruction was not a direct comment on the defendant's decision not to testify, and then assessed whether it was an improper "indirect" comment. *Morrison* held that the judge's instruction was not improper because "[t]estimony by the defendant was not the only method of contradicting the story told by the government's witnesses." 6 F.2d at 811. The court contrasted it to a case decided the prior year where a similar comment was improper because "'the only persons who could possibly contradict their testimony were the defendants themselves.'" *Id.* (*quoting Linden v. United States*, 296 F. 104, 106 (3d Cir. 1924)).

In the 100 or so years since *Morrison*, each of the federal circuit courts have adopted the *Morrison* test (although without always acknowledging the original source of the test's verbiage).[6] And as discussed below, Wisconsin has also adopted the *Morrison* test.

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[6] *See Taylor v. Medeiros*, 983 F.3d 566, 576 (1st Cir. 2020); *United States v. Whitten*, 610 F.3d 168, 199 (2d Cir. 2010); *Bontempo v. Fenton*, 692 F.2d 954, 959 (3d Cir. 1982); *United States v. Rand*, 835 F.3d 451, 466 (4th Cir. 2016); *United States v. Lara*, 23 F.4th 459, 479 (5th Cir. 2022); *Raper v. Mintzes*, 706 F.2d 161, 164-65 (6th Cir. 1983); *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996); *United States v. Sandstrom*, 594 F.3d 634, 662-63 (8th Cir. 2010); *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006); *Hamilton v. Mullin*, 436 F.3d 1181, 1187 (10th Cir. 2006); *United States v. Hano*, 922 F.3d 1272, 1295

2. In *Griffin v. California*, the Supreme Court held that there was a constitutional basis for the rule against comment on the defendant's silence.

While the *Morrison* rule was originally formulated to define the contours of the federal statutory right not to have silence create a presumption of guilt, the Supreme Court later recognized that the statute reflected the same principles animating the Fifth Amendment self-incrimination clause. *Griffin v. California*, 380 U.S. 609, 613 (1965).

In *Griffin*, a state prosecutor's closing arguments clearly would have violated the federal statute, if the comments had been made in federal court. The *Griffin* Court resolved the case by equating the federal statute with the Fifth Amendment privilege against self-incrimination. The Court first quoted approvingly its past discussion of the reasoning behind the federal statute prohibiting use of the defendant's silence as evidence of guilt:

> [T]he act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness

(11th Cir. 2019); *United States v. Mellen*, 393 F.3d 175, 182 (D.C. Cir. 2004).

> stand, though entirely innocent of the charge against him.

Griffin, 380 U.S. at 613 (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893)). The *Griffin* court then observed that "[i]f the words 'fifth Amendment' are substituted for 'act' and for 'statute' the spirit of the Self-Incrimination Clause is reflected." *Id*. at 613-614. The Court concluded that the state prosecutor's comments violated the defendant's Fifth Amendment right, as it otherwise would create "a penalty imposed by courts for exercising a constitutional privilege." *Id*. at 614.

Accordingly, since *Griffin*, the federal courts applying the *Morrison* test have done so because the comments potentially violated the defendant's Fifth Amendment rights, not the defendant's federal statutory rights.[7] Similarly, Wisconsin's adoption of the *Morrison* test was done to protect the defendant's Fifth Amendment rights. *Johnson*. 121 Wis. 2d at 246.

3. Federal circuit courts agree that the *Morrison* test is violated when the defendant is the only person who can controvert the government's accusations.

As noted above, the *Morrison* court held that it is permissible to observe that the government's evidence is uncontradicted when witnesses other than the defendant may have been able to provide the

[7] See cases cited in footnote 6, above.

contradictory evidence. However, when the defendant is the only person who can contradict the government's case, a comment on the lack of contradicting evidence is "naturally and necessarily … a comment on the failure of the accused to testify." 6 F.2d at 811.

This distinction has survived the constitutionalization of the *Morrison* rule post-*Griffin*. Each of the federal circuit courts considering the issue have held that such comments violate a defendant's Fifth Amendment rights when the defendant is the only possible witness. *United States v. Bey*, 188 F.3d 1, 9 (1st Cir. 1999) (finding "prohibited, indirect commentary in a prosecutor's references to evidence as uncontradicted when the defendant was the only witness who could have provided any contradictory evidence.") (citation omitted); *United States v. McDermott*, 918 F.2d 319, 327 (2d Cir. 1990); *United States v. Sotomayor-Teijeiro*, 499 F. App'x 151, 155 (3d Cir. 2012) *(*A "comment that the government's evidence is uncontradicted or unrebutted is improper if the only person who could have rebutted the evidence was the defendant.") (cleaned up). *United States v. Morrow*, 177 F.3d 272, 300 (5th Cir. 1999) ("[C]ommenting on the absence of specific evidence in the record does not constitute a comment on the defendant's failure to testify when witnesses other than the defendant could have testified to such information.") *Cotnam*, 88 F.3d at 497 ("A prosecutor's comment that the government's evidence on an issue is 'uncontradicted,' 'undenied,' 'unrebutted,' 'undisputed,' etc., will be a violation of the defendant's Fifth Amendment rights if the only person who could

have contradicted, denied, rebutted or disputed the government's evidence was the defendant himself."); *United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999) ("[A] prosecutor may not comment on a defendant's failure to present evidence to contradict the government's case if the defendant alone had the information to do so."); *Rhoades v. Henry*, 598 F.3d 495, 510 (9th Cir. 2010); *Hamilton*, 436 F.3d at 1187 ("Where a prosecutor's remarks concern matters that could have been explained only by the accused, they give rise to an innuendo that the matters were not explained because petitioner did not testify and, thus, amount to indirect comment on the defendant's failure to testify.") (cleaned up).

Only the Fourth and Sixth Circuits have declined to adopt a per se rule that it is improper for the prosecutor to argue that evidence is uncontradicted when the defendant is the only person who could contradict the evidence. However, in the Fourth Circuit case, there was another witness who could have contradicted the government's case, the victim's coworker. *United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996). And the Sixth Circuit held that a *per se* rule was improper because the court needed to look at the context of the prosecutor's argument, which in that case was a response to the defendant's arguments. *Butler v. Rose*, 686 F.2d 1163, 1172 (6th Cir. 1982). The Sixth Circuit thus anticipated the Supreme Court's decision in *United States v. Robinson*, 485 U.S. 25, 34 (1988), where it held that a prosecutor's references to the defendant's decision not to take the stand will not violate the defendant's Fifth

Amendment rights if the references are a "fair response" to the defendant's arguments. Notably, the year after *Butler*, the Sixth Circuit held that a prosecutor's argument that no witnesses had "disputed" or "contradicted" certain testimony was improper precisely because the "testimony clearly could only have been contradicted by the [defendant]." *Raper v. Mintzes*, 706 F.2d 161, 164-65 (6th Cir. 1983).

Finally, although the Eleventh Circuit has not specifically addressed this question, at least one district court within the circuit has held that such comments violate the defendant's Fifth Amendment rights. See, e.g., *United States v. Hunt*, 412 F. Supp. 2d 1277, 1287–88 (M.D. Ga. 2005)[8].

4. Supreme Court cases post-*Griffin*.

Two Supreme Court cases decided after *Griffin* are worth addressing, as they are later referenced by the Wisconsin courts. In the first, *United States v. Hasting*, 461 U.S. 499, 504-505 (1983), the Court simply held that a *Griffin*-error was subject to harmless error review, and that the court of appeals

[8] Hoyle has not endeavored to perform a similar survey of the 50 states. However, it is worth noting that at least the highest appellate courts of West Virginia, North Dakota, and Arkansas have held that it was reversible error for the prosecutor to refer to evidence of sexual assault as uncontradicted when only the defendant could contradict the relevant allegations. *State v. Scutchings*, 2009 ND 8, ¶ 11, 759 N.W.2d 729, 732; *State v. Keesecker*, 222 W. Va. 139, 147, 663 S.E.2d 593, 601 (2008); *Aaron v. State*, 312 Ark. 19, 23, 846 S.W.2d 655 (1993).

was wrong to use its "supervisory power" to impose a rule of automatic reversal to deter repeated *Griffin* violations. The Court's only reference to the substance of the claimed error was a footnote observing that Justice Stevens, in his concurring opinion, "may" be correct that the prosecutor's comments were not improper, but that question was not before the court. *Id*. at 506 n.4.

Justice Stevens, for his part, believed that the prosecutor's arguments were not improper because the "central question could have been addressed by defense witnesses and defense counsel even without testimony by the defendants themselves." *United States v. Hasting*, 461 U.S. 499, 514–15 (1983) (Stevens, J., concurring). Justice Stevens then dropped a footnote echoing the *Morrison* test, observing that "[r]eference to uncontradicted portions of the Government's evidence is improper only when the statement will naturally and necessarily be construed by the jury to be an allusion to the defendant's failure to testify." *Id.* at 515 n. 6.

The Supreme Court more directly addressed the substance of *Griffin* error in *United States v. Robinson*, 485 U.S. 25, 34 (1988). There, the Court simply held that a defendant's Fifth Amendment rights are not violated when the prosecutor's comments are "a fair response to a claim made by defendant or his counsel[.]" *Robinson*, 485 U.S. at 32.

5. Wisconsin's application of the *Morrison* test.

The Wisconsin Court of Appeals first referenced the *Morrison* test in *State v. Phillips*, 99 Wis. 2d 46, 52, 298 N.W.2d 239, 242 (Ct. App. 1980), albeit indirectly by citing a Seventh Circuit case, *United States v. Muscarella*, 585 F.2d 242, 249 (7th Cir. 1978). Subsequent Wisconsin cases cite a later court of appeals decision, *Johnson*, 121 Wis.2d at 246, as the source of the Wisconsin articulation of the test, perhaps because *Phillips* was overruled on other grounds in *State v. Feela*, 101 Wis. 2d 249, 265 & n. 4, 304 N.W.2d 152, 160 (Ct. App. 1981), but *Feela* was later overruled in *State v. Pharr*, 115 Wis. 2d 334, 340 N.W.2d 498 (1983).

In any event, the Wisconsin Court of Appeals has repeatedly applied the *Morrison* test. *See, e.g.*, *State v. Werlein*, 136 Wis. 2d 445, 457, 401 N.W.2d 848, 853 (Ct. App. 1987); *State v. Lindvig*, 205 Wis. 2d 100, 106- 107, 555 N.W.2d 197, 200 (Ct. App. 1996); *State v. Nielsen*, 2001 WI App 192, ¶ 35, 247 Wis. 2d 466, 489, 634 N.W.2d 325, 335; *State v. Jaimes*, 2006 WI App 93, ¶ 21, 292 Wis. 2d 656, 669–70, 715 N.W.2d 669, 675. Notably, in *Werlein*, the court held that the prosecutor's comments were not improper because the referenced "evidence could have come from a number of sources other than Werlein." 136 Wis. 2d at 457.

Finally, in assessing whether trial counsel provided ineffective assistance of counsel, *Strickland v. Washington,* 466 U.S. 668, 678–88 (1984), this Court

recognized the Court of Appeals adoption of the *Morrison* test. *State v. Doss*, 2008 WI 93, ¶ 93, 312 Wis. 2d 570, 619–20, 754 N.W.2d 150, 174–75 (*quoting Johnson*, 121 Wis.2d at 246). The Court concluded that counsel did not perform deficiently, because the prosecutor's arguments were in response to defense counsel's arguments. *Id*. at ¶ 94.

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Putting it all together, a prosecutor's comments are improper when the "language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify," *Johnson*, 121 Wis. 2d at 246, unless the comments were "a fair response to a claim made by defendant or his counsel[.]" *Robinson*, 485 U.S. at 32. Further, a prosecutor's argument that the government's case is "uncontradicted," or some like term, is "of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" when under the facts of the case the accused is the only witness who could refute the government's case. *Doss*, 2008 WI 93, ¶ 93.

B. Only Hoyle could have contradicted Hannah's sexual assault allegations.

The State's theory of the case was that Hoyle picked up Hannah while she was walking alone, drove her to a secluded area, and sexually assaulted her. Clearly, the only person who could contradict Hannah's version of events was Hoyle. The fact

pattern here is similar to numerous other cases where the prosecutor improperly referred to evidence of sexual assault as uncontradicted when only the defendant could provide the contradicting evidence. *See, e.g.*, *State v. Scutchings*, 2009 ND 8, ¶ 11, 759 N.W.2d 729, 732; *State v. Keesecker*, 222 W. Va. 139, 147, 663 S.E.2d 593, 601 (2008); *Aaron v. State*, 312 Ark. 19, 23, 846 S.W.2d 655 (1993); *Runnels v. Hess*, 653 F.2d 1359, 1363 (10th Cir. 1981).

The State properly concedes that only Hoyle could have provided "direct evidence" controverting the alleged assault. (State Br. at 29). Nonetheless, the State asserts that "the court [of appeals] erroneously assumed, without analysis, that the only evidence that could have controverted Hannah's testimony was Hoyle's testimony." *Id.* According to the State, Hoyle could have provided "indirect evidence," observing that "as a general matter, victims might tell a friend or family member a different version of the events" and that "cross examination is always available." (*Id.*)

The State's potshot at the court of appeals is unfair, as the State did not make its "indirect evidence" argument to that court. (*See* State Response Br. at 21-24). That argument appears for the first time in the State's initial petition for review. (State's First Amended Petition for Review). Plus, the court of appeals did provide an "analysis," explaining how under the facts of the case only Hoyle could have controverted Hannah's allegations. (April 26, 2022 court of appeals opinion at ¶¶ 17-18; State App. at 10-11). The court of appeals cannot be faulted for failing

to anticipate the State's novel "indirect argument," made for the first time to this court.

And novel it is. In fact, the State fails to cite any case law supporting its paltry, two sentence argument. (State Br. at 29). Of course, the possibility that the defendant successfully impeaches the government's witness, with a prior inconsistent statement or otherwise, exists in any case. But in none of the cases where the defendant was the only witness who could controvert the accuser's testimony did the possibility of impeaching the accuser save the government's case.

That is because words have meaning, and when the prosecutor points out that the accuser's testimony is "uncontroverted," the prosecutor is arguing that it is significant that *someone* could have "dispute[d]"[9] the testimony, but did not. When there are multiple witnesses of an important fact in a case, the "someone" who could have disputed the accuser's testimony, but did not, could be one of those witnesses rather than the defendant. But when the only person who could dispute the accuser's testimony is a non-testifying defendant, then the prosecutor's argument that the accuser's testimony is "uncontroverted" is "naturally and necessarily … a comment on the failure of the accused to testify."

When an accuser is impeached with a prior inconsistent statement, a motive to lie, etc., the accuser is not somehow "controverting" or "disputing"

[9] https://www.merriam-webster.com/dictionary/controvert

their testimony. In no world would a jury hearing that the accuser's testimony was "uncontroverted" think that this was a reference to the accuser not being effectively impeached. Because Hoyle was the only person who could controvert Hannah's accusations, the prosecutor's repeated arguments asking the jury to convict Hoyle because Hannah's testimony was "uncontroverted" was improperly inviting the jury to convict Hoyle because *he* did not provide any testimony disputing Hannah.

C. The "context" of the prosecutor's comments was that he was arguing that the jury should convict Hoyle because there was no evidence controverting Hannah's accusations.

The State maintains that the court of appeals erred by not taking the prosecutor's arguments in the proper context, asserting that they were made in reference to standard jury instructions and Hannah's credibility. (State Br. at 27-29). On the contrary, the prosecutor quite clearly and repeatedly argued that Hoyle should be convicted because Hannah's testimony was "uncontroverted"; and given that Hoyle was the only person who could controvert Hannah's accusation, a jury would "naturally and necessarily" conclude that the prosecutor was arguing that Hoyle should be convicted because Hoyle did not controvert Hannah's accusations.

Moreover, the prosecutor's references to the standard jury instructions, if anything, reinforced the notion that the jury should convict Hoyle simply

because he did not controvert Hannah's testimony. The prosecutor coupled his "uncontroverted" argument with the jury instructions against speculation, suggesting that jury was not allowed to "speculate" that Hanna's allegations were untrue because there was no evidence controverting her testimony.

The prosecutor referenced portions of two standard jury instructions. The first was a portion of Wis JI—Criminal 140, "Burden of Proof and the Presumption of Innocence," stating that "[a] reasonable doubt is not a doubt which is based on mere guesswork or speculation." (R. 22:15; 92:13). The second instruction was Wis JI—Criminal 103, "Evidence Defined," which includes the following language:

> Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial.

(R. 22:17).[10]

[10] The court did not actually read this portion of the instruction to the jury. When the court arrived to the section of Instruction 103 that concerns exhibits, he stopped to ask the parties if there were any exhibits in the case. (R. 92:14). There were not, and when the court resumed instructing the jury he said "So the evidence in this case to be considered is the testimony of witnesses only." (*Id.*) However, the jury was given the complete written form of this instruction that included the language referenced by the prosecutor. (R. 22:17; 92:50).

It should hardly need saying, but these instructions do not mean that the jury must believe the State's allegations and convict a defendant if there is no evidence "controverting" the accuser's testimony. That would convert the government's burden of proof to a burden of production, and place the burden on the defendant to "controvert" the allegations against him or her by testifying in court or providing some other evidence. The due process clause guarantees that it is the government's burden to prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). Instead, the instructions simply mean that a defense theory should be based on evidence, and that the jury must consider the evidence introduced at trial, and not outside sources.

However, the prosecutor repeatedly used these instructions to argue that Hoyle should be convicted simply because Hannah's accusations were "uncontroverted." The prosecutor began his closing argument by acknowledging the number and complexity of the instructions the court had just read, and then immediately tied the instruction against speculation with his "uncontroverted" argument.

> [T]he judge instructed you that you are to decide this case solely, solely on the evidence offered and received at the trial. What that means is you're only to base it upon what you heard yesterday when the evidence was coming in at trial. You're not to speculate about other things that may be out there. You're not to think about other things. You're to focus solely on the evidence that was presented to you yesterday in this trial.

> In fact, in order to reemphasize that, it's mentioned again in another instruction where it says, you are to consider only the evidence received during the trial. Once again, not to consider anything else. You're supposed to just focus on what you heard yesterday with the testimony. [Hannah's] testimony that she gave here yesterday is uncontroverted. You have heard no evidence disputing her account of that sexual assault. You heard nothing.

(R. 92:18-19).

Later, after recounting Hannah's testimony, the prosecutor argued that:

> All of that is uncontroverted. There is absolutely no evidence disputing her account of what occurred.

(R. 92:20).

The prosecutor then again argued to the jury that "You're not to speculate. You're not to guess. You're to focus on what you heard yesterday[.]" (R. 92:20-21). The prosecutor followed that up by arguing:

> You heard her testify here yesterday. None of that was controverted, meaning it was all uncontroverted, meaning there was nothing controverting her statements about what had occurred to law enforcement, at the preliminary hearing, and at the trial.

(R. 92:20-21).

The prosecutor returned to this theme in his rebuttal:

> You're not to focus on speculation. You're to focus on the testimony, the evidence that you heard in this particular case.

(R. 92:39). Finally, the prosecutor again tied the jury instruction admonishing the jury not to "speculate" with Hannah's testimony being "uncontroverted."

> You need to make the decision based upon the uncontroverted testimony of what she says occurred. They don't disagree it's uncontroverted. They just say you should ask for more. It's not my job to give you information I don't have. I'm not going to argue and say this is why you don't have it or that is why you don't have it. You don't have it. I will agree to that, you don't have that additional information, but the jury instruction says you are not to speculate about that.

(R. 92:39).

The prosecutor was quite plainly arguing that Hoyle should be convicted simply because Hannah's allegations were uncontroverted. Under the facts of this case, only Hoyle could have controverted her allegations. The prosecutor was thus arguing that Hoyle should be convicted because he did not take the stand and controvert Hannah's allegations. This imposes on Hoyle the kind of penalty on exercising his Fifth Amendment rights that *Griffin* prohibits. Either Hoyle gives up his right not to testify, or the government can argue that the jury can essentially find Hoyle in default. The prosecutor's arguments were a clear violation of Hoyle's Fifth Amendment rights.

D. The State misreads Wisconsin precedent. To the extent that language in prior cases conflict with the proper application of the *Morrison* test, the language should be clarified.

The State's argument relies heavily on isolated language in a handful of cases.

First, the State perceives some conflict between the court's observation in *Bies v. State*, 53 Wis. 2d 322, 325–26, 193 N.W.2d 46, 49 (1972), that "it is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant" with the court of appeals holding below that the prosecutor's repeated claim that the evidence was "uncontroverted" was improper. (Brief at 30-31, quoting *Bies*, 53 Wis. 2d at 325).

However, there is no conflict. In *Bies*, the defendant was convicted of robbing and killing a fellow bar patron. 53 Wis. 2d at 323. The defense was not that he did not commit the acts, but that he was too intoxicated to form the requisite intent. *Id.* at 324. Bies (who appeared pro se) argued that the prosecutor's observation "that certain evidence was uncontroverted" was an impermissible comment on his decision not to testify. *Id.* at 325. The Court rejected this argument because "the certain evidence" that the prosecutor said was uncontroverted was Bies's involvement in the robbery and murder of the victim, which again was not contested by Bies because he instead relied on an intoxication defense. *Id.* The argument could thus in no way be construed as a

comment about Bies's decision not to take the stand. Further, the court's recognition that "generally" a prosecutor may comment on the lack of evidence supporting a defense theory does not conflict with the long-standing recognition that arguments based on a defendant's failure to testify are an exception to this rule.

Next, the State relies on the court of appeals decision in *Jaimes* to suggest that there was no error because the prosecutor did not explicitly argue that Hoyle's failure to testify means that he is guilty. (State Br. at 26). The State misreads *Jaimes*.

The *Jaimes* decision came after the Supreme Court held in *Robinson* that a defendant's Fifth Amendment rights are not violated when the prosecutor's comments are "a fair response to a claim made by defendant or his counsel[.]" *Robinson*, 485 U.S. at 32. The *Jaimes* court recounted *Robinson*, and then stated that:

> … a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument.

2006 WI App 93, ¶ 21.

In *Jaimes*, defense counsel pointed out in closing that two of the defendant's alleged collaborators in a drug business had not testified. In rebuttal, the

prosecutor explained that they had the same constitutional right not to testify as the defendant. ¶¶ 18-20. *Jaimes* first concluded that the second part of its test was not met because the comments were not suggesting that the jury should find the defendant guilty because he did not testify, but were explaining why certain witnesses did not testify and why no inferences should be drawn from that fact. *Id*. at ¶ 23. In addition, the prosecutor's comments were a "fair response" to the defendant's argument in closing that the jury should draw a negative inference against the state for not calling the collaborators as witnesses. *Id*. at ¶ 24.

The State focuses on the second *Jaimes* factor, that "the comment must propose that the failure to testify demonstrates guilt," suggesting that it requires an explicit argument by the prosecutor that the defendant's guilt may be inferred from the failure to testify. Neither *Jaimes* nor any other cases that Hoyle is aware of requires such an explicit argument. The "naturally and necessarily" prong of the *Morrison* test is designed to cover "indirect" arguments based on the defendant's failure to testify. *See Morrison*, 6 F.2d at 811. Indeed, in none of the cases where the federal or state court found that the prosecutor's "uncontradicted" argument improper were there direct or explicit comments about the defendant's decision not to testify. (See cases collected on pages 18-19 above).

Instead, the second *Jaimes* factor seems aimed to separate out those incidental comments that

happen to "constitute a reference to the defendant's failure to testify" – the first *Jaimes* factor – but in context do not actually suggest any adverse inference should be drawn from that failure to testify. In *Jaimes*, the reference was in rebuttal, explaining that no inference should be drawn from the failure of the collaborators to testify, as they had the same right not to testify as the defendant. Here, the prosecutor argued in his initial closing and in rebuttal that the defendant should be convicted because the evidence was uncontroverted. The observation that the evidence was uncontroverted met the first *Jaimes* factor – a "reference to the defendant's failure to testify" – because Hoyle was the only person who could controvert Hannah's accusations. This observation was not made in a vacuum. It was made as the centerpiece of the prosecutor's argument for why the jury should find Hoyle guilty, and thus met the second *Jaimes* factor.[11]

Still, Hoyle cannot say with certainty what the court of appeals meant when it set out the second factor. It does not appear in *Robinson* or any other case, other than a passing reference to the *Jaimes* test in *Doss*. 2008 WI 93, ¶ 81. This Court may clarify that *Jaimes* should not be read as stating that a prosecutor's argument is only improper if he or she explicitly states that the defendant should be found guilty because he or she did not testify. Alternatively,

[11] The State correctly does not argue that the prosecutor's argument was a "fair response" to any defense argument, the third *Jaimes* factor.

the Court could state that the proper test is the *Morrison* test, with the additional proviso from *Robinson* that there is no Fifth Amendment violation when the comment about the defendant's silence is a "fair response" to the defendant's own arguments, and jettison the *Jaimes* test altogether.

Finally, the State places too much reliance on *Doss*. 2008 WI 93. (State Br. at 23-24). There, the court concluded that defense counsel was not ineffective for not objecting to a comment made by the prosecutor during closing about the lack of any explanation for the transfer of the funds at issue, when defense counsel had argued that the defendant's actions "showed nothing but good motives." *Id*. at ¶ 94. *Doss* thus turned on the holding in *Robinson*, that the defendant cannot claim a Fifth Amendment violation for a comment invited by the defendant's own arguments. *Id*.

The State latches onto other language in *Doss*, namely this observation:

> The U.S. Supreme Court has recognized that a prosecutor's statement that falls short of a direct statement on a defendant's failure to testify, but instead "'refers to testimony as uncontradicted where the defendant has elected not to testify and when he is the only person able to dispute the testimony,'" is at most an attenuated violation of *Griffin* … and *Robinson,* 485 U.S. at 34, 108 S.Ct. 864, and may not actually constitute a violation at all. *United States v. Hasting,* 461 U.S. 499, 503, 506 & n. 4, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

2008 WI 93, ¶ 94.

Respectfully, the *Doss* court misread *Hasting* as suggesting that *all* instances of a prosecutor referring to evidence as uncontradicted, when only the defendant can contradict the government's case, as being "at most an attenuated violation of *Griffin*." In the passage from *Hastings* that *Doss* quotes, the Supreme Court was explaining why the lower court's decision to automatically reverse instances of *Griffin* violation, instead of applying a harmless error test, was too strong medicine: the prosecutor's comments *in that case* were "at most an attenuated violation of *Griffin*." 461 U.S. at 506. The Court then stated in a footnote that Justice Stevens's concurrence "may well be correct that the prosecutor's argument was permissible" but that the issue was not before the Court. *Id*. at 506 n.4. And Justice Stevens would have found that the comments were proper because he disagreed with the lower court's conclusion that only the defendants could have contradicted the state's case. After reviewing the facts, Justice Stevens explained that the "central question could have been addressed by defense witnesses and defense counsel even without testimony by the defendants themselves." *Hasting*, 461 U.S. at 515 (Stevens, J., concurring).

Hastings simply does not stand for the proposition that an argument that the evidence is uncontradicted, when only the defendant can contradict the evidence, is permitted under the Fifth Amendment. If it did, at least *one* of the federal circuit courts would have mentioned it. Instead, every federal circuit court considering the issue, and applying the

same *Morrison* test adopted in Wisconsin, has found such arguments to be impermissible.

But even if the *Doss* court was correct that this kind of error is only an "attenuated violation of *Griffin*," it is still a violation. And the State has never argued that any error here was harmless. Nor could it, as there was absolutely no corroborating or physical evidence supporting the accusations against Hoyle, and the prosecutor's comments were not isolated but repeated. *Doss* does not stand in the way of this Court affirming the court of appeals below.

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Hoyle was accused of taking Hannah to a secluded area and sexually assaulting her. Only Hoyle could controvert those allegations. So when the prosecutor repeatedly argued that Hoyle should be convicted because Hannah's allegations were not controverted, a jury would "naturally and necessarily" interpret the argument as being that Hoyle should be convicted because *he* did not controvert Hannah's allegations. This violated Hoyle's Fifth Amendment right not to testify at trial, and so he entitled to a new one.

CONCLUSION

For the reasons stated above, the Court should affirm the Court of Appeals decision to grant him a new trial. If this Court does not affirm the decision, then the case should be remanded to the Court of Appeals so that court may address the remaining issues raised on appeal.

Respectfully submitted,

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Dated this 14th day of November, 2022.

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,824 words.

I further certify that I have submitted an electronic copy of this brief that is identical in content and format to the printed form of the response filed as of this date. A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 14th day of November, 2022.

Signed:

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