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Attorney's Trial Tactics Impugned

Judge tosses conviction

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Admonishing Deputy U.S. Attorney John Durham's trial tactics, as well as her own failure to maintain courtroom decorum, U.S. District



U.S. District Judge Janet Bond Arterton said her instructions to the jury 'were not adequate to counterbalance the pitting of the Government's prosecutor against [the defense witness] in a credibility contest.'

Judge Janet Bond Arterton has taken the extraordinary step of overturning a weapons charge conviction largely on account of prosecutorial misconduct.

In granting defendant Anthony Washington's request for a new trial last month, Arterton rebuked Durham for: undermining the defense's key witness, while personally vouching for those who took the stand on the prosecution's behalf; maligning defense counsel and his arguments; and alluding to highly prejudicial facts not in evidence.

The second-highest ranking federal prosecutor in the state, Durham also repeatedly interjected his personal views during closing remarks, through phrases such as "I believe" and "I would suggest to you," after vilifying defense counsel for doing the same, according to Arterton.

"The prosecutor ... proceeded to do exactly what he stated he would not," Arterton wrote in her 57-page decision of Durham first

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telling the jury that defense counsel Roger Sigal's arguments were improper before littering his own summation with first-person pronouns.

Durham could not be reached for comment by press time. But U.S. Attorney Kevin J. O'Connor said his office will be filing a motion for reconsideration in the matter. "We disagree with the decision strongly, both on a legal and factual basis," O'Connor proclaimed.

Though he declined to reveal the specifics of the government's objections, O'Connor acknowledged the rarity of a conviction being uprooted due to prosecutorial misconduct at the federal level, stating there have only been one or two such rulings in the past 20 years.

Sigal, an assistant federal public defender, declined to comment on the case while it is still pending.

In December 2001, Washington was charged with violating federal laws prohibiting felons from possessing firearms after police responded to a dispute between him and downstairs tenant Joseph McNeill at a three-family home on Maple Street in New Haven. In a 911-call, McNeill told police he had just taken a gun away from Washington. Police recovered the weapon in McNeill's first-floor apartment.

Washington was under the influence of a behavior-altering substance when police arrive and was described as "out of it." Two third-floor tenants, who helped Washington back to his girlfriend Ebony Moore's second-floor residence, testified at trial that they did not see Washington with a gun in his possession. A police officer, however, refuted their testimony as contrary to statements they had initially made

to police.

That trial consisted of more than three days worth of evidence in October 2002. After deliberating less than a day, the jury came back with a guilty verdict. Washington faced up to four years in jail before Arterton granted his motion for a new trial, which was filed before sentencing. On June 11, Washington was released on bond, under special conditions, by U.S. District Court Magistrate Joan Margolis.

Aiding Arterton in her decision to overturn the conviction was the late disclosure by Durham of McNeill's 1998 misdemeanor conviction for making a false report to police. McNeill died before Washington's trial began.

According to the ruling, Sigal asked Durham to disclose in May of 2002 whether any of its intended witnesses had prior misdemeanor convictions reflecting on their credibility. Durham promptly responded that he was not aware of any such issues.

However, on the first day of evidence in Washington's trial, Durham gave Sigal a Florida police report verifying McNeill's 1998 conviction.

The government, Arterton wrote, "provides no explanation for its very belated disclosure" or "how it came upon the existence of the conviction so long after it represented there was none." The slip-up, Arterton ruled, amounted to suppression of evidence, leaving the defense without any time to weave McNeill's conviction into its trial strategy.

Turning to Washington's claims of prosecutorial misconduct, Arterton faulted Durham for an "incendiary" cross-exami-

nation of Moore, the defendant's girlfriend, during which Durham persistently attempted to elicit testimony regarding her knowledge of a November 2001 incident involving Washington that erupted in gunfire and sent one person to the hospital with gunshot wounds. Prior to trial, Arterton had precluded evidence related to that event, as well as Washington's participation in a feud between rival gangs, from the government's case.

Durham later brought up the November 2001 incident in his opening summation, alluding to "multiple gunshot wounds" when no such evidence was in the record.

Chastising the prosecutor for the remarks, Arterton wrote, "In a case involving possession of a gun by a felon, a reference, no matter how fleeting, to 'gunshot wounds' can be highly prejudicial."

Durham later began his rebuttal "with the clear insinuation that defense counsel" made an improper argument and continued with "a barbed backhand" comment, Arterton noted.

After finding several additional instances where Durham attacked "the integrity of defense counsel," Arterton found that Sigal should have objected more, especially since the objections he did

raise were consistently sustained. The judge also acknowledged that she, too, should have spoken up. "The Court believes it failed to adequately discharge its duty to 'deal promptly with [improper argument] by either counsel,' ... and to 'maintain decorum in keeping with the nature of the proceeding,'" she wrote, citing standards set in the U.S. Supreme Court's 1985 decision in *U.S. v. Young*.

However, simply sustaining objections to "such loaded questions with no curative instruction would not have prevented the jury from being contaminated," she wrote. ■