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Perjury by Prosecution Witnesses

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Edited by: **Brianna Bell**

JURIST Guest Columnists Daniel J. Wright of The Law Office of Daniel J. Wright discusses a recent case of perjury by a prosecution witness in Maryland...

For more than 20 years, a key prosecution witness in Maryland criminal proceedings named Joseph Kopera, a firearms expert for the state crime lab, routinely and blatantly lied about his resume, background, qualifications, and other matters. Recently, the Maryland State Police **discovered** that he also forged signatures on firearms ballistics reports. His testimony was used to wrongfully convict hundreds, if not thousands, of defendants across the state.

Kopera was not the first and no doubt will not be the last prosecution witness to perjure himself. In 2017, a Massachusetts crime lab technician named Annie Dookhan **plead guilty** to

contaminating drug samples, tampering with evidence, and obstructing justice in thousands of cases. In 2015, prosecutors in Washington, D.C., **stopped sending** DNA samples to the city crime lab because of concerns about that lab misstating the likelihood that DNA had been left at a crime scene.

When criminal convictions are predicated on perjured testimony that the prosecution had knowledge of, either actually or constructively, then what should become of the conviction? The Maryland Court of Appeals faced this issue in the case of *McGhie v. State,* 449 Md. 494 (2016). In *McGhie*, the defendant had been convicted based in part upon the perjured testimony of Mr. Kopera. Mr. Kopera had been the State's go-to witness for at least ten years, testifying 125 – 130 times per year. He would venture opinions favorable to the state on any number of issues, not just ballistics. In almost every case, however, he openly lied about his credentials.

Perjury is nothing new in the criminal justice system, and courts have developed rules for dealing with it. In the leading case of *Napue v. Illinois*, 360 U.S. 264, 272 (1959), the Supreme Court reversed a conviction because "the false testimony used by the State in securing the conviction of petitioner *may have had an effect* on the outcome of the trial." In that case, a witness testified falsely that he had received no consideration in return for his testimony, when in fact he had received consideration and the prosecutor did nothing to correct the witness' false testimony. The Court found this to be a violation of due process. The false testimony went only to the issue of the witness' credibility, but the Supreme Court ruled that "a lie is a lie" and reversed.

Maryland courts have held that perjured evidence is material if there is a "substantial possibility" that if the evidence had been revealed the result of the trial would have been "different." *State v. Thomas*, 325 Md. 160, 190 (1992). Whether there is a difference between these two standards is unclear. A result can be "different" if the result of a trial would have been a hung jury instead of a judgment of guilt, or if certain counts (but not all) might have been acquitted. Maryland's actual innocence statute, **Section 8-301 of the Criminal Procedure Article**, provides relief where there is a "substantial or significant possibility" that the result may have been different. The choice of words is interesting. Was the use of "possibility" instead of "probability" important? Is there a difference between a "substantial possibility" and a "significant possibility"?

The courts, both federal and state, have applied a different standard where the evidence in question was perjured testimony (as opposed to non-disclosed facts or tangible evidence) that the prosecution knew or should have known about. In those cases, "a new trial is required if the false testimony could *in any reasonable likelihood* have affected the judgment of the jury." *Yearby v. State*, 414 Md. 708 n.5 (2010)(quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). In *Yearby*, the court acknowledged that "[t]his standard is stricter against the State." It doesn't call for the reviewing court to speculate about what the outcome should have been ("different result"), but rather whether the evidence in "any reasonable likelihood" had "affected the judgment of the jury." Notably, the word "any" is used to modify the "reasonable likelihood" to emphasize the heightened standard of review to be applied.

The Maryland Court of Appeals' decision in *McGhie v. State* is a significant misapplication of this standard. It is unclear whether he would have been accepted as an expert without these embellishments. However, with the truth of his character exposed, his acceptance as an expert was impossible, and the results of the vast majority of cases would not have been the same. Common sense dictates that jurors, upon learning that the State had presented perjured testimony to them, as well as in other cases, would have reacted negatively.

Did the Court of Appeals apply the law correctly in *McGhie*? The Court applied a watered-down test to the evidence using the standard of a "substantial possibility" of a different result. The Supreme Court in *Napue*, however, held that the proper test is whether knowledge of the perjury "in any reasonable likelihood" would have affected the judgment of the jury. Maryland's Court of Appeals acknowledged that this is a stricter test against the prosecution in *Yearby*. It did not apply it, however, in *McGhie*. Mr. McGhie had a right to have the *Napue/Yearby* standard applied as a matter of due process. Defendants convicted on the basis of perjured testimony have a right to have their cases reviewed under the stricter test, but that isn't happening in cases now due to the *McGhie* opinion. It isn't clear how inmates would invoke this right, since under the statute for newly discovered evidence the legislature utilized language tracking the more relaxed standard. Mr. Kopera's deceit was more than newly discovered evidence, however: it was perjury and a violation of the constitutional promise of due process of law. A standard that may be appropriate for newly discovered DNA evidence may not be appropriate when the State has employed perjured testimony by a State employee to secure a conviction. That is the lesson of *Napue* and *Yearby*, but it doesn't seem the lesson has been learned in Maryland.

Daniel J. Wright *was named one of the Top 100 Trial Lawyers in 2013 and 2014 and has been rated 10 out of 10 on Avvo. Attorney Wright received his Bachelor of Arts and his law degree from the University of Wisconsin-Madison. His email address is: djwrightesq@gmail.com.*

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This article was prepared for publication by **Brianna Bell**, a JURIST Staff Editor. Please direct any questions or comments to her at **commentary@jurist.org**
