

**IN THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS  
AUSTIN, TEXAS**

FILED  
COURT OF CRIMINAL APPEALS  
12/4/2020  
DEANA WILLIAMSON, CLERK

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**SAMUEL UKWUACHU,**

**Appellant,**

**vs.**

**THE STATE OF TEXAS,**

**Appellee.**

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**No. PD-0776-19**

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**APPELLANT'S MOTION FOR REHEARING**

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Respectfully submitted,

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(ON APPEAL ONLY)

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TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW **SAMUEL UKWUACHU**, Appellant in the above-entitled and numbered cause, by and through his attorney of record, **WILLIAM A. BRATTON, III**, and files this Motion for Rehearing, requesting the Court to reconsider the opinion previously rendered on November, 2020.

## I.

**The Court's decision reversing the decision of the Tenth District Court of Appeals which reversed the judgment of the trial court and ordered a new trial is based on a factually inaccurate statement of the events at trial and a legally inaccurate statement of the applicable law as stated by the United States Supreme Court in Napue v. Illinois, 360 U.S. 264 (1959) and Alcorta v. Texas, 355 U.S. 28 (1957)**

The Court's opinion on State's Petition for Discretionary Review held that the State's use of cell phone "*call and location records*" to "*impeach two defense witnesses*" did not violate the Appellant's due process right which would protect against the state creating a false impression before the jury. The Court's opinion opens with the statement "It is Axiomatic that a due process claim based on false evidence requires the defendant to prove first and foremost that the evidence was actually false" citing Ex Parte Weinstein, 421 S.W.3d 656 (Tex. Crim. App. 2014). This statement is not true. As stated by the court in Weinstein, supra:

"This due-process claim is " not aimed at preventing the crime of perjury--which is punishable in its own right--but [is] designed to ensure that the defendant is convicted and sentenced on truthful testimony." Neither a witness's nor the State's good or bad faith is relevant to a " false-testimony due-process error analysis." <sup>[28]</sup> The proper question in a false-testimony claim is whether the particular testimony, taken as a whole, " gives the jury a false impression." 421 S.W.3d at 666.

With respect to the substantive analysis of a due-process false-evidence claim, it is recognized that the use of materially false evidence to procure a conviction violates a defendant's due-process rights under the Fifth and Fourteenth amendments to the United States Constitution. See Ex parte Weinstein, 421 S.W.3d 656, 664 (Tex.Crim.App. 2014); Ex parte Chavez, 371 S.W.3d 200, 207 (Tex.Crim.App. 2012) *see also* U.S. Const. amend. V, XIV; Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935). In determining whether a particular piece of evidence has been demonstrated to be false, the Courts have explained that the

relevant question is whether the testimony, taken as a whole, gives the jury a false impression. **Ghahremani**, *supra* (agreeing with convicting court's determination that evidence was false because it " creat[ed] a misleading impression of the facts" ); *see also* **Alcorta v. Texas**, 355 U.S. 28 (1957) (evidence is false if it leaves jury with a " false impression" ). " [I]mproper suggestions, insinuations and, especially, assertions of personal knowledge constitute false testimony." **Robbins**, *supra*. The Courts has consistently held that testimony " need not be perjured to constitute a due process violation; rather it is sufficient that the testimony was false." **Chavez**, *supra* (citing **Robbins**, *supra*). That is because a false-evidence due-process claim is " not aimed at preventing the crime of perjury--which is punishable in its own right--but [is] designed to ensure that the defendant is convicted and sentenced on truthful testimony." **Weinstein**, *supra*.

The court's opinion state's "On cross-examination, the State attempted to impeach Tagive's and Reed's testimony by alluding to inconsistencies *allegedly* shown by Tagive's phone records." (opinion at p.5) The court then focused on *whether witnesses Tagive and Reed gave false testimony*. (opinion at p. 13-16) Incredibly, the Court tries to parse the questioning of Tagive and Reed as not being evidence within the meaning of a false evidence due process violation. (opinion at p. 14-15). The Court carved out the totality of the questioning of the witnesses Tagive and Reed by the state which was designed to undermine their credibility by the use of unadmitted or verified phone records.

On cross examination of Mr. Tagive, the prosecution questioned Mr. Tagive by asking "you know your phone records show you were across town at one o'clock in the morning..." (R.R.XI 60). On cross examination of Ms. Reed, the prosecution questioned Ms. Reed by asking

“why are you calling him at 1:00 a.m. according to his phone records? Why is he calling you from across town at 1:00 a.m. far away from his apartment?” (R.R.XI 30) The State’s questioning clearly created a false impression that the witnesses were not truthful in their testimony before the jury when there was no valid basis for the impression. The Court somehow ignores the reality of the prosecutor’s actions and dismisses the due process claim by stating that “nothing in the record credibly shows that Tagive or Reed misinformed the jury on any particular facts”. (opinion at p. 15) As further indication of the due process violation, the phone records were referenced during the State’s closing argument by arguing that Mr. Tagive was making phone calls all over town. (R.R.XI 197, 221). The argument of the prosecutor is a clear example of the false impression created by the cross-examination of the witnesses Tagive and Reed, not a confirmation of their credible, improperly characterized testimony.

### CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Motion for Rehearing be in all things GRANTED.

Respectfully submitted,

**/s/WILLIAM A. BRATTON III**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been forwarded to the District Attorney of McLennan County on this the 3rd day of December, 2020.

**/s/WILLIAM A. BRATTON III**  
WILLIAM A. BRATTON, III  
ATTORNEY FOR APPELLANT  
(ON APPEAL ONLY)

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