STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2013 AP 000467 – CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDDIE LEE ANTHONY,

Defendant-Appellant.

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ON REVIEW OF A JUDGMENT OF CONVICTION AND A DENIAL OF A MOTION FOR POST-CONVICTION RELIEF IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ PRESIDING.

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# REPLY BRIEF OF DEFENDANT-APPELLANT, EDDIE LEE ANTHONY

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases*

## INTRODUCTION

The defendant, Eddie Lee Anthony, by attorney Kimberly Alderman, filed an appellate brief ("Anthony's Brief") asking this Court to overturn his conviction or the circuit court's order denying Anthony's motion for post-conviction relief, because (1) the circuit court violated Anthony's constitutional right to testify in his defense at trial; (2) the circuit court denied Anthony's *Batson* challenge because peremptory strikes cannot be based on a religion alone; and (3) Anthony received ineffective assistance of counsel when Trial Counsel was deficient failing to completely argue regarding Anthony's right to testify or his valid *Batson* challenge. The State filed their brief in opposition ("State's Brief"). Anthony herein files a reply and states the following in support.

## SUPPLEMENTAL STATEMENT OF FACTS

Anthony's entire defense was based on a claim of self defense, for which he would be the sole witness. (R66:35.) However, when it came time for Anthony to present his case, the Circuit Court ruled that he would not be permitted to testify. (R66: 46.) The court decided to forbid Anthony from testifying in his own defense due to Anthony's insistence that he would mention facts that seemingly pertained to a prior conviction. (R66: 46.) More specifically, Anthony indicated that he intended to mention the facts surrounding a 1966 robbery. (R66*:* 27-28).

In its Supplemental Statement of the Facts, the State claims that Anthony misrepresented a fact in Anthony's Brief that Anthony was the victim in a 1966 robbery (Resp't's Br. 3). The State points to footnotes two and three in Anthony's Brief as the source of the error. *Id*. Footnote two 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." (App's Br. 3 n.2). Footnote three states, "As stated above, it does not appear that the Circuit Court understood that Anthony was the victim in the 1966 robbery." (App's Br. 4 n.3).

Anthony has never denied that he has convictions on his record. Rather, these footnotes reflect Anthony's representations to post-conviction counsel and attempted representations to the court as to the story behind a robbery at issue.[1] In addition to this information, Anthony intended to testify that he acted in self-defense in the instant case. (R66:35.) The circuit court disallowed him from testifying on either topic. (R66: 46.)

## ARGUMENT

### I. The Circuit Court violated Anthony's constitutional right to testify at trial.

#### a. The Circuit Court placed limits on Anthony's constitutional right to testify at trial that were arbitrary and disproportional to their purpose of preserving courtroom decorum.

The State does not dispute that Anthony has a constitutional right to testify at his own trial; however, the State argues that Anthony completely forfeited this constitutional right by engaging in courtroom misconduct. (Resp't's Br. 3).[2] As subsequently explained, the State's conclusion is incorrect.

The main case the State relies on to support this argument is *Smith v. Green*, No. 05 Civ. 7849 (DC), 2006 WL 1997476 (S.D.N.Y 2006). In Smith v. Green, the Southern District of New York held that the defendant's misconduct in front of a jury resulted in the defendant forfeiting the right to testify on his own behalf. *Id*. Despite warnings from the judge, the defendant made two separate outbursts in front of the jury, which included telling jury that he was already found innocent and referring the judge as a "dirty, lying racist fool." *Id*. Afterwards, the judge still offered the defendant the right

[1] Incidentally, the State's argument exemplifies the problem with the court's refusal to allow Anthony to testify, either in his own defense at his homicide trial or to complete the record at a *Machner* hearing.

[2] The State acknowledges that a de novo standard of review is applicable to issues of whether a defendant forfeited a constitutional right through his misconduct. (Resp't's Br. 6)

to testify, but the defendant refused to testify to any admissible material. *Id*.

The Southern District of New York applied the *Rock v. Arkansas* standard, which states that a court may limit a defendant's right to testify at trial to "accommodate other legitimate interests" so long as the limitations are not "arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (quoting *Rock v. Arkansas*, 483 U.S. 44, 55-6 (1987)).

Under the *Rock v. Arkansas* standard, the circuit court in the instant case should not have prevented Anthony from testifying at trial. In the instant case, the circuit court stated in its order that its limitation on Anthony's right to testify at trial was designed to serve the purpose of protecting the decorum of the tribunal.[3] R46:12-13. Under *Rock*, limitations on the right to testify cannot be "arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56. It is both "arbitrary and disproportionate" to use ethical rules on decorum to intrude on the province of constitutional rights. Ethical rules do not preempt the U.S. Constitution.

Further, the facts of the instant case suggest that the circuit court's limitations of Anthony's right to testify on his own behalf are especially "arbitrary or disproportionate to the purposes they are designed to serve." Anthony's conduct was nowhere near as disruptive as the conduct of the defendant in *Smith v. Green*. Anthony's misconduct never occurred in front of the jury. (R66). Further, the circuit court did not indicate that Anthony was disruptive enough to be removed from the courtroom. To the contrary, Anthony stated that he had great respect for the Circuit Court judge and the deputies that were present in the courtroom. (R66:39).

Additionally, Anthony's testimony at trial was vital to his defense. (R66: 35). His entire planned defense rested on his anticipated testimony that he acted in self-defense. *Id*. The

[3] The State argues that the circuit court also based its decision on a desire for safety in the courtroom. (Resp't's Br. 11). However, the circuit court already had Anthony shackled to a chair, with multiple deputies guarding him. (R66: 34).

Circuit Court's denial of Anthony's ability to testify at trial, on the day he was to testify, resulted in Anthony being tried for murder without having presented any defense at all to the charges. The ability of the court to remove severely disruptive defendants should not be so broadly construed as to prevent a defendant from raising any defense at trial.

### b. The Circuit Court's violation of Anthony's right to testify at trial was not harmless error.

The State also argues that the circuit court's actions amount to harmless error. (Resp't's Br. 12-16). The standard for harmless error articulated by the State 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. 1994). (Resp't's Br. 12).

The error in the instant case is that the Anthony's was prevented from testifying at trial. As previously stated, Anthony's defense of self-defense relied entirely on his testimony at trial. No other living person witnessed the events between Anthony and the decedent. Denying Anthony the ability to testify denied him the ability present *any meaningful defense to the crimes charged*. This creates a "reasonable possibility that the error contributed to the conviction." *Thoms*, 228 Wis. 2d at 873. The State's argument is patently without merit.

## II. The Circuit Court erred when it denied Anthony's *Batson* challenge, because peremptory strikes cannot be based solely on religion, even if a jury member is active in his or her religious beliefs.

Anthony argues that a preemptory strike violates *Batson* and its progeny if it is solely based on religious reasons. (App's Br. 13, 16).[4] The State argues that this case involves a preemptory strikes based on religious activity rather than religious beliefs, so equal protection under *Batson* does not apply. (Resp't's Br. 18). As discussed below, *Batson* and its

[4] Alternatively, Anthony also maintains his argument that the religious basis for the prosecutor's strike was a pretext for a race-based strike of the only black male juror. (App's Br. 9).

progeny extend to preemptory strikes based on religion, whether or not the juror participates in religious activities.

The United States Supreme Court has not directly addressed whether *Batson* should be extended to preemptory strikes of jury members based on religion. However, the Court has made it clear that *Batson* extends beyond discrimination based on race. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-43 (1994). When extending *Batson* to preemptory strikes based on gender, The Court reasoned, "Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory." *Id*. at 127. A commitment to "fair and nondiscriminatory" jury selection logically includes protection against striking jury members based on religious discrimination.

At trial, the prosecutor defended his strike by stating the following:

> [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.

(R60:93). The prosecutor's intent is clear. He systematically removes jury members based on religious activity. Juror Number 34 is an example of this discrimination. The prosecutor's reason for the strike was that Juror Number 34 "work[ed] his faith" by virtue of being a youth pastor (R60: 90). The prosecutor's actions and rational do not represent a "fair and nondiscriminatory" jury selection process, as envisioned by the Supreme Court. *J.E.B* 511 U.S. at 127.

The Seventh Circuit considered whether *Batson* applies to preemptory strikes based on religious activity, but ultimately reached its decision based a lack of plain error. *United States v. Stafford,* 136 F.3d 1109, 1114 (7th Cir.1998). In dicta, the court stated the following:

> [i]t would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a

> Jew, a Muslim, etc., [but] it would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing.

*Id.*

The Seventh Circuit's view is much more restrictive than the State's argument that it is proper to strike anyone who participates in religious activities. While Juror Number 34 engaged in religious activities, there was no indication, that his religious beliefs prevented him from applying the law or considering the evidence. There is nothing in fact or law to support the proposition that youth pastor are by definition unable to uphold the law and accurately consider evidence in evaluating a criminal defendant's guilt. (R29).

The State cites *United States v. Dejesus*, 347 F.3d 500 (3rd Cir. 2003), as support of its argument that this Court should recognize a distinction between striking a Juror based on religion alone and striking a Juror that engages in religious activities. In *DeJesus*, the Third Circuit held that a district court's differentiation "between a strike motivated by religious beliefs and one motivated by religious affiliation [was] valid and proper." *DeJesus,* 347 F.3d at 511. The court's reasoning was that religious activity suggests strong religious beliefs, which the court decided were a valid reason for a preemptory strike. *Id*. at 510-511. This reasoning was applied to two jurors who had been struck. As to the first, his religious activity consisted of (1) hobbies involving civic activities with the church, (2) reading of a religious publication, the Christian Book Dispatcher, (3) holding several biblical degrees, (4) being a deacon and Sunday School teacher, (5) singing in multiple church choirs, and (6) forgiving the murderer of his cousin with whom he had been close. *Id.* at 506. The second had similar interests and activities. *Id.*

The distinguishing feature between the instant case and this Third Circuit case is not that the *Dejesus* jurors had more substantial connections to religious thinking than did Juror Number 34, but rather that those connections were *substantiated.* In *Dejesus*, an individualized inquiry into each

prospective juror delving into this religious activity was actually undertaken, whereas in the instant case religious activity and belief was merely presumed. Juror Number 34 may, in fact, have been eligible for disqualification had such an inquiry been undertaken in accordance with *Batson* and its progeny.

Disallowing all youth ministers from serving on juries imposes a penalty on the basis of religious status alone. The Supreme Court rejected a similar restriction on civic rights when it struck down a law that precluded "ministers of the Gospel, or priests of any denomination whatever" from serving as a constitutional convention delegate. *See eg, McDaniel v. Paty,* 435 U.S. 618, 626-29 (1978). The court reasoned, "Government may not fence out from political participation, people such as ministers whom it regards as overinvolved in religion. The disqualification provision employed by Tennessee here establishes a religious classification that has the primary effect of inhibiting religion." *Id.* at 619.

The State's argument fails to account for the forest of categorical religious exclusion through the trees of presumed religious activity and beliefs.

**III. Anthony was cumulatively prejudiced by his Trial Counsel's deficient performance regarding Anthony's constitutional right to testify at trial and the prosecutor's violation of Batson and its progeny.**

The State's Brief discusses whether Trial Counsel was ineffective by looking at each deficiency individually. (Resp't's Br. 20-22) However, the State does but does not address Anthony's argument that the cumulative effect of both deficiencies prejudiced Anthony. (App's Br. 19.)

The Supreme Court of Wisconsin has held Trial Counsel to be ineffective based on the cumulative prejudicial effect of multiple deficiencies. *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305. The court explained, "we need not look at the prejudice of each deficient act or omission in isolation, because we conclude that the cumulative effect undermines our confidence in the outcome of the trial."

Further, "It is the State's burden to prove that the errors are, in their cumulative effect, harmless and not prejudicial." *State v. Harris*, 2008 WI 15, ¶ 113, 745 N.W.2d 397, 307 Wis. 2d 555.

The Wisconsin Supreme Court's analysis is consistent with Seventh Circuit case law on the topic. *See, eg, United States v. Allen,* 269 F.3d 842, 847 (7th Cir.2001).The Seventh Circuit has stated that "even errors that are individually harmless, when taken together, can prejudice a defendant and violate his right to due process of law." *U.S. v. Conner*, 583 F.3d 1011, 1027 (7th Cir. 2009); *See also*, *Allen,* 269 F.3d at 847.

In Anthony's Brief, Anthony argues that his Trial Counsel was deficient in two major ways. (App's Br. 19-20) First, Trial Counsel was deficient for failing to effectively argue regarding Anthony's constitutional right to testify at trial. (App's Br. 19) Second, Trial Counsel was deficient for failing to effectively argue that the exclusion of Juror Number 34 was in violation of *Batson* and its progeny as a categorical religious exclusion. (App's Br. 19-20) Combined, as well as individually, these deficiencies had a prejudicial effect, resulting in Anthony received ineffective assistance of counsel under *Strickland*.

The State argues that Anthony effectively waived his right to testify, through courtroom misconduct. (Resp't's Br. 20). As previously discussed, rules on courtroom misconduct, also referred to as decorum or ethical rules, do not trump the constitutional right to testify at trial. (See argument I., supra).

The State further argues that Anthony was not prejudiced, because it believes that Anthony would have been convicted, even if he testified at trial. (Resp't's Br. 21). However, the standard for prejudice under *Strickland* is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In the instant case, but for Trial Counsel's deficiency, the probability of a different outcome is sufficient to undermine confidence in the outcome of the trial. As previously discussed, (see section I. supra), Trial Counsel's failure to protect Anthony's constitutional right to testify prevented Anthony from presenting a defense at trial. The difference between having a defense at trial and having no defense at trial is enough to satisfy the *Strickland* prejudice prong.

The State further argues that Trial Counsel was not deficient with respect to the *Batson* violation, because the law is not settled on this issue. However, as previously noted, (see argument II, supra) federal and state courts have acknowledged that *Batson* can be extended to religious preemptory strikes. *See eg. United States v. Stafford,* 136 F.3d 1109 (7th Cir.1998).

The Supreme Court has settled that *Batson* extends beyond discrimination based on race. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-43 (1994)(holding *Batson* extends to preemptory strikes on the basis of gender). The Court made clear that it was committed "to jury selection procedures that are fair and nondiscriminatory." J.E.B., 511 U.S. at 127. Applying *Batson* and its progeny in a way that prevents unfair and discriminatory preemptory strikes of jury members based on race or religion would have been the effective way to comply with the Supreme Court's reasoning and to represent Anthony at trial.

Finally, because the Circuit Court denied Anthony the chance to establish what he would have testified to at trial by denying his post-conviction motion without a *Machner* hearing, it is impossible to evaluate from the record the likelihood that the jury would have found his testimony effective at creating reasonable doubt. The State, perhaps predictably, presumes that Anthony could not have said *anything* in his own defense. Anthony posits that this presumption is as inappropriate as the one that a youth minister is by definition incapable of serving on a jury in as capable a manner as his peers.

## CONCLUSION

For the foregoing reasons, Eddie Lee Anthony respectfully requests that this Court reverse his conviction and grant a new trial or any other relief that the Court deems appropriate.

Dated this ____ day of September, 2013.

Respectfully submitted,

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## CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,992 words. Including the cover, tables, and certifications, the length is 3,501 words.

_____
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## ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

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