No.

SUPREME COURT OF THE UNITED STATES

MILKIYAS BAYISA,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PROSECUTOR'S REPEATED REFERENCES TO GOD DURING REBUTTAL CLOSING ARGUMENT CONSTITUTED HIGHLY PREJUDICIAL PROSECUTORIAL MISCONDUCT RESULTING IN A DENIAL OF DUE PROCESS OF LAW

II. WHETHER THE MEMORANDUM OPINION AND JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS IS IN CONFLICT WITH OTHER CASES FROM THIS COURT AND OTHER CASES FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

LIST OF PARTIES TO THE PROCEEDINGS BELOW

A. Appellant, Milkiyas Bayisa

B. Appellee, United States of America

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CITATION TO MEMORANDUM AND OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

Milkiyas Bayisa v. United States of America, Appeal No. 18-CF-938, District of Columbia Court of Appeals, March 19, 2020.

STATEMENT OF BASIS OF JURISDICTION

Petitioner's direct appeal was denied on March 19, 2020. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Sec. 1257, having timely filed this Petition for Writ of Certiorari within 150 days of the judgment of the District of Columbia Court of Appeals. (This Court extended the filing deadlines due to the effects of COVID-19).

PETITION FOR WRIT OF CERTIORARI

Petitioner, Milkiyas Bayisa, currently in the custody in the United States Bureau of Prisons, having been convicted of voluntary manslaughter in the District of Columbia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the District of Columbia Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Due Process Clause of the Fifth Amendment to the United States Constitution

OPINIONS BELOW

The decision by the District of Columbia Court of Appeals denying direct appeal was issued on March 19, 2020. The opinion is attached at Appendix 1- .

STATEMENT OF THE CASE

A grand jury returned an indictment against Petitioner charging one count of second degree murder. The case was tried in the Superior Court of the District of Columbia. The jury returned a verdict of not guilty as to second-degree murder and guilty of the lesser included offense of involuntary manslaughter. Petitioner was sentenced to a period of 66 months of incarceration.

Essential Facts:

A Metropolitan Police Department Officer Sean Allen a communication on August 22, 2015 for an aggravated assault at Georgia Avenue N.W. and Fairmont Street at 3:00 am. He arrived on the scene near the “Peace Lounge” and noticed a large group of people gathered in the area. A witness represented that she knew the suspect and the decedent. She identified the suspect as Petitioner.

The owner of the Peace Lounge, where the outside altercation took placed between the decedent and Petitioner, rented out parts of the building and it included a restaurant on the top floor. He also maintained an office in the building and would on occasion sleep there. The witness installed surveillance cameras at the property. On August 22, 2015 he

heard the door shake and looked at his video monitors and saw two girls pushing each other.

The witness saw a man on his monitor come on to the scene. “He seemed like he trying (sic) to break the fight, but he was there.” Id. 90. He saw another man come on to the scene and there was a conversation between the second man and the person who hit him. Id. The person who hit the other man was the person who was talking to the girls by the office. Id. 96. He saw the first man throw a punch and the other man fall to the ground.

The man who later threw the punch walked towards them in a normal manner, was not looking over his shoulders and was interacting with the two girls he approached. He approached the girls by himself and did not have anything in his hands.

Another witness was employed at the Peace Lounge as a server from 8:00 p.m. to 3:00 a.m. While working on August 22, 2015 she met the decedent for the first time. He was with his friends who were drinking and having fun staying at the Peace Lounge until closing time. She saw Petitioner inside the lounge who was with girls and his friends... Id. 133.

The witness did not see any interaction between Petitioner and the decedent and did not seen fights or arguments in the club on the evening in question. When she finished her shift, the witness went outside to walk the decedent to his car. She turned around and saw Petitioner hit the decedent in his nose with his fist. Id. “The only thing I remember is when he hits him and he fall (sic) to the ground.”

Before Petitioner threw a punch, the witness never heard defendant raise his voice, there was never an altercation or argument between Petitioner and the decedent and there was never a confrontation between the two men.

The United States introduced an expert in the field of neurosurgery. He was not board certified in neurosurgery or any other area of medicine. He had not applied for his boards as he still was a resident and acknowledged there were other people more qualified than he in the field of neurosurgery. Defendant objected to the physician being qualified as an expert to answer hypothetical questions. The government contended he was a treating physician. The government proffered “We may have a couple more questions. But essentially we want him, quote and unquote, to be a teacher. We’ll ask him specific questions about what is this, what is

that."

The expert reviewed the decedent's medical records, imaging, particularly CT scans of the cervical spine, and photographs of the decedent. He assessed the patient and spoke with family members in order to acquire additional background information and to discuss the prognosis. Additionally, the witness viewed surveillance tape of the event. Upon admission, the decedent was in "extremely poor neurological condition…he was intubated…not sedated…He had minimal neurological function." Id. 448. He added based on the "patient's level of neurological function as well as radiograph findings that the injury sustained cannot be pileated or relieved by an surgical intervention. And as such unfortunately it's not one that he is able to recover from but will progress to a neurological death.

The physician acknowledged that the decedent's alcohol blood content was above the legal limit. He became aware of this information as soon as the decedent was brought into the hospital. Further, he agreed that there are situations where a person can sustain a closed head injury falling on the sidewalk that could have been the result of intoxication. It does not require a severe blow to the head if you fall backwards on to the back of your head on to concrete.

When a boxer is hit to the floor his body is not immediately removed from the tarmac because when there is trauma to the head there always is potential for cervical spine trauma as well and if the head were bobbing that could cause a negative consequence.

With respect to the decedent there was no frontal brain injury. Rather, the injuries to the brain were to the back of the head. Dr. Lynes was aware that the back of decedent's head hit the pavement and when he was punched it was not to the back of the head but rather to the front of the head. The only injury to the front of his head was a small laceration which can be caused by a small amount of force.

Chief Medical Examiner Roger Mitchell was offered as an expert in forensic pathology. He reviewed the work of another medical examiner who performed the autopsy on the decedent on August 25, 2015. Dr. Mitchell concluded that the cause of death was blunt force injuries of the head.

The doctor did not have an opinion regarding whether the decedent was unconscious before he hit the pavement. Dr. Mitchell, who did not do the actually autopsy, reported the toxicology results that decedent's blood alcohol level was approximately 50% above the legal limit for purposes of driving. Id. 576.

As part of the government's rebuttal closing argument, the following comments were made by the prosecutor. "I'm not suggesting that's what they are doing and the evidence does not suggest that. But what it does is thank God she was there. Thank God she was there." This argument drew an objection that was overruled by the trial court.

The prosecutor continued, "Thank God she was there because she puts a face on it. Thank the Almighty she was there." She is the critical piece."

Following completion of the government's rebuttal argument defendant reiterated his objection, explained the basis for his objection to the references to God and moved for a mistrial. The following discussion with the trial court ensued:

The Court. I didn't understand that what he said was actually invoking God in the way that the Court of Appeals had addressed it. I know he said something like thank God she was there. But he wasn't invoking God in terms of the verdict he was asking for.

The Court added: I think it may have gotten close to the line but I do not understand that what he said was what it was that the Court of Appeals was specifically addressing. Although I think leaving God out of it as a

general matter is probably a better idea.

The prosecutor responded, “I should have used thank goodness instead of God. It’s a term of art.”

REASONS FOR GRANTING THE PETITION

I. IN ORDER TO PROTECT THE DUE PROCESS RIGHTS OF INDIVIDUALS CHARGED WITH CRIMES THIS COURT SHOULD MANDATE THAT IT IS MISCONDUICT FOR A PROSECUTOR TO KNOWINGLY AND REPEATEDLY INVOKE THE NAME OF GOD DURING A REBUTTAL CLOSING ARGUMENT.

A prosecutor's closing arguments will be held to violate due process if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

It is well settled and often repeated that "Remarks calculated to arouse passion or prejudice constitute prosecutorial misconduct." See *Viereck v. United* States, 318 U.S. 236, 237-38 (1948). "a prosecutor's inflammatory appeal to a jury may constitute misconduct central to the ultimate issue of guilt or innocence." *Reed v. United States,* 403 A.2d 725, 731 (1979).

The District of Columbia Court of Appeals has repeatedly admonished parties for making improper remarks during closing arguments. "In evaluating such claims [prosecutorial misconduct], we must first determine whether any or all of the challenged comments by the prosecutor were improper." *McGrier v. United States*, 597 A.2d 36, 41 (D.C.

1991), internal quotations omitted, accord, e.g., *Harris v. United States*, 602 A.2d 154, 159 (D.C.1992) (en banc). "If they were, then viewing the remarks in context, we must consider the gravity of the impropriety, its relationship to the issue of guilt, the effect of any corrective action by the trial judge, and the strength of the government's case in determining whether the comments resulted in substantial prejudice." *McGrier*, 597 A.2d at 41, citations and internal quotations omitted.

This Court has stated that the test for assessing whether substantial prejudice occurred as a result of improper arguments of a prosecutor is "after pondering all that happened without stripping the erroneous action from the whole, we can conclude that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750,765 (1946).

a. **The timing and the repetition of the improper statements:**

The improper and prejudicial comments of the prosecutor came during rebuttal closing argument when the Petitioner had no opportunity to rebut or address the remarks. In addition, the entirely improper statements were repeated by the prosecutor during the rebuttal closing argument.

This trial was an emotionally charged proceeding involving the death of a young man not being the result of a drug transaction or robbery gone

badly. Rather, this event involved two groups of fundamentally law abiding individuals from the Ethiopian community who by nothing more than happenstance came together outside a bar on Georgia Avenue, N.W., Washington, D.C

There was disputed and highly excited testimony pertaining to the events that led up to the fatal event. The witnesses gave conflicting accounts of the

events and the majority of the government's witnesses were friends of the decedent.

When discussing a material witness who served the parties while inside the bar and escorted the decedent and his friends out of the bar towards a car, the prosecutor proclaimed, "But what it does is thank God she was there. Thank God she was there." This comment drew an immediate objection from Petitioner which the trial court overruled. The prosecutor's immediate next argument was, "Thank the Almighty she was there, because she is the one who puts a face to that name." Id. The prosecutor added, "She is the critical piece", going on to argue within the context of thanking God for her presence, "Yeah, he killed my friend and specifically gives the address."

The gravity of an improper argument is increased if the improper comment is repeatedly emphasized. See *Lucas v. United States*, 102 A.2d 270, 279 (D.C. 2014) (noting an improper argument is mitigated if it is *not* repeated). The District of Columbia Court of Appeals has determined that "[i]mproper prosecutorial comments are looked upon with special disfavor when they appear in the rebuttal because at that point defense counsel has no opportunity to contest or clarify what the prosecutor has said." *Turner v. United States*, 26 A.3d 738, 744 (2011). *Coreas v. United States,* 565 A.2d 594, 605 (D.C. 1989); *Diaz v. United States*, 716 A.2d 173, 180 (D.C. 1998).

The prosecutor plays a special role in a criminal trial and within the judicial system. *Dyson v. United States*, 418 A.2d 127, 130 (D.C. 1980), citing, *Berger v. United States*, 295 U.S. 78, 88 (1935). It was entirely improper for the prosecutor in this case to repeatedly reference God within the specific context of what he characterized as the essential government witness. These highly improper associations suggested to the jury that God was on the side of the government's witness.

b. Defendant made repeated objections to the prosecutor's improper rebuttal closing remarks.

At the first instance in rebuttal closing where the prosecutor "thanked

God" defendant immediately objected and was overruled by the trial Court. Tr. 5/14/18, 658. Following the conclusion of the government's rebuttal argument defendant asked to approach the bench and repeated his objection to the government's repeated references to God and for thanking God for the government's witnesses. Included in the objection was a motion for a mistrial.

Defendant: Your Honor, I prefer not making objections during closing argument. But in this situation I felt compelled to object…And they also attached the name of God to a material witness. And I would submit that's entirely improper. I had to object to preserve the objection. And I move for mistrial at this point because that's the only remedy available.

Government: We object, Hour Honor.

The Court: I didn't get exactly what you said. I thought you were just objecting because he was getting a little riled up.

Government: It's a term of art, Your Honor.

The Court: I didn't understand that what he said was actually invoking God in the way that the Court of Appeals has addressed it. I know he said something like thank God she was there. But he wasn't invoking God in terms of the verdict he was asking for.

Government: Fair enough, Your Honor.

The Court: I think it may have been, it may have gotten close to the line. But I do not understand that what he said was what it was that the Court of Appeals was specifically addressing. Although I think leaving God out of it as a general matter is probably a better idea.

Defendant: Very well.

Government: I should have used thank goodness instead of thank God. It's a term of art.

The Court: That's right. But I don't understand it as invoking. I understand the Court of Appeals had it when somehow when God gets connected to particular verdict. I don't understand that to be where we were here. Okay?

Id. 671-72.

Appellant notes that the prosecutor himself acknowledged the error in his rebuttal. It is submitted that thanking God for the presence of a government witness is not a term of art. Rather, it is an unmistakable and improper repeated association with the testimony of a material government witness.

c. The prejudicial impact of the inflammatory and repeated references to God.

It has long been settled that remarks calculated to arouse passion or prejudice constitute prosecutorial misconduct. *Dayson v. United States*, 450 A.2d 432, 437 citing *Viereck v. United States*, 381 U.S. 236, 237-43 (1948). Further, as this Court has recognized, "a prosecutor's inflammatory appeal to a jury may constitute misconduct central to the ultimate issue of guilt or innocence." *Reed v. United States*, 403 A.2d 725 (1979). "[A]llusions to historical figures…are to be avoided in argument because they have emotive overtones which do nothing to aid the jury's perception of the case." *Miles v. United States*, 374 A.2d 278, 283 (D.C. 1977).

Villacres v. United States, 357 A.2d 423 (D.C. 1976) is instructive. Therein, challenges to the conviction were based upon improper remarks of the prosecutor during closing argument. Specifically, "the prosecutor in order to draw an analogy between the execution of the decedent…and the crucifixion of Christ, proclaimed and you better believe that Jesus (English pronunciation) was crucified when Jesus (Spanish pronunciation) Guiterrez was executed. Id. 427-28.

The conviction in *Villacres* was reversed based in part upon a decision from the United States Court of Appeals for the District of

Columbia Circuit citing a prosecutor's improper remarks. "He was intelligent and Napoleon was a genius and he tried to wreck all of Europe. He bolled (sic) over anybody that got in his way, Hitler was a genius in his own way." *United States v. Hawkins*, 480 F.2d 259, 262 (D.C. Cir. 1973). This argument was deemed reversible error because it constituted a "dereliction of the prosecutor's high duty to prosecute fairly…." Id.

The District of Columbia Court of Appeals, relying upon precedent from the Supreme Court, has recognized the prejudice that occurs when a prosecutor vouches for the credibility of a government witness.

> Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.

Mathis v. United States, 513 A.2d 1344, 1348 (1989), citing *United States v. Young*, 410 U.S. 1 (1985).

Notwithstanding established precedent forbidding a prosecutor from referencing historical figures, prohibiting a prosecutor from attempting to appeal to the emotions of the jury, and prohibiting vouching for the

credibility of a witness, the trial prosecutor in rebuttal closing argument repeatedly invoked the name of God and thanked God for the testimony of a material government witness suggesting to the jury that God was on the side of the government. With no ability to address these inappropriate repeated references to the jury, and with no instruction from the Court when the remark was initially objected to, defendant was substantially prejudiced by the repeated references to God.

II. The Memorandum Opinion Issued by the District of Columbia of Appeals is in Conflict with Opinions from this Court and Other Opinions From the District of Columbia Court of Appeals.

The Memorandum Opinion from the Court of Appeals affirmed the conviction on grounds that, “four references to God do not rise to the level of extensive references to religion.” Memorandum opinion, FN 8, page 4, Appendix. Petitioner submits this is not an accurate assessment of the prejudice condemned by this Court and other opinions of the District of Columbia Court of Appeals. The references went unrebutted as they were made in rebuttal closing argument and clearly affected the fairness of the proceedings.

CONCLUSION

For the reasons set forth herein, Petitioner requests that this Court issue a writ of certiorari to review the judgement of the District of Columbia Court of Appeals.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, postage prepaid, on this the 17th day of August, 2020 to the Office of the Solicitor General, U.S. Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

_____/s/_____
Steven R. Kiersh