No.

October Term, 2019

In the
Supreme Court of the United States

Brian Lamar Brown,
Petitioner,

v.

Attorney General for the State of Nevada; Rick Walker; Bill Donat,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

Rene L. Valladares
Federal Public Defender of Nevada
*Jonathan M. Kirshbaum
Assistant Federal Public Defender
Jonathan_Kirshbaum@fd.org
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Petitioner
*Counsel of Record

QUESTION PRESENTED

1. Whether the prosecutor committed prejudicial misconduct during closing arguments?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Brown, No. CR96-0372 (2JDC Nev.) (Judgment of Conviction, entered September 24, 1996) (attached as Appendix ("App.") 44).

State v. Brown, No. 29803 (Nev. Sup. Ct.) (Order of affirmance, issued July, 16, 1999) (attached as App. 37.)

State v. Brown, No. 48114 (Nev. Sup. Ct.) (Order of Affirmance, issued September 6, 2007).

Brown v. Attorney General State of Nevada, 2:02-cv-0770-GMN-PAL (Dist. Nev. March 26, 2018) (order denying 28 U.S.C. § 2254 petition) (attached as App. 09)

Brown v. Attorney General State of Nevada, No. 13-16435 (9th Cir. June 2, 2015) (reversing order dismissing petition on procedural grounds)

Brown v. Attorney General State of Nevada, No. 18-15727 (9th Cir. December 23, 2019) (attached as App. 01.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Lamar Brown requests this Court grant his petition for writ of certiorari to review the memorandum of the Court of Appeals for the Ninth Circuit. *See* Appendix ("App.") 01.

OPINIONS BELOW

The memorandum of the Court of Appeals for the Ninth Circuit, affirming the denial of Brown's 28 U.S.C. § 2254 petition is unreported and appears at App. 01.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case pursuant to 28 U.S.C. § 2254. The Ninth Circuit granted a certificate of appealability. *See* App. 07. The Ninth Circuit's memorandum affirming the denial of the petition was issued on December 23, 2019. *See* App. 01. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a) because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Brown was charged with first-degree murder and attempted murder based on the killing of Jason Banks and attempted killing of Randy Beach. After a jury trial, Banks was acquitted of first-degree murder but convicted of second-degree murder. He was sentenced to 28 years to life.

The prosecutor presented evidence at trial indicating Brown took a loaded gun to an anticipated altercation. Under the State's theory, Brown then shot at the victims allegedly chasing one man across a city park whilst shooting. *See Brown v. State of Nevada*, No. 18-15727, DktEntry: 17 (9th Cir. April 26, 2019) (Excerpts of Record (hereinafter "EOR") at 391-93).[1] Brown presented evidence of self-defense, including medical evidence of an altered mental state engendered by hypoglycemia. In the opinion of the trial court, the effect of that evidence was to convince the jury to convict Brown of second, as opposed to first, degree murder. *See* EOR 399-400. Brown did not testify at trial but his statements to law enforcement, which were favorable to his self-defense claim, were part of the evidence presented at trial. *See* EOR 6 & n.2.

In response to the compelling evidence of self defense, the prosecutor made more than a dozen improper statements during closing including blatantly misrepresenting trial evidence. The prosecutor's misstatements were all directed at unfairly diminishing the impact of Brown's self-defense claim.

---

[1] Further references to documents in the EOR will cite directly to the relevant EOR pages.

Brown called psychiatrist Dr. Bittker to establish Brown's perception as to whether he was in danger of serious bodily harm was reasonable given his medical condition at the time. Brown's perception of events was altered by acute hypoglycemia, too much insulin, and not enough food.

The district attorney did not call its own expert witness to refute the expert's findings. Instead, the prosecutor used rebuttal argument to denigrate Dr. Bittker and defense function by applying to prejudices against the defense and arguing facts not in evidence. "You saw Dr. Bittker. One might wonder why he's not ever called by us here [sic]. You know why? We don't use that man. Ph.D. You've heard of that, piled higher and higher." EOR 266. This statement had no support in the record and is also likely false as the defense expert had testified for the prosecution in many Nevada trials. *See, e.g., Miller v. State*, 911 P.2d 1183, 1184 (Nev. 1996).

In a separate effort to defeat the self-defense claim, the prosecutor repeated at least five times that Brown shot the alleged victims in the back. *See* EOR 170-71, 172-73, 174, 241, 269.

But there was no question the deceased victim, Jason Banks, was shot in the front. The prosecutor's own witness, Terrence Young, M.D., established this fact. *See Brown v. Attorney General*, No. 2:02-cv-00770-GMN-PAL, ECF No. 41-18 at 28 (Dist. of Nevada) (explaining the bullet "traveled through the body in a general right-to-left, front-to-back, and slightly downward direction")[2]; *accord* App. 21 (federal district court agreeing the trial evidence established that Brown shot the decedent, Banks, in the front, "not the back"). This point is pivotal to the validity of Brown's self-defense claims.

[2] Further references to documents in district court record will use the ECF number of the document.

Contrary to the record, the prosecutor stated repeatedly that Brown shot both victims in the back. *See*, *e.g.*, EOR 172-73 ("No, this man waited purposefully, calculated, waited until the victim's backs were turned, produced the firearm, and opened fire."); EOR 174 ("He waited until the moment their backs were turned and the physical evidence tells us that.").

The prosecutor further misstated the testimony of witness Robin Skipworth. The prosecutor argued her testimony supported his "shot in the back" theory when in fact her testimony was quite the opposite. *See*, *e.g.*, EOR at 239 (falsely stating the testimony established victims were not the aggressors because "[t]hey walked away")

The prosecutor argued forensic findings never put into evidence and further misconstrued its own expert's findings. *See* EOR at 89. Prosecution witness Rizzo testified that gunshot residue patterns established that the shooting occurred within a range of zero to six feet. *See* ECF No. 41-16 at 51. Despite this, the prosecutor told the jury that a defense witness' testimony, if true, established that the victims were "standing more than 30 feet away, and [Brown is] still firing a gun at'em [sic], boom, boom, boom." ECF No. 42-1 at 40.

Brown raised a prosecutorial misconduct issue on appeal to the Nevada Supreme Court, pointing to the improper comments discussed above. In its Answering Brief, the State acknowledged some of the prosecutor's arguments were "quite impolite." The state highest court denied the decision in a terse opinion holding:

> We have previously held that "[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments alone, for the statements or conduct must be viewed in context, only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."
>
> After a careful review of the record, we conclude that the prosecutor's statements during closing argument do

> not rise to the level of reversible misconduct. Hence, we conclude that the fairness of the trial was not affected.

EOR 62 (citing, *inter alia*, *United States v. Young*, 470 U.S. 1, 11 (1985) (internal quotation marks and citation omitted).)

Brown then filed a federal petition raising the misconduct claim. After the district court denied this claim on the merits, App. 09, the Ninth Circuit granted a certificate of appealability on the issue, App. 07. In an unpublished memorandum, the Ninth Circuit concluded the Nevada Supreme Court had reasonably denied the claim. App. 06. It found only two statements were improper, namely the comments on Skipworth's testimony and those about the expert. It believed the shot-in-the-back comments were asking the jury to infer Brown waited to pull out his gun until the victims' backs were turned. Otherwise, the court found the comments to be acceptable and appropriate limiting instructions had been given.

REASONS FOR GRANTING THE PETITION

A. Prosecutorial misconduct in Brown's case rendered his trial fundamentally unfair under clearly established Supreme Court law.

Under 28 U.S.C. § 2254(d)(1), federal courts are permitted to grant habeas relief to a state prisoner if the state court's decision was an unreasonable application of clearly established Supreme Court law.

Here, the Nevada Supreme Court summarily stated, without analysis, that the prosecutor's statements did not rise to the level of "reversible misconduct." It concluded, as a result, the fairness of the trial was not undermined.

This decision was objectively unreasonable. The prosecutor engaged in a persistent pattern of misconduct specifically outlawed by this Court, which rendered the trial fundamentally unfair.

Since the time of *Berger v. United States*, 295 U.S. 78, 88 (1934), the Supreme Court clearly established that prosecutors are legally and ethically bound to refrain from improper argument. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. "The prosecutor's job isn't to win, but to win fairly, staying within the rules." *Id.*

A conviction may violate due process when improper prosecutorial argument infects the trial with unfairness. *Darden v. Wainwright*, 477 U.S. 168, 188 (1986).

In this regard, "[i]t is totally improper for a prosecutor to argue facts not in evidence." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Consistent and repeated misrepresentation of the facts "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Id.* at 646; *see also Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law.").

The prosecutor in Brown's case repeatedly violated these clearly established rules. In an effort to defeat Brown's self-defense claim, the prosecutor repeated at least five times that Brown shot the alleged victims in the back. *See* EOR 170-71, 172-73, 174, 241, 269.) Brown does not complain of an isolated incident. The prosecutor engaged in a persistent and deliberate effort to misstate the record evidence.

There is no question that the deceased victim, Jason Banks, was shot in the front. The prosecutor's own expert witness established this fact. This point is pivotal to the validity of Brown's self-defense claims. Although contrary to the record, the prosecutor stated repeatedly that Brown shot both victims in the back. *See, e.g.*, EOR 172-73 ("No, this man waited purposefully, calculated, waited until the victim's backs were turned, produced the firearm, and opened fire."); EOR 174 ("He waited until the moment their backs were turned and the physical evidence tells us that."). This constitutes patent prosecutorial misconduct.

The prosecutor further misstated the testimony of Skipworth. The prosecutor argued this witness supported his "shot in the back" theory when in fact her testimony was quite the opposite. *See, e.g.*, EOR 239 (falsely stating her testimony established the victims were not the aggressors because "[t]hey walked away").

The prosecutor argued forensic findings never put into evidence and further misconstrued its own expert's findings. *See* EOR 89. Prosecution witness Rizzo testified gunshot residue patterns established that the shooting occurred within a range of zero to six feet. Despite this, the prosecutor told the jury to ignore the State's evidence and focus on defense testimony supposedly suggesting the victims were standing at a 30-foot distance.

These improper comments were clearly intentional. The prosecutor's transparent attempt to warp the testimony and evidence should not be lightly countenanced. The Supreme Court of the United States recognizes the unique role that prosecutor's play in our system of justice:

> [We] have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials" . . . Courts, litigants, and juries properly anticipate that obligations [to refrain from improper methods to secure a conviction] plainly rest[ing] upon the prosecuting attorney will be faithfully observed.'

> Prosecutors' dishonest conduct . . . should attract no judicial approbation.

Banks v. Dretke, 540 U.S. 668, 696 (2004).

Here the prosecutor violated his sacred trust with the public by repeatedly misrepresenting the state of the trial evidence; all in a transparent attempt to defeat an otherwise valid self-defense claim.

But the misconduct did not end there. The prosecutor denigrated the defense expert in an entirely inappropriate manner. Because prosecutors are not at liberty to strike foul blows, they "may not inject their own testimony nor cast aspersions upon the defendant through offhand comments, suggestions of conspiracy with defense counsel, nor personal attacks upon the integrity of defense counsel." *United States v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005); *see also United States v. Pungitore*, 910 F.2d 1084, 1142 (3d Cir.1990) (collecting cases).

The prosecutor violated this rule in the extreme. The prosecutor asserted the defense expert was unreliable because he worked for the defense. That he was so questionable the District Attorney's Office would not use him; only a criminal defense attorney would. This argument improperly suggested only those experts the State value are worthy of belief. The utilized language also implied public defenders are engaged in an endeavor to hide the truth. *Cf. United States v. Frederick*, 78 F.3d 1370, 1279-80 (9th Cir. 1996). Even worse, the prosecutor suggested to the jury the expert should not be believed because of evidence—the Washoe County District Attorney "doesn't use that man"—that was never presented to the jury. This was obviously an improper attack on the integrity of a defense witness.

What is clear is that, contrary to the Nevada Supreme Court's conclusion, the prosecutorial misconduct rendered the trial unfair. "Supreme Court precedent counsels that the 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." *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001).

The prosecutor's misstatements were not isolated stray words. They were the focus of the prosecutor's argument and they were a direct response to the central theory in Brown's case. At least five times the prosecutor made the deliberate choice to falsely inform the jury that Brown shot both victims in the back while they were walking away. The unequivocal manner in which the prosecutor presented his false facts and theories misled the jury.

The trial court did not correct the prosecutor's misstatements. For example, defense counsel objected to the prosecutor's contention Shipworth stated the victims had their backs turned to Brown when he fired. But rather than act chagrined, the prosecutor simply barreled on stating: "That is the testimony." Nothing cured that misconduct.

Finally, the focus of the prosecutor's misconduct concerned an aspect of the case where the evidence was not overwhelming. In *Darden*, the Supreme Court reasoned that overwhelming evidence "reduced the likelihood that the jury's decision was influenced by" the prosecutor's improper argument in that case. 477 U.S. at 196. Brown's self-defense claim was far from frivolous. Both of the alleged victims had violent histories and had threatened violence before the shooting. Brown presented convincing expert testimony that his perception of events was altered by acute hypoglycemia. Brown feared for his life. The prosecutor's misconduct, which struck at the heart of the defense, severely undermined the fairness of the trial.

For the same reasons, the misconduct cannot be considered harmless. It is not clear from the Nevada Supreme Court's decision whether it was addressing the constitutional violation or the harmfulness of that violation. As a result, only one

part of the analysis should receive deference. Nevertheless, to the extent the Nevada Supreme Court reached the harmless error analysis, its conclusion was objectively unreasonable.

The prejudice analysis overlaps with the analysis of whether the misconduct constituted a constitutional violation. As before, the prosecutor's misconduct cut right to the heart of Brown's defense. It was pervasive and pernicious. No fair-minded jurist would find that misconduct was harmless beyond a reasonable doubt. Brown meets the AEDPA standard on both the substantive claim and the question of prejudice.

B. The Ninth Circuit's Memorandum was Clearly Erroneous

The Ninth Circuit improperly rejected Brown's prosecutorial misconduct claim. The court separated Brown's misconduct claims into four categories: (1) comments asserting Brown shot the victim in the back; (2) misstatements of witness testimony; (3) arguing facts not in evidence; and (4) denigrating the expert witness. App. 03.

With respect to the first category, the court concluded the shot in the back comments were not improper. The court believed that the prosecutor was only stating Brown waited to draw his gun until the victim's backs were turned. App. 03-04. But that's irrelevant to the case. It doesn't matter to either the self-defense claim or the State's theory when, and under what circumstances, the gun was drawn. The *only* relevant inference from the State's argument was that Brown shot the victims in the back. It is illogic to suggest otherwise.

The court actually seemed to acknowledge this as it further concluded any detrimental effect from these comments was "softened" by the trial court's general instruction that attorney comments are not evidence. App. 04. But all prosecutorial misconduct is "softened" by this general instruction, which is given in every single criminal case. It cannot be that improper comments are necessarily "softened" by

this instruction or this due process right would be meaningless. The court simply failed to grapple with the real issue here: the central importance of these improper comments in the context of the case.

With respect to the second category, the court concluded the Skipworth comments were improper, but the prejudice was limited as counsel objected and the court had previously told the jurors that they were the ones to decide what they heard. App. 04. This reasoning is unsustainable. Counsel's objection was not specific enough to alert the jury to the danger and the court never connected its prior guidance to this comment. The jury had no reason to set aside the prosecutor's improper argument as to Skipworth's testimony.

With respect to the third category, the court addressed two comments: (1) that the shooting occurred when Brown was thirty feet away from Banks and Beach, and (2) that the crime investigators found gun residue on Banks after swabbing the back of his hands. App. 05. The court concluded the first was merely a hypothetical. But this is not a fair conclusion. The improper part of this comment was that the evidence was to the contrary. It was not a hypothetical; it was an intentional misstatement. As for the second comment, the court agreed this was a misstatement. However, it concluded this comment did not undermine the fairness of the trial, especially when defense counsel immediately objected. *Id.* But, once again, the objection was vague and the jury was never instructed as to why the comment should be disregarded. More important, the misstatement was prejudicial. The prosecution made this statement to support its theory of the case and to undermine the defense position.

With respect to the fourth category, the court concluded the comment denigrating the expert was "clearly improper." *Id.* Nevertheless, the court believed the impact was "softened" by an immediate objection from defense counsel, which was sustained. *Id.* The court further found it was unlikely the jury discounted the

expert's opinion solely based on this improper comment. App __ (5-6). The court's reasoning was simply speculative. In contrast, the jury had no means to assess the impropriety of the prosecutor's misstatement. Even with the objection being sustained, the court provided very little guidance on why the jury should disregard the comment. It is just as likely the jury would have given credence to the prosecutor's inappropriate arguments, simply because it was the government official who made them.

Overall, the court's analysis here was incomplete. The court failed to look at the cumulative effect of the misconduct, particularly where the court concluded that there were multiple inappropriate comments. There was a persistent pattern of misconduct. The misconduct struck at the heart of the defense. It is precisely the situation where misconduct can undermine the fairness of a trial. The Ninth Circuit incorrectly concluded the state court's decision was reasonable. To the contrary, Brown met the § 2254(d) standard and habeas relief should have been granted.

CONCLUSION

For the foregoing reasons, Brown respectfully request that this Court grant his petition for writ of certiorari and reverse the judgment of the Court of appeals for the Ninth Circuit.

Dated this 20th day of May, 2020.

Respectfully submitted,

Rene Valladares
Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Counsel of Record for Petitioner
Assistant Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Jonathan_Kirshbaum@fd.org