

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM : PART 4

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

- against-

:Indict no.
2585/96

JABBAR WASHINGTON, :

Defendant. :

-----X

320 Jay Street
Brooklyn, New York
July 12, 2017

B E F O R E :

HONORABLE MATTHEW J. D'EMIC,
Justice

A P P E A R A N C E S :

OFFICE OF ERIC GONZALEZ, ESQ.
DISTRICT ATTORNEY, KINGS COUNTY
350 Jay Street
Brooklyn, N.Y. 11201
BY: MARK HALE, ESQ.
Assistant District Attorney

THE LAW OFFICE OF RONALD L. KUBY
Attorney for the Defendant
119 West 23rd Street, Suite 900
New York, N.Y. 10011
BY: RONALD KUBY, ESQ.

JOYCE MANZA
SENIOR COURT REPORTER

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1 THE CLERK: This is number ten on the Part Four
2 calendar, indictment 2585 of 1996, People of the State of
3 New York versus Jabbar Washington.

4 Appearances, please.

5 MR. KUBY: Ronald Kuby, K-U-B-Y, 119 West
6 23rd Street, New York, New York, Twitter @occupyKuby, for
7 the defendant Jabbar Washington.

8 Good afternoon, Judge.

9 THE COURT: Good afternoon.

10 MR. HALE: Office of the District Attorney by Mark
11 Hale.

12 Good afternoon, Judge.

13 THE COURT: Good afternoon. Yes.

14 MR. KUBY: Pursuant to discussions with the Office
15 of the District Attorney, I am making an oral motion
16 pursuant to 440.10, subsection one, subsections C, D and
17 G, to vacate the judgment of conviction. According to my
18 discussion with both Mr. Hale and District Attorney
19 Gonzalez, they will be joining the motion insofar as
20 section -- sub-subsection D applies.

21 MR. HALE: That is correct, Your Honor.

22 Mr. Gonzalez, the acting District Attorney, has
23 authorized me to join in that motion as to subsection 1D,
24 alleging a constitutional violation, which deprived
25 Mr. Washington of his due process rights, and resulted in

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1 a wrongful conviction.

2 If I may, Your Honor, state the reasons.

3 THE COURT: Yes.

4 MR. HALE: Jabbar Washington was accused, arrested
5 for and convicted of felony murder for the January 1995
6 push-in burglary/robbery by a group of heavily armed and
7 masked men of an apartment in Brownsville, Brooklyn, from
8 which crack cocaine was sold and consumed. In the course
9 of the robbery, at least two of the armed assailants
10 opened fire on the apartment's occupants, wounding five,
11 one of them fatally, a man by the name of Ronald Ellis.

12 Six other individuals, in addition to
13 Mr. Washington, were also arrested, as part of the group
14 of assailants, all of whom were convicted by jury verdict
15 or guilty plea of the robbery shooting and have served or
16 are still serving custodial sentences. With reference to
17 the other individuals, the Conviction Review Unit sees no
18 reason to disturb their respective convictions.

19 This one with Mr. Washington, being unique in its
20 facts, however, with regard to Mr. Washington, the
21 Conviction Review Unit has uncovered gross due process
22 violations, which mandate vacatur of the conviction, a
23 recommendation in which Mr. Gonzalez joined and will now
24 move to vacate the conviction.

25 First and foremost the violations consist of

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1 non-disclosure of critical Brady information. When the
2 arrest of Mr. Washington was authorized, the evidence
3 against Mr. Washington purportedly consisted of a
4 confessional statement to Detective Louis Scarcella and
5 his partner who were working on the case because the
6 assigned detectives were otherwise unavailable. And a
7 positive lineup hit by one of the victims of the crime, a
8 woman by the name of Lisa Todd. The lineup also being
9 conducted by Detectives Scarcella and Chmil, his partner.

10 At the Grand Jury, which occurred two days after the
11 arrest and the lineup, Ms. Todd appeared for her
12 testimony. At that time she disputed the detectives'
13 account of the lineup, which was conducted again two days
14 before, saying that she had never identified
15 Mr. Washington as a perpetrator, but just someone that
16 she knew from the building.

17 The Grand Jury Assistant made note of the
18 recantation, Ms. Todd did not testify at that time to
19 identify Mr. Washington as a perpetrator and, in fact,
20 never did throughout the course of this prosecution.

21 The Grand Jury assistant, as I said, made note of
22 that, but never-the-less -- and this note was made on
23 what's called the Grand Jury Synopses Sheet.
24 Never-the-less, that Grand Jury Assistant also filled out
25 the notice of identification and the voluntarily

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1 disclosure form, again noting that there was no Brady
2 material, despite the fact that this recantation had been
3 made.

4 Furthermore, in the motions that were filed by the
5 defendant in this case, in answer to those motions, the
6 People again answered that there was no known Brady
7 material, again, not disclosing that Ms. Todd, you know,
8 would not, could not and never would identify
9 Mr. Washington as a perpetrator, of which they had that
10 information at that time.

11 There was no mention at all of the disputed nature
12 of what the witness that identified the defendant as
13 being and doing, made no mention at all about the
14 notation and never turned it over. The People see this
15 and CRU saw this as an intentional withholding of that
16 particular information to put the defense at a
17 disadvantage in terms of the trial. There was no
18 reasonable explanation for withholding that information
19 at that time.

20 Never-the-less, the People again proceeded through a
21 pretrial hearing, which was ordered by the Court, a
22 pretrial Wade hearing, in which only the detectives
23 testified, the witness was not called to testify, again
24 alleging that this lineup procedure had occurred, without
25 resolving the dispute about what was actually said.

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1 It's the People's position, CRU believes that had
2 this disclosure been made, then the testimony concerning
3 the lineup identification would have either been
4 suppressed or precluded or the People would have
5 withdrawn their notice and probably what they should have
6 done. That again was not done.

7 Not only did the defendant, without that
8 information, was forced or compelled to use time and
9 energy conducting an unnecessary hearing, but it also
10 severely prejudiced, in CRU's view, their preparation for
11 the trial that was to come.

12 Now, the prosecution at trial went further by
13 questioning Ms. Todd in her direct examination as if she
14 were an identifying witness. In other words, they went
15 through all of the procedures and steps that led up to
16 the lineup, asking her about whether she went to the
17 precinct, how she was contacted to go to the precinct,
18 where she stayed at the precinct, what it was she was
19 instructed to do in terms of looking at the lineup, what
20 she saw in the lineup, six individuals holding numbers,
21 and finally elicited from her that she did, in fact,
22 recognize somebody in the lineup. This was done without
23 explanation at all as to the fact that she did not
24 identify him as a non-perpetrator. It was left up to
25 cross examination and the defense attorney asking

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1 Ms. Todd, "Are you saying that this fellow was a
2 perpetrator in the crime," and to which she said, "No."
3 To which she said, "No."

4 It's CRU's opinion that this examination was
5 intended to give the impression, to imply to the jury to
6 do, in a backdoor sort of way, the impression that she
7 had, in fact, made an identification of the defendant as
8 a perpetrator in the lineup. And, in fact, getting in
9 indirectly what they could not do directly.

10 And the law is very clear about that, that if
11 there's not going to be an in-court identification, then
12 there's no reason to be able to imply that there was an
13 out-of-court identification.

14 The People vouch for their witness's truth telling.
15 If she said he was not a perpetrator in the crime, that's
16 over and done with.

17 It is the opinion of CRU that this was done
18 intentionally to give that impression to the jury to get
19 evidence in which would not otherwise be admissible.

20 Same thing occurred during the questioning of
21 Detective Scarcella. On direct examination again,
22 Detective Scarcella was led through all the steps of
23 setting up the lineup, even though at this point this
24 testimony is completely irrelevant.

25 Now, defense counsel at trial did not make

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1 objections to any of this material coming in, but again,
2 it set up the whole thing. What did you do, Detective
3 Scarcella? We then gathered fillers, we gave the
4 defendant his choice of where to sit in the lineup. We
5 assigned the numbers in the lineup. This is what we
6 asked the witness, everything except eliciting the actual
7 identification.

8 And again, the defendant, not having the information
9 about where and when Ms. Todd had refuted or recanted her
10 identification, was not able to examine, to judge the
11 credibility of Detective Scarcella. Again, this was
12 setting up, again, getting in this evidence indirectly
13 which they could not do directly. And CRU believes
14 intentionally so.

15 It also set up an error that came thereafter. When
16 Detective Scarcella was being cross-examined by defense
17 counsel, he was asked, "Was getting a confession of
18 particular importance in this case?" Now that question
19 calls for a yes or no answer. Scarcella answered, and
20 not entirely responsively, and CRU believes
21 intentionally, "If he didn't get ID'd, it would have."
22 Again, received without objection. The Court, having
23 ruled that the defendant opened the door by this
24 statement. CRU does not necessarily agree because the
25 statement appears to be nonresponsive to the question.

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1 And again, CRU believes that this was intentionally
2 and improperly done to inject what Detective Scarcella
3 believed that the witness's testimony should have been or
4 what he comported with. But, as you know, the law
5 requires that the prosecution and the police can't have
6 it both ways. They can't have it both ways.

7 You can't put a witness on the stand who you vouch
8 for as testifying credibly and truthfully, who says that
9 she did not identify him as a perpetrator and then bring
10 up that she did, in fact, identify him as a perpetrator.
11 You simply can't have it both ways.

12 Now, this was compounded by the Court at that time
13 making, what the People believed, to be a very egregious
14 error. He took over the questioning at that point in
15 time and actually asked Detective Scarcella to read the
16 notes of what it was purported that Ms. Todd had said
17 during the lineup, to the effect that the defendant,
18 number three he was holding in the lineup, he was one of
19 the perpetrators, he had a gun, he spoke during the
20 robbery. And so -- and he did so doing that and failed
21 to give any instruction as how the jury was to consider
22 this evidence. Clearly the jury could not consider it as
23 evidence in chief that she had, in fact, made an
24 identification.

25 They should have -- and it was not requested, there

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1 was no objection to it. The Court should have instructed
2 the jury that they could only use, in terms of judging
3 the credibility of the witness, both the witness on the
4 stand Scarcella and the witness testifying Ms. Todd,
5 about who they were talking about. Because they did not
6 have this instruction, there is a very real possibility,
7 that CRU cannot dispute, that the jury used this as
8 evidence in chief that she had, in fact, made an
9 identification of the defendant as a perpetrator and that
10 that contributed to his conviction, in addition to the
11 other inculpatory evidence.

12 Now, the only inculpatory evidence really at the
13 trial was, in fact, the defendant's statement. The
14 defense at trial -- and the defendant took the stand --
15 was that the detective had fed him the information in the
16 statement, had coerced him to make the statement, that
17 Miranda came late, if at all, and that these were not his
18 words, that he was, in fact, innocent. And that really
19 becomes the key point on which the People are moving to
20 vacate or are joining in the motion to vacate this
21 particular conviction.

22 Because that key was the credibility of the
23 detectives who worked on the case, in terms of their
24 saying yes, he made this inculpatory statement, which was
25 contested. Without resolving this issue as to what it

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1 was or what was not said by Ms. Todd during the lineup,
2 the jury again, could not adequately assess the
3 credibility of the detective.

4 In other words, if Ms. Todd -- if that testimony had
5 been developed, once the door was opened, or if it had
6 chosen to be gone through by the defense attorney, that
7 Ms. Todd had said, hey, Detective Scarcella put those
8 words in my mouth or those are not my words, he entirely
9 fabricated it, I just identified him as an individual
10 that I knew and not as a perpetrator, then that would
11 have perhaps dovetailed with the defense that, in fact,
12 the defendant was saying that Detective Scarcella had
13 fabricated his statement, had put words in his mouth.
14 But this was left unresolved during the course of the
15 trial.

16 There were other violations, which did occur during
17 the course of the trial, which would mandate vacatur,
18 despite this issue about the lineup and the contested
19 nature of it.

20 During the cross examination of the defendant -- as
21 I mentioned, the defendant took the stand. The trial
22 prosecutor made a clear Bruton violation by asking the
23 defendant whether he was told by the interviewing
24 detectives that one of the codefendants had given him up
25 or had included him in the robbery/burglary. Clearly

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1 that was improper, would have mandated reversal on its
2 own.

3 The prosecutor went further again, another statement
4 was made during the course of the trial, another question
5 that was put by the prosecutor to Mr. Washington was,
6 "Can you think of a reason why Lisa Todd would frame you
7 for this particular crime for murder?" And, in fact,
8 Lisa Todd had not done so. Had not done so. There was
9 no good faith basis for asking him that question. It was
10 highly prejudicial. That, in and of itself, we believe,
11 would have mandated reversal. Again, these questions
12 were not objected to, they were not preserved for appeal.

13 The prosecutor went further asking the defendant
14 whether he was told, during the course of his
15 interrogation, about each and every one of the other
16 codefendants, whether he was told that they had been
17 convicted for the crime. Again, wholly improper.

18 Now, looking at those statements, the
19 cross-examining questions, either singularly or all
20 together, CRU believes that that would have been enough
21 to mandate vacatur of this conviction. There's a lot
22 of -- perhaps blame is maybe the wrong word, but
23 responsibility that goes around on that. Certainly past
24 the prosecutor asking the questions, it also goes to the
25 defense attorney not objecting to those questions, it

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1 goes to the Court not intervening concerning those
2 questions, which were obviously impermissible, and the
3 appellate attorney not raising those as part of the
4 appeal process.

5 Therefore, in his appeal, Mr. Washington, whose
6 appellate attorney only cited summation errors made by
7 the prosecutor, did not really get to the heart of a lot
8 of things which would have mandated reversal.

9 But the central issue really is this credibility
10 question with regard to Ms. Todd. CRU believes that the
11 defense attorney, while he did not do a great job in
12 combating what was prosecutorial misconduct by the trial
13 prosecutor, also was not equipped with the Brady
14 material, which pretrial, could have obviated all of this
15 by having a motion in limine to preclude any mention
16 about a lineup whatsoever and a identification
17 whatsoever. And this he failed to do.

18 The problem then becomes, since this is the basis of
19 our vacatur, is a what to do with the remainder of the
20 indictment. It is the position of CRU and the
21 recommendations of the District Attorney Mr. Gonzalez
22 that we cannot perpetuate her testimony, the testimony of
23 Ms. Todd because she's now deceased. She herself was the
24 victim of a homicide in 2006. Since this question would
25 be irresolved at the time as to what was said during this

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1 lineup identification and is now irresolvable at the time
2 of, since her demise, then we cannot retry Mr. Washington
3 in a way which comports with due process and the right to
4 confrontation on this particular question.

5 So in that regard, Your Honor, the People not only
6 acquiesce to the vacatur of the conviction under the
7 subsection that was mentioned, we would also move to
8 dismiss the indictment, in the interest of justice, and
9 ask the Court to discharge the defendant.

10 THE COURT: Mr. Kuby.

11 MR. KUBY: If I may, and I will be brief, at least
12 brief for me. Last time Mr. Washington was in court on
13 April 14th, 1997, when then Justice Pincus, giving him a
14 sentence of 25 to life, said his parole officer quote
15 "hadn't been born yet." And that turned out to be sort
16 of the one true thing that was said to him in the course
17 of the trial.

18 We have spent a tremendous amount of time and energy
19 and ink and argument and papers over the role that
20 Detective Scarcella did or did not play in this case,
21 other cases. I just want to note, for clarity purposes,
22 the only person who said Lisa Todd identified Jabbar
23 Washington was Detective Scarcella.

24 Lisa Todd herself, the first time she was asked by
25 somebody who was not Louie Scarcella, and that was before

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1 her Grand Jury presentation in this case, Lisa Todd
2 herself said, "No, I never said that. I only knew him
3 from the building." Which of course she did because he
4 lived in the building.

5 You know, for purposes of this hearing, you know,
6 Detective Scarcella is like the Lieutenant William Calley
7 of the 1980s or 1990s of New York City policing, yeah, he
8 pulled the trigger, he fired the bullets, but other
9 people gave him the gun, they gave him the ammunition,
10 and they didn't much care who he hit.

11 And what's important in this case more than any of
12 the other cases I've worked on is that District Attorney
13 Gonzalez and the Conviction Review Unit and Mark Hale
14 have made it explicit that this conviction was the
15 process of an institutional failure. The Assistant
16 District Attorney Kyle Reeves was the principal villain
17 here and I duly note that he has been fumigated out of
18 K.C.D.A. sometime ago, but he wasn't the only one.

19 There were a total of six Assistant District
20 Attorneys who knew or should have known this. There were
21 at least two judges who knew it or should have known it
22 or should have made some inquiry, not to mention the
23 appellate court justices and just so I'm not leaving out
24 defense counsel, in all fairness.

25 It is true that defense counsel in this case

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1 blundered into a minefield without a map. A minefield
2 that had been laid by Detective Scarcella and A.D.A. Kyle
3 Reeves, but once the first mine went off, once the first
4 explosion occurred, defense counsel, instead of sort of
5 backing up, decided to plow right ahead. And in three
6 pages of utter cringe-worthy testimony, he probably did
7 more to hurt his client than any other single witness did
8 in the course of the case.

9 And the problem with institutional problems is they
10 need institutional solutions. And D.A. Thompson began
11 that process, that institutional process by creating a
12 real CRU, with real lawyers and real staffing and real
13 resources and District Attorney Gonzalez has continued
14 that. And has also helped to maintain a different
15 culture that I have not seen before.

16 About a year ago, a client -- I was working on a
17 case with him in the CRU. And he said to me, "Do you
18 trust D.A. Gonzalez?" And I said, "Well, do I trust him
19 to see things as I see them? No. But I do trust him
20 that if his unit finds a document, finds evidence, I
21 totally trust the fact that it will be turned over to
22 us." And indeed, it was.

23 And sort of the back story in this case is that one
24 little document, that little Grand Jury Synopses Sheet --
25 I never even heard of a Grand Jury Synopses Sheet -- way

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1 in the bottom of a box somewhere in one of those manila
2 folders, probably with a little coffee stain ring around
3 it, the way they get when you are looking at papers, that
4 one little document that nobody turned over to the
5 defense, was discovered by then Assistant District
6 Attorney Jessica Wilson, who promptly turned it over to
7 the defense. And while, as you have heard from Brother
8 Hale there were a lot of things wrong with this case from
9 beginning to end, it was that document that was sort of
10 the fulcrum on which the seesaw of justice moved and so I
11 commend them for doing that.

12 And I commend District Attorney Gonzalez for his
13 personal involvement in this case, not just the
14 institutional involvement, but his personal involvement
15 in expediting this case as fast as it could be expedited.

16 And, you know, we're on the cusp of Mr. Washington's
17 release and I know -- I know it is not an academy award
18 ceremony, I'm not, you know, thanking my mom and my dad,
19 but I just want to note that there are three people, none
20 of them have law degrees, none of them work for law
21 enforcement and none of them were journalists, who are
22 probably more responsible for the moment we are in now
23 than any other three people. And they were three people
24 who began their own innocence clinic project in prison.
25 Two of them are here today. They have both been

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1 exonerated, one by the D.A.'s Office, one by a judge.
2 Derrick Hamilton, Shabaka Shakur. Third, Danny Rincon,
3 who was not convicted here, but was convicted, who is
4 also a third member of that project.

5 And these were the three men who took the time and
6 the care and the energy, the people who had the fewest
7 resources, financially and educationally, were the ones
8 who began the unraveling of the Scarcella misconduct,
9 which led to so many other things.

10 So as Jabbar Washington will walk out of this
11 courtroom today, he does walk out on the shoulders of the
12 men who have worked so hard before him. And I certainly
13 join in Brother Hale's motion to dismiss the charges.

14 THE COURT: Anything else?

15 MR. HALE: That's it.

16 THE COURT: Okay. So then, based upon the record
17 made before me this afternoon, the motion to vacate the
18 judgment of conviction is granted.

19 And upon the People's further representation that
20 the constitutional violations cited today can no longer
21 be resolved and, therefore, the recommendation that the
22 indictment be dismissed in the interest of justice, based
23 upon that record, is granted.

24 MR. KUBY: Thank you, Judge.

25 If I could have Mr. Washington uncuffed.

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1 THE COURT: Could I talk to counsel for one second?

2 MR. KUBY: Yes, Judge.

3 (Whereupon, a discussion was held off the record.)

4 (Whereupon, the proceedings concluded.)

5 * * * * *

6 Certified to be a true and accurate transcript of the
7 foregoing proceedings.

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Joyce Manza

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JOYCE MANZA

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OFFICIAL COURT REPORTER

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