

No.

---

---

**In the Supreme Court of the United States**

---

DAVID ARREDONDO,

*Petitioner,*

v.

PETER HUIBREGTSE,

*Respondent.*

---

**On Petition for a Writ of Certiorari  
to the United States Court of Appeals for the  
Seventh Circuit**

---

**PETITION FOR A WRIT OF CERTIORARI**

---

J. Bishop Grewell  
*Counsel of Record*  
Linda Boachie-Ansah  
*Mayer Brown LLP*  
*71 S. Wacker Drive*  
*Chicago, IL 60606*  
*(312) 782-0600*

*Counsel for Petitioner*

---

---

**QUESTION PRESENTED**

Whether a reasonable application of the balancing test set out by *Rock v. Arkansas*, 483 U.S. 44, 54-56 (1987), requires a court to consider the value of defendant's testimony when evaluating whether restricting that testimony is justified by the interests such a restriction serves.

## TABLE OF CONTENTS

	<b>Page</b>
QUESTION PRESENTED.....	i
PETITION FOR A WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS IN- VOLVED .....	1
STATEMENT .....	2
A.    Arredondo’s Trial and Direct Ap- peal .....	2
B.    State Postconviction Proceedings.....	5
C.    Petition for Habeas Relief in the District Court.....	6
D.    The Seventh Circuit’s Decision .....	7
REASONS FOR GRANTING THE PETITION .....	8
I.    THE SEVENTH CIRCUIT’S INTER- PRETATION OF ROCK V. ARKANSAS INFRINGEMENTS ON CRIMINAL DEFEN- DANTS’ FUNDAMENTAL RIGHT TO PRESENT THEIR DEFENSE .....	8
II.   THE SEVENTH CIRCUIT’S DECI- SION CONFLICTS WITH THE RUL- INGS OF BOTH THIS COURT AND SEVERAL OF THE COURTS OF AP- PEALS REGARDING THE PROPER SCOPE OF ROCK V. ARKANSAS .....	10
CONCLUSION .....	13

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
 <b>CASES</b>	
<i>Carey v. Musladin</i> , 549 U.S. 70 (2006) .....	9
<i>Clemons v. Miss.</i> , 494 U.S. 738 (1990).....	8
<i>Gill v. Ayers</i> , 342 F.3d 911 (9th Cir. 2003) .....	12
<i>Nichols v. Butler</i> , 953 F.2d 1550 (11th Cir. 1992) .....	8
<i>Owens v. United States</i> , 483 F.3d 48 (1st Cir. 2007).....	9
<i>Riggins v. Nevada</i> , 504 U.S. 127 (1992).....	8
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987) .....	<i>passim</i>
<i>State v. Curtis</i> , 582 N.W.2d 409 (Wis. Ct. App. 1998) .....	5
<i>State v. Machner</i> , 285 N.W.2d 905 (Wis. Ct. App. 1979) .....	5
<i>United States v. Byrd</i> , 403 F.3d 1278 (11th Cir. 2005) .....	11
<i>United States v. Peterson</i> , 233 F.3d 101 (1st Cir. 2000).....	11
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998).....	10

**TABLE OF AUTHORITIES—continued**

	<b>Page(s)</b>
<i>United States v. Tavares</i> , 100 F.3d 995 (D.C. Cir. 1996).....	9
<i>United States v. Turning Bear</i> , 357 F.3d 730 (8th Cir. 2004) .....	11-12
 <b>CONSTITUTION AND STATUTES</b>	
U.S. Const. amend. V .....	1
U.S. Const. amend. VI.....	1
U.S. Const. amend. XIV .....	2
28 U.S.C § 1254(1).....	1
28 U.S.C. § 2254(d).....	6

## PETITION FOR A WRIT OF CERTIORARI<sup>1</sup>

---

Petitioner, David Arredondo, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

### OPINIONS BELOW

The opinion of the Seventh Circuit (App., *infra*, 1a-37a) is reported at 542 F.3d 1155. The district court's order granting a certificate of appealability (App., *infra*, 38a-42a) is unreported, and its order denying the petition for a writ of habeas corpus (App., *infra*, 43a-78a) is reported at 498 F. Supp. 2d 1113. The opinion of the Court of Appeals of Wisconsin (App., *infra*, 79a-108a) is reported at 674 N.W.2d 647.

### JURISDICTION

The Seventh Circuit entered judgment on September 8, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

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

The Sixth Amendment to the United States Constitution provides, in relevant part:

---

<sup>1</sup> Counsel was appointed to represent the petitioner under the Criminal Justice Act of 1964. See 18 U.S.C. § 3006A(d)(6).

In all criminal prosecutions, the accused shall enjoy the right to \* \* \* have compulsory process for obtaining witnesses in his favor \* \* \*.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No state shall \* \* \* deprive any person of \* \* \* liberty \* \* \* without due process of law \* \* \*.

### STATEMENT

In *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987), this Court mandated a balancing test for whenever a defendant's constitutional right to testify is limited. The test requires a court to evaluate whether the interests served by limiting the right to testify are sufficiently weighty to justify the limitation imposed. This case asks whether a state court has unreasonably applied *Rock* by not considering the petitioner's testimony or right to testify when engaging in *Rock*'s balancing test. The Wisconsin Court of Appeals upheld the trial court's decision, and on federal collateral review, the district court denied the petition for a writ of habeas corpus. Affirming the district court's denial of relief, the Seventh Circuit agreed that "*Rock* established a methodology for reviewing restrictions on a defendant's right to testify," but relying on the "high level of generality" at which *Rock* applied, the Court held that the Wisconsin courts' balancing was not "objectively unreasonable" despite the Wisconsin courts failure to consider the defendant's testimony or right to testify in its analysis. App., *infra*, 32a-33a, 37a. Review is warranted because the Seventh Circuit's flawed conception of *Rock*'s balancing test contravenes the precedents of

this Court, as well as several of the other Courts of Appeals.

### A. Arredondo's Trial

Petitioner David Arredondo was charged with murder and sexual assault and was tried in the Circuit Court of Milwaukee County, Wisconsin. At trial, after the State rested, the trial court excused the jury and then questioned petitioner's counsel regarding whether petitioner would testify. App., *infra*, 3a. The court began by noting, "[i]t is my understanding the defense has two very brief witnesses to present before lunch and then the defendant will *at that time* make a decision about testifying" (emphasis added). *Ibid.* Counsel told the trial court that petitioner had decided not to testify, but added the caveat that petitioner might change his mind after he heard the testimony of the two defense witnesses. *Id.* at 4a. The court assured counsel and the petitioner that it would return to the petitioner's decision whether to testify after hearing from the other witnesses. It then engaged in a waiver colloquy to confirm that the petitioner understood the consequences of waiver and intended to waive his right to testify. *Id.* at 4a-5a. With the understanding that the court would later revisit the issue, petitioner waived his right to testify. Defense counsel presented the two witnesses and then the defense rested. Notwithstanding its earlier pledge, the trial court did not further inquire as to whether petitioner would testify. The court instructed the jury that the evidentiary phase of trial was complete and it recessed for lunch. *Id.* at 6a.

Immediately after lunch, however, petitioner sought to exercise his right to testify:

THE COURT: All right. The record should reflect we are now back on the record.  
\* \* \*

THE DEFENDANT: Your Honor, excuse me, Your honor. I did not understand very well about when you were asking me the questions. My attorney advised me to say yes, but I didn't understand the question that I was yes-ing to when we ended about an hour or two hours ago.

\* \* \*

THE COURT: You're changing your mind about your decision to testify?

THE DEFENDANT: Yes ma'am.

\* \* \*

THE DEFENDANT: Yes, I did not understand. When you were asking me about the rights or whatever about testifying—

THE COURT: Right.

THE DEFENDANT: I did not understand. And I need to take that back, the yes answer that I gave you and tell you no, I do need to testify because the only one that can defend David Arredondo today is David Arredondo.

App., *infra*, 6a.

Petitioner informed the court that he and counsel had disagreed about whether he should testify, but petitioner maintained that he had wanted to exercise this right after he heard the testimony of the defense witnesses. App., *infra*, 7a. The trial court granted a recess to allow the petitioner to confer with counsel, and after the session resumed, petitioner confirmed

his desire to revoke his waiver and testify. The court asked counsel whether he and petitioner previously had discussed the decision, and counsel claimed that petitioner had not earlier sought to testify. The court also asked the State whether its rebuttal witnesses could be relocated, and the State replied that it already had relocated some of the witnesses and “probably could” find the others. *Id.* at 9a, 12a. The court then concluded that the State, the jury, and the “system” would suffer “substantial prejudice” if petitioner were allowed to testify. *Id.* at 13a. It denied petitioner’s request without inquiring into defendant’s proposed testimony or considering the value of his right to testify. The trial court later described petitioner’s assertion of his right to testify as “another attempt to manipulate.” *Id.* at 19a.

The jury ultimately found petitioner guilty of first-degree intentional homicide and second-degree sexual assault. The trial court sentenced him to life without the possibility of parole on the homicide charge and twenty years’ consecutive imprisonment on the sexual-assault charge. App., *infra*, 21a.

### **B. State Postconviction Proceedings and Appeals**

Petitioner then sought postconviction relief for a new trial in the state courts arguing, among other things, that he was deprived of his constitutional right to present his own testimony. At petitioner’s *Machner*<sup>2</sup> hearing, petitioner testified that his waiver of his right to testify was conditioned on the

---

<sup>2</sup> A postconviction *Machner* hearing is a prerequisite to filing a claim of ineffective assistance of counsel in Wisconsin. See *State v. Curtis*, 582 N.W.2d 409, 410 (Wis. Ct. App. 1998) (citing *State v. Machner*, 285 N.W.2d 905 (Wis. Ct. App. 1979)).

testimony of the other defense witnesses. According to the petitioner, he told trial counsel that he wanted to testify before the defense rested, but counsel forbade him from doing so. In an affidavit attached to his postconviction motion, petitioner asserted that if allowed to testify, he would have explained to the jury that he and the victim had had consensual relations, that a third party watched them engaging in sexual activity, that afterwards petitioner went to two nearby taverns in search of alcohol and cocaine, and that when he returned, the victim already had left. The Circuit Court of Milwaukee County denied petitioner's postconviction motion, and the Wisconsin Court of Appeals affirmed. The state appellate court concluded that the trial court's denial of petitioner's request to testify was a proper use of discretion in light of the trial court finding prejudice to the State. App., *infra*, 89a-90a. The Wisconsin Supreme Court denied the petition for review.

### **C. Petition for Habeas Relief in the District Court**

Petitioner then sought collateral relief in the district court under 28 U.S.C. § 2254(d), reasserting his argument that he was deprived of his constitutional right to testify in his own defense. The district court, noting that it was a "close call" whether the state court decision was objectively reasonable, decided to uphold the Wisconsin Court of Appeals' decision. App., *infra*, 71a. It added that under Seventh Circuit precedent, the right to testify is subject to a harmless error analysis and concluded that "it is highly unlikely that the jury would have reached a different verdict if petitioner had testified." *Id.* at 72a. But the district court determined that reasonable jurists could debate whether the trial judge's re-

fusal to permit petitioner to testify was arbitrary and disproportionate to the interests it purported to serve and granted a certificate of appealability.

#### **D. The Seventh Circuit's Decision**

Before the Seventh Circuit, petitioner contended that by failing to consider the value of his testimony as part of *Rock's* required constitutional analysis, the state court had unreasonably applied *Rock*. Petitioner also explained why the District Court's harmless error analysis was itself in error. The Seventh Circuit reached only the first issue. Because application of the *Rock* methodology entailed "a substantial element of judgment," the Seventh Circuit determined the Wisconsin Court of Appeals was entitled to "more leeway" when determining whether its decision was objectively reasonable or not. App., *infra*, 33a. The Seventh Circuit engaged in the same analysis as the state courts, weighing only the prejudice to the State in determining whether the interests served in limiting petitioner's right to testify justified the limitation. Finding that analysis reasonable, the court affirmed the district court's judgment.

#### **REASONS FOR GRANTING THE PETITION**

This case presents a frequently-recurring question regarding *Rock v. Arkansas* and its protection of a right undergirding the adversary system and ensuring fairness in every criminal trial: a defendant's right to testify. In conflict with this Court and several of the other Courts of Appeals, the Seventh Circuit has held that a State need not consider the value of the defendant's testimony when undertaking *Rock's* analysis. For the benefit of defendants seeking to assert their rights and to reestablish *Rock's*

clear constitutional requirements for trial judges, this Court should grant review.

**I. THE SEVENTH CIRCUIT'S INTERPRETATION OF *ROCK V. ARKANSAS INFRINGES ON CRIMINAL DEFENDANTS' FUNDAMENTAL RIGHT TO PRESENT THEIR DEFENSE*.**

This Court repeatedly has acknowledged that a defendant's right to present his own testimony at trial is of utmost importance. See, e.g., *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) ("It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system"); *Clemons v. Miss.*, 494 U.S. 738, 769 (1990) (Blackmun, J., concurring in part, dissenting in part) ("[T]here [is] no longer any doubt that the right to be heard . . . [can] be vindicated only by affording a defendant an opportunity to testify before the factfinder"); *Rock*, 483 U.S. at 52 ("[T]he most important witness for the defense in many criminal cases is the defendant himself"); see also *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) ("The testimony of a criminal defendant at his own trial is unique and inherently significant"). In *Rock*, this Court set forth the required analysis for determining whether a defendant's fundamental right to testify can be restricted. But the Seventh Circuit's failure to uphold the clearly established procedure set forth by *Rock* allows defendants to be deprived of their rights notwithstanding the constitutional safeguards. By upholding, as objectively reasonable, applications of the *Rock* balancing test that only consider the State's interests when limiting a defendant's right to testify, the Seventh Circuit has added its judicial foot to the

“judicial thumb” already placed “on the warden’s side of the scales” in *Carey v. Musladin*, 549 U.S. 70, 79 (2006) (Stevens, J., concurring in the judgment). *Rock*’s balancing test requires a state court to “evaluate whether the interests served \* \* \* justify the limitation imposed.” 483 U.S. at 56. That can only be done in an objectively reasonable manner by considering the impact of the limitation imposed.

Upholding a defendant’s fundamental right to testify is especially critical in cases, like petitioner’s, where the question is not whether a crime was committed but whether the defendant was involved. See *United States v. Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996) (“[W]here the fact of the crime is conceded but the defendant’s involvement is the disputed issue, the defendant’s testimony must be considered of prime importance.”) (internal citation and quotation marks omitted); see also *Owens v. United States*, 483 F.3d 48, 59 (1st Cir. 2007) (“A defendant’s testimony as to non-involvement should not be disregarded lightly, especially given his constitutional right to explain his version of the facts”). In these situations, permitting the defendant to defend himself in front the jury may well be the difference between conviction and acquittal. But because the Seventh Circuit’s decision only weighs the interests served by limiting testimony without considering whether those interests justify the limitation, defendants’ right to present their testimony will be improperly restricted, with potentially devastating consequences. In the interests of justice, this Court should grant certiorari.

## II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE RULINGS OF BOTH THIS COURT AND SEVERAL OF THE COURTS OF APPEALS REGARDING THE PROPER SCOPE OF *ROCK V. ARKANSAS*.

In *Rock*, this Court delineated the “constitutional analysis that is necessary when a defendant’s right to testify is at stake.” 483 U.S. at 58. As this Court explained, whenever the State places limits on a defendant’s testimony, it must evaluate whether its interests are of great enough import to justify the infringement on a defendant’s constitutional rights. This Court has made clear that the *Rock* balancing test should be utilized whenever the defendant’s right to present his testimony is at issue.

For instance, in *United States v. Scheffer*, 523 U.S. 303 (1998), the question presented was whether the military could prevent the results of the defendant’s polygraph examination from being admitted at his trial without unconstitutionally abridging his right to present a defense. In holding that it could, this Court referenced the requirements laid out in *Rock*, and then proceeded to compare the interests advanced by the military with the value of the evidence that the defendant sought to present. See *Scheffer*, 523 U.S. at 308-317. This Court, as required by *Rock*, balanced the relative interests at stake before upholding the military’s decision. A different result was reached than in *Rock* because, it explained, when a restriction infringes “upon the accused’s interest in testifying in her own defense,” as was the case in *Rock* and as is the case here, “an accused ought to be allowed ‘to present his own version of events in his own words.’” *Id.* at 315-316.

Several of the other Courts of Appeals have recognized that *Rock*'s balancing test requires both sides of the scale to be considered when the defendant's right to present his own testimony is at stake. For example, in *United States v. Byrd*, 403 F.3d 1278 (11th Cir. 2005), the day after the evidence closed at trial, the defendant sought to reopen the case so that he could exercise his right to testify. In determining whether the trial court erred in denying his request, the Eleventh Circuit began by, appropriately, citing this Court's decision in *Rock* as the relevant precedent to guide its analysis. See *Byrd*, 403 F.3d at 1282. The Eleventh Circuit then weighed various factors—such as the inherent significance of the defendant's right to testify at his trial, the timeliness of the defendant's request, and the prejudice to the State—before it upheld the district court's decision. See *id.* at 1287-1288.

Similarly, in *United States v. Peterson*, 233 F.3d 101 (1st Cir. 2000), a case cited by the Wisconsin Court of Appeals as governing its decision here, after the defense rested and the trial court prepared the jury for closing arguments, the defendant requested that he be allowed to present his testimony. 233 F.3d at 105. The trial court denied the request, and on appeal the defendant claimed that the court had violated his constitutional rights. *Ibid.* The First Circuit, recognizing *Rock* as governing precedent, weighed the defendant's right to testify against "the need for order and fairness in the proceedings." *Id.* at 105-106.

In *United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004), in holding that a material defense witness's testimony was improperly excluded, the Eighth Circuit again acknowledged this Court's ad-

monition in *Rock* that the trial court should weigh the relevant interests before restricting a defendant's right to present relevant testimony. See 357 F.3d at 733-735; see also *Gill v. Ayers*, 342 F.3d 911, 920 (9th Cir. 2003) (using the factors set forth in *Rock* to conclude that defendant's right to testify at sentencing hearing was violated).

In contrast with the decisions of the First, Eighth, and Eleventh Circuits, the Seventh Circuit has ignored the clearly established rule of *Rock* by upholding an application of *Rock*'s balancing test that only places weight on one side of the scales. It is objectively unreasonable to apply *Rock*'s balancing test without consideration as to the value of the defendant's testimony and right to testify. To ensure *Rock*'s protection of the right to testify—a right fundamental both to the adversary system and to ensuring the fairness of the thousands of criminal trials held each year—certiorari should be granted.

### CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

J. BISHOP GREWELL  
*Counsel of Record*  
LINDA BOACHIE-ANSAH  
*Mayer Brown LLP*  
*71 S. Wacker Drive*  
*Chicago, IL 60606*  
*(312) 782-0600*

*Counsel for Petitioner*

DECEMBER 2008

## **APPENDIX**