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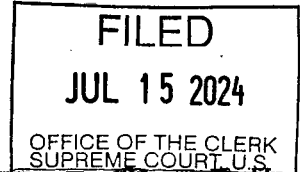
No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Eric Lee Smith - PETITIONER

vs.

UNITED STATES - RESPONDENT(S)



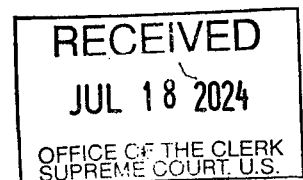
ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
PETITION FOR WRIT OF CERTIORARI

Eric Lee Smith #68110-509

Federal Correctional Institution Loretto

Post Office Box 1000 Cresson, Pennsylvania 16630



## I. Question Presented

Where the Assistant United States Attorney's representing the Government violates a standard announced in Napue v. Illinois by gaining a criminal conviction by knowingly using false evidence and false testimony, under what circumstances should the conviction be upheld at the cost of denying inalienable rights guaranteed by the Federal Constitution?

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#### IV. Petition for Writ Of Certiorari

Eric Lee Smith an inmate incarcerated at Federal Correctional Institution Loretto in Cresson, Pennsylvania by way of pro se, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court Of Appeals For The Fourth Circuit.

#### V. Opinion Below

The decision by the United States Court Of Appeals For The Fourth Circuit is reported as United States Of America v. Eric Lee Smith Case No. 23-4085 unpublished per curiam opinion.

#### VI. Jurisdiction

Eric Lee Smith's conviction was affirmed by the United States Court Of Appeals For The Fourth Circuit on April 25, 2024. Eric Lee Smith invokes this Court's jurisdiction under 28 U.S.C. §1254 (1) having timely filed this petition for writ of certiorari within ninety days of the United States Court Of Appeals For The Fourth Circuit affirmation.

#### VII. Constitutional Provisions Involved

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or natural forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for use, without just compensation.

## United States Constitution, Amendment XIV:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the assistance of counsel for his defense.

### VIII. Statement of the Case

Over 60 years ago, this Honorable Court held in Napue v. Illinois that if prosecution obtains a criminal conviction using evidence that it knows is false, the conviction violated the defendant's constitutional right to due process. When the government knowingly presents false testimony on a significant issue and fails to correct it, courts automatically conclude that the government violated defendant's constitutional rights to due process. See. United States v. Chavez 849 F. 3d 593, 601 (4th Cir. 2018) See also. United States v. Foster, 874 F. 2d 491 (8th Cir. 1988)

In Giglio v. United States 405. U.S. 150,154 (1972) "a new trial is required if false testimony could in any reasonable likelihood have affected the judgment of the jury" Napue, supra at 271, 3L Ed. 2d at 1222. "It is of no consequence that the falsehood bore upon the witness credibility rather than directly upon the defendant's guilt, a lie is a lie, no matter what it's subject, and if it is any way relevant to the case, the District Attorney has the responsibility and duty to correct what he knows to be false and elicit the truth... That the District Attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that in any real sense be termed fair".

This case presents an issue that until now, has gone unquestioned in the Fourth Circuit. The Court Of Appeals For The Fourth Circuit asserts that in their forum for having failed to preserve the Napue claim in the

trial court, we review the issue for plain error". This statement and practice in itself undermines Napue by so blatant disregard for a citizen's inalienable rights guaranteed by the Federal Constitution. Whether this interpretation by the Fourth Circuit is one of duplicity or has simply become their standard of review. Smith supports his argument with facts by way of the appendixes. The subornation of Paul Swartz's false evidence and false testimony solicited by way of representatives of the government namely Lisa McKeel and Devon Heath, Assistant United States Attorney's that prosecuted Smith, subpoenaed Swartz whom testified after Courtney Glaze, the expert digital forensic examiner. Paul Swartz's testimony directly contradicted the facts. Swartz utilizing a teleprompter to display a bogus powerpoint presentation declaring the number ending in "1070" was Kevin Criswell's when in fact the owner was a former girlfriend of Smith's that lived in Annapolis, Maryland. See. Appendix A. Then the representatives of the government let Kevin Criswell's false testimony go uncorrected when answering questions under direct examination and cross examination by Smith's defense counsel. Smith as a post conviction remedy wrote the District Court addressing the issues on or about July 5, 2022. Smith defense counsel, Laura P. Tayman advised Smith to stop contacting the Court. Smith requested that his defense counsel Laura P. Tayman develop a post-conviction remedy about the false testimony. Defense Counsel Laura P. Tayman not only refused, but also moved to withdraw as Smith's defense counsel. See. Appendix B. Newly appointed defense counsel Fernando Groene also refused to aid Smith in his substantive right by way of a post conviction motion. Smith with limited formal education, by way of pro se moved to vacate his own conviction. See. Appendix C. Judge Jackson on January 25, 2023 struck Smith's motion. It is with presumption that Judge Jackson failed to review the substance of Smith's motion, but in the certificate of service both Assistant United States Attorney's that aided in Smith's prosecution Lisa McKeel and Devon Heath as well as Smith's very own defense counsel Fernando Groene. Still Smith's prayer for resolution of injustice fell on deaf ears. The unfairness of officers in performance of their administrative function in Smith's case goes beyond assuming it occurred by way of the documentation Smith can support the flagrant disregard for his inalienable rights guaranteed by the Federal Constitution.

## 1. The Shooting

On November 25, 2020, Smith was arrested for the shooting of Kevin Criswell. It was stated that in the morning of November 25, 2020 in Matthew's County Virginia a dark colored sedan similar to Smith's parked in the street, a white male got out of the vehicle with a rifle, made argumentative statements with Kevin Criswell and then opened fire on Criswell, striking him multiple times in the legs and mid section of his body, then before leaving the suspect allegedly robbed Criswell. Smith, accused and charged in the Commonwealth Of Virginia with Aggravated Malicious Wounding (Count-One) Robbery in the Street (Count-Two) Use of a Firearm in Commission of a Felony (Count-Three and Four).

On March 15, 2021 a grand jury in Matthews County Virginia was convened. Three separate indictments were developed. The Commonwealth Attorney Tom Bowen allowed discovery to be released to Special Agent Banks on or about January 19, 2021 before Smith's indictments were ever designated as True Bills on March 15, 2021. Furthermore it must be inferred that Tom Bowen simply postured Smith's incarceration wrongfully so as the government could gain the unfair tactical advantage as it did. Sometime on or about October 1, 2021 the Commonwealth Attorney, Tom Bowen nolle processed the case against Smith less than 30-days before the jury trial was to begin in the Commonwealth's case against Smith. In an act of misconduct by the Commonwealth Attorney, Tom Bowen failed to disclose to Smith's Attorney that the government had issued a warrant to the U.S. Marshal's Office on July 1, 2021 in regards to the eight-count indictment, the government gained with the very discovery denied to Smith's retained counsel. Devon Hensly of Martin, Ingles & Hensly of Gloucester, Virginia. On June 30, 2021 a Grand Jury in Newport News, Virginia returned with an eight-count indictment: Conspiracy to Distribute and Possess with Intent to Distribute 500 grams or more of Methamphetamine in Violation of 21 U.S.C. §841(b)(1)(A)(Viii) and 846 (Count One); Using and Maintaining Drug Premises in Violation of 21 U.S.C. 856(2)(1). (Count Two and Three); Possession with Intent to Distribute Methamphetamine in Violation of 841(a)(1) and (b)(1)(c), (Count Four); Possession of a Firearm in Furtherance of a Drug Trafficking Crime in Violation of 18 U.S.C. 924(c)(1)(A), (Count Five); Possession, Brandishing and Discharging a Machine Gun in Furtherance of a Drug Trafficking Crime in Violation of 924(c)(1)(A)(iii) and (B)(ii), (Count Six); Illegal Possession of a



Machine Gun in Violation of 18 U.S.C. §922(O)(1) and 924(a)(2), (Count Seven); and Possession of an Unregistered Firearm in Violation of 26 U.S.C. §5861(d) and 5871, (Count Eight). Unlike Kevin Criswell, Smith was not under any form of drug trafficking investigations until the allegation of the shooting of Criswell.

## 2. Trial

On March 15, 2022 a five day trial began in Norfolk, Virginia, though Smith was indicted in Newport News, Virginia. On March 21, 2022 a jury found Smith guilty of seven of the eight counts. Acquitting Smith of the genesis of the entire case, the shooting that occurred on November 25, 2020. On February 1, 2023, Smith was sentenced to a total of 260 months.

## 3. Direct Appeals

On direct appeal, Smith argued four points. First, Smith brings the fact that his constitutional right to due process was violated because his conviction for conspiracy to distribute methamphetamine was obtained using evidence the government knew was false. Second, Smith argues the evidence was insufficient to support the conviction for possession of a firearm in furtherance of a drug conspiracy as there was no proof that the firearm aided, advanced or promoted the underlying offense of a drug conspiracy. Third, Smith states the fact that the evidence was insufficient to support the conviction under counts two and three for using and maintaining a drug premises because the government failed to present evidence of the addresses for an alleged drug premises. Fourth, finally Smith argued his sentence should be reduced based on failure to prove elements of counts two and three and of count five, which created an enhancement. The United States Court Of Appeals For The Fourth Circuit made a ruling on April 25, 2024, by way of unpublished opinion affirming the District Courts decision per curiam. This request for writ of certiorari follows.

## IX. Reasons For Granting The Writ

A. To prevent Circuits from denying inalienable Constitutional Rights, this Court should clarify the standard under Napue that applied when false testimony is solicited to gain convictions under the guise of justice as where the Prosecutors acts with impunity within their Circuit.

In Napue v. Illinois, 360 U.S. 264 (1959) this Court gave a direct definition of what the standard and substance of a Constitutional Violation. Conviction on testimony known to the prosecution to be false as denial of due process. No where in Kevin Criswell's proffer does either number prescribed by Paul Swartz ever come into or under the investigation. This case has two parallels to Napue in regards to two of the governments witnesses, Paul Swartz a subcontractor that works exclusively with the United States Attorney's Office in the Eastern District Of Virginia, implemented false evidence at trial, Swartz knew it to be false, then gave false testimony to support it. Kevin Criswell an alleged co-conspirator of Smith, that pled guilty in a different conspiracy a case in no way, shape or form is connected to Smith. On page 292, See. Appendix D. L-22 through page 293 L-11.

Kevin Criswell entered into a bilateral contract with the government on or about July 27, 2021 where as if Smith and others were convicted Criswell was assured a sentence reduction. Criswell being incarcerated on July 6, 2021 and essentially going home sometime in November of 2023. Approximately 28 months. Criswell was absolutely promised a sentence reduction on the provision of rule 35(b) in his cooperation agreement. Criswell was in fact promised a sentence reduction.

As long ago as Mooney v. Holohan 294 U.S. 103 (1935), this Court made clear that deliberate deception of a court and jury by the presentation of known false evidence is incompatible with "rudimentary demands of justice". This was affirmed in Pyle v. Kansas 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264 (1959) it was said, the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appear. A new trial is required if "the false testimony could... in any reasonable likelihood have affected the judgment of the jury"... In Smith's case the falsity of the evidence submitted by Paul Swartz directly contradicted expert testimony. Even the government states that Paul Swartz was not an expert at Smith's trial.

The Assistant United States Attorney began referring to Kevin Criswell as Kevin Ryan Criswell, and then Ryan Criswell in the direct examination of Paul Swartz. Paul Swartz alleged the number ending in 1070 belonged to Criswell essentially contradicting the expert digital forensic

examiner. Swartz alleged over 3500 communications between Criswell and Smith. See. Appendix D. page numbered 461 L-19 through 25 the review page numbered 462 L-1 through L-5. Now read L-6 Q. Now Criswell is referred to as Ryan. This was not only false testimony by Swartz, but blatant subterfuge by the prosecution.

The government was lacking an element in the predicate offense in Smith's eight-count indictment, communication that would corroborate Criswell's statements. Representatives of the government presented false evidence by their contractor Paul Swartz, evidence that directly contradicted Courtney Glaze the expert that testified at Smith's trial. Courtney Glaze debunked Criswell's proffer to Federal agencies. Criswell testified under oath that he would contact Smith by way of cellular phone. Smith's number ending in 3637. The known number for Criswell ending in 3561 not one communication between the numbers exist in any of the meta data. Then conveniently Paul Swartz a subcontractor for the United States Attorney's Office misidentifies the ownership of a number ending in "1070" and alleging Criswell is the owner when documentation clearly contradicts this. See. Appendix A.

The post conviction motion in Appendix C. is the motion Smith made in the District Court by way of pro se as both attorney's appointed to Smith refused to make this motion. By reviewing Appendix C. in the certificate of service shows the Prosecution was also made aware at the District Court level, yet still failed to correct the false testimony. One must infer the deception here was deliberate as no attempt to correct it was made, nor investigated post conviction as their position doesn't require them to, but should be bound by integrity.

For representatives of the government, namely the prosecution to state they were not aware of this evidence being false defies logic. Nowhere in any proffer, given by any witness does the number in question, ending in "1070" appear. Kevin Criswell nor any Federal agency involved in Criswell's case or Smith's ever had the number ending in "1070" as Criswell's. With the false evidence and false testimony the Assistant United States Attorney's implemented at trial by way of Paul Swartz a jury reached a defective verdict.

The testimony of Kevin Criswell must be construed as false testimony. The transcripts from trial directly contradicts his testimony. The governments case relied heavily on Criswell's testimony. Courtney Glaze an expert in meta data testified that she found no communication between the known numbers for Smith or the known number for Criswell.

Furthermore, in Criswell's testimony under oath states that he had purchased methamphetamine from Smith in March of 2021. It's a well known undisputed fact that Smith has been incarcerated since November 25, 2020 and remained incarcerated.

Kevin Criswell entered into on or about July 27, 2021 a plea agreement and a cooperation agreement. Where in the plea agreement Criswell is given a safety valve. In the cooperation agreement, a bilateral contract with the government in which Criswell received a rule 35(b). It is of no consequence that the falsehood bore upon the witness credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what it's subject, and if it's 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. Napue v. Illinois (1959). The Assistant United States Attorney's Lisa McKeel and Devon Heath made no attempt to correct the testimony of Criswell. Furthermore, in an act of conscious outrageous conduct had their own contractor submit false evidence and give false testimony to support his false evidence.

In cases in which there is a claim of denial of right's under the Federal Constitution, this Court is not bound by conclusion of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded. Niemotko v. Maryland 340 U.S. 268 (1951).

This case presents this Honorable Court the opportunity to not only clarify the importance of the Napue case and to demonstrate, not just to the Fourth Circuit but all Circuits that District Courts may not abandon the very principles in which our judiciary system was founded, that the ends under any circumstances does not justify the means when the means is by way of denying citizens the inalienable rights guaranteed by the Federal Constitution.

Smith was arrested on November 25, 2020 in the Commonwealths case. The allegation of shooting and robbing Kevin Criswell. The government began receiving the physical discovery in the Commonwealths case against Smith on or about January 19, 2021. Originally the government convened a grand jury on or about April 23, 2021. Essentially utilizing the grand jury as an investigation tool rather than it's intended purpose. After multiple grand jury dates on June 30, 2021, a grand jury finally developed an eight-count indictment against Smith. Rule 50 "Prompt Dispositions" states that defendant's Speedy Trial attaches when the government obtains a new indictment, charging the defendant with an unrelated offense.

Smith's original detention was related to the allegation of the robbery and shooting of Kevin Criswell. The government then indicted Smith with an unrelated offense on June 30, 2021.

In the governments eight-count indictment the predicate offense is conspiracy. This is unrelated to the original indictment secured by the Commonwealth on March 15, 2021. Smith right to a Speedy Trial was violated. This delay was a continued act to gain an unfair tactical advantage as Smith prosecution is proof.

Kevin Criswell's Federal warrant was issued to the United States Marshals on July 1, 2021. Smith's Federal warrant in a different case was also issued on July 1, 2021. The prejudice to Smith is transparent. As Criswell's warrant was executed on July 6, 2021. Smith's warrant was not executed until October 5, 2021. Smith was unaware of any Federal detainer nor was Smith defense counsel for the Commonwealths case against Smith.

The prejudice shown to Smith in the Commonwealth forum as well as the United States District Court is why our founding Father's developed the Constitution to protect it's citizens from the Courts propensity of unfairness that State Courts and United States Courts alike act to gain convictions when a defendant is jailed for the duration of pre-trial essentially rendering the defendants defenseless, ostracized by family and friends. The Commonwealths Attorney Tom Bowen had no intention of taking Smith to trial. Bowen postured Smith's detention until the government had certainly gained the greatest tactical advantage over Smith.

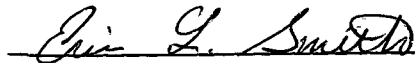
Smith had no convictions before this. Smith's right to presumption of innocence, fair trial and speedy trial was impeded on by representatives of the Commonwealth Of Virginia and the representatives of the government rights guaranteed by the Federal Constitution. Smith request plenary review.

#### X. CONCLUSION

For the foregoing reasons, Eric Lee Smith respectfully request that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals For The Fourth Circuit.

DATED this 15th day of July, 2024.

Respectfully Submitted,



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