No. 20-7442

IN THE

SUPREME COURT OF THE UNITED STATES

AHMAD SHALASH — PETITIONER
(Your Name)

vs.

DAVID GRAY, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ahmad Shalash #711,711
(Your Name)

P.O. Box 540
(Address)

St. Clairsville, OH, 43950
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Has the United States Court of Appeals for the Sixth Circuit imposed an improper burden and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent(s) when it denied Shalash a COA, to obtain a merits review of his (Insufficient evidence and Prosecutorial Misconduct) claims to sustain his convictions of aggravated robbery, specifically when the only two incriminating witnesses (co-defendants) recanted their inculpatory testimony?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

unknown

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TABLE OF AUTHORITIES CITED

OTHER

None

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at 2020 U.S. App. LEXIS 38800; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2020 U.S. Dist. LEXIS 104372; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 12-10-20.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution (in part): There shall be no law "prohibiting the free exercise" of "religion."

The Sixth Amendment to the United States Constitution (in part): "[T]he accused shall enjoy the right ... to a public trial, by an impartial jury ... and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution (in part): No "cruel and unusual punisment (shall be) inflicted."

The Fourteenth Amendment to the United States Constitution (in part): "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, Ahmad Shalash, timely filed a Petition for a Writ of Habeas Corpus, arguing four grounds for relief on December 11, 2017. On June 15, 2020, the district court, after issuing two (2) recommittal orders, denied Mr. Shalash's Petition and refused to issue a certificate of appealability. Mr. Shalash filed an Application for a Certificate of Appealability ("COA") on September 7, 2020. The United States Court of Appeals for the Sixth Circuit denied Petitioner's application for a COA on December 10, 2020. Hence, this Petition for a Writ of Certiorari to this Honorable Court.

REASONS FOR GRANTING THE PETITION

A. Petitioner has made a "substantial showing of the denial of a constitutional right." U.S.C.S. 2253

Petitioner had asserted his right of Due Process was denied when the State of Ohio lacked sufficient evidence to support his convictions because: 1) Both co-defendants recanted their testimony that incriminated Shalash, and 2) The State of Ohio failed to instruct the jury and prove that the firearm specifications, superimposed, were (to be) proven beyond a reasonable doubt.

Petitioner also asserted that he was denied his right to a fair trial, effective counsel, and an impartial trial jury when the prosecutor inflamed the jury with improper/prejudicial racial and religious comments and witness vouching.

It is well established that "A COA will issue if the requirements of 28 U.S.C.S. 2253 have been satisfied." See Miller-El v. Cockrell, 537 U.S. 322, 336. This Petitioner had/has met the standard of U.S.C.S. 2253.

B. Jurist of reason could disagree with the district court's resolution of Shalash's

constitutional claims. Slack v. McDaniel, 529 U.S. 484 (quoting Barefoot, supra at 893, n.4).

There is a sense of discontent where the district court ordered two (2) separate recommittal orders to Shalash's objections to the Magistrate's Report and Recommendation ("R&R"); yet, denied relief based upon the second supplemental R&R.

Insufficient Evidence

First, the lower court's have disregarded the recantation of both codefendant's incriminating testimonies (Appx. H and I). The state court of appeals, "pointing to the testimony of Shalash's wife Jennifer Neitz and his friend Jake Pfalz, who confessed to their participation in the robberies and described in detail Shalash's involvement in the crimes," (Appx. A at p. 4) was ruled upon without both recanted testimonies (being considered). There was a semblence of the recanted affidavits of Neitz and Pfalz in Shalash's fourth habeas claim where the state court denied relief because "the affidavits [Shalash] presented were 'viewed with grave suspicion' because of Neitz's relationship to Shalash." (Appx. A at p. 7). What about Pfalz's affidavit? What was his motivation to recant?

Both Neitz and Pfalz were caught "red-handed" by bank video evidence. Pfalz was also very familiar to the law, he and his mother were previously convicted of similar crimes. Pfalz's self-serving testimony against Shalash was for one purpose: to get a reduced prison sentence. According to Neitz's affidavit, Appx. H, Pfalz and Neitz were put into a room together, alone; where, inference be given, the State of Ohio was attempting to manipulate both codefendants into testifying against Shalash. With the help of Pfalz, they were able to connive and manipulate Neitz into an agreement to incriminate Shalash for nothing more than a reduced prison sentence for each Neitz and Pfalz. Not only was the police actions "gravely suspicious," the state went even further by offering plea deals of eight(8) years to Pfalz whom actually robbed the four banks and six(6) years to Neitz whom did "case" each of the four banks (both recieving 1/5 the sentence of Shalash). Who would not take such an attractive offer to incriminate another (in this case Shalash)? Neitz also wrote letters to her husband, Shalash, stating how she was guilty and that Shalash had done nothing and there was nothing for him to worry about -- sending false impressions to her husband awaiting trial. Subsequently, Neitz, after her release from prison, sought a divorce from Shalash. (Hamilton County Court of Domestic

Relations, Ohio, Case No.: DR1901610)

The real "grave suspicion" should be aimed at the state of Ohio. Neither Neitz nor Pfalz had anything to gain from recanting their testimonies; however, had plenty to lose had they not testified against Shalash. See Appx. Hand I. Where is the justice to reward criminal behavior by further encouraging other criminality?

Without Neitz or Pfalz's testimonies, there was no, absolutely no evidence placing Shalash as a participant to the robberies. Moreover, all of the 18 witnesses, none could identify Shalash at the banks at the time of the robberies. There was evidence that Pfalz and Shalash were seen together either hours before or hours after on the same day on two of the robberies, that alone, is insufficient to support a conviction of armed robbery.

Secondly, of the four robberies, only two counts carried a dual gun specification enhancement.

Under federal review, courts are required to look to state law for "the substantive elements of the criminal offense." Jackson v. Virginia, 443 U.S. 307, 324. The lower courts failed to acknowledge that the state of Ohio failed to prove (beyond a reasonable doubt) the guilt of Mr.

Shalash; specifically to the gun enhancement specifications 3 and 4 to counts 3 and 5 (armed robbery).

According to the jury instructions, "Specification 3 requires you to specify whether you find the defendant, Ahmad Shalash, did have on or about his person, or under his control, a firearm, while committing the offense of aggravated robbery in Count 3 [and 5]. Specification 4 requires you to specify whether you find that the defendant, Ahmad Shalash, did have on or about his person, or under his control, a firearm while committing the offense of aggravated robbery, and displayed the firearm, brandished the firearm, and indicated that he possessed the firearm or used it to facilitate the offense of aggravated robbery as alleged in Count 3 [and 5]."

Under these two specifications, Specification 3 is fully incorporated within Specification 4, which creates an Eighth Amendment violation of an excessive punishment by sentencing Shalash twice for the same offense. Moreover, the conjunction "and" requires that Shalash personally displayed, brandished the firearm, "and" either indicated that he possessed the firearm or used it to facilitate the offense of aggravated robbery.

Besides Neitz and Pfalz's testimonies, the state failed to identify, among 18 witnesses, Shalash as the

one in having or possessing a weapon or even being at or near the bank during the time of the robberies. Moreover, there was an attempt to introduce Neitz (thereby Shalash) of owning a gun; however, the gun in reference was taken from their home, and was used in a crime a year prior to the now accused crimes by a family member, Saed Elkahla (Hamilton County, Ohio, Judge: Nadine Allen, Case No.: C/11/CRA/37825, 12-13-2011). The police had this gun in their possession when these armed robberies were to have taken place.

Albeit, arguendo, if Neitz and Pfalz's testimonies are to be considered, they too admitted that Shalash never went into the bank. So if Mr. Shalash was with them, he would have been nothing more than a conspirator to Specification 4, which is not a part of the elements within either specification.

It could easily be inferred that because the trial court failed to instruct the jury that the firearm specification must be proven beyond a reasonable doubt, which is a structural error -- requiring vacating Shalash's conviction. At issue here is the complete ommission of the reasonable doubt standard of proof in the instruction for a firearm specification. Either way, the jury either misunderstood the specification and/or blatantly disregarded the elements

that were required by the state, which also failed to provide the evidence to support the second half of the enhanced gun specification "4."

A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. See Cavos v. Smith, 565 U.S. 2

A federal court may also overturn a state court decision rejecting a sufficiency of evidence . . . only if the decision was objectively unreasonable. See Cavos citing Renico v. Lett, 559 U.S. 766, 773.

Due to the aforementioned and the lack of evidence, the state court's decision rejecting Shalash's sufficiency of evidence is/was not only objectively unreasonable; but also, no rational trier of fact could have agreed with the jury. Therefore, jurists of reason would disagree with the district court's resolution of Shalash's sufficiency of evidence claim. A COA should have issued.

Prosecutorial Misconduct

"Appeals to racial, ethical, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." United States v.

Cabrera, 222 F. 3d 590, 594 (9th Cir. 2000)

"Federal courts have long condemned racially inflammatory remarks during governmental summation. *** [T]he Supreme Court stated *** the Constitution prohibits racially-biased prosecutorial arguments. Racial [and religious] fairness of the trial is an indispensable ingredient of due process and racial [/religious] equality a hallmark of justice." United States v. Doe, 284 U.S. App. D.C. 199, 903 F. 2d 16, 24-25 (1990) quoting McCleskey v. Kemp, 481 U.S. 279, 309, fn 30, 107 S.Ct. 1756 (1987)(internal quotations omitted) and citing (this is not the entire list of citations) McFarland v. Smith, 611 F. 2d 414 (2nd Cir. 1979); United States ex rel. Haynes v. McKendrick, 481 F. 2d 152, 156-159 (2nd Cir. 1973); Miller v. North Carolina, 583 F. 2d 701, 706-707 (4th Cir. 1978).

This Petitioner asserts that the inflammatory comments made by the prosecutor, not only violated his right to a fair trial, but also, a failure of effective counsel for his failure to object to the racial/religious comments as being prejudicial. Moreover, such racial/religious inflammatory slurs violated his First Amendment right to religious freedom.

In this case, the prosecutor's religious slur was first injected by pointing out that Shalash and Neitz

were married at a mosque while he was discussing the robberies -- this comment had zero significance or relevance to the facts surrounding the robberies. The prosecutor further degrades Shalash's Muslim religion as a religious and incorrect stereotype to insinuate that Shalash must have been present during the robberies when he said, "Do you believe that a Muslim wife is going to somehow be driving around town with an outsider, Pfalz, a stranger to the family, robbing banks and the husband has been with him just moments before and somehow he leaves the picture with the kids in the van?" Then again, in finishing his closing/rebuttal, the prosecutor reminds the jury that because Shalash is Muslim, that because Neitz is married to Shalash, she must be a fully practicing (radical) Muslim: "And a Muslim wife on top of that. In that culture, the women aren't even supposed to be out without a male relative and we got her robbing banks with a non-male relative with the kids in the truck. Give me a break. Give me a break."

These stereotypical religious comments/slurs are precisely the type of prejudicial remarks that infiltrate the fairness of the trial and violates due process. See Bains v. Cambra, 204 F. 3d 964, 974-975 (9th Cir. 2000). The use of race to aid in securing a jury verdict is obvious prosecutorial misconduct. Withers v. United States, 602 F. 2d 124, 125-126 (6th Cir 1979).

To make this situation worse, these prosecutorial slurs/ comments were not supported by any evidence on the record.

In addition, the prosecutor also vouched for the credibility of witnesses, induced fear in the jury, and refferred to the robberies as a "heroin induced rampage." The prosecutor numerously referred to Shalash as "General Shalash" and codefendants as "Private Neitz" and "Colonel Pfalz." The inflammatory slurs infer that Shalash was a military leader/dictator/terrorist attempting to wreak havoc against society -- requiring the jury to find Shalash guilty.

The state court of appeals found the prosecutor's comments about Shalash's religion were "arguably inappropriate." (Appx. A. p.5). However, the same court stated that the comments "were not so 'prejudicial or outcome determinative as to . . . deny Shalash a fair trial' in light of the overwhelming evidence of Shalash's guilt." (Appx. A. p. 5). Again, this was not considered by any court on the recanted testimonies from Neitz and Pfalz. Regardless, the opinionated state court decision did not query the jury to identify by what factored into Shalash's guilt.

Petitioner asserts he has shown that the prosecutor's

conduct so infected his trial that it rendered his trial and conviction fundamentally unfair per Parker v. Matthews, 567 U.S. 37, 45 (2012)(per curiam)

Jurist of reason could disagree with the district court's resolution of Shalash's prosecutorial misconduct claim. A COA should have issued.

C. Jurists could conclude the issues presented are adequate to proceed further.

Petitioner asserts that because the lower courts have refused to consider the recanted testimonies/affidavits of Neitz and Pfalz as part of Shalash's sufficiency claim, that it should be appropriate for this court to remand Shalash's claims back to the lower court. As this Honorable Court noted, "[T]he District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case." "[A] COA determination is a separate proceeding, one distinct from the underlying merits." "The question is the debatability of the underlying constitutional claim, not the resolution of that debate. Miller-El v. Cockrell, 523 U.S. 322, 342.

For all of the foregoing reasons, Mr. Shalash's case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve, but to maintain the public's confidence that courts will not permit a criminal defendant's conviction where a state manipulated/coerced desired testimon(ies) with irresistable (1/5 of a potential) plea agreement/prison sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ahmad Shalash

Date: _____