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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 55

DERRICK ULETT,

Appellant.

20 Eagle Street
Albany, New York
June 5, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 55, The People of the
3 State of New York v. Derrick Ulett.

4 MS. HULL: Good afternoon. May it please the
5 court, Leila Hull of Appellate Advocates for Mr. Ulett.

6 May I reserve two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may.

8 Ms. Hull, in this case, why isn't the testimony
9 of three eyewitnesses, two of whom knew the defendant, and
10 one who picked him out of a lineup, why isn't that enough
11 to overcome the failure to disclose the video?

12 MS. HULL: One of the witnesses that you - - -
13 you mentioned didn't see the shooting. That witness
14 becomes a potentially exculpatory witness, once you - - -
15 once you get to view the video, and the defense has an
16 opportunity to interpret it and present it to the jury.

17 The second witness, who's a stranger
18 identification, did not have a meaningful opportunity to
19 see the shooter. She saw the side and back view of
20 somebody for a split second or two seconds while she was
21 actually looking at the gun and running away. That's her
22 testimony.

23 And the final witness, who was the People's real
24 central witness in this case, presented several red flags.
25 He didn't come forward for ten months, and only did so when



1 he had - - - he was motivated to seek a benefit. And he
2 did get - - - while there's no formal cooperation
3 agreement, we do understand that he did get quite a
4 generous plea deal.

5 And while that information may have been in front
6 of the jury, what was not in front of the jury was a
7 recording of a shooting in progress, that laid bare a
8 series of events that was different than what their central
9 witness testified to and also showed that there was
10 potentially a different shooter. And that - - - in a case
11 like this, where you've got three witnesses, as you have
12 presented them, Your Honor, you need this kind of - - -
13 evidence to penetrate that kind of a case. Otherwise, all
14 you're doing is sort of, you know, playing around on the
15 periphery, and pointing out here and here and here of - - -
16 this type of video evidence is crucial in a case like this.
17 And that's why it's unquestionably material.

18 And it would have reframed the entire course of
19 the defense and also most likely - - -

20 JUDGE RIVERA: Because it would have supported a
21 theory that someone else is the shooter?

22 MS. HULL: Yes, it also would have given
23 additional avenues of investigation, a new eyewitness, and
24 even if they couldn't - - - find that witness, which we - - -
25 - we strongly dispute in our brief as - - - as - - - as the



1 - - - as not being possible. We think it very much could
2 be possible. They could also point out - - - the fact that
3 that witness exists, and the People haven't presented them,
4 especially when they - - - there are other eyewitness, the
5 stranger identification is such a poor one in terms of
6 their - - - a lack of a meaningful opportunity to - - -

7 CHIEF JUDGE DIFIORE: Is there any view of that
8 video that makes Cream something other than an eyewitness?

9 MS. HULL: I'm sorry. I don't understand the - -
10 - it makes - - - I - - - I mean, it raises some serious
11 questions about whether or not he's telling the truth, to
12 what extent does he have an involvement in this - - - in
13 this case. I mean, he does avoid the police at the time of
14 the shooting. He goes inside. He tells somebody that - -
15 - that the - - - the victim has been shot, but he then, you
16 know, kind of sneaks out of the building.

17 JUDGE RIVERA: But that's all in evidence.

18 MS. HULL: That's all in evidence, but what's not
19 in evidence is a video that says, you know, that shows why
20 he might have not be telling the truth. Something that is
21 concrete.

22 JUDGE FEINMAN: So - - - so that's how you're
23 going to use the video, to impeach Cream?

24 MS. HULL: Yes. That, in addition to he - - -
25 you know, when he's asked are there other people three



1 before the shooting, twelve minutes before the shooting, he
2 says, no, I don't remember, and no. And that - - - you
3 know, it's - - - it's - - -

4 JUDGE RIVERA: To show there are more lies and/or
5 to show that perhaps he's the shooter; is that what you
6 mean?

7 MS. HULL: Either one. You could show more lies.
8 You could show - - - you could show that he's potentially -
9 - -potentially involved. He may have a reason to be
10 concerned. But you also don't need to necessarily ascribe
11 a clear motive to Cream. You just need to demonstrate that
12 he isn't telling the truth.

13 And as the 440 court found - - - found this tape
14 could have done that, but for - - - but - - - but it - - -
15 it parsed the materiality of each aspect of this video.
16 And instead of considering them in their totality, as the
17 Supreme Court requires in Kyles, it simply said, you know,
18 here I don't agree, here I don't agree, and here I don't
19 agree. And that's the same analysis the People are
20 advancing, as well.

21 And I also think what is critical here is the - -
22 - the prosecutor's summation. If this wasn't material,
23 then I don't know why the prosecutor would have falsely
24 denied to the jury that it existed. Clearly the NYPD
25 thought it was important. They collected it. They made



1 stills of this video. They gave those stills to the
2 prosecutor. And the prosecutor had them in her trial file,
3 along with stills from a video they did put into evidence.
4 And to the extent that the People are also arguing that the
5 video doesn't show, you know, as much as we claim it is,
6 that, first of all, is belied by the actual 440 record here
7 - - -

8 JUDGE WILSON: Your argument doesn't depend on
9 bad faith by the prosecutor; is that right?

10 MS. HULL: No, because there's no bad faith
11 exception to Brady, and there's also no bad faith exception
12 for a summation misconduct, but it is the - - - the reality
13 of it is that the statement in summation was not correct,
14 and that was what the jury believed. The jury believed
15 there was no documentary evidence capable of challenging
16 the People's case.

17 JUDGE GARCIA: And we've said that statements
18 like that, misstatements, can enhance the prejudice to the
19 defendant in a materiality analysis, right?

20 MS. HULL: Yes, and with good reason.

21 And the - - - the concern here is that you've got
22 - - - you've got a case where it is - - - it looks
23 deceptively stronger than it is. And the suppressed video
24 of the shooting in progress really lays bare that it could
25 be a house of cards. And that's what the jury should have



1 been considering. The jury should have been debating
2 what's on that video; is it the People's theory or is it
3 the defense theory? But they never got a chance to do
4 that, and they were told it didn't exist. That, in its
5 totality, really requires reversal and a new trial in this
6 case.

7 Mr. Ulett is doing twenty-five to life in a case
8 where the jury didn't actually get to consider all of the
9 relative evidence.

10 And in - - - and the - - -

11 JUDGE RIVERA: Because the potential shooter, or
12 as you argue it, that one might view on this video, is
13 running in a different direction.

14 MS. HULL: Yes, that's exactly - - -

15 JUDGE RIVERA: And that - - - that's what it all
16 turns on, yeah?

17 MS. HULL: Yes.

18 JUDGE RIVERA: Yes, so - - -

19 MS. HULL: Yes, the alternative to shooter
20 theory.

21 JUDGE RIVERA: Right, so Cream could have been
22 wrong about the direction they were running in?

23 MS. HULL: I don't believe he - - - I think he -
24 - -

25 JUDGE RIVERA: Or anyone else could be wrong



1 about whatever direction they're running in?

2 MS. HULL: I believe Cream said he went in the
3 direction he came. So no, so I actually think it
4 contradicts directly Cream's testimony, if the shooter is
5 going - - -

6 JUDGE RIVERA: I'm sorry; I thought that's what I
7 said.

8 MS. HULL: Oh, I apologize.

9 JUDGE RIVERA: That it would - - - that it would
10 say it's not going in the direction he - - - the person's
11 not running in the direction Cream said he was running in.

12 MS. HULL: I get confused by double - - - double
13 negatives; I apologize. Yes, exactly, yes.

14 But - - -

15 JUDGE FAHEY: In some ways, it seems like we have
16 to determine whether the correct test was applied by the
17 trial court and in - - - in the 440 court in evaluating the
18 evidence. The way I understand it is - - - is, he ruled
19 that if the defense had the tape, the jury would have
20 returned a verdict that was more favorable to the
21 defendant.

22 And our test may be something different, which is
23 that - - - that there's a probability insufficient if it
24 had been turned over to undermine our confidence in the
25 outcome of the trial. And it's really, which test we're



1 applying here; isn't it?

2 MS. HULL: Yes, and I think the - - - well, the -
3 - - the second one is the test that the Supreme Court has
4 laid out in its - - -

5 JUDGE FAHEY: So you're saying that's the test,
6 and the test is not whether or not the jury would have - -
7 - returned a verdict that was more favorable to the
8 defendant?

9 MS. HULL: That's - - - Kyles said - - -

10 JUDGE FAHEY: So, okay.

11 MS. HULL: Yes.

12 JUDGE FAHEY: So tell me.

13 MS. HULL: Sorry.

14 JUDGE FAHEY: What's' the difference between
15 undermining the confidence of a - - - our confidence of a -
16 - - a verdict - - - in a verdict, and a verdict that's more
17 favorable - - - retuning a verdict more favorable to the
18 defendant?

19 MS. HULL: Where I think the suppressed evidence
20 would have reframed what the trial was really about.

21 JUDGE FAHEY: We - - - you mean by impeaching
22 Cream, who was one of the main identifiers?

23 MS. HULL: Impeaching Cream, providing an
24 alternate theory of who the shooter was - - -

25 JUDGE FAHEY: Well, it could have also identified



1 a possible witness too.

2 MS. HULL: And yes, exactly.

3 JUDGE FAHEY: Yeah, I see, okay.

4 MS. HULL: So if I - - - may I - - -

5 JUDGE FAHEY: Yeah, go ahead.

6 MS. HULL: So the - - -

7 JUDGE FAHEY: No, no, it's - - - to me, that's

8 the nub of the case. How do we apply this test?

9 MS. HULL: Absolutely. This case is about what
10 the test - - - what the test of materiality is and how does
11 it apply to these facts. I completely agree. And in this
12 case, what it does is, it means that the jury would have
13 been asking a whole host of different questions, and would
14 have been judging the People's evidence against a
15 recording, an objective piece of medical evidence. Also
16 being able to consider the ballistics evidence in a
17 completely new light.

18 All of that would have meant that the
19 deliberations most likely would have been different. The
20 complexion of the case would have changed. That is why you
21 can't feel confident - - -

22 JUDGE WILSON: Well, do you need - - - do you
23 need most likely would have been different, the deliberate
24 - - -

25 MS. HULL: Excuse me?



1 JUDGE WILSON: Do you need the deliberations most
2 likely would have been different, and what do you mean by
3 that?

4 MS. HULL: No, I don't mean, that most likely the
5 outcome would be different; that's not what I meant to say.
6 I apologize.

7 JUDGE WILSON: No, different - - -

8 MS. HULL: What I mean is, that the questions
9 that most - - - that most likely would have been raised in
10 the case would have been different. Because there - - -
11 everything that we are debating, the - - -

12 JUDGE RIVERA: The potential view of the
13 evidence.

14 MS. HULL: The potential view of the evidence.
15 But - - - and - - - and I think this case, the - - - the
16 litigation on appeal is illustrative of this. We would
17 have all been - - - everything that - - - that the
18 prosecutor and - - - and I are arguing about would have
19 been the trial. That would have been what everyone was
20 debating. But the - - - the factfinder should have been
21 the jury. And as much as I am very happy to be here, the
22 factfinder should be the jury on what - - - what the
23 outcome of - - - of the - - - of this debate would be.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MS. HULL: Thank you.



1 CHIEF JUDGE DIFIORE: Counsel?

2 MS. ROSS: Good afternoon, Your Honors. I'm Ruth
3 Ross for the Brooklyn DA's Office for the respondent.
4 There was no Brady violation in this case because the
5 inadvertently undisclosed low-resolution, overexposed - - -

6 JUDGE GARCIA: But counsel, you're not - - -

7 MS. ROSS: - - - surveillance video - - -

8 JUDGE GARCIA: I'm sorry. You're not - - -

9 MS. ROSS: - - - was not material.

10 JUDGE GARCIA: You're not - - - you're not
11 challenging the first two prongs of the Brady analysis,
12 right? That this was impeachment, at the least - - -

13 MS. ROSS: Absolutely.

14 JUDGE GARCIA: - - - and that it wasn't
15 disclosed. So all we're arguing - - -

16 MS. ROSS: All - - -

17 JUDGE GARCIA: - - - about here is - - -

18 MS. ROSS: The only issue in front of Your Honors
19 is the materiality.

20 JUDGE GARCIA: Okay.

21 MS. ROSS: And this is not simply a three-witness
22 case. This is three independent witnesses. One, who
23 actually saw the shooting and who knew the victim and the
24 defendant for his entire life. And not only that, he says
25 - - - Cream says, I was friends with the defendant till the



1 moment he shot Ruben.

2 JUDGE RIVERA: Well, and - - - and the argument
3 is that the video is additional evidence - - -

4 MS. ROSS: Well - - -

5 JUDGE RIVERA: - - - to undermine the veracity
6 and reliability of this witness.

7 MS. ROSS: There - - -

8 JUDGE RIVERA: So what are the other two
9 witnesses?

10 MS. ROSS: And so we're not just talking about
11 Mr. Cream, because - - -

12 JUDGE FEINMAN: We have to take more important -
13 - -

14 MS. ROSS: - - - we have an - - - a completely
15 disinterested witness, Coretta Bazemore, who also saw the
16 shooting, and identified the defendant from a photo array,
17 five hours after the shooting.

18 JUDGE WILSON: And then testifies - - -

19 MS. ROSS: She coincidentally happened to
20 identify the same person - - -

21 JUDGE WILSON: And then testifies at the trial -
22 - -

23 MS. ROSS: - - - that Cream did.

24 JUDGE WILSON: And then - - - and then testifies
25 - - - excuse me a second.



1 MS. ROSS: Sorry.

2 JUDGE WILSON: And then testifies at trial - - -

3 MS. ROSS: Yeah.

4 JUDGE WILSON: - - - that she may have been wrong
5 about her identification, no?

6 MS. ROSS: She - - - she was, I think, not
7 willing to contradict the attorney, but then she said on
8 redirect, could've been, but I don't think so. And we have
9 her testimony that she was, at most three car lengths away,
10 that she saw him, that she identified the gun. She
11 described the same outfit; she had him all in black, sort
12 of tallish.

13 But not just that, we have a third witness, who
14 also knew the - - - the defendant for his whole life, who
15 is completely unrelated - - -

16 JUDGE RIVERA: He didn't see the shooting.

17 MS. ROSS: He didn't see the shooting. But he
18 saw the defendant come down the street from his apartment
19 building - - -

20 JUDGE RIVERA: The defendant lives in the
21 neighborhood; what's unusual about that?

22 MS. ROSS: Yes, he turned the corner. He heard
23 the shots, and then he saw the defendant fleeing, tucking
24 something into his waistband. Mr. Courtney, who is that
25 third - - - that third witness, not an eyewitness to the



1 shooting - - -

2 JUDGE RIVERA: By why - - - why - - -

3 MS. ROSS: - - - but it's circumstantial - - -

4 JUDGE RIVERA: Excuse me. But why is counsel
5 wrong? Given that's the testimony. That the jury, with
6 the defense attorney having this video available, having
7 the opportunity to show this to the jury, to be able to
8 make these arguments, to try to undermine Cream further,
9 why - - - why isn't she correct that that might have made
10 the jury - - - or all you need is one juror - - - perhaps
11 look at that evidence differently? And that was not
12 available, because they didn't have this video.

13 MS. ROSS: The - - - the only question that we
14 have is, would it - - - is it material? Would it have - -
15 - is there a reasonable probability - - - not possibility,
16 but probability - - - that there would have been a
17 different outcome? And - - -

18 JUDGE FAHEY: That's really the question. Is
19 that the test? Or is it the test that it undermines our
20 confidence in the verdict?

21 MS. ROSS: Well, that's part of the definition,
22 the reasonable probability of a different outcome, is it
23 sufficient to undermine the confidence - - -

24 JUDGE FAHEY: The - - - the problem is, is you
25 have - - - this is what - - - on its face, it - - - it does



1 look like a strong case, but then you don't have any
2 physical or forensic evidence. You've got two of the
3 eyewitnesses who had credibility or reliability problems.
4 And the tape appears to clearly create impeachment - - -
5 evidence for the one witness, Cream, who was standing right
6 there when you look - - - allegedly this - - - the shot
7 took place.

8 So it - - - it - - - somebody is either mistaken
9 or they lied. One of those two things happened.

10 MS. ROSS: Right.

11 JUDGE FAHEY: So - - - let me just finish my
12 point. So - - -

13 MS. ROSS: Okay.

14 JUDGE FAHEY: - - - that being the case, how do I
15 not say, well, I can't be confident that this result was
16 beyond a reasonable doubt?

17 MS. ROSS: Because the three witnesses are not
18 looked at, in this case, separately, but as they
19 corroborate each other. You have Coretta Bazemore, who is
20 identifying the same individual as - - - as - - -

21 JUDGE FAHEY: But what about the exist - - -

22 MS. ROSS: - - - Rashawn Cream.

23 JUDGE FAHEY: What about the existence of the
24 delivery man, the person bringing in - - - and I - - - I
25 blew out the pictures themselves. I could make out his

1 face on those in the video, and - - - and I have it with me
2 today. I blew it up and looked at it. And it seems to me
3 that, if - - - if you're really concerned, a good attorney
4 would go throughout the apartment buildings and see if
5 anybody could identify this person who clearly was an
6 eyewitness to the - - - to the shooting.

7 MS. ROSS: Well, first there are three - - -
8 burdens that the defendant has to overcome. First of all,
9 you have to make - - - first of all, you would have to
10 locate this individual. It was - - -

11 JUDGE FAHEY: Oh, there's no question, but - - -

12 MS. ROSS: - - - seventeen months after the
13 shooting is when defendant is - - -

14 JUDGE FAHEY: There's no question about that, but
15 we're - - - we're assuming a number of things. You could
16 assume it's a delivery man. It could also be the grandson
17 of someone who lives in the building.

18 MS. ROSS: Exactly.

19 JUDGE FAHEY: Right. Easily identifiable.
20 Listen - - -

21 MS. ROSS: But the other thing is - - -

22 JUDGE FAHEY: - - - there - - - isn't there one -
23 - - there - - - there - - - the People did actually
24 disclose this tape, though, didn't they? What do you say
25 about that? That they mentioned it in DD5, number 13, the



1 surveillance video.

2 MS. ROSS: Absolutely.

3 JUDGE FAHEY: Uh-huh.

4 MS. ROSS: And not only that - - -

5 JUDGE FAHEY: Is that - - - would you - - - would
6 you characterize that as a document dump, or - - - or was
7 it made clear what it was, or was it just the existence of
8 it?

9 MS. ROSS: No, it was clearly - - - it - - - it
10 states, DD5, number 13, states that surveillance video was
11 recovered from 48 St. Paul's Place - - -

12 JUDGE WILSON: But how do you square that - - -

13 MS. ROSS: - - - from the lobby of 48 St. Paul's
14 Place.

15 JUDGE WILSON: How do you square that with the
16 prosecutor in summation saying, it doesn't exist?

17 MS. ROSS: She doesn't say it doesn't exist, Your
18 Honor, if I might - - - contradict you slightly there.
19 She is responding to a defense summation, in which defense
20 counsel has argued that you've heard there's video, why
21 haven't you seen it. She made an implied missing witness
22 argument about, well, it must have shown something helpful,
23 or the People would have shown it to you.

24 JUDGE WILSON: So why isn't the correct response,
25 we identified it to her. She knows this video. Here's the



1 form on which we showed it to her, and we gave it to her
2 months ago.

3 MS. ROSS: As the court below held, the
4 prosecutor forgot. She said that she had - - -

5 JUDGE RIVERA: Well, it's one thing to forget.
6 It's another to say, I'm quoting, "And isn't it common
7 sense that you would - - - would have seen that video if
8 there had been a video."

9 MS. ROSS: Right.

10 JUDGE RIVERA: That - - - that's not forgetting.
11 That's I am - - -

12 MS. ROSS: In that - - -

13 JUDGE RIVERA: Excuse me.

14 MS. ROSS: I'm sorry.

15 JUDGE RIVERA: I'm making a representation to
16 this jury, as you say, in response to defense counsel's
17 summation - - -

18 MS. ROSS: Right, but the next sentence, Your
19 Honor, is - - -

20 JUDGE RIVERA: Um-hum.

21 MS. ROSS: - - - there's no - - - "You've heard
22 there's no video. You haven't heard anything about a video
23 outside; yes, there's a video inside." So she is
24 qualifying it with the next sentence. If you take that
25 first sentence out of context, it's sound much more blanket

1 statement that there is no video.

2 JUDGE WILSON: The problem is one that you're
3 sort of trying to have it both ways. You're saying we can
4 charge the defense with knowledge, because this showed up
5 on a form, and we can excuse the prosecutor for saying in
6 summation that it doesn't exist, even though it was on a
7 form. And - - -

8 MS. ROSS: Well - - -

9 JUDGE WILSON: - - - it does seem inconsistent.

10 MS. ROSS: It wasn't just on a form. It was - -
11 - she elicited testimony from Angela Davis, who said, oh,
12 yeah, there's absolutely a surveillance video camera in the
13 lobby there.

14 JUDGE GARCIA: But doesn't, counsel - - -

15 MS. ROSS: But the video - - -

16 JUDGE GARCIA: - - - doesn't that go back to my
17 original question is you're not contesting that this was an
18 impeachment or other material that should have been
19 disclosed and you didn't disclose it.

20 MS. ROSS: Right.

21 JUDGE GARCIA: My view of the DD5 is only - - -
22 it gets you the standard of reasonable probability rather
23 than reasonable possibility, because they knew that it was
24 around and they never specifically asked for it. So you've
25 gotten a benefit of that already. The rest doesn't really



1 matter that you disclosed the DD5, because you didn't
2 disclose the tape.

3 MS. ROSS: Right.

4 JUDGE GARCIA: And you had an obligation to, and
5 we're by that. And I think - - -

6 MS. ROSS: Yes, Your Honor.

7 JUDGE GARCIA: - - - the problem here, for me,
8 that I'm having is the nature of your case, and you had
9 significant proof in the form of eyewitnesses, no forensic
10 evidence tying this defendant directly to the crime, as
11 Judge Fahey points out. But balanced against that, you
12 don't have, you know, a prior statement that you find in
13 the file, that may contradict some things the witness said.
14 You have a video of the crime scene, and in fact, in this
15 video, you have the defendant falling from being shot, and
16 the defense is saying we could have used that in a number
17 of ways in this trial, including impeaching your witness,
18 finding witnesses, having a different theory of - - - of a
19 case.

20 That's a pretty powerful argument for me,
21 compounded by, I think, a fair reading of the prosecutor's
22 summation, which is, if there was a tape, if it existed,
23 you would have seen it. So I think that's a - - - a fairly
24 tough hill to climb for the prosecution.

25 MS. ROSS: Well, it - - - it's not as though this



1 was an actual video of the shooting. You don't see the
2 shooter; you don't see the gunfire - - -

3 JUDGE GARCIA: We have a case, Viruet. You know,
4 Viruet, right? And where we say - - - Viruet's a - - -
5 destroyed evidence, but we say, look, this was the same
6 type of video. It was a video of a crime scene. It didn't
7 show the shooter, but it showed who was coming in, who was
8 going out, who was present. And that's material in a case
9 of, you know, a destroyed evidence issue.

10 But how can you say, again, we don't have the
11 shooting, but we have the scene. We have coming and
12 goings; we have people coming in and out of the building,
13 potential witnesses; we have Cream, I think, coming into
14 the building afterwards. All those things were subject to
15 fairly extensive cross. People's movements, who was there,
16 when they were there. And the nature of a videotape
17 showing the crime scene at the time of the crime, not the
18 shooter - - -

19 MS. ROSS: Right, and I - - - and I would also -
20 - -

21 JUDGE GARCIA: - - - could have been used in all
22 those ways. So - - -

23 MS. ROSS: I would - - - I would point out that
24 although perhaps Your Honor has been able to make out the
25 face of the - - - putative bicycle delivery man, the other



1 shapes are absolutely spectral. You cannot tell who's
2 there. You can't tell who's coming or going. And the fact
3 is that you have three witnesses who say the shooter - - -

4 JUDGE FEINMAN: Well, until you would turn that
5 video over, you don't know what kind of defense
6 investigative services they could've engaged to either
7 enhance that image or - - - or whatever.

8 MS. ROSS: But that enters into the realm of
9 speculative.

10 JUDGE FEINMAN: You - - - you know, that - - -
11 that's really not up for you to decide. The point is, to
12 turn over the tape and let them do what they can with it.

13 MS. ROSS: Yes, that's absolutely the case, and
14 it's the policy of our office in anything that's the least
15 bit questionable to turn it over. But mistakes do get
16 made. And in this case, there was an error. It wasn't - -
17 -

18 JUDGE FEINMAN: So it's an innocent mistake - - -

19 JUDGE RIVERA: So you're saying this was a
20 mistake, not an conscious choice?

21 MS. ROSS: It - - - no, it was - - -

22 JUDGE RIVERA: I thought she - - - I thought the
23 prosecutor said, I - - - didn't show anything, so I didn't
24 think it was relevant.

25 MS. ROSS: She says that at one point, but then



1 she explains I totally forgot about it. I - - -

2 JUDGE RIVERA: But she forgot about it later, but
3 her initial determination, at the point - - - let's just
4 say, at one point - - -

5 MS. ROSS: Right.

6 JUDGE RIVERA: - - - when she - - - she can make
7 a decision, whether or not this is covered by Brady, and
8 she has an obligation, a Constitutional obligation, to turn
9 this over, she - - - she's looked at it and she decides, I
10 don't have to.

11 MS. ROSS: Your Honors, you have to remember,
12 that the time code on the video is twenty-five minutes
13 fast. So if she was looking at what she believed to be - -
14 -

15 JUDGE RIVERA: Well, I'm not disputing with you,
16 whether or not she may genuinely believe this is not going
17 to help the defense, but that - - - that's - - - but she's
18 got something, as Judge Garcia's already pointed out, that
19 shows the scene. It does show, and it is, I agree with
20 you, perhaps, not the best quality when one looks at this
21 particular exhibit.

22 MS. ROSS: It's terrible quality, right.

23 JUDGE RIVERA: Judge Fineman's already pointed
24 out there might have been ways to improve that quality, but
25 putting that aside, it - - - it is the - - - the crime



1 scene. There are some aspects of the - - - of what these
2 people's movements. There's someone standing over someone
3 else who has fallen, supposedly the - - - the victim, and
4 then someone running in an opposite direction.

5 MS. ROSS: But it is not improper for a
6 prosecutor to make the initial determination. In fact,
7 *Kyles v. Whitley* says that clearly. It is always going to
8 be the prosecutor's job - - -

9 JUDGE RIVERA: But they're always making the
10 initial determination, because they've got, as they say,
11 the goods. The question is - - -

12 MS. ROSS: Right.

13 JUDGE RIVERA: - - - whether or not - - -

14 MS. ROSS: But here - - -

15 JUDGE RIVERA: - - - in this case it was material
16 and should have been turned over.

17 MS. ROSS: Right, here, looking at the quality of
18 the video, and what showed at the time code - - -

19 JUDGE RIVERA: Let me ask you this today.

20 MS. ROSS: Yes.

21 JUDGE RIVERA: Under the current policy of your
22 office, would this have been turned over?

23 MS. ROSS: Oh, absolutely.

24 JUDGE RIVERA: Okay.

25 MS. ROSS: And if I can just step outside the



1 record, the - - - the trial prosecutor was horrified - - -

2 JUDGE RIVERA: No need to do that.

3 MS. ROSS: - - - when she realized that she had
4 forgotten about this. But that's exactly why we're in
5 front of this court, is because mistakes, through
6 inadvertence, not bad faith, but inadvertence, get made,
7 and in this case, the mistake was not material, because not
8 just of the three corroborating witnesses, that it's
9 stronger than a - - - say, the two identified - - - the two
10 - - - eyewitnesses to the shooter - - - the shooting
11 itself, you have one who knew the defendant and one who
12 didn't. It is stronger than two stranger IDs, because they
13 could both be mistaken. And it's stronger than two
14 witnesses who both knew the defendant, because they can
15 have a motive to lie.

16 JUDGE RIVERA: But we've already - - - we've
17 already recognized the perils of stranger ID - - -

18 MS. ROSS: Yes.

19 JUDGE RIVERA: - - - especially in something like
20 a shooting under the emotional reaction that one might have
21 - - -

22 MS. ROSS: Right.

23 JUDGE RIVERA: - - - to observing such a thing
24 and the fear that it engenders, and it is a very brief - -
25 - and is - - - and a profile. So there - - - there are



1 problems also with this, that we have recognized in the
2 past, and the science backs that up.

3 MS. ROSS: Right. And absolutely. And if it
4 were just Ms. Coretta Bazemore, it would be a much weaker
5 case, but we have Rashawn Cream, who is a friend of
6 defendant's, who has no demonstratable motive to lie. His
7 testimony at trial, which was unimpeached, was - - - I did
8 not get a deal for my testimony, and he was already
9 incarcerated and serving his prison sentence at the time he
10 testifies at trial. He could not be hoping to get a
11 further benefit.

12 And you have Mr. Courtney, who doesn't see
13 defendant just strolling back and forth. He sees him
14 running back, tucking something in his waistband, and there
15 was video showing the defendant running back down the
16 street towards his apartment, one arm sort of out to the
17 side and swinging, and the other one held in close to his
18 waist.

19 So you have strong corroborative evidence here -
20 - -

21 CHIEF JUDGE DIFIORE: Thank you, Ms. Ross.

22 MS. ROSS: Oh.

23 CHIEF JUDGE DIFIORE: Thank you very much.

24 MS. ROSS: You're welcome, Your Honor.

25 CHIEF JUDGE DIFIORE: Ms. Hull?



1 MS. HULL: Very briefly. Actually, I just want
2 to pick up on the prosecutor - - - the prosecutor's
3 reference to the second video that they actually put into
4 evidence. They comment a lot about the quality about the
5 suppressed video. The video that they put in, you don't
6 see anyone's face. They say based on its time and place,
7 it's the defendant. We are saying, that based on the time
8 and place of this video, it's the shooting. That's why
9 it's material.

10 And I just want to quickly clarify one thing
11 about the summation. There is a subsequent statement that
12 the prosecutor makes towards the end, when she's referring
13 to the lobby. She goes, "Ms. Davis only says it's in the
14 lobby. It's common sense" - - - and there are some
15 brackets in my - - - my thing - - - "It's common sense that
16 you wouldn't be able to see into the street the sidewalk
17 where the shooting occurred."

18 Now, that's not true. That's why we're here. So
19 that's why the - - - the - - - we - - - we have highlighted
20 that summation misconduct, for what it is. It wasn't an
21 inference, or a - - - it was quite clear that it paralleled
22 the very - - -

23 JUDGE RIVERA: What's your response to your
24 adversary's last point that Cream really has no motive to
25 fabricate, which - - - which makes the case stronger on the



1 People's side?

2 MS. HULL: He - - - but even though the
3 circumstances that he came forward were suspicious enough
4 to give rise to the question of whether he had a motive to
5 fabricate.

6 JUDGE WILSON: Well, if you think there's a
7 possibility that he may have been the shooter or involved
8 in the shooter, isn't that a motive to fabricate?

9 MS. HULL: Absolutely.

10 JUDGE WILSON: And doesn't the video go to that?

11 MS. HULL: Yes. So, I mean, the - - - the point
12 is, that the - - - all of this could have been - - - I
13 mean, this opened up the case. This opened up a defense
14 that otherwise wasn't available.

15 If the court has no further questions - - -

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. HULL: Thank you, very much.

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Derrick Ulett, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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