ORIGINAL

No. 21-7730

IN THE

SUPREME COURT OF THE UNITED STATES

Justin L. Martin-PETITIONER

Vs.

David Shinn, Director, State of Arizona

Arizona Dept. of Corrections-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Justin L. Martin #126133
Arizona Dept. of Corrections
Tucson-Winchester Unit
10002 S. Wilmot Rd.
P.O. Box 24401
Tucson, AZ 85734

QUESTIONS PRESENTED

Mr. Martin raises these questions because at trial the State presented known "material" false testimony from its two key witnesses and neither the state nor Defense Counsel corrected what it knew to be false and elicit the truth. The only alleged evidence against Mr. Martin that links him to these crimes was witness testimony. Defense counsel knew the testimony was false and did not object. The state and the court stated that counsels failure to object to false testimony falls within the wide range of professional conduct.

1. Was Defense Counsel ineffective for failing to object to the states known use of false testimony in Petitioners trial. Violating his Constitutional Due process rights under the 6th Amendment.

2. Was the States known use of material false testimony in petitioner's trial a violation of his Constitutional Due Process rights under the 14th Amendment.

3. Does the Ninth Circuit Courts interpretation of *Strickland*, that Defense Counsels failure to object to the states known use of material false testimony in the Petitioners trial, (falls within the wide range of professional conduct,) conflict with relevant decisions of this court and go against clearly established Federal law. Violating Petitioners Constitutional Due Process rights under the 6th and 14th Amendments.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition as follows.

RELATED CASES

(None)

PRIOR OPINIONS AND ORDERS

May 14, 2012, Conviction, Armed Robbery, Kidnapping, Theft of means of transportation, Misconduct Involving weapons, Burglary, Maricopa County, AZ CR2009-177237-001 DT

September 5, 2013, Appeal, Conviction Affirmed, Maricopa County, AZ, No. 1 CA-CR 12-0390

January 22, 2015, Post-Conviction Dismissed, Maricopa County, AZ CR2009-177237-001 DT

October 17, 2017, Petition for review, relief denied, Maricopa County, AZ CR2009-177237-001 DT

March 3, 2021, Report and Recommendation, Recommending Dismissal Habeas Petition, Maricopa County, AZ No. CV-18-3005-PHX_RCC (JR)

April 9, 2021, Order Dismissing Habeas Petition, Maricopa County, AZ, No. CV-18-3005-PHX-RCC

December 17, 2021, (COA) Denied, United States Court of Appeals for the Ninth Circuit No. 21-15789

January 18, 2022, Motion for Reconsideration for (COA) Denied, United States Court of Appeals for the Ninth Circuit, No. 21-15789

_____, Brief_____United States Court of Appeals for the Ninth Circuit No. 21-15789

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL AMENDMENT 6

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STATEMENT OF THE CASE

On December 21, 2009, a Maricopa County Grand Jury indicted Appellant, Justin L. Martin, on twenty-three counts of armed robbery, kidnapping, misconduct involving weapons and theft of means of transportation concerning a series of home invasions in Paradise Valley AZ, spanning from October through December 2009 involving multiple victims. Trial began on April 23, 2012.

The State presented two witnesses in its case against Mr. Martin. Darrel Thompson and Detective Hoekstra. Both witnesses were key, as the State relied upon witness testimony. There were no fingerprints or D.N.A. evidence, none of the victims identified Mr. Martin as the assailant, no property from the robbery victims in this case was ever found in Mr. Martin's possession, and no weapon was ever found in Martin's possession.

Martin's alleged codefendant Darrel Thompson, testified that he was Martin's "getaway driver" and that he witnessed Martin commit some of these crimes. Thompson was arrested shortly after Martin, and was interviewed by Detective Hoekstra where he repeatedly denied any involvement in these crimes, specifically, denying any knowledge of Mr. Martin's alleged role in these crimes.

After spending approx. five months in jail, Thompson requested a "freetalk" interview with the state where he agrees to be a witness. During this interview, Thompson significantly changed his story listing out details of the crimes and he and Martin's alleged roles.

During this freetalk interview, Thompson gives false accounts in an effort to gain favor with the state, detailing an account that on the night of the second robbery, he claims to call Martin because it was dark and he could not see him. Thompson states Martin gave him instructions on where to pick him up and what to look for, placing Martin at the scene of the crime. Thompson first makes this statement two years prior to trial, at which the state had evidence in the form of cell phone records and Thompson's parole mandated G.P.S. ankle monitor, which proves this phone call does not exist, and this statement is false.

At trial, the state solicited testimony from Thompson, regarding this phone call conversation, knowing it to be false, and did not correct what it knew to be false and solicit the truth. Further, Defense Counsel failed to object to the states known use of false testimony.

The state then solicited testimony from Detective Hoekstra that Thompson's "story has been consistent from the beginning, and that his story never changed." The State solicited this false testimony from Det. Hoekstra knowing it to be false, and did not correct what it knew to be false and solicit the truth. Further, Defense Counsel failed to object to the states known use of false testimony.

Martin has raised Ineffective Assistance of Counsel and Prosecutor Misconduct at every stage of his Rule 32. The State nor the lower court have never denied the false testimony, instead they state that under Strickland, defense counsels failure to object to the States known use of false testimony "falls within the wide range of professional conduct" and that it was a "strategic and tactical" decision, even though Defense Counsel never stated that.

The District Court stated that because Defense Counsel pointed out several inconsistencies to show Thompson unreliability, Defense Counsel effectively discredited him. The issue above is the (testimony the jury was presented) that: Thompson called Martin to pick him up and Martin gave him instructions, and, that Det. Hoekstra testified that Thompsons story had never changed and was consistent from the beginning" two false statements that was never corrected, and that the jury was allowed to consider. (Martin further details these issues) While the state attempts to characterize "defense counsels efforts to show untruthfulness to the jury are thwarted" courts faithfully applying Napue hold that reversal is required where the prosecution fails to correct perjury, regardless of any defense efforts-successful or not-to combat it. Under Napue, the obligation is on the prosecution to correct perjury-not merely because they are ethically required to correct perjury, but because their word carries greater weight with juries who "frequently listen to Defense Counsel with skepticism." Lapage, 231 F.3d at 492. Accordingly, "the government's duty to correct perjury by its witness is not discharged merely because defense counsel knows, *and the jury may figure out*, that the testimony is

false." Id. (emphasis added).This duty is hardly burdensome: "Many prosecutors, when this occurs, interrupt their own questioning, and work out in a bench conference with the judge and defense counsel how to inform the jury immediately that the testimony is false." Lapage, 231 F.3d at 492)

On May 14, 2012, the jury returned guilty verdicts on (18) counts (6-23); the court declared a mistrial on the remaining counts (1-5). RT 05-14-2021 pg. 10-16,36; RT 06-14-2012 pg.19. On June 14, 2012, the court found that the state had proven Martins two prior armed robbery convictions and that the offences were serious pursuant to A.R.S. 13-706(f). RT 06-14-2012 pg.14-16, 32. Additionally, the court found two aggravating factors and no mitigation. Id., pg. 32. The court sentenced Martin to eleven-25 to Life sentences on counts (6-9, 19-22, 14, 15, and 17), a term of twenty years on count (10), aggravated terms of sixteen years on counts (11, 13, 18 and 23) The courts ordered counts 19-23 run concurrent to each other but consecutive to counts 6-18; counts 15-18 concurrent but consecutive to counts 6-14 and counts 6-13 to run consecutive. Id., pg.41; ROA at 212-215.

WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE STATES KNOWN USE OF FALSE TESTIMONY IN PETITIONERS TRIAL. VIOLATING HIS CONSTITUTIONAL DUE PROCESS RIGHTS UNDER THE 6TH AMENDMENT.

In the above case, Mr. Martin has raised the same I.A.C claims which reads:

1. Failure to object to the States known use of false Testimony of Darrel Thompson and Det. Frank Hoekstra. 2. Failure to object to the States known use of false testimony of Darrel Thompson. and 3. Prosecutor misconduct, for knowingly presenting False Testimony at Martin's trial.

Throughout Martin's entire appeals process, he has asserted the state knowingly solicited false testimony from (both) witnesses, Darrel Thompson and Det. Frank Hoekstra, which were listed in his PCR as well as his Habeas as two separate and distinct issues.

In Martin's Habeas, the State argued that because Thompson's plea agreement was submitted, and because Defense Counsel raised the fact that Thompson's memory was

cloudy to the jury, Thompson was properly impeached. The issue here was the State introduced false testimony which they failed to correct from both witnesses, Darrel Thompson and Det. Hoekstra. And, Defense Counsel failed to object to and or rebut the states improper submission of false testimony. *Under Napue, the prosecution may not sit back while the defense attempts to counter perjury, but rather must affirmatively "correct" the perjury and affirmatively "elicit" the Truth." 360 U.S. at 270. That is so for at least two reasons: (1) it is the prosecutor's duty to correct perjury-not the defendant's and (2) the introduction of contradictory evidence is not a "correction". Perjury must be specifically identified as such, and the jury must be instructed that it cannot consider it to convict the defendant. It is not enough to simply treat the known lie as any other piece of evidence and hope it does not mislead the jury.*

Also, Martin has asserted at every stage of his appeals process that [both] Darrel Thompson and Det. Hoekstra testified falsely, about two separate and distinct issues. He asserts the State knew the testimony was false and failed to correct it, and that Defense Counsel failed to object. The State and the Court focus only on Darrel Thompson, and simply ignore Martin's claims of false testimony from Det. Hoekstra, and have never addressed Martin's claim against Det. Hoekstra. The State and the Court never dispute the false testimony exists, instead simply state that any failure on Defense Counsel to object to the false testimony is "within the wide range of professional conduct, and is tactical and strategic" even though counsel never stated this.

Martin has done everything he knows to have the court address these issues, and asserts his Constitutional Due process rights were significantly violated and he was denied his right to a fair trial. Martin has always maintained his innocence.

Because it was primarily testimony which the state used to convict Martin, and the absolute absence of any physical evidence linking Martin to any of these crimes, the testimony of the States witnesses was key to the States case, testimony implicating Martin is material, and false testimony presented to the jury was harmful and violated Martins Due Process rights to a fair trial.

The United States Supreme Court clearly established Federal law governing I.A.C. claims in *Strickland v. Washington, 466 U.S. 668 (1984)* Appellant has established that a "reasonable Probability" exists that counsels conduct so undermined the proper

functioning of the adversarial process. Under the *Strickland* standard, a "reasonable probability" is one "sufficient to undermine confidence in the outcome, and according to the United States Supreme Court, withholding evidence which goes towards a witnesses credibility is enough to undermine confidence in the outcome.

The Sixth Amendment to the United States Constitution provides that a criminal defendant has a right to the effective assistance of counsel in his defense. The operative legal standard applicable to claims of ineffective assistance of counsel was addressed by the United States Supreme Court in *Strickland v. Washington, 466 U.S. 668 (1984).* The standards enunciated in Strickland are applied unless there is other Supreme Court precedent on point. *See Wright v. Van Patten, 552 U.S. 120 (2008).* Under Strickland, Martin must show both deficient performance and prejudice in order to establish that his counsels' representation was ineffective. *Strickland, 466 U.S. at 687.* Deficient performance is established by a petitioner's showing that counsel's performance fell below an objective standard of reasonableness. *See Hill v. Lockhart, 474 U.S. 52, 57 (1985) (citing Strickland, 466 U.S. at 688.* The courts evaluation of counsel's performance must be "highly deferential" and must avoid "the distorting effects of hindsight" by analyzing the challenged decision from counsel's perspective at the time. Strickland, 466 U.S. at 689. There is a strong presumption that counsels conduct falls within the wide range of reasonable assistance. To establish prejudice, Martin must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Lafler v. Cooper, 566 U.S. 156, 163 (2012) (citing Strickland, 466 U.S. at 694).*

Martin asserts that under Strickland, it would be unacceptable for Defense Counsel to "produce" false evidence including false testimony, the state would certainly object. So it cannot be said it "falls within objectionable reasonableness" when false testimony is presented by the state and counsel fails to object, since false testimony is, according to this court, unreasonable and illegal.

TESTIMONY FROM DARREL THOMPSON

Darrel Thompson, who was at the time, Martin's uncle, and is alleged to be the "getaway driver" in this case, was first interviewed by Det. Hoekstra and Hoekstra's Sgt.

at Thompsons moms house immediately following Martin's arrest. To which Thompson denied any knowledge regarding the crimes Martin was arrested for. Thompson was subsequently arrested after it was determined that Thompsons parole mandated GPS ankle monitor placed him in the area of where some of the crimes occurred.

The appeal issue Martin raised regarding Thompson arises out of false testimony he made at trial concerning a phone call he claims to have made to Martin on the night of the second robbery on October 26, 2009, claiming he called Martin on his cell phone because "it was dark and he couldn't see him" referring to Martin, and his testimony was that Martin told him to, "look for the light colored SUV and pull behind it and he'll jump in." Because the state had Thompsons GPS data, and Martin's Cell phone records it was determined that this phone call never took place and the testimony Thompson gave was in fact false. This false testimony is material in the sense that it allegedly has Martin at the scene of the crime, giving Thompson instructions on where to pick him up. Also because the victims reported seeing the suspect on the phone with what they presumed to be an accomplice.

On October 26, 2009, the Williams were robbed, and their Cadillac Escalade was stolen and left abandoned on Horseshoe Dr. which is one street south or Double Tree Ranch rd. The PVPD dispatch indicated the Williams 911 call came in at 21:09 PM.

Thompson testified that on the night of October 26, 2009, he was on his way to pick up the Appellant and stated: "I turned down the street and immediately called him, because it was dark and I could not see." Thompson claimed the Appellant told him to "look for a light colored SUV and pull behind it."

During Thompson's "freetalk" on May 27, 2010, he produced handwritten notes which he claimed were written prior to his "freetalk" interview. He stated the following:

- "...I get to the entrance of the street heading west-and call Justin, where are you! Justin drive down the street look for a light SUV on your right hand side pull behind it." Id., Pg.48.
- "...So I went to go pick him up and as we were driving down- I was drivin' down that road-it was dark, and I called him and said, "where you at? I can't see you." He goes, "keep driving, you'll see a white SUV. Um, I'm right-park right behind there. I'll get in."Id., pg.13

Prior to trial, Defense Counsel conducted an interview with Thompson. Thompson stated the following:

- "...um, I turned into the street to go pick him up and he goes-I called once, said, "Justin where are you at? I can't see you. Where-where you at?" Go-he said, "Right behind-go behind the light SUV and I'll be there for you to pick me up." Id., pg. 48, lines 2110-2114.

At trial, on cross-examination by defense counsel, Mr. Abernathy questions Thompson about this robbery.

Mr. Abernathy: "All right, and the third-let me take you back to the second robbery on the 26th of October 2009?"

Darrel Thompson: "On the second robbery, I dropped him off. I went straight to Starbucks to have a cup of coffee, when he called me to pick him up. I drove over to pick him up and the street was kind of dark, so I called him up, I said, "where are you?" He said, "I'm-drive until you see the SUV..." Id., RT May 1, 2012, pg. 152, lines 6-14.

Darrel Thompson: "...so I go to pick him up, I'm going down the street, its pitch black. I can't see-I said-"I can't see you, where are you?" Id., RT May 2, 2012, pg.45, lines 18-25

Mr. Abernathy: "Stop right there. You called him?"

Darrel Thompson: "I called him."

Mr. Abernathy: "Go ahead."

Darrel Thompson: "I can't see you, where are you? He says, Go behind the SUV and I'll meet you there. Id., May 2, 2012, pg. 46, lines 14-25.

Mr. Abernathy: "And how long did that conversation take?"

Darrel Thompson: "Oh, just a second. I called him and said, "where are you at?" and that's when he said to follow him-follow the street until you see the SUV and pull off to the left-hand-side or right hand side and I'll be right there. I said, Okay, so I did."

Mr. Abernathy: "And this is the-this is the Williams robbery, the second robbery?"

Darrel Thompson: "This is the second robbery, yes sir."

At this point Defense Counsel stopped his inquiry regarding this phone conversation. Mr. Martin asked Mr. Abernathy why he didn't point out to the jury that this was a lie, and he could prove it through phone records, and Mr. Abernathy's response was he can still call him back after the State rested its case, which he never did.

Because Thompson wore a GPS monitor, which shows exactly when he turned down Horseshoe Rd. which was at **9:10 pm** Along with Martin's cell phone records. Which show **no** phone calls from Thompson on October 26, 2009, at or near this time. Also, Det. Hoekstra's very own police report which states: (**#62 of 67- 2110:00 hours.** *Thompson turns west from Scottsdale Road onto Horseshoe Road behind victim's home.*) also, **(#63 of 67- 2111:00 hours.** *Thompson slows or stops on Horseshoe Road a short distance from where Martin abandons victim's vehicle which Martin had taken when he left the victim's home.)* In this report, Det. Hoekstra cross-referenced Thompson's GPS along with Martin's cell phone records, which show Thompson **did not** make this phone call.

Thompson made this false claim multiple times in his many pre-trial interviews. The State, Det. Hoekstra, Det. Schrimpf and Defense Counsel all knew this statement to be false, and did not take the steps to correct this testimony after it was introduced in Appellants trial.

Prejudice to the petitioner is clear in the fact that 1. The statement is false. And 2. The statement is material, as it directly alleges Martin giving Thompson directions to look for a light colored SUV, placing Martin at the scene of the crime.

TESTIMONY FROM DETECTIVE HOEKSTRA

First, Martin asserts that Det. Hoekstra testified falsely that Darrel Thompsons "story had never changed" and has been consistent "from the beginning" although Thompson had made multiple pre-trial statements to him regarding Martin and his alleged involvement in the crimes which significantly contradicted his trial testimony. And the state, knowing this to be untrue, further bolstered Det. Hoekstra and Thompsons testimony by stating multiple times in his closing argument to the jury that Thompsons testimony "had been consistent from the beginning" and that his "story had never changed, his story never changed." This statement from the State, along with Hoekstra's Statements were significant due to the fact that the state's case relied solely on Thompsons testimony, there was no physical evidence linking Martin to these crimes, and aside from Thompson identifying himself as Martin's alleged "getaway driver" no other identifications from other witnesses nor the victims themselves, identified Martin as the assailant. In fact, the only person who testified that Martin was the alleged assailant was Thompson.

At trial, the State called Det. Hoekstra who was involved in Thompson's "free talk interview" and who also coincidentally conducted Thompsons Initial Post-arrest interview on December 17, 2009. The State solicited testimony from Hoekstra regarding Thompson. Mr. Rand asked Hoekstra if Thompson's story had ever changed as to the facts of what happened with the defendant, to which Hoekstra answered "Not once." RT May 7, 2012, pg. 63, line 12-14.

Mr. Rand further solicited testimony from Hoekstra regarding Thompson's consistency with his version of events compared to his GPS ankle monitor. Asking if it was *"consistent with Thompson's testimony?"* to which he answered, *"Oh very much so."* Mr. Rand then asked Det. Hoekstra for clarification, he asked, *"When I say testimony, his interview and his freetalk?"* To which Det. Hoekstra answered, *"Yes, very much so."* RT May 7, 2012, pg. 93, line 22, through 94, line 1.

During his closing, Mr. Rand stated that, *"Thompson's testimony has been consistent from the beginning."* RT May 8, 2012, pg. 91, line 23-25 through pg. 92, line 1-4.

Mr. Rand further asserts this claim to the jury that Thompson's "story never changed, his story never changed." RT May 8, 2012, pg. 92 line 20-24.

At trial the Judge gave the jury their instructions on determining a witness' credibility by "Whether the witness was contradicted by anything the witness said or wrote before trial."

In the Appellants trial, the States only witness to Allege Appellant had any involvement in these crimes was Thompson, who in his initial interview on December 17, 2009 Thompson told Det. Hoekstra that Appellant had nothing to do with these crimes. Stating the following:

Darrel Thompson: "...for armed robbery, for theft, for home invasion, all kinds of stuff, yeah. I'm freaked. I had no idea he was doing that shit. And that's the absolute truth." Id., pg. 12-13

Darrel Thompson: "...I don't know what the fuck my nephew was doing..." pg. 17

Det. Hoekstra: "And the victim's-his comment on the phone was, 'This is going down now. I'll call you when I'm finished.'" Pg. 18 ***Darrel Thompson:*** "...I'm telling you I have no idea about him telling about it's going down now or its going..." pg. 19

Darrel Thompson: "I have no idea that he was doing any kind of a fucking robbery or hurting anybody. Absolutely not. pg. 20

Darrel Thompson: "...but to tell you that I was involved and knowing that he was stealing from car-or houses, cars, planes, no. Absolutely not. pg.21

Darrel Thompson: "...I had no idea he was doing that shit." Pg. 28

Det. Hoekstra: "...you knew it, you were his wheelman." Pg. 29

Darrel Thompson: "I did not know-and I'm not no wheelman for nothing." Pg. 29

Darrel Thompson: "...and he's dressed like this. No cap, black, all this stuff that you're talking about." Pg.31

Darrel Thompson: "...what? Ah, Whoa, whoa, whoa. I have no idea what you're talking about. I have no knapsack or jewelry." Pg. 32

Darrel Thompson: "...I have no idea. A knapsack with jewelry? No sir." ***Hoekstra:*** "So you're looking me in the face and you're telling me you didn't try and move some jewelry?" ***Thompson:*** "Absolutely not." ***Hoekstra:*** "At-at all, ever." ***Thompson***: No, at all, ever." ***Hoekstra:*** You specifically told us you were trying to sell some jewelry for your father." ***Thompson:*** "No, I went with him." ***Hoekstra:*** "And that you couldn't sell it. Nobody would buy it and you took it back to your dad and said, Here, you take care of it yourself." ***Thompson:*** "Really?" ***Hoekstra:*** "You told me this yesterday. We were standing there in your..." Thompson: "No." ***Hoekstra:*** "...bedroom when you told us this." ***Thompson:*** "Absolutely not. I've never taken any jewelry to nowhere by myself." Pgs.34-36

Darrel Thompson: "And that's absolutely not right. I did not know a fucking thing he was doing there. Pg. 40

Darrel Thompson: "I don't know anything about a knapsack." Pg. 41

Darrel Thompson: "...I never seen a knapsack, I never seen him-ah, like you said, a hood. He looked like-dressed like this and that's it." ***Hoekstra:*** "See, and-where did he get the knapsack, then?" ***Thompson:*** I don't know about no knapsack." Pg.41

Throughout the entire interview, Det. Hoekstra asked Thompson specific questions regarding Martin and these crimes, to which Thompson answered his questions, and throughout, Det. Hoekstra continued to call him a liar. Thompson told Hoekstra he and Martin were in the area passing out flyers for Martins Handyman Business, at which, Hoekstra called Thompson a liar. Frustrated, Thompson invoked his rights and the interview was concluded.

At trial, Thompson significantly changed his story, testifying to the following:

- Thompson was in fact Martin's "getaway driver" RT May 1, 2012 pg.152, lines 6-14; pg. 45, lines 18-25; pg. 46, lines 14-25; May 2, 2012 pg. 42, lines 14 thru pg. 43 line 11.
- That Martin did in fact call him during a robbery telling him "it's going down now." RT May 1, 2012, pg. 122, line 6; pg. 144, line 9-14; May 2, 2012, pg.37, line 24.

- That Martin was dressed all in black "like a ninja." RT May 1, 2012, pg.123, lines 11-15; pg.129, line 25thru pg130, line 1-2; pg.152, line 15-25 and May 2, 2012, pg.46, lines 4-5.
- That he saw Martin with a gun. RT May 1, 2012, pg. 134, line 15-23; pg. 135, line 10-17; pg. 152, line 21-25; May 2, 2012 pg. 42, line 14 thru pg. 43, line 11.
- That he saw Martin carrying a large backpack. RT May 1, 2012, pg. 124, lines 4-6.
- That Martin was trying to sell Jewelry. RT May 1, 2012, pg. 127, line 1-19.

This testimony is material due to the fact that Thompson did in fact have two separate and significantly different "stories". One version implicates Martin, the other has Thompson stating he had no knowledge of the crimes, that Martin was not robbing people, wearing all black, selling jewelry or making phone calls etc...

The Trial Judge in this case, gave the jury specific instructions on weighing a witnesses credibility, read in part: "...was the witness contradicted by what the witness said or wrote prior to trial." First, Det. Hoekstra's false testimony removes the jury's burden of weighing Thompson's pre-trial statements against his trial testimony. Second, with Thompson being the only witness to offer any alleged information against Martin, his testimony becomes key in the prosecution's case.

Martin raised this claim at every stage of his appellate process, that Det. Hoekstra, not Thompson, gave false testimony regarding Thompson's inconsistent statements. The State, has never addressed Det. Hoekstra's false testimony, instead, they turn the issue, completely removing Det. Hoekstra from the claim.

Appellant alleges that the State knowingly introduced perjured testimony in his trial, in two separate and distinct issues one against Darrel Thompson and the other against Detective Hoekstra. The I.A.C. claim was for his Defense Counsels failure to object, knowing that the testimony being introduced was false and material to the case. Martin also alleged Prosecutor Misconduct for knowingly introducing false testimony from both witnesses. The court ruled that any misconduct made by the prosecutor is barred because it should have been raised in his Direct Appeal. Appellant argues that the States knowing use of perjured testimony falls under Rule 32 P.C.R. Because in appellant's case, both the Prosecution and Defense Counsel knew the testimony was false, and they both failed to correct the false testimony or offer any evidence to rebut the false testimony. The

only way to prove the perjured testimony would require (going outside the record,) **which is not allowed on Direct Appeal.**

WAS THE STATES KNOWN USE OF MATERIAL FALSE TESTIMONY IN PETITIONERS TRIAL A VIOLATION OF HIS CONSTITUTIONAL DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT.

Appellant is asking this court to consider this claim for the reasons stated below:

The issues Appellant raises here is: (Did the State violate his 14th Amendment Due Process rights by "Knowingly" soliciting false testimony and/or failing to correct false testimony it knows to be, or should have known to be false, from their key witnesses Darrel Thompson and Det. Frank Hoekstra?) *"...Governments knowing use of false testimony, or failure to correct testimony violates Due Process." Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001); "...Denial of Due Process occurs where the State allows false evidence to go uncorrected." Hall v. Dir.of Corrections, 343 f.3d 976 (9th Cir. 2003); Dow v. Virga, F.3d 1041 (9th Cir. 2013) Prosecutor "knowingly elicited and then failed to correct false testimony by police detective"; Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011) Prosecution failed to correct perjurious testimony"*

The state cannot rely on a procedural bar, of its presentation of false testimony, since false testimony must be corrected by the state "Whenever" it becomes known to them. False testimony is fundamentally unfair

It is important to note that the State has never disputed that the false testimony that Martin asserts here exists, to the contrary, the State simply ignores Martin's issues by either eliminating [Detective Hoekstra] from the issue that [He] presented false testimony that, "Thompsons story had never changed," and that "Thompson's story had been consistent from the beginning" both false statements. Even though Martin has asserted this claim against Det. Hoekstra throughout his entire appellate process, the State or the Court has never addressed it.

Next, Martin's appeal issue regarding [Thompson] arises out of false testimony he made at trial concerning a phone call he claims to have made to Martin on the night of the

second robbery on October 26, 2009, claiming he called Martin on his cell phone because "it was dark and he couldn't see him" referring to Martin, and his testimony was that Martin told him to, "look for the light colored SUV and pull behind it and he'll jump in." Because the state had Thompsons GPS data, and Martin's Cell phone records it was determined that this phone call never took place and the testimony Thompson gave was in fact false. This false testimony is material in the sense that it allegedly has Martin at the scene of the crime, giving Thompson instructions on where to pick him up.

The State has never addressed this issue. They simply state that Thompson's "inconsistent statements" are for the jury to decide. The allegations Martin makes are that Thompson "flat out lied" about receiving directions from Martin during a phone call. And the State knew Thompson was lying about these statements. There were no inconsistencies regarding this issue presented to the jury, which is the crux of Martin's claim. The statements made from Thompson regarding this issue are, in fact, false and because the prosecutor failed to correct what it knew to be false and elicit the truth, which is its duty, and because defense counsel never objected, the jury was only given one version of events from Thompson. Thereby no inconsistencies.

Appellant first raised his claims of Prosecutor Misconduct for "knowingly soliciting false testimony from Darrel Thompson and Det. Hoekstra" in his Petition for post-conviction relief, rule 32. And has continued to assert this claim throughout his entire appellate process. The State, along with the Arizona Court of Appeals, Arizona Supreme Court and the District Courts rulings on this issue mirror each other's, stating: 1. Prosecutor Misconduct is Procedurally Barred because it should have been raised in Appellants Direct Appeal. And, 2. Trial Counsels failure to object to the State's known use of false testimony, (that he himself knew to be false) was a "tactical and strategic decision" (which Defense Counsel never stated was tactical or strategic) and his failure to object to the states known use of false testimony, falls within the wide range of professional conduct.

The Ninth Circuit Court, as well as the United States Supreme Court, have consistently held that known presentation of false testimony by the State is a Constitutional Due Process violation under the 14th Amendment: *Giglio v. United States,*

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001); "...Denial of Due Process occurs where the State allows false evidence to go uncorrected." Hall v. Dir.of Corrections, 343 f.3d 976 (9th Cir. 2003); Dow v. Virga, F.3d 1041 (9th Cir. 2013); Prosecutor "knowingly elicited and then failed to correct false testimony by police detective"; Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011) Prosecution failed to correct perjurious testimony"

The States position is that Defense Counsel failure to object to the States Knowing Use of false testimony was "strategic and tactical" and therefore could not be challenged and that his actions "fell within the wide range of professional conduct." Defense Counsels actions cannot be said to be "Effective Assistance" as guaranteed under the 6th Amendment and under the *Strickland* standard, when these actions are ruled by this court and the U.S. Supreme Court as Constitutional Due Process rights violations, under the 14th Amendment, which go against clearly established Federal law.

It's important to note that the State has never once denied Appellants claims that the Prosecutor solicited false testimony from their key witnesses, instead, they argue that any false testimony presented by the State is "merely a simple matter of credibility."

Appellant is asking this court to give his claims of Prosecutor Misconduct consideration because the State's failure to correct false testimony when it occurs, goes against this courts "clearly established federal law." And that a "Miscarriage of Justice" will occur if Martins convictions, which were based on the Prosecutions solicitation of false testimony from their two key witnesses was presented to the jury to consider when reaching their verdict.

DOES THE NINTH CIRCUIT COURTS APPLICATION OF *STRICKLAND*, THAT DEFENSE COUNSELS FAILURE TO OBJECT TO THE STATES KNOWN USE OF MATERIAL FALSE TESTIMONY IN THE PETITIONERS TRIAL, (FALLS WITHIN THE WIDE RANGE OF PROFESSIONAL CONDUCT,) CONFLICT WITH RELEVANT DECISIONS OF THIS COURT AND GO AGAINST CLEARLY ESTABLISHED FEDERAL LAW. VIOLATING PETITIONERS CONSTITUTIONAL DUE PROCESS RIGHTS UNDER THE 6TH AND 14TH AMENDMENTS.

The Ninth Circuit Court of appeals summarily dismissed Martins Request for a Certificate of Appealability on December 17, 2021 stating, *"the Petitioner has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C.§2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)."*

Petitioner cites Slack v. McDaniel, 529 U.S. 473 (2000) "the court should issue a Certificate of Appealability because Petitioner has alleged that pursuant to U.S.C. § 2253 he has shown: (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right." And "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel, 529 U.S. 473 (2000); Fed. R. App. P., Rule 22(b)*

The Courts misapplication of Strickland v. Washington, that Defense Counsel's failure to object to the States Known use of false testimony: (a) falls within the wide range of professional conduct, and (b) is a tactical and strategic decision and could therefore not be challenged. First, the state is suggesting that Counsels failure to object to the states use of false testimony was trial strategy and/or a tactical decision. Defense Counsel never gave any explanation regarding this issue, and has never stated that his not objecting to the State's known use of false testimony was part of his trial tactic/strategy. First, Martin asserts that under federal law, the use of false testimony is strictly prohibited, and counsel cannot rely on false testimony as a defense strategy or tactical. This point is moot because counsel never suggested it was, the State drew that conclusion in error. Next, the United States Supreme Court has consistently held that the State's known use of false testimony to gain a conviction violates a Defendants Constitutional Due Process rights under the 14th Amendment. *The United States Supreme Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 12 (1935). In Napue v. Illinois, the Supreme Court reiterated that a conviction obtained through use of false testimony, known to be such by representatives of the state, is a denial of due process. The Court further ruled that there is also a denial of due process when the state, though not soliciting false evidence, allows it to go uncorrected when it appears. In cases involving*

false or misleading testimony, a new trial is required if "the false testimony could...in any reasonable likelihood have affected the judgment of the jury...Napue, 360 U.S. at 271

In fact, the Ninth Circuit Court has even held the same: *Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001); "...Denial of Due Process occurs where the State allows false evidence to go uncorrected." Hall v. Dir.of Corrections, 343 f.3d 976 (9th Cir. 2003); Dow v. Virga, F.3d 1041 (9th Cir. 2013); Prosecutor "knowingly elicited and then failed to correct false testimony by police detective"; Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011) Prosecution failed to correct perjurious testimony"* Similarily, *the Ninth Circuit has emphasized that the burden rests with the government "to correct false testimony given by its witnesses, even when the defense knows the testimony was false." Soto v. Ryan, 760 F.3d 947, 968 (9th Cir. 2014); accord United States v. Gale, 314 F.3d 1, 4 (D.C.Cir.2003)*

Therefore it cannot be said that Defense Counsel was effective as guaranteed by the Sixth Amendment, when he failed to object to the States known use of false testimony, which the state relied on in gaining Martins conviction, especially when he himself knows the testimony is in fact false. The Court misapplied *Strickland* when they stated that "Defense Counsels failure to object to the States known use of false testimony falls within the wide range of professional conduct." This Court has consistently held this is a violation of a Defendants Due Process rights under the 14th Amendment. In allowing the Ninth Circuit Court of Appeals ruling, that Martins Constitutional rights were not violated, sets a dangerous standard that removes counsels duty to subject the State's case to adversarial testing. The State's case against Martin consisted of one witnesses testimony that Martin was responsible for these crimes. His testimony was key in the prosecution's case, and failing to correct testimony known to be false, first and foremost falls on the prosecution. But when the State attempt to deliberately deceive the court and jury by introducing false evidence, Defense Counsels duty, under the 6th Amendment is to protect his client, which he did not do.

Martin has demonstrated that defense counsel's failure to object to known false testimony is **"Deficient Performance."** Attorneys and Judges do not view false testimony as acceptable, there is a long history of this court ruling "against" the use of false testimony, there are certainly Jurist of Reason who will agree and this Court strictly prohibits the use of false testimony in a trial.

Martin was **"Prejudiced"** by counsel's conduct due to the fact that the False testimony was "Material" and because the State relied on Thompson and Det. Hoekstras testimony to present their case against Martin. Specifically Thompsons testimony. Without Thompsons testimony, there is no evidence linking Martin as the perpetrator of these crimes.

REASONS FOR GRANTING THE PETITION

Mr. Martin went to trial with the understanding that his defense counsel would defend and protect him. This includes the presentation from the State of known false testimony. The State argues that the petitioner is not entitled to "perfect" representation. Martin argues that the most basic right, protected by the constitution, is to have a fair trial, one free of the debilitating effect of false testimony. The jury was presented facts that were false, and had the truth been revealed, would have produced a different result. Martin's Defense Counsel knew the evidence being presented was false and chose not to object to, and or present any rebuttal evidence. If the State chooses to present testimony it knows to be false, the only other protection a defendant has is his Counsel.

The Petitioner has consistently maintained his innocence. He was sentenced to (11) 25 to life sentences, four of which were run consecutively. The evidence against Martin was far from overwhelming, aside from Thompsons testimony, there was no evidence presented at trial that Martin committed these crimes, which made Thompsons testimony key to the States case. There were no fingerprints, D.N.A or identifications of Martin, and no property from any of the victims in Martins possession. In fact, these crimes continued in the same area even after Martin was arrested and incarcerated awaiting trial.

At every stage of his Appellate Procedure, he has made the claims that the State solicited false testimony of a material issue from Darrel Thompson and Det. Frank Hoekstra, of which throughout, the State has never denied the allegations, instead, the State argues that Defense Counsels failure to object to the States known use of false testimony is a tactical and strategic decision and falls within the wide range of

professional conduct. This interpretation of *Strickland* is in error, and conflicts with relevant decisions of this court.

The States position is that Defense Counsel failure to object to the States Knowing Use of false testimony was "strategic and tactical" and therefore could not be challenged and that his actions "fell within the wide range of professional conduct." Defense Counsels actions cannot be said to be "Effective Assistance" as guaranteed under the 6th Amendment and under the *Strickland* standard, when these actions are ruled by the U.S. Supreme Court as Constitutional Due Process rights violations, under the 14th Amendment, and go against clearly established Federal law.

Further, the Ninth Circuit Court, as well as the United States Supreme Court, have consistently held that known presentation of false testimony by the State is a Constitutional Due Process violation under the 14th Amendment: *Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2001); "...Denial of Due Process occurs where the State allows false evidence to go uncorrected." Hall v. Dir.of Corrections, 343 f.3d 976 (9th Cir. 2003); Dow v. Virga, F.3d 1041 (9th Cir. 2013); Prosecutor "knowingly elicited and then failed to correct false testimony by police detective"; Sivak v. Hardison, 658 F.3d 898 (9th Cir. 2011) Prosecution failed to correct perjurious testimony"*

This Court's intervention is further warranted because the decision below contravenes the principle "that a conviction secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process." *White v. Ragen, 324 U.S. 760, 764 (1945).* Napue articulated a general rule requiring prosecutors to correct perjury-without exceptions. Indeed, even the majority below acknowledged that this Court has never recognized "exceptions for testimony elicited by the defense, or testimony known by the defense to be false, or testimony corrected before the jury deliberates." Moreover, the Napue rule is consistent with a long line of authority holding that [WHENEVER] the government "obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. *Hyster v. Florida, 315 U.S. 411, 413 (1942).*

Napue's categorical requirement to correct perjury was no accident. As the dissent observed below, "Napue itself considered and rejected the grounds the majority relies upon to excuse the Illinois' courts failure to follow it. The Court was clear that a Due Process violation occurs when the prosecution, "although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue, 360 U.S. at 269 (emphasis added).* The prosecution violates due process where it "allows [perjured testimony] to go uncorrected" regardless of whether the prosecutor relies on it. Id. (emphasis added). Nor can the introduction of contradictory evidence "turn what was otherwise a tainted trial into a fair one." Id. At 270. The Napue Court considered and rejected such exceptions.

Thus, there is no doubt that the constitutional right at issue here was clearly established. The "precise contours" of a defendant's due process right to a trial free of perjury have been "established [by] a clear or consistent path for courts to follow." *Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003).*

Martin asserts the Ninth Circuit court's ruling in dismissing his claims were in error, when the court ruled that, " Martin has not made a substantial showing of a denial of his Constitutional rights."

Near identity of facts between clearly established Supreme Court precedent and petitioner's case is not required for relief under AEDPA.

Under this Court's precedents, Mr. Martin need not show that this Court has already ruled on an identical case. Rather, because the state court did not "reasonably apply the rules 'squarely established' by" Napue and its progeny to his case, Mr. Martin is entitled to a new and fair trial. *White v. Woodall, 134 S.Ct. 1697, 1706 (2014).* Indeed, the right to a trial free from perjured testimony is "fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado, 541 U.S. 652, 666 (2004).*

Not only would the State improperly limit Napue to its facts, but the rule the State urges is plainly contrary to this Court's longstanding precedents. While the State, as it did in this case contends that perjury may be "corrected" simply by cross-examining witnesses or introducing contrary evidence, Napue makes clear that such measures do not constitute a "correction." The Napue Court rejected the state's contention that "the fact that the jury was apprised of other grounds for believing that the witness...may have had an interest in

testifying against petitioner turned what was otherwise a tainted trial into a fair one." 360 U.S. at 270. Allowing the jury to "weigh" the "credibility" of a witness who offers false testimony as the State would have courts do, is precisely what Napue prohibits.

The jury must be directed that it cannot consider the perjured testimony. As the dissent observed below, Napue is violated when the prosecution fails to correct perjury "whether the defense knew of the false testimony or whether the jury heard evidence contradicting the false testimony." "A jury that hears evidence merely contradicting the perjury cannot be said to know the truth."

In fact, the constitutional violation here was much worse than in Napue. Not only did the State solicit false testimony from Darrel Thompson and Det. Frank Hoekstra, knowing that the testimony was false, but the prosecution emphasized during closing argument that although "Thompsons testimony wasn't perfect", "his story never changed." *Id.* As the third Circuit has aptly observed, "how can a defendant possibly enjoy his right to a fair trial when the state is willing to present (or fails to correct) lies told by its own witness and then vouches for and relies on that witnesses' supposed honesty in its closing?" *Haskell, 866 F.3d at 152.* The Ninth Circuit's affirmance of Mr. Martin's conviction calls out for correction. There is no dispute that Darrel Thompson was the Key witness in the case above, and there was no physical evidence tying Mr. Martin to the crimes. *See Haskell, 866 F.3d at 146* ("key witness" "could have affected the jury's judgment" since, as here, "all the other eyewitnesses had significant problems with their testimony"; *Hayes, 399 F.3d AT 985* (witness was "the centerpiece of the prosecution's case" and nearly all of the other evidence against [the defendant] was circumstantial").

Courts faithfully applying Napue hold that reversal is required where the prosecution fails to correct perjury, regardless of any defense efforts-successful or not-to combat it. Under Napue, the obligation is on the prosecution to correct perjury-not merely because they are ethically required to correct perjury, but because their word carries greater weight with juries who "frequently listen to Defense Counsel with skepticism." *Lapage, 231 F.3d at 492.* Accordingly, "the government's duty to correct perjury by its witness is not discharged merely because defense counsel knows, *and the jury may figure out,* that the testimony is false." Id. (emphasis added). This duty is hardly burdensome: "Many prosecutors, when this occurs, interrupt their own questioning, and work out in a

bench conference with the judge and defense counsel how to inform the jury immediately that the testimony is false." *Lapage, 231 F.3d at 492)*

The question is a significant one, of fundamental importance to the criminal justice system. "When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened." *Hayes v. Brown, 399 F.3d 972, 988 (9th Cir. 2005)*

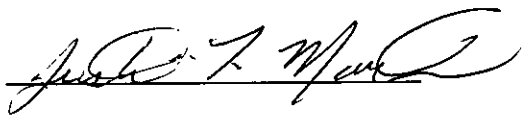
This Court has clearly and repeatedly held that when a government witness lies, the prosecutor must not "allow it to go uncorrected." *Napue, 360 U.S. at 269.* Thus, Napue plainly sets forth a "specific legal rule" that provides a basis for habeas relief. *Lopez v. Smith, 135 S.Ct. 1, 4 (2014).* Indeed, multiple circuits have granted habeas relief where convictions were secured by false testimony. Napue presents an easy-to-follow directive: "A lie is a lie...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." 360 U.S. at 269-70. When the court below excused the prosecution from that duty, it allowed Mr. Martin to be convicted based on lies of a government witness and denied him "a trial that could in any real sense be termed fair." Id. At 270. This court should grant review to reaffirm the vitality of Napue and ensure that defendants like Justin Martin are no longer deprived of their fundamental constitutional rights.

The State's position, adopted by the court below, is "inconsistent with the rudimentary demands of justice," *Mooney v. Holohan, 294 U.S. 103, 112 (1935),* and contradicts nearly a century of this court's clear precedent. Under Napue, the prosecution may not sit back while the defense attempts to counter perjury, but rather must affirmatively "correct" the perjury and affirmatively "elicit" the Truth." *360 U.S. at 270.* That is so for at least two reasons: (1) it is the prosecutor's duty to correct perjury-not the defendant's and (2) the introduction of contradictory evidence is not a "correction". Perjury must be specifically identified as such, and the jury must be instructed that it cannot consider it to convict the defendant. It is not enough to simply treat the known lie as any other piece of evidence and hope it does not mislead the jury.

CONCLUSION

The petition for a Writ of Certiorari should be granted. It is undisputed that the key witnesses repeatedly lied under oath. As a result, Mr. Martin will spend the rest of his life in prison-an outcome that could have been avoided had the false testimony in question been corrected by the prosecutor at the time it was presented. Martin has been denied his life and liberty on a conviction based on false testimony. He was denied a fair trial and has been denied his right to appeal by the State and Court failing entirely to address his claims. He asks this court to review his claims, reverse and remand his case to the proper court for a new trial.

Respectfully submitted,



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