

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | No. 19 CR 567 |
| |) | |
| -vs- |) | |
| |) | Hon. Harry D. Leinenweber |
| |) | |
| ROBERT SYLVESTER KELLY, also known |) | |
| As "R.Kelly," DERREL MCDAVID, and |) | |
| MILTON BROWN, also known as "June |) | |
| Brown." |) | |
| |) | |
| Defendants. |) | |

MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33

NOW COMES, the Defendant, ROBERT S. KELLY, by and through his counsel, Jennifer Bonjean, and moves this Court to grant a new trial where Defendant's Due Process guarantees were violated when the government's expert, Dr. Darrel Turner, gave perjured testimony that the government failed to correct pursuant to its obligations under *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

1. Federal Rule of Criminal Procedure 33 provides that "the court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." The Seventh Circuit has interpreted the "interest of justice" to require a new trial in situations on which "the substantial rights of the defendant have been jeopardized by errors or omission during trial." *United States v. Kuzinar*, 881 F. 2d 466, 470 (7th Cir. 1989). Unlike Rule 29, Rule 33 "confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice," but such "discretion should be exercised sparingly." *United States v. Sanchez*, 969 F. 2d 1409, 1413-14 (2d Cir. 1991).

2. The government's expert witness Dr. Darrel Turner testified as a so-called child sexual abuse expert at Defendant's trial. Over Defendant's objection, Dr. Turner testified about how offenders "groom" their victims and further testified about victimology and counterintuitive behaviors of child sexual abuse victims. Dr. Turner's testimony was relied on by the government to explain away the victims' failure to report or disclose sexual abuse in prompt fashion and was critical to the government's theory of inducement. According to the government, Dr. Turner's testimony was necessary to explain to the jury why the victims' conduct was not inconsistent with sexual abuse and why the jury should *credit* their testimony.

3. In a written motion, Defendant objected to the testimony as unreliable and questioned, *inter alia*, Dr. Turner's qualifications and *basis* for offering the proposed testimony.

4. On October 27, 2022, the government disclosed that Dr. Turner gave false testimony at Defendant's trial, that the government knew of the false testimony, and failed to correct it. Specifically, AUSA Pozolo disclosed that Dr. Turner testified that his hourly rate was \$250 (R. 579) when his contract executed *prior* to trial reflected an hourly rate of \$450 hour. Dr. Turner further testified that prior to testifying, he spent two hours preparing for trial and had charged the government accordingly. According to an invoice dated on August 17, 2022 (a day after his testimony), Dr. Turner charged 6.5 hours for trial preparation and billed the government accordingly. (Exhibit A - AUSA Pozolo's Disclosures)

5. AUSA Pozolo's letter reveals that the government *knew* that when Dr. Turner gave false testimony about his hourly rate at trial that his testimony was false. As the record reflects, the government did nothing to correct Turner's testimony or apprise the jury that Dr. Turner had not testified truthfully. Furthermore, the day after Dr. Turner's testimony, the government *knew* that Dr. Turner had misled the jury about the number of hours he spent

working on the case to minimize any perception of a financial motive. Again, at no point over the course of the next three weeks of trial did the government make any moves to correct that testimony or apprise the jury that Dr. Turner had testified falsely.

6. The Supreme Court has held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *See also, Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (new trial required where government failed to correct false testimony by key witness about a benefit, he received for testifying and the prosecutor should have been aware of the falsehood). The same result obtains when the government, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue*, 360 U.S. at 269. When a conviction is obtained through the knowing use of false testimony, it must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 271.

7. In the case at bar, the government's case, particularly as to the inducement counts, turned on the credibility of the complainants. The government bolstered the credibility of the complainants through "expert testimony" of a witness who knowingly gave false testimony and misled the jury. The government, by its own admission, *knew* that Dr. Turner gave false testimony and declined to bring the falsehoods to the attention of the court, and more importantly to the jury.

8. Had the jurors known that Dr. Turner actively misled them, the jurors would likely have rejected his testimony outright. A reasonable likelihood exists that Dr. Turner's false testimony affected the judgment of the jury in terms of crediting Nia and Pauline about why they delayed reporting the alleged sexual conduct with Defendant, whether the incidences happened

at all, and whether the alleged incidences occurred when the complainants were under the age of 17 as they alleged. Absent Dr. Turner's testimony, a reasonable likelihood exists that Defendant would have been acquitted of at least the inducement counts.

8. Accordingly, Defendant is entitled to a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant Defendant a new trial

Respectfully Submitted,

/s JENNIFER BONJEAN
Attorney for Robert Kelly

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CERTIFICATE OF SERVICE

I, JENNIFER BONJEAN, an attorney licensed to practice law in the State of Illinois, hereby certifies that she filed the attached Rule 33 Motion on November 14, 2022, by filing the motion via the Northern District of Illinois Electronic Filing System. The government and other parties were automatically served via ECF.

/s/JENNIFER BONJEAN