

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

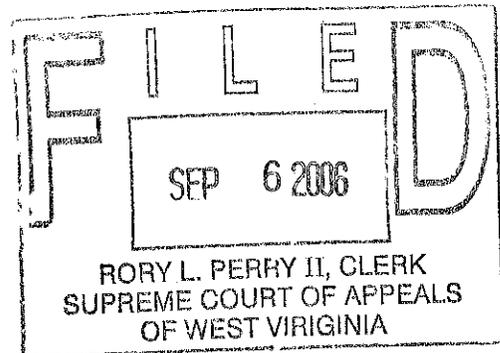
v.

Supreme Court No. 33039

Circuit Court No. 01-F-85-M  
(McDowell)

ANTHONY RAY WHITT,

Appellant.



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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

REPLY ARGUMENT .....1

I. SINCE CO-DEFENDANT LORI DAY HAD NO LEGAL BASIS FOR REFUSING TO TESTIFY, WHITT'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS, TO PRESENT A DEFENSE, AND CONFRONT HIS ACCUSERS REQUIRED THAT HE BE PERMITTED TO CALL HER AS A WITNESS BEFORE THE JURY.....1

RELIEF REQUESTED.....10

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Baxter v. Palmigiano</u> , 425 U.S. 308, 319, 96 S.Ct. 1551, 1558 (1976).....	4
<u>Berger v. United States</u> , 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935) .....	8
<u>California v. Green</u> , 399 U.S. 149, 158, 90 S.Ct. 1930, 1935 (1970).....	8
<u>Gray v. State</u> , 796 A.2d 697, 717 (Md. 2002) .....	4,8
<u>Hoffman v. United States</u> , 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951).....	2
<u>In re Anthony Ray Mc.</u> , 200 W.Va. 312, 323, 489 S.E.2d 289, 300 (1999).....	2
<u>People v. Lopez</u> , 71 Cal. App. 4 <sup>th</sup> 1550, 1553 (1999) .....	4
<u>Rogers v. United States</u> , 340 U.S. 367, 71 S.Ct. 438 (1951).....	2
<u>State v. Blake</u> , 197 W.Va. 700, 709 n.14, 478 S.E.2d 550, 559 n.14 (1996) .....	6,7
<u>State v. Harman</u> , 165 W.Va. 494, 504, 270 S.E.2d 146, 153 (1980).....	1
<u>Taylor v. Illinois</u> , 484 U.S. 400, 409, 108 S.Ct. 646, 653 (1988).....	2
<u>United States v. Valenzuela-Bernal</u> , 458 U.S. 858, 871, 102 S.Ct. 3440, 3448 (1982) .....	6
<u>United States v. Beye</u> , 445 F.2d 1037, 1042 (9 <sup>th</sup> Cir. 1971).....	3
<u>United States v. Nixon</u> , 418 U.S. 683, 709, 94 S.Ct. 3090, 3108 (1974) .....	8
<u>W.Va. Dept. of Health &amp; Human Resources v. Doris S.</u> , 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996) .....	4
<u>Washington v. Texas</u> , 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 (1967).....	5,8
<u>CONSTITUTIONAL PROVISIONS</u>	
Fifth Amendment, United States Constitution.....	<i>passim</i>
Sixth Amendment, United States Constitution .....	9

RULE

West Virginia Rule of Evidence 103(a).....6

## REPLY ARGUMENT

### I. **Since Co-Defendant Lori Day Had No Legal Basis For Refusing To Testify, Whitt's Constitutional Rights To Compulsory Process, To Present A Defense, And Confront His Accusers Required That He Be Permitted To Call Her As A Witness Before The Jury.**

The State does not dispute that Lori Day had no valid Fifth Amendment privilege or other legal basis for refusing to testify as a witness in this case. The State nevertheless defends the trial court's refusal to allow Whitt to call Day as a witness contending, *inter alia*, that "the court had already done everything within its power to force Lorie Day to testify[,]” Brief of Appellee, State of West Virginia (State's Brief) 10; and that Whitt was not unfairly prejudiced by the trial court's refusal to permit Day to be called as a witness. State's Brief 19-22. The State is incorrect. The trial court did not try to force Day to testify by allowing Whitt to call her as a witness before the jury since “. . . [Day] did not have the right to decline to take the stand.” State v. Harman, 165 W.Va. 494, 504, 270 S.E.2d 146, 153 (1980).

In addition, Whitt was unfairly prejudiced by the trial court's refusal to permit him to call Day as a witness. Day was the only witness (besides Whitt) who had personal knowledge of the homicide events and that Whitt's confession was false. The trial court's refusal further allowed Day's hearsay statements to Donna Brewster, implicating Whitt in the homicide, to go unchallenged by cross-examination. Other than Whitt's false confession, Day's statements to Brewster was the only evidence presented by the State which implicated Whitt in the homicide. Day's hearsay statements were further the only State's evidence which corroborated the autopsy finding as to the cause of death (blunt force trauma to the head), which was inconsistent with Whitt's confession. Day's testimony would certainly have been relevant and material to Whitt's defense.

The State asserts that it is irrelevant whether Day had a valid Fifth Amendment privilege because she refused to testify. State's Brief 10. To the contrary, whether Day could validly claim Fifth Amendment protection was extremely relevant to whether the trial court could force her to take the stand and testify. As the State acknowledges, if the witness does not have a valid Fifth Amendment privilege which justifies her silence, the court must "require [her] to answer[.]" State's Brief 10 (citing Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951), and Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951)). Accord In re Anthony Ray Mc., 200 W.Va. 312, 323, 489 S.E.2d 289, 300 (1999). See Appellant's Brief 13-14. In this case, the trial court failed to order Lori Day to testify as a witness once it determined she had no valid privilege against self-incrimination.

The State, on the other hand, contends that the right to compulsory process only gives a defendant the right to produce witnesses, but not their testimony. State's Brief 10. This is directly contrary to the Supreme Court's pronouncement in Taylor v. Illinois, 484 U.S. 400, 409, 108 S.Ct. 646, 653 (1988), that "[t]he right to compel the witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." Where the witness has no valid privilege justifying a refusal to testify, the trial court must order the witness to testify in the presence of the jury. The trial court refused to do that here. This is the only way the fundamental state and federal constitutional rights to compulsory process can be guaranteed and protected. Otherwise, a witness may refuse to testify for any illegitimate reason and the trial court would be without authority to compel their testimony.

The State further contends that Whitt "was not entitled to require [Day] to invoke the privilege [against self-incrimination] *before the jury*." State's Brief 14. This argument has

several serious flaws. First, Whitt is not contending that he was entitled to require Day to invoke the Fifth Amendment before the jury. Because Day did not have a valid Fifth Amendment privilege, Whitt can hardly argue he was entitled to have her assert an invalid claim of privilege before the jury. Thus, the cases cited by the State holding “that it is inappropriate to have a witness take the stand only to invoke his Fifth Amendment privilege in front of the jury[.]” State’s Brief 16, are inapposite.<sup>1</sup> What Whitt was entitled to was an order from the trial court to Day to take the stand in the presence of the jury, to not claim a Fifth Amendment privilege, and to answer defense counsel’s questions. This is because Day had no legitimate right to refuse to answer counsel’s questions. That is what the constitutional right to compulsory process requires. That did not occur in this case.

Secondly, it puts the proverbial cart before the horse. If the trial court had permitted Whitt to call Day to the stand and ordered her to testify before the jury, we do not know whether Day would have done so, so it is somewhat presumptuous to assume she would not have testified. If the trial court had told Day she no longer had a Fifth Amendment privilege, that he was ordering her to take the stand as a witness, answer questions, and not invoke the Fifth Amendment privilege, Day may very well have followed the court’s orders once she was called to the stand before the jury. As stated by Circuit Judge Ely in his dissenting opinion in United States v. Beye, 445 F.2d 1037, 1042 (9<sup>th</sup> Cir. 1971), it is possible that Day might, once sworn as a witness, decide to change [her] mind and testify[.]” and “it is the only practical way of determining whether [she] will actually persevere in [her] refusal to testify.” Id. While this reasoning was used in the context of a witness who had an apparently valid Fifth Amendment

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<sup>1</sup> As indicated in Appellant’s Brief, at footnote 2, page 15, there are some courts that permit a witness to invoke a valid Fifth Amendment privilege before the jury if some valid purpose is served. However, this Court need not resolve this conflict as Day clearly had no valid privilege to invoke.

privilege, it is certainly more applicable where, as argued here, the witness is told she has no valid privilege and is ordered to testify before the jury.

Thirdly, if Day had been ordered to take the stand and testify, the trial court could have further ordered her to not claim a Fifth Amendment privilege in front of the jury since she had none. While she may have chosen not to answer any questions, she could have followed the court's instructions had she been told not to claim a Fifth Amendment privilege in doing so.

The State further argues that permitting a defendant to call a witness to the stand to have the jury observe their refusal to testify, even where, as here, they do not have a valid privilege against self-incrimination, would invite improper speculation by the jury. State's Brief 17-18. Anytime a witness, properly called to testify, refuses to answer a question at trial, or provides an evasive answer, the jury is called upon to evaluate that witness' actions and credibility. This is nothing new to our legal system. As argued at pages 17-18 of Appellant's Brief, silence in the face of accusation is a relevant fact not barred from evidence because it has evidentiary value in some circumstances, particularly where the witness has no constitutional privilege or right to refuse to testify. See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 1558 (1976); People v. Lopez, 71 Cal. App. 4<sup>th</sup> 1550, 1553 (1999); W.Va. Dept. of Health & Human Resources v. Doris S., 197 W.Va. 489, 498, 475 S.E.2d 865, 874 (1996) (abuse and neglect case). See also Gray v. State, 796 A.2d 697, 717 (Md. 2002) (concluding that where there was sufficient evidence linking the witness to the crime, trial court could permit witness to be questioned about involvement in crime and invoke his Fifth Amendment right in jury's presence).

Thus, the State's reasoning would require that we abort the right to compulsory process anytime a witness says she is refusing to testify. As previously stated, a witness only has a right

to decline to answer if she has a valid Fifth Amendment privilege. Once it is determined she does not, the defendant is entitled to have the right to compulsory process enforced. Otherwise, the Court and the parties are at the mercy of the witness and the rights to compulsory process embodied in our state and federal constitutions are a practical dead letter. The substantial interests of a defendant like Whitt in obtaining testimony and evidence to establish his innocence, as guaranteed by the right to compulsory process, should not be subservient to those of a witness like Day who has no legitimate basis for refusing to testify. The trial court's ruling here made that a reality. It is one thing when a witness has a right to refuse to answer questions based on an invocation of a constitutional privilege; it is quite another when a witness simply refuses to answer. The Constitution protects the former, not the latter.

Finally, the State contends that Whitt failed to show how Lori Day's testimony would have been material and favorable to his defense; and that Whitt was not unfairly prejudiced by the Court's refusal to let him call Day to the stand. State's Brief 13, 19-22. These arguments are without merit. In Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 (1967), the Court recognized that a co-defendant who had personal knowledge of the events in the case could provide testimony that would be "relevant and material to the defense." This case is no different. The evidence in this case strongly indicates that Lori Day not only had personal knowledge of the homicide events, but actually committed the homicide alone.

Unlike Whitt, who had a close, loving relationship with Dorothy Mitchell, the victim<sup>2</sup>, Day made threatening statements to several individuals (Polly Whitt, Ed Pierson, Bobby Frazier) prior to the homicide that if Dorothy didn't get off her back or leave her alone, she was going to

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<sup>2</sup> The State incorrectly asserts that Whitt's and Dorothy Mitchell's "relationship apparently was disrupted by the arrival of Lorie Day." State's Brief 2. This assertion is totally unfounded as there is no evidence in the record that Whitt's relationship with Dorothy ever changed. Whitt was even doing things for Dorothy the night of the homicide. See Appellant's Brief 4, 23.

knock her (Dorothy's) brains out. (Tr. Vol. II 207-08; Tr. Vol. III 27-30, 129). Day similarly complained to Deborah Hall, a neighbor, about Dorothy and said she was going "to do something about it." (Tr. Vol. III 46-48). Subsequent to the homicide, Day confessed the killing to no less than three people (Jennifer Ray, Jessica Mullins, and Tina Ashworth), told Ray and Mullens she killed Mitchell by herself by hitting her in the head with a baseball bat, and that Whitt did not commit the murder. (Tr. Vol. III 86, 89, 154, 160, 172, 178-79). Thus, Day's testimony via defense counsel's cross-examination would have been relevant, material, and arguably favorable to Whitt's defense that Day alone committed the homicide and Whitt initially falsely confessed to protect her.

In addition, defense counsel did advise the trial court that Day was an essential witness who could make a difference in the outcome. (Tr. Vol. III 107, 109). Since defense counsel did not have an opportunity to speak with Day before trial, "it [was] of course not possible to make any avowal of *how* [Day] may testify." United States v. Valenzuela-Bernal, 458 U.S. 858, 871, 102 S.Ct. 3440, 3448 (1982). Furthermore, in State v. Blake, 197 W.Va. 700, 709 n.14, 478 S.E.2d 550, 559 n.14 (1996), Justice Cleckley noted that "[c]ross-examination is fundamental to a fair trial and insisting on offers of proof would undercut this important right."

Moreover, as the Supreme Court recognized in Valenzuela-Bernal, "the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." Id. It is pretty evident from the testimony of witnesses at trial regarding Day's animosity toward Dorothy, her verbal threats to knock her brains out, and Day's confessions to multiple people that she killed Dorothy, that defense counsel would have cross-examined Day concerning these and the other relevant matters relating to the homicide. See Blake, 197 W.Va. at 708, 478 S.E.2d at 558 ("... Rule

103(a) [W.Va. Rules of Evidence] provides an exception to the voucher rule if the information that would have been contained in the offer of proof is otherwise apparent from the record.”). This cross-examination was essential and would have been material and favorable to Whitt’s defense that Day alone killed Dorothy and that his confession was false. The fact that other witnesses testified to Day’s actions and statements, as the State argues, State’s Brief 20, some of which conflicted, hardly lessened the need to cross-examine the only other material witness who obviously had first hand knowledge of what occurred.

Cross-examination of Day was further necessary to challenge Day’s prejudicial hearsay statement to her cousin, Donna Brewster, that Whitt participated in the murder by hitting Dorothy in the head with a baseball bat. Other than Whitt’s confession, the State presented no other evidence implicating Whitt in the homicide. The prosecutor used these statements in closing argument to buttress his argument that both Day and Whitt committed the homicide. (Tr. Vol. IV 53-55, 86-87, 89). These hearsay statements were also the only evidence presented by the prosecution which corroborated the cause of death (blunt force trauma to the head) because, according to the medical examiner, Whitt’s confession was inconsistent with blunt force trauma being the cause of death. (Tr. Vol. I 119-20, 127).

Since the trial court refused to allow Whitt to call Day as a witness, Whitt was denied his right to confront his chief accuser, i.e., his co-defendant, and her prejudicial hearsay statements implicating him in the murder, the kind of statements this Court and the United States Supreme Court have repeatedly recognized are unreliable. See cases cited in Appellant’s Brief 21-22. See also Blake, 197 W.Va. at 710, 478 S.E.2d at 560 (“Our cases consistently make clear that when there is a possibility of a motive to lie, extensive cross-examination must be permitted.”).

The State asserts that Whitt was not prejudiced by Day's statements to Brewster because the jury also heard Day's statements to defense witnesses that she alone committed the murder and decided which version to believe.<sup>3</sup> State's Brief 21. The major fallacy with this argument is that the jury was forced to decide when Day was telling the truth solely from her hearsay statements without ever hearing her testify. If Whitt's jury was supposed to determine the truth about what happened and who killed Dorothy, this was an extremely unreliable way to do so. On the other hand, our legal system has recognized for a long time that cross-examination is the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935 (1970) (footnote and citation omitted). Where a witness, like Day, has given conflicting statements, it is usually only through cross-examination that a defendant, like Whitt, is able to establish where the truth lies. That is the essence of cross-examination. As noted by the Supreme Court in Washington, 388 U.S. at 22, 87 S.Ct. at 1924-25:

'. . . the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court \* \* \*'. Rosen v. United States, 245 U.S. 467, 471, 38 S.Ct. 148, 150, 62 S.Ct. 406.

Had Whitt been permitted to cross-examine Day concerning her personal knowledge of all relevant matters pertaining to the homicide, it is likely he could have shown that she, not Whitt, committed it.

“[T]he twofold aim of (criminal justice) is that guilt shall not escape or innocence suffer.” United States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108 (1974) (quoting Berger

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<sup>3</sup> The State's attempt to distinguish Gray v. State, 796 A.2d 697 (Md. 2002) on the same basis must fail. The Maryland Court found not only that the defendant was denied the opportunity to present the incriminating statements against penal interest of the person the defendant said committed the crime, but also the error was compounded by the trial court's failure to exercise its discretion to determine whether the defendant should have been allowed to call that person as a witness to invoke their Fifth Amendment privilege before the jury. Id. at 707, 717-18.

v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935)). The trial court denied Whitt an opportunity to establish his innocence when it violated his Sixth Amendment rights to compulsory process and to confront his accusers by refusing to allow him to call Day as a witness. "It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." Id. at 711, 94 S.Ct. at 3109. As shown above, that was not done in this case.

**RELIEF REQUESTED**

For the foregoing reasons, Whitt requests the Court to reverse his conviction and sentence and remand his case to the Circuit Court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on the 6<sup>th</sup> day of September, 2006, I mailed a copy of the foregoing Appellant's Reply Brief to Counsel for Appellee, Dawn E. Warfield, Deputy Attorney General, 1900 Kanawha Boulevard East, Room E-26, Charleston, West Virginia 25305.

  
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