

FILED

JUN 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28194-9-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYLER W. GASSMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
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Spokane, WA 99203
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INDEX

A.	ASSIGNMENT OF ERROR.....	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE	2
D.	ARGUMENT.....	10
1.	MR. KONGCHUNJI'S EXCULPATORY TESTIMONY WAS "NEWLY DISCOVERED EVIDENCE" AND THE TRIAL COURT'S REFUSAL TO GRANT A NEW TRIAL WAS BASED UPON UNTENABLE AND UNREASONABLE GROUNDS.....	10
a.	Mr. Kongchunji's Testimony Probably Would Have Changed The Outcome Of Mr. Gassman's Trial	11
b.	Mr. Kongchunji's Testimony Was Discovered After Mr. Gassman's Trial And Could Not Have Been Discovered Prior To His Trial By The Exercise Of Due Diligence	14
(i.)	<u>Mr. Kongchunji's Testimony Was New Evidence Because It Was A Witness's Recantation</u>	14
(ii.)	<u>A Witness Whom The State Threatens With Perjury Charges If He Testifies In A Trial, And As A Result Who Has Stated He Will Invoke The Fifth Amendment If Called As A Witness, Is "Unavailable."</u>	15

(a)	The State’s threats that forced Mr. Kongchunji into silence violated Mr. Gassman’s right to due process	16
(b)	Mr. Gassman does not bear the burden of establishing that the Fifth Amendment privilege was available to Mr. Kongchunji if he was called as a witness	18
(iii.)	<u>Mr. Kongchunji’s Testimony Was Material Since It Was Exculpatory Evidence And Thus Was Neither Merely Cumulative Nor Simply Impeaching</u>	20
2.	IN THE ALTERNATIVE, MR. GASSMAN’S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY COUNSEL’S FAILURE TO CALL MR. KONGCHUNJI AS A WITNESS	22
E.	CONCLUSION.....	24

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BARRY, 25 Wn. App. 751, 611 P.2d 1262 (1980)	11
STATE V. BURRI, 87 Wn.2d 175, 550 P.2d 507 (1976)	16
STATE V. CARLISLE, 73 Wn. App. 678, 871 P.2d 174 (1994)	16, 17
STATE V. CASTRO, 32 Wn. App. 559, 648 P.2d 485 (1982)	11
STATE V. CRAWFORD, 159 Wn.2d 86, 147 P.3d 1288 (2006)	22
STATE V. HUDLOW, 99 Wn.2d 1, 659 P.2d 514 (1983)	20
STATE V. KING, 130 Wn.2d 517, 925 P.2d 606 (1996)	15, 16
STATE V. MACON, 128 Wn.2d 784, 911 P.2d 1004 (1996)	14
STATE V. MAUPIN, 128 Wn.2d 918, 913 P.2d 808 (1996)	20
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995)	23
STATE V. NELSON, 72 Wn.2d 269, 432 P.2d 857 (1967)	19
STATE V. PARTEE, 141 Wn. App. 355, 170 P.3d 60 (2007)	11
STATE V. POST, 118 Wn.2d 596, 826 P.2d 172 (1992)	16

STATE V. SLANAKER, 58 Wn. App. 161, 791 P.2d 575 (1990)	15
STATE V. SWAN, 114 Wn.2d 613, 790 P.2d 610 (1990)	10
STATE V. WARNICK, 121 Wn. App. 737, 90 P.3d 1105 (2004)	23
STATE V. WHITE, 74 Wn.2d 386, 444 P.2d 661 (1968)	21
STATE V. WILLIAMS, 96 Wn.2d 215, 634 P.2d 868 (1981)	11

OTHER CASES

STATE V. CALDWELL, 112 Idaho 748, 735 P.2d 1059 (1987)	15
-----------------------------------------------------------------	----

SUPREME COURT CASES

McMANN V. RICHARDSON, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).....	22
MINNESOTA V. MURPHY, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).....	15
STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	22, 23
WEBB V. TEXAS, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972).....	17

FEDERAL CASES

AMOS V. UNITED STATES, 218 F.2d 44 (D.C.Cir.1954).....	15
UNITED STATES V. JACKSON, 935 F.2d 832 (1991).....	17

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT1, 5, 9, 15, 16, 18, 19, 23
SIXTH AMENDMENT.....18, 22

COURT RULES

CtR 7.8.....10

A. ASSIGNMENT OF ERROR

1. The trial court abused its discretion by denying Mr. Gassman's motion for a new trial based upon newly discovered evidence.

B. ISSUES

1. Is evidence newly discovered for purposes of CrR 7.8 where a witness co-defendant indicates he will invoke the Fifth Amendment if called to testify, and later the witness decides he can testify?
2. After the State threatens a witness with perjury charges if the witness decides to testify, and as a result that witness asserts he will invoke the Fifth Amendment if called, is that witness "unavailable" for purposes of analyzing whether his testimony is newly discovered evidence under CrR 7.8?
3. Does a defense witness who will testify that the defendant was framed and had no part in the crimes for which he is charged offer merely "rebuttal" or "impeaching" evidence under CrR 7.8?
4. Does a trial court err when it denies a motion for a new trial when a witness co-defendant who insisted he would invoke

the Fifth Amendment if called to testify, subsequently admits he and the State's sole fact witness conspired to frame the defendant for crimes he did not commit, recants his false accusations, and offers to testify?

C. STATEMENT OF THE CASE

In April, 2008, Clifford Berger and his girlfriend Joni Jeffries arranged for a drug deal. They wanted to purchase approximately \$4,500 worth of Oxycontin pills, and then planned to resell the pills for a profit. (RP 94; 99; 102) Mr. Berger's friend from work, Eric Weskamp was the connection to a man nicknamed "Poncho", Anthony Kongchunji, who had a supply of the drugs. (RP 99) Mr. Weskamp set up the deal to take place outside his and Ms. Jeffries's home on Cataldo Street in Spokane. (RP 99)

At about 10:00 p.m., when the dealers arrived, several people were inside the house including Mr. Berger, Ms. Jeffries, Rob Syler and Eric Weskamp. (RP 149-152) Mr. Weskamp went outside with the money. (RP 103; 257) He climbed inside the waiting truck. (RP 103-04) Mr. Kongchunji was inside the truck, along with Matthew Dunham. (RP 219) When the men did not respond to his friendly greeting, Mr. Weskamp realized something was wrong and he started to get out of the truck. He was immediately confronted by "a bunch of people in bandannas and

masks.” (RP 222) The masked men beat Mr. Weskamp with a shotgun and a pistol. (RP 223)¹ Mr. Weskamp did not recognize any of the men involved other than Mr. Kongchunji and Matthew Dunham. (RP 233)

After they got the money, the men left in the truck. (RP 100) Mr. Weskamp ran back into the house and told everyone that they had been robbed. (RP 104)

Kyle Williams had the unfortunate timing of arriving just as the drug deal had gone awry. (RP 153) As he walked to the front door, Mr. Berger came running outside, and told Mr. Williams to get the license plate number of the truck. (RP 153) The two men got inside Mr. Williams’ car and gave chase to the truck. (RP 154-57) Eventually, someone in the truck opened fire on Mr. Williams’ car. (RP 157) When the two men heard bullets hit the car grill, they decided to abandon the chase. (RP 112; 57)

None of the people involved in the robbery could identify the masked men involved in the beating and robbery. (RP 127; 187)

Matthew Dunham, a 17-year old, was arrested for participating in a separate oxycontin-related robbery. (RP 331-35) In order to obtain a deal from prosecutors, Mr. Dunham offered to give the police the names of several men that he claimed participated in robberies with him, and to

¹ Robert Syler, another friend who apparently went outside with Mr. Weskamp, was in the middle of the street, lying facedown, with a gun pointed at him. (RP 226; 249)

testify at the trials. (RP 140; 335-37) Mr. Dunham told police that Tyler Gassman was one of the men who participated in the robbery at Mr. Berger and Ms. Jeffries's home. (RP 338-39) Mr. Dunham received an 18-month sentence. (CP 496)

As a result, Mr. Gassman was charged with five counts: (1) first degree robbery; (2) attempted first degree murder of Clifford Berger; (3) attempted first degree murder of Kyle Williams; (4) drive-by shooting related to Clifford Berger; and (5) drive-by shooting related to Kyle Williams. (CP 1-3)

A jury convicted Mr. Gassman of first-degree robbery, both counts of first degree assault, and the both counts of drive-by shooting. (CP 327; 329; 331-33) The jury acquitted Mr. Gassman of both attempted first degree murder charges. (CP 328; 330) The jury found Mr. Gassman was armed with a deadly weapon at the time of the robbery and the assaults. (CP 334-36) The court sentenced the twenty-one-year-old Tyler Gassman to a total of 309 months or nearly 26 years in prison. (CP 569)

Subsequently, Mr. Gassman filed a motion for arrest of judgment, or in the alternative, a new trial. (CP 338-352) In that motion, Mr. Gassman argued that the judgment should be arrested and the charge dismissed based upon insufficiency of the evidence. He also argued in the alternative that a new trial should have been granted based upon the

severity of the prosecutorial misconduct in the trial proceedings. (CP 338-352) The motion was denied.²

Mr. Gassman moved for a new trial based upon newly discovered evidence. (CP 375-381; 466-521) Counsel for Mr. Gassman stated that Mr. Kongchunji's attorney revealed that if called to testify in Mr. Gassman's trial, Mr. Kongchunji would assert his Fifth Amendment privilege to remain silent, because he could face potential criminal charges as of result of the testimony. Counsel was told that the anticipated charges would arise not from his participation in the current matter, because he had entered a plea, but for other possible charges. (CP 376)

Counsel stated that, as a result, Mr. Kongchunji was "unavailable" as a witness for Mr. Gassman's trial. (CP 376) Subsequently, Counsel learned Mr. Kongchunji had written a letter from jail, witnessed by a corrections officer at the jail, to co-defendant Paul Statler's father that exonerated Mr. Gassman. (CP 377)

Along with the motion, Mr. Gassman submitted an Affidavit of Anthony Kongchunji that stated in part:

Originally, I was going to testify in this case, but I was threatened with perjury charges if I did so and therefore

² It appears that this motion was handled in the hearing held on March 30, 2009. The trial court ultimately imposed sanctions upon the State for mismanagement in this case. The State filed an appeal of that order in separate action, No. 280543, which is currently pending before this Court.

chose to remain silent. I have since learned that I would not have committed perjury, so I have decided to tell the truth of what really happened.

After Tyler, Robert and Paul were convicted based upon the false testimony of Matt Dunham I was stunned and wrote a letter to Paul's father Duane... Tyler, Paul and Robert were not involved in any of these crimes. It was always Matt [Dunham], Larry [Dunham], Nick [Smith] and myself and that includes the Oxycontin robbery of Eric Weskamp. There was one individual there that I did not know, but it was not Tyler, Paul, or Robert.

(CP 378)

Mr. Kongchunji's letter was attached as an exhibit. (CP 380-81)

In part, the letter stated,

I don't know how the jury could believe Matthew [Dunham] at all because I've read his statement and they are all lies.

I thought I should let you know that Paul, Tyler, and Robert were not involved with any of the alleged incidents and the reason I know this is because I was involved. The other individuals involved were Larry Dunham, Matthew Dunham and Nicholas Smith. The Prosecution has threatened me with more charges if I was to get on the stand and tell my story because what I told the detectives is different than what I'm telling you now. The only reason I agreed to talk to detectives is because it is the first I've ever been to jail and I was scared. I made up a bunch of lies in hopes of getting a better deal, but that didn't work.

(CP 380)

Mr. Gassman also attached to this motion Mr. Kongchunji's testimony from Paul Statler's trial that occurred on April 21, 2009, *after*

Mr. Gassman's trial. (See CP 475-520) In his testimony, Mr. Kongchunji testified that after he was picked up for his role in a robbery, he was jailed with Matthew Dunham. He explained that every day in jail, he and Mr. Dunham spent three hours together. (CP 483-85) Mr. Kongchunji testified that he and Mr. Dunham agreed to save their friends and falsely accuse others as their co-conspirators:

Yeah. We said that we'd, you know, save your friends and his brother from any incriminations since they already had – it was only us that they were asking. So we decided to pin it on some other people, which happened to be Mr. Statler and a few other friends.

(CP 486)

Mr. Kongchunji then testified about a robbery, not the presently charged robbery, in which he and his friends tried to rob "the Fowlers." When asked who was involved, Mr. Kongchunji replied, "Same people I always go rob people with: Larry, Nick, Matt." (CP 486)

Mr. Kongchunji testified that he was told that if he spoke with detectives in a "free talk," it would substantially decrease his sentence. (CP 494) Mr. Kongchunji and Mr. Dunham agreed in advance what they would say in their "free talk." (CP 21-22) Mr. Dunham received 18 months. Mr. Smith and Larry Dunham each received 51 months, while Mr. Kongchunji received 14 years. (CP 496)

Mr. Kongchunji testified that he knew Tyler Gassman, but they were not friends. (CP 497-99; 510) He also testified that at the time he accepted a plea deal, he knew Mr. Gassman's case had been dismissed, but when he learned later that the case was re-filed and Mr. Gassman was convicted, he felt remorse:

Q. At the time you pled guilty for your involvement in this robbery, were you aware of what the status of Mr. Larsons' and Mr. Gassman's case was?

A. Yeah. They were dismissed.

Q. And yet you still pled guilty even though their cases had been dismissed?

A. Yeah. It was for my – for me. I was pleading guilty for me.

Q. So when the judge recited those facts to you, you didn't – it didn't trouble you that their case has been dismissed while you were pleading guilty?

A. No.

Q. Mr. Kongchunji, are you sorry that implicated three innocent men in this robbery?

MR. CRUZ: Objection.

THE WITNESS: Yeah.

THE COURT: Objection overruled.

THE WITNESS: Yeah, I'm sorry. It's not right. I've seen the – how innocent people get found guilty all the time. It's just not right, that's why I'm here today.

(CP 519) On April 22, 2009, Mr. Statler was acquitted of any involvement in the alleged robberies. (CP 471)

The State objected to Mr. Gassman's motion for a new trial on the basis that it was untimely, and that Mr. Gassman had not presented sufficient facts to warrant a new trial. (CP 382-404)

The court heard argument on May 1, 2009. (5/1/09 RP 1-53) The trial court filed a memorandum decision denying Mr. Gassman's motion.

In the opinion, the court found that Mr. Gassman was not entitled to a new trial. (CP 529-531) Specifically, the trial court relied upon three grounds in denying the motion for new trial. First, the Court found that Mr. Kongchunji's testimony did not "vindicate Mr. Gassman or somehow suggest that Mr. Gassman did not commit the crimes for which he was convicted...." (CP 531) The court concluded "[t]here is simply no evidence presented by Mr. Gassman to support the notion that the jury verdict of February 17, 2009, would probably change if a new trial were granted." (CP 531)

Second, the court denied the motion because it concluded Mr. Kongchunji was available to testify, and Mr. Gassman's lawyer "chose" not to call him. (CP 531) The Court summarily concluded "in fact no privilege existed as to Mr. Kongchunji at the time of the Larson, Gassman, Statler trial." (CP 531) The Court characterized Mr. Gassman's arguments that Mr. Kongchunji was unavailable as "frankly self-serving and nonsensical." (CP 531) The court confidently concluded that had Mr. Gassman called Mr. Kongchunji, and if the witness had attempted to rely upon a Fifth Amendment privilege, "the Court could have compelled Mr. Kongchunji's testimony...." (CP 531)

Finally, the trial court held that Mr. Kongchunji's testimony would have been cumulative or simply impeaching: "Mr. Kongchunji would likely have been offered as a rebuttal witness to impeach or rebut commentary provided to the jurors by Mr. Dunham – a factor which *Williams* and *Castro* directly bar." (CP 531) The court also found that an additional factor would have been, if called to testify, the State would likely have had to call two detectives to impeach Mr. Kongchunji's testimony regarding matters he disclosed to police. (CP 531-32)

Based on these three factors, the court entered an order denying the motion. (CP 533-34)

Mr. Gassman appeals.³

D. ARGUMENT

1. MR. KONGCHUNJI'S EXCULPATORY TESTIMONY WAS "NEWLY DISCOVERED EVIDENCE" AND THE TRIAL COURT'S REFUSAL TO GRANT MR. GASSMAN A NEW TRIAL WAS BASED UPON UNTENABLE AND UNREASONABLE GROUNDS.

The appellate court reviews a CrR 7.8 ruling for an abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 642, 790 P.2d 610 (1990). A trial court abuses its discretion when it bases its decisions on untenable

³ Mr. Statler (Appeal No. 28195-7-III) and Mr. Larson (Appeal No. 28474-4-III) also have appeals which are currently pending before this Court.

or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

A defendant is entitled to a new trial based upon newly discovered evidence where the defendant demonstrates that the evidence “(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). The absence of any one of these factors is grounds to deny a new trial. *Williams*, 96 Wn.2d at 223.

- a. Mr. Kongchunji’s Testimony Probably Would Have Changed The Outcome Of Mr. Gassman’s Trial.

To determine whether the newly discovered evidence will probably result in a different outcome upon retrial, the trial court must determine the credibility, significance and cogency of the proffered evidence. *State v. Barry*, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980). Additionally, in determining whether the new evidence would have changed the outcome, the court considers the strength of the State’s evidence. *State v. Castro*, 32 Wn. App. 559, 565- 66, 648 P.2d 485 (1982). The Court may assess whether the jury would have believed the new testimony. *Id.*

In this case, the newly discovered evidence consisted of exculpatory evidence that Mr. Gassman was never involved in the crime, and that he was framed. Mr. Kongchunji's testimony should have been considered credible, since as a result of his testimony, he was told he could face possible criminal perjury charges.

The evidence was cogent – Mr. Kongchunji carefully described in Mr. Statler's trial how he and Mr. Dunham agreed to implicate innocent men in order to cover for their friends.

Finally, the significance of the evidence cannot be overstated: Mr. Gassman is innocent.

The trial court's conclusion that this new evidence was not likely to change the outcome of Mr. Gassman's trial is inexplicable and based upon an erroneous reading of the record. The trial court stated that Mr. Kongchunji's testimony "did not vindicate Mr. Gassman or somehow suggest that Mr. Gassman did not commit the crimes..." (CP 531) Yet even a cursory glance at Mr. Kongchunji's letter, affidavit and testimony from Mr. Statler's trial reveals more than *three* passages where he clearly states that Mr. Gassman did not participate in any robberies, ever, with him. (CP 380; 486; 519)

Moreover, it is obvious from the letter, affidavit and testimony that the purpose of Mr. Kongchunji's testimony is to exonerate Mr. Gassman

and that he did not participate in the robbery that he was convicted of, nor did he participate in *any* robbery with Mr. Kongchunji. The Court's conclusion to the contrary is irreconcilable with the record.

At both Mr. Gassman and Mr. Statler's separate trials, Matthew Dunham testified that that each defendant participated in the robbery. Mr. Gassman was convicted, and Mr. Statler was acquitted. The significant and obvious difference between the outcomes of those trials was one factor: Mr. Kongchuni's testimony.

In Mr. Gassman's trial, no witnesses were available to contradict Mr. Dunham's testimony that Mr. Statler committed the crime. But in Mr. Statler's trial, Mr. Kongchunji testified that Mr. Statler was not involved, and explained why Matthew Dunham lied.

The fact that Mr. Statler's trial involved a different alleged robbery than the Berger-Jeffries robbery for which Mr. Gassman was convicted is of no moment. Mr. Kongchunji and Mr. Dunham participated in a string of robberies, and they both agreed to pin the blame on the same innocent people for all the robberies. When he finally came forward, Mr. Kongchunji testified he did the charged robbery with the "[s]ame people I always go rob people with: Larry, Nick, Matt." (CP 486)

Mr. Statler had the benefit of Mr. Kongchunji's testimony that Mr. Statler was not involved in the crime, and Mr. Statler was acquitted. The

significant difference between these two trials was Mr. Kongchunji's credible, significant and cogent testimony that the men charged were innocent. Mr. Kongchunji's testimony would probably result in a different outcome for Mr. Gassman. The trial court's conclusion to the contrary is unsupported by the record and thus based upon untenable grounds.

b. Mr. Kongchunji's Testimony Was Discovered After Mr. Gassman's Trial And Could Not Have Been Discovered Prior To His Trial By The Exercise Of Due Diligence.

(i) Mr. Kongchunji's Testimony Was New Evidence Because It Was A Witness' Recantation.

A witness or victim's recantation of earlier statements is generally considered new evidence. *State v. Macon*, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996). The superior court must determine whether a witness's recantation is credible before considering the defendant's motion for a new trial based on the recantations, regardless of whether there is independent evidence supporting the defendant's conviction. *Id.* at 804.

In this case, Mr. Kongchunji was a witness to the events. The charges against Mr. Gassman were filed based upon the accusations made during the "free talk" with detectives by Mr. Kongchunji and Matthew Dunham. The fact that Mr. Kongchunji did not testify at trial should not preclude the court's consideration that he is a "witness" and thus his

recantation should be considered new evidence. The court's failure to assess the credibility of Mr. Kongchunji's recantation prior to denying the motion for a new trial was reversible error.

- (ii) A Witness Whom The State Threatens With Perjury Charges If He Testifies In A Trial, And As A Result Who Has Stated He Will Invoke The Fifth Amendment If Called As A Witness, Is "Unavailable."

"[T]estimony of a known but unavailable witness will be considered 'newly discovered evidence' where reasonably diligent efforts to produce the witness have been unavailing[.]" *State v. Slanaker*, 58 Wn. App. 161, 167, 791 P.2d 575 (1990) (quoting *State v. Caldwell*, 112 Idaho 748, 751, 735 P.2d 1059 (1987) and citing *Amos v. United States*, 218 F.2d 44 (D.C.Cir.1954)).

The Fifth Amendment not only permits a person to refuse to testify against himself at a criminal trial, but also allows him not to answer official questions put to him in any other proceeding, civil or criminal, where the answer might incriminate him in future criminal proceedings. *State v. King*, 130 Wn.2d 517, 523-24, 925 P.2d 606 (1996), citing *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141-42, 79 L. Ed. 2d 409 (1984).

The availability of the Fifth Amendment privilege does not turn on the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure it invites. *State v. King*, 130 Wn.2d at 524; *State v. Post*, 118 Wn.2d 596, 604, 826 P.2d 172 (1992).

In this case, Mr. Gassman knew about the existence of Mr. Kongchunji, but Mr. Gassman was not privy to the substance of his testimony. Mr. Gassman had been informed that Mr. Kongchunji would not speak with him, and planned to assert the Fifth Amendment if he was called to the stand. Mr. Kongchunji later explained the prosecutor threatened him that if he testified, he would face additional charges.

- (a) The State's threats that forced Mr. Kongchunji into silence violated Mr. Gassman's right to due process.

The right to compulsory attendance of material witnesses is a fundamental element of due process and goes directly to the right to present a defense. *State v. Burri*, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976); *State v. Carlisle*, 73 Wn. App. 678, 871 P.2d 174 (1994). If a defense witness is threatened and those threats effectively keep that witness off the stand, the defense is deprived of due process of law.

Webb v. Texas, 409 U.S. 95, 98, 93 S. Ct. 351, 353, 34 L. Ed. 2d 330 (1972).

A prosecutor may advise a witness of the right against self-incrimination when the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution. *Carlisle*, 73 Wn. App. at 679. “Where the prosecutor simply provides the witness with a truthful warning no constitutional violation occurs.” *United States v. Jackson*, 935 F.2d 832, 847 (1991).

Yet in this case, it is apparent that the State desired to keep Mr. Kongchunji from testifying that Mr. Gassman was not involved in his string of robberies for the simple reason that it would likely result in Mr. Gassman’s acquittal.

Moreover, it is doubtful that the State’s threats constituted a simple, truthful warning. From the timing, it is not clear that Mr. Kongchunji would in fact be subject to perjury, because he had not yet testified, and had simply participated in a “free talk” with law enforcement.

In any event, it is apparent that the reason Mr. Kongchunji refused to testify was that he had been threatened by the State that if he recanted, he would face substantial perjury charges. But for the State’s threats, Mr. Kongchunji would have been available to testify.

- (b) Mr. Gassman does not bear the burden of establishing that the Fifth Amendment privilege was available to Mr. Kongchunji if he was to be called as a witness.

Mr. Gassman did not call Mr. Kongchunji to the stand because counsel for Mr. Kongchunji stated that he would invoke the Fifth Amendment. Yet the trial court denied the motion for a new trial, characterizing counsel's failure to call Mr. Kongchunji as a choice. (CP 531) The Court termed Mr. Gassman's assertions that Mr. Kongchunji was unavailable prior to trial as "frankly self-serving and nonsensical." (CP 531) The trial court concluded that if Mr. Kongchunji had been put upon the stand, the Court would not have allowed him to invoke the Fifth Amendment, and thus Mr. Kongchunji would have been forced to provide testimony. (CP 531)

Where a potential witness indicates he or she will invoke the Fifth Amendment if called, that witness should be deemed unavailable. Certainly, if Mr. Kongchunji was called to the stand, knowing he intended to assert the Fifth Amendment in response to questions about whether he had implicated Mr. Gassman in his "free talks", Mr. Gassman's Sixth Amendment right to confront witnesses would have been violated, and a new trial would have been mandatory. *State v. Nelson*, 72 Wn.2d 269,

285, 432 P.2d 857 (1967) (new trial ordered where State called witness to inquire about the details of confession to police implicating co-defendant, where State knew witness intended to assert the protections of the Fifth Amendment).

Yet in denying the motion for a new trial, the trial court seemingly required Mr. Gassman to actually call Mr. Kongchunji to the stand, despite knowing he would invoke the Fifth. This easily could have resulted in a cross-examination from the State that would result in invited error.

Additionally, the trial court freely speculated on what would have happened if Mr. Kongchunji had been called to testify. The Court cursorily concluded that the Fifth Amendment was not available to Mr. Kongchunji, and thus, the court would have forced him to testify.

Yet it is far from certain that Mr. Kongchunji would have done so, or that the court would have correctly ruled this way if the parties briefed and argued the issue. The court's unfounded, unexplained musings on what would have happened if Mr. Kongchunji had been subpoenaed do not provide a reasonable basis on which to deny a motion for a new trial based upon a recanting witness who has decided to abandon the protection of the Fifth Amendment and ignore the State's threats of prosecution for perjury.

(iii) Mr. Kongchunji's Testimony Was Material Since It Was Exculpatory Evidence And Thus Was Neither Merely Cumulative Nor Impeaching.

The third ground upon which the trial court denied the motion was its opinion that Mr. Kongchunji's testimony would have been cumulative or simply impeaching. (CP 531) The court concluded that Mr. Kongchunji would have been merely a "rebuttal witness" to impeach Mr. Dunham. (CP 531)

The trial court confused two important but separate legal concepts: rebuttal evidence is dramatically different from exculpatory defense evidence. "Under the federal and Washington constitutions, an accused has a right to compulsory process, such that she may compel the attendance of witnesses." *See State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). "This right to compulsory process is synonymous with the right to present a defense." *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

By contrast, "[r]ebuttal evidence is admitted to enable the plaintiff to answer new matter presented by the defense. Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence

offered in reply to new matters.” *State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968) (citations omitted).

Mr. Kongchunji cannot be accurately described as a “rebuttal witness.” His testimony that Mr. Gassman was innocent is not a “new matter” raised by the defense. Instead, his testimony is properly characterized as evidence that Mr. Gassman was constitutionally entitled to present: a defense to the charges. The court’s apparent confusion about these two types of evidence served as one of the bases for erroneously denying the motion for a new trial.

In fact, Mr. Kongchunji’s testimony was neither cumulative nor simply impeaching. The single fact witness for the State that implicated Mr. Gassman in the crimes was Matt Dunham. No witnesses contradicted Mr. Dunham.

In a new trial, Mr. Kongchunji would testify that Mr. Gassman was not involved, but that he and Mr. Dunham agreed to blame him in order to save their friend and brother. Thus, this evidence was not cumulative, nor merely impeaching, but instead was part of Mr. Gassman’s constitutionally protected right to call witnesses and present a defense. The trial court’s ruling to the contrary was an abuse of discretion.

In summary, all five factors necessary to order a new trial were present. The trial court’s order denying Mr. Gassman’s motion for a new

trial based upon newly discovered evidence ignored the substance of the offer of proof, and contained an erroneous determination that Mr. Kongchunji's testimony was rebuttal evidence. The court's order denying the new trial based upon newly discovered evidence must be reversed, and the case should be remanded for a new trial.

2. IN THE ALTERNATIVE, MR. GASSMAN'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY COUNSEL'S FAILURE TO CALL MR. KONGCHUNJI AS A WITNESS.

A criminal defendant has the right to assistance of counsel under the Sixth Amendment to the United States Constitution. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). This right is "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

To show that counsel provided ineffective assistance, a defendant must show: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except

for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Reversal of a lower court decision is required where the defendant demonstrates both deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687.

If this Court finds that defense counsel was not entitled to rely upon Mr. Kongchunji's statement he intended to invoke the Fifth Amendment if he was called as a witness, then this Court should find trial counsel provided ineffective assistance.

Decisions regarding the strategy of a case are tactical decisions for an attorney to determine, and an attorney's decision to present a witness at trial is generally a tactical decision. *State v. Warnick*, 121 Wn. App. 737, 746, 90 P.3d 1105 (2004). However, in this case, the State's sole fact witness who testified that Mr. Gassman committed the crime was Matthew Dunham. Mr. Kongchunji was the only other potentially available witness who could have exonerated Mr. Gassman by admitting his part in the conspiracy to frame Mr. Gassman. If trial counsel was not able to rely upon Mr. Kongchunji's assertions that he would not testify then the failure to call Mr. Kongchunji as a witness fell below an objective standard of reasonableness.

Mr. Gassman was prejudiced by the lack of Mr. Kongchunji's testimony. In a similar trial where Matthew Dunham was the State's sole witness implicating Paul Statler in one of the string of robberies, Mr. Kongchunji testified and Mr. Statler was acquitted. Mr. Kongchunji's testimony is powerful and credible. The failure to introduce this exculpatory evidence was not properly characterized as trial strategy, and resulted in prejudice to Mr. Gassman.

E. CONCLUSION

The trial court's decision denying Mr. Gassman's motion for a new trial was an abuse of discretion. The court's decision relies upon an erroneous reading of the record, the misconstruction of the law related to what constitutes an unavailable witness, and an apparent confusion between the legal concepts of rebuttal evidence and exculpatory defense evidence. The trial court's order denying Mr. Gassman a new trial was an abuse of discretion and must be reversed.

Dated this 7th day of June, 2010.

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