SUPREME COURT NO. 12-0305
POLK COUNTY CASE NO. AGCR250625

IN THE SUPREME COURT OF IOWA

STATE OF IOWA

Plaintiff-Appellee,

v.

KENNETH RAY WASHINGTON, III

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE WILLIAM PRICE, ASSOCIATE DISTRICT COURT JUDGE

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF IOWA IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF FILING

I, Gary Dickey, hereby certify that I will file eighteen (18) copies of the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on July 6, 2012.

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I, Gary Dickey, hereby certify that on July 6, 2012, I served a copy of the attached brief on all other parties to this appeal by mailing one (1) copy thereof to the respective counsel for said parties at the following addresses:

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Iowa, founded in 1935, is its statewide affiliate. Together, the two organizations work in the courts and legislature to safeguard the rights of all citizens. In particular, the ACLU and its Iowa affiliate are committed to ensuring that due process protections for the criminally accused are scrupulously honored. Because this case addresses an important Fifth Amendment question, its proper resolution is a matter of substantial concern to the ACLU of Iowa and its members.

STATEMENT OF THE CASE

The issue presented in this appeal is whether a district court may impose a disproportionate sentence because a defendant chooses to invoke his right to remain silent in the face of the court's questions concerning recent drug use. Under clearly existing precedent, the criminally accused are afforded a constitutional privilege against self-incrimination throughout all stages of a criminal case—including sentencing. The privilege only has value if a defendant is guaranteed that he or she will not be penalized for exercising it. In this case, the district court imposed a substantial term of community service following Washington's invocation of his right to remain silent. More importantly, the amount of community service far exceeded

that which had been imposed in similar circumstances. Accordingly, this Court should reverse and remand for resentencing before a different judge.

ARGUMENT

I. THE FIFTH AMENDMENT PROHIBITS PENALIZING A DEFENDANT FOR EXCERCISING HIS OR HER RIGHT AGAINST SELF-INCRIMINATION AT THE TIME OF SENTENCING

A. Applicable Legal Principles

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. While the Iowa Constitution does not expressly contain a provision against self-incrimination, Iowa court have recognized that such a right is fundamental to the "general guaranty of due process of law" found in Article I, section 9. *State v. Height*, 117 Iowa 650, 659, 91 N.W. 935, 938 (1902). In *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964), the United States Supreme Court explained the policies of the privilege:

> The privilege against self-incrimination registers an important advance in the development of our liberty-one of the great landmarks in man's struggle to make himself civilized. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of

> the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. at 55 (citations and quotations omitted). Two cases from the United States Supreme Court illustrate these principles in the context of sentencing.

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court considered the issue of whether a defendant retains the privilege against self incrimination in the sentencing phase of a bifurcated capital case. *Id.* at 457-58. Smith had previously undergone a psychiatric exam in which the psychiatrist concluded that he was "a very severe sociopath" who "has no remorse or sorrow for what he has done" and "will continue his previous behavior." *Id.* at 459-60. Over Smith's objection, the prosecution presented testimony from the doctor during the penalty phase about Smith's future dangerousness. *Id.* On appeal, Smith claimed the doctor's testimony violated his privilege against self-incrimination because he was not advised of his right to remain silent prior to the psychiatric exam. In response, the State argued that Smith was not entitled to the protection of the Fifth Amendment because the doctor's testimony was used only to determine punishment after conviction, not to establish guilt. *Id.* at 462. The Court sided with Smith and held that the "privilege does not turn upon the type of proceeding in which the protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Id.* (citing *In re Gault*, 387 U.S. 1, 49 (1967)). Further, the Court explained, "[a]ny effort by the State to compel

respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." *Id.* at 463. For this reason, the Court vacated Smith's death sentence.

In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court revisited the scope of the privilege in the context of sentencing. Mitchell and twenty-two other co-defendants were indicted for conspiracy to distribute cocaine. *Id.* at 317. Mitchell pleaded guilty, but reserved the right to contest the drug quantity attributable to her. *Id.* Following a sentencing hearing where her codefendants testified about the drug quantities flowing from Mitchell's activities, the sentencing court found that she had distributed enough to push her over the threshold that required a mandatory minimum sentence of ten years. *Id.* at 318-19. In making this finding, the court explained that it was persuaded by her codefendant's testimony in part because Mitchell was "not testifying to the contrary." *Id.* at 319. The district court further ruled that by pleading guilty, Mitchell no longer had the right to remain silent. *Id.* Finding error, the Supreme Court concluded that "[b]y holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing, the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Id.* at 330.

Thus, *Estelle* established that a defendant retains the right to remain silent during sentencing, even if guilt has already been established. *Mitchell* clarified that a sentencing court cannot draw a negative inference from a defendant's assertion of the

privilege. Taken together, *Estelle* and *Mitchell* stand for the proposition that using a defendant's silence alone as a basis for a more harsh sentence violates the protections afforded under the Fifth Amendment. *Id.*; *Estelle*, 451 U.S. at 462-63.

B. Questions During a Sentencing Hearing Concerning Defendant's Drug Use Are Inherently Incriminating

The Fifth Amendment prohibits only compelled testimony that is incriminating. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004) ("To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled"). The United State Supreme Court has always "broadly construed" the protection afforded by the Fifth Amendment privilege to "assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." *Maness v. Meyers*, 419 U.S. 449, 461 (1975). Consequently, the privilege does not merely cover direct evidence establishing guilt, but also "includes information which would furnish a link in the change of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Id.* Not much is required, therefore, to show an individual faces some authentic danger of self-incrimination as the privilege extends to admissions that may only *tend* to incriminate. *United States v. Rivas-Macias*, 537 F.3d 1271, 1278 (10th Cir. 2008) (citations and quotations omitted). Accordingly, a witness's invocation of the privilege should be honored unless it is "perfectly clear, from a careful consideration of all the

circumstances in the case," that the witness "is mistaken" and the answer could not "possibly have" a "tendency to incriminate." *Id.* at 1278-79 (citing *Hoffman v. United States*, 341 U.S. 479, 488 (1951)).

The crux of the Fifth Amendment violation in this case centers on the district court's questioning concerning whether Washington would test positive for drug use:

> THE COURT: Mr. Washington, if you were to drop a urine sample today, would it be clean or dirty for marijuana?
>
> MR. REHKEMPER: Your Honor, at this time I'm going to instruct my client not to answer that question and invoke his constitutional right against self-incrimination under the Fifth Amendment [and] the corresponding section of the Iowa Constitution.

(Transcript of Plea and Sentencing Proceeding at 11-12). This line of questioning is incriminating in several respects. A defendant who answers in the affirmative may be exposed to a plethora of criminal sanctions. For example, a defendant may be held in criminal contempt for violating the conditions of pretrial release as a result of admitting drug use. *Oliver v. United States*, 682 A.2d 186, 188 (D.C. 1996). A defendant who drove to court may be exposed to a charge of operating a motor vehicle while under the influence. *State v. Comried*, 693 N.W.2d 773 (Iowa 2005). A defendant who has children runs the risk of being charged for neglect of a dependent person. *State v. Petithory*, 702 N.W.2d 854 (Iowa 2005). At a minimum, it exposes a defendant to an investigation for a drug related offense. *See* Iowa Code Chapter 124. This is particularly true in Washington's case where he was asked to make admissions in the presence of a prosecuting attorney. Thus, questions concerning a defendant's

recent drug use strike at the "core" of the privilege, which exists to alleviate the "cruel trilemma of self-accusation, perjury, or contempt." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990).

C. Imposition of Additional Community Service For Asserting the Privilege Against Self-Incrimination Is Unconstitutional

The United States Supreme Court has long noted that our justice system is an accusatorial, not inquisitorial, system in which the criminally accused have a right "to remain silent unless [he or she] chooses to speaking in the unfettered exercise of [his or her] own will, and *to suffer no penalty*" for such silence. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (emphasis added). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). For this reason, the Government "may not impose substantial penalties because [an individual] elects to exercise [his or her] Fifth Amendment right not to give incriminating testimony . . . ." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Along this line, the Supreme Court has decided a string of so-called "penalty" cases that hold that an individual may not be penalized for asserting his or her Fifth Amendment privilege. *See Minnesota v. Murphy,* 465 U.S. 420 (1984); *Cunningham,* 431 U.S. at 804-808; *Lefkowitz v. Turley,* 414 U.S. 70, 77-84 (1973); *Sanitation Men v. Comm. of Sanitation,* 392 U.S. 280, 284-285 (1968); *Gardner v. Broderick,* 392 U.S. 273, 276-279 (1968) (all stating that sanctions such as loss of job, of state contracts, of future contracting privileges with the state, of political office, of the right

to run for office and the revocation of probation are all impermissible "punishment" on the exercise of the privilege). As relevant in the context of sentencing, *Mitchell* made clear that a court's decision to increase a sentence based upon the defendant's exercise of his or her Fifth Amendment privileges is an unconstitutional "penalty." *Mitchell*, 526 U.S. at 329.

This case fits squarely within the line of cases prohibiting the imposition of a penalty for exercising the right against self-incrimination. The record as recreated by counsel reflects that Washington attempted to exercise his right to remain silent during the initial attempt at sentencing. (Transcript of Plea and Sentencing Proceeding at 3). In response, the district court warned that if Washington did not want to answer, he could "take a conviction" instead of receiving a deferred judgment. (Transcript of Plea and Sentencing Proceeding at 3). Thereafter, the parties and the court reconvened the hearing on the record. (Transcript of Plea and Sentencing Proceeding at 4-5). When the court inquired on the record whether he would test "clean or dirty" for marijuana, Washington once again asserted his privilege against self-incrimination. (Transcript of Plea and Sentencing Proceeding at 11-12). Thereafter, the court imposed 250 hours of community service despite the prosecutor's recommendation that he only receive fifty hours. (Transcript of Plea and Sentencing Proceeding at 8, 12-13). The amount of community service given to Washington was substantially higher than in other cases involving similarly situated defendants. (Washington Proof Br. at 27-30). In short, the court's threat to deny

Washington a deferred judgment followed by its imposition of a disproportionate amount of community service created the "classic penalty situation." *Murphy*, 465 U.S. at 435 (observing that if the prosecution "either expressly or by implication, asserts that invocation of the privilege [against self-incrimination] would lead to revocation of probation, it would have created the classic penalty situation"). Consequently, Washington's sentence should be vacated and remanded for resentencing before a different judge. *See United States v. Rodriguez*, 602 F.3d 346, 359 (5th Cir. 2010) (explaining the "different judgment" requirement decreases the possibility of vindictiveness).

D. The Court Should Use This Case to Clarify the Fifth Amendment Principles that Apply When a Sentencing Court Asks Questions That Expose a Defendant to Potential Incrimination

As previously explained above, questions from the court at the time of sentencing about a defendant's recent drug use inherently call for answers that may be incriminate him or her in a pending or later criminal prosecution. At the same time, when the questions are posed by the judge, a defendant must necessarily worry that failure to respond may lead to the same result as what occurred to Washington—a higher sentence. In those circumstances, the privilege against self-incrimination is self-executing. *Murphy*, 465 U.S. at 435. Thus, the Court should use this case to expressly hold that questions at sentencing posing a threat of incrimination in a separate criminal proceeding fall within the scope of a defendant's right against self-incrimination. Accordingly, no adverse inference or penalty may follow a defendant

who chooses to the right to remain silent at sentencing. *Mitchell*, 526 U.S. at 329. Alternatively, a defendant who responds to the court's questions cannot have his answers used against him to increase his sentence or in a subsequent prosecution absent evidence of a prior knowing, voluntary, and intelligent waiver. *Estelle*, 451 U.S. at 465-69.

CONCLUSION

The ACLU of Iowa respectfully requests this Court reverse the decision of the district court because it fails to adequately respect a defendant's Fifth Amendment right against self-incrimination at the time of sentencing.

COST CERTIFICATE

I hereby certify that the cost of printing this application was $ 96.00 and that that amount has been paid in full by me.

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