

No.

IN THE SUPREME COURT OF THE UNITED STATES

YUSEF ALLEN,

PETITIONER,

V.

THE ADMINISTRATOR OF THE
NEW JERSEY STATE PRISON;
THE ATTORNEY GENERAL OF
THE STATE OF NEW JERSEY,

RESPONDENTS.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FROM THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The main question in this petition is whether the gross actions of prosecutorial misconduct were so egregious as to render the defendant's conviction unconstitutional. Does a prosecutor have a greater obligation than simply meeting Brady requirements. Prosecutorial misconduct is a critical issue for the integrity of the criminal justice system.

The majority of New Jersey prosecutors successfully discharge the obligations requisite in their two roles: acting both as advocates in seeking convictions and as ministers of justice, charged with using only fair methods to prosecute those they believe are guilty. However, some prosecutors have let their advocacy role prevail to the extent of using deceptive and unfair tactics to secure convictions. The critical issue is then presented; does the egregious prosecutorial misconduct in this case justify permitting an unconstitutional conviction stand?

PARTIES TO THE PROCEEDINGS

The petitioner is an inmate at the East Jersey State Prison, located in Rahway, NJ. The respondent is the Union County Prosecutor's Office, located in Elizabeth, NJ.

TABLE OF CONTENTS

	<u>Pages</u>
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	i
TABLE OF CONTENTS.....	ii
INDEX TO APPENDIX.....	iv
TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASON FOR GRANTING THE PETITION.....	4

POINT ONE

THE DEFENDANT'S PETITION FOR CERTIORARI MUST BE GRANTED BECAUSE HIS CONVICTION WAS UNCONSTITUTIONAL BECAUSE OF EGREGIOUS PROSECUTORIAL CONDUCT.....	4
---	---

POINT TWO

THE DEFENDANT'S PETITION FOR CERTIORARI MUST BE GRANTED BECAUSE THERE WERE MAJOR <u>BRADY</u> VIOLATIONS IN THIS CASE THAT RAISE IMPORTANT CONSTITUTIONAL QUESTIONS.....	7
--	---

POINT THREE

THE DEFENDANT'S CONVICTION RAISES IMPORTANT CONSTITUTIONAL ISSUES BECAUSE THE PROSECUTOR FAILED TO INFORM THE DEFENDANT THAT TWO KEY WITNESSES WOULD MAKE AN IDENTIFICATION OF HIM BASED ON THEIR PRIOR DRUG PURCHASE(S)	14
--	----

POINT FOUR

THERE WAS EGREGIOUS PROSECUTORIAL MISCONDUCT BASED ON
DELIBERATELY ELICITED PREJUDICIAL AND INFLAMMATORY
TESTIMONY FROM THE KEY WITNESS RHONDA WHITFIELD.....21

POINT FIVE

THERE WAS SEVERE PROSECUTORIAL MISCONDUCT IN THE CASE
BASED ON THE THE DELIBERATELY ELICITED PREJUDICIAL AND
INFLAMMATORY TESTIMONY FROM THE KEY WITNESS RUBY WALLER....24

POINT SIX

THERE WAS GROSS PROSECUTORIAL MISCONDUCT BECAUSE THE
PROSECUTOR MADE MANY PREJUDICIAL AND INFLAMMATORY
STATEMENTS TO THE JURY.....29

POINT SIX (A)

THERE WAS GROSS PROSECUTORIAL MISCONDUCT BECAUSE THE
PROSECUTOR MADE MANY PREJUDICIAL AND INFLAMMATORY
STATEMENTS TO THE JURY.....30

POINT SIX (B)

THE PROSECUTOR ALSO COMMITTED GROSS MISCONDUCT WHEN HE
MADE INFLAMMATORY STATEMENTS DURING THE SUMMATIONS.....31

POINT SIX (C)

THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT BY
TRYING TO SUBMIT INFLAMMATORY PHOTOGRAPHS OF THE VICTIM'S
DEAD BODY.....34

CONCLUSION.....35

INDEX TO APPENDIX

PAGE(S)

APPENDIX A. Opinion of the District Court of New Jersey, <i>Yusef Allen v. Charles Warren, et.</i> <i>al.</i> , Docket No. 13-4304 (KM)	1a to 44a
APPENDIX B. Opinion of the Third Circuit Court of Appeals, <i>Yusef Allen v. The Administrator, New</i> <i>Jersey State Prison, The Attorney General of the</i> <i>State of New Jersey</i> , Docket No. 16-3887	45a to 49a
APPENDIX C. Opinion of the Appellate Division of New Jersey, on February 14, 2001	50a to 68a
APPENDIX D. Order denying a petition for certification on January 24, 2002	69a
APPENDIX E. Opinion of the Appellate Division of New Jersey, on March 4, 2008	70a to 86a
APPENDIX F. Opinion of the Appellate Division of New Jersey, on February 28, 2011	87a to 111a
APPENDIX G. Opinion of the Appellate Division of New Jersey, on May 22, 2012	112a to 120a
APPENDIX H. Order denying a petition for certification on January 16, 2013	121a

TABLE OF AUTHORITIES

CASES

PAGE(S)

<u>Berger v. United States</u> , 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	21
<u>Brady v. Maryland</u> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....	7
<u>Brecht v. Abrahamson</u> , 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).....	31
<u>Darden v. Wainwright</u> , 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d (1986).....	6,30,32,34
<u>Spicer v. Roxbury</u> , 194 F. 3d 547 (4 th Cir 1000).....	30
<u>United States v. Berrios</u> , 676 F. 3d 118 (3 rd Cir. 2012).	34
<u>United States v. Bagley</u> , 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).....	15
<u>United States v. Liburd</u> , 607 F. 3d 339 (3d Cir. 2010)..	24
<u>United States v. Morena</u> , 547 F. 3d 191 (3 rd Cir. 2008)..	20
<u>United States v. Santiago</u> , 46 F. 3d 885, 890-891 (9th Cir. 1995).....	34
<u>United States v. Sipe</u> , 388 F. 3d 471 (5th Cir. 2004).....	30

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Yusef Allen, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals, for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, was filed on December 3, 2018. (App. B)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on December 3, 2018. (App. B) The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The Third Circuit Court of Appeals entered its judgment on December 3, 2018. This petition is filed within 90 days of the judgment. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The defendant's right to a fair trial and due process was violated because there were numerous instances of prosecutorial misconduct. The prosecutor's actions made a fair trial impossible in this case, and therefore violated the defendant's due process rights under the Fifth Amendment. The most egregious instances of prosecutorial misconduct occurred when he excluded African-

Americans on the basis of race from the jury selection. A mistrial was granted based on this instance of prosecutorial misconduct alone. (Exhibits C to H)

STATEMENT OF CASE

This is petition for certiorari appeals the Third Circuit Court of Appeals decision on December 3, 2018. (Exhibits A and B) The defendants raises many important constitutional issues for review. The defendant's right to a fair trial was violated because there were numerous instances of prosecutorial misconduct. The most egregious instances of prosecutorial misconduct occurred when he excluded African-Americans on the basis of race from the jury selection. A mistrial was granted based on this instance of prosecutorial misconduct alone. (Exhibits C to H)

The second major instance of prosecutorial misconduct occurred when the prosecutor failed to inform the defense that it's key witness Rhonda Whitfield had been involved in a car accident after the shooting. Rhonda Whitfield sustained severe memory lost from this accident. The defense could have used this Brady evidence to assist them to further discredit Rhonda Whitfield's testimony. Moreover, the defense could have retained a medical expert to examine Rhonda Whitfield to determine if she was competent to testify. (Exhibits C to H)

The third instance of misconduct is that the witness Rhonda

Whitfield further testified that the defendant was a violent person who used to always beat people up. The prosecutor failed to instruct this witness to refrain from testifying as to the prior alleged bad acts that may have been committed by the defendant. (Exhibits C to H)

The fourth major instance of prosecutorial misconduct occurred when he failed to notify the defense in advance that the state's major witness Ruby Waller was going to make an identification of the defendant. Moreover, the prosecutor failed to inform the defendant that Ruby Waller was going to testify that she used to always buy drugs from him. (Exhibits C to H)

The fifth major instance of prosecutorial misconduct is that the state's main witness Rhonda Whitfield also made a similar identification of the defendant. Rhonda Whitfield also testified that she used to purchase drugs from the defendant. (Exhibits C to H)

The sixth major instance of prosecutorial misconduct is that the prosecutor made highly prejudicial and inflammatory statements during his opening and closing arguments.

The seventh major instance of prosecutorial misconduct is that the prosecutor repeatedly tried to introduce highly inflammatory and prejudicial photographs of the victim's injuries, and of his dead body. These pictures had no relevance to the case. (Exhibits C to H)

Finally, the defendant also submits that the numerous Brady

violations denied him of his constitutional right to have a fair trial, and his due process rights were also denied. (Exhibits C to H)

REASONS FOR GRANTING THE WRIT

POINT ONE

THE DEFENDANT'S PETITION FOR CERTIORARI MUST BE GRANTED BECAUSE HIS CONVICTION WAS UNCONSTITUTIONAL BECAUSE OF EGREGIOUS PROSECUTORIAL CONDUCT.

The prosecutor committed misconduct when he opined in his opening statement that there was a "murderer" in the courtroom. The prosecutor made at least six inflammatory statements during the closing. All of these objections were sustained. The prosecutor also injected race into the case. The prosecutor tried to inject inflammatory racial comments and bias into his closing statements/summations. It is important to note defense objections were routinely granted on these errors. (Exhibits C to H)

The prosecutorial misconduct had a cumulative effect of making a fair trial impossible for Yusef Allen. The defendant was even offered a mistrial. (Exhibits C to H) However, the bottom line is that he declined this offer because he could not afford to pay his trial counsel Mr. Norton, Esq. for his services for a second trial. The prosecutor was punished because he was simply poor. The defendant simply could not afford to hire his skilled attorney Mr. Norton, Esq. to try the case once again. (Exhibits C to H) Consequently, the defendant was convicted primarily because

of the underhanded tactics committed by the prosecutor. Moreover, these Brady violations obviously hurt the defendant. Finally, the inflammatory and prejudicial evidence in the case damaged the defendant's due process rights as well.

It is evident that the jury was improperly led to convict the defendant primarily because they heard inflammatory and misleading evidence from the two key witnesses, that he was a drug dealer. The jury was supposed to only focus on the evidence at hand, and to decide whether Mr. Yusef Allen committed a homicide. Moreover, the witness Rhonda Whitfield testified that the defendant was always beating people up. (Exhibits C to H)

This highly inflammatory testimony was even stricken from the record. However, the obvious damage was already done. The jury only convicted the defendant because they believed that Yusef Allen was a bad person, and not based on a fair and reasonable evaluation of the evidence.

Additionally, the prosecutor cruelly manipulated the trial by injecting race as the major issue in the case. The first trial resulted in mistrial based on Gilmore violations. Finally, in the summations the prosecutor tried to inject race in the trial once again. The prosecutor tried to argue that Yusef Allen killed the victim solely because he was white. However, there was no evidence established on this point. The defense's objection on this point was obviously sustained. (Exhibits C to H)

Our criminal justice system aims at a difficult and critical

balance. The requirement that prosecutors only use fair means of conviction means that they sometimes are unable to convict people they believe are guilty. But that is the balance we have struck, recognizing that it is better that some guilty go free than the fairness of trials be compromised and the innocent convicted. Prosecutorial misconduct is wrong. It is not excusable as a means to convict the guilty, and it is abhorrent in the conviction of the innocent.

In the case of Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d (1986), the United States Supreme Court established the legal standard to review prosecutorial misconduct. The court must analyze whether in light of the proceedings as a whole, the misconduct as a whole so infected the trial with unfairness as to make the resulting conviction a denial of due process.

The prosecutorial misconduct in light of the proceedings as a whole, so infected the trial with unfairness as to make the resulting conviction a clear denial of due process. The prosecutor so infected the trial with blatant unfairness as to make the resulting conviction a denial of due process. The prosecutor caused a mistrial because he committed many Gilmore violations. The prosecutor also deliberately struck all of the potential African-American jurors, and this prejudicial error caused a mistrial. (Exhibits C to H)

The prosecutor also failed to disclose critical Brady

evidence. The prosecutor clearly committed a Brady violation when he failed to turn over the medical and hospital reports of Rhonda Whitfield showing the head trauma and injuries caused by her accident. See, Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). As a result, the defense was clearly prejudiced because they could have retained a medical expert to examine Rhonda Whitfield. This expert witness could have assisted the defense to the even further discredit Rhonda Whitfield's testimony. The defendant was even offered a mistrial over this issue. (Exhibits C to H)

POINT TWO

THE DEFENDANT'S PETITION FOR CERTIORARI MUST BE GRANTED BECAUSE THERE WERE MAJOR BRADY VIOLATIONS IN THIS CASE THAT RAISES IMPORTANT CONSTITUTIONAL QUESTIONS.

The prosecutor committed further misconduct when he failed to disclose that the major witnesses Rhonda Whitfield and Ruby Waller, who would both make an in-court identification(s) of the defendant. Moreover, the prosecutor never instructed these witnesses to refrain from testifying that they purchased drugs from the defendant. Additionally, the prosecutor refrained from advising Rhonda Whitfield from testifying that the defendant was a violent person, and that he was always beating people up. (Exhibits C to H)

The prosecutor committed misconduct when he opined in his

opening statement that there was a "murderer" in the courtroom. The prosecutor made at least six inflammatory statements during the closing. All of these objections were sustained. The prosecutor also injected race into the case. The prosecutor tried to inject racial comments and bias into his closing statements/summations. The defense objections were routinely granted on these errors. (Exhibits C to H)

The prosecutorial misconduct had a cumulative effect of making a fair trial impossible for Yusef Allen. The defendant was even offered a mistrial. (Exhibits C to H) However, the bottom line is that he declined this offer because he could not afford to pay his trial counsel Mr. Norton, Esq. for his services for a second trial. The prosecutor was punished because he was simply poor. The defendant simply could not afford to hire his skilled attorney Mr. Norton, Esq. to try the case once again. (Exhibits C to H) Consequently, the defendant was convicted primarily because of the underhanded tactics committed by the prosecutor. Moreover, the Brady violations obviously hurt the defendant. Finally, the inflammatory and prejudicial evidence in the case damaged the defendant's due process rights as well.

It is evident that the jury was improperly led to convict the defendant primarily because they heard inflammatory and misleading evidence from the two key witnesses that he was a drug dealer. The jury was supposed to focus on the evidence at hand, and to decide whether Mr. Yusef Allen committed a homicide.

Moreover, the witness Rhonda Whitfield testified that the defendant was always beating people up. (Exhibits C to H) This inflammatory testimony was even stricken. However, the obvious damage was already done. The jury only convicted the defendant because they believed that Yusef Allen was a bad person, and not based on a fair and reasonable evaluation of the evidence.

Additionally, the prosecutor cruelly manipulated the trial by injecting race as the major issue in the case. The first trial resulted in mistrial based on Gilmore violations. Finally, in the summations the prosecutor tried to inject race into the trial once again. The prosecutor tried to argue that Yusef Allen killed the victim solely because he was white. However, there was no evidence established on this point. The defense's objection on this point was obviously sustained. (Exhibits C to H)

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During the trial, the defendant learned that one of the state's witness, Rhonda Whitfield had been involved in a car accident. In this accident, Rhonda Whitfield suffered from a severe head trauma that severely affected her memory. When the trial court learned that the State had not provided this information to the defense in advance of trial, it offered the

defense the option of a mistrial. The defendant declined the offer to have mistrial based on financial reasons. (Exhibits C to H)

During the course of the trial, it came out that Rhonda Whitfield had been involved in a car accident. In this accident she suffered severe head injuries. Consequently, she could hardly remember events that had occurred before the accident. Simply put, she suffered from amnesia which would call into question her ability to recall the events that took place on October 15, 1997. Moreover, these severe injuries also compromised her ability to identify the defendant. (Exhibits C to H) Rhonda Whitfield informed the prosecutor's investigators that she had experienced significant memory loss as a result of the accident. She was even hospitalized for a period of time thereafter. Quite unexplainably, this information was only obtained by defense counsel during voir dire. The prosecutor made no effort to provide this information to defense counsel before the start of the trial. (Exhibits C to H)

The prosecutor was fully cognizant that Rhonda Whitfield had been involved in a car accident. She suffered from head injuries and she could hardly remember the events that had occurred before the accident. However, the prosecutor never disclosed this information to the defense. (Exhibits C to H)

The court even opined as follows;

The Court: This is an amazing event today. I'm not

going to comment now. I will mull it over, too. At least, though, we should call Juman and Juman about the reports as to her claims and their medicals. Let's do that right now.

The court further added:

The Court: I must add I think this is a Brady violation, counsel. The lady clearly said that she told you and your investigator of the fact that she had this injury. And further, that it affected her memory. That factor should have been disclosed to the defense. Now it came out, it came out only thought a throughout cross-examination. It should have been disclosed by you very clearly.

I would say if this defense wished for a new trial, to throw out this jury and start again, given this, I would do that for you. Counsel, I understand that realities of economics, your client doesn't want to fund an entire new case, I understand that, I think you should talk to him about this now before we go ahead. (Exhibits C to H)

Nonetheless, the defendant declined the judge's offer to have a mistrial, and he was reluctantly forced to go forward with the case. This was an erroneous decision. However, the defendant's finances played an important part of this decision. The defendant simply could not afford to pay his trial counsel Robert Norton, Esq. to try the case once again. (Exhibits C to H)

This was a clear Brady violation. The court further clarified the Brady violation;

The Court: The problem is, counsel, under oath maybe an hour ago, she said she told you and your investigator that, indeed, not only did she have this trauma to her but it affected her memory, her ability to recall. Is she mistaken, is she lying I don't know. I have a pattern going here that I don't like. We're not going to beat it to death anymore. We're going to go forward, but it's not been a commendable day here again. (Exhibits C to H)

The prosecutor intentionally failed to disclose information because he failed to inform the defense of a car accident involvement Rhonda Whitfield which occurred after the shooting. She had informed the investigator(s) from the prosecutor's office that she had experienced some memory loss as a result of the accident, and she was even hospitalized for a period of time thereafter. (Exhibits C to H) This ongoing bad faith conduct further illustrated the prosecutor's calculated efforts to deny the defendant a fair trial. (Exhibits C to H)

The prosecutor committed misconduct when he opined in his opening statement that there was a "murderer" in the courtroom. The prosecutor made at least six inflammatory statements during the closing. All of these objections were sustained. The prosecutor also injected race into the case. The prosecutor tried to inject racial comments and bias into his closing statements/summations. The defense objections were routinely granted on these errors. (Exhibits C to H)

It is evident that the jury was improperly led to convict the defendant primarily because they heard inflammatory and misleading evidence from the two key witnesses that he was a drug dealer. The jury was supposed to focus on the evidence at hand, and to decide whether Mr. Yusef Allen committed a homicide. Moreover, the witness Rhonda Whitfield testified that the defendant was always beating people up. (Exhibits C to H) This inflammatory testimony was even stricken. However, the obvious

damage was already done. The jury only convicted the defendant because they believed that Yusef Allen was a thug and a very bad person, and not based on a fair and reasonable evaluation of the evidence.

Additionally, the prosecutor cruelly manipulated the trial by injecting race as the major issue in the case. The first trial resulted in mistrial based on Gilmore violations. Finally, in the summations the prosecutor tried to inject race in the trial once again. The prosecutor tried to argue that Yusef Allen killed the victim solely because he was white. However, there was no evidence established on this point. The defense's objection on this point was obviously sustained. (Exhibits C to H) This discovery violation(s) denied the defendant of a fair trial, and it undermined the confidence in a fair trial. United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

POINT THREE

THE DEFENDANT'S CONVICTION RAISES IMPORTANT CONSTITUTIONAL ISSUES BECAUSE THE PROSECUTOR FAILED TO INFORM THE DEFENDANT THAT TWO KEY WITNESSES WOULD MAKE AN IDENTIFICATION OF HIM BASED ON THEIR PRIOR DRUG PURCHASE(S).

Immediately after the first jury selection resulted in a mistrial, the prosecutor was lectured by the court because he failed to turn over during the discovery period, relevant evidence to the defense relating to the testimony of Ruby Waller. She was reluctant to talk to investigators from the defense

counsel's office. Ruby Waller's forthcoming testimony was "hazy" at best. The prosecutor knew well in advance that Ruby Waller stated that she had purchased drugs from the defendant in the past, and that she had known him in this capacity for over a year. The prosecutor also was well aware that she had planned to testify at trial that she purchased drugs from the defendant in Plainfield, NJ. Quite shockingly, the prosecutor failed to disclose this to the defense counsel, and he conducted a trial by ambush. (Exhibits C to H)

Ruby Waller's proposed testimony was speculative at best. The prosecutor knew in advance that Ruby Waller informed his investigators that she had purchased drugs from Mr. Allen in the past, and that she had known him in that capacity for over a year. He also knew that she had planned to testify as to these particular matters at trial. Sadly, the prosecutor committed a Brady violation when he failed to disclose this evidence to defense counsel. This evidence was only disclosed until prompted by defense counsel and the court the day before Ruby Waller was going to testify. This course of deceptive conduct clearly bolsters the defendant's grounds that the cumulative effect of prosecutorial misconduct denied him due process. Consequently, the prosecutor clearly disregarded his duty to seek justice. (Exhibits C to H)

The defendant also submits that the prosecutor's failed to turn over discovery material, including prior identifications by

the primary witnesses Ruby Waller and Rhonda Whitfield. The prosecutor also failed to instruct these witnesses not to give unduly prejudicial testimony that defendant sold them drugs and had a violent history. These repeated acts of misconduct are clear evidence of the prosecutor's continued intent to obtain an illegal conviction by any means necessary. (Exhibits C to H)

The prosecutor also failed to inform defense counsel that Rhonda Whitfield had made a similar identification. This reversible error once again demonstrated his continued reluctance to heed the warnings of the court. (Exhibits C to H) The prosecutor was then instructed of the possible repercussions of continued misconduct only days earlier during the trial of his continued mistakes. The prosecutor was scolded and warned to stop these egregious actions. These repeated cautionary measures made the prosecutor aware of the results which could stem from his continued misconduct. (Exhibits C to H)

Prior to Ruby Waller testifying, she was voir dired concerning the identification of the defendant. During the direct examination and during the voir dire she testified that she knew the defendant because she had purchased drugs from him the past. Immediately, thereafter the court informed defense counsel that they would be heard on the record. (Exhibits C to H)

Immediately after the first jury selection resulted in a mistrial, the prosecutor was scolded by the court for failing to turn over evidence during the discovery period. This evidence

related to the testimony of Ruby Waller. She was reluctant to talk with the investigators from defense counsel's office. The prosecutor knew in advance that Ruby Waller stated that she had purchased drugs from the defendant in the past, and that she had known him in that capacity for over a year. The prosecutor was fully aware that she planned to testify that she purchased drugs from the defendant. Nonetheless, the prosecutor failed to disclose this information defense counsel only until the day before Ruby Waller was going to testify. (Exhibits C to H)

The court made it clear that it would not allow the testimony of Ruby Waller wherein she described purchasing drugs from the defendant. The court also made it clear to the witness that she was not to testify as to any thing about purchased drugs from the defendant. (Exhibits C to H)

However, once Ruby Waller started to testify she totally disregarded the court's instructions. The following colloquy ensued;

Q. Ma'am, you identified a man by the name of Status as being the defendant here in court today. Is that correct?

A. Yes, I did.

Q. How often did you see him?

A. Three, four times a day.

Q. Three, four times a day?

A. Yes, Just look out my window, I see him.

Q. Had you seen him at the street corner of Third and

West Prescott before?

A. Yes, I have.

Q. How frequently did you used to see him at Third and Prescott before this incident?

A. Everyday.

Q. Had you seen him at the Mack house where the window is where you went to buy drugs, had you seen him at This house before this incident?

A. Yes, I have.

Q. How many times have you seen him at the house before this incident?

A. I'm not for sure how many times, but several times.

Q. Did you know him by the name of Status?

A. Yes, I did.

Q. Did you know his real name?

A. No, I didn't.

Q. Had you talked to him before to say like hello or goodbye, that type of thing?

A. Yeah, I spoke to him; hello, how you doing, whatever.

Q. Were you friends with him?

A. No.

Q. Were you an acquaintance of his?

A. Just to purchase drugs.

As soon as Ruby Waller blurted out that she knew the defendant because she had purchased drugs from him the past, and after being instructed by the court not to, the trial court intervened and instructed the jury;

The Court: That comment is struck, you are to disregard it totally. I don't expect you to forget it, but you can't use that to decide this case. This case is not about that, this case is about homicide. That's all this case is about.

However, the damage was already done.

Thereafter, trial counsel moved for a mistrial. The pertinent colloquies are as follows:

Counsel: I don't believe that you can tell a jury to ignore that. They heard that in their minds. After all the painstaking steps we took, direct admonitions to this witness not to mention this and she did this. I move for a mistrial. It's amazing that the steps we take — and this is why I was concerned and I even said that at sidebar. If we ask these questions, who knows that this witness will say. That's exactly what I was concerned with and that is exactly what happened.
(Exhibits C to H)

After Ruby Waller completed her testimony, the court decided to deny the motion for a mistrial. The court ruled:

The Court: Now, we're not going into the fact that she might have ---- that she might have purchased drugs from your client for example. The extent the note might reflect that, do not go into that type of thing. But identification of your client and being on the date and time as potential suspects vis a vis her that will come in.

Prosecutor: Yes, your Honor.

The Court: You can ask a question, for example, in that call where you didn't give a name did you identify that person as Status and/or and then there's no issue about blurting something out.

Counsel: Leading doesn't do any good since blurting out she brought drugs from him in the past is unresponsive. So I think another caution instruction by you might be appropriate.

The Court: Bring her out and I'll cover that.
I'll put on the record at this point in time your

motion made earlier testimony for mistrial is denied. The only thing in the record is that one phrase that I struck and I gave them I think a clear direction not to use that. And in my view, given the fact that we know now that corner is an active corner and she was an active participant in buying drugs on a regular basis, if your client was in there, is an inference obviously he was participating in that event and the fact that he might have sold her drugs on an occasion is not in my mind that prejudicial to the warranting of a mistrial at this point. So for the record it's denied. (Exhibits C to H)

An important and similar case is United States v. Morena, 547 F. 3d 191 (3rd Cir. 2008). Here, the Third Circuit held that federal prosecutors have a special and solemn duty to refrain from improper methods of obtaining a conviction. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id., See, Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). As such, a prosecutor "may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Id.

POINT FOUR

THERE WAS EGREGIOUS PROSECUTORIAL MISCONDUCT BASED ON DELIBERATELY ELICITED PREJUDICIAL AND INFLAMMATORY TESTIMONY FROM THE KEY WITNESS RHONDA WHITFIELD.

The prosecutor also failed to inform defense counsel that Rhonda Whitfield had made a similar identification of the defendant. The most common form of improper witness examination is eliciting inadmissible evidence. It is misconduct for prosecutors to elicit inadmissible evidence in witness examinations, and especially improper when the examination violates a specific court order. It is standard practice for judges to make rulings before or during trial on the admissibility of evidence. Enforcement of such orders is critical to protect the rights of defendants and ensure that convictions are based only on reliable and relevant evidence. (Exhibits C to H)

Rhonda Whitfield previously advised the prosecutor that she could identify the defendant because she repeatedly purchased drugs from him. Quite shockingly, the prosecutor failed to disclose this evidence to the defendant. The prosecutor was warned of the possible repercussions of this type of prosecutorial continued misconduct only a few days earlier. These repeated cautionary measures made the prosecutor aware of the results which could stem from his continued misconduct. (Exhibits C to H)

During Rhonda Whitfield's testimony, the prosecutor elicited testimony regarding the defendant's bad conduct on a prior occasion which was inadmissible. During Rhonda Whitfield's testimony she repeatedly referred to the defendant as "always beating people up." Moreover, she also repeatedly testified that the defendant sold drugs.

An important part of her testimony is as follows;

A. Approximately how far were you from these three men.

The Court: When, when?

Q. At the time that you saw them following the light-skinned man?

A. Not that far when they came off the porch, cause like I told you, I was moving away going that way around to the corner. Cause I didn't pay it no mind, like it was another beating up like they always do.
(784a)

Another important part of her testimony is as follows:

The Court: Ma'am, we can't hear you.

A. I said to myself probably another beating up, they forever beating up somebody around there.

The Court: Madam, madam, just respond to the question.

That comment is struck. The jury is directed to disregard the same. (Exhibits C to H)

Defense counsel objected and requested a mistrial. The important part of the trial is as follows:

Counsel: Now, I'm going to make another motion for a mistrial because the State's witness has blurted out on several occasions they are always beating people up there.

Now we have from the State's witness that my client

sold drugs in the past, now we have they're beating people up there. And we just keep getting more and more prejudicial information elicited from the State's witness.

Granted as it may be they're non-responsive, but the State has to be bound by these answers. To tell the jury to disregard he sold drugs, okay, one strike. Now to tell the jury there's crimes of violence and they're always beating people up there, is far more damaging because this is a homicide case. The drugs I can live because it's an aspect of this case, but violence has now introduced an entirely new element to these whole matter. (Exhibits C to H)

The trial court agreed with this objection. This conduct results in irreparable harm; the jury cannot "un-hear" the evidence once it is out. The court's ruling is as follows:

The Court: Mr. Silver, the more you ask this lady the same questions, the more likely it is the potential for this kind of thing coming out again. So I have been trying to keep it to a minimum. You keep asking the same thing over and over again. She keeps giving an occasional non-responsive answer. Get to a point, hit and get to another point.

Mr. Silver: Okay.

The Court: At this point in time your motion is denied. (Exhibits C to H)

Illustrative is the case of United States v. Liburd, 607 F. 3d 339 (3d Cir. 2010), the Third Circuit vacated Mr. Liburd's conviction in light of repeated prosecutorial misconduct. Ultimately, the Third Circuit also determined that the prosecutor's actions made a fair trial impossible in this case, and therefore violated the defendant's due process rights under the Fifth Amendment.

POINT FIVE

THERE WAS SEVERE PROSECUTORIAL MISCONDUCT IN THE CASE BASED ON THE THE DELIBERATELY ELICITED PREJUDICIAL AND INFLAMMATORY TESTIMONY FROM THE KEY WITNESS RUBY WALLER.

Brady violations are among the most pernicious forms of prosecutorial misconduct. Failure to disclose Brady material keeps the jury from considering proper and admissible evidence supporting the innocence of the defendant. Without access to this evidence, innocent defendants face a serious risk of being convicted for a crime they did not commit. (Exhibits C to H)

Prior to Ruby Waller giving her trial testimony, she was voir dired concerning the identification of the defendant. During the direct examination of voir dire she testified that she knew the defendant because she had purchased drugs from him in the past. The court informed defense counsel and the prosecutor that once Ruby Waller left the courtroom they would be heard on the record. The following colloquy ensued;

The Court: Now counsel, go ahead. You want to offer as part of your identification of the defendant her testimony as to where she knows him, how long she knew him, how many times has she spoken to him, and such. Plus you want to offer the fact he sold her drugs on those occasions might have.

Mr. Silver: That's the circumstances and context of her knowledge of him, yes.

The Court: Okay. Go ahead. Anything you wish to say, Mr. Silver?

Mr. Silver: Judge, I think this is relevant, material and probative in this case on the strength of her identification. And I think that probative value

substantively outweighs any prejudice to the defendant of the fact that the context in which she know him was a drug dealer.

This is obviously a murder trial. The fact that he's a drug dealer is not going to overshadow that fact, but rather' it's the context in which she knows him and knew of him for a period of time, apparently several years before this incident, and it's in the context of her buying drugs.

Obviously, I'm going to be looking to argue that her identification is strong because she knows him from having seen him so often and in this contest. This was one of her drug dealers.

Mr. Norton: That's an amazing argument. If it's that material, why did I learn about it when we started this case.

The Court: That's not the issue now.

Mr. Norton: It is also an issue, a threshold issue is that if the identification is barred on her purchased in drugs from him in the past, Mr. Silver knew about it. Det. Koury knew about it, and I was informed the other day for the first time. I think that's a real problem.

The Court: We went through this already. I heard this already talk about the issues in front of me now.

Mr. Norton: The prejudice in this case that he's a drug dealer and he's a bad person is prejudicial in terms of her identification is I've know him from the street. The one scintilla of evidence that she maybe brought drugs from him behind the window changes the whole complexion of this case. We are trying Mr. Allen based on what happened on October 15, 1997. Her identification is I've seen him from the street, I've seen him 200 times so two or three times or four times, and that he may have been behind the window, doesn't denigrate her ability to say I saw him on the street and I've known him for a couple of years. That element that was recently injected in this case clearly outweighs the fact she knew him for two years.

The Court: Okay. I am going to permit the lady to testify to the location where she knows him from, if

she knows him from this corner, that she goes there on a regular basis, whether it's weekly, daily monthly, et. cetera, whatever she can recall, that she spoke to him on a regular basis, however many times she can tell us, and she's seen his face on a regular basis. However, many times at this point in time the fact he sold her drugs one or ten times in not coming in. That may come in and change depending on what is developed on cross-examination. So why don't you be careful what doors you open at this time.

Mr. Norton: In response to that, the door may be ---- I want this witness instructed because answers questions not responsively.

The Court: I will take care of it.

At this point, it was very clear that the court would not allow Ruby Waller to testify that she purchased drugs from the defendant. Before Ruby Waller was sworn in front of the jury, the court advised her that "You are not going to talk about purchasing drugs from this gentleman unless I specifically say it's okay." Then the court states "so if they ask you how many times did you go to the corner, you can say you went to the corner, and how many times. If they ask you did you speak to this man, you can of rouse say yes, If they ask you how often did those conversations occur, you tell them. But don't start putting into the record unless you're authorized clearly by me that you bought cocaine or heroin or anything of that type from this gentleman. Do you understand?" The witness responded again "All right. Um-hum." (Exhibits C to H)

Nonetheless, all of these instructions were ignored by Ruby Waller. As soon as the prosecutor started to question her,

she testified that she purchased drugs from the defendant.

The following colloquy then occurred:

Q: Ma'am, you identified a man by the name of Status as being the defendant here in court today. Is that correct.

A: Yes, I did.

Q. Before this incident on October 15, 1997, how long had you known Status?

A. In the area a couple years, few years before

Q. How often did you see him?

A. Three, four times a day.

Q. Yes, Just look out my window, I see him.

Q. Had you seen him at the street corner of Third and West Prescott before?

A. Yes I have.

Q: How frequently did you used to see him at Third and West Prescott before this incident.

A. Everyday.

Q: Had you seen him at the Mack house where the window is where you went to buy drugs, had you seen him at this house before this incident?

A: Yes, I did.

Q: Did you know his real name?

A: No, I didn't

Q: Were you an acquaintance of his?

A: Just purchased drugs.

As soon as Ruby Waller blurted out that she knew the the defendant because she had purchased drugs from him in the

past, the trial court struck this comment. The judge ruled;

The Court: That comment is struck. You are to disregard it totally. I don't expect you to forget it, but you can't use that to decide this case. Next, this case is not about that, this case is about homicide. That's all this case is about.

However, the damage was done. Defense counsel requested a side bar. At the side bar the following colloquy occurred;

Counsel: I don't believe that you can tell a jury to ignore that. They heard that in their minds. After all the painstaking steps we took, direct admonitions to this witness not to mention this and she said this. I move for a mistrial. It's amazing that the steps we take - and this is why I was concerned and I even said this at sidebar. If we ask these questions, who knows what this witness will say. That's exactly what I was covered with and that is exactly what happened.

Court: I reserve on the issue at this point in time. We're going to go forward now. You might ---- later on I might grant that. We'll see. (Exhibits C to H)

After Ruby Waller finished her testimony, the court declined to grant the defendant's first motion for a mistrial.

An argument can be made that the trial court's own statements in the trial prove that there was gross prosecutorial misconduct. During the testimony of Ruby Waller the trial court opined:

The Court: At this point in time, Mr. Silver, I am again astounded that you're doing this kind of game playing in this court in this case.

Another insightful comment by the trial court is as follows:

The Court: I prefer to say you're still an honest person in my eyes, but the bottom line is, Counsel, on this day and time, information is going to be taken out of the record wherein you didn't provide it to your

adversary. That's not acceptable in today's error. It was acceptable 30 years ago. It's not acceptable now. You know that. So let's not belabor the issue. Let's get on with this case for the next 15 minutes. Okay. (Exhibits C to H)

In summary, the defendant contends that the prosecutor failed to provide him with material that two key witnesses Ruby and Rhonda Whitfield, were prepared to make prior identifications of him based on drug purchases they made from him at the Mack house, in Plainfield, NJ. The trial court allegedly rectified any discovery violation, by having the prosecutor provide the defendant with the material prior to trial.

The defendant contends that his counsel was greatly hampered by these Brady violations, and that he would have been more effective had he received the disclosures sooner. See, Spicer v. Roxbury Corr. Inst., 194 F. 3d 547 (4th Cir. 1999); United States v. Sipe, 388 F. 3d 471 (5th Cir. 2004); (Holding that there were Brady violations because the cumulative effect of undisclosed statement, criminal history of witness, and benefit to testifying aliens undermined credibility of a key witness.)

POINT SIX

THERE WAS GROSS PROSECUTORIAL MISCONDUCT BECAUSE THE PROSECUTOR MADE MANY PREJUDICIAL AND INFLAMMATORY STATEMENTS TO THE JURY.

Upon a review of the entire record, this honorable court must find that the prosecutor made several inflammatory

statements in the opening, during the trial, and during summations. The record clearly supports a finding that the challenged statements have had a substantial and injurious effect or influence on the jury's verdict. (Exhibits A and B)

A criminal defendant's due process rights are violated if prosecutorial misconduct renders a trial fundamentally unfair. See, Darden v. Wainwright, supra, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d. A habeas petition will be granted for prosecutorial misconduct only when the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 181. A prosecutorial misconduct claim is examined in "light of the record as a whole" in order to determine whether the conduct "had a substantial and injurious effect or influence" on the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619 , 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). A "reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant."

A. THERE WAS GROSS PROSECUTORIAL MISCONDUCT BECAUSE THE PROSECUTOR MADE MANY PREJUDICIAL AND INFLAMMATORY STATEMENTS TO THE JURY.

The most egregious comment was made in the prosecutor's opening statement. The prosecutor stated as follows:

Mr. Silver: Thank you, Your Honor. Thank you, your Honor. May it please the Court, counsel, ladies and gentlemen of the jury:

Good afternoon.

On behalf of the people of the State of New Jersey I want to thank you for your willingness to serve as jurors in this case.

There's a murderer sitting in this court room.

Mr. Norton: Judge, that's good to start with. I object.

The Court: Sustained. Let's go on. (Exhibits C to H)

Any pervasive improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction an injustice. As discussed above, when reviewing a prosecutor's comments in an opening or closing statement, "the relevant question is whether the prosecutor's comments `so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, supra, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d.

B. THE PROSECUTOR ALSO COMMITTED GROSS MISCONDUCT WHEN HE MADE INFLAMMATORY STATEMENTS DURING THE SUMMATIONS.

During the summations the prosecutor called the defendant an enforcer. The prosecutor in his summations made speculative comments about the motive of Ruby Waller as to why she should would testify against the defendant. There was an objection as to this speculation. The judge struck these comments from the record as speculation. (Exhibits C to H)

The prosecutor also vouched for the credibility of the main witness Ruby Waller. The judge sustained the objection and he ruled:

The Court: Counsel you can't tell now before the jury what was in the lady's mind unless it's in the evidence. I sustained the objection twine. I strike that comment again. Let's get on with this. (Exhibits C to H)

The prosecutor also wanted to inject race into the closing argument. The pertinent colloquy is as follows:

Mr. Silver: A possible motive for the shooting was that the drug dealers thought it was a white man and they don't sell drugs to white people at the house. And they heard evidence to support all that in the record.

Mr. Norton: Judge, to inject at this point in the trial that he was shot because he was white when he's a black male real those the racial elements in this case is not, absolute not necessary in light of the entire proofs in this case. That's unfair at this juncture to raise that.

The Court: From who do you think that came in the record.

Mr. Silver: From Ruby Waller and Rhonda Whitfield and its in the case, Judge. And it's simply going toward motive and it's a possibly in how I'm phrasing it to the jury.

Mr. Norton: But they simply killed him because he's white.

Mr. Silver: It's one of the facts.

Mr. Norton: Judge, that's improper.

Mr. Silver: It's in the evidence, your Honor, and it's a reason for the killing. There's no reason to hide that from the jury.

The Court: Take a few minutes and I'll look at my notes

The Court: Please go into room.

Don't discuss the case with each other.

The Court: I find one passing on race that's related to Ben and to the defendant. Ben said to the victim, something to the effect, "Get the fuck out of here you white M.F." I don't have any notes showing the defendant said that. So how can you impart Ben's state of mind to him since it's not alleged they acted as a team.

.....

The Court: I have sustained the objection posted by Mr. Norton.

Please go on. (Exhibits C to H)

Finally, the court sustained another objection when the prosecutor speculating as to the defendant's mental state. The prosecutor commented that the defendant (Status) was cocky and arrogant. (Exhibits C to H)

Prosecutorial appeals to racial, religious, or ethnic prejudices and stereotypes give rise to Fourteenth Amendment equal protection and due process violations, as well as the Sixth Amendment right to a fair trial. United States v. Santiago, (9th Cir. 1995) 46 F. 3d 885, 890-891. In summary, there were six sustained objections as to the prosecutor's improper and inflammatory comments made during the summations. Darden v. Wainwright, supra, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d (1986).

C. THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT BY TRYING TO SUBMIT INFLAMMATORY PHOTOGRAPHS OF THE VICTIM'S DEAD BODY.

The prosecutor attempted to submit highly prejudicial and inflammatory photographs of the victim's dead body. The judge ruled that they were not admissible. However, the prosecutor's intent to try to have these inflammatory pictures submitted as evidence proves that he had a also add to his prosecutorial misconduct. (Exhibits C to H)

The defendant submits that there was prosecutorial misconduct by trying to submit these inflammatory pictures into evidence. See, United States v. Berrios, 676 F.3d 118 (3rd Cir. 2012). Here, the court held that it was improper for the prosecutor to submit at trial an enlarged photograph of the victim/officer who was killed.

CONCLUSION

In this case, there was not only a few isolated instances of prosecutorial misconduct. Instead, the misconduct started right at the start of the case during the jury selection process, and it continued right up until the prosecutor's summations. The inescapable conclusion after reviewing the entire record is that it was impossible for Mr. Yusef Allen to have due process when faced with all of these unscrupulous tactics. The trial court even offered the defendant with a mistrial. However, the defendant declined to accept the mistrial because he could not afford to hire his defense counsel, to try the case once again. (Exhibits C to H)

The defendant did not have a fair trial based on the intentional actions by the prosecutor. The prosecutorial misconduct was intentional, and it was designed to manipulate the jury to convict Mr. Allen because he was a long time drug dealer, and because he was a bruiser who was allegedly "always beating people up." (Exhibits C to G)

Unfortunately, the jury was not focused on the evidence on the case. Instead the prosecutor was able to obtain a conviction by creating a mistrial, by committing Brady violations, by withholding evidence, by not adequately instructing his two key witnesses from testifying as to bad acts evidence, and by making both an inflammatory opening and closing statements.

Finally, the prosecutor cruelly injected race into the case. The prosecutor tried to convince the jury that Yusef Allen killed the victim solely because he was a white person. The cumulative effect of all of these prejudicial errors undoubtedly denied the defendant due process. Accordingly, his conviction(s) must be reversed. (Exhibits A to B)

Prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases. Accordingly, the petition must be granted.



By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE:

2/14/19

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Pennsylvania, New Jersey and Connecticut bars. I further certify that I am a member of good standing in all of these bars. I further certify that I am a member of the bar of the Third Circuit Court of Appeals. I hereby certify that the above referenced statements are true, and that they are made under the penalties of perjury.


By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE:

2/14/19

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari in the above-referenced case contains 8,519 words, excluding the parts of the petition exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.


By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR APPELLANT

DATE:

2/14/19

CERTIFICATE OF SERVICE

1. I hereby certify that service of the foregoing brief and appendix for petitioner was made, by certified mail upon;

Union County
Prosecutor's Office
32 Rahway Ave.
Elizabeth, NJ 07202

2. I hereby certify that these statements made by me are true, and are made under the penalties of perjury.



By: THEODORE SLIWINSKI, ESQ.
ATTORNEY FOR PETITIONER

DATE:

2/14/19