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Carl T. Edwards

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SPEAK OF THE MISSING WITNESS, AND SURELY HE SHALL APPEAR: THE MISSING WITNESS DOCTRINE AND THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS—*State v. Blair*, 117 Wash. 2d 479, 816 P.2d 718 (1991).

Carl T. Edwards

Abstract: In *State v. Blair*, the Washington Supreme Court held for the first time that the state may use the missing witness doctrine against criminal defendants. Under the missing witness doctrine, which provides a permissive inference based on a defendant's failure to present available witnesses, prosecutors may now argue that a defendant failed to call certain witnesses because the defendant feared that their testimony would have been incriminating. This Note examines the court's decision in *State v. Blair*, the formulation of the missing witness doctrine adopted by the court, and the common law origins of the missing witness doctrine. This Note argues that the *Blair* court failed to examine the most compelling constitutional issues raised by its use of the missing witness doctrine and concludes that although the court correctly decided the issues presented in *Blair*, Washington courts should narrowly interpret the holding of *Blair* and prohibit the use of the doctrine against criminal defendants on constitutional grounds not addressed in *State v. Blair*.

What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

-Justice William O. Douglas,
Griffin v. California[1]

At petitioner Daniel Blair's trial, the prosecution entered into evidence a booklet containing hand-written lists of names with shorthand notations and numbers beside them.[2] The state contended that this booklet was a ledger of Blair's illegal drug dealings.[3] In the prosecutor's closing argument, he referred to this booklet and suggested that Blair had not called the people listed in the booklet to testify because their statements would have incriminated him.[4] The prosecutor stated that there was a simple reason why Blair had not called them all in, and that was because they would have said, "Yeah, I bought dope from him, cocaine."[5] With the help of this "testimony" from the missing witnesses, the jury convicted Blair for delivery of a controlled substance.[6]

1. 380 U.S. 609, 614 (1965).
2. State v. Blair, 117 Wash. 2d 479, 482, 816 P.2d 718, 720 (1991) (9-0 decision; no petition for certiorari filed to U.S. Supreme Court).
3. *Id.*
4. *Id.* at 483–84, 816 P.2d at 720–21.
5. *Id.* at 484, 816 P.2d at 721.
6. *Id.*

Blair appealed on grounds that the prosecutor's comments had improperly shifted the burden of proof and referred to facts not in evidence.[7] In *State v. Blair,* however, the Washington Supreme Court analyzed the prosecutor's comments under the missing witness doctrine and held that the prosecutor had not shifted the burden of proof by commenting on the defendant's failure to present witnesses. The court concluded that the prosecutor had merely argued the permissive inference provided by the missing witness doctrine.[8]

The *Blair* court, however, did not address a number of constitutional issues raised by the use of the missing witness doctrine against criminal defendants. In particular, the court failed to analyze the use of the missing witness doctrine with respect to the defendant's rights to confrontation and compulsory process under the Sixth Amendment. Furthermore, the court failed to discuss the due process limitations that apply to the use of common law inferences by the prosecution as it attempts to prove guilt beyond a reasonable doubt. Washington courts should limit the holding of *Blair* to the issues decided in that case and prohibit the use of the missing witness doctrine against criminal defendants on constitutional grounds not addressed in *Blair.*

I. *STATE V. BLAIR:* WHO WERE THE MISSING WITNESSES AND WHAT DID THEY HAVE TO SAY?

Officers of the Bellingham Police Department knocked on Daniel Blair's door with a search warrant in the predawn hours of March 8, 1988.[9] During the ensuing search, the officers seized a booklet containing lists of names with shorthand notations and numbers beside them.[10] The dispute that arose at trial over the contents of this booklet eventually led to the supreme court's application of the missing witness doctrine in *Blair.*

A. The History of State v. Blair

The state offered the booklet seized from Blair's room as evidence at his trial, contending that it represented a crude business ledger, or "crib sheet," of Blair's drug dealings.[11] A police officer testified on direct examination that he recognized some of the names in the book-

7. *Id.*
8. *Id.* at 487–88, 816 P.2d at 723.
9. *Id.* at 482, 816 P.2d at 720.
10. *Id.*
11. *Id.*

let as persons "known in the narcotics trade."[12] The officer also testified that some of the booklet's notations resembled "crib sheets" that he had seen in other drug cases.[13] On cross-examination, the officer conceded that he recognized only one name from the booklet and that many of the booklet's notations did not appear to relate to cocaine transactions.[14]

Blair denied that the booklet referred to drug transactions.[15] He testified that the entries represented debts from card games, personal loans, and miscellaneous travel arrangements, medical appointments, and rent payments.[16] Although he admitted that two of the entries related to drug purchases, Blair denied selling cocaine for a profit.[17] To support his explanation, Blair called one of the persons listed in the booklet to testify.[18] That person said that his name appeared in the book several times and that each entry represented a personal loan that he had received from Blair.[19]

In his closing argument, the prosecutor told the jury that Blair knew the people listed in the booklet could have proven his innocence by testifying that the entries had nothing to do with the sale of cocaine.[20] Therefore, argued the prosecutor, the jury could reasonably infer that Blair did not call them to testify because they would not have corroborated his story.[21] Referring to the missing witnesses, the prosecutor said, "Why not . . . bring them all in and settle the matter? . . . . [T]he reason is simple. He couldn't bring those people in to say . . . 'Yeah, I bought dope from him, cocaine.' "[22] The jury convicted Blair on one count of possession and one count of delivery of a controlled substance.[23]

Blair appealed the conviction for delivery on the grounds that prosecutorial misconduct had denied him a fair trial.[24] First, Blair argued that the prosecutor improperly shifted the burden of proof by

12. Brief for Appellant at 11, State v. Blair, No. 23967-8-I (Wash. App. Aug. 27, 1990).

13. *Id.*

14. *Id.* Several of the amounts ranged from $3 to $10, which the officer stated would buy very little cocaine. *Id.*

15. *Blair,* 117 Wash. 2d at 483, 816 P.2d at 720.

16. *Id.* at 483, 816 P.2d at 720.

17. *Id.* at 482, 816 P.2d at 720.

18. *Id.* at 483, 816 P.2d at 720.

19. *Id.*

20. *Id.* at 483–84, 816 P.2d at 720–21.

21. *Id.*

22. *Id.* at 484, 816 P.2d at 721.

23. *Id.* Counsel made no objection to the prosecutor's remarks. *Id.* at 481, 816 P.2d at 719.

24. Brief for Appellant at 1, State v. Blair, No. 23967-8-I (Wash. App. Aug. 27, 1990).

commenting on his decision not to call more witnesses.[25] Second, he argued that the prosecutor referred to facts not in evidence when he stated that the people in the booklet would have said, "Yeah, I bought dope from him."[26] The court of appeals held that the prosecutor had improperly suggested that Blair had a duty to present proof of his innocence if such evidence was available to him.[27] Nonetheless, the court affirmed Blair's conviction on grounds that Blair failed to make a timely objection at trial when a curative instruction could have neutralized the prejudicial effect of the prosecutor's improper comments.[28]

B. The Supreme Court's Decision: Enter the Missing Witness Doctrine

Blair's petition for review presented the supreme court with a single question: "Were the prosecutor's comments flagrant, ill-intentioned, and prejudicial?"[29] The supreme court accepted Blair's petition for review, but rendered the question presented moot by reversing the court of appeals on the underlying issue of prosecutorial misconduct.[30] The court held that when the defense chooses to present evidence, the prosecution may comment on the evidence presented by the defense without shifting the burden of proof to the defendant.[31] Stating that the prosecutor was entitled to argue reasonable inferences from the evidence presented,[32] the court held that a proper analysis of Blair's appeal must consider the missing witness doctrine.[33] Applying that doctrine to the circumstances of Blair's case, the court concluded that the prosecutor had merely argued the reasonable inference permitted by the missing witness doctrine when he told the jury that Blair did not call the missing witnesses because they would have identified him as their drug dealer.[34]

25. *Blair,* 117 Wash. 2d at 484, 816 P.2d at 721.

26. *Id.*

27. State v. Blair, No. 23967-8-I, slip op. at 13 (Wash. App. Aug. 27, 1990).

28. *Id.*

29. Based on the court of appeal's decision that the prosecutor's comments had been improper, Blair asked the supreme court to reverse, despite the lack of a timely objection, on grounds that the comments were "flagrant, ill-intentioned, and prejudicial." Petition for Review at 1, State v. Blair, 117 Wash. 2d 479, 816 P.2d 718 (1991) (No. 57669-6).

30. *Blair,* 117 Wash. 2d at 492, 816 P.2d at 725.

31. *Id.* at 491, 816 P.2d at 724–25.

32. *Id.* at 491, 816 P.2d at 725.

33. *Id.* at 487–88, 816 P.2d at 723.

34. *Id.* at 492, 816 P.2d at 725.

II. THE MISSING WITNESS DOCTRINE

Before *State v. Blair,* Washington courts had traditionally applied the missing witness doctrine only in civil trials when a party failed to meet its burden of production, or in criminal trials when the prosecution failed to produce an important witness.[35] In *Blair,* the court departs from that tradition by permitting the prosecution to use the traditional form of the missing witness doctrine against a criminal defendant for the first time.[36] This form of the missing witness doctrine can be traced back to the early 1700s, when courts frequently used doctrines such as the missing witness doctrine to allocate the burden of proof on certain issues to the party with the best access to evidence.[37]

A. The Missing Witness Doctrine in the State of Washington

The *Blair* court adopted the following statement of the missing witness doctrine: "[W]here evidence which would properly be part of a case is within the control of the party [in] whose interest it would naturally be to produce it, and . . . he fails to do so,—the jury may draw an inference that [the evidence] would be unfavorable to him."[38] Prior to *Blair,* however, Washington courts had not applied this form of the missing witness doctrine against criminal defendants.[39] Courts traditionally allowed prosecutors to comment on a criminal defendant's failure to produce an alibi witness,[40] but did not permit the use of the adverse inference of the missing witness doctrine.[41] The *Blair*

35. *See* Washington Patterned Jury Instructions - Criminal 5.20 (noting that missing witness instruction applies only against the state); *see also* State v. Davis, 73 Wash. 2d 271, 438 P.2d 185 (1968) (missing witness doctrine against state in criminal trial); Wright v. Safeway Stores, 7 Wash. 2d 341, 109 P.2d 542 (1941) (missing witness doctrine in civil trial).

36. *Blair,* 117 Wash. 2d at 487, 816 P.2d at 723.

37. *See* Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair,* 44 MD. L. REV. 137, 138–43 (1985).

38. *Blair,* 117 Wash. 2d at 485, 816 P.2d at 722.

39. The *Blair* court stated that the court of appeals previously found the missing witness doctrine applicable to criminal defendants. *Id.* at 487, 816 P.2d at 723. While each of the three cases cited in support of this proposition permitted some comment about a missing witness, none of the cases actually permitted the prosecutor to argue the adverse inference of the missing witness doctrine. *See* State v. Contreras, 57 Wash. App. 471, 788 P.2d 1114 (1990); State v. Cozza, 19 Wash. App. 623, 576 P.2d 1336 (1978); State v. Green, 2 Wash. App. 57, 466 P.2d 193 (1970).

40. Courts have permitted comment on the absence of an alibi witness because defendants asserting an alibi defense are required to come forward with evidence as to the alibi itself. *Green,* 2 Wash. App. at 69, 466 P.2d at 200.

41. *Compare Blair with* State v. Fowler, 114 Wash. 2d 59, 785 P.2d 808 (1990) (analyzing similar circumstances without applying the missing witness doctrine against a criminal defendant).

court, however, stated that the majority of jurisdictions permit the missing witness doctrine to be used against criminal defendants,[42] and held that the doctrine should apply to the circumstances of this case.[43] The court traced its authority for using the doctrine against criminal defendants back to *Graves v. United States,*[44] an 1893 Supreme Court decision that remains the leading case on the use of the missing witness doctrine in criminal cases.[45]

The Washington Supreme Court acknowledged that important limitations apply to the use of the missing witness doctrine.[46] First, the *Blair* court stated that the inference does not arise unless the prosecution establishes circumstances indicating a reasonable probability that the defendant would not knowingly fail to produce the witness unless the witness' testimony would be damaging.[47] Next, the court stated that the missing witness inference does not arise if the witness' testimony would be unimportant or cumulative,[48] if the witness' absence is satisfactorily explained,[49] if the missing witness is not competent to testify,[50] or if the witness is privileged from testifying.[51] Finally, the court stated that the inference does not apply if the witness is equally available to both parties.[52]

42. *Blair,* 117 Wash. 2d at 486, 816 P.2d at 722. While courts have generally accepted the doctrine's application in civil trials, Stier, *supra* note 37, at 149 n.53, many courts and commentators have expressed concern about using the doctrine against defendants in criminal trials. *See, e.g.,* Julie E. McDonald, Comment, *Drawing an Inference from the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations,* 61 CAL. L. REV. 1422 (1973); *see also* United States v. Busic, 587 F.2d 577, 586 (3d Cir. 1978); Harper v. B & W Bandag Ctr., 311 S.E.2d 104, 106–7 (Va. 1984) (Russell, J., concurring).

43. *Blair,* 117 Wash. 2d at 487, 816 P.2d at 723.

44. 150 U.S. 118 (1893).

45. MCCORMICK ON EVIDENCE § 272 (Edward W. Cleary ed., 3d ed. 1984). *Graves* provides the classic statement of the missing witness doctrine: "[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves,* 150 U.S. at 121.

46. *Blair,* 117 Wash. 2d. at 488, 816 P.2d at 723.

47. The court stated that this does not require the prosecution to show that the defendant has engaged in any willful misconduct to suppress the testimony of competent witnesses. *Id.* A sufficient suspicion that competent testimony had been willfully withheld arises whenever a defendant fails to produce a witness under circumstances when it would be natural to expect to hear from the witness. *Id.* (quoting State v. Davis, 73 Wash. 2d 271, 280, 438 P.2d 185, 190 (1968)).

48. *Blair,* 117 Wash. 2d at 488, 816 P.2d at 723.

49. *Id.* at 489, 816 P.2d at 723.

50. *Id.*

51. *Id.* at 489, 816 P.2d at 724.

52. *Id.* at 490, 816 P.2d at 724. Under the missing witness doctrine, a witness is "particularly available" to the defendant if there is some community of interest or ties of affection that would make it reasonable to expect the defendant to call the witness. *Id.* The *Blair* court stated that

As a passing consideration, the court stated that prosecutors may not use the missing witness doctrine if the use of the doctrine infringes on the defendant's constitutional rights, such as the right to remain silent.[53] In the absence of a legitimate constitutional challenge,[54] however, the court held that the missing witness doctrine should now be applied against criminal defendants.[55]

The supreme court concluded that the circumstances of Blair's case satisfied the conditions of the missing witness doctrine because Blair failed to produce the people listed in the booklet when it would have been in his interest to do so.[56] Since the court found that none of the doctrine's limitations applied to the facts of *Blair,* the court held that the prosecutor properly argued the missing witness inference[57] when he asserted that the uncalled witnesses would have said, "Yeah, I bought dope from him."[58]

B. The Common Law Origins of the Missing Witness Doctrine

Common law courts of England and the United States have used some form of the missing witness doctrine for more than 250 years.[59] The doctrine originated at a time when the English courts used presumptions and inferences for two reasons.[60] One type of common-law inference gained acceptance primarily because of the strong probative relationship between the facts proved and the fact presumed.[61] The second type of common-law presumption developed as a means of allocating the burden of production among the parties based on con-

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the missing witness doctine does not require the state to show that the witness was legally unavailable to the state before arguing the adverse inference of the doctrine. *Id.*

53. *Id.* at 491, 816 P.2d at 724.

54. *Id.* at 490, 816 P.2d at 724.

55. *Id.* at 492, 816 P.2d at 725.

56. *Id.* at 487, 816 P.2d at 722–23.

57. *Id.* at 492, 816 P.2d at 725. While the supreme court held that the prosecutor's comments were proper under the missing witness doctrine, the state's appellate briefs never mention the missing witness doctrine or any of the relevant case authority. *See* Respondent's Statement of Additional Authority, State v. Blair, 117 Wash. 2d 479, 816 P.2d 718 (1991) (No. 57669-6); Brief for Respondent, State v. Blair, No. 23967-8-I (Wash. App. Aug. 27, 1990).

58. *Blair,* 117 Wash.2d at 484, 816 P.2d at 721.

59. Stier, *supra* note 37, at 139–42.

60. MCCORMICK, *supra* note 45, § 343.

61. *Id.* An example of this first type of inference is the common-law doctrine that allows the state to infer that a person found in possession of recently stolen property is the thief or, at the very least, knows that the property was stolen. *See* Barnes v. United States, 412 U.S. 837, 845 (1973) (concluding that "common sense and experience" tell us that the petitioner was aware of the high probability that the checks were stolen).

venience of proof or access to evidence.[62] In the absence of modern discovery procedures, courts reasoned that the best evidence would be produced at trial by placing the burden of production on the party with the best access to the evidence.[63] This second type of inference generally had a much weaker probative relationship between the facts proved and the fact presumed, but the courts of 18th century England knowingly sacrificed the accuracy of their fact-finding process in order to compel the production of evidence at trial.[64] The missing witness doctrine is an example of this second type of presumption.

The missing witness doctrine, like the presumption against spoliators[65] and the best evidence rule,[66] developed as a means of preventing the fabrication, suppression, or destruction of evidence.[67] If a party failed to produce a witness, the presumption of the missing witness doctrine provided the lost testimony of the missing witness, to the detriment of the non-producing party.[68] Although the probative relationship between the failure to produce a witness and the actual content of that witness's testimony is weak,[69] courts used the missing witness doctrine to compel parties to produce witnesses at trial.[70] Courts permitted the adverse inference to be drawn as a means of punishing

62. MCCORMICK, *supra* note 45, § 343 ("[J]ust as the burdens of proof are sometimes allocated for reasons of fairness, some presumptions are created to correct an imbalance resulting from one party's superior access to the proof.").

63. Stier, *supra* note 37, at 141.

64. *Id.* at 143. Courts of that era created presumptions for reasons unrelated to the factual likelihood that the presumed fact follows from the proven fact. Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 316 (1986).

65. Stier, *supra* note 37, at 140–42. Courts applied the presumption against spoliators when a party failed to produce evidence that had been within that party's control. The mere failure to produce such evidence gave rise to a presumption that the evidence would have been unfavorable. *Id.* at 140.

66. MCCORMICK *supra* note 45, § 272 (noting that modern discovery procedures have diminished the importance of the best evidence rule).

67. Stier, *supra* note 37, at 139–43.

68. The presumption against spoliators could be offered as affirmative proof of the lost evidence, *Id.* at 141, just as the missing witness doctrine allowed the fact-finder to conclude that the actual testimony of the missing witness would have been unfavorable to the non-producing party. *Id.* at 142.

69. McDonald, *supra* note 42, at 1427 ("[A] variety of considerations unrelated to guilt might motivate him not to put a particular witness on the stand."); Stier, *supra* note 37, at 143 ("[A] variety of inferences . . . might be drawn from the failure to produce a witness . . . ."); *see also* Tina M. Webster et al., *Voices From an Empty Chair: The Missing Witness Inference and the Jury*, 15 LAW AND HUMAN BEHAVIOR 31 (1991) (psychological study suggesting that the inference of the missing witness doctrine is not a natural inference).

70. Stier, *supra* note 37, at 143.

those who would attempt to benefit by suppressing the testimony of a material witness.[71]

III. CONSTITUTIONAL ISSUES NOT RAISED IN *STATE V. BLAIR*

The court applied the missing witness doctrine in *State v. Blair* without addressing a number of constitutional issues related to the use of the missing witness doctrine against a criminal defendant. First, the missing witness doctrine provides an inference about the testimony of uncalled witnesses. Therefore, the Confrontation Clause gives rise to issues of availability and reliability. Second, the missing witness doctrine exists primarily to coerce the production of witnesses. As a result, the use of the doctrine against a criminal defendant bears directly on the defendant's right to present witnesses under the Sixth Amendment. Finally, the Due Process Clause of the Fourteenth Amendment limits the manner in which the state may use permissive inferences to help meet its burden of proof beyond a reasonable doubt.

A. The Confrontation Clause: Availability and Reliability

The first constitutional issue that the supreme court did not address in *State v. Blair* is the defendant's right to confrontation under the Sixth Amendment.[72] The fundamental right protected by the Confrontation Clause is the literal right to confront the prosecution's witnesses at the time of trial.[73] The underlying purpose of the Confrontation Clause is to help ensure the accuracy of the fact-finding process by providing the defendant with an opportunity to test the evidence brought forth by the prosecution.[74] The Supreme Court has recognized, however, that considerations of public policy and the necessities of the case may warrant dispensing with actual confrontation at trial.[75] The Court has sought to accommodate the competing interests of the accused and the state by strictly defining the circumstances under which the core values of the Confrontation Clause do not strictly require a witness to be produced at trial.[76]

71. *Id.*

72. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406 (1965).

73. California v. Green, 399 U.S. 149, 157 (1970).

74. Ohio v. Roberts, 448 U.S. 56, 64 (1980).

75. *Id.* ("Every jurisdiction has a strong interest in effective law enforcement . . . .").

76. *Id.*

The Confrontation Clause requires the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial,[77] because the Sixth Amendment implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom.[78] The Supreme Court has determined that the Sixth Amendment protects a defendant's right to confrontation in two distinct ways.[79] First, the prosecution must either produce the witness whose statements it wishes to use against the defendant or demonstrate that the witness is legally unavailable to testify.[80] Before a witness may be declared legally unavailable, the state must make a good-faith effort to produce the witness at trial.[81] Second, the prosecution must provide some indication that the testimony of the missing witness is reliable.[82] Before the state may refer to the statements of any witness who does not testify at trial, the trier of fact must have some basis for evaluating the truth of the missing witness' statement.[83]

B. The Sixth Amendment Right to Present Witnesses

A second constitutional issue that the *Blair* court did not address is the right of an accused to present witnesses for the defense in an adversarial criminal trial. The framers of the Constitution believed that defendants should be guaranteed the right to present witnesses at trial.[84] The Sixth Amendment guarantees the right to compulsory process so that the defendant's witnesses, as well as the prosecution's, might be evaluated by the jury.[85] The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law and stands on no lesser footing than the other Sixth Amendment rights.[86]

The Sixth Amendment does not guarantee merely that a defense shall be provided for the accused;[87] it grants to the accused the right to

77. *Green,* 399 U.S. at 174 (Harlan, J., concurring).

78. Turner v. Louisiana, 379 U.S. 466, 472–73 (1965).

79. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

80. *Id.*

81. Barber v. Page, 390 U.S. 719, 724–25 (1968); State v. Ryan, 103 Wash. 2d 165, 170, 691 P.2d 197, 202 (1984).

82. *Roberts,* 448 U.S. at 65.

83. *Id.*

84. Washington v. Texas, 388 U.S. 14, 20 (1967).

85. *Id.* The Sixth Amendment provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. The right to compulsory process applies to the states through the Due Process Clause of the Fourteenth Amendment. *Washington,* 388 U.S. at 18–19.

86. *Washington,* 388 U.S. at 18–19.

87. Faretta v. California, 422 U.S. 806, 819 (1975).

present a defense of a personal character.[88] Taken together, the bundle of rights guaranteed by the Sixth Amendment protects the most fundamental values of due process within the adversarial setting of American justice.[89] The tactical privileges protected by the Sixth Amendment may not be used as an "organ of the State interposed between an unwilling defendant and his right to defend himself personally."[90] The language and spirit of the Sixth Amendment insist that these tools shall be an aid to a willing defendant.[91]

C. Due Process and the Common Law Inference

The third constitutional issue the court did not address in *State v. Blair* is the relationship between the Due Process Clause of the Fourteenth Amendment and the state's use of common law inferences in criminal trials. On the one hand, due process requires the state to prove beyond a reasonable doubt every element required for conviction.[92] Both the burden of production and the burden of persuasion remain with the state until the trier of fact enters a verdict.[93] On the other hand, common law courts of the 18th and 19th centuries developed presumptions as a means of distributing the burden of proof during the course of a trial, either as a matter of convenience or to coerce unwilling litigants to produce evidence.[94] American courts, however, have adapted certain types of common law presumptions for use in criminal trials as "permissive inferences."[95]

A permissive inference operates essentially the same as a burden-shifting presumption except that the burden of proof does not shift.[96] With a permissive inference, the state may argue the existence of fact *B* based on proof of fact *A*,[97] but the trier of fact is free to accept or

88. *Id.* at 819–20 (stating that the right "to make one's own defense personally [is] necessarily implied by the structure of the [Sixth] Amendment").

89. "The Sixth Amendment includes a compact statement of the rights necessary to a full defense." *Id.* at 818. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

90. *Faretta,* 422 U.S. at 820.

91. *Id.*

92. *In re* Winship, 397 U.S. 358, 364 (1970).

93. Mullaney v. Wilbur, 421 U.S. 684, 702 n.31 (1975).

94. *See* Stier, *supra* note 37, at 138–43.

95. MCCORMICK, *supra* note 45, § 346. The Supreme Court uses the terms "permissive inference" or "permissive presumption" to describe a statutory or common law presumption that does not shift the burden of proof. *See* County Court v. Allen, 442 U.S. 140, 157 (1979).

96. *Allen,* 442 U.S. at 157.

97. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity,* 92 HARV. L. REV. 1187, 1187 n.1 (1979).

reject the inference based on all of the evidence produced at trial.[98] Even when offered as a permissive inference, a common law inference must still satisfy standards of due process "in light of present-day experience."[99] First, criminal due process requires a rational connection, based on common sense and practical experience, between the underlying facts and the inference itself.[100] Considering all of the evidence in a particular case, a permissive inference will be constitutionally acceptable only if there is a rational way for the jury to draw the inference suggested by the common law doctrine.[101] Second, due process prohibits the use of any common law inference based on the comparative convenience of requiring the defendant to produce evidence on a particular issue.[102] The fact that the defendant has better access to the information, standing alone, does not justify the use of a permissive inference to help meet the state's burden of proof beyond a reasonable doubt.[103] Due process requires the prosecution to bear the burden of proof on issues that the defendant is better able to prove, even though the prosecution may have great difficulty proving them.[104]

IV. THE MISSING WITNESS DOCTRINE DOES NOT SHIFT THE BURDEN OF PROOF OR REFER TO FACTS NOT IN EVIDENCE

In applying the missing witness doctrine, the *Blair* court addressed only the issues raised in Blair's petition for review. Blair argued that the prosecutor's comments had improperly shifted the burden of proof and the prosecutor referred to facts not in evidence.[105] The supreme court's analysis under the missing witness doctrine effectively negated both of these arguments. First, the court rejected Blair's argument that the prosecutor's comments impermissibly shifted the burden of proof.[106] The court characterized the prosecutor's comments as the permissive inference provided by the missing witness doctrine,[107] and a permissive inference, by definition, does not shift the burden of proof

98. *Allen*, 442 U.S. at 156.
99. Barnes v. United States, 412 U.S. 837, 844–45 (1973).
100. *Allen*, 442 U.S. at 157.
101. McCORMICK, *supra* note 45, § 347.
102. Tot v. United States, 319 U.S. 463, 469 (1943).
103. *Id.*
104. Harris, *supra* note 64, at 323.
105. State v. Blair, 117 Wash. 2d 479, 484, 816 P.2d 718, 721 (1991).
106. *Id.* at 491, 816 P.2d at 724–25.
107. *Id.*

in a criminal trial.[108] By allowing the prosecutor to argue that the missing witnesses would have testified that Blair was a drug dealer, the court placed a great deal of practical pressure on Blair to produce the witnesses or more adequately explain their absence. In a technical sense, however, Blair did not bear the burden of proof on this issue because the jury remained free to reject the prosecutor's inference even if Blair presented no evidence at all on this issue.[109]

Second, Blair's claim that the prosecutor's comments referred to facts not in evidence failed to anticipate the manner in which the missing witness doctrine operates. Without the missing witness doctrine, the facts in evidence did not provide a reasonable basis for inferring that the missing witnesses would have incriminated Blair with their statements.[110] The missing witness doctrine, however, operates on this same set of facts to infer the adverse "testimony" of the missing witnesses.[111] According to the *Blair* court's analysis under the missing witness doctrine, the prosecutor merely argued the proper inference of the missing witness doctrine when he told the jury that the uncalled witnesses would have identified Blair as their cocaine dealer.[112]

V. CONSTITUTIONAL ISSUES NOT RAISED IN *STATE V. BLAIR* SHOULD PROHIBIT THE USE OF THE MISSING WITNESS DOCTRINE AGAINST CRIMINAL DEFENDANTS

Although the court in *Blair* rejected the argument that the missing witness doctrine impermissibly shifts the burden of proof in a criminal trial, the court neither addressed nor decided a number of other constitutional issues regarding the use of the missing witness doctrine in Blair's trial. A broader analysis of the prosecutor's comments in *Blair* reveals that the state's use of the missing witness doctrine violated Blair's constitutional rights in three distinct ways. First, the prosecutor violated Blair's right of confrontation under the Sixth Amendment

108. County Court v. Allen, 442 U.S. 140, 157 (1979).

109. *See id.* at 156–57.

110. The court addressed a similar situation one year earlier in State v. Fowler, 114 Wash. 2d 59, 785 P.2d 808 (1990). In *Fowler,* the court held that prosecutorial speculation about the absence of a defense witness constituted error as a reference to evidence not at issue. *Id.* at 66, 785 P.2d at 813. The court stated that it considered speculation of this type highly inappropriate and contrary to the standards to which it held members of the bar. *Id.* The *Blair* opinion disapproved of *Fowler* to the extent that *Fowler* is inconsistent with the application of the missing witness doctrine. *Blair,* 117 Wash. 2d at 486–87, 816 P.2d at 722.

111. *See supra* note 68 and accompanying text (the missing witness doctrine provides affirmative proof of the adverse testimony of the missing witnesses).

112. *Blair,* 117 Wash. 2d at 492, 816 P.2d at 725.

by offering the "testimony" of witnesses who did not testify at Blair's trial. Second, the prosecutor violated Blair's right under the Sixth Amendment to present his own witnesses at trial by using a doctrine that exists primarily to coerce the production of witnesses. Finally, the court's use of the missing witness doctrine failed to comply with due process limitations on the state's use of permissive inferences in criminal trials.

Each of these constitutional violations provides a viable challenge to the use of the missing witness doctrine against criminal defendants in the State of Washington. The *Blair* court did not explicitly decide whether the use of the missing witness doctrine violates the Sixth Amendment or fails to comply with the limitations placed on the use of permissive inferences by the Due Process Clause. Washington courts should therefore limit the precedential effect of *Blair* to the issues decided in that case and prohibit the use of the missing witness doctrine on constitutional grounds not considered by the *Blair* court.[113]

A. The Missing Witness Doctrine and the Confrontation Clause

The prosecutor in *State v. Blair* violated Blair's right to confrontation under the Sixth Amendment when he told the jury that the people listed in the booklet would have incriminated Blair by testifying that they had purchased cocaine from Blair. With this comment, the prosecutor offered evidence about the statements of witnesses whom the state had made no effort to produce at Blair's trial.[114] This use of the missing witness doctrine violated the Confrontation Clause in two ways. First, the prosecutor offered this inference without showing that the missing witnesses were legally unavailable to testify at Blair's trial. Second, the missing witness doctrine does not provide the jury with an adequate basis for evaluating the reliability of the testimony that the prosecutor claimed the missing witnesses would have offered.

1. The Missing Witnesses Must Be Legally Unavailable

Under the Confrontation Clause, the prosecution may not offer evidence regarding the statements of any witness who does not appear at trial without first demonstrating that a good faith effort has failed to obtain the witness's presence.[115] In *Blair,* however, the court held

113. *See* James Hardisty, *Reflections on Stare Decisis,* 55 IND. L.J. 41, 61 (1979) ("If the precedent . . . did not consider the justifying rule of the case at bar, then in a real sense the decisional court is pondering how to decide a question that has never been decided.").

114. *Blair,* 117 Wash. 2d at 490, 816 P.2d at 724.

115. *See supra* notes 80–81 and accompanying text.

that the missing witness doctrine did not require the state to identify, locate, or produce the missing witnesses before arguing the missing witness doctrine.[116] The *Blair* court stated that the missing witness doctrine required only a showing that the witnesses were available to the defendant and that some community of interest made it reasonable to expect the defendant to call the witnesses.[117] The lower standard of availability required by the missing witness doctrine, however, does not protect a defendant's right to confrontation under the Sixth Amendment.

Although the prosecution in *Blair* met the showing of availability required by the missing witness doctrine, the prosecution did not meet the showing of unavailability required by the Confrontation Clause. The Sixth Amendment requires the state to demonstrate with certainty that the missing witnesses were legally unavailable to testify before offering evidence of their out-of-court statements.[118] In *Blair,* the state made no effort prior to trial to identify or locate any of the persons listed in the booklet.[119] At trial, Blair provided the first and last names of the people listed in the booklet, but the state still made no effort to produce the witnesses.[120] There can be no exception to the confrontation requirement of the Sixth Amendment unless the prosecution has made a good-faith effort to obtain the presence of the missing witnesses at trial.[121] The availability requirement of the Confrontation Clause should have prohibited the state's use of the missing witness doctrine in *Blair.*

2. *The Missing Witness Inference Must Be Reliable*

In addition to showing that the missing witnesses are legally unavailable, the Confrontation Clause requires the state to show some particularized guarantee that the missing witness inference is trustworthy before placing that inference before the jury.[122] The missing witness doctrine, however, is not sufficiently reliable to satisfy the demands of the Confrontation Clause because the inference provided by that doctrine suffers from a lack of actual probative value. Common law courts developed the arbitrary inference of the missing wit-

116. *Blair,* 117 Wash. 2d at 490, 816 P.2d at 724.
117. *Id.*
118. State v. Ryan, 103 Wash. 2d 165, 170–71, 691 P.2d 197, 202 (1984).
119. *Blair,* 117 Wash. 2d at 490, 816 P.2d at 724.
120. Supplemental Brief for Petitioner at 3, State v. Blair, 117 Wash. 2d 479, 816 P.2d 718 (1991) (No. 57669-6).
121. Barber v. Page, 390 U.S. 719, 724–25 (1968).
122. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980).

ness doctrine more than 250 years ago in order to compel the production of witnesses. Despite the lack of a rational connection between the failure to produce a witness and the content of that witness' testimony,[123] courts adopted the missing witness doctrine as a means of punishing litigants for failing to produce witnesses within their control.[124]

The use of the missing witness doctrine against criminal defendants conflicts with the underlying values of the Confrontation Clause because the missing witness doctrine weakens the reliability of the fact-finding process. Simply as a matter of legitimate trial tactics, criminal defendants may choose not to call witnesses for many reasons unrelated to guilt or innocence.[125] The missing witness doctrine, however, arbitrarily presumes that only a guilty defendant would fail to produce witnesses. Furthermore, the trier of fact has no basis for evaluating the reliability of the missing witness inference because it is virtually impossible to evaluate the trustworthiness of purely hypothetical "testimony." Any form of hearsay evidence would be more reliable than the missing witness inference, yet the confrontation clause prohibits the use of most hearsay evidence. With the missing witness inference, the prosecution must rely solely on suspicion and innuendo to support the theory that the missing witnesses would have incriminated the defendant if they had testified.

In *Blair,* the state provided no particular indication that the missing witness inference was sufficiently reliable to satisfy the underlying values of the Confrontation Clause. Both parties offered an explanation at trial regarding the contents of the booklet, and both parties had the ability to call the people listed in that booklet to support their respective theories. The missing witness inference in this case was pure speculation based on the prosecutor's assertion that the booklet was a crib sheet of Blair's drug dealings. The reliability requirement of the Confrontation Clause should have prohibited the use of the missing witness doctrine in *Blair* because the inference provided by that doctrine is arbitrary, speculative, and unreliable.

123. Stier, *supra* note 37, at 143 ("[T]he failure to produce a witness . . . says nothing about the *content* of a missing witness' testimony.").

124. *See supra* notes 66–68 and accompanying text.

125. The decision of counsel not to subpoena a witness is a matter of legitimate trial tactics. *See* State v. Thomas, 71 Wash. 2d 470, 429 P.2d 231 (1967).

B. *The Missing Witness Doctrine and the Right to Present Witnesses*

The Sixth Amendment guarantees that the defendant's version of the facts as well as the prosecution's shall be placed before the jury so that the jury may determine for itself where the truth lies.[126] In the adversarial process of American criminal justice, the defendant has the right to choose the witnesses called to testify for the defense.[127] Any attempt to coerce the defendant's choice of witnesses should be forbidden as a violation of the Sixth Amendment right to present witnesses.[128] The Supreme Court has held that the state may not thrust counsel upon the accused, "against his considered wish," without violating the logic of the Sixth Amendment.[129] The same should hold true of the right to present witnesses: the state may not force a defendant to produce witnesses without violating the Sixth Amendment.

The missing witness doctrine pursues its coercive mission by permitting the prosecutor to draw an inference of guilt from the defendant's failure to produce certain witnesses.[130] While Blair's right to present witnesses is protected by the Sixth Amendment,[131] the court permitted the prosecutor to penalize Blair for exercising that right.[132] The state may not attempt to penalize a criminal defendant by drawing an adverse inference of guilt from the exercise of a constitutional right.[133] The Supreme Court has characterized this type of comment as "a remnant of the inquisitorial system of justice."[134] The use of the missing

126. Washington v. Texas, 388 U.S. 14, 19 (1967).

127. *Id.* at 18.

128. The *Contreras* opinion, upon which *Blair* relies, states that "[t]he absence of a duty to call witnesses is not a specific constitutional right. It is a judicially developed corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt." State v. Contreras, 57 Wash. App. 471, 473, 788 P.2d. 1114, 1115 (1990). This misses the point. The issue is not whether a defendant has a duty to call witnesses, but whether a defendant has a right not to call witnesses. Such a right is protected by the Sixth Amendment.

129. Faretta v. California, 422 U.S. 806, 820 (1975).

130. *See* Stier, *supra* note 37, at 143 (stating that courts used the missing witness doctrine to punish "would-be spoliators")

131. *See supra* notes 80–82 and accompanying text.

132. Drawing such an adverse inference is "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614 (1965).

133. When the State of California attempted to use a defendant's decision not to testify as the basis for an adverse inference, the United States Supreme Court held that no adverse inference may be drawn from a defendant's decision to exercise the Fifth Amendment right to silence. *Id.* at 613–15. Similarly, when the State of Ohio attempted to draw an inference of guilt from a defendant's decision to remain silent after hearing his *Miranda* rights, the Court held that the state may not use a defendant's exercise of the rights guaranteed by *Miranda* to infer that the defendant's story at trial is unreliable. Doyle v. Ohio, 426 U.S. 610, 617–18 (1976).

134. *Griffin*, 380 U.S. at 614.

witness doctrine against a criminal defendant violates the Sixth Amendment by making it costly for the defendant to assert the right to present witnesses.

Furthermore, the coercive nature of the missing witness doctrine renders the doctrine fundamentally incompatible with the Sixth Amendment. The common-law origins of the missing witness doctrine reveal that the purpose of the missing witness doctrine is to compel the production of witnesses,[135] yet the Sixth Amendment guarantees defendants the right to present a defense at trial free from coercion by the state. Unless the courts of Washington perform some type of doctrinal exorcism to cast out the spirit of coerciveness that has possessed the missing witness doctrine since its earliest origins, the use of the doctrine against defendants in criminal trials will inevitably violate the Sixth Amendment.

C. The Missing Witness Doctrine and Due Process

The arbitrary and coercive inference of the missing witness doctrine fails to comply with the requirements of due process regarding the state's use of permissive inferences in criminal trials. First, evidence that a defendant has failed to produce a witness has no rational connection to the claim that the missing witness' testimony would have incriminated the defendant.[136] Second, the missing witness doctrine does not have a basis in common-knowledge and practical experience. Third, the missing witness doctrine rests firmly on the belief that it would be easier for the defendant, rather than the state, to produce the missing witnesses.[137]

First, the use of the missing witness doctrine in *Blair* violates due process because there is no rational connection between the facts in evidence and the prosecutor's assertion that the missing witnesses would have identified Blair as their drug dealer. Commentators[138] and jurists[139] alike have noted that the failure to produce a witness is an ambiguous act. In choosing defense witnesses, Blair had to consider

135. *See supra* notes 66–68 and accompanying text.

136. The Supreme Court criticized a very similar doctrine, the presumption against spoliators, in Arizona v. Youngblood, 488 U.S. 51 (1988), stating that the presumption against spoliators is illogical unless the opposing party makes some showing that the nonproducing party acted in bad faith to destroy evidence that actually might have been unfavorable to the nonproducing party.

137. *See* Stier, *supra* note 37, at 138–43.

138. McDonald, *supra* note 42, at 1427; *see* Stier, *supra* note 37, at 153.

139. United States v. Busic, 587 F.2d 577, 586 (3d Cir. 1978) ("Every experienced trial lawyer knows that the decision to call a witness often turns on factors which have little to do with the actual content of [the] testimony.").

questions of demeanor, credibility, and hostility.[140] Blair might have decided not to put a witness on the stand for fear that the witness would be impeached as a result of a particularly damaging criminal record, or because the witness was unpredictable or untrustworthy.[141] Blair might have thought that calling one of the "missing" witnesses would be sufficient, or he simply might have lacked the financial resources to call a great number of witnesses.[142] The prosecutor's decision not to call the missing witnesses, even after Blair provided their full names, makes it even less likely that they would have incriminated Blair.[143] The prosecutor's failure to produce available witnesses must be viewed in light of the state's duties under the Sixth Amendment. So far as the Confrontation Clause is concerned, the prosecution, not Blair, was solely responsible for the absence of these particular missing witnesses.[144] On the facts presented in *Blair,* there was no rational way that a juror could have drawn the inference suggested by the prosecutor. Due process should have prohibited the prosecution from using such an arbitrary inference to help meet its burden of proof beyond a reasonable doubt.

Second, the missing witness doctrine violates due process because it lacks a basis in practical experience or common knowledge. While proponents of the doctrine characterize the missing witness inference as natural or logical,[145] a recent psychological study suggests that the inference "is not as natural as it may seem."[146] The psychologists found that jurors in their study generally did not draw the missing witness inference unless the judge or opposing counsel prompted them

140. *Id.*

141. McDonald, *supra* note 42, at 1427.

142. *See* Harper v. B & W Bandag Ctr., 311 S.E.2d 104, 107 (Va. 1984). Blair qualified for assistance from the Washington Appellate Defenders Association on appeal. Telephone Interview with Eric Broman, Washington Appellate Defenders Association, Seattle, Wash. (Feb. 6, 1992) (notes on file with the Washington Law Review).

143. *Busic,* 587 F.2d at 586 ("[C]ases such as this . . . where both parties fail to call an available witness . . . shatter the myth than an absent witness's testimony might be expected to be particularly favorable to either side.").

144. Barber v. Page, 390 U.S. 719, 725 (1968) (stating that when the record reveals that the state has failed to make a good faith effort to produce a witness, the sole reason for the witness' absence is the state's failure to seek the witness' presence).

145. Stier, *supra* note 37, at 145 n.32 ("[T]he missing witness rule . . . is more a product of common sense than of the common law") (quoting UAW v. NLRB, 459 F.2d 1329, 1335 (D.C. Cir. 1972)). Compare Stier's own text: "[I]n their attempt to explain [the circumstances under which] the inference is natural, the courts have produced a set of guidelines that are extraordinary for their unnatural complexity, their ability to confuse, and their potential for abuse." *Id.* at 146.

146. Webster et al., *supra* note 69, at 40.

to do so.[147] When the jurors were asked to consider only the evidence presented at trial, they did not tend to draw the anticipated inference based solely on their own practical experience and common knowledge.[148] The results of this study indicate that the missing witness instruction distracts jurors from the facts in evidence and invites them to speculate on matters not in evidence.[149] The psychologists' conclusion that the missing witness inference is not a "natural" inference provides empirical evidence that the missing witness doctrine has no basis in common sense and present-day experience. Due process prohibits the state from using such an inference as it attempts to prove guilt beyond a reasonable doubt in a criminal trial.

Third, the missing witness doctrine violates due process because it rests firmly on the belief that defendants should be compelled to produce certain witnesses when it is easier or more convenient for the defendant to produce those witnesses.[150] The missing witness doctrine developed as burden-shifting device to allow courts to distribute the burden of production to the parties with the best access to particular witnesses.[151] Just as the doctrinal origins of the missing witness doctrine render the doctrine incompatible with the Sixth Amendment, those same origins render its use against criminal defendants fundamentally inconsistent with modern notions of due process.

VI. CONCLUSION

The Washington Supreme Court correctly decided the issues presented in *State v. Blair.* However, the *Blair* court did not address a number of constitutional issues related to the use of the missing witness doctrine against criminal defendants. First, the missing witness doctrine provides an inference regarding the "testimony" of uncalled witnesses without the showing of unavailability and reliability required by the Confrontation Clause. Second, the missing witness doctrine is a coercive doctrine that violates the Sixth Amendment right to present witnesses by making the exercise of that right costly for the defendant. Finally, the use of the missing witness doctrine adopted in *Blair* fails to comply with due process limitations on the use of permissive inferences in criminal trials.

The *Blair* holding should be read very narrowly: the use of the missing witness doctrine by the state in a criminal trial does not shift

147. *Id.* at 39.
148. *Id.* at 40.
149. *Id.*
150. *See supra* notes 65–71 and accompanying text.
151. Stier, *supra* note 37, at 138–43.

the burden of proof to the defendant. The precedential effect of *Blair* should be limited to the issues decided in that opinion. Washington courts, including the supreme court, should distinguish *Blair* on its issues and prohibit the use of the missing witness doctrine on constitutional grounds not decided in *State v. Blair.*