

STATE OF MARYLAND

v.

ALICIA WHITE

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE NO. 115141036

* * * * *
DEFENDANT ALICIA WHITE'S MOTION TO PRECLUDE INCONSISTENT
PROSECUTORIAL ARGUMENT DURING HER TRIAL

RECEIVED FOR RECORD
CIRCUIT COURT FOR
BALTIMORE CITY
2016 JAN 15 P 4:25
CRIMINAL DIVISION

NOW COMES, Defendant, Alicia White, by and through her attorneys; Ivan J. Bates, Esquire, Tony N. Garcia, Esquire, Mary M. Lloyd, Esquire, and Bates & Garcia, LLC, and hereby files this Motion to Preclude Inconsistent Prosecutorial Argument During Her Trial, and in support thereof states as follows:

Introduction

During the trial of Officer Porter, the State repeatedly referred to Officer Porter as a perjurer. Officer Porter testified in his own defense that he told Sergeant White that Freddie Gray needed help while Sergeant White was present at North Avenue and Pennsylvania Avenue. During closing argument, State's Attorney Michael Schatzow suggested to the jury that Officer Porter lied about telling Sergeant White that Freddie Gray needed medical assistance while Porter, White, and Gray were at North Avenue and Pennsylvania Avenue.

Defense counsel for Sergeant White now fears that the State may duplicitously try to credit Officer Porter's testimony in Sergeant White's trial in order to support the theory that Officer Porter did, in fact, tell Sergeant White that Freddie Gray needed help at North and Pennsylvania Avenue. Such an argument in Sergeant White's trial would clearly be inconsistent with the State's previous prosecutorial theory presented in Officer Porter's trial – that Officer Porter lied about

telling Sergeant White that Freddie Gray needed help at the intersection of North and Pennsylvania.

Argument

The Fifth Amendment of the United States Constitution, applied to the States through the Fourteenth Amendment, provides, “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. AMENDS. V, XIV. It is important to begin with the State’s fundamental interest in criminal prosecution: “not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935); see *United States v. Agurs*, 427 U.S. 97, 111 (1976). Although the prosecutor must prosecute with earnestness and vigor and “may strike hard blows, he is not at liberty to strike foul ones.” See *id.* The Due Process Clause requires conduct of a prosecutor that it does not require of other participants in the criminal justice system, such as the duty to “disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial” *United States v. Bagley*, 473 U.S. 667, 675 (1985). The due process requirement will cast into doubt a conviction obtained by a prosecutor’s knowing or reckless use of false testimony. *Napue v. Illinois*, 360 U.S. 264, 269, 272, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *United States v. Duke*, 50 F.3d 571, 577-78 & n. 4 (8th Cir.1995) (government has duty to serve and facilitate the truth-finding function of the courts).

In *Smith v. Goose*, 205 F.3d 1045 (8th Cir. 2000), *cert. denied*, *Gammon v. Smith*, 531 U.S. 985 (2000), the United States Court of Appeals for the Eighth Circuit addressed the issue of a prosecutor relying on two wholly inconsistent and irreconcilable statements made by the same witness. In the first of two trials in *Smith*, the prosecution relied on a statement by a witness that the victims were alive when they entered the house and that a colleague of the witness testifying had, in fact, killed the victims. *Smith*, 205 F.3d at 1048. In a subsequent trial of a different

defendant, the prosecutor relied on a different statement made by the same witness that the victims were dead when they arrived at the house. *Id.* “In short, what the State claimed to be true in [the first case] it rejected in [the second case], and vice versa. . . . This before/after distinction is the heart of the prosecutorial inconsistency that allowed the State to convict as many defendants as possible in a series of cases in which the question of timing was crucial.” *Smith*, 205 F.3d at 1050-1051. The court held that the actions of the State in this case “constituted foul blows ... that fatally infected Smith’s conviction,” and the court held that the use of inherently factually contradictory theories violates the principle of due process.” *Smith*, 205 F.3d at 1052.

In *Thompson v. Calderon*, a plurality of the Ninth Circuit held that the state of California violated a defendant’s due process rights by arguing at Thompson’s trial that he alone committed a murder, while arguing at a subsequent trial that another defendant actually committed the same murder. 120 F.3d 1045, 1058-59 (9th Cir.1997) (en banc), *vacated on other grounds*, 523 U.S. 538 (1998). After noting the fundamental duty of prosecutors “to vindicate the truth and to administer justice,” the court pointed out that the prosecutor in the second trial **“discredited the very evidence he had previously offered in Thompson’s trial.”** *Id.*

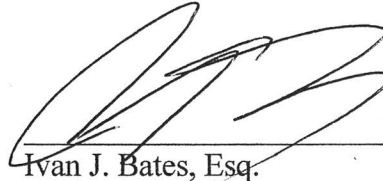
Precisely like the scenario addressed by the Eighth Circuit in *Smith v. Goose*, “what the State claimed to be true,” in Officer Porter’s case, i.e., Officer Porter lied about telling Sergeant White at North and Pennsylvania Avenue that Gray needed help, the State may “reject[]” this allegation of perjury¹ in Sergeant White’s case in order “to convict as many defendants of possible.” *Smith*, 205 F.3d at 1050-1051. This wholly inconsistent theory goes to the heart of the

¹ It is worth noting that of Court of Appeals has held that the State’s use of known perjured testimony would entitle Sergeant White to a new trial in a potential appeal. *See Strosnider v. Warden of Md. Penitentiary*, 228 Md. 663, 666 (1962).

State's case and would infect Sergeant White's case to a constitutional dimension. *See Thompson*, 120 F.3d 1045, 1058-59.

WHEREFORE, Defendant Alicia White, respectfully moves this Honorable Court to preclude inconsistent prosecutorial argument during her trial

Respectfully submitted,



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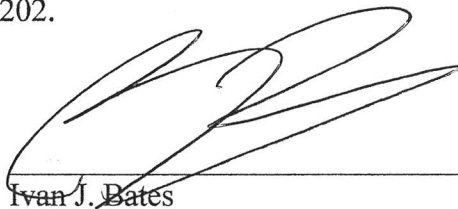
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January 2016, a copy of the foregoing Motion to Preclude was mailed to the Office of the State's Attorney for Baltimore City, 120 E. Baltimore Street, 9th Floor, Baltimore, Maryland 21202.



Ivan J. Bates