22-5319

IN THE UNITED STATES SUPREME COURT OF APPEALS

No._____

GARY LEE ROLLINS,
PETITIONER

VS.

DONALD F. AMES, SUPERINTENDENT,
MOUNT OLIVE CORRECTIONAL COMPLEX,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Filed By:

Gary Lee Rollins
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia 25185

QUESTIONS PRESENTED

I. Under the Due Process Clause of the U.S. Constitution's 14th Amendment, does a court reviewing a criminal defendant's claims under *Brady v. Maryland* and *Napue v. Illinois* commit prejudicial error when it:

A. makes a clearly erroneous factual finding that a suppressed immunity agreement was not consummated, given significant evidence indicating otherwise?

B. makes an unreasonable legal conclusion that the prosecuting attorney did not err when they bolstered the credibility of a witness and mislead the jury by eliciting false evidence that no immunity agreement existed between the prosecution and the witness?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page, however, they are also briefly denoted below.

Petitioner:
Gary Lee Rollins
pro se

Gary Lee Rollins
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia 25185

Respondent:
Donald F. Ames, Superintendent,
Mount Olive, Correctional Complex
by counsel

Ms. Lindsay S. See, Esq.
West Virginia Solicitor General
1900 Kanawha Blvd. East
Bldg 1 Rm 26E
Charleston, WV 25305-0220

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On November 7, 2017, Gary Lee Rollins ("Petitioner"), by counsel, Kevin Hughart, Esq. ("Mr. Hughart") filed an Amended Post-Conviction Writ of Habeas Corpus Petition, which amended the *pro se* pleading filed by the Petitioner back in 2015. In 2019, the Circuit Court of Nicholas County, West Virginia held a two-day evidentiary hearing. As is relevant to this pleading, Petitioner alleged a violation of *Brady v. Maryland* 373 U.S. 83 (1963) due to the prosecution's failure to disclose the immunity agreement of a testifying codefendant, and a violation of *Napue v. Illinois* 360 U.S. 264 (1959) due to the prosecution's statements to the jury that no such agreement existed.

Habeas Corpus relief was denied on January 21, 2020. (A.R. 1-20). The Circuit Court argued that there was no consummated agreement between the prosecution and the codefendant, April O'Brien Bailes ("Ms. Bailes"), and thus there could be no violation of *Brady* or *Napue*. Petitioner timely appealed to the West Virginia Supreme Court of Appeals ("WVSCA"). On June 10, 2022, a divided WVSCA affirmed the denial of Petitioner's Habeas Corpus petition, after two oral arguments, in a narrow 3-2 Memorandum Decision. (A.R. 21-48).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The West Virginia Supreme Court of Appeals decided Petitioner's case on June 10, 2022. (A.R. 21). The Petition is timely filed. Therefore, this Court has jurisdiction over the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

14th U.S. Constitutional Amendment

"All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

West Virginia Code § 61-2-1

"Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

In an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased."

West Virginia Code § 61-11-6(b)

"Notwithstanding the provisions of subsection (a) of this section, any person who knowingly harbors, conceals, maintains or assists the principal felon after the commission of the underlying offense violating the felony provisions of sections one, four, or nine of article two of this chapter, or gives such offender aid knowing that he or she has committed such felony, with the intent that the offender avoid or escape detention, arrest, trial or punishment, shall be considered an accessory after the fact and, upon conviction, be guilty of a felony and, confined in

a state correctional facility for a period not to exceed five years, or a period of not more than one half of the maximum penalty for the underlying felony offense, whichever is the lesser maximum term of confinement. But no person who is a person in the relation of husband and wife, parent, grandparent, child, grandchild, brother or sister, whether by consanguinity or affinity, or servant to the offender shall be considered an accessory after the fact."

STATEMENT OF THE CASE

On October 5, 2009, Petitioner found his wife, Ms. Rollins, trapped under water by a fallen tree, in a pond on the family's property. (A.R. 21). An employee of the farm – and Petitioner's mistress of one year – Ms. Bailes, called 911 to report the death of Ms. Rollins. Within thirty days of Ms. Rollins's death, Ms. Bailes quit her job on the Rollins's property. (A.R. 340). The death was initially found to be accidental, and no charges were brought. (A.R. 21). When West Virginia Governor Joe Manchin ordered the investigation to be reopened after an unknown period of time, the police changed their theory; they ruled the death a homicide. (A.R. 21-22). The Prosecuting Attorney at the time, P.K. Milam ("Mr. Milam") would later testify at Petitioner's *habeas corpus* evidentiary hearing that Ms. Bailes "jerked [investigators] around for about a year and a half, telling [them] she didn't know anything about [the case] – when [they] clearly knew that she had knowledge." (A.R. 198). Mr. Hughart subsequently elicited the following testimony from Mr. Milam on direct examination:

> Q. Would you not agree with me, Mr. Milam, that when someone gives false information to law enforcement in order to aid someone in the concealment of a crime that that is an accessory after the fact?
> A. (Nodded.) Yes.
> Q. Okay.
> A. That's what I just said, I think.
> Q. So isn't it true, sir, that if Ms. Bailes continued to jerk law enforcement for a year and a half after Ms. Rollins' death, after she no longer worked for

Mr. Rollins, and continued to give false statements to law enforcement officers, she could then be charged as an accessory after the fact? Would you agree with this?

A. (Nodded.) Yeah.

(A.R. 201).

During the September 2011 term of court, the Nicholas County, West Virginia grand jury indicted Petitioner. (A.R. 80). Ms. Bailes was arrested in connection with the crime on October 7, 2011, and charged by complaint as an accessory after the fact based upon Ms. Bailes's purported knowledge that Ms. Rollins was dead prior to her calling 911. (A.R. 22). On October 13, 2011, Ms. Bailes gave a statement to police that "Petitioner took her aside on the morning of Ms. Rollins's death and admitted that he killed her." (A.R. 23). The lead investigator in Ms. Bailes's case, Sergeant Ron Lilly ("Sgt. Lilly"), recalled having a discussion with Mr. Milam where Mr. Milam indicated his intention to indict Ms. Bailes. (A.R. 84).

On October 26, 2011, Ms. Bailes had a hearing in magistrate court wherein a motion was filed to waive the time limits for holding a preliminary hearing. The purpose on record was for "further investigation."[1] (A.R. 305). Mr. Milam; the Assistant Prosecuting Attorney at the time, Jonathan Sweeney ("Mr. Sweeney"); and Ms. Bailes's defense attorney, Cynthia Stanton, Esq. ("Ms. Stanton"); all testified at the Petitioner's evidentiary hearing that, when a motion was filed in magistrate court with the notation "for further investigation," it usually meant that the defendant was going to work for the prosecution in another case. This notation was a signal to the attorneys that an agreement had been reached (or was in the works), while still protecting the individual who was going to assist the prosecution. (A.R. 189-90; 282-83; 304-05). Ms. Stanton

[1] Sgt. Lilly testified at Petitioner's evidentiary hearing that there was no additional investigation conducted after October 26, 2011 because, as far as the police were concerned, the case against Ms. Bailes was ready for trial. (A.R. 90-91).

further testified that this is what happened in MS. Bailes's case; she and Mr. Milam had worked out a deal where, depending on the veracity of Ms. Bailes's testimony at Petitioner's trial, Mr. Milam would either dismiss the charges, or Ms. Bailes would plea to a misdemeanor with no jail time. (A.R. 306-07).

Petitioner had a pre-trial hearing on July 24, 2012. There, the issue of Ms. Bailes's criminal culpability arose. Mr. Milam argued that Ms. Bailes was under duress at the time of the 911 call, and thus she could not be charged as an accessory after the fact. He also stated that if Ms. Bailes testified in accordance with her October 13, 2011 statement, no crime would have been committed. Finally, he stated that there was no agreement between the prosecution and Ms. Bailes. (A.R. 217-18).

Ms. Bailes was, in fact, a witness at Petitioner's trial, which started on August 14, 2012. At trial, Ms. Bailes testified in accordance with her October 2011 statement to police. (A.R. 95; 207). According to the WVSCA's majority opinion, during closing arguments, Petitioner's defense counsel intended to impeach Ms. Bailes's credibility by showing Mr. Milam's lack of intent to indict her. In rebuttal, however, Mr. Milam argued that there was no deal with Ms. Bailes, and he was going to indict her in the upcoming September 2012 term of court. (A.R. 23-24). The jury was even instructed that Ms. Bailes was facing five years in prison. (A.R. 127-28). The jury found Petitioner guilty of First Degree Murder in violation of West Virginia Code § 61-2-1, and they did not recommend mercy. Petitioner was sentenced to life without the possibility of parole. (A.R. 24).

On August 27, 2012, Ms. Stanton requested a meeting with the trial judge, Judge Johnson, and Mr. Milam. At this meeting, Ms. Stanton indicated that Mr. Milam's closing

argument was unethical and factually inaccurate because there *was* an agreement between Mr. Milam and Ms. Bailes. Ms. Stanton testified that under no circumstances would she put any defendant on the stand in a murder case without some type of agreement. (A.R. 317-18). Even Mr. Milam indicated that such a tactic would be "idiotic" when they could potentially incriminate themselves on the stand and go to prison. (A.R. 206). Ms. Stanton proceeded to indicate that the oral agreement was created on October 26, 2011. (A.R. 322).

In a post-conviction deposition, Mr. Milam also stated that when he tried to indict Ms. Bailes as an accessory after the fact under West Virginia Code § 61-11-6(b), he could not because of a "master-servant" clause which prevented the servant from being criminally liable for aiding an employer after-the-fact in a First Degree Murder case under West Virginia Code § 61-2-1. (A.R. 112). Accordingly, Ms. Bailes was never indicted. (A.R. 346). Curiously, Mr. Milam *and* Sgt. Lilly both gave post-conviction testimony indicating Mr. Milam's intention to indict Ms. Bailes and prosecute her from the very beginning of the case. (A.R. 204; 84). Even more curious is the fact that, despite Mr. Milam's position that Ms. Bailes continued to "jerk investigators around" after she had terminated the master-servant relationship with Petitioner, Mr. Milam conceded at Petitioner's evidentiary hearing that Ms. Bailes still could have been prosecuted as an accessory after the fact because the master-servant clause does not apply to former employers. (A.R. 201-02). Still, Ms. Bailes was never prosecuted.

By October of 2012, Ms. Bailes still had not been indicted, and she finally had her preliminary hearing, which Ms. Stanton waived on her behalf. (A.R. 308). Although Mr. Sweeney, Ms. Stanton, and Ms. Bailes all believed that there was an agreement between Ms. Bailes and Mr. Milam, (A.R. 281; 304; 357), Mr. Milam maintained his position that there was

never any agreement. After the case was bound over to the circuit court, the court dismissed the case after three terms of inaction; in Ms. Stanton's eyes, Mr. Milam upheld his end of the bargain not to prosecute. (A.R. 318).

After the Petitioner's two-day evidentiary hearing on his *habeas corpus* petition wherein he alleged violations stemming from this Court's decisions in *Napue v. Illinois* as well as *Brady v. Maryland* and it's progeny, the circuit court denied *habeas* relief because there had been no consummated agreement. (A.R. 27). The WVSCA narrowly affirmed this holding on appeal. Petitioner now asks this Court to grant his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

A failure to review Petitioner's *Brady v. Maryland* claim in the instant proceedings will result in a fundamental miscarriage of justice. Petitioner's claim is before this Honorable Court directly from the WVSCA; there has yet to be any federal review to this claim and, as will be shown below, now is the proper time to review it.

Although this Court noted in *Kyles v. Whitley* 498 U.S. 931, 932 (1990) that the Federal Habeas Corpus Petition under 28 U.S.C. § 2254 is a more appropriate avenue for relief than "direct collateral review"[2] of a federal constitutional claim, more recently the Court has recognized the legitimacy of direct collateral review. For example, in *Dunn v. Madison* 139 S.Ct. 9, 12 (2017)(Ginsburg, J. concurring), Justice Ginsburg noted that, had the issue been "appropriately presented, the issue would warrant a full airing." This statement was made in light of the Court's decision to *not* review a claim because it was precluded by the Anti-Terrorism and

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[2] A term colloquialized by Payvand Adhout to describe this Court's review of a Federal Constitutional Question brought up in State collateral review proceedings. *See generally* Z. Payvand Adhout, "Direct Collateral Review" 21 Columbia L. Rev. 160 (2021)

Effective Death Penalty Act of 1996 ("AEDPA").

If this Court were to instruct Petitioner to proceed through the § 2254 "gauntlet," as it did with the Petitioner in *Kyles*, his claim would likely be defeated because of the deference the federal courts give to state courts under AEDPA. *See* 28 U.S.C. § 2254(d)(2)(review of factual claims arising from a state conviction will only be examined if the claims are based on an "unreasonable determination of the facts"); 28 U.S.C. § 2254(e)(1)(a State Court's factual determinations are presumed to be correct unless a petitioner can meet the very demanding "clear and convincing evidence" standard to prove that the aforesaid factual determinations were improper); 28 U.S.C. § 2254(d)(1)(a State Court's legal determinations will not be overturned unless a petitioner can show that the state court decision was contrary to, or an unreasonable application of clearly established federal law). Accordingly, Petitioner avers that, in the interests of justice, his claims should be reviewed in the instant proceedings, as opposed to after the Fourth Circuit has had a chance to review the claims under AEDPA.

The narrow majority of the WVSCA argued that Petitioner's *Brady* and *Napue* claims fail because "the habeas court did not err by concluding that there was not a plea agreement" and, as a necessary corollary, Petitioner could not show that he was prejudiced. (A.R. 30). The ultimate reality, however, is that there *was* an oral *nolle prosequi* agreement between Ms. Bailes and Mr. Milam. Such a conclusion is supported by several pertinent facts of this case. First, as shown above, Ms. Stanton, Mr. Sweeney, and Ms. Bailes all testified that there was an agreement between Mr. Milam and Ms. Bailes. The only individual who (rather incredulously) testified that there was no agreement was Mr. Milam, himself. His reason for not indicting Ms. Bailes varied depending on the narrative he was attempting to tell; Mr. Milam either thought that Ms. Bailes

was under duress, that she had not committed a crime, or that her indictment would be precluded by West Virginia statutory provisions.

Additionally, it was Mr. Milam's common practice to make oral agreements with criminal defendants in magistrate court (A.R. 186) and, when the record indicates that cases were continued "for further investigation," it meant that a plea and/or cooperation agreement was oftentimes present between the defendant and the prosecution. (A.R. 189-90; 282-83). The "for further investigation" notation provided some semblance of protection for the state informants, (A.R. 306-07), and this notation was present in Ms. Bailes's magistrate court record. (A.R. 305). Finally, Mr. Milam did not indict Ms. Bailes, in compliance with the agreement which, according to him, "never existed." It is exceptionally telling that even Mr. Sweeney – Mr. Milam's assistant prosecutor – believed that a secret agreement existed. (A.R. 281). The record also clearly indicates that this agreement was *never* conveyed to Petitioner's defense team. (A.R. 122; 154-155). Instead, it was knowingly and intentionally suppressed by Mr. Milam before, during, and after trial.

The WVSCA's decision affirming the denial of *habeas corpus* relief initially rested upon a factual determination that there was no consummated agreement[3] between Mr. Milam and Ms. Bailes. (A.R. 30). Cooperation-immunity agreements are contractual in nature and subject to contract law standards. *United States v. Bulger* 816 F.3d 137, 148 (1st Cir. 2016); *In re Drayer* 190 F.3d 410, 412 (6th Cir. 1999); *United States v. McHan* 101 F.3d 1027, 1034 (4th Cir. 1996); *United States v. Brown* 801 F.2d 352, 354 (8th Cir. 1986). The contract between Ms. Bailes and Prosecutor Milam was indisputably verbal. (A.R. 315). Whether a verbal contract exists or not is

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[3] Although labeled as a "plea agreement" in the courts below, (A.R. 25), the agreement between Ms. Bailes and Prosecutor Milam is more accurately described as a "cooperation-immunity agreement."

a question of fact. *Lord & Stevens, Inc. v. 3D Printing, Inc.* 756 N.W.2d 789 (N.D. 2008); *Holland v. FEM Elc. Ass'n, Inc.* 637 N.W.2d 717, 719 (S.D. 2001); *Johnson the Florist, Inc. v. Tedco Constr. Corp.* 657 A.2d 511, 516 (Pa. Super. Ct. 1995); *Cook v. Heck's Inc.* 342 S.E.2d 453, 457 (W.Va. 1986). Thus, any further review of the presence of an agreement would rest upon a determination of fact.

Under "direct collateral review," the deferential standard under § 2254, which was created to protect petitioners against "extreme malfunctions" in the states' criminal justice systems, is no longer controlling. *Harrington v. Richter* 562 U.S. 86, 102-103 (2011); *Madison v. Alabama* 139 S.Ct. 718, 722, 726 (2019). Instead, the Court may apply a more robust review of Petitioner's claims under 28 U.S.C. § 1257(a), wherein Petitioner would need to show that the factual findings by the lower court were "clearly erroneous." Fed. R. Civ. Proc. Rule 52(a)(6); *Hernandez v. New York* 500 U.S. 352, 364-65 (1991)(relying on *Rogers v. Lodge* 458 U.S. 613, 622-23 (1982)). A finding is "clearly erroneous" when, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Easley v. Cromartie* 532 U.S. 234, 242 (2001). In this case, the error of the WVSCA could not have been more clear, as shown above, and the Court should be left with the definite and firm conviction that a mistake has, in fact, been made.

In *Brady v. Maryland*, 373 U.S. at 84, the prosecution failed to disclose the confession of a defendant's accomplice after it was requested by the defendant. This Court granted the defendant a new sentencing hearing because the undisclosed agreement was material to punishment. Later, in *Giglio v. United States* 405 U.S. 150 (1972), this Court remanded a case to the lower court to determine if a prosecuting attorney promised a witness that they would not be

prosecuted in exchange for cooperation with the government. Similarly, in *United States v. Bagley* 473 U.S. 667 (1985), this Court reversed and remanded a case to the lower court to determine whether there was a reasonable probability that the trial's result would have been different had the government's reward offer to a witness (in exchange for their testimony) been revealed. This case is analogous in that the prosecution suppressed an *immunity* agreement from the defense, which could have been used to impeach Ms. Bailes at trial.

Indeed, during the Petitioner's closing argument at trial, his defense team attempted to do just that. But, during the prosecution's closing argument, Mr. Milam improperly bolstered Ms. Bailes's credibility by arguing that he was going to indict her (and thus she had no reason to lie on the stand), knowing full and well that he was not going to do so. (A.R. 23-24). He even mentioned *pre-trial* on July 24, 2012 that he was not going to pursue charges against Ms. Bailes. (A.R. 217-18). It is highly improbable that, in the midst of trial, Mr. Milam changed his mind and decided to indict Ms. Bailes – especially given that, according to his own testimony, she performed as expected in Petitioner's trial (A.R. 207) – only to turn around and change his mind *again* that he was *not* going to indict her.

This conclusion is especially true when one considers the fact that Mr. Milam requested that the petit jury be instructed as to Ms. Bailes's sentencing exposure of five years. (A.R. 127-128). Mr. Milam effectively changed his story to fit the narrative he was attempting to tell at different points in the Petitioner's proceedings. It is exceptionally concerning that Mr. Milam even elicited testimony from Ms. Bailes at trial that there was no agreement between the two of them. (A.R. 23).

In *Napue v. Illinois*, 360 U.S. at 269, this Court held that a prosecutor's knowing failure

to correct false testimony affecting a witness's credibility was improper. Similarly, in *Giglio*, 405 U.S. at 152-55, this Court held that a prosecutor's introduction of a witness, who falsely testified to not having a plea deal, was improper because the prosecutor should have known about the agreement. As shown, this case is highly similar to that of *Napue* and *Giglio*. Although the agreement in this case was not a plea agreement, *per se*, it was still an agreement not to prosecute. Thus, the preceding opinions of this Court, which only involved guilty pleas, should apply, *a fortiori*, since an agreement not to prosecute is a much more significant incentive to lie for the prosecution than a guilty plea for leniency.

In the instant case, there has been no determination of prejudice as to the *Brady* claim or the *Napue* claim. Petitioner argues that he can show prejudice because, although prosecuting attorneys retain the discretion to grant immunity, *United States v. Doe* 465 U.S. 605, 616 (1984), when immunity is granted to a key government witness without disclosing the cooperation-immunity agreement to the defense, prejudice necessarily follows, especially when the jury is lied to repeatedly about the agreement. As in *Wearry v. Cain* 136 S.Ct. 1002, 1004, 1006 (2016), the undisclosed impeachment evidence – i.e. the cooperation-immunity agreement – met *Bagley*'s materiality standard because there is a reasonable probability that, had the evidence been disclosed, Mr. Milam's case would have fallen apart like a "house of cards" through Ms. Bailes's impeachment.

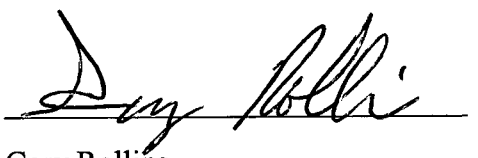
Ms. Bailes's testimony at Petitioner's trial, when combined with Mr. Milam's own statements during closing arguments (which were both false and misleading) *and* the faulty jury instruction on Ms. Bailes's sentencing exposure, resulted in a manifest injustice to the Petitioner at trial. Accordingly, Petitioner's case should be reversed for a new trial. Nevertheless, should the

Court disagree with finding prejudice without a lower court's analysis on the same, Petitioner contends that this case should be reversed for the WVSCA to determine whether prejudice ensued from the knowing use of perjured testimony and the overtly prejudicial jury instruction, both of which relate back to Ms. Bailes's and Mr. Milam's agreement and the suppression thereof.

CONCLUSION

For the foregoing reasons, Petitioner humbly requests this Honorable Court grant him a Writ of Certiorari, and any other relief deemed just and proper. The Petitioner understands that this Court will act within the confines of justice.

Respectfully Submitted,
Gary Rollins, *pro se*



Gary Rollins
Mount Olive Correctional Complex
One Mountainside Way
Mount Olive, West Virginia 25185