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April 21, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-46-19 State v. Damon Williams (083532),
Appellate Division Docket No. A-0517-17T4

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), kindly accept this letter brief on behalf of Amicus
Curiae American Civil Liberties Union of New Jersey.

TABLE OF CONTENTS

Preliminary Statement..... 1
Statement of Facts and Procedural History 2
Argument 2
I. Where prosecutors transgress well-established limits on closing
arguments, defendants cannot receive fair trials. 2
II. Demonstrative aids may be used in summation, but litigants cannot
display what they cannot say. 4
A. Demonstrative aids can effectively convey arguments. 4
B. A picture is worth a thousand words: where some of those
words are inappropriate, so too is the picture. 5

1. There are clear limits to what prosecutors can say during summation; those limits exists regardless of how the prosecutor communicates to the jury.6
2. In this case, it would have been clear error for the prosecutor to say what the picture conveyed.11

Conclusion13

Preliminary Statement

Defendant Damon Williams asks to have his fate decided by a jury based upon conduct proven beyond a reasonable doubt rather than by unfair comparison to a fictional murderer. His request is grounded in the well-established principle that a fair trial requires prosecutors to avoid unfair arguments. (Point I). Unfair argument usually takes the form of statements made by prosecutors; but the rules that our courts have established apply with equal force to images displayed to jurors to amplify their closing statements.

Advocates can utilize demonstrative aids during summation to help persuade the finder of fact. (Point II, A). Visual aids need not satisfy the rules for admissibility of evidence, but nor is their use boundless. As courts have frequently noted in the context of civil litigation, advocates cannot display what they cannot say. (Point II, B). In criminal trials, there exist well-established – if too frequently ignored – limits on prosecutorial argument. Those limits apply with equal or greater force to that which is conveyed through non-verbal communication. (Point II, B, 1).

In this case – in an attempt to convey the appropriate message that a threat can be found not only in the defendant's words, but also in his actions – the prosecutor inappropriately referenced a still photograph of an axe-murdering psychopath from popular culture. Because a verbal reference to a murderer would

not have been permitted in summation, this picture should also have been forbidden. (Point II, B, 2).

Statement of Facts and Procedural History

Amicus American Civil Liberties Union of New Jersey accepts the statement of facts and procedural history found in the unpublished Appellate Division opinion in this matter. *State v. Williams*, 2019 N.J. Super. Unpub. LEXIS 1925, 2019 WL 4492849 (App. Div. Sept. 19, 2019).

Argument

I. Where prosecutors transgress well-established limits on closing arguments, defendants cannot receive fair trials.

The unique role of prosecutors in our criminal justice system is “well-settled” as “New Jersey courts have commented repeatedly on the special role filled by those entrusted with the responsibility to represent the State in criminal matters[.]” *State v. Smith*, 212 N.J. 365, 402-03 (2012). “Those entrusted with the responsibility of representing the State at criminal prosecutions must never forget their fundamental obligation is not to convict but to see that justice is done.” *State v. Goode*, 278 N.J. Super. 85, 91-92 (App. Div. 1994). After all, “[i]f fairness and justice are forgotten in the pursuit of a guilty verdict, the integrity and authority of our criminal justice system is challenged.” *Id.*

During summation, prosecutors are “generally limited to commenting on the evidence and to drawing any reasonable inferences supported by the proofs[.]”

State v. Zola, 112 N.J. 384, 425-26 (1988); *see also State v. Bogen*, 13 N.J. 137, 140 (1953). That does not mean that prosecutors are “expected to present the State’s case in a manner appropriate to a lecture hall[.]” *State v. Johnson*, 31 N.J. 489, 510-11 (1960). Courts “expect that criminal trials will be conducted with[] some show of feeling.” *Id.* Still, in order to protect a defendant’s right to a fair trial, courts have established clear limits. And when courts “have found that the prosecutor in his summation overstepped the bounds of propriety and created a real danger of prejudice to the accused[,]” they “have not hesitated to reverse convictions.” *Id.* at 511. Prosecutors “may strike hard blows, [but] not . . . foul ones.” *State v. Feaster*, 156 N.J. 1, 59 (1998) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)).

As illustrated below, the limits on prosecutorial argument apply with equal force if the prosecutor speaks an argument or displays it.

II. Demonstrative aids may be used in summation, but litigants cannot display what they cannot say.

A. Demonstrative aids can effectively convey arguments.

For more than a half century, New Jersey courts have recognized that demonstrative aids can assist fact finders. In 1960, the Appellate Division explained that “anything which counsel has the right to argue as a legitimate interpretation of or inference from the evidence he is free, within the discretionary control of the trial court, to write upon the blackboard.” *Cross v. Robert E. Lamb, Inc.*, 60 N.J. Super. 53, 74-75 (App. Div. 1960). As technology has advanced, so too have visual aids. More recently, our courts have approved of the use of PowerPoint presentations to assist finders of fact. *State v. Rivera*, 437 N.J. Super. 434, 447-48 (App. Div. 2014).

Demonstrative aids serve as critical tools for lawyers, allowing them “[t]o clarify, to dramatize and to emphasize” critical evidence in a case. Mary Quinn Cooper, *The Use of Demonstrative Exhibits at Trial*, 34 *Tulsa L.J.* 567 (1999) (quoting Celia W. Childress, *Persuasive Delivery in the Courtroom* 619 (1995)). Skilled trial lawyers understand that jurors retain more information when they both hear it and see it than they do when they only hear it.

That is why, throughout the country, attorneys use visual demonstrative aids during summations. These images are not themselves evidence. *See, e.g., People v Anglin*, 178 A.D.3d 839, 841 (N.Y. App. Div. 2019). As a result, their use is not

bounded by the *Rules of Evidence*; but neither is it boundless. As the Nevada Supreme Court explained about PowerPoint, “as an advocate’s tool, [it] is not inherently good or bad[.]” *Watters v. State*, 313 P.3d 243, 247 (Nev. 2013). Ultimately “its propriety depends on content and application.” *Id.* Our courts have adopted the same approach, finding “that the content, not the medium, is important.” *Rivera*, 437 N.J. Super. at 448.

B. A picture is worth a thousand words: where some of those words are inappropriate, so too is the picture.

Because our courts use a “content, not medium” standard to evaluate visual aids, courts must first ask whether a prosecutor would be able to convey the same message verbally. “It may be a cliché, but it appears intuitively correct to reason that ‘[w]hat the ear may hear, the eye may see.’” *Dehanes v. Rothman*, 158 N.J. 90, 96 (1999) (quoting *Affett v. Milwaukee & Suburban Transport Corp.*, 106 N.W.2d 274, 280) (Wisc. 1960)). The converse, of course, is also true: what the ear may not hear, the eye may not see. *See Cross*, 60 N.J. Super. at 75 (“Conversely, what counsel may not argue, he may not write on the board.”).

The Texas Court of Criminal Appeals utilized the same standard in deciding that “[p]laying a video of a lion trying to eat a baby to argue for a high prison sentence in a simple robbery case was an improper use of a demonstrative aid[.]” *Milton v. State*, 572 S.W.3d 234, 244 (Tex. Crim. App. 2019). The court held that the analogy – though intended to convey a legitimate argument about

incapacitation – “improperly invited the jury to view Appellant’s crime and criminal history as more brutal than they were.” *Id.* Because the prosecutor could obviously not call the defendant a baby-hungry lion, he also could not depict him as one using a video.¹ The initial question, then, is not whether the prosecutor could use a particular demonstrative aid, but whether the prosecutor was entitled to express what the visual aid did.

1. There are clear limits to what prosecutors can say during summation; those limits exist regardless of how the prosecutor communicates to the jury.

Because “prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries[,]” they “are afforded considerable leeway in their closing arguments.” *Smith*, 167 N.J. at 177. But “a prosecutor must refrain from improper methods that result in a wrongful conviction[.]” *Id.* To that end, the Court has “articulated several principles with respect to the appropriateness of

¹ The prosecutor played a short – and, according to the prosecutor, “comical” – video clip that included the still photos depicted here. *Milton*, 572 S.W.3d at 236-37.



prosecutor's comments" during summation. *Id.* Notwithstanding clear guidance regarding what is permitted and what is forbidden, "instances of prosecutorial excesses . . . seem to come to [our appellate courts] with numbing frequency." *State v. Frost*, 158 N.J. 76, 88 (1999) (alterations in original, internal citations omitted). Indeed, an ACLU-NJ study of prosecutorial misconduct found that summation errors were by far the most frequent form of misconduct identified by courts, comprising more than seventy percent of total errors. ACLU-NJ, *Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey* 14 (2012).²

Although frequently ignored, courts have set the bounds of legitimate argument during summation. For example, in *State v. Frost*, this Court condemned a prosecutor's summation that suggested that defense counsel's closing arguments were "lawyer talk." 158 N.J. 76, 86 (1999). The Court made clear that "[a] prosecutor is not permitted to cast unjustified aspersions on defense counsel or the defense . . . [and] defense counsel should not be subjected to disparaging remarks for simply doing his or her job." *Id.*

² Available at http://www.aclu-nj.org/files/1413/4815/6876/ACLU-NJ_Proc_Cond_Color.pdf

Under the principle that counsel may not display that which they may not say, counsel would be precluded from displaying the below image³ to the jurors while explaining that although everyone is entitled to a defense, jurors need not credit it.



Similarly, in *State v. Gregg*, 278 N.J. Super 182 (App. Div. 1994), *certif. denied*, 140 N.J. 227 (1995), a death by auto case where the defendant was accused of being highly intoxicated, the Appellate Division criticized the prosecutor's closing statement. The panel explained that "[t]here was indeed very little of the summation that was not couched in terms of personal pejorative. . . . The prosecutor repeatedly resorted to name-calling . . . using a whole slang dictionary's worth of demeaning colloquialisms for an intoxicated person." *Id.* at 189. The

³ Saul Goodman was a fictional, and highly unethical, lawyer who helped drug dealer Walter White launder money in the television series *Breaking Bad*. Mr. Goodman's backstory was later featured in the show *Better Call Saul*.

court found plain error, just as it would have had the prosecutor eschewed name calling and instead displayed the below image.



In a case where a “defendant’s guilt depended entirely on which experts the jury believed,” *Smith*, 167 N.J. at 187, the Court reversed the defendant’s conviction because the prosecutor improperly described defense experts as “hired, paid consultants ... [who] charge hefty fees” and might “shade their testimony” in hopes of getting hired in the future. *Id.* at 184. The result would have been no different had the prosecutor simply displayed this image⁴ while discussing the defense experts’ testimony.



⁴ Rich Uncle Pennybags, also known as the Monopoly Man, or Mr. Monopoly, is a mascot for the Hasbro board game Monopoly. The single object of the game is to make as much money as possible.

As a final example, in *State v. Mathis*, the Court reversed a conviction because the State “suggested strongly . . . that defendant was in financial need, and hence was likely to commit a robbery.” 47 N.J. 455, 469-72 (1966). The Court similarly would not have permitted the prosecutor to display a picture of the fictional character Jean Valjean.⁵



Such a display would be impermissible, even if the prosecutor could legitimately argue to the jury that the act of breaking a windowpane could satisfy the element of force needed for a robbery. That is, even where an image serves a legitimate purpose, if it conveys more than is allowed, its use amounts to error. A picture is worth a thousand words: a prosecutor cannot find safe harbor in the fact that some of those words advance legitimate, permissible arguments. If the image *also* conveys impermissible themes to a jury, prosecutors cannot use it.

⁵ Jean Valjean is the protagonist of Victor Hugo’s novel *Les Misérables* that later became a Broadway musical and a Hollywood feature film. Valjean was sentenced to hard labor after breaking a window to steal a loaf bread to feed his sister’s starving children.

2. *In this case, it would have been clear error for the prosecutor to say what the picture conveyed.*

As a threshold matter, there is no doubt that the State was permitted to address the concept that threats can be both verbal and non-verbal. The problem here stemmed from how the State conveyed its message, not the topic of discussion. There are many ways to illustrate the legitimate point that “it’s not just the words; it’s what you do before and what you do after the words that matters.” 14T 245:7 to 19.⁶ The prosecutor here chose to use an iconic photograph of a character from *The Shining*, a Stanley Kubrick film based on a Stephen King novel.

The photograph depicted a scene of Jack Nicholson’s portrayal of the fictional character Jack Torrance, a struggling writer who takes on the role of a winter overseer at a Colorado hotel. As time passes in the deserted hotel, Jack begins to develop cabin fever, ultimately driving him to a murderous rage. The character, who is best remembered in popular culture for his attempt to murder his wife and son with an axe, displays several despicable character traits, even before he becomes gripped by psychosis. Throughout film, viewers learn that Jack has physically abused his son – dislocating his elbow in a fit of drunken rage – verbally abused his wife, and used vile racial slurs. As the film ends, in the scene

⁶ 14T refers to the trial transcript of March 29, 2017

memorialized in the photograph displayed by the prosecutor, Jack attempts to kill his family members who have barricaded themselves in a hotel room. Though his bid to murder his wife and son ultimately fails, Jack does kill another hotel employee who sought to intercede on the woman and boy's behalf.

Of all the possible ways the State could have conveyed the idea that threats can be non-verbal, the prosecutor chose to use a photograph of an abusive, racist, murderer. If a prosecutor made such a comparison verbally, courts would certainly intercede and forbid it. The State cannot seek refuge in the fact that it displayed its message rather than spoke it. Indeed, where attorneys deliver message verbally, they can ensure precision: they can tell the jury exactly what they mean and what they do not mean. On the other hand, when attorneys display a picture, they must take responsibility for all thousand words that the picture represents. So, here, where the prosecutor sought to use the photograph to demonstrate that threats can be non-verbal, she risked jurors thinking that she was equating Defendant with Jack Torrance, along with all his failings. Thus, although the State might not have intended to suggest that Defendant was a homicidal maniac, the clumsy use of the photograph risked raising than connection in the mind of jurors.

Conclusion

Demonstrative aids can help attorneys communicate to jurors (and judges), but they may only be used where they do not convey forbidden messages. When, as here, the message is not only inappropriate but incendiary, the prosecutorial error warrants reversal. For that reason, the Court should reverse the decision of the Appellate Division and remand for a new trial.

Respectfully submitted,



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