

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 138577

ALEXANDER ACEVAL,

Defendant-Appellant.

Court of Appeals No. 279017
Lower Court No. 05-003228-01

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

**MOTION TO EXTEND THE TIME FOR FILING PLAINTIFF-APPELLEE'S
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STATEMENT OF APPELLATE JURISDICTION

The People do not contest jurisdiction for purposes of this supplemental brief in opposition to defendant's application for leave to appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

Is dismissal the appropriate remedy for a due process violation involving a prosecutor's acquiescence in the presentation of perjured testimony in order to conceal the identity of a confidential informant?

The People answer: No.

Defendant answers: Yes.

The Court of Appeals answered: No.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The People rely on the counter-statement of facts contained in the People's Brief in Opposition to Application for Leave to Appeal subject to the additions noted below.

On June 4, 2010, the Court granted defendant's motion for reconsideration of its September 25, 2009, order, vacated the portion of that order denying leave to appeal, and directed the clerk to schedule oral argument on whether to grant the application or take other peremptory action. The Court directed the parties to address at oral argument "whether the prosecution's acquiescence in the presentation of perjured testimony in order to conceal the identity of a confidential informant amounts to misconduct that deprived the defendant of due process such that retrial should be barred." The Court further provided that the parties could file supplemental briefs within 42 days of the order.

ARGUMENT

A new trial, not dismissal, is the appropriate remedy for a due process violation involving a prosecutor's acquiescence in the presentation of perjured testimony in order to conceal the identity of a confidential informant.

Standard of Review

The Court reviews claims of due process violations de novo.¹

Discussion

The Due Process Clauses of the Fifth and Fourteenth Amendments² guarantee a defendant a fair trial in a fair tribunal,³ and it is that right that is implicated when the prosecution knowingly uses perjured testimony during trial.⁴ Recognizing that the remedy is controlled by the nature of the constitutional violation, courts have granted defendants relief in the form of a new trial, not dismissal, when the prosecution engages in misconduct. Defendant received that relief in this case, and is entitled to no more.

For over seventy-five years, the United States Supreme Court has adhered to its holding

¹ *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

² The constitutional claim in state cases falls under the Due Process Clause of the Fourteenth Amendment, which provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). The Michigan Constitution contains the same protection, providing that a person shall not be “deprived of life, liberty, or property, without due process of law.” Const 1963, art 1, § 17.

³ *Danforth v Minnesota*, 552 US 264, 269-270; 128 S Ct 1029; 169 L Ed 2d 859 (2008); *Strickland v Washington*, 466 US 668, 684-685; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955).

⁴ *United States v Agurs*, 427 US 97, 103, 107; 96 S Ct 2392; 49 L Ed 2d 342 (1976); *Albright v Oliver*, 510 US 266, 273 n 6; 114 S Ct 807; 127 L Ed 2d 114 (1994) (plurality opinion).

in *Mooney v Holohan*⁵ that the prosecution's securing of a defendant's conviction through known perjured testimony violates due process. The Court has applied *Mooney* to situations where the State itself solicits the testimony or where it allows false evidence to go uncorrected.⁶ Michigan courts also have applied the holdings of *Mooney* and its progeny.⁷

For example, in *People v Wiese*,⁸ this Court concluded that the prosecution's failure to correct a witness' false testimony at the preliminary examination that he received no consideration for his cooperation denied the defendant a fair trial because he was unable to challenge the witness' trial testimony. The remedy accorded the defendant in *Wiese* was a new trial, not dismissal.⁹

A new trial was also the relief ordered by the United States Supreme Court in *Giglio v United States*.¹⁰ *Giglio* explained that a new trial is not automatic. Rather, it is required "if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."¹¹ *Giglio* met that threshold, and the People agree that defendant would have as well if his first jury

⁵ *Mooney v Holohan*, 294 US 103, 112-113; 55 S Ct 340; 79 L Ed 791 (1935).

⁶ *Pyle v Kansas*, 317 US 213, 216; 63 S Ct 177; 87 L Ed 214 (1942); *Alcorta v Texas*, 355 US 28, 31; 78 S Ct 103; 2 L Ed 2d 9 (1957); *Napue, supra*; *Miller v Pate*, 386 US 1, 7; 87 S Ct 785; 17 L Ed 2d 690 (1967).

⁷ See *People v Wiese*, 425 Mich 448, 453-456; 389 NW2d 866 (1986); *People v Woods*, 416 Mich 581, 601-604; 331 NW2d 707 (1982); *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976); *People v Lester*, 232 Mich App 262, 276-280; 591 NW2d 267 (1999).

⁸ *Wiese, supra* at 450-456.

⁹ *Id.* at 456.

¹⁰ *Giglio v United States*, 405 US 150, 155; 92 S Ct 763; 31 L Ed 2d 104 (1972).

¹¹ *Id.* at 154, quoting *Napue, supra* at 271.

had returned a guilty verdict.¹²

The appropriate remedy follows from the nature of the violation, and in this case, dismissal is not appropriate for a due process violation. The “touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”¹³ When determining the appropriate remedy, the general rule is that “remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.”¹⁴ Society has an interest in punishing one whose guilt is clear at the conclusion of a fair trial, and it is this interest that justifies the practice of using a retrial to correct trial error.¹⁵

*Burks v United States*¹⁶ is instructive in this regard. In *Burks*, the Court explained that, unlike the overturning of a conviction for the failure of proof at trial, a reversal for trial error “is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.”¹⁷ The use of a retrial to remedy the error serves the competing interests involved. It protects the accused’s interest in obtaining a fair readjudication

¹² The People confessed error in codefendant Ricardo Pena’s appeal from his conviction.

¹³ *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982).

¹⁴ *United States v Morrison*, 449 US 361, 364; 101 S Ct 665; 66 L Ed 2d 564 (1981).

¹⁵ *United States v Tateo*, 377 US 463, 466; 84 S Ct 1587; 12 L Ed 2d 448 (1964).

¹⁶ *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978).

¹⁷ *Id.* at 15.

of guilt, as well as society's interest in ensuring that the guilty are punished.¹⁸ Society's interest is paramount where, as here, defendant admitted his culpability when pleading guilty.

The Supreme Court's *Brady*¹⁹ jurisprudence further supports the granting of a new trial to remedy the prosecution's knowing use of perjury. *Brady* held that the suppression of material evidence favorable to the accused violates due process irrespective of the good faith or bad faith of the prosecution. The *Brady* Court viewed its holding as an extension of *Mooney*,²⁰ and the Court since has noted that *Mooney* and its progeny can be viewed as an application of *Brady* because both rules involve the posttrial discovery of information known to the prosecution but not the defense.²¹ The culpability of the prosecutor has no bearing on whether a due process violation occurred because the principle of *Brady* and *Mooney* "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."²²

The culpability of the prosecutor likewise should have no bearing on the remedy here. The United States Supreme Court has never sanctioned dismissal as an appropriate remedy for a *Mooney* or *Brady* violation, and to the extent that federal appellate courts have suggested that it might be, apparently none have upheld dismissal as a remedy.²³ Any *Brady* error is remedied when the government provides the *Brady* information and the defendant is able to use evidence

¹⁸ *Id.* at 15-16.

¹⁹ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

²⁰ *Id.* at 86.

²¹ *Agurs, supra* at 103.

²² *Brady, supra* at 87.

²³ See *Gov't of the Virgin Islands v Fahie*, 419 F3d 249, 254, n 6 (CA 3, 2005).

relating to the *Brady* issue on retrial.²⁴

To the extent that courts of other jurisdictions have approved of dismissal as a sanction for prosecutorial misconduct, they generally have done so under their supervisory powers, not because the Constitution mandates that remedy.²⁵ This Court, like the United States Supreme Court,²⁶ has supervisory authority over lower courts.²⁷ But this Court has not exercised that authority to bar retrial on the basis of prosecutorial misconduct during trial,²⁸ nor do its decisions support that relief in this case.

*People v Dunbar*²⁹ suggests that a court should focus on the defendant's right to a fair proceeding when determining the remedy for prosecutorial misconduct and that the remedy should be narrowly tailored to the particular violation. *Dunbar* concluded that the prosecution did not engage in impermissible judge-shopping when it refiled charges after dismissing the case

²⁴ *United States v Babiar*, 390 F3d 598, 600 (CA 8, 2004).

²⁵ See e.g. *United States v Jacobs*, 855 F2d 652, 655 (CA 9, 1988); *Alabama v Hall*, 991 So2d 775, 778 (Ala Crim App, 2007); *Washington v Moen*, 110 Wash App 125, 131-132; 38 P3d 1049 (Wash Ct App, 2002), aff'd 150 Wash 2d 221; 76 P3d 721 (2003); *Illinois v Polonowski*, 258 Ill App 3d 497, 500; 629 NE2d 1162 (Ill App Ct, 1994).

²⁶ *McNabb v United States*, 318 US 332, 340-341; 63 S Ct 608; 87 L Ed 819 (1943) (observing that the Court's power to "undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,'" secured by the Fourteenth Amendment, but its power over convictions in federal courts "is not confined to ascertainment of Constitutional validity").

²⁷ *Tomlinson v Tomlinson*, 338 Mich 274, 276; 61 NW2d 102 (1953).

²⁸ The Court of Appeals has granted that relief where the misconduct so irretrievably tainted the prosecution that the defendant could never receive a fair trial. *People v Morris*, 77 Mich App 561, 563-564; 258 NW2d 559 (1977).

²⁹ *People v Dunbar*, 463 Mich 606; 625 NW2d 1 (2001).

at the preliminary examination. *Dunbar* then questioned whether dismissal would be an appropriate remedy if the prosecutor had committed misconduct:

The dissent, believing defendant's due process rights were violated, would affirm a dismissal of all charges against defendant. We question that this remedy would be appropriate even if we were persuaded that the assistant prosecutor had engaged in judge-shopping. In such a situation, we likely would remand to the Court of Appeals to determine whether the proper remedy would be continuation of the original examination before the original judge, rather than a dismissal with prejudice, inasmuch as jeopardy had not attached.^[30]

Had there been misconduct, *Dunbar* would remedy the violation by giving the defendant the process that was due—a hearing before the original preliminary examination judge—not a windfall in the form of a dismissal.

*People v Pearson*³¹ similarly suggests that the focus is the defendant's right to a fair trial, not punishment of the prosecutor who engaged in misconduct. In determining the appropriate remedy for a violation of the former res gestae witness statute, *Pearson* explained:

If it appears to the judge that there has been professional misconduct but that defendant's right to a fair trial has not been adversely affected, then the sanctions should rest upon the individual prosecutor rather than upon society. If professional misconduct also results in prejudice, the defendant should have his remedy and the code violation should be referred to the Grievance Commission for appropriate action.^[32]

Dunbar and *Pearson* demonstrate that the Court always exercises restraint when using its supervisory powers, utilizing them only when justified by their underlying purposes. Those purposes “are threefold: to implement a remedy for violation of recognized rights, . . . ; to

³⁰ *Id.* at 618, n 14.

³¹ *People v Pearson*, 404 Mich 698; 273 NW2d 856 (1979).

³² *Id.* at 726.

preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, . . . ; and finally, as a remedy designed to deter illegal conduct.”³³

Dismissal in the instant case would not further the above purposes, and intervention by the Court is not required to remedy the constitutional violation. Defendant received what he was entitled under the Due Process Clause during his second trial—a fair trial with evidence of the prior perjury. He then elected not to take full advantage of his right and instead pleaded guilty after his own efforts to suborn perjury came to light. Especially under these unique circumstances, dismissal is not necessary to preserve judicial integrity because defendant’s conviction rests on appropriate considerations—a knowing and voluntary guilty plea. Nor is dismissal necessary to deter illegal conduct. The pending criminal charges against the prosecutor and trial judge, as well as potential sanctions for professional misconduct, have a far greater deterrent value than the dismissal of charges against defendant.

Balancing defendant’s interest, the interest of the judicial system, and society’s interest in ensuring that the guilty are punished for their crimes, the appropriate remedy for the misconduct in this case was a new trial. Retrial, not dismissal, is the remedy under the Due Process Clause, and no legal, equitable, or policy consideration justifies the use of the Court’s supervisory powers to provide different relief. Defendant has already received his remedy, and now must fulfill the terms of his plea agreement and serve his sentence.

³³ *United States v Hasting*, 461 US 499, 505; 103 S Ct 1974; 76 L Ed 2d 96 (1983) (citations omitted).

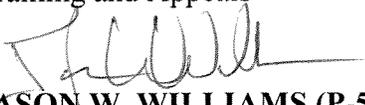
RELIEF

WHEREFORE, the People request that this Court deny defendant's application for leave to appeal.

Respectfully Submitted,

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Dated: July 29, 2010.

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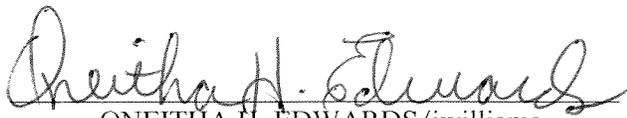
STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL and MOTION TO EXTEND THE TIME FOR FILING SUPPLEMENTAL BRIEF

Upon: DAVID L. MOFFITT

the within named attorney, by depositing said pleading in the U.S. Mail in the City of Detroit, enclosed in an envelope bearing postage fully prepaid, on August 3, 2010, plainly addressed as follows:

David L. Moffitt
Attorney at Law
30600 Telegraph Rd., #2185
Bingham Farms, MI 48025


ONEITHA H. EDWARDS/jwilliams

said pleading was filed in the SUPREME COURT, by U.S. MAIL at the following address:

✓ CORBIN R. DAVIS, Clerk
Michigan Supreme Court
925 W. Ottawa
Lansing, Michigan 48915

Subscribed and sworn to before me
this 3rd day of August, 2010


JOYCELYN SHARP

Notary Public, Wayne County, Michigan
My Commission Expires: 03-08-2015