

**THE SUPREME COURT OF
THE UNITED STATES OF AMERICA**

JERMEL POPE Petitioner	)	
	)	
	)	
	)	District Court Case No: 16-CV-1456
v.	)	7 th Cir. Appeals Court Case No: 16-4176
	)	Supreme Court Case No:
	)	
JEFFEREY E. KRUGUER Respondent	)	
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	)	

PETITION FOR WRIT OF CERTIORARI

COMES NOW, Jermel Pope (Petitioner) pro se, in the above style petition for writ of certiorari.

I. BACKGROUND

On April 22, 2008, a federal grand jury returned an indictment against Petitioner charging him with knowingly transporting an individual, who was under the age of 18, in interstate commerce, from the State of Wisconsin to the State of Illinois, with the intent that such individual engage in prostitution, in violation of 18 U.S.C. 2421. Crim.R1. On May 22, 2008, the Petitioner pleaded not guilty to the charge. Crim.R.16. On June 10, 2009, following a hearing, the District Court sentenced Petitioner to a term of 100 months imprisonment, to follow by three years of supervised release. R.84; S.Tr. 30-31. The Petitioner appealed his sentence and argued that his below-guideline sentence was procedurally unsound because the District Court

did not adequately respond to his request for an even lower sentence. *United States v. Pope*, 370 Fed. Appx. 735, 736 (7th Cir. 2010). On April 14, 2010, the Seventh Circuit rejected the Petitioner's argument and affirmed his sentence. *Id.* At 737-39. A petition for certiorari was denied by the Supreme Court on October 18, 2010. Petitioner then filed a 2255, this petition was denied on November 1, 2012. On October 17, 2016, the Petitioner filed an application for second successive 2255 with the United States Appeals Court of the Seventh Circuit. On October 25, 2016, that application was denied. On November 18, 2016, Petitioner filed a Writ of Habeas Corpus (case number above), which was denied. Petitioner appealed the denial to the Seventh Circuit Appeals Court. Such Appeal was denied on August 21, 2017. Petitioner then filed a Petition for En Banc hearing, on September 5, 2017, which was denied on September 20, 2017. Petitioner now comes to this high Court to request petition for review.

II. LEGAL QUESTIONS

- 1) If a Napue violation occurs in a case, does the Defendant waive his right to appeal such violation if he pleads guilty?**
- 2) If a Napue violation occurs in a case, and the Defendant's counsel fails to find it and encourages the Defendant to plead guilty, does that failure result in ineffective assistance of counsel?**
- 3) If a Napue violation occurs in a case, and Prosecution should have known or did know of such violation, but failed to correct it, does these action result in prosecutorial misconduct?**
- 4) Does a Napue violation apply to grand jury proceedings? If so, does it violated a Defendant's Due process rights if discovered after a plea of guilty?**

III. ARGUMENT

- A. Petitioner's Counsel was ineffective, and violated Petitioner's Fifth and Sixth Amendment rights of the Constitution.**

The Supreme Court has recognized that, pursuant to the Sixth Amendment, “the right to counsel is a right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). Petitioner “must show that counsel’s performance was deficient” meaning that counsel’s error was “so serious that counsel was not functioning as the counsel guaranteed... by the Sixth Amendment.” *Strickland*, 466 U.S. at 687 (internal quotations omitted). Second, Petitioner must show that counsel’s “defective performance prejudiced the defense”, meaning that “counsel’s error were so serious as to deprive [Petitioner] of a fair trial, a trial whose result is reliable.” *Id.*

Petitioner asserts that he was denied effective assistance of counsel during his grand jury and pre-trial District Court proceedings. In order to prevail on an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), “a petitioner must demonstrate that his counsel’s assistance was objectively unreasonable and resulted in a substantial risk of prejudice.” *Brown v. Finnan*, 598 F.3d 416, 419 (7th Cir. 2010)(citing *Berkey v. United States*, 318 F.3d 768, 772 (7th Cir. 2003)). Only after a Petitioner presents “specific acts or omissions of his counsel that constitute ineffective assistance” should there be any consideration as to “whether these acts or omissions were made outside the wide range of professionally competent assistance.” *Berkey*, 318 F.3d at 772 (7th Cir.)

To establish prejudice in the context of a guilty plea, the Petitioner “must prove that there is reasonable probability that he would not have plead guilty absent his attorney’s deficient conduct.” *Hutchings*, 618 F.3d at 697 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Morales v. Boatwright*, 580 F.3d 653, 663 (7th Cir. 2009)). Such a showing requires that the

petitioner do more than simply allege "that he would have insisted on going to trial". He must also come forward with objective evidence that he would not have plead guilty. *United States v. Cieslowski*; 410 F.3d 353, 359 (7th Cir. 2005). Objective evidence includes the nature of the misinformation provided by the attorney to the Petitioner and the history of plea negotiation. *Hutchings*, 618 F.3d at 697 (citing *Julian v. Bartley*, 495 F.3d 487, 499 (7th Cir. 2007))

Petitioner contends that one of the "reasonable" steps any counsel should take is to look at the validity of the charge and indictment. The facts that were alleged by the prosecution at the time of the indictment should have warranted an investigation into the indictment. Due to the fact a Defendant could be actually innocent of the charged indictment if it was obtained illegally. Petitioner contends that his counsel would have discovered that the FBI agent Tina Fourkas lied under oath and that testimony of facts was material to the finding of the grand jury to indict the Petitioner. Counsel informed the Petitioner that they had enough to prove his guilty in trial of the indictment, but failed to find or address the *Napue* violation within the grand jury proceedings.

The FBI agent Ms. Fourkas, testified that the Petitioner had admitted the fact that he knew that Victim A was only 17 years old. She testified that the Petitioner admitted to this fact on a recorded interview with the Aurora Police Department (APD). See Prosecution Discovery Release Page 492-493 & 638). This testimony was perjury, a violation of 18 U.S.C. 1623. Since the perjury was material to the Petitioner indictment, and was prejudicial to Petitioner's plea of guilty, for Transportation of a Minor across interstate commerce, the conviction and indictment is invalid. Due to Petitioner's Counsel ineffectiveness violating Petitioner Sixth Amendment right to effect counsel and Due Process rights under the Fifth Amendment.

“Element of materiality, to be tested as of time of investigation, only requires that question be material to subject of grand jury inquiry or subsidiary issue not necessarily to main issue or primary subject; under 18 U.S.C. 1621, false declaration is material if it has tendency to influence, impede, or hamper grand jury from pursuing its investigation, and test is the same under 18 U.S.C. 1623.” *United States v. Parcell*, (1973, CA9 *19 NEV) 526 F.2d 189.

“Five elements must be proved to establish case under 18 U.S.C. 1623 for perjury: (i) declarant must be under oath; (ii) testimony must be given in proceeding before court of United States; (iii) witness must knowingly make statement which is (iv) false and (v) testimony must be material to proof of crime. *United States v. Whimpy* (1976, CA5 GA) 531 F.2d 768; *United States v. Balery* (1977, CA8 MO) 565 F.2d 1059. See also *United States v. Simone* (1986 DC NJ) 627 F. Supp. 1264.

Petitioner cites the above case law to show that the court can determine if in fact the testimony was perjury under criminal statute that it can and does violated Petitioner Due Process rights under the Fifth Amendment, when such perjury is used in judicial proceedings.

Petitioner contends had his counsel properly investigated the materiality of the charge and reviewed Tina Fourkas testimony under oath to the grand jury. Petitioner’s counsel would have found that the information provided to the grand jury was material and was false (perjury). Petitioner contends his counsel could have presented these facts to the Court, to clearly demonstrate a violation to Petitioner’s Due process rights. The witness had clearly made her statement under oath before a court of the United States, she knowingly knew that her statement was false to the extent of her testimony to Petitioner recorded interview. Those statement were material based on the fact the grand jury indicted Petitioner with “knowingly

transporting and individual who was under the age of 18, in interstate commerce, from the State of Wisconsin to the State of Illinois with the intent that such individual engage in prostitution, in violation of 18 U.S.C. 2421."

Petitioner further contends that such perjury, could have a "tendency to influence, impede, or hamper the grand jury from pursuing its investigation" If the grand jury is told that a Defendant in this case the Petitioner, admitted to a fact of the crime, there would be no reason for them to question further, due to the fact the statements would lead them to or influence them to the concluded that the Defendant is guilty of the charge in the indictment. Thus, violating the Petitioner Due Process Rights.

Petitioner contends had this information been presented to him at the time before his plea of guilty, Petitioner would have not have plead guilty to an indictment that was illegally obtained by perjury. Based on the information provided to Petitioner by his counsel he should plead guilty, because the prosecution could find him guilty at trial. Petitioner contends had counsel investigated the indictment and grand jury, that he would not have allowed Petitioner to plead guilty to an indictment obtained by perjury.

Petitioner would like the Court to note, that though a plea of guilty was made by the Petitioner. The Petitioner lacked the competency at the time to handle his own case, thus the appointment of the Public Defender's Office. Based on these facts, counsel is a license professional of law, his competency of law is held to a higher standard, and was not effective and lead to Petitioner pleading to an indictment obtained by perjury. This competency of law should have led to an investigation of the charge, prior to advising the Petitioner to plead guilty to the indictment. Clearly, in Petitioner case the counsel had extreme "deficient conduct."

Hutchings, 618 F.3d at 697. Thus, the Petitioner meets the requirements for ineffective assistance of counsel.

Counsel is “strongly presumed to have rendered adequate assistance and to have made significant decisions in the exercise of his or her reasonable professional judgment.” *Cooper v. United States*, 378 F.3d 638, 641 (7th Cir. 2004) The Court presumes that counsel made reasonable strategic choices unless Petitioner produce evidence rebutting that presumption. *Id.* “In order to establish that counsel’s performance was deficient the Defendant must show errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. *Hartjes*, 456 F.3d at 790.

Petitioner contends that the fact that counsel urged and coerced the Petitioner to plead guilty to an indictment that was obtained with the use of perjured testimony is “so serious that counsel was not functioning as that “counsel” guaranteed by the Sixth Amendment. Furthermore, since counsel never investigated the validity of the indictment, further shows that his performance was deficient and below the standards provide by Sixth Amendment.

Based on the above information, Petitioner contends that counsel was ineffective and his conviction should be vacated and remanded to be overturned for violation of his Due Process rights under the Fifth Amendment and violation of his Sixth Amendment right to effective counsel.

B. Prosecutorial Misconduct Violation of Fifth Amendment Due Process

To state a claim of prosecutorial misconduct, Petitioner must establish that “(1) the prosecution’s case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is a likelihood that the false testimony affected the

judgment of the jury.” *Simental v. Matrisciano*, 363 F.3d 607, 615 (7th Cir. 2004) See *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217.

Under *Napue*, a conviction obtained through the knowingly use of false testimony violates due process (Fifth Amendment). The government had a duty [obligation] to correct testimony that it knew was false. “Under *Napue*, when prosecutor knowingly relies on testimony, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Are*, 590 F.3d 499, 509 (7th Cir. 2009)(internal quotations omitted).

Petitioner contends that when the perjured testimony was made in his grand jury by FBI agent Tina Fourkas, the prosecution “knew or should have known” that the testimony was false. At that time, the government had a “duty [obligation] to correct [the] testimony that it knew was false.”

Petitioner contends that the FBI agent Ms. Fourkas, stated under oath that Petitioner on a recorded interview after his initial arrest, admitted that he knew that Victim A was in fact 17 years of age. But in review of the that tape the Court can see that the Petitioner never stated he knew that Victim A was 17 years of age, in fact Petitioner stated that he didn’t become aware until after the arrest and the investigating officer informed him of such information. Thus it can lead to believe that because the government failed to do their “duty” of correcting the false testimony that it “influenced” or “hampered” with the grand jury pursuing its investigation into Petitioner’s indictment. Based on her stating that the Petitioner admitted to parts of the crime, which were material to Petitioner’s indictment. Thus, violating Petitioner’s Due Process rights.

To violate due process, the state must know of the testimony's falsehood and the false testimony must have been reasonably likely to affect the judgment of the jury." Agurs, 427 U.S. at 103, 96 S. Ct. 2392. Rather, the testimony must be directly related to the Defendant's guilt or innocence, and not on a collateral matter. Simental, 363 F.3d at 615; United States v. Adcox, 18 F.3d 290, 295 (1994).

It is well established that the government may now knowingly present false testimony or fail to correct testimony that is known to be false. Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) That general obligation extends to testimony presented to the grand jury, and a violation warrants dismissal of the indictment. United States v. Hogan, 712 F. 2d. 757, 762 (2nd Cir. 1983)

Petitioner contends that such violation of Napue and Hogan, warrants a dismissal of the Petitioner indictment. Clearly, the testimony was false, and could have affected the jury. The testimony was "directly related to the Defendant's guilt or innocence," due to the fact the testimony stated that Petitioner admitted to that part of the crime, which could lead the jury to believe the Petitioner was guilty of all parts of the crime. Thus, violation of Petitioner's Due Process.

Although it would be better practice for someone present at grand jury proceedings to testify to be giving an oath, transcripts of Defendant's grand jury testimony is sufficient to prove that he testified under oath where transcripts reads "having duly first been duly sworn by foreman to testify." United States v. Picketts (1981 CA7 ILL) 655 F.2d 837.

Petitioner contends that the FBI agent Tina Fourkas is criminally liable for her false testimony, based on the fact that she clearly was under oath and still provides the Court and

the grand jury with false and misleading information. She and the prosecutor on this case violated Petitioners Due Process rights, even if neither is prosecuted for perjury later.

“False testimony regarding transaction other than one for which Defendant is on trial is nonetheless material where it tends to establish Defendant’s state of mind when he entered into transaction for which he is being tried.” *United v. Rapport* (1976, CA2 NY) 545 F.2d 837.

The false testimony in Petitioner’s case was material to the Petitioner’s state of mind at the very least. The fact that Petitioner would knowingly transport a minor, and admit to knowing that she was minor, would influence any jury to find an individual liable for that act. Thus, the false testimony of such admittance could and did hamper with the grand jury, violation Petitioner Due Process. Since the prosecution never corrected the false testimony at the time it was presented to the grand jury it was a violation of Petitioner’s Due Process.

A government lawyer’s use of perjured evidence [testimony] is a threat to the concept of ordered liberty.” See *Napue*, 360 at 269. This threat is just as pernicious if the testimony goes only to the credibility of the witness, because [t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence [to indict or not indict], and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may [be effected].

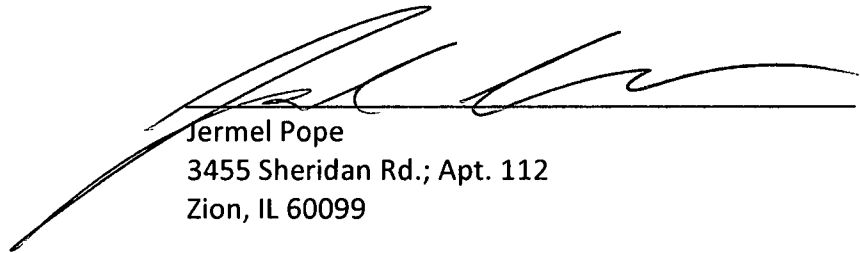
IV. CONCLUSION

Based on the above information, Petitioner contends that the prosecution “knew or should have known” of the false testimony, and should have taken action to correct that information at that time. Since they did not Petitioner was subjected to an illegally obtained indictment and was coerced and urged to plead guilty to that indictment. This Court should

grant his Writ of Certiorari, and allow this case to proceed in this high Court. Based the prosecutorial misconduct, false testimony of government witness, which caused such constitutional violations.

12-5-2017

Date



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