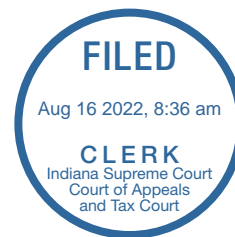


## MEMORANDUM DECISION ON REHEARING

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Michael Yates,  
*Appellant-Plaintiff,*

v.

State of Indiana,  
*Appellee-Defendant.*

August 16, 2022

Court of Appeals Case No.  
21A-PC-2677

Appeal from the Howard County  
Superior Court

The Honorable William C.  
Menges, Jr., Judge

Trial Court Cause No.  
34D01-1306-PC-459

**Bailey, Judge.**

[1] Michael Yates (“Yates”) was found guilty of Attempted Robbery, as a Class B felony,<sup>1</sup> and sentenced to twenty years imprisonment. His conviction and sentence were affirmed on direct appeal. *Yates v. State*, No. 34A04-1010-CR-606 (Ind. Ct. App. April 7, 2011). Yates petitioned for post-conviction relief. Among other things, he alleged that he had been denied due process, according to the guidance of *Napue v. Illinois*, 360 U.S. 264 (1959), because the jury had never been informed that the principal witness against Yates avoided, by rendering his testimony, approximately 200 years of legal jeopardy pursuant to a deal with the State. The post-conviction court entered a judgment denying Yates post-conviction relief. On appeal, we reversed that judgment, concluding that Yates had shown that he was deprived of the effective assistance of appellate counsel, because counsel did not raise a *Napue*-based deprivation of due process issue on direct appeal.

[2] The State of Indiana now petitions for rehearing, asserting that appellate review of the denial of post-conviction relief is limited to the findings and conclusions of the post-conviction court. Yates responds that this Court need not ignore a denial of due process made apparent by the trial and post-conviction record. The State correctly points out a limitation upon our review.

A court that hears a post-conviction claim must make findings of fact and conclusions of law on all issues presented in the petition. *See* Ind. Post-Conviction Rule 1(6). The findings must be supported by facts and the conclusions must be supported by the

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<sup>1</sup> Ind. Code §§ 35-42-5-1, 35-41-5-1.

law. See *Bivins v. State*, 735 N.E.2d 1116, 1121 (Ind. 2000), *reh'g denied*. Our review on appeal is limited to these findings and conclusions.

*Allen v. State*, 749 N.E.2d 1158, 1164 (Ind. 2001) (emphasis added.) However, we do not defer to a post-conviction court's legal conclusions. *State v. Hollin*, 970 N.E.2d 147, 151 (Ind. 2012).

[3] Here, the post-conviction court acknowledged that Yates had raised the following issues in his Amended Petition for Post-Conviction Relief: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, denial of the right to due process because of the suppression of evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and denial of the right to due process because of the use of false evidence, standing uncorrected, in violation of *Napue*. Appealed Order at 3. The post-conviction court adopted the State's proposed findings and conclusions. With regard to an alleged *Napue* violation, and an alleged *Brady* violation,<sup>2</sup> the post-conviction court collectively entered two findings:

All credible evidence shows the State of Indiana disclosed to the Petitioner the true extent of its agreement with Launden Lockett.

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<sup>2</sup> Under *Brady*, the State has an affirmative duty to disclose material evidence favorable to the defendant. "To prevail on a *Brady* claim, a defendant must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *Minnick v. State*, 698 N.E.2d 745, 755 (Ind. 1998) (citing *Brady*, 373 U.S. at 87, 83 S. Ct. 1194). Evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*

There is no credible evidence the State of Indiana knowingly used false testimony of Launden Luckett regarding his agreement with the State or allowed any false testimony regarding his agreement with the State to go uncorrected.

(*Id.* at 5-6.)

[4] Quite simply, the grand jury transcript, the trial transcript of bench conferences, the trial testimony, and the post-conviction hearing record all point unerringly to a different conclusion as to disclosure. At the post-conviction hearing, the former prosecutor and defense counsel did not claim to have a clear recall of any out-of-court disclosure regarding incentives extended to Luckett for his testimony. It is uncontroverted that the grand jury hearing transcript was unsealed only after Yates’s trial for Attempted Robbery. The transcript of the bench conferences and trial testimony do not suggest that there had been an out-of-court disclosure to the defense as to the terms of Luckett’s agreement with the State. Indeed, the prosecutor argued against revealing to the jury the breadth of Luckett’s incentivization, and defense counsel verbally contemplated eliciting more detail from Luckett but was discouraged by the trial court from doing so. The trial court’s ultimate ruling was that the jury would learn of generalities and not specifics of Luckett’s agreement.<sup>3</sup> At the post-conviction hearing, Detective Mike Banush testified that he had known that Luckett “got a

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<sup>3</sup> The trial court also expressed an opinion that it was “implicit” that Luckett “[got] much more for his testimony.” (P.C.R. Ex. Vol. II, pg. 102-3.)

deal.” (P.C.R. Tr. Vol. II, pg. 61.) But neither the detective, nor any other witness, claimed that they had expressly informed the defense of its terms.

[5] Although we addressed the deprivation of due process issue within the context of ineffectiveness of appellate counsel, it is clear that the post-conviction court did not do so. In this situation, we should have addressed the issue as one demonstrably unavailable to Yates at the time of his trial and direct appeal. *See Hollin*, 970 N.E.2d at 153 (affirming a grant of post-conviction relief on due process grounds where the prosecutor had not disclosed witness incentivization and the fact that the witness had a “change of story” upon the filing of charges). Although the grand jury record was unsealed after Yates’s trial, there has been no contention that appellate counsel was informed of that event during his representation of Yates.

[6] Addressing Yates’s due process issue outside the context of ineffectiveness of appellate counsel, our analysis under *Napue* remains the same. With reference to *Napue* and its progeny, it is well established that “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.” 360 U.S. at 269 (internal citations omitted). “Evidence of any understanding or agreement as to a future prosecution would be relevant to [witness] credibility and the jury was entitled to know of it.” *Giglio v. United States*, 405 U.S. 150, 155 (1972). In *Napue*, *supra*, the promised consideration

was a recommendation for, and a promise to effectuate, if possible, a reduced sentence.

- [7] A defendant's Fourteenth Amendment due process rights are violated when the prosecution knowingly uses false testimony without disclosing its falsity or attempting to correct the false testimony. *Smith v. State*, 34 N.E.3d 1211, 1219 (Ind. 2015), (citing *Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957)) (where the defendant's defense would have been corroborated had the witness testified truthfully, but the prosecutor knowingly allowed false testimony to go uncorrected); *Miller v. Pate*, 386 U.S. 1, 6-7 (1967) (where the Court found that the prosecutor had deliberately misrepresented the truth).

The main thrust of the case law in this area focuses on whether the jury's ability to assess all of the facts and the credibility of the witnesses supplying those facts has been impeded to the unfair disadvantage of the defendant. Active or passive behavior by the State that hinders the jury's ability to effectively act as the fact-finder is impermissible and may violate a defendant's due process rights.

*Smith*, 34 N.E.3d at 1220.

- [8] As stated in *Napue*:

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, 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 depend.

360 U.S. at 269.

[9] Here, there was clearly misrepresentation of Lockett's "deal," uncorrected by the State. That said, however, *Napue* incorporates a finding of materiality of the evidence. As a panel of this Court has explained:

A finding of materiality is required. In the case of perjured testimony, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the fact finder. In a case characterized by a pretrial request for specific information, the test of materiality is whether the suppressed evidence might have affected the outcome of the trial.

*Deatrick v. State*, 392 N.E.2d 498, 501 (Ind. Ct. App. 1979).

[10] Here, Lockett's credibility was crucial. The State lacked physical evidence and rested its case almost entirely upon Lockett's identification of Yates as his accomplice. Dunn's identification of Yates was couched in terms of thinking and guessing. She thought she recognized some of Yates' hair escaping from a wig, the wearing of which Lockett could not verify. Two of Dunn's house guests were called as witnesses but failed to provide identification testimony. One of those witnesses had made a prior statement to police identifying someone other than Yates as Lockett's accomplice. The intended victim appeared as a defense witness and testified that Yates was not one of the intruders; rather, the intruders were Lockett and a heavy-set man. Taylor

acknowledged having written to the Prosecutor in an attempt to clear Yates of suspicion. Dunn's neighbor, who had confronted the intruders, testified for the defense that he was unable to recognize anything familiar when presented with a photograph of Yates.

[11] Had the jury been accurately informed of Lockett's criminal exposure and the benefit he received in exchange for his testimony, Lockett's credibility could well have been undermined. And his credibility was central to Yates's conviction.

[12] As with our original opinion in this matter, the same result ensues. The post-conviction court erroneously denied Yates post-conviction relief. Accordingly, we reaffirm the holding of our opinion, but clarify that we do so by addressing a due process issue demonstrably unavailable to Yates at trial and on direct appeal. We remand for a new trial.

[13] Reversed and remanded.

Bradford, C.J., and Najam, Sr. J., concur.