No. 21 - 7758

ORIGINAL

FILED
APR 25 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD W. ESTELL JR — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DISTRICT COURT WESTERN DISTRICT OF MISSIOURI (SPRINGFIELD)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONALD W. ESTELL JR #10876-031
(Your Name)

F.C.I. - MCDOWELL P.O. BOX 1009
(Address)

WELCH, WV 24801
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

#1 Should this Court apply the Napue Due Process for a defendant whom pleads guilty, absent a motion to withdraw guilty plea - in addition, apply the Napue Due Process to the Rule 11 requirements?

#2 Will the Court allow sentencing judge to rely upon materially or factually False testimony and statements made by any witness under the influence of narcotics (drugs) - in addition, utilize such as relative conduct and increase the alleged drug amount?

#3 Is or should erroneous imposition of sentence be or consist of utilization of False testimony, uncorroborated, or unreliable hearsay evidence considered?

#4 Is or should an erroneous sentence (illegal) consist of a sentencing judge denying a defendant to speak in his own defense, and present factual document, as well as testify on his own behalf?

#5 Is or should a Breach of Plea Agreement be an erroneous or illegal sentence?

QUESTIONS PRESENTED

#6 Should ~~or~~ will this Court apply the Napue Due Process to relative conduct findings during plea hearings, and/or sentencing

LIST OF PARTIES

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

TABLE OF CONTENTS

Questions

LIST OF PArties

OPINION BELOW

Jurisdiction

statutory Provisions INVOLVED

UNITED STATES CONSTITUTIONS INVOLVED

statement of the CASE: Total of 4 pg

Reason For Granting The writ

CONCLUSION

CERTIFICATE OF SERVICE

Appendix: TOTAL OF 2

Addition Document: TOTAL OF 12 pages

TABLE OF AUTHORITIES

	PG
United States Constitution	
FIFTH AMENDMENT, DUE PROCESS	1
CASES	
Napue v Illinois, 360 U.S. 264, 269, 7 S.CT 1173, 3 L.Ed 2d 1217 (1959)	1
Giglio v U.S. 405 U.S. 150, 153-154 92 S.CT 763 31 L.Ed. 2d 104 (1972)	1
United STATES v Dennis T. Butler, 955 F.3d 1052; 446 U.S. App. D.C. 247 2020	1
U.S. v Kermit Daryl Tanner, 389 F.supp.3d 684; 2019 U.S. Dist. Lexis 125215	6
U.S. v Gentry, et. al No 17-10169 (5th cir. Oct 28. 2019	8
U.S. v Betancourt 422 F.3d 240 241 (5th cir 2005)	8
U.S. v Zuniga, 720 F.3d 587, 591 (5th cir 2013)	8
U.S. v Kikumura, 918 F.2d 1084, 1990 U.S. App. Lexis 19227 3Rd circuit	11
U.S. v Jesus Lara 8th cir. 690 F.3d 1079 2012	14
U.S. v Cynthia J. Dewitt 8th cir. 366 F.3d; 2004 U.S. App lexis 8321	14
U.S. v Daniel Greatwalker, 285 F.3d 727, 2002 U.S. App lexis 6448 8th cir	15
U.S. v Richard W. Lovelace, 565 F.3d 1080, 2009 U.S. App lexis 10458 8th cir	16

INDEX TO APPENDICES

UNITED STATES v. DONALD W. ESTELL
(6:18-cr-03127-BCW-1) 8th cir 2021
Appendix A

Order denying rehearing and rehearing
en banc . . . . Appendix A(1)

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.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was ______________.

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NOV-30-2021, and a copy of the order denying rehearing appears at Appendix petitioner order on 12-7-2021

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including APRIL-29-22 (date) on Feb-11-22 (date) in Application No. 21 A 414.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was ______________. A copy of that decision appears at Appendix ______.

[ ] A timely petition for rehearing was thereafter denied on the following date: ______________, and a copy of the order denying rehearing appears at Appendix ______.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______________ (date) on ______________ (date) in Application No. ___A______.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLED

	PG
Due Process	1
U.S.S.G. 6A1.3 (a)	2
U.S.S.G. 2D1.1 (b) (1)	5
Procedure Act, Pub. L. NO. 94-64 Stat. 320 (1975)	10
CRIMINAL HISTORY SCORE	11
4A1.2 (e), commencement of the instant offense	Pg 9
U.S.S.G. 1B1.3 (a) (1) (B)	3
Federal Rule of Evidence 404 (b)	PG 7
21 U.S.C 841 (2) (1) and (b) (1) (A)	PG 104 (S.O.C)

STATEMENT OF THE CASE

1. Procedural History

On or about October 18, 2018, petitioner was originally indicted by criminal complaint and then by a superceding indictment of felony charges including conspiracy to distribute methamphetamine and possession of methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841 (a)(1) and (b)(1)(A).

On or about July 16, 2020, petitioner Donald W. Estell entered a plea of guilty to one count of possession of methamphetamine with the intent to distribute in violation of 21 U.S.C. 841 (a)(1), and 841 (b)(1)(A). All other charges were dismissed pursuant to plea agreement.

A Presentence Investigation Report was prepared and pursuant to U.S.S.G. 2D1.1, it determined the base offense level to be 34, but also sought to enhance petitioner for two enhancements. The first enhancement being due to the career offender designation under 4B1.1 The sentencing judge dismissed the career offender enhancement stating petitioner did not qualify as a career offender under U.S.S.G. 4B1.1 The second enhancement sought was for possession of a dangerous weapon (including a firearm) 2D1.1(b)(1).

Petitioner Estell, objected to each position of the 2D1.1(b)(1) enhancement, as well as the criminal history score. Pursuant to 2D1.1(b)(1) this guideline should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.

The Presentence Investigation Report also included a base offense level of 34 - 10 to 15 pounds of methamphetamine. The exact amount alleged in excess of 6.1 Kg of methamphetamine. Yet, at sentencing the government advocated for higher amount of said drug - over 64 Kilograms of methamphetamine through the testimony of co-defendant Candice Highfill. In addition, petitioner objected to the criminal history score (4A1.1 and 4A1.2) due to the governments failure to adhere to the 15 year lookback rule.

3 of 4

At sentencing, the district court imposed a Sentence of 210 months imprisonment. On appeal, petitioner's lawyer raised only two issues (petitioner raised more issues than those raised by attorney):

1. The district court erred in its calculation of the sentencing guidelines range because the additional three criminal history points for petitioner's prior Felony offense, was against the clear weight of the evidence - being the first date of relevant conduct in the matter at question was more than 15 years from the defendant's discharge in said prior Felony case.

2. The district court erred in its calculation of the sentencing guideline range due to its additional two level increase for the petitioner's alleged use of a firearm in connection with a drug offense. Which was clearly against the clear weight of the evidence. (NOTE: This application is the incorrect burden of proof,

Which is applied for the safety valve provision 5C1.2 (a)(2)

(This issue was raised by Petitioner lawyer)

Petitioner's direct appeal was denied after counsel filed Anderson Brief and motion to be removed as petitioner's attorney.

Petitioner then filed pro se petition for Hearing or Rehearing En Banc, which was subsequently denied in light of factual issues raised Issues presented, listed as follows:

I- The petitioner was denied the opportunity to speak on his own behalf, present document, and to testify at sentencing.

II- A higher standard of clear and convincing standard should have been used.

III- Use of uncorroborated or unreliable hearsay and insufficient Indicia of reliable to support its probable accuracy.

IV- Breach of plea agreement.

REASON FOR GRANTING THE PETITION

This Court should grant the writ because the
pg 1 district court's use of materiality of false testimony, violating the Napue Due Process; Napue v Illinois, 360 U.S. 264, 269, 79 S.Ct 1173, 3 L. Ed 2d 1217 (1959); Giglio v. U.S., 405 U.S. 150, 153-154 92 S. Ct 763, 31 L. Ed. 2d 104 (1972) and United States v Dennis T. Butler, 955 F.3d 1052; 446 U.S. App. D.C. 247; 2020 U.S. App. LEXIS 11733 decided April 14, 2020.

The Due Process Clause forbids the judge from relying on materially false or unreliable information.

The government's knowing presentation of false evidence against a criminal defendant is incompatible with rudimentary demands of justice.

A Napue violation occurs when the government presents or fails to correct testimony it knows to be false or misleading.

To resolve a defendant's factual objections related to the application of the U.S.S.G. manual, a district court may consider pg 2 relevent information without regard to its admissibility under the rules of evidence applicable at trial, providing that the information has sufficient indicia of reliability to support its probable accuracy, U.S.S.G. Manual 6A1.3. In this case the sentencing judge used materiality of false testimony, perjury testimony, improper burden of proof on substantial enhancement, and unsubstantiated statement were erroneously relied upon to enhance sentence.

The Presentence Investigation Report presented the governments case and position. The PSR alleged that the C.I. purchased 10-15 lbs. of methamphetamine from May 2017-August 2017. (Note that the C.I. and the co-defendant are two different people.) The co-defendant Candice Highfill alone was responsible for possessing and distributing 559.69 grams of methamphetamine. With the defendant's 819 grams, and the co-defendant's 559 gram amount, the total amount would be 1,379 grams of methamphetamine. This would make the defendant's base offense level a 30 (500 gm to 1.5 Kg of methamphetamine) pg 3 This was the petitioner's position and response to the PSR (defendant would agree to 1200 gms)

At sentencing, the government established the relevant conduct date and drug amount through co-defendant Candice Highfill (Refer to Sentencing Transcript pg. 13 through pg. 44. During cross-examination, the co-defendant (Ms. Highfill) stated throughout her testimony a relevation of new evidence; stating that during the time of her proffer statement, and herillegal activity that she was high (under the influence of narcotics). The petitioner will reserve the new evidence issue if necessary for a later date.

The government acknowledged during sentencing that the co-defendant was in fact a drug addict, (see sentencing transcript pg. 48) Furthermore, the sentencing judge acknowledged that there was a credibility issue with Ms. Highfill's testimony, (see sentencing transcript pg. 73). The sentencing judge found that the relevant conduct did not start in May of 2017, but determined that the relevant conduct started in December of 2017.

pg4 By this determining date, the sentencing judge dismisses the drug amount of the C.I. Which in regard to the government's position, was that the C.I. was responsible for 10-15 lbs of methamphetamine. (pounds)

The co-defendant was responsible for 559.69 grams of methamphetamine. I present this question to the Court: "What evidence does the government have, or has presented, to validate any amount of drugs alleged to be possessed or sold by the petitioner?" clearly, the error of the judge to use materiality of false testimony violated the Due Process Clause and substantial rights of the petitioner. Without the C.I. statement and the co-defendant's testimony, it is clear that the petitioner's sentencing range would be 78-97, with a criminal history category of two. The petitioner asks this honorable court, in all fairness, will this court allow such a sentence to stand?

In this case, the imposition of petitioner's sentence was illegal and a total disregard of the truth.

pg 5

A district court abuses discretion and imposes an "unreasonable sentence" when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factor but commits a clear error of judgement in weighing the factor. A defendant may not be sentenced on the basic of mis-information of constitutional magnitude.

The second issue here is 2D1.1(b)(1), its definition of firearm and dangerous weapon. This enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. The government established this enhancement through the testimony of State Trooper Clark and petitioners co-defendant Highfill. State Trooper Clark testified to hearsay, and could only validate that in the month of December, 2017 he found a gun in a car that the petitioner was driving. The government called State Trooper Clark for two reasons: (1) to establish relevant conduct date; and (2) that the firearm was present and connected to a conspiracy 10-months later.

v

pg 6 Petitioner objected to the 2D1.1(b)(1) enhancement and asked the court to refer to United States v. Kermit Daryl Tanner, 389 F. Supp. 3d 684; 2019 U.S. Dist. LEXIS 125215 decided July 26, 2019. The instant legal tender, and the afore-referenced case are interchangeable - almost identical.

The Tanner application was for the U.S.S.G. 5C1.2 (safety valve) "in" connection with the offense. The Court ruled in Tanner's favor, and furthermore went on to say/or state, had the government wanted to utilize a more demanding standard under U.S.S.G. 2D1.1(b)(1) Tanner would have prevailed.

State Trooper Clark testified that he [redacted] found no drug substance during the initial stop. He further states that another officer found this substance, and was responsible for turning this substance over to the federal government. State Trooper Clark also testified that there was a field test administered, but not by himself.

pg 7 Now, let us look upon the evidence presented by the state trooper. It is clear that Mr. Clark's testimony is hearsay. The cross-examination of Mr. Clark will reveal this fact, (see Sentencing Transcript pgs. 9 thru 12).

There were no photos of the substance allegedly found in the vehicle, there was no recorded field test, and the substance found in said vehicle was supposed to be turned over to the federal government. According to the PSI Report, the substance was suspected methamphetamine, and the amount undetermined.

[redacted] Out of court declarations may not be used unless there is a corroboration of the statement with sufficient indicia of reliable to support probable accuracy. Federal Rule of Evidence 404 (b) states that the act in question (Ambit of consp.) must be part of a continuing pattern of illegal activity and cannot have occured at a different time and under different circumstances from the offense charged.

pg 8 Originally, on October 18, 2018, petitioner was charged with one count of unlawful transport of firearms, etc. Question, if this is the traffic stop that the government used to establish that the firearm was present, how could that be 10 month later?

[redacted] Unsubstantiated statement was erroneously relied upon to enhance petitioners sentence. See United States v. Gentry, et. al. NO 17-10169 (5th Cir. Oct 28, 2019); United States v Betancourt, 422 F.3d 240 241 (5th Cir. 2005); United States v. Zuniga, 720 F.3d 587, 591 (5th Cir. 2013). The statement made by Ms. Highfill came 32 month later. This statement was not mentioned once in her proffer, her plea agreement, nor her interview with the P.S.I. reporter. The statement that I always had a gun when I came to meet her, and I was going to kill her, came only after speaking to the assistant U.S. Attorney with in days of petitioner sentencing, (See transcript pgs 21 thru 25). Aside of testimony, I ask this court what evidence did the government present of sufficient indicia of reliable to support it probable accuracy?

pg 9 Testimony alone, is not sufficient indicia.

The 3rd issue here is that an improper burden of proof was utilized to enhance petitioners criminal history score, as well as the drug amount. A higher standard of clear and convincing standard should have been used. The government established the relevant conduct date as December of 2017; this was the basis of the 15-year lookback date to scoring the criminal history score. The government also tried to establish that the petitioner was a career offender from this 15-yr. lookback date. The record is not clearly exact when, or what date was established - from the year petitioner was released from prisons or post-supervision. The sentencing judge placed the burden of proof upon petitioner, yet in the initial stages of criminal investigation, indictment, and also, the imposition of the sentence, the government bears the burden of proof to prove each sentencing factor that is to be utilized in prosecution of petitioner.

pg 10 The petitioner attempted to speak, testify on his own behalf, and present documents to the court pertaining to his criminal history. The sentencing judge denied the petitioner this opportunity, violating his due process right, U.S.S.G 6A1.3 (a) and Procedure Act, Pub. L. NO 94-64 Stat. 370 (1975).

Also it is clearly expressed directly in petitioners plea agreement that the petitioner would be allowed to personally adress any issue or position taken by the government. In the plea agreement, this right is expressly reserved by the government, as well as the defendant. Had the court allowed petitioner to present said document(s) pertaining to his criminal history score, its calculation would have been a criminal history score of two.

The government advocated at sentencing for a higher drug amount (over 64 Kilograms of methamphetamine) ten times the initial amount of the P.S.I. Report determination (6.1 Kilograms of methemphetamine).

X

pg 19 In certain instances, a sentence may be so overwhelming, or be so disproportionate to a punishment that would otherwise be imposed absent the sentencing factors "mandated" by the sentencing guidelines manual, that due process concerns must be addressed. This may occur where a defendant's sentence is so greatly increased as a result of considering relevant conduct that the conduct essentially became an element of the offense for which a defendant is being punished. United States v. Kikumura, 918 F.2d 1084, 1990 U.S. App. Lexis 19277 3rd circuit.

The government established petitioner's criminal history score based on hearsay testimony of state trooper clark, and direct testimony of co-defendant Highfill. Mr. Clarks testimony was unreliable to validate that there was any drug substance found in the vehicle during a stop in December of 2017.

There are no photos, no recording of this substance, nor did the state trooper find this substance, or administer the field test

Pg 12 that he said was done. All we have is his testimony of what another officer supposedly done. Further, Ms. Highfill's testimony should not have been used in any form or fashion. Not only did she admit to being high during the proffer statement and that the proffer statement was inaccurate, she was totally discredited on direct cross-examination at sentencing. The mere fact that the government advocted for a 10-fold increasement of the drug amount and a higher criminal history score based on meterial of false tesimony, as well of unreliable testimony, the burden of proof standard should have been a clear and convincing standard!

Petitioners fourth and final issue is a Breach of the plea agreement. Breach of an agreement is the determination of whether a party breached a plea agreement, and is governed by the law of contracts. However, concerns unqiue to the criminal justice system lead to greater scrutiny by the court than would be afforded to general questions of contract law.

pg 13 The party claiming a breach of a plea agreement must prove the breach by a preponderance of the evidence. Due process requires that the agreement be interpreted in keeping with a defendant's reasonable understanding and that any ambiguity be constructed against the government.

The petitioner read the proffer statement of Ms. Highfill to the amount of 30-40 lbs of methamphetamine that she received from petitioner. The petitioners lawyer at the time informed him of two reasons that he should accept the plea agreement:

#1 The weapon (gun) was a moot issue because the government was dismissing the gun charge;

#2 The government was willing to agree on a base offense level of 34.

Petitioner understood that 34 would be the level that he'd be up against, and that he'd be fighting to lower the level of 34, (see transcript of Sentencing pgs. 66-68).

pg 14 United States v. Jesus Lara 8th Cir. 690 F.3d 1079 2012 (when ambiguity resolved in defendant's favor the government breached the plea agreement by introducing evidence supporting a greater sentence. United States v. Cynthia J. Dewitt 8th Cir. 366 F.3d; 2004 U.S. App. lexis 8321 (where the government enter into a plea agreement to a drug quantity and a base offense level, it may not initiate an effort at the sentencing to obtain a greater sentence.)

No Knowing or any reasonable person could have known that the advice of counsel (Mr Roberts) was wrong. No Knowing or reasonable person would think that the promise of their counsel from the government could be broken. No Knowing or reasonable person would think that the government would have used, or could use False testimony to seek a greater sentence at sentencing.

A plea of guilty entered by one fully aware of the direct consequence, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by misrepresentation, including unfulfillable promises.

pg 15 United States v. Daniel Greatwalker, 285 F.3d 727, 2002 U.S. App. Lexis 6448. The government called Ms. Highfill to testify to a greater methamphetamine amount than the P.S.I. Reports determination, and even a greater amount of drugs than her proffer statement.

Petitioner then requested to his attorney (counselor Roberts) to file for a Motion of Suppression for the weapon (gun) which stemmed from an illegal search. Petitioner's counsel misrepresented the facts of this issue to him - informing him that the gun would be a moot issue because it had nothing to do with the conspiracy, and that the government was willing to dismiss the gun charge.

Petitioner understood the plea to be a favorable position of offense level 34, and that he could argue for a lower level of 34. The petitioner could not object to the position of his attorney's request for the court to accept a base offense level of 34.

pg 16 The petitioner informed his lawyer/attorney of his objection to the base offense level of 34, and due to his restriction to speak on his own behalf, the petitioner remained in silence.

The sentencing transcript clearly reveals a breach of the plea agreement, and a fundamental miscarriage of justice. United States v. Richard W. Lovelace, 565 F.3d 1080, 2009 U.S. App. LEXIS 10458 8th. Cir.

CONCLUSION

Once the co-defendant Ms. Candice Highfill testified at sentencing that during her proffer statement, she was under the influence of narcotics (drugs) the sentencing judge was under duty and obligation to dismiss her entire testimony. Furthermore, the sentencing judge stated that there was a credability issue with Ms. Highfill's statement. To accept any part of her testimony was a total, wreckless disregard of the fundamental pillars of law, (substantial evidence and burden of proof).

pg 17 Further, to sentence petitioner utilizing a materiality of false testimony is an unlawful act by prosecution, as well as the sentencing judge. The unreliable and uncorroborated statement by the state trooper Mr. Clark and Ms. Highfill should not have been used to establish the petitioner's 15 year lookback date (C.H.S), relevant conduct, or the 2D1.1 (b)(1) enhancement. The sentencing judge should not have denied the petitioner the right to speak on his own behalf, and present document that would have shown that petitioner's criminal history was outside the 15 year lookback date.

The petitioner stands firm upon the fact that in his initial plea agreement that his right was reserved to contest any issue or position taken by the government. A higher standard of proof by a clear and convincing standard should have been used. It is clear that when the government advocated for a higher amount of drugs by 10 fold, that a clear and convincing standard should have been used.

pg 18 The increasement of petitioner's criminal history score from a level 2 to a level 4, the advocation of an increased drug amount, and a final request from the government for a 300 month term of imprisonment is clear and realistic that a higher standard of proof should have been used.

The government breached the plea agreement by advocating for an higher drug amount at sentencing; and therefore, the waiver of the petitioner should be void.

In closing, the threat of a potential miscarriage of justice should invalidate petitioner's waiver as well as his plea agreement. On every level, and at every stage of petitioner's criminal prosecution is the potential threat of a fundamental miscarriage of justice.

The petitioner humbly requests that this honorable court in all fairness to void petitioners waiver and his initial plea agreement - refusing to allow this sentence to stand based on a materiality of false testimony.

pg 19 It is clear that had not the sentencing judge used perjury and false testimony that the petitioner could actually have claims of actual innocence. The petitioner humbly requests that this honorable court vacate his sentence, void his waiver, and void his plea agreement. Thereby, granting this here writ of certiorari.

Respectfully Submitted,

Donald W Estell Jr

Donald Estell,
#10876-031
FCI Mcdowell
P.O. Box 1009
Welch, WV 24801