No.

In the

SUPREME COURT OF THE UNITED STATES

JARRETT ALVIN KINLEY,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was subject to a pretrial polygraph by his bondsman for "risk assessment" purposes as a condition of his bond. The polygraph examiner testified before trial that he worked for the bondsman and was paid by him. The polygraph examiner's trial testimony changed to assert that it was Petitioner who "hired" him when he was questioned about whether he told Petitioner to tell him "something happened" before he leaves.

Where the Pennsylvania Superior Court held that if "there was any mistake in the examiner's testimony as to who paid for his services . . . it was incumbent upon the defense to correct the 'false narrative,'" did that holding conflict with this Court's decision in *Napue v. Illinois,* 360 U.S. 264 (1959)?

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Commonwealth of Pennsylvania v. Jarrett Alvin Kinley*, 191 MAL 2021 (Pa.) (Allocatur denied Aug. 31, 2021);

- *Commonwealth of Pennsylvania v. Jarrett Alvin Kinley*, 1753 MDA 2019 (Pa. Super. Ct.) (Judgment entered Mar. 16, 2021); and

- *Commonwealth of Pennsylvania v. Jarrett Alvin Kinley*, CP-49-CR-0000801-2016 (Court of Common Pleas of Northumberland County) (Judgment of Sentence of Sept. 19, 2018).

There are no other proceedings in state or federal courts, nor in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jarrett Alvin Kinley respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

OPINIONS AND ORDERS BELOW

The Pennsylvania Superior Court's unpublished memorandum opinion, *see* 2021 WL 983020, is reproduced at App. A. The trial court's opinion is reproduced at App. B. The Pennsylvania Supreme Court's per curiam order denying allowance of appeal, *see* 2021 WL 3877963, is reproduced at App. C.

JURISDICTION

The Pennsylvania Supreme Court denied a timely petition for allowance of appeal on August 31, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

U.S. Const. amend XIV.

INTRODUCTION

Sixty-two years ago, in *Napue v. Illinois,* 360 U.S. 264 (1959), this Court obligated prosecutors to correct false evidence, known to be false, and it flatly condemned convictions obtained on such evidence. This Court didn't draw a distinction about the prosecutor's duty to correct based upon when the false evidence was elicited, whether on direct- or cross-examination.

In this case, when Petitioner's polygraph examiner—introduced to the jury as an "interviewer," App. E, at 91—was challenged by defense counsel on cross-examination that he told Petitioner to "tell him something happened and [he] can leave," the polygraph examiner replied, "He hired me. He could leave any time he wanted to." *Id.* at 97-98.

That notion that Petitioner "hired" the polygraph examiner was false. The polygraph examiner repeatedly affirmed during pretrial hearings that he was hired and paid by Petitioner's bondsman to conduct a polygraph as a "risk assessment." App. D, at 4-9, 11. The polygraph was a "condition of bond." App. F, at 1.

The prosecutor was aware of these pretrial affirmations, yet at trial picked upon on re-direct, leading the polygraph examiner by asking: "You said that the defendant hired you for the interview; correct?" App. E, at 99. And the polygraph examiner reaffirmed with a simple "Yes." *Id.* at 100.

Petitioner's jury therefore falsely heard twice that he personally "hired" this professional "interviewer" to whom he seemingly made voluntary and inculpatory statements.

STATEMENT OF THE CASE

A. Factual Background

At 16, Petitioner Jarrett Kinley's daughter disclosed that he had sexually abused her over a period of nine years. Kinley was charged and lodged in jail. To bail him out, Kinley's father engaged a bondsman who posted bond for Kinley but required as a condition of his bail that he submit to a polygraph exam as part of a "risk assessment." Kinley did so. Shortly after his release, he met with a retired Pennsylvania State Trooper, who the bondsman hired to conduct the polygraph examination.

Kinley's meeting with the polygraph examiner was audio and visually recorded, and he spent approximately three hours with him. In all that time, Kinley repeatedly denied the accusations leveled against him, and after the polygraph examiner reported that the polygraph indicated deception, Kinley still denied the charges. It wasn't until the polygraph examiner insisted that Kinley tell him what he did before he left "to mitigate the mistakes [he] made" that Kinley said he occasionally got erections while massaging his daughter's back. He said this only after the polygraph examiner repeatedly assured him that he was there to help him; that everyone makes mistakes except "the only perfect person they put on the cross"; and that no one, other than the bondsman, would know what was said.

Indeed, the bondsman dropped in on Kinley's polygraph at the conclusion. When he arrived, the polygraph examiner informed the bondsman of the deceptive results and what Kinley said, and the bondsman reiterated that no one else would know except Kinley's attorney.

B. Procedural History

1. The case against Kinley progressed. As it did, Kinley was confronted with a surprise: the prosecution had obtained under subpoena from the polygraph examiner the audio-video DVD copy of his entire polygraph, and it was seeking to introduce it at trial. The issue therefore was teed up for a pretrial hearing. *See generally* App. D.

The prosecution's position was that it had no intention of using the polygraph results themselves at trial, instead it sought only to use "specific statements that go directly to rebut" Kinley's assertion to law enforcement that "he was unable to get an erection" and thus unable to do the things his daughter accused him of. The defense countered that anything Kinley said to the polygraph examiner was out of bounds because he only completed the polygraph at the request of his bondsman to get out of jail, and he was "specifically told" that "no one other than the bail bondsman would ever hear [his] statements." The prosecution's retort, however, was that Kinley could've chosen another bondsman if he didn't want to complete the polygraph, so it's "fair game" that the prosecution makes use of this evidence.

2. The trial court conducted an evidentiary hearing on "this important issue," and the polygraph examiner was the sole witness. *See* App. D. At the hearing, the polygraph examiner testified that he was contacted by Kinley's bondsman to conduct the polygraph; that he was paid by the bondsman; that he specifically was working for the bondsman; and that he went over paperwork with Kinley that detailed who he worked for and further explained that the results of his examination "could be subject to compulsory disclosure." *Id.* at 4-7.

3. Based on all of this, defense counsel persisted that Kinley's inculpatory statements not only remained inadmissible because they were obtained under false pretenses and pursuant to a condition of bond, but they were inadmissible because the polygraph examiner "was an agent of the Commonwealth" in gathering the information that he did. The prosecution countered that "[t]he defendant agreed to do a polygraph examination with his bondsman," and the refrain was the same: "[Kinley] could have gotten another bondsman if he didn't want to participate. He could have terminated the interview at any time." *Id.* at 21. And since "it was not an attorney who hired [the polygraph examiner]," and the prosecution had "no hands in this whatsoever," the

prosecution contended that Kinley's inculpatory statements should be admissible at trial. *Id.*

4. The trial court agreed. It ordered that Kinley's statements were admissible. But the trial court limited the admissibility of Kinley's statements on the condition "that the term polygraph not be used at any time during the pendency of the trial." *Id.* at 22.

Thus, so limited, the case proceeded onward, and Kinley's case came up for trial. How trial played out can largely be thought of in terms of Kinley's daughter's account of ongoing sexual abuse by Kinley over a nine-year period on the one hand, and, on the other hand, attempted inroads by the defense to undermine the abuse narrative. That was until the polygraph examiner testified.

The prosecution called the polygraph examiner, and he was introduced to the jury as a self-employed "interviewer." App. E, at 91. On direct, he acknowledged that he was "hired to conduct an interview" of Kinley. *Id.* at 92. He testified that during the "post-interview" Kinley admitted to getting erections, at least six times, while giving his daughter back rubs, and he stated that Kinley admitted to touching his daughter's butt and breasts over a thousand times. *Id.* at 93-94. When

confronted on cross that he told Kinley to "tell him something happened and [he] can leave," however, the polygraph examiner replied, "He hired me. He could leave any time he wanted to." *Id.* at 97-98.

To this point, the Commonwealth picked up on re-direct, leading the polygraph examiner by asking, "You said that the defendant hired you for the interview; correct?" The polygraph examiner reaffirmed with a simple "Yes." *Id.* 99-100.

5. Ultimately, the jury convicted Kinley of all counts. He was sentenced to 30 to 60 years of imprisonment. He filed a both a post-verdict and post-sentence motions seeking a new trial on the grounds that prosecutor's failure to correct the polygraph examiner's testimony as to who "hired" him denied Kinley due process. His request for a new trial was denied.

6. Kinley sought further review of this issue in the Pennsylvania Superior Court. The Pennsylvania Superior Court, like the trial court, agreed that even if "there was any mistake in the examiner's testimony as to who paid for his services . . . it was

incumbent upon the defense to correct the 'false narrative.'" *See* App. A, at 9; App. B, at 4. It thus affirmed on this point.[1]

7. The Pennsylvania Supreme Court denied Kinley's Petition for Allowance of Appeal. App. C.

REASONS FOR GRANTING THE WRIT

1. When the Pennsylvania Superior Court held "that defense counsel could have corrected the 'false narrative'" perpetuated by the polygraph examiner, that holding conflicted with *Napue v. Illinois*, 360 U.S. 264 (1959), which held that a state may not knowingly let go "uncorrected" false evidence that it otherwise did not solicit.

Kinley put before the lower courts that he was denied due process, and entitled to a new trial, because the prosecutor didn't correct the polygraph examiner's trial testimony that it was Kinley who hired him.

Kinley asserted that this was prejudicial because it "perpetuate[d] a false narrative" that he voluntarily engaged this "interviewer"—as the jury knew him, *see* App. E, at 91—to make incriminating statements to. That, however, hadn't been what was testified to and established in the lead up to trial, and it certainly wasn't the reality of the situation.

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[1] The Pennsylvania Superior Court, however, did vacate Kinley's judgment and remanded for resentencing for a violation of Pennsylvania's sentencing norms.

In the evidentiary hearing concerning the admissibility of Kinley's post-polygraph statements, the polygraph examiner had testified seven different times that he worked for Kinley's bail bondsman, and that's who paid him for the polygraph. *See* App. D, at 4-9, 11. This point was, in fact, probed by the prosecutor

* * *

Q. And further, did you—could you identify Commonwealth Exhibit 2?

A. Yes, it is the agreement to conduct polygraph examination.

Q. And, again, does that indicate who is actually paying for the polygraph and who contacted you?

A. Yes, ma'am.

Q. Who was that?

A. That is, again, the bail bondsman, Chris Hauptman.

* * *

Id. at 5-6 (Emphasis added).

At trial, the polygraph examiner testified to the jury as a self-employed "interviewer." App. E, at 91. On direct, the prosecutor was quick to establish that he had not been hired at its behest, *id.* at 92, and

it was further careful to ask this leading question to which the polygraph examiner simply responded, "Yes":

> **And you were hired to conduct an interview of Jarrett Kinley?**

Id.

The prosecutor probed no further on the subject of payment. That is, of course, until defense counsel's cross-examination prompted re-direct. On cross, defense counsel had attempt to commit the polygraph examiner to agreeing that he told Kinley, "Just tell me something happened and you can leave." *Id.* at 97-98. The polygraph examiner wouldn't accept that he said that to Kinley, so he in turn replied contrary to his well-established pretrial testimony:

> ***He hired me.* He could leave any time he wanted to.**

Id. at 98 (Emphasis added).

Having heard the polygraph examiner say that it was Kinley who hired him as an "interviewer" and knowing that testimony contradicted his pretrial testimony, the prosecutor's first question on re-direct nonetheless aimed to reaffirm what the polygraph examiner had just testified to:

> **You said that the defendant hired you for the interview, correct?**

The answer: "Yes." *Id.* at 99. Thus, the jury heard twice, and unequivocally, that it was Kinley who hired the polygraph examiner.

Apart from the jury left to wonder, "what is an interviewer?", this testimony left the jury to imagine that Kinley had hired this "interviewer" to incriminate himself. In that sense, the evidence used to convict Kinley was misleading since Kinley was meeting the polygraph examiner "as a condition of bond." *See* App. F, at 1. Kinley didn't choose the polygraph examiner; he was arranged by the bondsman. App. D, at 4. This notion then that Kinley hired this "interviewer" and could leave if he pleased simply wasn't reality, yet it was evidence unfairly reinforced by the government.

Rather than taking the opportunity to confront the polygraph examiner with his pretrial testimony that contradicted his assertion that Kinley hired him, the prosecutor doubled-down on this notion and reinforced in the minds of the jury this false narrative: *that Kinley was willingly providing inculpatory statements to "an interviewer" he personally hired.*

This misleading narrative was the proverbial "last nail in the coffin" for Kinley's case. While the lower courts attempted to eschew

this claim by suggesting "[t]here is nothing in the record which shows that anyone other than the Defendant and/or his attorney paid for the examination," *see* App. A, at 9, and App. B, at 4, the record evidence laid before the trial court in the post-verdict and post-sentence motions contradicted that position. Even the Commonwealth acknowledged that the polygraph examination was ***"paid for by the bondsman,"*** App. F, at 1, and "it was not an attorney who hired [the polygraph examiner] to do the interview." App. D, at 21.

This Court has obligated prosecutors to correct knowingly false evidence, and it has flatly condemned convictions obtained on such evidence. It has said:

> First, 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. [Citations omitted.] The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations omitted.] The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in

> a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854—855: 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Napue v. Illinois, 360 U.S. 264, 269–70 (1959) (citations omitted).

The American Bar Association, too, has spoken to the prosecutor's important duty to correct false testimony in the trial record. The *ABA Standards of Criminal Justice Relating to Prosecution Function* say this:

* * *

> During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. **If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination.** If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.

* * *

ABA Standards of Criminal Justice Relating to Prosecution Function, Standard 3-6.6(c) (emphasis added).

Here, the prosecution's allowance of the polygraph examiner to testify that Kinley personally hired him as "an interviewer," who he made inculpatory statements to, perpetuated a trial based on false evidence. For the lower courts to suggest that it was "incumbent" upon Kinley to correct the matter, that ignores that the defense correcting the polygraph examiner's contradictory testimony would've swung wide open the door that it was the bondsman who paid the polygraph examiner. That in turn would've only raised a host of other questions, such as: Why would a bondsman be hiring an interviewer for Kinley? What purpose did the interview serve? Why did the polygraph examiner say it was Kinley who hired him? If Kinley didn't hire the polygraph examiner, could he really leave at any time?

These were the problems destined for the polygraph examiner's testimony from the start. So long as this was evidence that the prosecution wanted in, it had the obligation to ensure that its evidence was accurate and comported with the truth. Where it did not, and the prosecution failed to correct the record, it rendered Kinley's trial an unfair one and denied him adequate due process.

Napue is clear on this issue, it controls, yet the Pennsylvania Superior Court thought otherwise because the polygraph examiner's contradictory testimony regarding who hired him was information given "during cross examination by defense counsel." *See* App. B, at 10. *Napue,* however, doesn't draw a distinction about the prosecutor's duty to correct based upon *when* the false statement came up. *Napue* doesn't relieve the prosecution from correcting false evidence merely because the evidence was elicited on cross-examination. Indeed, the facts of *Napue* involved that very circumstance. *See Napue, supra,* at 267 n.2 ("The alleged false testimony . . . first occurred on . . . cross-examination.") The duty to correct, this Court said, continues "although [the State's] not soliciting false evidence." *Id.* at 269.

> [I]t 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. [Citations omitted.] The same result obtains **when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.**

Id. (Emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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