

QUESTION PRESENTED

WHETHER THE GOVERNMENT'S USE OF AND FAILURE TO CORRECT THE MATERIALLY FALSE AND MISLEADING TESTIMONY OF ONE OF THEIR WITNESSES VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FAIR TRIAL

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STATUTES

18 U.S.C. 2
 21 U.S.C. 841 (b)(1)(C)
 21 U.S.C. 846

STATEMENT OF THE CASE

PRE-TRIAL:

ON OCTOBER 16, 2018, PETITIONER, TAUREAN POTTER, WAS INDICTED ON COUNT 1 OF A FIVE-COUNT INDICTMENT, CHARGING HIM WITH CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE A QUANTITY OF COCAINE, IN VIOLATION OF 21 U.S.C. 846 [APP. 36-40]. THE INDICTMENT NAMED DYLAN MAIN AND ANTHONY WASHINGTON AS CO-CONSPIRATORS, AND ALLEGED A CONSPIRACY FROM IN, AND AROUND 2017 THRU MAY 2018. PETITIONER WAS CHARGED IN COUNTS 2 AND 3 WITH DISTRIBUTION AND POSSESSION WITH INTENT TO DISTRIBUTE A QUANTITY OF COCAINE, IN VIOLATION OF 21 U.S.C. 841 (B)(1)(C), AND 18 U.S.C. 2. COUNT 2 ALLEGED A DISTRIBUTION OF COCAINE OCCURRING ON OCTOBER 14, 2017, WHILE COUNT 3 ALLEGED A COCAINE DISTRIBUTION ON FEBRUARY 16, 2018. JUST DAYS BEFORE TRIAL, THE GOVERNMENT WOULD FILE A MOTION TO DISMISS COUNT 3 OF THE INDICTMENT "BASED UPON ITS REASSESSMENT OF THE EVIDENCE AGAINST DEFENDANT POTTER", AND ITS DETERMINATION THAT DISMISSAL WAS "IN THE INTEREST OF JUSTICE AS TO DEFENDANT POTTER ONLY" [APP. 31, 41], WHICH THE COURT WOULD GRANT.

TRIAL:

DURING THE COURSE OF THE TRIAL, UNDERCOVER OFFICER PATTERSON WOULD TESTIFY THAT ON FEBRUARY 16, 2018, HE AND AN UNDISCLOSED CONFIDENTIAL INFORMANT APPROACHED THE PETITIONER AT A BAR, WHERE THE INFORMANT HAD INSTRUCTIONS "TO ATTEMPT TO PURCHASE COCAINE FROM [PETITIONER]" [APP. 92]. NO EVIDENCE WOULD BE PRESENTED IN REGARDS TO THE INFORMANT'S INSTRUCTED ATTEMPT TO MAKE THE PURCHASE AND HIS SUCCESS OR LACK THEREOF. UNDERCOVER OFFICER PATTERSON WOULD TESTIFY THAT "LATER THAT EVENING" HE AND THE INFORMANT WOULD GO TO A DIFFERENT BAR, WHERE THEY WOULD MEET AN INDIVIDUAL NAMED ANTHONY WASHINGTON, AND WOULD MAKE A PURCHASE OF COCAINE FROM WASHINGTON [APP. 92]. ANTHONY WASHINGTON WOULD TESTIFY AT TRIAL AS A GOVERNMENT WITNESS, WHERE ON DIRECT EXAMINATION, WHEN ASKED "THAT COCAINE YOU ULTIMATELY SOLD TO THIS UNDERCOVER OFFICER, WAS THAT PROVIDED BY [PETITIONER]?" WASHINGTON REPLIED, "[PETITIONER]... HAD NOTHING TO DO WITH IT." [APP. 186]. DURING CROSS-EXAMINATION, AFTER STATING "THAT CHARGE THAT WE CONSPIRED HAD NOTHING TO DO WITH [PETITIONER]", FOR FURTHER CLARIFICATION, WASHINGTON WAS ASKED "THE

CHARGE WHERE YOU DELIVERED DRUGS TO [INFORMANT] ON FEBRUARY 16, 2018?", TO WHICH WASHINGTON REPLIED "I NEVER TALKED TO [PETITIONER] THAT NIGHT" [APP. 196]. FOLLOWING THIS TESTIMONY, AGENT SEAN KIRLEY, WHO WAS NOT PRESENT AT THE FIRST BAR, BUT WAS AT THE SECOND BAR WHEN OFFICER PATTERSON AND THE INFORMANT ARRIVED, WOULD TESTIFY AS TO WHAT HE WITNESSED UPON THEIR ARRIVAL AND THEIR INTERACTION WITH ANTHONY WASHINGTON. AGENT KIRLEY WAS THEN ASKED BY THE GOVERNMENT, "WAS THERE ANY PURCHASE MADE FROM [PETITIONER] ON THAT NIGHT?", TO WHICH KIRLEY REPLIED "NOT DIRECTLY" [APP. 211]. TRIAL COUNSEL PROMPTLY OBJECTED TO AGENT KIRLEY'S ANSWER, STATING "HE KNOWS WHAT HE KNOWS", BUT THE OBJECTION WAS OVERRULED AND KIRLEY'S TESTIMONY WAS ADMITTED IN ITS ENTIRETY.

DIRECT APPEAL

ON JUNE 13, 2019, PETITIONER WAS FOUND GUILTY ON ALL REMAINING COUNTS. FOLLOWING SENTENCING, PETITIONER FILED A TIMELY NOTICE OF APPEAL TO THE THIRD CIRCUIT COURT OF APPEALS [APP. 1]. AMONG THE ISSUES RAISED ON DIRECT APPEAL, AND THAT WHICH IS BEING RAISED AGAIN FOR CONSIDERATION BY THE UNITED STATES SUPREME COURT IS "THE GOVERNMENT BREACHED IT'S DUTY TO CORRECT MATERIALLY FALSE TESTIMONY OF ONE OF IT'S WITNESSES AND VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL AND DUE PROCESS.". PETITIONER ARGUED KIRLEY'S "NOT DIRECTLY" STATEMENT WAS FALSE, THE GOVERNMENT KNEW IT WAS FALSE AND INTENTIONALLY OR INADVERTANTLY FAILED TO CORRECT THE FALSE TESTIMONY. ON NOVEMBER 13, 2020, THE THIRD CIRCUIT COURT OF APPEALS RULED, "THE GOVERNMENT DID NOT BREACH IT'S DUTY TO CORRECT MATERIALLY FALSE TESTIMONY BY LETTING THE TESTIMONY STAND BECAUSE THERE IS NO INDICATION THAT KIRLEY'S TESTIMONY WAS FALSE OR THAT THE GOVERNMENT HAD REASON TO THINK IT WAS".

REASONS FOR GRANTING PETITION

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THE THIRD CIRCUIT COURT OF APPEALS FAILED TO PROPERLY CONSIDER APPELLANT'S ARGUMENT ON DIRECT APPEAL THAT THE GOVERNMENT KNEW OR HAD REASON TO THINK THAT THE TRIAL TESTIMONY OF AGENT SEAN KIRLEY WAS FALSE, AND THAT THE RESULTING PREJUDICE CONSTITUTED COURTROOM ERROR AND COMPROMISED THE CONSTITUTIONAL GUARANTEE OF A "FAIR TRIAL".

ONLY DAYS BEFORE TRIAL, THE GOVERNMENT WOULD FILE A PRE-TRIAL MOTION TO DISMISS COUNT 3 OF THE INDICTMENT (ALLEGING THE PETITIONERS INVOLVEMENT IN THE FEBRUARY 16, 2018 TRANSACTION) AFTER CONDUCTING AN INTERVIEW WITH ANTHONY WASHINGTON. THE GOVERNMENT'S LANGUAGE IN THEIR PRE-TRIAL MOTION PROVIDES SIGNIFICANT INSIGHT AS TO THE EXCULPATORY NATURE OF THE INFORMATION PROVIDED BY WASHINGTON: "BASED UPON ITS REASSESSMENT OF THE EVIDENCE" IT WAS "IN THE INTEREST OF JUSTICE TO DISMISS COUNT 3 AS TO DEFENDANT POTTER ONLY." [APP. 41]. TO FURTHER DEMONSTRATE THEIR KNOWLEDGE AND ACCEPTANCE OF THE EXCULPATORY INFORMATION, NOT ONLY WOULD THE GOVERNMENT THEN CALL ANTHONY WASHINGTON AS A WITNESS AT TRIAL WHERE HE REPEATEDLY MADE IT VERY CLEAR THAT PETITIONER WAS IN NO WAY INVOLVED IN THE TRANSACTION THAT TOOK PLACE ON FEBRUARY 16, 2018 AND HE "NEVER TALKED TO HIM THAT NIGHT" [APP. 196], BUT THE GOVERNMENT WOULD EVEN ENDORSE THIS EXCULPATORY TESTIMONY OF THE PETITIONER ON RE-DIRECT EXAMINATION WHEN ASKING WASHINGTON "DID WE EVER ASK YOU TO PROVIDE ANYTHING BUT TRUTHFUL AND COMPLETE INFORMATION?" WASHINGTON REPLIED, "NO". THE GOVERNMENT THEN ASKED, "THAT'S WHAT YOU TRIED TO DO HERE TODAY IS PROVIDE THIS JURY TRUTHFUL AND COMPLETE INFORMATION"? WASHINGTON ANSWERED, "YES". FINALLY, THE GOVERNMENT ASKED, "INCLUDING THAT THE FEBRUARY CONTROLLED BUY FROM LAW ENFORCEMENT WAS NOT RELATED TO [PETITIONER]"? TO WHICH WASHINGTON REPLIED, "NO IT WAS NOT AT ALL". [APP. 199].

THIS TESTIMONY WOULD TAKE PLACE BEFORE THE TESTIMONY OF AGENT KIRLEY, BUT IT SHOULD BE NOTED THAT DUE TO KIRLEY'S ROLE AS A "CASE AGENT", HE WOULD BE SUBJECT TO THE COURT'S ORDER TO SEQUESTER WITNESSES, AND WOULD REMAIN AT THE PROSECUTOR'S TABLE THROUGHOUT THE DURATION OF TRIAL. WITHOUT ANY AUDIO/VISUAL SURVEILLANCE OR ADDITIONAL TESTIMONY PERTAINING TO WHAT TOOK PLACE PRIOR TO THE UNDERCOVER OFFICER, THE INFORMANT AND ANTHONY WASHINGTON ENTERING THE BAR, AGENT

THE THIRD CIRCUIT COURT OF APPEALS FAILED TO PROPERLY CONSIDER APPELLANT'S ARGUMENT ON DIRECT APPEAL THAT THE GOVERNMENT KNEW OR HAD REASON TO THINK THAT THE TRIAL TESTIMONY OF AGENT KIRLEY WAS FALSE, AND THAT THE RESULTING PREJUDICE CONSTITUTED COURTROOM ERROR AND COMPROMISED THE CONSTITUTIONAL GUARANTEE OF A "FAIR TRIAL".

ONLY DAYS BEFORE TRIAL, THE GOVERNMENT WOULD FILE A PRE-TRIAL MOTION TO DISMISS COUNT THREE OF THE INDICTMENT (ALLEGING PETITIONER'S INVOLVEMENT IN THE FEBRUARY 16, 2018 TRANSACTION) AFTER CONDUCTING AN INTERVIEW WITH ANTHONY WASHINGTON. THE GOVERNMENT'S LANGUAGE IN THEIR PRE-TRIAL MOTION PROVIDES SIGNIFICANT INSIGHT AS TO THE EXCULPATORY NATURE OF THE INFORMATION PROVIDED BY WASHINGTON: "BASED UPON IT'S REASSESSMENT OF THE EVIDENCE" IT WAS "IN THE INTEREST OF JUSTICE TO DISMISS COUNT THREE AS TO DEFENDANT POTTER ONLY" [APP. 41]. TO FURTHER DEMONSTRATE THEIR KNOWLEDGE AND ACCEPTANCE OF THE EXCULPATORY INFORMATION, NOT ONLY WOULD THE GOVERNMENT THEN CALL ANTHONY WASHINGTON AS A WITNESS AT TRIAL WHERE HE REPEATEDLY MADE IT VERY CLEAR THAT PETITIONER WAS IN NO WAY INVOLVED IN THE TRANSACTION OF FEBRUARY 16, 2018 AND HE "NEVER TALKED TO [PETITIONER] THAT NIGHT" [APP. 191], BUT THE GOVERNMENT WOULD EVEN ENDORSE THIS EXCULPATORY TESTIMONY OF THE PETITIONER ON RE-DIRECT EXAMINATION WHEN ASKING WASHINGTON "DID WE EVER ASK YOU TO PROVIDE ANYTHING BUT TRUTHFUL AND COMPLETE INFORMATION"? WASHINGTON REPLIED, "NO". THE GOVERNMENT THEN ASKED, "THAT'S WHAT YOU TRIED TO DO HERE TODAY IS PROVIDE THE JURY TRUTHFUL AND COMPLETE INFORMATION"? WASHINGTON ANSWERED, "YES". FINALLY, THE GOVERNMENT ASKED, "INCLUDING THAT THE FEBRUARY CONTROLLED BUY FROM LAW ENFORCEMENT WAS NOT RELATED TO [PETITIONER]"? TO WHICH WASHINGTON REPLIED, "NO IT WAS NOT AT ALL" [APP. 199]

THIS TESTIMONY WOULD TAKE PLACE BEFORE THE TESTIMONY OF AGENT KIRLEY, BUT IT SHOULD BE NOTED THAT DUE TO KIRLEY'S ROLE AS A CASE AGENT, HE WOULD NOT BE SUBJECT TO THE COURT'S ORDER TO SEQUESTER WITNESSES, AND WOULD REMAIN AT THE PROSECUTOR'S TABLE THROUGHOUT THE DURATION OF TRIAL. AGENT KIRLEY WAS NOT AT THE FIRST BAR WHERE THE INFORMANT HAD INSTRUCTIONS TO ATTEMPT A PURCHASE FROM PETITIONER. KIRLEY WAS, HOWEVER, AT THE SECOND BAR WHERE OFFICER PATERSON AND THE INFORMANT

MADE A PURCHASE FROM WASHINGTON. AGENT KIRLEY'S TESTIMONY IN RESPECT TO THEIR ARRIVAL AND WHAT HE WITNESSED OF THEIR TRANSACTION WOULD PROCEED AS FOLLOWS:

DIRECT EXAMINATION

Q. NOW WAS THERE ANY PURCHASE MADE FROM MR. POTTER THAT NIGHT?

A. NOT DIRECTLY.

.....

Q. WHAT DID YOU OBSERVE WITH RESPECT TO THE C.I. AND SPECIAL AGENT PATTERSON ON THAT NIGHT?

A. ON THAT NIGHT, WHEN THEY CAME INTO THE BAR, THEY WERE STANDING BY THE DOOR OF THE BAR. A COUPLE MINUTES LATER, I OBSERVED DYLAN MAIN WALK INTO THE BAR AND GO TO THE BATHROOM. FOLLOWING THAT ANTHONY WASHINGTON WALKED INTO THE BATHROOM WITH HIM. APPROXIMATELY 30 SECONDS LATER OR SO, THEY BOTH CAME OUT OF THE BAR... OUT OF THE BATHROOM, I APOLOGIZE. DYLAN MAIN LEFT THE BAR, ANTHONY WASHINGTON WALKED TO AGENT PATTERSON, THAT'S WHEN HE PLACED SOMETHING IN HIS HAND, WHICH WE LATER CONFIRMED TO BE COCAINE.

[APP. 21]

WITHOUT ANY AUDIO/VISUAL SURVEILLANCE OR ADDITIONAL TESTIMONY PERTAINING TO WHAT TOOK PLACE PRIOR TO THE UNDERCOVER OFFICER, THE C.I. AND WASHINGTON ENTERING THE SECOND BAR, AGENT KIRLEY HAD NO REASON TO BELIEVE — AND CERTAINLY COULD NOT HAVE KNOWN — WHETHER THE C.I. AND OFFICER PATTERSON MAY HAVE WASHINGTON AND/OR MAIN AT THE FIRST BAR AND ARRANGED THE PURCHASE OR SEVERAL OTHER POSSIBLE SCENARIOS. WITHOUT ANY EVIDENCE TO SUBSTANTIATE IT, KIRLEY'S ALLEGATION IS BASELESS AND A PREJUDICIAL SUPPOSITION WHICH SHOULD NOT HAVE BEEN ALLOWED BY EITHER THE PROSECUTOR OR THE TRIAL COURT. THE INFORMANT WOULD NOT BE AVAILABLE TO TESTIFY OR EVEN DISCLOSED TO THE DEFENSE, WHILE OFFICER PATTERSON, WHO WOULD TESTIFY AS A GOVERNMENT WITNESS,

WOULD OFFER NO EVIDENCE SUGGESTING THAT PETITIONER AGREED TO CONSUMMATE A SALE WITH THE INFORMANT, MUCH LESS THAT THE PETITIONER DIRECTED THE INFORMANT⁵; OFFICER PATTERSON TO A COMPLETELY DIFFERENT BAR "LATER ON THAT EVENING" [APP.92] TO MEET WITH ANOTHER INDIVIDUAL. DESPITE NOT HAVING ANY EVIDENCE TO SUGGEST THE PETITIONER'S INVOLVEMENT, ALONG WITH THE EXCULPATORY TESTIMONY BY WASHINGTON, AGENT KIRLEY WOULD GO ON TO PURPOSELY MISLEAD THE JURY WITH HIS PATENTLY FALSE TESTIMONY.

A WITNESS COMMITS PERJURY IF HE "GIVES FALSE TESTIMONY CONCERNING A MATERIAL MATTER WITH THE WILLFUL INTENT TO PROVIDE FALSE TESTIMONY, RATHER THAN AS A RESULT OF CONFUSION, MISTAKE, OR FAULTY MEMORY." U.S. v. DUNNIGAN, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L. Ed. 2d 445 (1993). DUE TO KIRLEY'S LACK OF ANY EVIDENCE WHATSOEVER TO SUPPORT HIS BASELESS ALLEGATION OF THE PETITIONER'S INVOLVEMENT, COUPLED WITH THE FACT THAT JUST MOMENTS BEFORE HIS TESTIMONY HE WITNESSED THE EXCULPATORY TESTIMONY GIVEN BY WASHINGTON, KIRLEY'S TESTIMONY SHOULD CERTAINLY BE CONSIDERED PERJURY. TO INSTEAD EXCUSE KIRLEY'S TESTIMONY AS CONFUSION, MISTAKE, OR FAULTY MEMORY, OR TO SIMPLY WAIVE IT AS INCONSISTENT OR CONTRADICTORY, THEN CERTAINLY ANY ACT OF PERJURY CAN BE EXCUSED FOR ONE REASON OR ANOTHER. HOWEVER, THE ISSUE RAISED ON APPEAL WAS NOT WHETHER OR NOT THE WITNESS COMMITTED PERJURY, BUT RATHER THAT THE GOVERNMENT FAILED TO CORRECT TESTIMONY IT KNEW, SHOULD HAVE KNOWN, OR HAD REASON TO THINK IT WAS FALSE. WHEN CHALLENGED IN THAT REGARD, IT IS NOT A MATTER OF THE "INTENT" OF THE WITNESS, AS THE THIRD CIRCUIT HAS ESTABLISHED THAT THE GOVERNMENT DOES NOT HAVE THE LUXURY OF PUNTING ON THE CREDIBILITY OF IT'S OWN WITNESS. IN U.S. v. HARRIS, 498 F.2d 1164, 1169 (3RD CIR. 1974) THE THIRD CIRCUIT HELD:

"WE DO NOT BELIEVE, HOWEVER, THAT THE PROSECUTION'S DUTY TO DISCLOSE FALSE TESTIMONY BY ONE OF IT'S OWN WITNESSES IS TO BE NARROWLY AND TECHNICALLY LIMITED TO THOSE SITUATIONS WHERE THE PROSECUTOR KNOWS THAT THE WITNESS IS GUILTY OF THE CRIME OF PERJURY. REGARDLESS OF THE LACK OF INTENT TO LIE ON THE PART OF THE WITNESS, GIGLIO AND NAPUE REQUIRE THAT THE PROSECUTOR APPRISE THE COURT WHEN HE

KNOWS THAT HIS WITNESS IS GIVING TESTIMONY THAT IS SUBSTANTIALLY MISLEADING... WHEN IT SHOULD BE OBVIOUS TO THE GOVERNMENT THAT THE WITNESS'S ANSWER, ALTHOUGH MADE IN GOOD-FAITH, IS UNTRUE, THE GOVERNMENT'S OBLIGATION TO CORRECT THAT STATEMENT IS AS COMPELLING AS IT IS IN A SITUATION WHERE THE GOVERNMENT KNOWS THAT THE WITNESS IS INTENTIONALLY COMMITTING PERJURY."

IN A RECENT OPINION BY THE THIRD CIRCUIT COURT OF APPEALS, IN *U.S. v. REYES-ROMERO*, 959 F.3d 80, 92 (3RD CIR. 2020), THE COURT OF APPEALS WOULD CITE HARRIS IN STATING, "NAPUE OBLIGATIONS SPRING TO LIFE ONLY WHEN THE PROSECUTOR KNOWS THAT HIS WITNESS IS GIVING TESTIMONY THAT IS SUBSTANTIALLY MISLEADING AND WHERE THE MISLEADING NATURE OF THE TESTIMONY IS 'OBVIOUS'." THE THIRD CIRCUIT AGAIN MAKING IT CLEAR THAT A "USE OF FALSE TESTIMONY" VIOLATION IS NOT STRICTLY LIMITED TO THE SUBORNATION OF PERJURY, BUT TESTIMONY THAT IS "MISLEADING" TO THE JURY AS WELL. FURTHER, WE ARE NOT ONLY LEFT WITH THE THIRD CIRCUIT'S RULING IN HARRIS TO DEFER. SEE *HAYES v. BROWN*, 399 F.3d 972, 980-81 (9TH CIR. 2005) CITING *NAPUE v. ILLINOIS*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S.Ct. 1173 (1959). "NAPUE, BY ITS TERMS, ADDRESSES THE PRESENTATION OF FALSE EVIDENCE, NOT JUST THE SUBORNATION OF PERJURY. AS CHIEF JUSTICE WARREN WROTE:

"IT IS ESTABLISHED THAT A CONVICTION OBTAINED THROUGH USE OF FALSE EVIDENCE, KNOWN TO BE SUCH BY REPRESENTATIVES OF THE STATE, MUST FALL UNDER THE FOURTEENTH AMENDMENT. IN DESCRIBING THE RULE, THE COURT ITSELF DISCUSSED THE USE OF 'FALSE EVIDENCE, INCLUDING FALSE TESTIMONY...'

THERE IS NOTHING IN NAPUE, IT'S PREDECESSORS, OR IT'S PROGENY, TO SUGGEST THAT THE CONSTITUTION PROTECTS DEFENDANTS ONLY AGAINST THE KNOWING USE OF PERJURY."

FURTHER STILL, ALSO SEE *ALCORTA v. TEXAS*, 355 U.S. 28, 2 L. Ed. 2d 9, 78 S.Ct. 103 (1957). *ALCORTA* INVOLVED A CASE QUITE SIMILAR THE ONE PETITIONER ARGUES HERE TODAY IN.

REGARDS TO A "USE OF FALSE TESTIMONY" CLAIM. IN *ALCORTA*, THE COURT WAS CONFRONTED WITH A PROSECUTOR WHO, ON DIRECT EXAMINATION, KNOWINGLY ALLOWED A WITNESS TO CREATE A "FALSE IMPRESSION" (355 U.S. AT 29-30). THE COURT HELD THAT THE FALSE IMPRESSION GIVEN TO THE JURY BY THE PROSECUTOR AND THE STATE VIOLATED *ALCORTA*'S RIGHT TO DUE PROCESS. THIS RULING IS ESPECIALLY IMPORTANT IN CASES SUCH AS PETITIONER'S, WHERE THE GOVERNMENT AND THEIR CHAIR-SIDE WITNESS HAVE ATTEMPTED TO ELUDE THE CLEARLY ESTABLISHED RULES PROHIBITING THE USE OF FALSE TESTIMONY BY MISLEADING THE COURT AND JURORS WITH PATENTLY FALSE IMPRESSIONS AND/OR SUGGESTIONS WHICH HAVE THE SAME POTENTIAL TO JEOPARDIZE THE FAIRNESS OF CRIMINAL TRIALS AND VIOLATE AN INDIVIDUAL'S RIGHT TO DUE PROCESS AS THE USE OF PERJURED TESTIMONY ITSELF. "AS THE SUPREME COURT HAS WARNED, THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM IS JEOPARDIZED WHEN PROSECUTORS ADOPT TACTICS WHICH ARE GOVERNED BY THE SADLY MISTAKEN AND DANGEROUS PRINCIPLE THAT VICTORY IS THE PRIMARY OBJECTIVE OF CRIMINAL PROSECUTION." *U.S. V. BAILEY*, 840 F.3d 99 (3RD CIR. 2016).

CONTRARY TO THE RULING OF THE THIRD CIRCUIT COURT OF APPEALS IN THE INSTANT CASE, THE PETITIONER EXHIBITS MORE THAN SUFFICIENT REASONING TO PROVE THERE WAS FAR MORE THAN A MERE INDICATION THAT, BOTH, AGENT KIRLEY'S TESTIMONY WAS FALSE AND THAT THE GOVERNMENT HAD REASON TO THINK IT WAS FALSE. TO FURTHER ILLUSTRATE THE FLAGRANCY IN THE GOVERNMENT'S MISCONDUCT, NOT ONLY DID THE GOVERNMENT FAIL TO CORRECT THE FALSE TESTIMONY, BUT ELICITED THE FALSE TESTIMONY FROM KIRLEY JUST MOMENTS AFTER ENDORSING THE EXCULPATORY TESTIMONY GIVEN BY WASHINGTON. IN *GIGLIO V. UNITED STATES*, 405 U.S. 150, 153-154, 92 S.Ct. 763, 31 L. Ed. 2d 104 (1972), THE COURT WROTE: "AS LONG AGO AS *MOONEY V. HOLOHAN*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L. Ed. 791 (1935), THIS COURT MADE CLEAR THAT THE DELIBERATE DECEPTION OF A COURT AND JURORS BY THE PRESENTATION OF KNOWN FALSE EVIDENCE IS INCOMPATIBLE WITH THE RUDIMENTARY DEMANDS OF JUSTICE." IN *NAPUE V. ILLINOIS*, THE COURT EXPLAINED, "ONE OF THE BEDROCK PRINCIPLES OF OUR DEMOCRACY, 'IMPLICIT IN ANY CONCEPT OF ORDERED LIBERTY', IS THAT THE STATE MAY NOT USE FALSE EVIDENCE TO OBTAIN A CRIMINAL CONVICTION" AND THAT "THE DISTRICT ATTORNEY'S SILENCE WAS NOT THE RESULT OF GUILE OR DESIRE TO PREJUDICE MATTERS LITTLE, FOR IT'S IMPACT WAS THE SAME, PREVENTING, AS IT DID, A TRIAL THAT COULD IN

ANY REAL SENSE BE TERMED FAIR".

THE EMPHASIS IN THE UNITED STATES SUPREME COURT'S BRADY JURISPRUDENCE ON FARNNESS IN CRIMINAL TRIALS REFLECTS BRADY'S CONCERN WITH THE GOVERNMENT'S UNQUESTIONABLE ADVANTAGE IN CRIMINAL PROCEEDINGS, WHICH THE COURT HAS EXPLICITLY RECOGNIZED. AS THE COURT IN BRADY EXPLAINED, "THE PROSECUTOR IS THE 'ARCHITECT' OF THE TRIAL, AND HIS PURPOSE IS TO BOTH, SECURE CRIMINAL CONVICTIONS AND ENSURE THAT 'CRIMINAL TRIALS ARE FAIR, EVEN WHERE HIS POLICE OFFICERS WOULD NOT.'" BRADY V. UNITED STATES, 397 U.S. 742, 748, 90 S.Ct. 1403, 25 L. Ed. 2d 747 (1970). IN SEVERAL CASES OVER RECENT YEARS, THIS COURT HAS CITED BERGER V. U.S., WHERE THE COURT HELD: THE PROSECUTOR IS "THE REPRESENTATIVE NOT OF AN ORDINARY PARTY TO A CONTROVERSY, BUT OF A SOVEREIGNTY WHOSE OBLIGATION TO GOVERN IMPARTIALLY IS AS COMPELLING AS IT'S OBLIGATION TO GOVERN AT ALL; AND WHOSE INTEREST THEREFORE, IN A CRIMINAL PROSECUTION IS NOT THAT IT SHALL WIN A CASE, BUT THAT JUSTICE SHALL BE DONE." BERGER V. UNITED STATES, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L. Ed. 1314 (1935). AS SUCH, "HE MAY PROSECUTE WITH EARNESTNESS AND VIGOR — INDEED, HE SHOULD DO SO. BUT WHILE HE MAY STRIKE HARD BLOWS, HE IS NOT AT LIBERTY TO STRIKE FOUL ONES." (BERGER, 295 U.S. AT 88). THEREFORE, PROSECUTORS MUST "REFRAIN FROM THE USE OF IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION" *Id.* ALSO, SEE WHAT THIS COURT WROTE IN BANKS V. DRETKE (ADMONISHING THE GOVERNMENT FOR ALLOWING FALSE TESTIMONY TO STAND UNCORRECTED), "IF IT WAS REASONABLE FOR [THE DEFENDANT] TO RELY ON THE PROSECUTION'S FULL DISCLOSURE REPRESENTATION, IT WAS ALSO APPROPRIATE FOR [THE DEFENDANT] TO ASSUME THAT HIS PROSECUTORS WOULD NOT STOOP TO IMPROPER LITIGATION CONDUCT TO ADVANCE LITIGATION ~~CONDUCT~~ PROSPECTS FOR OBTAINING A CONVICTION." BANKS V. DRETKE, 540 U.S. 668, 698-701, 124 S.Ct. 1256, 157 L. Ed. 2d 1166 (2004).

THE CLEARLY ESTABLISHED UNITED STATES SUPREME COURT'S PRECEDENT IN THE NAPUE DECISION IS THAT A PRESENTATION TO A FACT-FINDER OF FALSE TESTIMONY KNOWING IT TO BE FALSE RESULTS IN THE REVERSAL OF A CONVICTION IF "THE FALSE TESTIMONY COULD IN ANY REASONABLE LIKELIHOOD HAVE AFFECTED THE JUDGEMENT OF THE JURY." GIGLIO V. UNITED STATES (QUOTING NAPUE V. ILLINOIS). A SUCCESSFUL CHALLENGE TO A CONVICTION BASED ON THIS TYPE OF PROSECUTORIAL MISCONDUCT REQUIRES

A DEFENDANT TO SHOW THAT: (1) THE TESTIMONY WAS ACTUALLY FALSE ("FALSITY ELEMENT"); (2) THE PROSECUTOR KNEW OR SHOULD HAVE KNOWN IT WAS FALSE ("PROSECUTOR KNOWLEDGE ELEMENT"); AND (3) THERE IS ANY REASONABLE LIKELIHOOD THE FALSE TESTIMONY AFFECTED THE JUDGEMENT OF THE JURY ("MATERIALITY ELEMENT"). UNITED STATES V. AGURS, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L. Ed. 2d 342 (1976). SEE ALSO UNITED STATES V. MCNAB, 605 F.3d 1152, 1208 (11TH CIR. 2010) CITED WITH APPROVAL IN PROSDOCIMO V. SEC'Y, PA. DEPT. OF CORR., 458 FED. APPX. 141, 147 N.5 (3RD CIR. 2012) ("TO ESTABLISH PROSECUTORIAL MISCONDUCT FOR THE USE OF FALSE TESTIMONY, A DEFENDANT MUST SHOW THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY, OR FAILED TO CORRECT WHAT HE SUBSEQUENTLY LEARNED WAS FALSE TESTIMONY..."). HERE, EVEN IF THE GOVERNMENT WERE TO ARGUE THEY WERE NOT AWARE OF THE EXCULPATORY TESTIMONY BY WASHINGTON PRIOR TO IT BEING GIVEN AT TRIAL, THAT WOULD STILL NOT JUSTIFY THE GOVERNMENT'S FAILURE TO CORRECT THE FALSE TESTIMONY DUE TO THE FACT THAT WASHINGTON'S TESTIMONY WAS GIVEN BEFORE KIRLEY WOULD TESTIFY, WHICH MEANS THE GOVERNMENT HAD THE OPPORTUNITY AND THEREFORE AN OBLIGATION TO CORRECT THE FALSE TESTIMONY WHEN IT APPEARED.

IN DOW V. VIRGA, THE COURT EXPLAINED: "ALTHOUGH THE GOVERNMENT'S KNOWING USE OF FALSE TESTIMONY DOES NOT AUTOMATICALLY REQUIRE REVERSAL, COURTS APPLY A LESS DEMANDING MATERIALITY STANDARD TO NAPUE ERRORS: WHETHER 'THERE IS ANY REASONABLE LIKELIHOOD THAT THE FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGEMENT OF THE JURY.' (UNITED STATES V. AGURS). THIS MATERIALITY STANDARD IS, IN EFFECT, A FORM OF HARMLESS ERROR REVIEW, BUT A FAR LESSER SHOWING OF HARM IS REQUIRED UNDER NAPUE'S MATERIALITY STANDARD THAN ORDINARY HARMLESS ERROR REVIEW. SEE SMITH V. PHILLIPS, 455 U.S. 209, 220 N.10, 102 S.Ct. 940, 71 L. Ed. 2d 78 (1982) (DESCRIBING THE 'MATERIALITY REQUIREMENT' THAT APPLIES TO NAPUE AND GIGLIO CLAIMS)... NAPUE REQUIRES US TO DETERMINE ONLY WHETHER THE ERROR COULD HAVE AFFECTED THE JUDGEMENT OF THE JURY, WHEREAS ORDINARY HARMLESS ERROR REVIEW REQUIRES US TO DETERMINE WHETHER THE ERROR WOULD HAVE DONE SO." DOW V. VIRGA, 729 F.3d 1041, 1048 (9TH CIR. 2013). HOWEVER, THE COURT IN BAGLEY, (EXPLAINING THE MATERIALITY STANDARD) WOULD STATE: "THE FACT THAT TESTIMONY IS ~~CONSIDERED~~ PERJURED IS CONSIDERED MATERIAL UNLESS FAILURE TO DISCLOSE IT WOULD BE HARMLESS BEYOND A REASONABLE DOUBT" UNITED STATES V.

BAGLEY, 473 U.S. 667, 679-80, 105 S.Ct. 3375, 87 L. Ed. 2d 481 (1985).

THERE IS CERTAINLY A REASONABLE LIKELIHOOD THE FALSE TESTIMONY BY AGENT KIRLEY COULD HAVE AFFECTED THE JUDGEMENT OF THE JURY. THE TESTIMONY SPOKE DIRECTLY UPON THE PETITIONERS INVOLVEMENT IN A CONSPIRATORIAL ARRANGEMENT IN COORDINATING A SALE OF COCAINE. KIRLEY'S TESTIMONY THAT THE PETITIONER WAS "NOT DIRECTLY" INVOLVED IN A DRUG SALE WAS A BLATANT ACT OF PERJURY THAT WAS CALCULATED AND INJECTED FOR THE PURPOSE OF SWAYING THE OPINIONS OF THE JURORS IN ORDER TO SALVAGE A CONSPIRACY ELEMENT THAT OTHERWISE WAS NON-EXISTENT. WITH THE WEAKNESS OF THE EVIDENCE CONSIDERED, SUCH AN ALBEIT UNTRUE STATEMENT OF INCRIMINATING NATURE FROM A LAW ENFORCEMENT OFFICIAL AND CASE AGENT STANDS TO CONTRIBUTE CONSIDERABLE WEIGHT TO EVIDENCE THAT WOULD HAVE BEEN INSUFFICIENT TO ANY RATIONAL JURIST. (SEE HASKELL V. UNITED STATES, 806 F.3d 139 (3RD CIR. 2017), CONSIDERING THE "CENTRAL ROLE" OF THE WITNESS AS A FACTOR IN DETERMINING MATERIALITY OF FALSE TESTIMONY). IT NEED NOT BE SAID THAT A RATIONAL JURIST WOULD NEVER RETURN A GUILTY VERDICT FOR A CHARGE FOR WHICH THERE IS NO EVIDENCE. IN KEEPING WITH THE THIRD CIRCUIT COURT OF APPEALS OPINION DURING AN ORAL ARGUMENT HEARING, WHICH DESCRIBED THE CASE AS "INCREDIBLY SLOPPY" AND "A PATHETIC CASE", THE ADMISSION OF KIRLEY'S STATEMENT OVER COURT ROOM OBJECTION MOST ASSUREDLY CAUSED HARM TO THE DEFENSE. THE HARM IS EVEN MORE EVIDENT DUE TO THE FACT THAT IN AFFIRMING THE CONSPIRACY CONVICTION, THE COURT OF APPEALS FOUND THE CONSPIRACY TO BE PREDICATED SOLELY ON THE PETITIONERS INVOLVEMENT IN THE SALE OF COCAINE ON FEBRUARY 14, 2018. HOWEVER, THE COURT RECOGNIZED THE EVIDENCE AS SO THIN, DURING ORAL ARGUMENT IT USED THE ANALOGY "BY THE WIDTH OF A PIECE OF DENTAL FLOSS" WHEN STATING "THERE MAY JUST BE ENOUGH TO SUSTAIN A CONSPIRACY, IN TERMS OF SUFFICIENCY (UNDER (PLAIN ERROR REVIEW))". THE THIRD CIRCUIT HAS HELD, "THE STRONGER THE EVIDENCE AGAINST THE DEFENDANT, THE MORE LIKELY THAT IMPROPER ARGUMENTS OR CONDUCT HAVE NOT RENDERED THE TRIAL UNFAIR, WHEREAS PROSECUTORIAL MISCONDUCT IS MORE LIKELY TO VIOLATE DUE PROCESS WHEN EVIDENCE IS WEAKER." MARSHALL V. HENDRICKS, 307 F.3d 36, 49 (3RD CIR. 2002). CONSIDERING THAT UPON REVIEW BY THE THIRD CIRCUIT COURT OF APPEALS, THE CONSPIRACY CONVICTION WOULD BE BASED ON THE EXACT TRANSACTION IN WHICH THE FALSE TESTIMONY IMPROPERLY SUGGESTED THE

PETITIONER'S INVOLVEMENT, THERE EXCEEDS A REASONABLE LIKELIHOOD THAT THE FALSE TESTIMONY COULD HAVE AFFECTED THE JUDGEMENT OF THE JURY.

A DOCUMENT FILED PROSE IS TO BE LIBERALLY CONSTRUED, AND A PROSE COMPLAINT, HOWEVER INARTFULLY PLEADED, MUST BE HELD TO LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED BY LAWYERS. ERICKSON V. PARDUS, 551 U.S. 89, 94, 127 S.Ct. 2197

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,

Tom Alt

DATE: 4-9-21