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COA NO. 43438-5-II.

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SUPREME COURT NO. 89976-2

SUPREME COURT OF WASHINGTON

ROBERT BARRY, Appellant,

v.

STATE OF WASHINGTON, Respondent,

Supplemental Brief in Support of Petition for Review

Mitch Harrison

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ORIGINAL

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II. SUPPLEMENTAL ARGUMENTS

A. The Trial Court's Ruling Violated the Fifth Amendment.

During its deliberations, the jury sent a note asking the court, “Can we use as ‘evidence’, for deliberation, our observations of the defendant’s—actions—demeanor during the court case[?]”¹ The trial court instructed the jury, “Evidence includes what you witness in the courtroom.”² The court of appeals conceded that this instruction was “overbroad” and would allow the jury to consider just about anything in the courtroom as evidence, including the defendant’s demeanor and silence:

Initially, we note that the trial court's instruction was improper in its overbreadth. The State cites no authority for the proposition that anything a jury witnesses in the courtroom constitutes evidence. And many things a jury might witness in the courtroom would not constitute “evidence.”³

Despite conceding its overbreadth, the court of appeals held that this instruction did not violate Mr. Barry’s right to testify, holding that Mr. Barry was not “compelled”—within the meaning of the Fifth Amendment—because Barry had “full control over how he acted in the courtroom.”⁴

¹ Clerk’s Papers (CP) at 115.

² CP at 115.

³ *State v. Barry*, 179 Wn. App. 175, 178-79, 317 P.3d 528, 530 (2014) *review granted*, 180 Wn.2d 1021, 328 P.3d 903 (2014)

⁴ *Id.*

But, as argued in his Petition for Review, this definition of “compelled” is far too narrow. In fact, such a narrow definition of what constitutes “compelled” testimony contradicts the Fifth Amendment precedent of this Court and the U.S. Court of Appeals.

1. Federal Case Law

“The Court has . . . plainly ruled that it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case.”⁵ Over 50 years ago, in *Griffin v. California*, the U.S. Supreme Court declared, for the first time that “[t]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence *or* instructions by the court that such silence is evidence of guilt.”⁶

In *Griffin*, the court instructed the jury that it could, but was not required to, consider that silence as evidence of the defendant's guilt. The instruction authorized the jury to use such silence to evaluate the strength of the State's evidence,⁷ in addition to allowing the jury to consider that

⁵ *Baxter v. Palmigiano*, 425 U.S. 308, 317, 96 S.Ct. 1551, 1557, 47 L.Ed.2d 810 (1976); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

⁶ *Griffin v. California*, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965)

⁷ *Id.* (telling the jury that it could “take that failure into consideration as tending to indicate the truth of [the State's] evidence.”).

silence in determining the defendant's credibility if he "fails to deny or explain...particular facts within his knowledge."⁸

The court of appeals here, however, failed to recognize the holding in *Griffin*. Instead, the court of appeals rejected Mr. Barry's comparison of his case (involving a jury instruction) and similar cases that involve improper argument by counsel in violation of the Fifth Amendment. But as *Griffin* made clear over 50 years ago, there is no logical distinction between these two mistakes, especially when viewed in light of the facts of this case and specific Washington case law, discussed below.

2. Washington State Case Law

In *Easter*, this Court had to decide whether the Fifth Amendment right to self-incrimination applied even before *Miranda* warnings were given so as to prevent a police officer from commenting on his pre-arrest silence during trial.⁹ In doing so, this Court rejected an almost identical argument by the State in the context of "compelled" testimony in the context of comments on the accused's pre-arrest silence:

The State argues pre-arrest silence may be used to support the State's case in chief because the Fifth Amendment is designed to deal only with "compelled" testimony, and *Easter* was under no compulsion to speak at the accident

⁸ 380 U.S., at 610, 85 S.Ct., at 1230 ("as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.").

⁹ *State v. Easter*, 130 Wn.2d 228, 240, 922 P.2d 1285, 1291 (1996) (quoting *State v. Fencil*, 109 Wis.2d 224, 237, 325 N.W.2d 703, 711 (1982)).

scene prior to his arrest. . . . We decline to read the Fifth Amendment so narrowly as the State urges. An accused's right to silence derives, not from *Miranda*, but from the Fifth Amendment itself.⁸ The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding.¹⁰

Here, just as in *Easter*, the court of appeals adopted a definition of “compelled testimony” that was far too narrow. As this Court held in *Easter*, just because the Easter was under no “compulsion to speak at trial,” did not mean that the comments on his pre-arrest silence did not violate his right to testify. Easter, just like Mr. Barry decided not to testify. Accordingly, the jury was not entitled to consider his silence—a form of demeanor evidence—“as substantive evidence.”¹¹

Notably, such a narrow definition of what constitutes “compelled testimony puts the accused into a “veritable Catch-22 Situation” in which the “individual is compelled to do one of two things—either speak or remain silent.” In the end, neither *Easter* nor Mr. Barry were given “no choice that [could] prevent self-incrimination.”¹²

Finally, holding that Mr. Barry’s right to not testify was violated is supported by the purposes of the Fifth Amendment and the right against

¹⁰ *State v. Easter*, 130 Wn.2d 228, 237-39, 922 P.2d 1285, 1290 (1996) (citing *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972)).

¹¹ *Id.*

¹² *Id.*

self-incrimination. As this court recognized in *Easter*, “The purpose of the right is to make the government obtain evidence on its own, and ‘to spare the accused from having to reveal, directly *or indirectly*, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.”¹³ The right exists to put the entire load of producing incriminating evidence on the State “by its own independent labors.”¹⁴ Applying the right more generally supports this policy.¹⁵

Here, as it was applied more generally to pre-arrest silence in *Easter*, the Fifth Amendment must be applied more generally to preserve the right to not testify here. The jury asked a specific question to the court, “Can we use as ‘evidence’, for deliberation, our observations of the defendant’s—actions—demeanor during the court case[?]” Though this question would naturally include Mr. Barry’s silence, the court, nevertheless told the jury that it could. This instruction did exactly what the Fifth Amendment is desired to prevent: it forced him to “indirectly” “reveal . . . his knowledge of facts relating him to the offense” to the jury.

¹³ *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285, 1292 (1996) (quoting *Doe*, 487 U.S. at 213, 108 S.Ct. at 2349)).

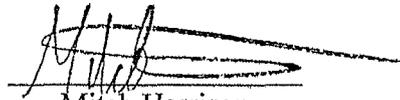
¹⁴ *Id.* (quoting *Miranda*, 384 U.S. at 460, 86 S.Ct. at 1620).

¹⁵ *Id.*

III. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated August 29, 2014.

A handwritten signature in black ink, appearing to read "Mitch", is written over a horizontal line. The signature is stylized and extends to the right.

Mitch Harrison
Attorney at Law

CERTIFICATE OF SERVICE

I, Kaitlyn Jackson, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the law firm of Harrison Law.

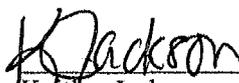
At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the August 29, 2014 I served to the parties listed below in the manner noted the following:

1) Supplemental Brief in Support of Petition for Review

Washington State Supreme Court 415 12th Ave SW Olympia, WA 98501-2314	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: Supreme@courts.wa.gov <input type="checkbox"/> Fax:
Appellant, Robert Barry/DOC# 357122 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email: <input type="checkbox"/> Fax:
Court of Appeals, Div. I One Union Square 600 University St Seattle, WA 98101-1176	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email: <input checked="" type="checkbox"/> Fax: 206-389-2613
Kitsap County Prosecutor's Office, Appellate Unit c/o Jeremy Morris 614 Division Street Port Orchard, WA 98366	<input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: jmorris@co.kitsap.wa.us <input type="checkbox"/> Fax:

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Kaitlyn Jackson

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Dear Supreme Court –

Attached please find our Supplemental Brief in Support of the Petition for Review that was filed previously.

If you have any questions please contact our office.

Respectfully submitted,

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