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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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, EDDIE LEE ANTHONY

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## ISSUES PRESENTED

1. Did the Circuit Court err when it ruled that Anthony could not testify in his own defense?

   Applying case law that permits a court to remove a disruptive defendant from the courtroom, the Circuit Court held that Anthony was properly denied his right to testify even though the Court merely feared Anthony *might* become disruptive, and Anthony never actually did and was never removed from the courtroom.

2. Did the Circuit Court err when it ruled that African-American veniremember Number 34 was properly struck after the Circuit Court had placed Number 34 into the jury panel to satisfy *Batson*?

   Agreeing with the State that it is permissible to assume without any inquiry that any youth pastor in any faith will have "spiritual sympathies [that] might work against the State," the Circuit Court found that the State's strike of Number 34 was Constitutionally-permissible.

3. In the alternative, was counsel ineffective for failing to argue that Anthony was constitutionally permitted to testify in his own defense and that the State's strike of Number 34 was unconstitutional under *Batson*?

   After Anthony filed a postconviction motion arguing that Trial Counsel was ineffective for raising the above two arguments, the Circuit Court held that Trial Counsel was effective because neither argument would have provided Anthony with any relief.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Anthony welcomes oral argument to clarify any questions the court may have. Publication is warranted because this case advances constitutional analysis in Wisconsin on issues ## 1 and 2, above.

## STATEMENT OF THE CASE AND FACTS

*Background*

Defendant Eddie Lee Anthony was convicted by a jury, Hon. Richard J. Sankovitz presiding, of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a). (R29.) sentence. (*Id.*) Anthony timely filed a motion for post-conviction relief in the Circuit Court, arguing ineffective assistance of counsel. (R40; *see* Appx. D.) In an order dated February 5, 2013, the Circuit Court denied Anthony's motion for post-conviction relief. (R46:16; *see* Appx A.) Anthony herein appeals. No hearing on the issues was scheduled or held. (*Id.*at 7-8.)

*Facts*

Anthony, an African-American, lived with Sabrina Junior and their children. (R62:5-6.) On August 20, 2010, Anthony stabbed and killed Sabrina with an icepick. (R59:11; R64:54.) Anthony was convicted of first-degree intentional homicide in violation of Wis. Stat. § 940.01(1)(a). (R29.)

Anthony and his Trial Counsel intended to present a theory on self-defense. (R66:35; see Appx. C.) Anthony was the only person in the room with Sabrina at the time of her death, so he was and remains the only person who could present this defense.[1]

During voir dire, Trial Counsel objected under ***Batson v. Kentucky***, 476 U.S. 79 (1986), to having only one African-American male veniremember. (R59:34.) The Circuit Court overruled the objection, reasoning that there was no proof that the clerk of courts was discriminatorily calling veniremembers. (*Id*. at 34.)

Subsequently, the African-American veniremember, Number 34, was included in the jury panel by the Circuit Court "because …he [was] the only African American male." (R60:91; *see* Appx. B.) In his voir dire questioning, Number

[1] Two of the Anthony and Sabrina's daughters were elsewhere in the apartment but did not witness the physical confrontation between Anthony and Sabrina.

34 stated his name and said, "I live in Milwaukee, Wisconsin. Single. I work at a church as a youth pastor. That's it… [I live in the neighborhood of] Greendale." (*Id.* at 57.) He was never asked if he thought any of his beliefs prevented him from being fair and impartial. He was never asked whether his occupation provided religious advice or general youth support. Indeed, he was never even asked what his faith was.

On the basis of this exchange, Number 34 was peremptorily struck by the State. (R60:84; 85; 89; *see* Appx. B.) After the strike, Anthony again raised a *Batson* challenge. (*Id*. at 89.) The State explained that it did not want Number 34 on the panel because Number 34 was a youth pastor. (*Id*. at 89.) Anthony argued that this reason was pretextual, and that Number 34 was struck on the basis of race. (*Id*. at 89.)

In assessing the credibility of the State's proffered reason for the strike, the Circuit Court stated that there is a regular practice among prosecutors for using peremptory strikes on "people who work their faith." (*Id*. at 89-90.) The Circuit Court found that the State provided an "honest, candid and legitimate reason" for the strike. (*Id*. at 92.) The Circuit Court further reasoned,

> if that was a Sister of St. Francis that was sitting back there, if that was a nun in the Daughters of Charity, if that was a Lutheran minister, if that was a faith healer, if that was a Native American shaman back there and [the State] struck that person for the reason that their spiritual sympathies might work against the State I would say that was a legitimate use of a peremptory strike.

(*Id*. at 92.) The Circuit Court concluded:

> it's the faith and action here that I think is different, and 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 I think a

> perfectly plausible subject for peremptory strike, so the *Batson* objection is overruled.

(*Id*. at 94.)

At trial, the State presented evidence of the following. Anthony and Sabrina had been walking through their neighborhood and began arguing. (R62:10-11.) The couple returned back to their home where the argument continued. (*Id.* at 16; 18.) Their daughter entered the apartment to find Sabrina's body as Anthony was leaving. (*Id*. at 21; 24.) Anthony fled and was arrested in Illinois. (R64:14; 11.)

Anthony did not contest these allegations during the State's case-in-chief. Instead, he intended to defend against the charges by arguing that he acted in self-defense. (R66:35; *see* Appx. C.)

After the State rested, Trial Counsel advised the Circuit Court that Anthony would be taking the stand. (*Id.* at 23.) The court addressed Anthony directly explaining, if he were asked about whether he was convicted of a crime, he should respond that he had been convicted of two crimes. (*Id*. at 24.) Anthony responded directly to the court that he believed that he should be able to testify about those two crimes. (*Id*. at 25.) The Circuit Court corrected Anthony, indicating that he would only be able to say that he had been convicted twice. (*Id*. at 25-26.) Anthony indicated that this was not factually true. (*Id*. at 25.) Anthony indicated that he intended to mention a 1966 robbery.[2] (*Id*. at 27-28.) The Circuit Court instructed him that he would not be able to do so. (*Id*. at 28.) In the court's words, Anthony became "animated" and caused a "ruckus" over the instruction. (*Id*. at 34.) Anthony stated he understood, but that the jury should "know the truth, the whole truth." (*Id*. at 28-29.)

The Circuit Court ruled that Anthony would not be permitted to testify because he refused to promise not to mention any facts pertaining to his prior convictions. (*Id*. at 46.) This

[2] 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.

conversation occurred between the Circuit Court and Anthony personally, with Trial Counsel standing quiet. (*Id*. at 25-47.) Trial Counsel did not interject during this exchange between the Circuit Court and Anthony. (*Id*.) Rather, afterward, he made an offer of proof (*Id*. at 35-38) and objected that the probative value of Anthony's self-defense testimony outweighed the prejudicial value of any potentially irrelevant testimony he might attempt to give. (*Id*. at 45-47.)

The Circuit Court explained it prohibited Anthony from taking the stand in his own defense for the following reasons. First, it reasoned that the jury would be biased if Anthony mentioned the 1966 robbery into believing that Anthony was a criminal and convict him on that basis.[3] (*Id*. at 34.) Second, the Circuit Court explained that the jury would be biased against Anthony by any "ruckus" that he caused if he became agitated on the stand, amplified by the fact that Anthony was "going to be shackled to the witness stand." (*Id*. at 34.) Finally, the Circuit Court did not want the jury to see anything that would suggest that Anthony was someone who "easily loses his temper" or who "can't follow the rules other people follow." (*Id*. at 42.) In addition to its desire to protect Anthony from the scrutiny of the jury, the Circuit Court was concerned with providing "a person carte blanch [*sic*] to break the court's rules." (*Id*. at 46.)

Trial Counsel made an offer of proof that Anthony would have stated that the icepick was kept in his room for self-defense, and that he was afraid of Sabrina when she entered his room with a knife and threatened him. (*Id*. at 35.) Trial Counsel further explained Anthony would have testified that he was not aware that the threat had been eliminated, so continued to strike Sabrina in self-defense. (*Id*. at 36.) Trial Counsel further explained Anthony would have explained why he fled afterwards because he has a special fear of police in Illinois and Wisconsin due to events in his past, so flight was a natural response. (*Id*. at 36-37.)

[3] As stated above, it does not appear that the Circuit Court understood that Anthony was the victim in the 1966 robbery.

Much of the confusion with the Circuit Court was caused because Anthony had wanted to reference his past encounters with law enforcement to explain why his fleeing was not indicative of guilt. Anthony had wanted to reference the 1966 robbery to demonstrate that he has only hurt people who have come after him first, and that this pattern of behavior is consistent with the instant case because Sabrina was the aggressor.[4]

Trial Counsel did not explain this rationale to the Circuit Court or attempt to bridge the gap between his client's and the Circuit Court's understanding. (*See generally*, R66; *see* Appx. C.) He did not try to intervene, or ask for a recess.[5] (*See generally*, R66; *see* Appx. C.) When Trial Counsel was asked if he had anything to add, he simply clarified his objection that the testimony would be more probative than prejudicial. (*Id.* at 45-46.) It is clear from the transcripts than direct communication between the judge and Anthony was strained at best, Trial Counsel did not attempt to remedy this problem, and the Circuit Court was left without an adequate understanding of why Anthony would want to discuss facts related to his history with law enforcement. (*See generally*, R66; *see* Appx. C.)

During all of this confusion and miscommunication, Anthony was permitted to remain in the courtroom. (*See generally,* R66.) In fact, there is nothing in the trial transcripts to indicate that Circuit Court even *considered* removing Anthony from the courtroom at any time. (*Id.*) To the extent that one could conclude that Anthony's expression of frustration upon denial of his right to testify was disruptive, even then there is no indication that he was at risk of being removed from the courtroom. (*See, e.g., id.*at 30-33.)[6]

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[4] To be clear, Anthony does not now argue that the 1966 robbery was admissible. Rather, Anthony mentions this to demonstrate the severity of the communication breakdown between Anthony and the court.

[5] As per n.6, the Circuit Court directed that Trial Counsel speak to his client off the record. That discussion did not have any noticeable impact on the discussion, nor did Trial Counsel do anything on his own initiative until he made an offer of proof. (*See generally*, R66; *see* Appx. C.)

[6] Though the dialogue between Anthony and the court went on for some time, this cite is to what undersigned counsel believes to be the worst time. That is, at

Anthony has maintained that he would have also testified that Sabrina was a heavy user of crack cocaine and was high on crack cocaine on the night of her death. (R40:4; *see* Appx. D.)[7] He has further maintained that Sabrina had a history of being aggressive while high on crack cocaine, and was exhibiting severe aggression in connection with this crack cocaine use on the night of her death. (*Id.*) According to Anthony, in the physical confrontation that ultimately resulted in her death, Sabrina threatened and attempted to kill Anthony, who was defending himself and his children against her attack. (*Id.*)

In the defense, Anthony was permitted to call his young daughters Mystic and Ramona Junior. (R66:59-67; *see* Appx. C.) Mystic testified in the defense's case in chief that she was hiding in a closet in her bedroom when the fight between Anthony and Sabrina occurred in another room. (R66:60-61; *see* Appx. C.) The closet was "away from the door" to the bedroom. (*Id.*) Ramona was in the same closet and looking through the closet door but "couldn't see" what happened between Anthony and Sabrina. (*Id.* at 66.) Because neither daughter testified as to what occurred between Sabrina and Anthony, Anthony failed to present any evidence of self-defense to the jury.[8] In effect, he failed to present any defense at all.

*Post-Conviction Proceedings*

Anthony timely filed a post-conviction motion with the Circuit Court. (R40; *see* Appx. D.) He argued that Trial Counsel was ineffective for failing to (1) argue and present case law that Anthony's right to testify was absolute subject

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the worst, the Circuit Court only believed it necessary to allow Anthony time to collect his thoughts (*id.* at 32) and to talk to Trial Counsel off the record (*id.* at 33).

[7] This is citation to Anthony's postconviction motion because there was not a postconviction hearing. In any case, Anthony argues that these facts do not need to be on record for his relief as they are not dispositive over whether Anthony's constitutional rights were violated.

[8] *Note bene*: the offer of proof on Anthony's testimony occurred outside the presence of the jury.

to very discrete limitations such as telling the truth and (2) argue a valid challenge that the State improperly struck Juror Number 34 on religious grounds based on *Batson* and its progeny. (*Id.* at 1.)

The Circuit Court denied Anthony's Post-Conviction motion. (R46:15; *see* Appx A.) First, the Circuit Court held that, even if *Batson* can be extended to religion, the State's peremptory strike of Number 34 was not analogous to those cases that have held peremptory strikes impermissible when they are based on religious affiliation. (*Id.* at 10.) The Circuit Court reasoned that because Number 34 "worked his faith as a youth pastor," Number 34 was struck because of his religious beliefs. (*Id.*)

In its reasoning, the Circuit Court relied on ***United States v. Brown,*** 352 F.3d 654 (2d Cir. 2003) and ***United States v. DeJesus***, 347 F.3d 500 (3rd Cir. 2003) to argue that Number 34 was struck because he engaged in "religious activities," even "unusual amounts of religious activity" that suggested "strong religious beliefs, which could prevent them from convicting the defendant." (R46:10; *see* Appx A.) Ultimately, the Circuit Court believed that the mere conclusion that Number 34 "worked his faith as a youth pastor" satisfied the requirement of "unusual amount of religious activity." (*Id.*)[9]

Next, the Circuit Court denied Anthony's claim that, where he was asserting a self-defense theory based on his own testimony, he had an absolute right to testify subject only to testifying truthfully. (*Id.* at 15.) The Circuit Court held that a defendant's right to testify could be limited where a defendant's testimony "threatens disruption which jeopardizes the orderliness of the proceedings." (*Id.* at 12.)[10]

[9] This is contrary to the factual evidence elicited during voir dire. Indeed, it is unknown even what activities those are, or what religion Number 34 practices.

[10] Unlike as suggested by the Circuit Court in its opinion, there was no basis in the trial transcript or elsewhere in the record to suggest that Anthony might attack or otherwise harm the jury or anyone else in the courtroom. The fear underlying the denial of Anthony's right to testify was a self-destructive tirade, not an attack on any third person. *See* above for Circuit Court's reasoning; *see also* Mot. for Postconviction Relief at 3 and corresponding cites.

The Circuit Court reasoned that a defendant could be removed from the courtroom entirely for "obstreperous" conduct as a threat to the "dignity, order, and decorum" of the court. (*Id.* at 13.) It also reasoned that it did not have any other options to enforce its order not to testify to irrelevant evidence as the court's alternatives would "tak[e] distinct risks with the decorum of the proceedings." (*Id.*at 13-14.)[11]

The Circuit Court agreed in its Order dated February 5, 2013, explaining, "None of the facts from which I would infer an answer to [the issues in this case] are disputed. The only pertinent evidence – the trial transcript – is undisputed…an evidentiary hearing would serve no purpose in this case." (R46:7-8; *see* Appx A.) The Circuit Court summarily denied a hearing. (*Id.*) Anthony agrees that the transcripts are enough to determine whether his constitutional rights have been violated.

This appeal follows.

## ARGUMENT

As analyzed further below, the Circuit Court below made two divergent errors that infringed on Anthony's right to due process under the Fifth Amendment and right to meaningful defense under the Sixth Amendment. First, the Circuit Court held that Anthony's U.S. Constitutional right to testify had not been violated when the court exercised authority based in ethical rules to control the decorum of the courtroom. However, to the extent that there are exceptions to Anthony's right to testify beyond testifying truthfully, the Circuit Court's action to suppress Anthony's right to testify and to suppress highly relevant testimony was arbitrary and disproportionate to the purpose of maintaining decorum.

Second, the Circuit Court held that the State had validly exercised a peremptory strike on a black male veniremember because he was a youth pastor. However, even using a clearly erroneous standard, neither the State nor the Circuit Court articulated (nor does the record show) any particular reason

[11] *See* n. 1.

why the veniremember was incapable of standing in judgment of another. The inability of the State to mention a single non-discriminatory reason why the veniremember was unfit to serve as a juror reveals the State's reasoning to be a pretext, and the peremptory strike unconstitutional.

In the alternative, Trial Counsel was ineffective for having failed to raised these arguments.

**I. The Circuit Court erred when, after the close of the State's case, it denied Anthony his right to take the stand because this obliterated Anthony's defense, and there is nothing on record to indicate that Anthony either was disruptive or did not intend to tell the truth.**

A criminal defendant has the due process right to testify in his own defense under the U.S. Constitution. ***Wisconsin v. Albright***, 96 Wis.2d 122, 129, 291 N.W.2d 48 (1980). In determining that a criminal defendant has a due process right to testify in his own defense, the Wisconsin Supreme Court cited ***Harris v. New York***, in which the U.S. Supreme Court correlated the absolute right of a defendant to refuse to testify with the right to affirmatively testify: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." ***Harris v. New York,*** 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971)(cited by *Albright*, 291 N.W. 2d at 490). In *Albright*, the Wisconsin Supreme Court concluded that "there is a constitutional due process right on the part of the criminal defendant to testify in his own behalf." *Id.*

Though *Albright* clearly identifies the right to testify as a constitutionally-based right, the case relates to whether counsel was effective when counsel deprived the defendant of that right. As such, though *Albright* is determinative of whether Anthony has a constitutional right to testify, undersigned counsel has not identified a standard of review for Anthony's case. Anthony, however, notes that *Albright* appears to have used a *de novo* standard. *See generally, Albright, supra; see also, generally,* R42 (evidencing no case law on point); *see* Appx. E.

Across the country, there are very few limitations to this right, such as knowing, intelligent and voluntary waiver. *Albright*, 96 Wis.2d at 129. The right to testify is also subject to the defendant telling the truth. *See, eg,* ***State v. McDowell***, 272 Wis.2d 488, 681 N.W.2d 500 (2004). The U.S. Supreme Court has indicated that limitations on the right to present relevant testimony are permissible, but those limitations "may not be arbitrary or disproportionate to the purposes which they are designed to serve." ***Rock v. Arkansas***, 483 U.S. 44, 55-6, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). That is, in all cases in which a right to testify has been limited, the Circuit Court was *required* to balance the decision with the effect on the defendant.

Anthony has not identified any cases where a judge prevented a defendant from testifying on his own behalf where the defendant indicated that his testimony would be truthful. The closest case on point is ***U.S. v. Gleason***, 980 F.2d 1183 (8th Cir. 1992), where a defendant was ordered not to present irrelevant evidence. However, the defendant decided that, without the evidence that the court deemed irrelevant, his testimony would not serve any purpose and, in that case, waived his right to testify. *Id*. at 1185.

Anthony never waived his right to testify or indicated that he would testify in anything but a truthful manner. Rather, he repeatedly stated he wanted provide the jury with "the truth." R66:29; *see* Appx. C. Counsel explained that Anthony wanted to present the only available evidence to support his self-defense theory. *Id*. at 35. Other than Anthony, no living witness saw what occurred between Anthony and Sabrina on August 20, 2010. *Id.* at 60-61; 66. The only way for Anthony to present his argument that he acted in self-defense was to testify on his own behalf. He never waived his right to testify. *Id.* at 35-38. Instead, Anthony prepared for trial and sat through the State's entire case, relying on his right to testify in order to present a theory of self-defense, only to have this opportunity taken away from him at the very last moment. Anthony was therefore tried for and convicted of intentional homicide without having presented *any defense at all* to the charges.

Moreover, contrary to the Circuit Court's reasoning, whether a court may "remove unruly parties from the courtroom altogether" should not be read so broadly as to prevent a defendant from effectively presenting a defense or to infringe on the defendant's strategy. Further, there is nothing on the record to indicate that Anthony was "unruly," beyond his exchange with the court where Anthony fervently indicates his strong desire to testify in his own defense and tell the jury "the whole truth." (R66:29; *see* Appx. C.) Even then, the court does not indicate that Anthony is disruptive enough to be at risk of removal from the courtroom; rather, his conduct was described at the time as being a "very animated way [of] talking" (*Id*. at 34.)

Perhaps most importantly, the Circuit Court emphatically relied on the decorum of the tribunal to support its written order. R46:12-13; *see* Appx A. The decorum of the tribunal is a phrase from ethical rules designed to quickly and efficiently administer a case. *See, e.g.,* SCR 60.04(c)("A judge shall require order and decorum in proceedings before the judge"); *see also* SCR 20:3.5 (titled "Impartiality and decorum of the tribunal"). Moreover, left unsaid by the Circuit Court, even if a defendant is removed from the courtroom, his attorney remains to present and argue his case.

However, the instant case of a defendant testifying on his own behalf is profoundly different. It is axiomatic that ethical rules fail to preempt the U.S. Constitution. Under *Rock, supra*, limits may be placed on this right only if the limits are not "arbitrary or disproportionate to the purposes which they are designed to serve." *Rock,* 483 U.S. at 55-6. That is, as a legal issue, it is both arbitrary and disproportionate to use ethical rules to intrude on the province of evidentiary rules.

Moreover, ethical rules should be the only consideration on appeal as ethical rules were the only consideration of the Circuit Court at trial; the Circuit Court's reasoning as stated in its order denying Anthony's post-conviction motion that Anthony posed a threat to persons in the courtroom appears to have arisen *post-hoc*. (R66:34; *also cited as a significant phrase by* R46:6 *cf.* R46:14; *see* Appx A for R46; *see* Appx. C for R66.) However, during the trial, the Circuit Court

limited its ruling to three primary reasons. First, it reasoned that the jury would be biased by Anthony's potential mention of a 1966 robbery into believing that Anthony was a criminal and convict him on that basis.[12] (R66:34; *see* Appx. C.) Second, the Circuit Court stated it suspected that the jury would be biased against Anthony by any "ruckus" that he caused if he became agitated on the stand, amplified by the fact that Anthony was "going to be shackled to the witness stand." (*Id*. at 34.) Finally, the Circuit Court indicated that he did not want the jury to see anything that would suggest that Anthony was someone "who easily loses his temper easily or can't follow the rules other people follow." (*Id*. at 42.) In addition to the reasons that seemed to focus on protecting Anthony from his own testimony, the Circuit Court was concerned with providing "a person carte blanch [*sic*] to break the court's rules." (*Id*. at 46.) Omitting after the fact rationalizations that twist the facts of what actually happened, these three reasons are the only reasons that this Court should consider in deciding whether the court below violated Anthony's right to due process.

Anthony has the due process right to testify in his own defense. That right cannot be circumscribed by mere decorum of the tribunal principles. The harm to Anthony by the court's disregard for constitutional rights is amplified here because the only way to present Anthony's self-defense theory was through his own testimony; no other person saw what happened between Sabrina and Anthony. The only option for the court in this case was to permit Anthony's testimony. Only then would the court have been able to determine whether Anthony had respected his order or not. Only then could the court have been able to appropriately tailor a response or sanction *if* Anthony had acted as the court anticipated.

On these facts, no matter what standard this Court determines is appropriate, Anthony should be granted a new trial because of the Circuit Court's denial of Anthony's constitutional rights to testify in his own defense and to present a

[12] The Circuit Court did not appear to have understood that Anthony was actually the victim in this robbery. *See* above, *e.g.*, nn. 2 and 3.

meaningful defense.

## II. The Circuit Court erred when it denied Anthony's Batson challenge because peremptory strikes cannot be based on a religious category alone.

***Batson v. Kentucky***, 476 U.S. 79 (1986) prevents a juror from being excluded from a jury on account of race under the Equal Protection Clause. *Id*. The U.S. Supreme Court reasoned that competence as a juror "ultimately depends on an assessment of individual qualifications and ability to impartially consider evidence presented at a trial." *Id*. at 87 (internal citations omitted.) Moreover, the Supreme Court reasoned that race is unrelated to a juror's fitness. *Id*. (internal citations omitted.) Exclusion of a veniremember on account of race further undermines "public confidence in the fairness of our system of justice." *Id*. (internal citations omitted.) In reviewing a circuit court's assessment of *Batson* challenges, reviewing courts apply a clearly erroneous standard. ***State v. Lamon***, 2003 WI 78, ¶ 41, 262 Wis. 2d 747, 664 N.W.2d 607 (2003)(internal citations omitted).

There is a three-part test well accepted in Wisconsin to resolve *Batson* challenges. First, a defendant presents a prima facie case that a veniremember was excluded from the venire based on race. *Id. at* ¶ 28. Next, the State must offer a race-neutral reason for exercising the strike. *Id*. at ¶ 29. "The prosecutor's explanation must be clear, reasonably specific, and related to the case at hand." *Id*. The explanation "need not rise to the level of a for cause challenge." *Id*. The reason does not have to be persuasive or even plausible. *Id*. at ¶ 31. "[E]ven a 'silly or superstitious' reason, if facially nondiscriminatory, satisfies the second step." *Id*. Finally, the circuit court must weigh the credibility of the testimony and determine whether purposeful discrimination has been established. *Id.*at ¶ 32. In this step, the defendant may argue that the reason was a pretext. *Id*.

The U.S. Supreme Court has stated that it may be appropriate to use "peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side." ***Holland v. Illinois***, 493 U.S. 474, 481, 110 S.Ct. 803,

107 L.Ed.2d 905 (1990). Peremptory strikes are "a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." *Id*. at 484, 110 S.Ct. 803 (quoting ***Batson***, 476 U.S. at 91) (quotation marks omitted) .

The US Supreme Court has expanded *Batson* to prevent the use of strikes on the basis of gender. ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127, 140-43 (1994). Among the circuits, *Batson* has also been expanded to prevent strikes of Native Americans (***Kesser v. Cambra***, 465 F.3d 351 (9th Cir. 2006); *see also Wisconsin v. Karen Lynne Snow*, 2012AP2323-CR, Ct. App. D. IV, April 4, 2013, *attached hereto as Appx. G.*), Hispanics (***United States v. Rudas***, 905 F.2d 38 (2d Cir. 1990)), and religiously active persons (***United States v. Brown***, 352 F.3d 654 (2d Cir. 2003)).

Federal courts "are divided" over whether *Batson* may be expanded to prevent the use of strikes on the basis of religion. *See, e.g.*, ***US v. Berger***, 224 F.3d 107, 119 (2nd Cir. 2000). *See also*, Wayne R. LaFave et al., Criminal Procedure sec. 22.3(d) (2010) ("Lower courts have divided over whether the *Batson* principle prohibits challenges based on religion, with the better view banning challenges based on membership but allowing challenges based on activities or articulated beliefs.")(*cited in* ***US v. Prince***, 647 F.3d 1257, FN3 (10th Cir. 2011)). Some circuits agree that it is appropriate for a prosecutor to "strike a juror for being unwilling to sit in judgment of another human being." ***Prince***, 647 F.3d at FN3 (citing ***United States v. DeJesus***, 347 F.3d 500 (3rd Cir. 2003)(internal citations omitted). However, the State may not "infer solely from a prospective juror's race, gender or religion that he will be unwilling to sit in judgment of another, and then offer that unwillingness as a permissible basis for a peremptory challenge." *Id*. [13]

[13] There is limited 7th Circuit analysis of this topic. See, *e.g., US v. Stafford*, 136 F.3d 1109 (7th Cir. 1998)(finding on independent federal grounds that the judge's decision to permit a strike of a veniremember was not "plain error" but stating in dicta that it "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*. at 1114).

The Circuit Court ruled that Anthony successfully articulated a prima facie case of discrimination. R60:89; *see* Appx. B. The burden then shifted to the State to show a neutral reason for the strike. *Id*. In this step, the Circuit Court found for the State, rejecting Anthony's argument that the exclusion based on religion was pretextual. *Id*. at 90. The Circuit Court rested its decision to preclude Number 34 from the jury panel solely on the conclusion that Number 34, a youth pastor, "work[ed] his faith." *Id*. at 90. The court further reasoned,

> if that was a Sister of St. Francis that was sitting back there, if that was a nun in the Daughters of Charity, if that was a Lutheran minister, if that was a faith healer, if that was a Native American shaman back there and [the State] struck that person for the reason that their spiritual sympathies might work against the State I would say that was a legitimate use of a peremptory strike… [But the Circuit Court emphasized that it was] the faith and action here that I think is different, and 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 I think a perfectly plausible subject for peremptory strike, so the *Batson* objection is overruled.

*Id*. at 92; 94.

The Circuit Court concluded that the State had presented a permissible race-neutral reason for striking Number 34. *Id*. at 92. Trial Counsel unsuccessfully argued that, where the Circuit Court included Number 34 in the venire due to *Batson* concerns, the State had a higher burden to satisfy if it wanted to strike Number 34. *Id*. at 90-92.

On seeing the caselaw above presented in Anthony's postconviction motion, the Circuit Court stated that "the record is clear that the prosecutor struck [Number 34] not simply because of his faith but because he worked his faith as

a youth pastor." R46:10; *see* Appx A. The Circuit Court, accordingly, implicitly held that striking a veniremember on the basis of his or her work in a church-related or religious profession is an adequate neutral explanation for use of a preemptory strike. *Id.*

The Circuit Court's reasoning was flawed for two reasons: (1) a position of employment with a religious organization does not inherently involve particular personal beliefs, and (2) to the extent that Number 34's personal religion is also the religion of his employer, religion does not inherently involve particular personal beliefs. That is, the Circuit Court's order permitted a categorical strike of religious workers or members of cloistered religious communities. Though the Circuit Court's definition of "works his faith"[14] remains absent, the recitation of a nun, a Lutheran minister, of a faith healer, of a Native American shaman strongly suggests that the Circuit Court would have permitted a strike against any religious worker or member of a cloistered religious community. This rationale runs contrary to the precepts of *Batson* and its progeny.

According to *Batson*, the "ultimate [assessment] depends on an assessment of individual qualifications and ability impartially to consider evidence presented." ***Batson***, 224 F.3d at 87. Nowhere in the record is there any indication that Number 34's faith or occupation would have prevented him from impartially considering the evidence. Being a pastor, "a Sister of St. Francis…a nun in the Daughters of Charity…a Lutheran minister…a faith healer, [or]… a Native American shaman" such that the person "works his faith" does not speak to a juror's fitness to serve. Under the caselaw outlined above and the *Batson* imperative to assess "individual qualifications and ability impartially to consider evidence presented," the proper inquiry should have been whether any of Number 34's *individual* beliefs barred his ability to

[14] The Circuit Court has used the following phrases interchangeably: "works his faith" (R46:2; *see* Appx A), "a person who actually works in an occupation where they put their faith to work" (R46:3; R60:94; *see* Appx A for R46; *see* Appx. B for R60), and "people who work their faith" (R60:90; *see* Appx. B for R60).

impartially consider evidence presented at trial. *Batson,* 476 U.S. at 87. To preserve a fair cross-section of society in this jury, Number 34 should have been asked what his occupation included, and whether, because of his job, he had fervently held beliefs that would render his unable to impartially consider evidence.

Similarly, to the extent that it can be assumed that Number 34 believed in a religion and was not just doing a job, the State should not be allowed to strike veniremembers merely because of their religious identity. Under the caselaw cited above, the State is required to make the inquiry necessary to actually point to religious activities or beliefs that would inhibit a particular juror's ability to impartially consider the evidence. At the very minimum, if the State had articulated a belief of Number 34's particular religion (had it ever been disclosed) that rendered him unable to sit in judgment of Anthony, and had elicited a statement from Number 34 that he follows all of the beliefs of his religion, that would likely be a permissible basis for the strike. However, on the facts in the record, the State inferred that *any* youth pastor would be unable to sit in judgment of another, and then used that inference to exclude Number 34. This strike was impermissible because the State did not individually tailor its reasoning for the strike to anything that Number 34 said or believed.

Moreover, similar to the race exclusion in *Batson*, the blanket exclusion of religious workers and members of cloistered religious communities from juries undermines public confidence in the fairness of our system of justice. Religious workers and members of cloistered religious communities are a part of American society. They are citizens, required to pay taxes, vote, and serve on juries just like any other citizen. In trying to obtain a cross-section of society, it would be artificial to exclude anyone who is a religious worker or is a member of a cloistered religious community.[15] In creating a

[15] According to the US Census Bureau, County Business Patterns, 3,807 religious organizations employ 37,076 persons throughout Wisconsin. *See* http://censtats.census.gov/cgi-bin/cbpnaic/cbpdetl.pl. Judicial notice may be taken where a fact is "capable of accurate and ready determination by resort to

jury that is unbiased and qualified, an entire cross section of society should be included absent a particular reason why any particular veniremember cannot sit in judgment of another human being. Patently assuming that *any* youth pastor will have sympathies that prevent him from rationally evaluating a criminal case is exactly the sort of evil that *Batson* sought to cure:

> Exercising peremptory strikes simply because a venire member affiliates herself with a certain religion is [] a form of state-sponsored group stereotype rooted in, and reflective of, historical prejudice. Such strikes, like those based on race and gender, cause harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. That harm flows directly from the government's participation in the perpetuation of these invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

*Brown*, 352 F.3d at 669(internal citations omitted)(generally, *Brown* cited *J.E.B, supra,* to indicate that similar policy considerations encouraged the expansion of *Batson* to religion just as *J.E.B.* had found when *Batson* was expanded to gender.)

The only appropriate reason to strike a veniremember "ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented." *Batson,* 476 U.S. at 87. The categorical exclusion of people who work in the religious sector interfered with Anthony's rights as articulated in *Batson*. Therefore, Anthony should be provided a new trial, one with a fair cross-section of society, untainted by the State's unconstitutional use of peremptory strikes.

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sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01(2)(b).

**III. In the alternative, Trial Counsel was ineffective for failing to raise either an argument that Anthony had a constitutional right to testify that could not be preempted by ethical rules, or that the exclusion of Number 34 was in violation of *Batson* and its progeny as a categorical religious exclusion.**

A defendant alleging ineffective assistance of counsel must demonstrate that a deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Anthony argued in the Circuit Court below that either of Trial Counsel's deficiencies individually caused both presumed and actual prejudice sufficient to undermine the outcome of his trial, and further argues that, taken together, they establish cumulative prejudice under *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305. R40:15-18; *see* Appx. D.

As discussed above with respect to the right to testify, the denial of Anthony's right to testify in his own defense prevented Anthony from presenting his self-defense theory. Anthony's testimony was the only way to inform the jury of Sabrina's threat against Anthony's life and her repeated attempts to kill him, continuing to attempt to find weapons to kill him even after he tried to stop her. In preparation for this theory of defense, Anthony had not presented any evidence tending to show that he had not stabbed Sabrina. Indeed, to the contrary, he told the Circuit Court that he had killed Sabrina. R66: 35-36; *see* Appx. C. Without Anthony's testimony, the only part of the case that the jury heard was that Anthony had killed Sabrina. Effectively prohibiting Anthony from presenting a theory on why he stabbed and killed Sabrina did not just prejudice him – it completely undermined his only intended or available defense, at the last possible moment, after the State had rested. Anthony was therefore tried for intentional homicide without having presented ***any defense at all*** to the charges against him.

Additionally, with respect to the *Batson* challenge, the Circuit Court had already determined that Anthony presented a prima facie case of discrimination when the State struck Number 34. The Circuit Court had further already included Number 34 in the jury panel in order to correct racial imbalances. By all

indications on record, Number 34 was about to be included in the jury. Had Trial Counsel shown the State's strike of Number 34 to be unconstitutional as outlined above, the State would not have had any neutral explanation for the exercise of the strike and Number 34 would have been included in the jury.

The facts of this case are not in dispute: Number 34 was on the jury panel, ready to be included in the jury, moved into position to be included on the jury because of his race. The only curative action for the Circuit Court to take in order to have had Number 34 on the jury was to realize that the State's proffered explanation was unconstitutional and deny the strike. Had Trial Counsel made these arguments, "there is a reasonable probability that the objection would have been sustained and the trial court would have taken the appropriate curative action." *State v. Taylor*, 2004 WI App 81, ¶ 17, 272 Wis.2d 642, 679 N.W.2d 893 (Ct. App. 2004)(internal citations omitted). That is, "the jury selection would have resulted differently." *Id*. at ¶ 16. That is, if Number 34 should have been included, that necessitates a finding for Anthony under the recognized Wisconsin test for prejudice when reviewing a *Batson* violation.

Even if this Court finds that Anthony was not prejudiced under either of these arguments alone, then he was cumulatively prejudiced. *See generally, State v. Thiel, supra.* Anthony was tried by a tainted jury who heard no evidence at all to support his theory of self-defense. Together, this presented an insurmountable obstacle for Anthony that rendered his trial implicitly unfair, denying him his Fifth and Sixth Amendment rights.

## 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 June, 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 7,281 words. Including the cover, tables, and certifications, the length is 8,111 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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## CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

_____

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## TABLE OF APPENDICES