STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING

# BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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# BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

## ISSUES PRESENTED FOR REVIEW

1. Did Anthony forfeit the right to testify by repeatedly stating that he would not comply with the trial court's evidentiary rulings limiting the content of his testimony and by threatening that he would have to be carried from the courtroom if the court did not allow him to testify as he wanted?

The trial court decided Anthony could not testify.

2. Alternatively, assuming the trial court violated Anthony's due process right to testify, was the error harmless beyond a reasonable doubt?

3. Did the trial court err in rejecting Anthony's *Batson* challenge to the prosecutor's use of a peremptory strike to remove the only African-American male juror from the panel?

The trial court said no.

4. Did trial counsel render ineffective assistance by failing to argue that Anthony had a constitutional right to testify that could not be preempted by ethical rules or that the peremptory strike of Juror 34 was barred as a categorical religious exclusion under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

The trial court said no.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the parties' briefs thoroughly set forth the relevant facts and legal authorities.

Unless the court resolves the first issue on the basis of harmless error, the State asks that the opinion be published to provide guidance to the circuit courts regarding the circumstances in which it is proper to prevent a criminal defendant from testifying.

## SUPPLEMENTAL STATEMENT OF FACTS

The State will present facts additional to those set forth in Anthony's brief where necessary in the course of argument. The State does wish to correct a misrepresentation set forth at several points in Anthony's brief, however.

The misrepresentation is that Anthony was the victim rather than the defendant in a 1966 armed robbery in Illinois. This misrepresentation first appears at footnote 2 in Anthony's brief, where he states: "It appears that the Circuit Court did not understand that Anthony was the victim in the 1966 robbery case. Trial Counsel made no attempt to correct the misunderstanding." Anthony's brief at 3 n.2. The misrepresentation is repeated at footnote 3 and again at footnote 12 of Anthony's brief.

It appears the genesis for this misrepresentation was the postconviction motion filed by predecessor counsel. In her statement of the facts, counsel represented that "Anthony indicated that he intended to mention a 1966 robbery in which he was the victim" (40:2). But the transcript pages cited for that proposition, 66:27-28,[1] say no such thing. In that motion, counsel also made the following assertion:

> Anthony was actually the victim in the 1966 robbery, but it does not appear the Court understood this point, and Anthony was ordered to stop talking before he could explain. His trial attorney did not attempt to clarify the confusion. Anthony wanted to mention the 1966 matter to illustrate that in the instances where he has injured someone, he was always acting in self-defense.

(40:3 n.1.) Counsel made the same misrepresentation in the Reply to State's Opposition to Motion for Postconviction Relief (43:4).

In reality, Anthony was convicted of armed robbery in Illinois on January 25, 1967, and received a twelve-year prison sentence for that crime (27:4). During trial, Anthony apprised the court of this conviction while claiming to be innocent of the crime:

---

[1] In the postconviction motion, counsel cited to the morning transcript of September 15, 2011, beginning at page 27, line 18 and continuing through page 28, line 2 (40:2). That transcript is item 66 in the appellate record.

> I'm thinking now it might be to my benefit to show that in my mind if I go back all the way to 1966—because like I say that I don't care what nobody do think, but in 1966 I was convicted of an armed robbery of a white man. I was only 19 and I was innocent. I stayed like 12 mother-fucking years for something I didn't do. I'm going to tell it to the jury.

(66:27-28.)

While Anthony claimed he was innocent of the 1966 robbery, it is inaccurate to assert that he was the victim and that the trial court did not understand this. The trial court knew Anthony believed he had been wrongly convicted, but the court believed the fact of his armed robbery conviction – if revealed to the jury – would prejudice him. Anthony's suggestion that the trial court misunderstood the circumstances surrounding this event and that this misunderstanding led to an incorrect ruling is inaccurate.[2]

[2] The trial court in denying Anthony's postconviction motion generously viewed his motion as alleging that he was actually the victim in the 1966 robbery for which he was convicted and was acting in self-defense at the time (46:7).

## ARGUMENT

### I. BY REPEATEDLY INSISTING THAT HE PLANNED TO VIOLATE THE TRIAL COURT'S RULING BARRING EVIDENCE OF HIS ALLEGEDLY WRONGFUL CONVICTION IN ILLINOIS AND THREATENING THAT HE WOULD HAVE TO BE CARRIED FROM THE COURTROOM IF THE COURT PREVENTED HIM FROM GIVING THE TESTIMONY HE WANTED, ANTHONY FORFEITED THE RIGHT TO TESTIFY.

#### A. General principles regarding forfeiture of constitutional rights.

The United States Supreme Court has never addressed the issue of whether a criminal defendant through misconduct may forfeit the right to testify. The Court has, however, held that a defendant's constitutional right to be present during all material stages of his trial may be forfeited if the defendant conducts himself "in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Given that forfeiture of the right to testify is inherent in forfeiture of the right to be present, logically the Court would apply forfeiture doctrine to a criminal defendant's right to testify as well.

Likewise, this court has held that a defendant by his misconduct may forfeit constitutional rights, including the right to counsel, *State v. Coleman*, 2002 WI App 100, ¶ 16, 253 Wis. 2d 693, 644 N.W.2d 283, and the right to confront the witnesses against him. *State v. Rodriguez*, 2007 WI App 252, ¶ 20, 306 Wis. 2d 129, 743 N.W.2d 460. As this court recently observed, "a defendant in a

criminal case may lose fundamental rights (such as the right to appear at the trial and confront the accusers) when the defendant forfeits those rights by interfering with the ability of the trial court to protect those rights." *State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543 (citations omitted).

Whether a defendant forfeited a constitutional right through his misconduct presents a question of constitutional fact that this court reviews de novo. *Coleman* 253 Wis. 2d 693, ¶ 10. As the State will show below, Anthony forfeited his right to testify by repeatedly insisting that he would not abide by the trial court's evidentiary rulings and by threatening that he would have to be physically removed from the courtroom if he did not get his way.

### B. The circuit court correctly found that Anthony forfeited his right to testify.

In accusing the trial court of violating his right to testify, Anthony downplays the seriousness of his misconduct and unjustifiably accuses the court of engaging in "after the fact rationalizations that twist the facts of what actually happened." Anthony's brief at 12. He also ignores the court's repeated warnings that his refusal to abide by the court's evidentiary ruling would jeopardize his right to testify.

After the court advised Anthony that he should answer "two" when asked how many convictions he had (66:27), Anthony indicated that he planned to tell the jury about a wrongful conviction for a 1966 crime that netted him twelve years in prison (*id.*:27-28). The court told Anthony that the conviction was irrelevant, but Anthony insisted he had a right to bring it up (*id.*:28). After expressing sympathy for what had happened to Anthony, the court explained that "whether you were wrongfully accused and convicted or not doesn't make any

difference" (*id.*). Anthony continued to insist "I'm telling them that, too. I want to bring everything out" (66:29).

Anthony then went off on a rambling tangent (*see* 66:29), causing the court to interject, "Can you stop for a second, please?" (*id.*:30). The court encouraged Anthony to "take a deep breath and calm down" (*id.*). The court started to explain that if Anthony were to "go into detail about the armed robbery" he claimed to be wrongly convicted of, the court would cut him off (*id.*). Anthony retorted:

> Cut me off. They judge of the facts. That's a fact that happened that's true. I'm going to keep saying it. *You got to carry me out of here.* I'm going to say it, Your Honor. . . I have a right to say that the police came up there and close my mouth up. . . .

(*Id.*) (emphasis added).

The court warned Anthony that if he went into detail about the armed robbery, "I'm directing you to stop talking and if you don't stop talking I will take you off the stand" (66:31). Anthony replied, "Okay, all right"; the court reiterated that "[i]f you go into that[,] that's the end of your testimony. I'll find you've blatantly violated my rule . . . and they will take you off the stand. That will be the end of it" (*id.*).

After an additional colloquy between the court and Anthony (66:31-33), the court again advised him that if he started talking about the armed robbery while on the stand, the court would remove him and that would end his chance to tell his side of the story (*id.*:33). There was then a four-to-five-minute break during which Anthony conferred with trial counsel (*id.*). After this break, the following colloquy occurred:

> THE COURT: . . . If you take the stand you're going to avoid the armed robbery issue from the sixties?

> THE DEFENDANT: I can't avoid it.
>
> THE COURT: Then I'm going to order you right now you can't take the stand.
>
> THE DEFENDANT: Okay.
>
> THE COURT: I could put you on the stand but if you went into that, I try to cut off that line of questioning I'd have a difficult situation for two reasons.
>
> THE DEFENDANT: I understand.

(66:33-34.)

The court painstakingly explained the ways in which Anthony would hurt his cause by flouting the court's order (66:34). Defense counsel then provided an offer of proof regarding the testimony Anthony would have given had he been permitted to testify (*id.*:35-37). The court interrupted counsel's recitation:

> I just want to find out what he's going to say on the stand. I want to be clear from Mr. Anthony what he's giving up if he decides he's going to tell the jury about the armed robbery, his wrongful conviction.

(66:37.)

Shortly thereafter, the court asked Anthony if he planned to "take the stand and tell the jury about this matter which I said you can't talk about" (66:38). Anthony replied that he wanted the jury "to know everything I can remember all the way back to when I was five years old" (*id.*). The court once more explained that he could not do so and that it was excluding testimony regarding Anthony "being convicted of armed robbery, wrongfully serving time in prison" (*id.*). The court unambiguously cautioned him that "[i]f you're telling me right now you're going to break my rule I'm not even going to let you take the stand" and asked if Anthony understood (*id.*). Anthony said he did, at which point the

court inquired "What's your decision? Are you going to talk about that or not?" (*id.*). Anthony replied "I got to do it," prompting the court to rule that he could not testify because he said he planned to break the court's rules (*id.*).

Anthony then launched into a stream-of-consciousness narrative (66:39-40). Exhibiting the utmost patience, the court told Anthony that its ruling was not based on respect for the court but rather on its concern that the jury's decision would be made more difficult by injecting irrelevant matters into the trial and that if the court were required to enforce its ruling while Anthony was testifying, "it is going to put you in a very, very, very poor light in front of this jury" (*id.*:41). Giving Anthony yet another chance, the court inquired if he had changed his mind (*id.*:42). He replied, "I can't, Your Honor" (*id.*). The court then thoroughly explained the ramifications of Anthony's decision (*id.*:43) and engaged Anthony in a colloquy to make sure nobody had pressured him into insisting on telling the jury about his Illinois conviction (*id.*:44).

The court concluded by stating:

> So you understand what you've now decided is because you want to break my rule I'm not going to let you do that, you're giving up your chance to tell your side of the story to the jury. Do you understand that?

(66:45.) Anthony confirmed that he did understand (*id.*).

The court expressed its concern that allowing Anthony to testify about what happened to him in the sixties would interfere with the jury's ability to get at the truth (66:46). The court remarked that if Anthony tried to get the evidence in, "he's forfeited his right to testify" (*id.*).

Under these circumstances, this court should uphold the trial court's ruling. While no published Wisconsin case has addressed the precise issue, the federal

court in *Smith v. Green*, No. 05 Civ. 7849(DC), 2006 WL 1997476 (S.D.N.Y. July 18, 2006),[3] held that in a situation analogous to the one confronting the trial court here, the habeas petitioner had forfeited the right to testify through his misconduct. There, after receiving multiple warnings from the judge, Smith would not agree to limit his trial testimony to the charged conduct. Rather, Smith's attorney told the court that Smith wanted to testify "'for the sole purpose of discussing the verdict of the previous trial and the fact that it was unconstitutionally obtained.'" *Id.* at *11; R-Ap. 110. Finding that the judge "had every reason to believe that Smith meant what he said and that he would not limit the scope of his testimony as instructed," the court found that the judge had properly prevented Smith from testifying:

> The judge's decision was not "arbitrary or disproportionate" relative to the court's purpose of protecting the sanctity of the trial. *Rock* [*v. Arkansas*], 483 U.S. [44,] 56 [(1987)]. Smith's proffered testimony was irrelevant to the charges. In fact, evidence that he had already been convicted and sentenced for substantially similar conduct would likely have prejudiced the jury against him. Under these circumstances, including petitioner's clearly articulated purpose of continuing to disrupt the proceedings and ignore the court's instructions, it was well within the judge's discretion to prevent him from testifying. Accordingly, the court's decision did not violate Smith's Fifth Amendment rights.

(*Id.* at *11; R-Ap. 111.)

As in *Smith*, here Anthony failed to heed the trial court's numerous warnings and repeatedly insisted that he would violate the trial court's evidentiary ruling, going so far as to threaten that he would have to be carried out of the courtroom if he were not allowed to tell the jury what he wanted them to hear (66:30). While the fifth and sixth amendments guarantee a criminal defendant the

[3] The State has included the decision in the appendix to its brief (R-Ap. 101-13).

right to testify at his trial, the right is not absolute. *See Rock v. Arkansas*, 483 U.S. 44, 49, 55 (1987). Rather, *Rock* teaches that limitations on a defendant's right to testify are permissible as long as they are not "arbitrary or disproportionate to the purposes which they are designed to serve." *Id.* at 55-56.

Preventing Anthony from telling the jury about his allegedly wrongful conviction in Illinois four decades earlier, even if it meant he could not give testimony to support a self-defense theory, was not arbitrary or disproportionate to the trial court's goals. Those goals were to exclude irrelevant evidence that would have worked to Anthony's detriment and to head off an expected outburst from Anthony when the court tried to enforce its rulings during his testimony. While Anthony asserts that the trial court's post-trial statement that it was concerned about the security risk he would have posed had the court allowed him to testify despite his intent to flout its order is an "after the fact rationalization[] that twist[s] the facts of what actually happened" (Anthony's brief at 12), that accusation is baseless. That the court was concerned about Anthony's potential for violence is reflected in its comments at sentencing:

> You're sitting there in a wheelchair with 1, 2, 3, 4, 5 extra deputies because of that once [sic] incident where you couldn't contain your rage, and that's what I'm concerned about.

(68:38.) Contrary to Anthony's assertion, the trial court did not manufacture reasons for barring him from testifying only in response to his postconviction motion. The trial court's failure to set forth its concerns in detail during the trial was purposeful. As the court explained in denying Anthony's postconviction motion, "I was hoping not to provoke another outburst" (46:4).

For all these reasons, this court should find that Anthony through his misconduct forfeited the right to testify at trial.

## II. ALTERNATIVELY, ANY ERROR IN PREVENTING ANTHONY FROM TESTIFYING WAS HARMLESS BEYOND A REASONABLE DOUBT.

### A. General principles governing harmless-error review.

As this court has recognized, deprivation of a defendant's right to testify is subject to harmless-error analysis. *State v. Flynn*, 190 Wis. 2d 31, 56, 527 N.W.2d 343 (Ct. App. 1994) (citing *Crane v. Kentucky*, 476 U.S. 683, 691 (1986)). Virtually every court to consider the question is in agreement. *See State v. Robinson*, 953 P.2d 97, 102 (Wash. Ct. App. 1997) (Ellington, J., concurring in part, dissenting in part) (collecting cases), *rev'd on other grounds*, 982 P.2d 590 (Wash. 1999).

The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *State v. Thoms*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (citing *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)). The error is harmless if, in the context of the entire trial, it does not undermine this court's confidence in the verdict. *Thoms,* 228 Wis. 2d at 873 (citing *State v. Grant*, 139 Wis. 2d 45, 53, 406 N.W.2d 744 (1987)). As the beneficiary of the error, the State bears the burden to show that an error is harmless. *State v. Sullivan*, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998).

B. Given the strength of the State's case and the evidence undermining his self-defense claim, there is no reasonable probability the jury would have acquitted Anthony had he testified that he killed Sabrina Junior in self-defense.

1. Because Anthony decided against the submission of second-degree intentional homicide, the State must show only that Anthony's testimony would not have created a reasonable probability of an acquittal.

In deciding whether any error in barring Anthony from testifying was harmless, this court must not lose sight of Anthony's decision to pursue an all-or-nothing strategy at the close of the case. This strategy was confirmed during the instructions conference, when the trial court informed counsel that out of an abundance of caution, it had included an instruction on self-defense, second-degree intentional homicide, in the packet of instructions it had prepared (67:4). The court indicated that defense counsel earlier had said Anthony's preference was not to have any lesser-included offense submitted and inquired if that was still Anthony's position (*id.*:5). Counsel and Anthony confirmed that it was (*id.*). The court then explained to Anthony what was meant by a lesser-included crime and asked if he understood (*id.*:5-6). Anthony replied "Yes, I do" (*id.*:6). The court gave Anthony time to consult with defense counsel (*id.*:6-7), after which the court asked Anthony:

> What you want is just to have the jury choose between first-degree intentional homicide or not guilty; that would be their choice?

(67:7.) Anthony responded affirmatively (*id.*).

The court then made a record on whether anyone had threatened Anthony to force him to give up his right to request a lesser-included instruction; whether defense counsel had discussed the choices available; and whether counsel thought Anthony understood them (67:7-8).

In light of Anthony's decision to adopt an all-or-nothing strategy at the close of the case, the test for harmless error is whether there is a reasonable probability Anthony would have been acquitted had he been permitted to testify. Because counsel – and Anthony personally – declined the submission of any lesser-included crime, the test for harmless error is not whether there is a reasonable probability he would have been convicted of something other than first-degree intentional homicide. As a result of Anthony's informed decision, the jury's only options were first-degree intentional homicide and not guilty. Consequently, Anthony would be judicially estopped from now arguing that the trial court's ruling prejudiced him by preventing the jury from convicting him of a less serious type of homicide. *See State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987) (defendant judicially estopped from arguing evidence was insufficient to convict him of manslaughter, heat of passion, where he requested an instruction on that offense).

Because Anthony personally waived the right to a lesser-included-offense instruction, any error in preventing him from testifying was harmless if there is no reasonable probability he would have been acquitted of murdering Sabrina Junior had he testified.

2. There is no reasonable probability the jury would have acquitted Anthony had he testified.

According to counsel's offer of proof, had Anthony been allowed to testify, he would have said that he "became fearful and afraid" in the victim's bedroom because of the physical altercation between the two; that he believed she had picked up a knife; and that he then used the ice pick he had brought into the room to defend himself (66:35). When the trial court asked how Anthony intended to explain why he stabbed the victim so many times, counsel said Anthony would say "he did not realize or understand that the threat had previously been terminated" (*id.*:36).

Had Anthony provided the testimony counsel summarized, there is no reasonable probability the jury would have found him not guilty. The brutal nature of the crime, Anthony's statements immediately after the murder, and other evidence belie any self-defense claim.

The victim, Sabrina Junior, was five feet, seven inches tall and weighed 139 pounds (65:39). She suffered from rheumatoid arthritis in her hands, causing them to cramp up (63:41). She used a walker and sometimes had a limp (*id.*:77). The autopsy revealed she had been stabbed approximately forty-three times (65:60) and had four broken ribs (*id.*:46). Her body showed evidence of blunt force trauma as well as cutting and puncturing injuries (*id.*:40). Some of the sixteen puncture wounds to her left breast penetrated three to four inches into her body (*id.*:55). Five of the wounds caused 400 milliliters of blood to pool on the left side of her chest and 250 milliliters of blood to surround her heart (*id.*:56).

Immediately after the murder, Anthony went to the home of Janet Mayfield, the mother of his fourteen-year-old son (64:19, 27). Anthony confessed to Mayfield that

he had stabbed Sabrina forty to fifty times because she was "messing around with the dude next door and the 'B' upstairs had something to do with it and Anubis told him to do it" (*id.*:21). Mayfield testified she thought Anubis was "[s]ome ancient Egyptian voodoo god" (*id.*:22). Anthony also told Mayfield that Sabrina "had fronted him off" and "called him all kinds of names," causing him to snap (*id.*:24). He announced that he was going to return and kill the man next door and the woman upstairs (*id.*:24-25). Anthony did not say a word to Mayfield about self-defense or being attacked (*id.*:25).

Sandra Rasco, the upstairs tenant Anthony told Mayfield he wanted to kill (63:36), testified that on August 18 – the day before the murder – Sabrina told her that Anthony said he would take her to the woods and kill her (*id.*:37). She said he had put an ice pick to her throat at the time (*id.*).

Ramona Junior, the daughter of the victim and Anthony (*see* 66:63), testified that she saw Anthony enter her mother's room with an ice pick (*id.*:66). After that, she heard her mother yelling "stop, please stop" (*id.*). Larina Junior, the victim's eighteen-year-old daughter (62:3), testified that earlier that evening Anthony told her mom that if she left out the front door, he was going to kill her (*id.*:10). When he said this, Anthony had an ice pick in his hand (*id.*).

While Anthony in his offer of proof claimed that he saw Sabrina arm herself with a knife during their altercation, none of the police witnesses at trial testified to having found a knife at the murder scene.

While the foregoing summary is not an exhaustive recitation of the evidence undercutting Anthony's self-defense claim, the State believes it is sufficient to show that any error in preventing Anthony from testifying was harmless beyond a reasonable doubt.

## III. THE TRIAL COURT PROPERLY REJECTED ANTHONY'S *BATSON* CHALLENGE TO JUROR 34 BECAUSE NEITHER THE UNITED STATES SUPREME COURT NOR THE WISCONSIN SUPREME COURT NOR THIS COURT HAS EXTENDED *BATSON* TO STRIKES BASED ON A JUROR'S OCCUPATION AS A RELIGIOUS LEADER.

During voir dire, the prosecutor exercised a peremptory strike to remove Juror 34, the only African-American male juror[4] on the panel (60:89). At an unreported sidebar, defense counsel objected to the strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming the only possible reason the prosecutor struck the juror was because he was African-American (60:89).

Responding to the *Batson* challenge, the prosecutor gave a race-neutral reason for striking Juror 34; the juror was a youth minister and the prosecutor "was concerned a youth minister might rely on some element of spirituality to decide the case, might actually be sympathetic to [the defendant] in a way [the prosecutor] was unsatisfied with" (60:89). Defense counsel claimed this explanation was pretextual because the prosecutor's expressed concerns were not demonstrated by the questions the prosecutor asked Juror 34 or the answers he gave (*id.*:90). Defense counsel stated, "I believe the explanation[,] although I can see it was race-neutral is nonetheless pretextual" (*id.*).

The court stated that it was persuaded the prosecutor "gave an honest, candid and legitimate reason for striking a juror that has nothing to do with his race" (60:92). The court said that if the prosecutor had struck a nun, a Lutheran minister, a faith healer or a Native American shaman because the prosecutor feared that the

[4] Four panel members, three women and one man, were apparently of African-American heritage (59:34).

prospective juror's sympathies might work against the State, the court would find it to be "a legitimate use of a peremptory strike" (*id.*). At that point the prosecutor added the following observation:

> [I]n 99 percent or maybe even 100 percent of the cases that I've tried anyone that as the Court says "works his faith" I've struck because of the fact that I'm afraid there's going to be a spiritual decision and not a legal decision in the case, and it's something I do consistently.

(60:93.)

Defense counsel renewed his claim that the strike was a pretext for race but that it was also improper because it was based on Juror 34's religion (60:93). The court rejected this argument, finding that the strike was not based on the juror's faith but on the intersection of faith and action (*id.*:94). The court reasoned that striking a person "who actually works in an occupation where they put their faith to work like this may create sympathies, may create attitudes, may create biases that are . . . a perfectly plausible subject for peremptory strike" (*id.*). On that basis, the court overruled the *Batson* objection (*id.*).

On appeal, Anthony no longer is claiming that the strike of Juror 34 was motivated by race or that the prosecutor's religious-based explanation for the strike was pretextual. Rather, Anthony's sole claim is that peremptory strikes cannot be based on religion alone. *See* Anthony's brief at 13-18. That claim fails because the prosecutor struck Juror 34 not based on his religious affiliation but because of his occupation as a youth pastor, and neither the Supreme Court nor the Wisconsin courts have held such a strike barred under *Batson*.

Neither the United States Supreme Court nor our supreme court nor this court has extended *Batson* to strikes based on religion. While observing that the lower federal courts disagree as to whether *Batson* should be

expanded to prevent peremptory strikes based on religion alone, Professor LaFave has said "the better view ban[s] challenges based on membership alone but allow[s] challenges based on activities or articulated beliefs." 6 Wayne R. LaFave et al., Criminal Procedure, § 22.3(d), at 130 (3d ed. 2007) (footnote omitted).

Consistent with this "better view," the Indiana Supreme Court in *Highler v. State*, 854 N.E.2d 823, 828-30 (Ind. 2006), found no denial of equal protection in striking an African-American juror partially because he was a pastor and therefore more apt to be forgiving. The court characterized the strike as based on occupation rather than religious affiliation.

Similarly, in *McKinnon v. State*, 547 So.2d 1254, 1257 (Fla. Dist. Ct. App. 1989), the court upheld the prosecutor's strike of an evangelic minister based on the prosecutor's policy to excuse people in the religious profession because they are overly sympathetic. Likewise, the court in *King v. State*, 539 S.E.2d 783, 795 (Ga. 2000), found nothing improper in the State's preference that ministers not serve as jurors because they generally try to forgive people and look to the best in them. *Cf. Lockett v. State*, 517 So.2d 1346, 1351 (Miss. 1987) (strike of minister because of perceived sympathy of ministers toward accused in criminal case is race-neutral explanation).

Along the same lines, the Third Circuit in *United States v. DeJesus*, 347 F.3d 500 (3d Cir. 2003), avoided the question of whether a peremptory strike based solely on religious affiliation would be unconstitutional because the court found that the government's peremptory strikes were based on jurors' "heightened religious involvement," and such a reason for striking them was permissible. *Id.* at 510.

Here, the prosecutor's strike of Juror 34 was not based on his religious affiliation – an affiliation the record does not reveal – but on his occupation as a youth pastor.

None of the cases cited in Anthony's brief holds that it is unconstitutional to strike a juror based on his occupation as a religious leader, and the cases cited above support the circuit court's determination that this is a constitutionally valid reason for a peremptory strike. This court should therefore find that the circuit court properly overruled Anthony's *Batson* objection to Juror 34.

## IV. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ARGUE THAT ANTHONY HAD A CONSTITUTIONAL RIGHT TO TESTIFY THAT COULD NOT BE PREEMPTED BY ETHICAL RULES.

As an alternative to his argument that the trial court erred in barring him from testifying, Anthony accuses his trial attorney of ineffectiveness for failing to argue that Anthony had a constitutional right to testify that could not be preempted by ethical concerns. *See* Anthony's brief at 19.

As the State has already demonstrated in argument I., Anthony forfeited his right to testify by repeatedly insisting that he planned to violate the court's evidentiary rulings once he got on the stand and by threatening that he would have to be carried from the courtroom if he could not testify as he wished. In that argument, the State also demonstrated that the court's ruling was not based on mere "ethical rules" but on its concern that allowing Anthony to testify would inject irrelevant evidence into the case and pose a security risk in the event the court tried to stop his testimony.

Therefore, an argument that Anthony's right to testify could not be trumped by ethical rules would have failed, so counsel cannot be guilty of deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to advance such a claim.

In addition, for the same reasons that any error in preventing Anthony from testifying was harmless beyond a reasonable doubt (*see* section II., *supra*), Anthony did not suffer prejudice under *Strickland* when his attorney failed to argue that the right to testify could not be trumped by ethical rules.

This court should therefore reject Anthony's first claim of ineffective assistance.

## V. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ARGUE THAT THE RELIGIOUS EXCLUSION OF JUROR 34 WAS BARRED BY *BATSON*.

As an alternative to his argument that the trial court erred in overruling his *Batson* objection to the prosecutor's strike of Juror 34, Anthony claims his attorney was ineffective in failing to argue that the exclusion of the juror violated *Batson* "as a categorical religious exclusion." Anthony's brief at 19.

As this court observed in *State v. Maloney*, 2005 WI 74, ¶ 23, 281 Wis. 2d 595, 698 N.W.2d 583, "because the law is not an exact science," ""'the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized'"" (citations omitted). *Accord State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994) (counsel not required to object and argue unsettled point of law).

As the State has demonstrated in argument III. above, neither the United States Supreme Court nor the Wisconsin courts have extended *Batson* to peremptory strikes based on religious affiliation. Nor are the lower federal courts in agreement as to whether *Batson* should be expanded to encompass religious-based strikes. Moreover, several courts from other jurisdictions have

upheld a government strike based on a juror's occupation as a religious leader.

Due to the unsettled nature of the law in this area, counsel's performance cannot be deemed deficient based on his failure to argue that the strike of Juror 34 was a categorical religious exclusion that violated *Batson*. Nor was Anthony prejudiced by counsel's omission because, as the circuit court found in denying his postconviction motion, it would have upheld the strike of Juror 34 on the ground of his faith-based occupation even if counsel had advanced this argument. *See* 46:8-10.

This court should therefore reject Anthony's second claim of ineffective counsel.

## CONCLUSION

This court should affirm the judgment and order of the circuit court.

Dated this 27th day of August, 2013.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5493 words.

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Marguerite M. Moeller
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of August, 2013.

_____

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