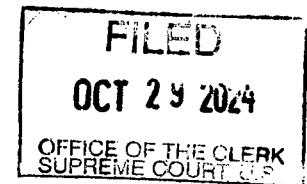


No. 24-5961

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

JAMES A. BELL (#105533) — PETITIONER
(Your Name)

VS.

MICHELLE DAUZAT, Custodian — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES A. BELL (#105533)

(Your Name)
DAVID WADE CORRECTIONAL CENTER
670 BELL HILL RD. H4B

(Address)

HOMER, LOUISIANA 71040

(City, State, Zip Code)

N/A

(Phone Number)

(*): Petitioner is a layman and prays that this Honorable Court give this Petition a liberal construction. Haines v. Kernes, 404 U.S. 519 (1972).

QUESTION(S) PRESENTED

1.

WHETHER A PROSECUTOR'S "BOLSTERING" OF A WITNESS' TESTIMONY IS A PERMISSIBLE EXCEPTION TO U.S. v. YOUNG's PROHIBITION AGAINST VOUCHING, WHERE THE "BOLSTERING" CONSISTS OF THE PROSECUTOR PERSONALLY ATTESTING TO THE TRUTHFULNESS OF WITNESS' TESTIMONY.

2.

WHETHER THE COMMENTS OF THE PROSECUTOR IN THIS CASE SO INFECTED THE TRIAL WITH UNFAIRNESS THAT THE RESULTING CONVICTION VIOLATES THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION.

LIST OF PARTIES

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 is as follows:

Petitioner, James A. Bell (#105533), is a prisoner incarcerated at the David Wade Correctional Center, Homer, LOUISIANA.

Respondent, Michelle Dauzat, is the Warden at the David Wade Correctional Center.

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Cupp v. McNaughten</u> , 414 U.S. 141, 94 S.Ct. 396	
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STATUTES AND RULES

28 U.S.C. § 2254

United States Constitution, Sixth Amendment
United States Constitution, Fourteenth Amendment

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.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix "A" 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 "B" to the petition and is

[] reported at 2024 WL 129326; 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 State Post Conviction (No. 63,133) court appears at Appendix "C" to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was on August 6, 2024.

[] 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: _____, 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. § 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 INVOLVED

This case involves Amendment XIV to the Constitution of the United States, which provides:

Section 1. 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, or property, without due process of law; nor deny any person within it's jurisdiction to the equal protection of the laws.

This case involves Amendment VI to the Constitution of the United States, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner was originally charged by Bill of Information with four counts of Molestation of a Juvenile and three counts of Indecent Behavior with a Juvenile, Case No. 63,133, 3rd Judicial District Court, Parish of Lincoln, State of Louisiana. After the filing of numerous Amended Bills of Information, Petitioner was ultimately charged with 10 counts of Indecent Behavior with Juveniles. On May 20, 2014, Petitioner was tried and convicted by a six person jury and subsequently received sentences totaling 42 years.

Petitioner appealed and the conviction was affirmed, State v. Bell, 50,092-KA, 2nd Circuit. 9/30/15, 179 So.3d 683, Writ denied, 215 So.3d 701, La. 1-10-17.

Petitioner timely filed for Post Conviction Relief in the 3rd Judicial District Court on 6-8-17, Case No. 63,133 (See Appx. "D"), raising 4 claims related to ineffective assistance of counsel. On 3-12-18, the District Court dismissed Petitioner's First Ineffectiveness claim concerning "other crimes" evidence on procedural grounds and ordered further briefing on the remaining claims. (See Appx. "C-1"). On 8-1-19 Petitioner raised a Fifth Supplemental Claim for relief concerning the Clerk's failure to read the Bill of Information into the record at trial. On 9-11-19, the Court dismissed Petitioner's fourth ineffectiveness claim concerning cumulative error on procedural grounds and ordered the State to file any procedural objections to claims two and three or an answer on the merits. (See Appx. "C-2").

On 10-11-19, the State filed procedural objections to claims two and three. On 3-16-20, the Court ordered a Contradictory Hearing on the State's procedural objections to the Petitioner's two remaining ineffectiveness claims, which were: Claim Two (counsel's failure to object and move for mistrial or curative instructions as to the prosecution's "vouching" for the truthfullness of its witnesses) and Claim Three (Counsel's failure to file Motion to Quash the Bill of Information as to Count Nine). (See Appx. "C-3"). The contradictory hearing was set for 6-16-20, however, no hearing was ever conducted. On 4-26-21, the Court granted the State's procedural objections as to Claim Three and dismissed the claim. As to Claim Two, Petitioner's sole remaining ineffectiveness claim, concerning prosecutorial vouching, the Court overruled the State's procedural objection and once again ordered a contradictory hearing and set the date for 5-11-21. (See Appx. "C-4"). Again, no hearing was conducted. On 6-14-21, without a hearing, the Court denied Petitioner's sole remaining claim for relief on the ground that the Court considered the prosecutor's comments as "permissible bolstering" and not vouching. (See Appx. "C").

Petitioner next sought Supervisory Writs in the Second Circuit Court of Appeals. The Second Circuit Court of Appeals denied Supervisory Writs, without an opinion on September 2, 2021.

The Louisiana Supreme Court initially declined to consider Petitioner's Writ Application as untimely on 1-26-22; however, on 6-1-22, the Court granted Petitioner's Application for Reconsideration but

denied Petitioner's Writ Application that same day.

Petitioner next sought Habeas Relief in the U.S. District Court Western District of Louisiana on 6-27-22, raising the same five (5) claims of ineffective assistance of trial counsel. (See Appx. "E"). On 12-27-23, the Magistrate issued a report and recommendation rejecting each of Petitioner's ineffectiveness claims. In particular, the Magistrate rejected Claim Two (Prosecutorial Vouching) on the ground that "bolstering is admissible" and therefore, recommended that the claims be dismissed with prejudice. (See Appx. "B-1"). On 1-9-24, Petitioner filed objections to the Magistrate's Report and Recommendation. On 1-11-24, the District Court adopted the Magistrate's Report and Recommendation and dismissed the Habeas Corpus Application and denied a Certificate of Appealability. (See Appx. "B"). Thereafter, Petitioner sought a C.O.A. in the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals denied C.O.A., on 8-6-24. (See Appx. "A").

REASONS FOR GRANTING THE PETITION

This case presents a fundamental question of the interpretation of this Court's decision in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84. L.Ed.2d 1. The question presented is of great public importance because it concerns the Due Process Rights of all criminal defendants in the State of Louisiana and indeed the entire Federal Fifth Circuit. In Young, *supra*, this Court resolved the question "[W]hether a prosecutor may rebut [improper] closing defense argument ... by responsive argument that would be inappropriate in the absence of such provocation." Id. @ 23. In that case the government argued that the Supreme Court should recognize "a prosecutor's right to respond" to improper defense argument. In rejecting that proposed right, the Court made clear that Prosecutors have no licence to make otherwise improper argument in response to defense rhetoric. Id. @ 1045. The Court further elaborated on this point in Darden v. Wainright, 106 S.Ct. 2464, 477 U.S. 168, 91 L.Ed.2d 144 (1986), where the Court explained:

"The idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as whole." Id. @ 2472.

In the case at bar, the record reflects no instances of improper argument by defense counsel, nor was there any allegation by the prosecution that defense counsel made any improper argument. However, the record does reflect that the prosecution personally vouched for the credibility of it's witnesses; at least nine times in it's closing argument alone, repeatedly urging that it's witnesses were telling the truth. (See Appx. "F"). Moreover, the prosecution made highly inflama-

tory and prejudicial comments, at one point referencing to Petitioner as a "monster". (See Appx. "F-1"), and subtly exploiting the imprimatur of the State:

"Now, let me tell you, when the State even feels like we need to tell you that a child is saying no. When we even feel like we need to prove to you that she said no, what a sad state of affairs we have when it's not enough that every adult in the room knows it's wrong, but here we have him." (See Appx. "F-2").

These incendiary comments, among many others, were calculated to use the prestige of the State and inflame the passion of the jury against the defendant in order to induce the jury to convict based on emotion rather than reason. The effect of the repeated vouching and infuriating comments, in addition to the exploration of the prestige of the State, was that Petitioner's trial was so infected with "unfairness "that the resulting conviction violates due process." Cupp v. McNaughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368. In Post-conviction proceedings, Petitioner argued that his trial counsel rendered ineffective assistance by failing to object to repeated vouching by the prosecution and move for a mistrial or curative instruction. (See Appx. "D"). In a case which hinged solely on the credibility of the State's witnesses, counsel's failure to object to the prosecutor's blatant vouching and inflammatory comments defies logic. The State District Court Judge ruled that counsel was not ineffective for failing to object because the prosecutor's arguments to the jury were not vouching but "permissible bolstering."

The Court cited no authority in support of this conclusion; only that counsel's failure did not violate Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. It is important to note

that the State never disputed the fact that it repeatedly vouched for the truthfulness of its witnesses, it only argued that Petitioner's claim is "a back-door attempt at an insufficient evidence argument." (See Appx. "C").

It is also important to note that on 4-26-21 a hearing was ordered as to this claim for relief, which was set for 5-11-21. However, this date came and went but Petitioner was never afforded an opportunity to be heard. (See Appx. "C-4").

On 6-14-21, as stated above, the Court ruled that because it considered the prosecution's vouching to be "permissible bolstering," counsel's failure to object "did not meet the burden as to ineffective assistance of counsel imposed by Strickland v. Washington, *supra*. Moreover, the Court apparently considered the trial judge's standard instruction at the conclusion of the argument (that "the arguments are not evidence") to be sufficient to cure any prejudice suffered. (See Appx. "C"). The Louisiana Supreme denied review without an opinion.

Petitioner re-urged all ineffectiveness claims in habeas corpus proceedings before the U.S. District Court for the Western District of Louisiana. In reference to the issue at bar, the State responded to the vouching claim relying on the Federal Fifth Circuit Court of Appeals standard for prosecutorial vouching as set forth in United States v. McCann, 613 F.3d 486. The District Court agreed with the Post Conviction Court ruling that the prosecutor's vouching was "permissible bolstering", and that "none of the instances of vouching hint at potential additional evidence." Based on those findings the Court ruled that it was reasonable for counsel to withhold objections and

thus the post conviction court properly adjudicated the ineffective assistance claim. (See Appx. "B"). The District Court dismissed the habeas Petition with prejudice and the U.S. Fifth Circuit Court of Appeals denied C.O.A.

In order to reach its conclusion the District Court relied on two Federal Fifth Circuit cases; one was cited by the Court and the other was not. The first, which was not cited, is U.S. v. Dorr, 636 F.2d 117, which elaborated the concept of "permissible bolstering":

"The prosecutor may refer to matters that are in evidence, and may even present what amounts to a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon him or his witness." Id. @ 120.

Both, the Federal District Court and the post conviction court found the conduct of the prosecutor to be "permissible bolstering" in this case. However, the federal district court further relied on a second case U.S. v. McCann, supra, in which the U.S. Fifth Circuit Court set the standard for prosecutorial vouching:

"The test for improper vouching for the credibility of a witness is whether the expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused guilt." Id. @ 495.

± It is Petitioner's contention that both, Dorr and McMann conflict with U.S. v. Young, supra, for separate reasons and thus the rulings of the lower courts relying on these cases are unreasonable. Petitioner now address each case in tandem.

U.S. v. Dorr, 636 F.2d 117

In this case, the U.S. Fifth Circuit Court of Appeals created a de facto exception to U.S. v. Young, 470 U.S. 1 prohibition against prosecutorial vouching by permitting prosecutors to ("present what amounts to a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon him or his witness." Dorr @ 120). Petitioner asserts that this language is overbroad. It's use of the word "assertions", without qualification in reference to defense counsel, permits the prosecutor to "bolster" the testimony of its witness against any argument by defense counsel which challenges the credibility of the prosecution's witness, even if the argument is not improper; the case at bar is a prime example. Moreover, the term "bolster" itself, as used in this context, is dangerously vague and open to many different interpretations. For these reasons it is Petitioner's position that this standard should be abrogated as being in conflict with this Court's decision in U.S. v. Young, 470 U.S. 1, 105 S.Ct. 1068, 84 L.Ed.2d 1.

U.S. v. McCann, 613 F.3d 486

In this case the Fifth Circuit Court of Appeals set forth its own standard governing improper vouching:

"The test for improper vouching for the credibility of a witness is 'whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt.'" Id. @ 495.

It is Petitioner's contention that this standard, which was applied in Petitioner's case at both the State and Federal levels, vitiates the protection provided by this Court's decision in U.S. v. Young, *supra*. In Petitioner's case the prosecutor personally and repeatedly attested to the truthfulness of the testimony of its witnesses in its closing arguments. Moreover, the prosecutor exploited the imprimatur of the State as cited to above. (See Appx. "E-2").

The deferal district court ruled that "none of the instances of vouching hint at potential additional evidence" and "such bolstering is permissible "(See Appx. "C"). Based on these findings the Court concluded that Petitioner's counsel was not ineffective for failing to object to the prosecutorial vouching and thus the post conviction court's judgment was not unreasonable.

In United States v. Young, 470 U.S. 1, 105 S.Ct. 1068, 84 L.Ed.2d 1, this Court explained the concerns underlying its decision in that case:

"The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known by the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence." Id. @ 18-19.

It is Petitioner's contention that McCann conflicts with this Court's decision in U.S. V. Young, *supra*, because although McCann appears to adopt Young's first protection (against the danger that

the jury may believe that the prosecutor is privy to evidence of the accused's guilt that is unavailable to the jury) it completely omits Young's second protection (against the prosecutor exploiting the imprimatur of the government) and thereby creates a standard lower than that of Young, giving the prosecution an unfair advantage and undermining the protection provided by Young. In Petitioner's case the prosecutor personally and repeatedly attested to the truthfulness of the testimony of its witnesses without objection from counsel or intervention by the judge. Moreover, the vouching was not in response to any improper argument from defense counsel, because this case hinged solely on the credibility of the vouched for testimony, the conduct of the prosecutor, the failure of the counsel to object and the inaction of the trial judge coalesced to deny Petitioner "that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166.

Petitioner asserts that U.S. v. Dorr, supra and U.S. v. McCann, supra, should be abrogated as being in conflict with this Court's decision in U.S. v. Young.

PRAYER

PETITIONER PRAYS THIS HONORABLE CONSIDERS ALL THE FACTS AND INFORMATION CONTAINED HEREIN, AND AFTER FURTHER CONSIDERATION THAT THIS WRIT OF CERTIORARY BE GRANTED AND THIS MATTER REMANDED BACK FOR A NEW TRIAL.

OR IN THE ALTERNATIVE, PETITIONER REQUEST ANY REMEDY THIS COURT DEEMS NECESSARY IN ORDER TO PROVIDE WITH THE PROTECTIONS GUARANTEED BY THE UNITED STATES CONSTITUTION.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James A. Bell #105533

Date: October 29th 2024