No. 20-6547
S.Ct ; 2021 WL 666565
2021 LEXIS 878

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID FRANKLIN MCNEES, Jr. -- Petitioner

vs.

MICHIGAN -- Respondent

MOTION FOR REHEARING
S.Ct. Rule 44

The petitioner asks leave to file this motion because he has recently obtained his co-defendant's plea and sentencing transcripts on February 22, 2021, (withheld by the prosecution) which supports Petitioner's Brady, and Napue violations. The prosecution knowingly presented misleadingly false testimony concerning the co-defendant's deal for testimony. This evidence also establishes that the prosecution knew about this evidence and chose to conceal it, while capitalizing on the false testimony during closing argument. He requests this Honorable court conduct a rehearing of the February 22, 2021, denial of Certiorari and states in support as follows:

S.Ct. Rule 44.2 provides in relevant part:

> "Any petition for rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days..., but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented." See also Florida v Rodriquez, 469 US 1, 18 (1984).

FACTS

Petitioner did request this evidence in a Demand for Discovery on August 11, 2010. See (Appendix-L of Petition for Certiorari).

The trial Court record also demonstrates (Co-defendant) Smith's testimony in

Petitioner's trial concerning his deal:

Cross-Examination

"COUNSEL: What were you threatened with if you didn't come in here and testify against David McNees?

SMITH: Six and a half.

COUNSEL: Six and a half? That would be the minimum. What was the maximum on the minimum guideline range do you remember?

SMITH: 28 and a half -- or 22 and a half.

COUNSEL: I can't hear you, sir.

SMITH: 22 and a half.

COUNSEL: 22 and a half. And when you say 22 and a half, you're talking about years, right?

SMITH: Right, it's a max. See (Exhibit-1, [TT Vol II page 358 lines 13-24]).

* * * *

"COUNSEL: Okay. So six months below the bottom end of the guideline. If you gone to trial, without cutting your deal with the prosecuting attorney's office to testify against David McNees, what was the maximum sentence that you could get on the minimum guideline range?

SMITH: Six and a half to 22 and a half. See (Exhibit-1, [TT Vol II pg 362 lines 1-6]).

SMITH'S TRANSCRIPTS

PLEA

BEFORE THE HONORABLE ALEXANDER LIPSEY

Kalamazoo, Michigan -Friday, September 24, 2010

NOTE: These transcripts were not transcribed until 2-11-21.

THE COURT: Mr. Smith, you are here pursuant to an information filed by the prosecutor alleging two counts; both counts being of criminal sexual conduct in the third degree. That, an initial charge, would be a felony punishable by up to 15 years in prison, along with mandatory AIDS and STD testing.

There is a second or subsequent offense notice as to each of those counts under the Public Health Code, which would in fact increase the ultimate sentence in this matter I believe it looks like an initial five years; I'm not sure what that's about.

MS. BOURGEOIS: Mandatory minimum five-year.

THE COURT: Mandatory minimum five, thank you.

MS. BOURGEOIS: Thank you.

THE COURT: So that in essence the maximum sentence would be 15 but there would have to at least a minimum of five if in fact you're convicted of either of those offenses.

In addition, there is a notice of intent to seek enhanced sentence as an habitual offender **fourth** or subsequent notice, which would convert with either count one or count two from 15 years to life in prison.

You understand that?

(Sidebar conversation between Ms. Bourgeois and Ms. Montague)

THE COURT: Mr. Smith, do you understand all of that?

THE DEFENDANT: Yes.

THE COURT: Miss Bourgeois, what is the plea agreement in this matter?

MS. BOURGEOIS: Your Honor, prior to putting the plea agreement on the record, I would ask to amend the felony information count one to the township of Schoolcraft. With that amendment, I would indicate to the Court that it's my understanding Mr. Smith will be tendering a plea to count one of the felony information, criminal sexual conduct in the third degree. He will plead as a second habitual offender.

We agree to recommend -- we have a sentence agreement of six to 22-and-a-half years.

He further agrees to testify truthfully against David McNees, M-C-capital N-E-E-S. The Defendant agrees to give a truthful statement to the police regarding both his involvement and the involvement of David McNees. He understands that the interview and any testimony he gives can be used against him if he chooses to withdraw his plea.

And it is conditioned on his having three prior felony convictions. That is the extent of the **agreement**. See (Exhibit-2, [Smith's Plea Transcripts see page 3 lines 16-25; pg 4 lines 1-25; pg 5 lines 1-14) (Emphasis added).

* * * *

THE COURT: And pentration -- well, let me back up a minute.

I note -- and I do apologize for interrupting this -- I note -- Miss Bourgeois that you indicated that the plea would be as a second habitual offender. Does that mean that you would be dismissing the Public Health Code portion of this?

MS. BOURGEOIS: We would, your honor." See (Exhibit-2, [Smith's plea transcripts page 11 lines 1-7]) (Emphasis added).

SENTENCING

BEFORE THE HONORABLE J. RICHARDSON JOHNSON

After the parties determined that OV 10 should be scored at zero changing the OV to 25 the following occurred:

> "MS. BOURGEOIS: It does your Honor. That would change the OVs to a level three and the numbers would change to 78 to 162 months.
>
> THE COURT: 78 to how many months?
>
> MS. BOURGEOIS: 162.
>
> THE COURT: Miss Montague, do you agree?
>
> MS. MONTAGUE: I do, your Honor. Thank you.
>
> THE COURT: The Court then will use the guideline minimum range of 78 to 162 months. See (Exhibit-3, [Smith's Sentencing Transcripts page 8 lines 8-16]).
>
> * * * *
>
> THE COURT: The other count is dismissed. If there is a balance to the habitual offender notice -- and there is -- it is dismissed." See (Exhibit-3, [Smith's Sentencing Transcripts page 12 lines 19-21]).

During Petitioner's trial the prosecution made the following assertions during closing:

> "Jeff Smith told you he got a sentencing agreement, that his sentencing guideline said he should have done between six and--six and 22 and a half years in prison. The agreement was--no, I got that wrong. He should have done between six and a half and 22 and a half years in prison. His sentencing agreement was he has to do minimally six. He got six months shaved off of it. He's in prison for between six years and 22 and a half years. Is six months motivation to come in here and tell you this happened, and corroborate it with what everybody else said?" See (Exhibit-4, [TT Vol III pg 462 lines 16-25]).

For arguments sake, if the prosecution had the discretion to give the plea agreement she further had the discretion to cancel the plea agreement and/or the court had discretion to refuse to accept it. This Court is aware as is Petitioner that had Smith chose to go to trial he would have been facing all original charges as a Fourth Habitual Offender. The jury was deceived about this.

Petitioner submits that Smith did get 6 months off his sentence as "part" of his deal. However, what constituted perjury was when Smith was asked what he faced had

he not entered into his deal he responded 6½ to 22½, when in truth he was facing 6½ years to 260 months (21 years 8 months) up to life in prison as a Fourth Habitual Offender (MCL 777.63; MCL 777.21(3)(a)-(c)). As Petitioner establishes through Smith's plea and sentencing transcripts, Smith's deal was more substantial than what was disclosed to the jury, he argues that he has presented a due process violation via perjured testimony requiring automatic reversal.

Moreover, the prosecution augmented the perjury during closing argument by arguing that "is six months motivation to come in here and tell you this happened". The entire deal was relevant in ascertaining Smith's credibility. Here, the prosecution was aware and concealed the facts of the entire deal, while capitalizing on the misleadingly false testimony and concealment during closing arguments. As credibility was in issue, the jury was never apprised of Smith's extensive criminal history or his complete deal, and the misleadingly false testimony bolstered Smith's veracity.

Analysis

To establish a due process violation based on false testimony, the defendant must clear three hurdles. Courts have enforced the three requirements: (1) false testimony was presented at trial; (2) that the prosecution had the prerequisite culpability through actual, constructive, or imputed knowledge, and (3) that the false testimony was significant enough to be material.

A due process violation presents a constitutional question that is reviewed de novo. Chapman v California, 386 US 18 (1967). It is inconsistent with due process when the prosecution allows false testimony from a state's witness to stand uncorrected, Napue v Illinois, 360 US 264, 269 (1959); Giglio v United States, 405 US 150, 153 (1972). People v Wiese, 425 Mich 448, 453-454 (1986). It is well established that "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction...." Napue, 360 US at 269.

Indeed, the prosecution has an affirmative duty to correct false testimony, and this duty specifically applies when the testimony concerns remuneration for a witness's cooperation. See Giglio, 405 US at 154-155; Weise 425 Mich at 455-456. The responsibility "does not cease to apply merely because the false testimony goes only to the credibility of the witness." Napue, 360 US at 269. Nor is the blameworthiness of the prosecutor relevant. Smith v Phillips, 455 US 209, 220 n 10 (1982).

Rather, while "not every contradiction is material" and the prosecutor need not correct every instance of mistaken or inaccurate testimony. United States v Martin, 59 F3d 767, 770 (CA 8 1995), it is the effect of a prosecutor's failure to correct false testimony that "is the crucial inquiry for due process purposes," Smith, 455 US at 220 n 10. A prosecutor's capitalizing on the false testimony, however, is of particular concern because it "reinforce[s] the deception of the use of false testimony and thereby contribute[s] to the deprivation of due process." DeMarco v United States, 928 F2d 1074. 1077 (CA 11 1991); see Jenkins v Artuz, 294 F3d 284, 294-295 (CA 2 2002)(stating that the prosecutor's promotion of the false testimony at summation "plainly sharpened the prejudice," "'ha[d] no place in the administration of justice[,] and should neither be permitted nor rewarded")(citations and quotation marks omitted); Mills v Scully, 826 F2d 1192, 1195 (CA 2 1987)("[T]here may be a deprivation of due process if the prosecutor reinforces the deception by capitalizing on it in closing argument....").

A new trial is required if the uncorrected false testimony "could ... in any reasonable likelihood have affected the judgment of the jury." Napue, 360 US at 271-272; see also Giglio, 405 US at 154; See also People v Smith, 498 Mich 466, 475-478 (2015).

In Alcorta v Texas, 355 uS 28 (1957), this court recognized the corrupting impact of misleading testimony and granted relief because the prosecutor's questioning of a key witness created a false impression even though the witness'

testimony was not actually false.

Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness, and plainly that the prosecution not exploit any confusion relating to this critical topic. See United States v Cervantes-Pacheco, 826 F2d 310, 315 (CA 5 1987)("As in the case of the witness who has been promised a reduced sentence it is up to the jury to evaluate the credibility of the compensated witness). (Emphasis added).

Given the centrality of Smith's credibility to the prosecutions case, as he is the only witness who actually claimed to have participated and witnessed the sexual acts, there is a reasonable likelihood that the prosecutor's exploitation of Smith's misleadingly false testimony affected the judgement of the jury.

Petitioner submits he has overcome hurdles one and two leaving the question of material. Pursuant to 18 U.S.C. § 1001 the test for materiality is not whether the false statement actually influenced a government function, but whether it had the capacity to influence. See United States v Gaudin, 515 US 506 (1995). See also United States v Lane, 474 US 438, 460 (1986)(inquiry cannot be merely whether there was enough to support the result).

Due process was also denied Petitioner when the evidence was withheld in violation of Brady v Maryland 373 US 83 (1963).

PRAYER FOR RELIEF

Pursuant to Townsend v Sain, 372 US 293 (1963), Petitioner requests this court to remand this matter to the appropriate lower Court for an evidentiary hearing to develop facts not of record to substantiate his claims.

Respectfully submitted,

David McNees

Dated: March 8, 2021