

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

TYRONE SMITH,
Petitioner,

v.

DONALD DORSEY, Warden,
Western New Mexico Correctional Facility,
Respondent.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an immunity agreement that requires a prosecution witness to testify to a particular version of events, on pain of losing the benefit of the agreement and facing prosecution, violates the defendant's right to due process under clearly established federal law?

2. Whether counsel who fails to challenge an immunity agreement that requires a prosecution witness to testify to a particular version of events renders ineffective assistance?

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PETITION FOR A WRIT OF CERTIORARI

Tyrone Smith petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-10) is unreported. The Magistrate Judge's findings and recommended disposition (App. 11-66) and the order of the district court adopting the Magistrate Judge's recommendations (App. 67-68) are unreported. The orders of the Second Judicial District Court of New Mexico denying Smith's state petition for a writ of habeas corpus (App. 71-81) and of the Supreme Court of New Mexico denying Smith's petition for a writ of certiorari (App. 69-70) are unreported. The opinion of the Supreme Court of New Mexico on direct appeal (App. 82-127) is reported at 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

JURISDICTION

The court of appeals entered judgment on October 12, 2006. App. 1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

28 U.S.C. § 2254(d)(1) provides in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

Tyrone Smith stands convicted of the first-degree murder of Jerol Younger. No physical evidence connected Smith to Younger's killing. The prosecution's case rested heavily on the testimony of Frank Lucero, an immunized accomplice witness who was himself a suspect in the murder. Lucero's immunity agreement required him, on pain of losing his immunity and facing prosecution for Younger's murder, to testify in accordance with the story he had previously told prosecutors, which exculpated him and inculpated Smith. Despite the plainly coercive nature of the

immunity agreement, Smith's counsel failed to seek exclusion of Lucero's testimony or to otherwise challenge the lawfulness of the agreement. This Court should grant certiorari to remedy the patent injustice of a conviction obtained through means calculated to distort the factfinding process.

I. NATURE OF THE CASE.

A New Mexico grand jury indicted Smith, Denise Spikes, and Matt Brown on June 10, 1994. The indictment charged Smith with an open count of murder; conspiracy to commit murder; three counts of tampering with evidence; and bribery of a witness. RP 2.¹

Trial began on September 12, 1995. In its opening statement, the prosecution contended that Smith killed Younger because he was jealous of Younger's alleged sexual relationship with Spikes (Smith's girlfriend and Younger's former wife) and because Spikes expected to receive life insurance proceeds from Younger's military policy. T. 9/13 at 119-20. The defense contended that Lucero, an admitted user of crack cocaine, had killed Younger, an alleged drug dealer, over a drug debt that Lucero could not pay. T. 9/13 at 126-28, 131.

Lucero testified for the prosecution under an agreement that gave him complete immunity for his conduct in connection with Younger's murder, provided that he complied with certain conditions. SX 44A; T. 9/15 at 147-

¹ The Appendix filed in the United States Court of Appeals for the Tenth Circuit will be cited as "Aplt. App." The Record Proper filed in the New Mexico Supreme Court will be cited as "RP"; trial transcripts will be cited as "T." followed by the date and page; transcripts from the evidentiary hearing on Smith's state habeas petition will be cited as "HT" followed by the date and the page; and prosecution trial exhibits will be cited as "SX."

48; *see* App. 26; Aplt. App. 1006-08. The first condition of the immunity agreement required Lucero to "give complete and truthful statements of all facts known to him regarding the murder of Gerol Younger Jr as represented by his attorney and set forth in paragraph 1 through 11." Aplt. App. 1008. Paragraphs 1 through 11, in turn, began "The State understands the following facts to be," and then recited two pages of alleged facts that exculpated Lucero and inculpated Smith and Brown. Aplt. App. 1006-07. Paragraph 8 set forth at length what Lucero allegedly told his aunt, Linda Satomba, about Younger's murder. Aplt. App. 1006-07. Paragraph 11 recited a version of the murder that Lucero's attorney provided. Aplt. App. 1007.

The fourth condition of the immunity agreement declared that "[t]his agreement will be null and void if any credible evidence is subsequently discovered that Frank Lucero participated in the murder by helping, assisting, encouraging, aiding or abetting other than what has been disclosed to the State through investigation and by his attorney Bill Parnall." Aplt. App. 1008. The agreement further provided that "[i]f any of the conditions fail, the agreement may be declared null and void by a party to the agreement, however the District Attorney agrees to consider, in good faith, any cooperation and assistance provided by Frank Lucero before proceeding on any charges against Frank Lucero." Aplt. App. 1008. To underscore Lucero's obligation to comply with the agreement, including the requirement that he testify to the facts recited in the first condition, a final provision added: "If any of the conditions fail, Frank Lucero can be prosecuted." Aplt. App. 1008.

Despite a defense request, the trial court refused to instruct the jury that it must consider the testimony of immunized accomplice witnesses with greater caution than that of ordinary witnesses. Instead, in accordance with New

Mexico law, the court gave a general credibility instruction that makes no reference to immunity or to accomplice witnesses. RP 234, 271; T. 9/22 at 12-13.

On September 25, 1995, the jury found Smith guilty of first-degree murder, conspiracy to commit first-degree murder, and two counts of evidence tampering. T. 9/25 at 7-11; RP 286-91, 300. On February 19, 1996, the court sentenced Smith to life in prison plus twelve years. T. 2/19/96 at 11-13; RP 311.

Smith appealed his conviction to the New Mexico Supreme Court. Among other issues, he argued that Lucero's immunity agreement was impermissibly coercive. The Supreme Court affirmed Smith's conviction. Applying a "fundamental error" standard of review, because Smith's counsel had not objected in the trial court, the court found that Lucero's immunity agreement did not violate due process. App. 90-95. The court declared: "While it is possible to interpret [the agreement] as Defendants argue-- that is, as compelling Lucero to testify to a particular story, whether truthful or not--the record supports a conclusion that the prosecutor did not intend to compel Lucero to testify other than truthfully and that Lucero understood he was to testify truthfully." App. 91. The "record" on which the court relied consisted of Lucero's trial testimony that he understood that his agreement was to tell the truth and the arguments of defense counsel to similar effect. App. 91-95.

On July 19, 1999, Smith filed a petition for writ of habeas corpus (later amended) in the Second Judicial District Court of New Mexico. Smith's amended petition asserted (among other claims) that Lucero's immunity agreement was impermissibly coercive and that his trial counsel was ineffective for failing to challenge the agreement. In October 2001, the state court conducted a two-day evidentiary

hearing. At the hearing, the lead prosecutor testified that he had the authority to determine whether Lucero had violated the immunity agreement and, if so, whether to revoke it and prosecute him. Aplt. App. 1332. The prosecutor further acknowledged that the first condition of the immunity agreement could fairly be read to mean that if Lucero's testimony departed in some material way from the facts recited at paragraphs 1 through 11 of the agreement, he would be in breach of the agreement, Aplt. App. 1215; that if Lucero had testified in a way that differed materially from that recitation of facts, the state would have revoked the agreement under the first condition and prosecuted him, even if that testimony was proven to be truthful, Aplt. App. 1323-25; that if the state's only objective had been to have Lucero tell the truth, the first condition could have ended after the reference to Younger--there was no need for the phrase "as represented by his attorney and set forth in paragraph 1 through 11," Aplt. App. 1319-20; and that if Lucero had testified at trial that he committed the homicide and that testimony had proven to be true, the state would have revoked his immunity agreement under the fourth condition and prosecuted him, Aplt. App. 1325-26; *see* Aplt. App. 1216.

Smith's trial counsel testified at the state habeas hearing that he did not file a motion to exclude Lucero's testimony on the ground that his immunity agreement was coercive because he did not think about it before trial. Aplt. App. 1217. Counsel acknowledged that he had seen many immunity agreements in the course of his career, but he could not recall one other than Lucero's that recited the state's understanding of the facts at the beginning. Aplt. App. 1262. Nor could the lead prosecutor, who had been a prosecutor for 15 years, recall a similar agreement. Aplt. App. 1321. Trial counsel testified that although he cross-examined Lucero at trial, it would have been preferable to

exclude his testimony entirely. Counsel agreed that there was no inconsistency in filing a pretrial motion to exclude Lucero's testimony on the basis of the immunity agreement and, if that failed, cross-examining him at trial. Aplt. App. 1263.

Following the hearing, the state court denied Smith's petition. App. 71-81. Without acknowledging the testimony cited above, the court found that the Lucero immunity agreement did not cause his testimony to be "inherently unreliable" and that "Lucero's credibility was properly left to the jury." App. 73. It added that "[t]he prosecutor did not intend to compel Lucero to testify other than truthfully and Lucero understood he was to testify truthfully." App. 73.

Smith sought discretionary review from the New Mexico Supreme Court through a petition for writ of certiorari. The petition raised the related issues of Lucero's immunity agreement and ineffective assistance of counsel. The Supreme Court denied the petition without comment on August 25, 2003. App. 69-70. This Court denied Smith's petition for a writ of certiorari. *Smith v. Lucero*, 540 U.S. 1165 (2004).²

On March 9, 2004, Smith filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of New Mexico. Aplt. App. 9. The state moved to dismiss the petition. Aplt. App. 717. The Magistrate Judge recommended that the motion be granted. App. 11-66; *see* App. 26-29 (addressing ineffective assistance claim), 49 (addressing due process claim). Over Smith's objection, the district court adopted the Magistrate

² In his petition, Smith presented a single issue: Whether the Due Process Clause requires the trial court to give a specific instruction directing the jury to consider the testimony of immunized accomplice witnesses with caution when the prosecution's case rests substantially on such testimony.

Judge's findings and recommended disposition and entered judgment dismissing Smith's petition with prejudice. App. 67-68.

The United States Court of Appeals for the Tenth Circuit granted Smith a certificate of appealability on a number of issues, including whether Lucero's immunity agreement was impermissibly coercive and whether his counsel was ineffective for failing to move to exclude his testimony on that basis. After oral argument, the court of appeals affirmed the denial of Smith's habeas petition. App. 1-10. Addressing the immunity agreement issue, the court recognized that "all parties agree that this particular agreement is quite unusual." App. 8. But the court adopted the position of the Magistrate Judge that "there was nothing on the record that would tend to show Lucero was coerced into testifying as he did." App. 8 (quoting Magistrate Judge's findings). Similarly, the court affirmed the district court's conclusion that Smith's counsel was not ineffective for failing to move to exclude Lucero's testimony. App. 5-7.

II. STATEMENT OF THE FACTS.

Jerol Younger was an Air Force sergeant based at Kirtland Air Force Base in Albuquerque. He appears also to have been a drug dealer. T. 9/22 at 15. On the morning of September 14, 1992, a passer-by found his body, wrapped in bags and sheets and bound with duct tape, half-submerged in an irrigation ditch in southwest Albuquerque. T. 9/14 at 5-9. Younger had been beaten with a hammer and strangled. T. 9/14 at 13-16; T. 9/18 at 133-45. Later that day, investigators discovered his car--a white BMW with California vanity plate "KOOL J"--parked in a grocery store lot about a mile from the ditch. T. 9/14 at 21-22, 54.

In September 1992, before Younger's killing, Lucero's cousin Peter saw a light-complected black man (a

description fitting Younger) drop Lucero off twice in a white BMW. T. 9/21 at 79-80. During the month following Younger's death, Lucero became nervous when he saw the police. According to his then-girlfriend, "We'd be cruising down the road or going somewhere and he would see a police car and he would actually just duck underneath my seat and hide. He would hide, literally, just underneath the seat." T. 9/18 at 159, 161. Lucero's cousin Peter testified that he acted "real strange" and "scared." T. 9/21 at 81. Lucero told another cousin, Denise Purcell-Abeyta, and her housemate that he "needed a place to stay because he was running from the cops." T. 9/21 at 110, 144. They described him as "[p]anicky, scared." T. 9/21 at 110, 145. Lucero finally admitted to the women that he killed Younger because "he had owed [Younger] some money for some drugs." T. 9/21 at 111, 137-39, 145; *see* App. 4-5, 14-15, 86.

Shortly after Younger's killing, detectives received information that Lucero may have been involved. T. 9/14 at 27-28. In mid-October 1992, they searched Lucero's dwelling--a small, free-standing room a mile from the ditch where Younger's body was found. T. 9/14 at 24-33, 50, 57. Lucero's room had been burned. Detectives found a hammer head and handle, plastic garbage bags, duct tape, and cords similar to those used to bind Younger. T. 9/14 at 44-47; *see* App. 14.

At about the time the police searched his room, Lucero traveled with Smith to visit Spikes in San Diego, California and then began living with his aunt, Linda Satomba, in San Jose. T. 9/14 at 145; T. 9/19 at 87-88. A few months later, in early 1993, he told Satomba his version of Younger's killing. T. 9/14 at 145-46. According to Satomba, Lucero told her that he was at a friend's house; that Smith came over with Brown and they went back to Lucero's room; that Smith brought a television in and put it in

Lucero's closet; that a man and a woman arrived, and Smith told the man that the television was "over there"; that when the man went to the closet, Smith and Brown grabbed hammers or tools and began hitting him; that the woman ran away; that Lucero got scared, but Smith and Brown would not let him leave; that Smith and Brown continued beating the man; that he fell on the floor, and Smith and Brown tied him up with tape; that Smith put a bag over the man's head; that Smith told Lucero to take the man's keys, put on a pair of gloves, and get rid of the man's car; that Lucero did not want to comply with Smith's directive, but he did; that he wanted to run after dropping off the car, but Smith and Brown appeared in a truck and made him get in; that they returned to Lucero's room; that Smith and Brown told Lucero to start the truck; that they carried the man out and loaded him in the truck; that Lucero drove the truck to a ditch; and that Smith and Brown dumped the man there. T. 9/15 at 181-84.

In early 1994, police came to Satomba's workplace in San Jose looking for Lucero. She falsely denied knowing where he was. T. 9/15 at 186-87. On May 17, 1994, the police returned and Satomba gave them a statement recounting Lucero's version of events. T. 9/15 at 187, 191-93. Lucero was jailed briefly in California until his attorney could negotiate an immunity agreement. T. 9/15 at 99-106. In early June, Lucero and Satomba travelled to Albuquerque. On June 9, 1994, they appeared before the grand jury. Before Lucero testified, and before he gave any statement to law enforcement, he signed the immunity agreement requiring him to conform his testimony to what "[t]he State understands the . . . facts to be," including Satomba's account of what Lucero had allegedly told her about the killing. Aplt. App. 1006-08. The grand jury indicted Smith, Brown, and Spikes. RP 2. Lucero and Satomba both testified at trial

to the version of events incorporated in Lucero's immunity agreement.

Following a severance, Spikes obtained a formal order of immunity and appeared at trial as a prosecution witness. She testified that she married Younger in October 1985. They had a son, Dominic, in 1986. Younger abused Spikes physically throughout their marriage, and they divorced in April 1987. T. 9/19 at 105-06. Spikes began dating Smith in December 1989, and their relationship ended in February 1993. T. 9/19 at 32, 34.

According to Spikes, Younger resented Smith's relationship with Spikes and Dominic, who lived with Spikes. T. 9/19 at 111, 150; T. 9/20 at 23-24. Smith objected to Younger's persistent efforts to resume a sexual relationship with Spikes. T. 9/19 at 49-50, 111. In September 1992, according to Spikes, Smith decided that they should travel from California (where they were living) to Albuquerque to talk with Younger and resolve the relationship between Spikes and the two men. T. 9/19 at 53-56, 122. Spikes testified that, once in Albuquerque, she and Smith switched cars and met Brown. Spikes, Smith, and Brown then picked up Lucero. According to Spikes, the men dropped her off at a pay phone. Smith asked her to call Younger, and she did. T. 9/19 at 63, 102. Younger picked her up in his BMW, and they drove to Lucero's room.

At Lucero's room, Younger parked his car and walked to the open door, with Spikes a few steps behind him. T. 9/19 at 130. According to Spikes, someone grabbed Younger, and the door slammed shut. Spikes testified that she heard Younger cry out. T. 9/19 at 69. She ran to a pay phone some distance away to call for help. T. 9/19 at 69-70, 128. She claimed that, while she was on the telephone, Smith drove up and made her get into his vehicle. T. 9/19 at

71, 128-29. They drove back to Lucero's room. Younger's car was gone when they arrived. T. 9/19 at 72. Smith went into the room for about ten minutes, while Spikes waited outside. T. 9/19 at 73. Then Smith came out, and they drove to his mother's house. T. 9/19 at 74, 129. Spikes later asked Smith if he had killed Younger, and he adamantly denied having done so. T. 9/19 at 132-33.

In mid-1994, after reading the affidavit in support of the arrest warrant for Smith, Spikes commented to a friend that Younger "deserved what he got"; that "it was either her or him"; and that Lucero was "covering up for [her] and for himself." T. 9/20 at 78-79, 81-82.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to correct the grave injustice of a conviction obtained through an immunity agreement that, on its face, compelled a key prosecution witness, who was himself a suspect in the offense, to adhere to a story that exculpated him and inculpated the defendant. Such an agreement makes a mockery of the fundamental principle that a criminal trial represents a search for the truth.

Respondent conceded in the court of appeals that "[i]f Lucero's immunity agreement were coercive, its use to coerce his testimony would deny Smith a fair trial and due process, and the failure of Smith's counsel to object to such testimony would be ineffective assistance of counsel." Appellee's Answer Brief at 20. The critical question, therefore, is whether the agreement's requirement that Lucero "give complete and truthful statements of all facts known to him regarding the murder of Gerol [sic] Younger Jr as represented by his attorney and set forth in paragraph 1 through 11," coupled with the agreement's other conditions, compelled him to testify to a particular story.

It plainly did. The immunity agreement required Lucero to follow the script set forth in the agreement itself, on pain of forfeiting his immunity and subjecting himself to a prosecution that could land him in prison for life. The first condition of the agreement required Lucero to testify to two pages of alleged "facts" that exculpated him and inculpated Smith and Brown. Aplt. App. 1006-07. The fourth condition of the agreement provided that "[t]his agreement will be null and void if any credible evidence is subsequently discovered that Frank Lucero participated in the murder by helping, assisting, encouraging, aiding or abetting other than what has been disclosed to the State through investigation and by his attorney Bill Parnall." Aplt. App. 1008. Another part of the agreement declared that if any of the conditions failed, Lucero could be prosecuted. *Id.* Under these provisions, if Lucero's testimony had departed in a material way from the facts recited at paragraphs 1 through 11 of the agreement, he would have been in breach of the agreement, *even if his testimony was truthful*. As the trial prosecutor acknowledged, the state would have revoked the agreement and prosecuted him. Aplt. App. 1215-16, 1323-26.

It is hard to imagine any set of safeguards that could legitimize such a coercive agreement. Remarkably, the state trial court specifically rejected one of the standard safeguards that many courts require even for less coercive agreements; it refused to give the immunized accomplice witness instruction that the defense requested, T. 9/22 at 12-13, and gave instead a general instruction on credibility (New Mexico Uniform Jury Instruction 14-5020) that failed entirely to address "the testimony of accomplices" and "the nature of each accomplice's contingent agreement and the risk that it creates." *United States v. Dailey*, 759 F.2d 192, 201 (1st Cir. 1985); *see, e.g., United States v. Levenite*, 277 F.3d 454, 459-64 (4th Cir. 2002) (discussing safeguards for accomplice testimony given under a plea or immunity

agreement); *Morris v. Woodford*, 273 F.3d 826, 836 (9th Cir. 2001) (same); *United States v. Estrada*, 256 F.3d 466, 471-72 (7th Cir. 2001) (same); *United States v. Gomez*, 810 F.2d 947, 956-57 (10th Cir. 1987) (same); *see also* App. 123-25 (New Mexico Supreme Court affirms trial court's refusal to give cautionary instruction).

Given the obviously coercive nature of the Lucero immunity agreement, Smith's counsel rendered ineffective assistance by failing to seek the exclusion of Lucero's testimony under the due process clause of U.S. Const. Amend. XIV. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Counsel should similarly have sought to exclude Lucero's testimony under prevailing state law. The New Mexico Supreme Court first addressed coercive immunity agreements in *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987). The court concluded: "As in the federal circuits, so too in the state courts, the principal requirement for the validity of an immunity agreement is that the accomplice testify truthfully . . . ; likewise, absent an agreement that induces an accomplice to testify in a certain fashion, the testimony of an accomplice goes to credibility, not to admissibility." *Id.* at 548, 746 P.2d at 654; *see* App. 91. As the evidence at the state habeas hearing established, Lucero's immunity agreement "induce[d] [him] to testify in a certain fashion"--in strict conformity with the "facts" set forth in paragraphs 1 through 11 of the agreement--and thus violated the *Zinn* standard.

The California Supreme Court's decision in *People v. Badgett*, 895 P.2d 877 (Cal. 1995), highlights the impropriety of the Lucero immunity agreement. In *Badgett*, the court declared: "An immunity agreement that requires the witness to testify consistently with a previous statement to the police is deemed coercive and testimony produced by

such an agreement is subject to exclusion from evidence." *Id.* at 893. The court added that "when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police . . . the accomplice's testimony is tainted beyond redemption and its admission denies defendant a fair trial." *Id.* (quotations and brackets omitted).

In light of the evidence presented at the evidentiary hearing, Lucero's agreement was impermissibly coercive under the *Badgett* principles. Lucero was "granted immunity subject to the condition that his testimony substantially conform to . . . earlier statement[s] given to police" by his attorney, his aunt, and others. His testimony was therefore "tainted beyond redemption." *Id.*

Similarly, in *People v. Allen*, 729 P.2d 115 (Cal. 1986), the court declared that the defendant is denied a fair trial if the prosecution's case "'depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.'" *Id.* at 130 (quoting *People v. Medina*, 41 Cal. App. 3d 438, 455 (1974)). The agreement in *Allen*, unlike the Lucero agreement, required the witness to "testify fully and completely" in all proceedings, *id.* at 129 n.4; the witness' testimony was therefore "conditioned only on [the witness'] truthful and complete testimony in all proceedings against the defendant" and others, *id.* at 132. In upholding the agreement, *Allen* distinguished *Medina*, which found that the defendant had been denied a fair trial where two key prosecution witnesses testified under agreements that required that their testimony not "materially or substantially change" from prior statements to police. *Id.* at 131. The Lucero immunity agreement, on its face and as interpreted by the prosecutor, falls squarely within the *Medina* rule. The

agreement barred Lucero, on pain of revocation and prosecution for murder, from deviating from the "facts known to him regarding the murder of Gerol Younger Jr *as represented by his attorney and set forth in paragraph 1 through 11.*" Aplt. App. 1008 (emphasis added).

The courts below rested their conclusion that Lucero's agreement was non-coercive on his testimony that the agreement required him to tell the truth and the prosecutor's similar assertion at the habeas hearing. *E.g.*, App. 26-29, 72, 91-92. But this is pure bootstrapping. An immunized accomplice's testimony that he understands he must tell the truth cannot salvage an immunity agreement that defines the truth according to the prosecution's script. No immunized witness with a deal like Lucero's would *ever* admit that he felt pressured to stick with the prosecution's story. And the prosecutor's testimony at the habeas hearing means little, given his extraordinary admission that if Lucero had testified in a way that differed materially from the recitation of facts on pages 1 and 2 of the immunity agreement, the state would have revoked the agreement and prosecuted him, even if that testimony was proven to be truthful. Aplt. App. 1323-26.³ In other words, from the prosecutor's perspective and undoubtedly from Lucero's as well, the agreement required Lucero to tell the truth, but only as long as the truth coincided with the state's view of the facts.

³ The prosecutor also acknowledged at the habeas hearing that if the state's only objective had been to have Lucero tell the truth, the first condition of the immunity agreement could have simply required Lucero to "give complete and truthful statements of all facts known to him regarding the murder of Gerol Younger Jr." The agreement could have omitted the phrase that followed: "as represented by his attorney and set forth in paragraph 1 through 11." Aplt. App. 1008, 1319-20.

If the evidence apart from Lucero's testimony established conclusively that the version of the facts recited in the immunity agreement was true, then the coercive nature of the agreement might be less significant. A court could be reasonably confident that the agreement coerced Lucero to tell the actual truth, and not just the prosecution's theory. But here Lucero was the only eyewitness to Younger's murder. No physical evidence corroborated his claim that Smith and Brown committed the offense. And there is ample reason to believe that Lucero himself killed Younger over a drug debt. Detectives found items potentially linked to Younger's murder in Lucero's room. T. 9/14/95 at 44-47. After Younger's death, Lucero became "[p]anicky" and "scared" when he saw the police. T. 9/18/95 at 159, 161; T. 9/21/95 at 81, 110, 145. He told his cousin and her housemate that he "needed a place to stay because he was running from the cops." T. 9/21/95 at 110, 144. Lucero ultimately admitted to the women that he killed Younger because "he had owed [Younger] some money for some drugs." T. 9/21/95 at 111, 137-39, 145; *see* App. 4-5, 14-15, 86. In light of this powerful evidence of Lucero's guilt, including a confession to two witnesses, the immunity agreement--which permitted Lucero to go free as long as he exculpated himself and inculpated Smith and Brown--distorted the factfinding process.

For all of these reasons, Lucero's testimony under the coercive immunity agreement violated Smith's right to due process. The state court's contrary decision constitutes an unreasonable application of the principles announced in *Napue* and *Mooney*. Similarly, the failure of Smith's trial counsel to move to exclude Lucero's testimony constituted ineffective assistance of counsel, and the state court's contrary decision unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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