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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANTWONN WASHINGTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT FO THE STATE OF
WASHINGTON FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Antwonn Washington, who is African-American, objected pursuant to Batson v. Kentucky¹ to the State's peremptory challenge of an African-American juror. Because the State's proffered race-neutral explanation applied equally to white members of the venire who were sworn as jurors, and because of the questioning strategy the State employed with the African-American juror differed from that used with the similar white jurors, Mr. Washington contends the trial court erred in denying his challenge.

Mr. Washington also contends the trial court denied him his Sixth Amendment right to confront witness by first improperly allowed a critical witness to invoke his Fifth Amendment privilege and then refused to strike the remainder of the witness's testimony.

B. ASSIGNMENTS OF ERROR

1. The trial court erred and violated the Fourteenth Amendment Equal Protection Clause when it affirmed the State's challenge of an African-American juror.

2. Mr. Washington was deprived of his Sixth Amendment right to confront witnesses.

¹ 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The race-based striking of prospective jurors violates the Equal Protection Clause of the Fourteenth Amendment. Pursuant to Batson, if a defendant makes a prime facie showing of purposeful discrimination based upon the totality of relevant facts, the State must provide a race-neutral explanation for excusing the juror. The trial court must determine if the proffered explanation is legitimate and overcomes the prime facie showing of purposeful discrimination. Where the State's proffered explanation for excluding an African-American juror applies equally to white jurors who served on the jury, and in the totality of facts appears pretextual, did the trial court err in denying Mr. Washington's Batson challenge?

2. A witness is entitled to assert his Fifth Amendment right in response to a question where there is a reasonable likelihood of an incriminating response. In response to questions by the State, Travis Bride readily admitted he sold one to two pounds of marijuana every day, worth \$2500 to \$3000, and admitted he used guns to protect his drugs and proceeds. Mr. Bride nonetheless asserted his Fifth Amendment privilege when asked whom he bought his drugs from and to whom he sold them. Was there a

reasonable likelihood these questions would lead to an incriminating response in light of the Mr. Bride's remaining testimony?

3. Under the Sixth Amendment, a defendant has a right to confront witnesses. Under the Fifth Amendment, a witness has the right to refuse to testify to matters which may incriminate him. Where a witness's assertion of his privilege against self-incrimination works to deprive the defendant of the right to confrontation on matters going directly to the truth of the witness's testimony, a trial court may strike the witness's testimony or instruct the jury they may draw adverse inferences from the witness's assertion of his privilege. Did the trial court error in refusing to strike Mr. Bride's testimony?

D. STATEMENT OF CASE

Travis Bride was a drug dealer living in Puyallup. Mr. Bride supported himself in large part by selling one to two pounds of marijuana a day netting \$2,500 to \$3,000 per pound.² 3/12/07 RP 66. Mr. Bride grossed from \$5,000 to \$20,000 each month from his drug sales. 3/13/07 RP 191-92.

² Mr. Bride also collected unemployment benefits from the State.

On June 14, 2003, Mr. Bride hosted a party for about 150 recent high school graduates. 3/12/07 RP 69-72.

After the party had ended, in the early morning hours of June 15, 2003, only a handful people remained at the house, when a man, later identified as Christopher Blackwell, entered the front door of the house wearing a mask and armed with a shotgun.

3/12/07 RP 95-96. Mr. Bride testified he saw a second person with a bandana covering his face enter behind Mr. Blackwell armed with what appeared to be an assault rifle. 3/12/07 RP 99. Mr. Blackwell struck Mr. Bride in the face with the gun and demanded his money and the keys to his Chevrolet Tahoe. Id. at 97, 103, 107. When Mr. Bride gave Mr. Blackwell about \$8,000 which he had in his pocket, Mr. Blackwell demanded access to his safe. Id. at 105. Mr. Bride claimed he did not have a safe, Mr. Blackwell responded he knew he did and demanded Mr. Bride get it. Id. at 103.

Mr. Bride led Mr. Blackwell into his bedroom, where several people, including Josh May, were asleep. 3/12/07 RP 110. Mr. Bride opened the safe and gave the contents, about \$15,000 to Mr. Blackwell. Id. RP 113. The gunmen then asked where Mr. Bride's second safe was and demanded he open it. Id. at 108. Mr. Bride

produced the second safe, and opened it showing it was empty. Id. at 115.

Mr. May who was still on the bed began to argue with Mr. Blackwell. 3/12/07 RP 119-21 When Mr. May refused to be quiet, Mr. Blackwell shot him one time. 3/12/07 RP 121. Mr. May died of that single gunshot. 3/22/07 RP 1075-86.

Mr. Bride claimed that while in the bedroom he heard a third person in the back of the house. 3/12/05 RP 100, 109, 151.

Lesley Reed and Terisha Schodron testified they went to Mr. Blackwell's house in the late hours of June 14, 2003, and found Mr. Washington, George Scanlan and Mr. Blackwell there. 3/13/07 RP 236. 3/20-21/07 RP 802. According to Ms. Reed and Ms. Schodron, the three men were discussing a robbery Id. at 823. The two women asked to go along, and Ms. Reed drove the group to Mr. Bride's house. Id. at 831.

When the three men left the car, Ms. Reed saw Mr. Blackwell carrying gun. Id. at 837. A short time later, Mr. Blackwell and Mr. Scanlan returned to the car each carrying a gun. Id. at 840-42. Once in the car, Mr. Blackwell said "I think I shot that guy." Id. at 845. As they drove from the house, Ms. Reed saw Mr. Washington drive Mr. Bride's Tahoe from the driveway. Id. at 844.

Ms. Reed saw the Tahoe in Mr. Blackwell's garage later that day.

Id. at 846.

Ms. Reed did not see any guns in the car nor when the three men left the car. 3/13/07 RP 246, 293. Neither Ms. Schodron nor Ms Reed saw Mr. Washington armed with a weapon at any time during the course of events. 3/13/07 RP 297, 3/20-21/07 RP

According to Jesse Copley, the following evening, he assisted Mr. Washington in setting the Tahoe on fire on a roadside in Edgewood. 3/19/07 RP 774.

The State charged Mr. Washington with: first degree murder with a firearm enhancement; first degree burglary with a firearm enhancement; two counts of first degree robbery with a firearm enhancement; second degree assault with a firearm enhancement; and second degree arson. CP 1-6.

In exchange for their testimony the prosecutor dismissed the murder charge and one of the robbery charges and the firearm enhancements against both Ms. Schodron and Ms. Reed and agreed to recommend sentences of 48 months and 60 months respectively. 3/13/07 RP 231, 3/20-21/07 RP 811-15. As opposed to the more than 45 years they would have otherwise received.

3/13/07 RP 295. Despite admitting his own involvement, Mr. Copely was never charged with arson. Id. 781.

A jury convicted Mr. Washington as charged of the murder, burglary, arson, and one robbery count. CP 71.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. WASHINGTON'S *BATSON* CHALLENGE

a. Batson required the trial court to find the State has a legitimate and race-neutral explanation for striking a minority juror where there is prime facie showing of purposeful discrimination. In Batson the Court found the purposeful removal of minority prospective jurors violates the Fourteenth Amendment's Equal Protection Clause. 476 U.S. 79. Batson established a three-step analysis. First, the defendant must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson, 476 U.S. at 94. Once the defendant does so, the state must offer a "clear and reasonably specific" race-neutral basis for striking the juror. Id. at 97. The trial court, must then determine whether "the defendant has established a purposeful discrimination." Id. at 98. In making this determination, the trial

court, as well as this Court, is limited to the reasons given by the prosecutor. Louisiana v. Snyder, __ U.S. __, 128 S.Ct. 1203, 1207, 170 L.Ed. 175 (2008) (trial court must rule based on the “parties’ submissions”).

[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up an rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v. Dretke, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

b. The relevant circumstances demonstrate the prosecutor’s striking of Juror 10 was race based. To determine the legitimacy of the government’s supposed race-neutral explanation the trial Court must consider “all relevant circumstances.” Id. at 240. Miller-El v. Dretke endorsed a comparative analysis of the legitimacy of the prosecutor’s explanation, the Court explained

[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered as Batson’s third step.

545 U.S. at 241.

Employing this method of review, Miller-El v. Dretke concluded the trial court and several lower appellate court's were wrong to accept the prosecutions purported explanations in light of the record. 545 U.S. at 236-37. The Court reached its conclusion despite the deferential standard of review of a Batson challenge generally, and despite the even more deferential standard of review of state-court decisions on federal habeas review. Id. at 240 (citing 28 U.S.C. § 2254). "[D]eference does not by definition preclude relief." Miller-el v. Cockerell, 537 U.S. 322, 340, 123 S.Ct 1029, 154 L.Ed.2d 931 (2003).

An examination of the totality of the facts in this case, demonstrates the trial court erred in failing to affirm the Batson challenge.

Juror 9 stated he had both positive and negative experiences with police "so cops that were very arrogant. I understand those are probably the type of people that you want in that position." 2/26/07 RP 266. He described an experience in with an officer as follows:

I guess he was doing his job, and I was trying to be as respectful as I could. But there were a lot of times where I felt that he was maybe a little, you know, too much. Not really aggressive but just abrasive would be a better word.

Juror 9 was not an African-American. Juror 9 was sworn and served on the jury. Supp. CP __, (Original Jury Panel Selection List).³

Juror 11, Kojo Aako, explained he had a lone isolated, albeit negative, experience with police in 2002. 2/26/07 RP 291-92. Mr. Aako described being arrested by police following a verbal argument with his girlfriend. Id. He described complaining about the tightness of the handcuffs and the arresting officer responding with language which Mr. Aako did not wish to repeat. Id. Mr. Aako stated he did not harbor any resentment of police, had police officers and judges as friends, and believes the system is fair. 2/26/07 RP 293. Mr. Aako was born in Ghana and has resided in the United States for more than 20 years. 2/26/07 RP 288. Mr. Aako works as a tax specialist for the State of Washington, in which capacity he has worked with law enforcement.

Mr. Aako, acknowledged the 2002 incident was a negative experience with the police, “[b]ut other than that, I respect the police. I respect everything they do, because I work – I do some

³ A supplemental designation of clerks’ papers has been filed, but an index has not yet been received.

work for them as well." 2/26/07 RP 292. The prosecutor

nonetheless continued:

Q: My concern is, I have police officers that come into court and testify.
Are you going to give less weight to what they have to say based upon your experience?

A: I'll have to wait for that. I have police officers as friends. That's why I checked that I knew a police officer. I have some of them as friends, and I don't have problems with them.

.....

Yeah, I know some police officers, and I know a judge here because we attend the same church.

Q: Do you think that you were unfairly treated by the police in your situation?

Defense Counsel: Your honor I believe the juror has already answered that question.

The Court: Overruled. You may answer the question.

Q: Do you remember the question?

A: Yeah, I do.

Q: Do you think you were unfairly treated by the police officers?

A: Yes

Q: What about the court system?

A: I think the court system was fair.

2/26/07 RP 293-94.

The State exercised a peremptory challenge against Juror 11. Supp. CP __, Peremptory Challenges; 2/27/07 RO 396-97.

The State defended its challenge saying “Juror Number 11 indicated that he didn’t believe he was treated fairly in this situation, and that’s the sole reason for the state exercising its peremptory.” 2/27/07 RP 398. The State added it was entitled to strike jurors who thought they were “unfairly treated.” 2/27/07 RP 401

Juror 9 believed police officers were often jerks but that was a desirable quality in the profession. Juror 9, despite his own experience with an “arrogant” and “abrasive” officer was sworn and served on the jury. This despite the prosecutors claim that it was seeking to challenge jurors who believed they had been “unfairly treated.” Despite his friendship with and respect for police officers and the work they do, for his lone isolated experience Mr. Aako was struck from the panel. The record simply does not support the State’s proffered race-neutral explanation. If the prosecutor were genuinely concerned with the negative experiences with law enforcement, Juror 9 would have been the first to be struck.

But aside from the answer the two prospective jurors gave, the prosecutors questioning of them further undercuts the legitimacy of the proffered race-neutral explanation. Juror 9

seemed resolved that a fair number of police officers were “jerks” saying “I think you want that kid of person.” 2/26/07 RP 266. Despite the juror’s obvious negative perception of police officers, the deputy prosecutor did not press the point further, accepting Juror 9’s claim that it would not color his ability to be receptive to police testimony in this case and moving to a new area of questioning. 2/26/07 RP 268.

The State elaborated on its challenge of Mr. Aako explaining, “Juror Number 11, in response to my questioning, appeared quite upset and hostile towards my questioning.” 2/27/07 RP 400. That seems equally likely to be a result of the fact that the deputy prosecutor was employing a far more argumentative approach to questioning Mr. Aako than he had used just two jurors earlier with Juror 9. Even after Mr. Aako stated he has police officers and judges as friends and works with law enforcement, the prosecutor asked twice more “do you think you were unfairly treated.” 2/26/07 RP 293. Rather than accept the Juror 11’s word, as he had Juror 9’s, the prosecutor’s leading questions plainly illustrate he was hoping for, and apparently got, something more of a reaction from Juror 11.

In Miller-El v. Dretke, the Court highlighted the fact that the prosecution employed different questioning tactics with African-American jurors, and then relied upon the jurors' response to those tactics to proffer a basis for striking them. 545 U.S. at 256-59, 261-63. The court concluded not only were the proffered bases illegitimate but the difference in questioning itself demonstrated the pretextual basis of the supposed race-neutral explanations. Id. at 260, 263

The pretextual nature of the prosecutions questioning of Mr. Aako is further demonstrated by the prosecutor's questioning of Juror 8. Juror 8 was sworn as a juror even as he was completing a deferred prosecution for a 2002 Driving Under the Influence charge. As he had with Juror 9, the prosecutor simply accepted Juror 8's word that the he harbored no resentment towards police or the courts, and moved to another area of inquiry. 2/26/07 RP 249. Yet he would not do the same for Mr. Aako, despite the fact that Mr. Aako has police officers and judges as friends and harbors no ill-will towards police or the court system generally.

c. The trial court erred in denying Mr. Washington's Batson challenge. Despite the pretextual nature of the State's proffered explanation, the trial court concluded "this appears to be a

persuasive reason to exercise a peremptory challenge against him. So I'll deny the Batson challenge to Juror Number 11." The trial court's task was not to simply determine whether the State had offered a race-neutral explanation. Although, had the State failed to do so the Batson argument would be far simpler. Instead, the Court must determine, in light of all the circumstances, whether the proffered basis was legitimate, i.e. not a pretext, and sufficient to overcome the prime facie showing of purposeful discrimination. Snyder, 128 S.Ct. at 1207. "If any facially neutral reason sufficed to answer a Batson challenge, then Batson would not amount to much. . . ." Miller-El v. Dretke, 545 U.S. at 240. The trial court failed to engage in this analysis.

The court's conclusion that the prosecutor's explanation was a "persuasive reason to a exercise a peremptory challenge" is not the same as a finding that proffered reason (1) is legitimate as opposed to pretextual, and (2) overcomes the prime facie showing of purposeful discrimination. The trial court merely accepted that because the prosecutor articulated a race-neutral explanation Mr. Washington could not meet his burden. Miller-El v. Dretke and Snyder make clear this is an incorrect application of Batson. These cases did not affirm the Batson challenges because the prosecutor

could not articulate a race-neutral basis for excusing the jury. In both cases the government had proffered race-neutral reasons. Rather, both Miller-El v. Dretke and Snyder concluded those proffered race-neutral explanations were insufficient to overcome the defense showing of racial motivation.

The trial court erred in rejecting Mr. Washington's Batson challenge. Mr. Washington is entitled to a new trial.

2. MR. WASHINGTON WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION AND HIS RIGHT TO PRESENT A DEFENSE

a. Mr. Bride was improperly allowed to assert his privilege against self-incrimination. On direct examination the State elicited that in 2003 Mr. Bride supported himself in large part by selling one to two pounds of marijuana a day, resulting in a net income of from \$2,500 to \$3,000 per pound. 3/12/07 RP 66. Prior to his testimony, Mr. Bride told police that he sold marijuana. 3/12/07 RP 66. Mr. Bride testified at the time of the robbery he had \$8,000 in cash in his wallet and approximately \$15,000 more in a safe in his room. Id at 105. Mr. Bride admitted he kept a 12-gauge shotgun and AK-47 in his bedroom. Id. at 113. Mr. Bride explained he had three vehicles, Chevrolet Tahoe, a Chevrolet Impala, and a

Chevrolet Chevelle. Id. at 107. Mr. Bride spent about \$5,000 on wheels and a stereo for his Tahoe. Id. 127.

From his drug dealing Mr. Bride grossed more than \$5,000 per month, and sometimes grossed that much in week. 3/13/07 RP 19-92. Mr. Bride admitted he used the guns to protect his drug proceeds. 3/13/07 RP 192.

When defense counsel asked who Mr. Bride purchased his drugs from, Mr. Bride twice refused to answer. 3/13/07 RP 194-95. The trial court concluded the evidence was relevant. Id. at 202. Specifically the court concluded the evidence was relevant to the perpetrator's knowledge that Mr. Bride had money, 3/13/07 RP 196, and to "knowledge on the part of the defense." Id. at 202. The court found Mr. Bride in contempt, appointed him an attorney, and ordered he be taken into custody. Id. at 206.

The following day, Mr. Bride's appointed counsel argued Mr. Bride could refuse to answer the questions pursuant to his Fifth Amendment right not to incriminate himself. 3/14/07 RP 358-59. Defense counsel responded that because the testimony concerned Mr. Bride's activities nearly 4 years earlier, it was outside the statute of limitations and thus not subject to the Fifth-Amendment privilege. Id. at 357-58. In the alternative, defense counsel argued

Mr. Bride had plainly waived the privilege in responding to the deputy prosecutor's questioning. Id. at 368.

The state agreed the statute of limitations had expired but urged the court to reconsider its ruling that the evidence was relevant. 3/14/07 RP 363-67.

Mr. Washington argued again the evidence was relevant to Mr. Bride's credibility as it reflected the enormity of the benefit he received from the State when it chose not to prosecute him. 3/14/07 RP 369. Mr. Washington also reiterated the evidence's relevance to knowledge. Id.

The parties and court agreed Mr. Bride would need to specifically assert privilege with respect to specific questions. Outside the presence of the jury, but with counsel for Mr. Bride present, defense counsel questioned Mr. Bride:

Q: . . . Yesterday . . . we were asking questions about your business of purchasing and selling marijuana, do you recall?

A: Yes

Q: First of all, how long did you engage in selling marijuana, for what period of time?

A: Probably about a year or two years, year and a half.

Q: Okay, and do you purchase from one source or more than one source?

A: One source.

Q: And who was that person?

A: I take the Fifth.

Q: And why are you taking the Fifth on that?

A: Because that's my right.

Q: In what way do you think that it incriminates you?

13/14/07 RP 378-79.

Mr. Bride's attorney objected arguing Mr. Bride could not be required to explain how he believed it incriminated him. Id. at 379. The court ruled the possibility of federal prosecution provided a basis for Mr. Bride to assert his privilege. Mr. Bride again asserted his privilege when asked who he sold marijuana to. Id. The court sustained his assertion. Id. Mr. Bride then admitted it was possible the perpetrators of this crime were aware he was a drug dealer and had proceeds of drug sales in his house. Id. at 380.

Mr. Washington again argued Mr. Bride had waived his privilege by readily admitting he sold drugs. 3/14/07 RP 381. Mr. Washington argued that if Mr. Bride was permitted to invoke his privilege the Court should strike his testimony in its entirety. Id.

The trial court concluded Mr. Bride had not waived his privilege but reserved ruling on the motion to strike. 3/14/07 RP 383.

The court subsequently denied the motion to strike Mr. Bride's testimony concluding the questions concerned collateral matters. 3/22/07 RP 968. However, the court did not retreat from its prior ruling that the evidence was relevant. See, 3/22/07 RP 969-72.⁴

b. The trial court erred in affirming Mr. Bride's assertion of his Fifth-Amendment privilege. The Fifth Amendment privilege against self-incrimination generally permits a witness to refuse to answer questions which may implicate the witness. Hoffman v. United States, 341 U.S. 479, 485-87, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). The privilege applies only when the defendant has "reasonable cause to apprehend danger from a direct answer." Id. at 486. "The danger of incrimination must be substantial and

⁴ In response to the State's motion to instruct the jury that the court was not holding Mr. Bride in contempt, defense counsel argued that if the court instructed the jury it was also necessary to instruct that the court had found Mr. Bride was invoking his Fifth-Amendment privilege to relevant questions. 3/22/07 RP 972. The court declined the State's motion, concluding its contempt ruling was connected to the assertion of the privilege and the court agreed informing the jury of the assertion of the privilege was prejudicial. Id. Thus, the court concluded the better course was to say nothing. Id. But the court never took issue with defense counsel characterizations of the evidence's relevance.

real, not merely speculative.” State v. Hobble, 126 Wn.2d 283, 290, 892 P.2d 85 (1995).

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed.2d 344 (1951), and to require him to answer if “it clearly appears to the court that he is mistaken.” Temple v. Commonwealth, 75 Va. 892, 899 (1881).

Hoffman, 341 U.S. at 486.

Mr. Bride freely admitted he sold pounds of marijuana every day, netting thousands of dollars a day. Mr. Bride freely admitted he used guns in the course of his dealings, i.e., to protect his proceeds. The only questions on which he invoked his privilege concerned who he purchased his drugs from and who he sold them to. The answers to these questions did not pose a “substantial and real” danger of incriminating Mr. Bride beyond what he freely admitted. At best, the answers to these questions posed a danger of incriminating someone else. The Fifth Amendment does not guard against that risk. The trial court erred in sustaining Mr. Bride’s assertion of privilege.

c. Mr. Bride’s assertion of his privilege deprived Mr. Washington of his Sixth Amendment rights. The Sixth Amendment

to the United States Constitution, incorporated to the States by the Fourteenth Amendment, guarantees a criminal defendant the right to be confronted with the witnesses against him. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105 (1974); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The right to confrontation is more than being allowed to confront the witness physically, instead "primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

The Supreme Court has recognized that while "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," a witness's valid Fifth Amendment claim does provide a justification for compromising a person's Sixth Amendment rights. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). However, because a witness's claim of a Fifth Amendment privilege necessarily has an adverse impact on a defendant's Sixth Amendment rights to confrontation and compulsory process, a trial court must carefully scrutinize a claim of privilege. Washington v. Texas, 388 U.S. 14, 17, 87 S. Ct. 18 L.Ed.2d 1019 (1967).

Because a court cannot protect the defendant's Sixth Amendment rights by forcing the witness to testify, balancing the competing rights may require the court to strike the testimony of the nonresponsive witness. State v. Pickens, 27 Wn.App. 97, 100, 615 P.2d 537, review denied, 94 Wn.2d 1021 (1980). "When a witness' refusal to answer prevents [a] defendant from directly assailing the truth of the witness' testimony, the court should strike at least the relevant portion of the testimony." United States v. Zapata, 871 F.2d 616, 623 (7th Cir. 1989) (quoting United States v. Humphery, 696 F.2d 72, 75 (8th Cir. 1982), cert. denied, 459 U.S. 1222 (1983)); see also Pickens, 27 Wn.App. at 101.

As an alternative remedy, a court may instruct a jury that the jury could draw an adverse inference from the witness's exercise of the privilege. See Caminetti v. United States, 242 U.S. 470, 494, 37 S.Ct. 192 (1917); United States v. Kaplan, 832 F.2d 676, 684 (1st Cir. 1987).

Here the trial court found the questions Mr. Bride refused to answer were relevant to the defense. 3/13/07 RP 196, 202 , 3/22/07 RP 969-72. The evidence was relevant to questions of knowledge of the perpetrators, as well as to Mr. Bride's credibility. The evidence had further relevance with respect to the police

investigation and their own credibility. The evidence was not collateral.

Mr. Washington was prevented from truly confronting one of the principal witnesses against him by Mr. Bride's refusal to answer questions at the heart of this case. Mr. Washington was prevented from "directly assailing the truth" of Mr. Bride's testimony, and there was no other witness's testimony that so demanded attack.

Because the court could not force Mr. Bride to forfeit his own Fifth Amendment rights, the only remaining means of protecting Mr. Washington's rights, was to strike Mr. Bride's testimony.

d. The State cannot demonstrate the court's failure to strike Mr. Bride's testimony was harmless beyond a reasonable doubt. The Supreme Court has said the denial of effective cross examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis, 415 U.S. at 318 (quoting Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), and Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 16 L.Ed.2d 3146 (1966)). This statement suggests the denial of the Sixth Amendment rights at stake here may never be deemed harmless. But even if one were to apply a

harmless error analysis, Mr. Washington's case should be reversed.

Where an error of constitutional magnitude occurs, reversal is required unless the State can demonstrate beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In a criminal case, "an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." State v. Anderson, 112 Wn.App. 828, 837, 51 P.3d 179 (2002).

Mr. Bride's testimony was unique among the State's evidence. It alone provided the most complete view of the actual crimes. In light of the pivotal nature of Mr. Bride's testimony, the State cannot prove beyond a reasonable doubt the withholding of evidence from the jury by his improper assertion of his privilege was harmless beyond a reasonable doubt.

F. CONCLUSION

For the reasons above, this Court should reverse Mr.
Washington's convictions.

Respectfully submitted this 24th day of October 2008.



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