

No.
In The
Supreme Court of the United States

RICHARD BACQUIE,
Petitioner,
v.

STATE OF NEW YORK,
Respondent.

**On Petition For A Writ Of Certiorari To The
New York Supreme Court, Appellate Division**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an attorney who violates the advocate-witness rule by placing themselves in a position where they are the sole witness for exculpatory information which establishes a defense, but fails to move to withdraw as counsel or to present that exculpatory evidence to the jury, renders effective assistance of counsel under the Sixth Amendment?
2. Whether the Sixth Amendment's speedy trial guarantee permits the prosecution to impose a three-year delay in bringing a garden-variety, non-complex street crime felony case to trial where the delay actually prejudices the defendant?
3. Whether a prosecutor who repeatedly shifts the burden of proof to the defendant, despite being repeatedly told to refrain from such conduct by the trial court, repeatedly injects their personal beliefs as to a defendant's guilt, and improperly cross-examines a defendant and defense witnesses to elicit whether prosecution witnesses were lying, violates a defendant's Due Process right to a fundamentally fair trial?

PARTIES TO THE PROCEEDING

The original parties to this case were Richard Bacquie (previously Defendant-Appellant) against the People of the State of New York, (previously Respondent). Rule 14.1(b) of the Supreme Court Rules.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Bacquie, respectfully prays that a writ of certiorari be issued to review the judgment of the New York Supreme Court, Appellate Division, Second Department, entered in the above-entitled case on October 4, 2017.

DECISIONS BELOW

The October 4, 2017 opinion of the New York Supreme Court, Appellate Division, Second Department, whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, page App. 1. That decision is reported at People v. Bacquie, 154 A.D.3d 648, 62 N.Y.S.3d 425 (N.Y.A.D. 2017). The New York Court of Appeals denied discretionary review on February 15, 2018, which is reported at 30 N.Y.3d 1113, 2018 WL 1281920 (Table) (N.Y. 2018).

STATEMENT OF JURISDICTION

The decision of the New York Supreme Court, Appellate Division, Second Department to be reviewed was entered on October 4, 2017. Petitioner timely sought discretionary review to the New York Court of Appeals, which denied review on February 15, 2018. The instant Petition is filed within 90 days of the date of decision. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

**CONSTITUTIONAL PROVISIONS,
TREATIES, STATUTES, RULES
AND REGULATIONS INVOLVED¹**

United States Constitution, Fifth Amendment
United States Constitution, Sixth Amendment
United States Constitution, Fourteenth Amendment
New York Criminal Procedure Law § 30.20(1)
New York Criminal Procedure Law § 30.30(1)(a)
New York Civil Rights Law § 12
New York Penal Law § 265.00(5)
New York Penal Law § 265.03(3)
New York Penal Law § 265.02(1)
22 New York Code of Rules and Regulations § 1200,
Rule 3.7

STATEMENT OF THE CASE

On July 4, 2013, Richard Bacquie attended a barbecue and met up with some friends and acquaintances. (App. 64). He left the barbecue with three acquaintances after one became involved in an argument at the barbecue, and decided to drive them to a different party in Queens, New York City. (App. 64). The person who had gotten into an argument continued to remain animated, and Bacquie then asked all three men to get out of his car, and left them in an unfamiliar neighborhood in Queens with cab fare. (App. 64).

¹ Aforementioned provisions are reproduced in the appendix.

At the time, Bacquie was employed as a tunnel miner in New York City whose duties included supervising other miners and working with explosives. (App. 63-64). As a miner and a supervisor, he was required to carry with him at all times several tools, including at least one knife. (App. 63). He took his tools home with him each night after work to avoid them being stolen by other tunnel workers. (App. 63). He was a supervisor who earned over \$100,000 per year and was a union member. (App. 63) He owned a home in New Jersey, and drove an expensive Lexus that had New Jersey license plates. This as the car he drove on July 4, 2013.

Inside his car he had various items of personal property, including two knives that he used as tools at work. (App. 63-64). Both knives had been purchased on Amazon.com online legally. (App. 63). One was a fixed blade knife, and the other was a standard folding knife that locked when open. The blade was held to the handle of the knife with a pivot pin secured by a retaining screw. When Bacquie purchased that knife, the blade opened and closed only when manually operated. (App. 63).

On July 4, 2013, NYPD Officers Kenneth Sepulveda and Joseph Algerio were working as plain-clothes officers as members of the Anti-Crime Patrol, driving in an unmarked car. (App. 53-55). The NYPD Anti-Crime Patrol unit is a plain-clothes unit that is specifically charged with patrolling for violent crimes, such as assaults, robberies, burglaries, and firearms

offenses. (Id.) Anti-Crime Patrol officers do not conduct traffic enforcement, nor do they even carry traffic citation booklets. They patrol in unmarked vehicles in order to maintain a low profile. (Id.)

At approximately 10:20 p.m., after Bacquie dropped off the three men, he began to find his way home. (Id.) Sepulveda and Algerio saw him driving past them in the opposite direction. (Id.) Sepulveda could not see into the windows, and he assumed that the windows had illegal tints. (Id.) Sepulveda had previously received no training in the police academy as to tinted windows or in the use of a “tint meter” that measures the gradation of tinted windows. (Id.) The officers made a U-turn to follow Bacquie, and pulled him over by activating hidden police lights. (Id.) Sepulveda admitted under oath at a pre-trial hearing that the driver committed no other traffic violations and there was no other basis to pull over the vehicle. (Id.) He further testified that on July 4, 2013, he never used a tint meter to test Bacquie’s window tint, and admitted he did not even have one with him. (Id.) Algerio testified that Bacquie was pulled over because he was familiar with the neighborhood, and had never seen Bacquie’s car there before, and “didn’t belong there.” (Id.)

As Sepulveda and his partner approached the vehicle after the stop, he saw Bacquie in the car and claimed he saw what he characterized as the handle of an illegal dagger in the front seat, which he defined as

“a straight blade with a sharp tip.”² (Id.) However, Sepulveda testified when he saw the object he did not immediately recognize it as an illegal weapon, saying, “[i]t was illegal because it’s a knife.” (Id.)

Bacquie was removed from the car, handcuffed and searched. (Id.) Police found what they claimed as an illegal “gravity knife” in his pocket – the same folding knife Bacquie had purchased from Amazon.com to use for work.³ (Id.)

Bacquie was transported to the police station for processing, and his car was impounded and searched. Police claimed they found a pistol in the back seat of the car pursuant to an inventory search, and Bacquie was charged with possession of gravity knife and the pistol, and ultimately prosecuted in the Queens County Supreme Court for possession of the gravity knife and the pistol, but not the dagger under New York Penal Law § 265.02(1) and § 265.03(3). After he was released on bail, Bacquie made a complaint with the Internal Affairs Bureau of the NYPD that initially the police refused to release his

² Though possession of a “dagger” is illegal under New York law, the term “dagger” is not defined in New York Penal Law § 265.00, the statute that defines and describes illegal weapons. Bacquie was never charged with possession of a “dagger.”

³ New York Penal Law § 265.00(5) defines a “gravity knife” as any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device

car to him, alleging that valuables had been missing from his car. (App. 63-64).

The case remained pending in the Queens County Supreme Court for three years before the prosecution moved the case to trial. Bacquie retained counsel to represent him. Defense counsel examined the knife recovered by police from Bacquie at the prosecutor's office, but examined the knife and tested it on his own, without anyone else associated with the defense to examine the knife, observe or note its condition. (App. 66-67). During this examination, defense counsel observed that the knife did not flip open with centrifugal force, and that the retaining screw that secured the blade and the pivot pin to the handle and provided the axis upon which the blade would open and close, was tight and secure. (Id.).

Prior to trial, counsel retained a cutlery expert in order to challenge the prosecution's assertion that the folding knife was a "gravity knife." (App. 60-61). The defense purchased two of the same exact knives from Amazon.com for the expert to examine. The expert conducted an inspection and tests, and concluded that the knife was not a "gravity knife" because it did not operate with centrifugal force. Id. However, prior to trial, defense counsel did not seek to have the expert examine the knife recovered from Bacquie. Id.

After the prosecution failed to move the case to trial for almost three years, Bacquie moved to dismiss

the case, arguing that his Sixth Amendment Speedy Trial rights were violated by the delay, and further argued his New York statutory speedy trial rights were violated. (App. 26-37). The trial court denied the motion five days after it was filed, making calculations of timeliness under New York statutory law, but never addressed his Constitutional Speedy Trial claim. (App. 11-20).

After a pre-trial suppression hearing, Bacquie's motion to suppress the knives and the pistol were denied. The case proceeded to a jury trial on May 25, 2016. At trial, the prosecution relied upon the testimony of the police officers who participated in the stop, arrest, and search of the car, and the opinion testimony of the police officers that the knives recovered were illegal weapons. The "gravity knife" was introduced into evidence, and this time the police officer was able to flick open the blade. (App. 58). During cross-examination of that officer about the condition of the knife, defense counsel stipulated that the evidence bag containing the knife in question was opened in his presence prior to trial, and had been sealed. (App. 57-58).

The condition of the folding knife became a central point of contention in the trial. The defense presented the testimony of the expert witness, who examined the folding knife recovered from Bacquie for the first time on the witness stand, and compared it to the identical knives of the same make and model he had purchased from Amazon.com. (App. 60-62). The

expert concluded that the retaining screw in the knife in evidence had been loosened, and this allowed the blade to swing freely; however, the knife was not manufactured or sold in that condition, and had somehow been altered after the fact. (App. 60-62).

Bacquie also testified in his own defense that the “gravity knife” which was recovered from him on July 4, 2013 did not freely swing open as it did during the trial, and asserted that someone had loosened the retaining screw and altered its condition after it had been taken from him. He further testified that he had no knowledge that the gun was in his car. His testimony, and the testimony of other defense witnesses, established that the gun belonged to one of the individuals that was in Bacquie’s car on the night of the incident. Bacquie testified that the knives were tools he used for work, as did many of his fellow miners. This testimony was also corroborated by defense witnesses who were his co-workers. (App. 61-62). However, the individual who was the owner of the gun was unable to be found at the time of trial, despite testimony regarding the efforts of the defense witnesses to locate him. (App. 62-63).

During summation, the District Attorney attempted to shift the burden onto the defense several times. (App. 78-81). First, the prosecutor argued “at the end of the People’s case, the defense had two options. One was to call this a plant by the police, meaning that the police put this gun in his car,” drawing a sustained objection and admonition by the

trial court. (App. 79). After this, the prosecutor attempted to argue that Bacquie failed to make this allegation during his call to Internal Affairs, again drawing a sustained objection and an instruction not to shift the burden and to move on from this argument. (App. 79-80)

Undeterred, the prosecutor ignored the trial court's admonitions and for a third time, immediately returned to that same argument, now drawing an objection and a motion for a mistrial, which was denied. (App. 80). Later in his summation, the prosecutor again tried to shift the burden onto the defense, this time displaying open disrespect to the trial court when an objection was sustained:

Vega didn't tell you anything about a function or charity event, said this was a barbecue and they were drinking and he got wasted. Does that sound like a fundraiser for kids on July 4th? That makes no sense. How about the fact that the defendant testified that there was another guy in the car, this guy named Red. Anthony Vega didn't say anything about Red being in the car while they were driving.

MR. DIDIO: Objection. That's not true.

THE COURT: Sustained. The jury will decide.

MR. BARKOFF: So, that's overruled.

THE COURT: Yes. Thank you for informing me of that and don't do it again.

Undeterred, the prosecutor then immediately again tried to shift the burden, arguing that Bacquie's failure to call a witness meant that the theory of defense was a lie, again drawing a sustained objection. (App. 80-81).

During deliberations, the jury requested re-instruction on all charges contained in the Indictment and a specific request for a definition of a gravity knife. (App. 65-67). After complying with this request and further deliberations, the jury sent out a second request to see the knife. (Id.) However, at this point it became apparent that the screw holding the blade to the handle had fallen out. (Id.) A court officer found the screw on the floor. (Id.)

There was an extended discussion concerning whether the jury would be able to handle the knife and if it would be told the screw had fallen out and been placed back in by court staff. (Id.) Ultimately, the court decided to show the knife to the jury and that if jurors wanted to handle it, to submit another note. (Id.) After showing jurors the knife, they immediately sent another note now requesting to test the gravity knife. (Id.)

Defense counsel argued the knife was not loose when it was purchased or recovered by the police and

urged the court to permit jurors to test the knife, instructing them that the screw had fallen out and had been placed back in. (App. 67). The District Attorney vigorously objected, now blaming defense counsel for loosening the screw by “playing” with the knife during his summation. The following then ensued:

THE COURT: He wasn't playing with the knife.

MR. DIDIO: I think I need to comment on that. A month and-a-half ago when I inspected the knife and handled the knife at the DA's office, that blade was not loose. I opened it. I handled it for quite a while. I don't know how it got loose. Certainly, the first time it got loose wasn't when I was handling it during summation. It was loose beforehand when the expert testified. So, any suggestion that somehow my actions caused the bolt to fall out is not based upon –

(App. 66).

Over the prosecutor's objection, the court instructed jurors the screw had fallen out of the knife and “right now we have no way of knowing the actual condition of the knife at the time it was recovered from the defendant.” (App. 67). The next note sent by the jury requested the definition of a gravity knife to be

read twice. (Id.) Following that, jurors sent a series of notes requesting read-back of testimony, indicating they were deadlocked, and requesting an instruction on reasonable doubt and intent before rendering a verdict of guilty on all four counts remaining in the Indictment. (Id.) He was subsequently sentenced to four and one half years in prison on the firearms charge, and one year concurrently on the knife charge.

Bacquie directly appealed his conviction to the New York Supreme Court, Appellate Division, Second Department. In that appeal, Bacquie raised the following issues:

1. Whether the Trial Court Properly Denied Defendant-Appellant's Motion to Suppress Physical Evidence Where the Evidence Established the Police Unlawfully Stopped Defendant-Appellant's Vehicle in the Absence of Reasonable Suspicion and Where the People Failed to Establish that Police Conducted a Proper Inventory Search of the Vehicle Once it Was Impounded?
2. Whether Defendant-Appellant was Denied Due Process and a Fundamentally Fair Trial Where the Prosecutor Repeatedly Shifted the Burden of Proof to the Defense Despite Being Admonished Several Times to Refrain from Doing So, Repeatedly

Presented his Own Personal Beliefs and Opinions Regarding the Credibility and Guilt to the Jury During Cross-Examination of Defendant-Appellant and on Summation, Called Defendant-Appellant a Liar in his Summation, and Improperly Asked Defendant-Appellant if the Police Were Lying In their Testimony?

3. Whether Defendant-Appellant Received Effective Assistance of Counsel Where His Attorney Violated the Advocate-Witness Rule By Placing Himself in a Position Where He Was the Sole Witness for a Sharply Disputed Fact that Would Have Corroborated Defendant-Appellant's Testimony on a Key Issue for the Theory of Defense, But Failed to Move to Withdraw or Present to the Jury the Significant Exculpatory Evidence that Counsel Alone Possessed?

4. Whether Defendant-Appellant's Constitutional and Statutory Rights to a Speedy Trial Were Violated Where the People Failed to Announce Ready Within Six Months and Where the

People Failed to Move the Case to Trial
for Almost Three Years?

(App. 39-40).

On October 4, 2017, that court reversed in part, and affirmed in part. (App. 2). As to the first issue, the majority opinion granted suppression on the basis that the prosecution failed to establish the lawfulness of the inventory search of Bacquie's car, which resulted in the discovery and recovery of a gun. (App. 4-5). The Second Department held that there was no testimony given at the suppression hearing of the content of any NYPD police concerning the process of inventory searches, or the recovering officer's compliance therewith. (*Id.*) The majority rejected Bacquie's argument that there was no reasonable suspicion or probable cause to stop his vehicle, rendering the recovery of a gravity knife from his person the product of an illegal stop and search. (App. 3).

With respect to his claim of prosecutorial misconduct, the Second Department held that while many of the prosecutor's remarks were improper, they did not deprive Bacquie of a fair trial. (App. 5).

The ineffective assistance of counsel argument was dispensed with in a single sentence: "Viewing the record as a whole, the defendant was afforded meaningful representation, and thus, was not deprived of the effective assistance of counsel." (App. 5).

Finally, Bacquie's Speedy Trial claim was also dispensed with in a single sentence: "The defendant's remaining contentions are without merit." (App. 6).

Justice Priscilla Hall concurred in part and dissented in part. (App. 6-9). The dissenting opinion stated that it would have granted suppression of both the gun and the knife recovered from Bacquie's person as the result of an unlawful traffic stop unsupported by reasonable suspicion. (Id.) The dissent opined that the basis for the officer's suspicion that Bacquie's car had illegal tints was suspect; the mere fact that it was hard to see inside a vehicle that was moving at night did not constitute a reasonable suspicion that the vehicle's windows had a light transmittance of less than 70% in violation of New York law. (Id.)

Bacquie and the prosecution both sought discretionary review in the New York Court of Appeals, which denied the applications on February 15, 2018. (App. 21). This timely Petition follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO DETERMINE WHETHER AN ATTORNEY WHO VIOLATES THE ADVOCATE-WITNESS RULE BY PLACING THEMSELVES IN A POSITION WHERE THEY ARE THE SOLE WITNESS FOR EXCULPATORY INFORMATION WHICH ESTABLISHES A DEFENSE, BUT FAILS TO MOVE TO WITHDRAW AS COUNSEL OR TO PRESENT THAT EXCULPATORY EVIDENCE TO THE JURY, RENDERS EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT

The United States Constitution guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. U.S. Const. Amend. VI. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. United States v. Cronin, 466 U.S. 648, 658 (1984).

This Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant

shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

This case implicates the advocate-witness rule, which is set forth in Rule 3.7 of the Rules of Professional Conduct (formerly New York Disciplinary Rule 5-102(a), codified at 22 NYCRR § 1200.21(a)), which prohibits a lawyer from acting as both an advocate and a witness in a contested legal matter, with certain exceptions of an administrative nature:

Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial

evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal. (b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

22 NYCRR § 1200, Rule 3.7.

The importance of this rule has been recognized by the Ninth Circuit:

The advocate-witness rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. This venerable rule is a necessary corollary to the more fundamental tenet of our adversarial system that juries are to ground their decisions on the facts of a case and not on the integrity or credibility of the advocates. **Accordingly, adherence to this time-honored rule is more than just an ethical obligation of**

individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice.

United States v. Prantil, 764 F.2d 548, 552-553 (9th Cir. 1985) (emphasis added).

The decision in United States v. Watson, 87 F.3d 927 (7th Cir. 1996) lays out clearly and concisely how a trial attorney conducting pre-trial investigation or preparation can avoid running afoul of the advocate-witness rule. This practice and procedure reflects basic common sense, and reflects what every practicing trial attorney knows (or should know) – when investigating a matter or interviewing a witness – take a third party with you to avoid making yourself a witness.

In Watson, the defendant was arrested and then questioned by an Assistant United States attorney after being administered Miranda warnings, and confessed to the AUSA and the accompanying law enforcement agents. The defendant moved to suppress, and the same Assistant United States Attorney who questioned the defendant represented the Government at the hearing. The District Court granted the motion to suppress, and criticized the Government for having the same attorney who was a witness conduct the hearing as counsel. The

Government appealed, and the Seventh Circuit reversed, ruling:

Under the advocate-witness rule, counsel is barred from acting as both an advocate and a witness in a single proceeding except under special circumstances. United States v. Marshall, 75 F.3d 1097, 1106 (7th Cir.1996). However, that does not mean that every AUSA who interviews a suspect is precluded from representing the government at a suppression hearing regarding the suspect's statement. Far from it. The correct procedure, and one that the AUSA followed in this case, is to avoid interviewing a suspect except in the presence of a third person so that the third person can testify about the interview.

Id. at 932

The Second Circuit has recognized that a defense lawyer who runs afoul of the advocate-witness rule may provide ineffective assistance of counsel. Ramchair v. Conway, 601 F.3d 66 (2d. Cir. 2010). At trial, Ramchair's counsel had moved for a mistrial after the prosecutor elicited testimony that counsel had been present at the lineup procedure during which Ramchair was identified as the perpetrator of

the crime with which he was charged, but that counsel had not objected to the lineup. Before moving for a mistrial, trial counsel had requested and been denied permission to testify in rebuttal to the testimony by way of explanation as to why he may not have objected. The motion for a mistrial was denied, and Ramchair was ultimately convicted of first- and second-degree robbery. In granting habeas relief, the District Court held:

By eliciting for the first time that [defense counsel] was present at the line-up and failed to object on the ground that it was suggestive, the prosecutor made [defense counsel] a witness against his own client on the central issue in the case: the suggestiveness of the line-up identification of Ramchair seven weeks after the robbery.

Ramchair v. Conway, 671 F.Supp.2d 371, 375 (E.D.N.Y. 2009) (Gleeson, J.).

The Second Circuit affirmed the granting of a writ of habeas corpus pursuant to 28 U.S.C. § 2254, finding that the failure of Ramchair's appellate counsel to argue that Ramchair's rights had been violated as a result of the implication of the advocate-witness rule constituted ineffective assistance.

In contrast, here defense counsel did not move for a mistrial, or in the alternative, seek permission to testify to establish the condition of the knife as he saw it prior to trial.

Here, a hotly contested issue at trial was whether the knife was a gravity knife on July 4, 2013 when it was recovered by police from Bacquie. Specifically, the issue was whether prior to trial, someone had loosened the screw holding the blade to the handle, enabling it to function as a gravity knife. In his summation, trial counsel argued the police officers were not credible for a host of reasons and compared the credibility of the police officers against the credibility of Defendant-Appellant, arguing there was no evidence to corroborate the police officers' testimony, which was compromised by prior inconsistent statements and a lack of independent forensic evidence.

To the contrary, counsel argued there was evidence to corroborate Bacquie's testimony that he did not knowingly possess a firearm, the knife was not a gravity knife when purchased, nor was it a gravity knife when it was recovered by police, based upon the defense expert witness' testimony. Trial counsel argued:

Mr. Bacquie told you when he purchased the knife and he received it, it was not loose like that. When it was recovered from

him on July 4, 2013, it was not loose like that, and by being loose like that in the handle, that means there's less friction on the blade. There's two sort of bolts here or pivots here and you can look at that in the jury room. **If those bolts or pivots are loosened and actually one of them is coming off right now, I will try to close it.** If those pivots or bolts are loosened, then this knife and the blade will be loose in the handle and what would that do? That would create a situation where the blade opens in a way that was not designed to open. It opens perhaps in this force of way when actually would never open that way. This knife as explained by the expert opened manually. That's the way it is designed to open, but if this blade and the resistance is loose, it may open through that act of pulling down or pushing down lineal and it may appear to be a gravity knife, but by design when it was purchased, when it was possessed by Mr. Bacquie, it was not a gravity knife by definition, so the defense submits to you for all those reasons, my client should be acquitted of that charge, the charges regarding the gravity knife.

(App. 94-95) (emphasis added).

Thus, the theory of defense was that if the police tampered with evidence and lied about the condition of the knife at the time of Bacquie's arrest, they could not be believed, and Bacquie's credibility would have been greatly enhanced, as there was other evidence that the police officers were corrupt. The record is also clear that approximately one and one-half months prior to trial, defense counsel went to the District Attorney's Office for the purpose of conducting an inspection of the knife.

At the pre-trial inspection, the evidence bag for the knife was sealed and unopened at the time of the pre-trial inspection. The record is also clear that the defense expert retained by Bacquie did not accompany counsel to that meeting or otherwise conduct a pre-trial inspection of the knife in question. In fact, the expert first examined the knife while on the witness stand where his expert opinion raised the sharply disputed issue whether the knife opened with either gravity or centrifugal force. The jury clearly struggled with the issue, repeatedly inquiring about the definition of a gravity knife and sought to inspect it to see if it was, in fact, a gravity knife.

Clearly jurors were trying to determine who to believe – Richard Bacquie or the police. Finally, when the condition of the knife was altered through no fault of those present in the courtroom, the trial court instructed jurors “right now we have no way of

knowing the actual condition of the knife at the time it was recovered from the defendant.”

By examining the knife without someone else present, defense counsel placed himself in a position where he alone had exculpatory information as to the condition of the knife when it was recovered by police. Because he failed to take another person with him, especially the expert, during the pre-trial inspection of the evidence, counsel made himself the sole witness as to the sharply disputed fact of the condition of the knife – whether it was a gravity knife when it was recovered from Bacquie, or if police altered the knife in order to cause it to function in a way for which it was never designed. This was made even more important in light of counsel’s stipulation that the evidence bag was sealed when he inspected the knife.

But this was never presented to the jury because trial counsel could not call himself as a witness at his own trial. He could not make himself an unsworn witness even if he tried. His status as a fact witness only came to light in an entirely unforeseen way during jury deliberations.

Counsel’s failure to either have the expert, or anyone else, accompany him to the pre-trial inspection, or to ask to be relieved so he could testify about this contested issue was objectively unreasonable and a clear violation of the Rules of Professional Conduct. There was no legitimate strategic or tactical reason for this failure.

Moreover, this failure demonstrably prejudiced Bacquie. Because the firearms charge has been reversed and dismissed, the only charge for which Bacquie stands convicted is the charge related to possession of the knife. Moreover, Bacquie had no one to corroborate his testimony as to the actual condition of the knife as of July 4, 2013, the date of his arrest, as opposed to the condition of the knife at trial almost three years later. On the other hand, the police officers' testimony corroborated each other on the same issue.

Because trial counsel failed to offer the exculpatory evidence that only he possessed, it was Bacquie's word against three NYPD officers. Bacquie was deprived of the one witness who would have corroborated his testimony on the issue that determined his credibility. Accordingly, he received ineffective assistance.

This Court has never before been called upon to determine whether a lawyer who alone possesses exculpatory information renders ineffective assistance in failing to seek to either give testimony or to be relieved in order to be able to give testimony that would exculpate their own client. This case provides this Court with this exact opportunity to further define the contours of the Sixth Amendment right to effective assistance of counsel.

II. REVIEW IS NECESSARY TO DETERMINE WHETHER THE SIXTH AMENDMENT'S SPEEDY TRIAL GUARANTEE PERMITS THE PROSECUTION TO IMPOSE A THREE-YEAR DELAY IN BRINGING A GARDEN-VARIETY, NON-COMPLEX STREET CRIME FELONY CASE TO TRIAL WHERE THE DELAY ACTUALLY PREJUDICES THE DEFENDANT

The Speedy Trial clause of the Sixth Amendment states that “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...”

The evils at which the [Speedy Trial] Clause is directed are readily identified. It is intended to spare an accused those penalties and disabilities - incompatible with the presumption of innocence - that may spring from delay in the criminal process. The Court recognized in United States v. Ewell, 383 U.S. 116, 120, (1966), that the speedy-trial right ‘is an important safeguard to prevent undue and oppressive incarceration prior to trial.’ We also recognized in Ewell that a speedy trial is intended ‘to minimize anxiety and concern accompanying public accusation.’

Dickey v. Florida, 398 U.S. 30, 41 (1970) (Brennan, J., concurring).

The right to a speedy trial is “one of the most basic rights preserved by our Constitution,” and is enforceable against the states through the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). In addition, the New York Court of Appeals has long held that, under the New York Constitution, “unreasonable delay in prosecuting a Defendant-Appellant constitutes a denial of due process of law.” People v. Singer, 44 N.Y.2d 241, 253, 376 N.E.2d 179 (N.Y. 1978) (quoting People v. Staley, 41 N.Y.2d 789, 791, 364 N.E.2d 1111 (N.Y. 1977)). Where, as here, a constitutional speedy trial violation is established, the charges must be dismissed with prejudice. See Strunk v. United States, 412 U.S. 434, 440 (1973).

In Barker v. Wingo, 407 U.S. 514 (1972), this Court adopted a four-part balancing test to determine whether a defendant’s Sixth Amendment right to a speedy trial has been violated in a pending criminal prosecution:

- (1) length of delay,
- (2) the reason for the delay,
- (3) defendant’s assertion of his right,
- and
- (4) prejudice to defendant

Id. at 530.

This Court further held that “none of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.* at 533. “[B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. *Barker*, *supra* at 530-531 (emphasis added).

Here, neither the trial court nor the appellate court gave any treatment to Bacquie’s Constitutional Speedy Trial claim. As is the norm in New York City court practice, the focus was on the calculation of the statutory “readiness” statute, New York Criminal Procedure Law § 30.30. CPL § 30.30 is not a speedy trial statute; rather, it is a statutory framework that provides a criminal defendant with a statutory right to seek dismissal if the prosecution fails to announce “ready” for trial within a certain time period. Under the statutory framework, certain periods of time are counted towards the goal of six months of “chargeable” time for a felony case, while certain periods of time are excludable. New York jurisprudence is equally clear that CPL § 30.30 is not an embodiment of the Sixth Amendment right; it is a statutory right that exists

independently. See People v. Anderson, 66 N.Y.2d 529, 535, 488 N.E.2d 1231 (N.Y. 1985). Rather, two other statutory provisions, CPL § 30.20, and New York Civil Rights Law § 12, codify the Federal Constitutional guarantee.

The caselaw in New York jurisprudence on CPL § 30.30 litigation is extraordinarily extensive, and as every practitioner knows, encourages much gamesmanship on both sides. When the prosecution is ready, the defense announces they are not ready in order to draw an adjournment, at which the next time the prosecution may announce not ready, and the defense may accumulate more chargeable time towards the magic goal of six months total. When the prosecution is not ready, they request an extremely short adjournment, knowing full well that the New York courts, congested as they are, are highly unlikely to honor the short request; however, the prosecutors, well-versed in CPL § 30.30 jurisprudence, know full well that if they request only a two-day continuance, they will only get charged for two days, rather than the customary thirty-day continuance to a free date on the court's calendar.

This case illustrates how far removed the theory behind CPL § 30.30 is from reality. In theory, CPL § 30.30 is intended to force the prosecution to move cases to trial faster to prevent a violation of a Constitutional right to a speedy trial. In practice, however, the current application of CPL § 30.30 promotes the exact kind of gamesmanship that

resulted in a garden variety weapon possession case taking almost three years to be brought to trial.

Moreover, the prejudice to Bacquie was palpable. In addition to being forced to defend against these charges for an inordinate length of time, because the case took almost three years to get to trial, he was unable to find a key witness, a fact established by his testimony and the testimony of other witnesses.

The fact that both the trial court and the appellate court completely ignored the Defendant's Sixth Amendment claim establishes that the Sixth Amendment right to a speedy trial simply does not exist in the State of New York. The state courts have completely ignored this Court's mandate in Barker v. Wingo, focusing instead on a statutory framework independent of the Constitution that fails to protect criminal defendants' speedy trial rights.

The New York courts continue to decide an important federal question in a way that conflicts with relevant decisions of this Court. Accordingly, this Court should review this case to re-establish the supremacy of the United States Constitution over the statutes of the State of New York.

III. REVIEW IS NECESSARY TO DETERMINE WHETHER A PROSECUTOR WHO REPEATEDLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT, DESPITE BEING REPEATEDLY TOLD TO REFRAIN FROM SUCH CONDUCT BY THE TRIAL COURT, REPEATEDLY INJECTS THEIR OWN PERSONAL BELIEFS AS TO A DEFENDANT'S GUILT, AND IMPROPERLY CROSS-EXAMINES A DEFENDANT AND DEFENSE WITNESS TO ELICIT WHETHER PROSECUTION WITNESSES WERE LYING IN THEIR TESTIMONY, VIOLATES A DEFENDANT'S DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL

This Court has recognized that prosecutors have a special duty under the United States Constitution to ensure a fair trial. In Strickler v. Greene, 527 U.S. 263, 281 (1999), this Court described the special role “played by the American prosecutor in the search for truth in criminal trials.” Id.

[The prosecutor] 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. As such, he is in a peculiar and

very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He 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. It is as much his 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 v. United States, 295 U.S. 78, 88 (1935).

Where a prosecutor engages in misconduct in order to secure a conviction, a defendant's Due Process right to a fundamentally fair trial is violated, requiring reversal of the conviction. See Tankleff v. Senkowski, 135 F.3d 235 (2d. Cir. 1998). The Circuits have condemned various instances of prosecutorial misconduct. See Government of the Virgin Islands v. Mills, 821 F.3d 448 (3d Cir. 2016) (prosecutorial misconduct to argue that that jurors' safety depended upon convicting defendant and to suggest that gun discarded by defendant would endanger schoolchildren and the community); Bedford v. Collins, 567 F.3d 225, 234 (6th Cir. 2009) (prosecutorial misconduct to invite the jurors to place themselves in the victim's shoes, and to urge jurors to identify individually with the victims with comments

like ‘it could have been you’ the defendant killed or ‘it could have been your children,’); United States v. Cannon, 88 F.3d 1495, 1501–02 (8th Cir. 1996), abrogated on other grounds by Watson v. United States, 552 U.S. 74, 128 S.Ct. 579, 586, 169 L.Ed.2d 472 (2007) (prosecutorial misconduct to engage in name-calling against the defendants, labelling them as "bad people"); United States v. Morris, 568 F.2d 396 (5th Cir. 1978) (misconduct for prosecutor to insert their personal beliefs of the defendant's guilt, to express personal opinions as to credibility of witnesses, to argue that the government would not have prosecuted unless the defendant was actually guilty, or to imply that there was additional evidence not presented that supports a finding of guilt); United States v. Carr, 424 F.3d 213 (2d. Cir. 2005) (prosecutorial misconduct to express personal opinions as the truthfulness of a witness or the guilt of the defendant).

Here, the prosecutor engaged in a repeated, persistent, and widespread pattern of misconduct in his opening statement, in his cross-examination of defense witnesses, and most especially during his summation. The prosecutor expressed a personal opinion as to the guilt and truthfulness of Bacquie, repeatedly called him a liar, and impermissibly shifted the burden of proof on numerous occasions, despite being admonished by the trial court several times to refrain from such conduct. As a result, the cumulative effect of those errors deprived Bacquie of a fundamentally fair trial, necessitating reversal.

A prosecutor who wishes to argue in summation that the government's evidence has been largely uncontradicted must walk a fine line...On the other hand, she must avoid commenting in a way that trenches on the defendant's constitutional rights and privileges. For example, she may not permissibly comment on the failure of the defendant to testify, or invite the jury to "presume" in the absence of countervailing evidence that the government's view of the case is correct, or suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatever.

United States v. Parker, 903 F.2d 91, 98 (2d. Cir. 1991); citing United States v. Gotchis, 803 F.2d 74, 81 (2d. Cir. 1986); United States v. Walker, 835 F.2d 983, 988-89 (2d. Cir. 1987); United States v. Cruz, 797 F.2d 90, 93 (2d. Cir. 1986); United States v. Pena, 793 F.2d 486, 491 (2d Cir. 1986).

Here, the prosecutor impermissibly shifted the burden of proof throughout the trial. The prosecutor attempted to shift the burden not only during summation but during Bacquie's cross-examination. The prosecutor stated that the police officers did not

bring up the Internal Affairs investigation, implying that Bacquie was lying as a result, drawing a sustained objection and a curative instruction that Bacquie had no burden of proof. The prosecutor also questioned Bacquie about his purported failure to give his attorney information regarding the believed owner of the gun, prompting repeated sustained objections. The prosecutor then stated, rather than asked, to Defendant-Appellant that in making a report to Internal Affairs, “anybody else would say they had no clue where that gun came from,” again drawing a sustained objection.

Further, the prosecutor engaged in further misconduct by injecting his personal opinions as to the credibility of witnesses and Bacquie, and the evidence of guilt. Here, the pattern of misconduct began during the opening statement, in which the prosecutor argued:

Now, members of the jury, after hearing all what I just explained to you, hearing from the multiple experts, the DNA experts, I believe that you will find this defendant guilty beyond a reasonable doubt.

MR. DIDIO: Objection as to what he believes.

THE COURT: Sustained as to that.

MR. BARKOFF: I believe after hearing all of that evidence you will find the

defendant guilty beyond a reasonable doubt.

MR. DIDIO: Objection as to what he believes.

THE COURT: Sustained.

...

I am confident that at the end of this case, you'll find the only verdict that is consistent with the law, that is consistent with the evidence and that is consistent with your common sense and that is consistent with justice and that is guilty of all counts.

MR. DIDIO: Objection as to justice.

THE COURT: Sustained as to justice.

(App. 83-84).

The misconduct continued during the prosecutor's cross-examination of Bacquie when he was repeatedly asked whether two defense witnesses lied during their testimony and whether the police officers lied during their testimony. He further asked Bacquie whether he took the law into his own hands when work lockers were broken into, and why he had failed to call police, again prompting sustained objections.

The prosecutor also injected his own personal opinion of Bacquie's truthfulness, asking:

Q: Throughout this whole trial, this case -- withdrawn. Let's talk more about that phone call because **I think there are some things that are very telling in that phone call.**

MR. DIDIO: Objection to what counsel thinks.

THE COURT: Sustained.

(App. 84-85).

Q: So, you are telling me that when you had internal affairs on the phone and you had an opportunity to tell them about any misconduct that this police officer might have done, any misconduct, you had an opportunity to do that and you left out the part about the police just coming in your car and searching your car while you're sitting in there? You left out that part?

A: Excuse me. I'm not being rude to you. There is no reason for you to yell at me.

Q: You know what, because you are not being honest.

A: I am being honest.

MR. DIDIO: Objection.

THE COURT: Sustained. Sustained.

(App. 85).

Throughout his summation, the prosecutor referred to Bacquie's testimony as his "story" no less than six (6) times, each time drawing a sustained objection. The prosecutor further presented his own personal beliefs that the gun belonged to Bacquie, not the other individual, and that during his call to Internal Affairs, Bacquie did not admit to possession of the gun because "that would be essentially pleading guilty to the charges." The repeated instances of prosecutorial misconduct so infected the trial as to render it fundamentally unfair.

The issue of prosecutorial misconduct arises in a surprisingly high number of criminal cases in each of the State courts and all of the Federal Circuit Courts of Appeals. What does, or does not, qualify as reversible error varies widely from case to case, from State to State, or from Circuit to Circuit.

This case presents this Court with the opportunity to define what is, and what is not, appropriate conduct for an American prosecutor under the Due Process clauses of the Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons set forth above, this Court should grant this petition and review all three claims presented by the Petitioner.

Respectfully submitted on this 15th day of May,
2018.

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