No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSEREN DESHUNE DELANCY, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

On Petition for a Writ of Certiorari to the
Fourth District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
Public Defender

Paul Edward Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600
ppetillo@pd15.state.fl.us
appeals@pd15.org

QUESTION PRESENTED

Whether this Court should overrule *McCleskey v. Kemp*, 481 U.S. 279 (1987), and adopt the *Batson v. Kentucky*, 476 U.S. 79 (1986), framework that a defendant may establish a prima facie case of racial discrimination in sentencing by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

IN THE SUPREME COURT OF THE UNITED STATES

No.

JOSEREN DESHUNE DELANCY, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

Joseren Deshune Delancy respectfully petitions for a writ of certiorari to review the judgment of the Fourth District Court of Appeal of Florida.

OPINIONS BELOW

The decision of the state supreme court denying review is reported as *Delancy v. State*, SC18-1988, 2019 WL 2518402 (Fla. June 19, 2019), and is reprinted in the appendix ("A_") at A1. The decision of the Fourth District Court of Appeal is reported as *Delancy v. State*, 256 So. 3d 940 (Fla. 4th DCA 2018), and is reprinted in the appendix at A2.

JURISDICTION

The Fourth District Court of Appeal affirmed petitioner's conviction and sentence on September 20, 2018. A2. Petitioner timely sought review in the Florida Supreme Court, but that court denied review June 19, 2019. A1. On September 9, 2019, Justice Thomas extended the time for filing a petition for writ of certiorari to October 17, 2019. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Joseren Deshune Delancy is African American. He was convicted of high speed fleeing and eluding in Martin County, which is one of four counties in Florida's Nineteenth Judicial Circuit. High speed fleeing and eluding is a second-degree felony punishable by up to 15 years in state prison. §§ 316.1935(3)(a), 775.082(4)(d), Fla. Stat. (2014).

Petitioner was sentenced to 10 years in state prison. He argued in state court that his sentence violated the Equal Protection Clause of the Fourteenth Amendment because black defendants in Florida, and black defendants in the Nineteenth Judicial Circuit in particular, are punished more severely than white defendants. To assist the Court in understanding his claim, he sets forth a basic roadmap of Florida's non-capital sentencing regime.

Petitioner was sentenced under Florida's Criminal Punishment Code, which governs non-capital sentencing. § 921.002, Fla. Stat. This Code is Florida's primary sentencing policy. William H. Burgess, *Fla. Sentencing* § 5:5 (2018-19 ed.). It is scoresheet based and provides a "uniform evaluation of relevant factors present at sentencing, such as the offense before the court for sentencing, prior criminal record, victim injury, and others." *Florida's Criminal Punishment Code: A Comparative Assessment; A Report to the Florida Legislature Detailing Florida's Criminal Punishment Code*, DEPT. OF CORRECTIONS, 3 (Sept. 2018). The scoresheet determines a permissible sentencing range, but the only upper bound is the statutory maximum (in petitioner's case, 15 years). § 921.0024(2), Fla. Stat. If the defendant is before the court for sentencing on more than one offense, the upper

bound is the statutory maximum for each offense stacked end to end. *Id.*

The Code ranks the seriousness of every felony on a scale from 1 to 10, with 10 being the most severe. § 921.0022(2), Fla. Stat. (2014). For example, second-degree (depraved mind) murder is a level 10 offense; burglary of a dwelling is a level 7 offense; carrying a concealed firearm is a level 5 offense; and possession of a controlled substance (other than marijuana) is a level 3 offense. § 921.0022(3)(c)(e)(g)(j), Fla. Stat. Petitioner's offense, high speed fleeing and eluding, is a level 4 offense. § 921.0022(3)(d), Fla. Stat.

A point value is assigned to each level depending on whether the offense is scored as a primary offense, additional offense, or prior record. § 921.0024(1)(a), Fla. Stat.; Fla. R. Crim. P. 3.992. Level 7 offenses, for example, are assigned 56 points as primary offense, 28 points as additional offense, and 14 points as prior record. *Id.* Level 4 offenses, like petitioner's, score 22 points as primary offense, 3.6 points as additional offense, and 2.4 points as prior record. §§ 921.0022(3)(d), 921.0024(1)(a), Fla. Stat.

Primary offense is that offense pending before the court for sentencing that scores the most points. § 921.0021(4), Fla. Stat. An additional offense is "any offense other than the primary offense for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense." § 921.0021(1), Fla. Stat. And prior record includes any "conviction for a crime committed by the offender, as an adult or a juvenile, prior to the time of the primary offense," with some limitations on old convictions and juvenile adjudications. §

921.0021(5), Fla. Stat.

The scoresheet assesses points in nine categories: primary offense; additional offenses; victim injury; prior record; legal status violation; community sanction violation; firearm/semi-automatic or machine gun; prior serious felony; and enhancements. § 921.0024(1)(a), Fla. Stat.

All points are tallied to reach the "total sentence points." § 921.0024(1)(a), Fla. Stat. A computation is then performed: if the total sentence points exceed 44, 28 points are subtracted and the new total is decreased by 25 percent. § 921.0024(2), Fla. Stat. That final number represents the "lowest permissible sentence" that a court can impose absent a valid ground to depart below it. *Id.* Again, the statutory maximums stacked end to end are the top of the range (except where the lowest permissible sentence exceeds the statutory maximum, in which case that lowest permissible sentence must be imposed). § 921.0024(2), Fla. Stat.

Under the sentencing guidelines that governed before the Code, the total sentence points were decreased by 25 percent to establish the lower bound, and increased by 25 percent to establish the upper bound. § 921.0014(2), Fla. Stat. (1997). The Code, effective October 1, 1998, eliminated the upper bound. Ch. 97-194, Laws of Fla. For example, under the sentencing guidelines, the sentencing range for a defendant with no prior record convicted of burglary of a dwelling (a second-degree felony punishable by up to 15 years in state prison) and grand theft (a third-degree felony punishable by up to 5 years in state prison) would be 21.9 months to 36.5 months in prison, and to go above or below that the judge would need a valid

departure ground.[1] By contrast, under the Criminal Punishment Code the sentencing range is 21.9 months to 20 years in state prison (15 plus 5).[2]

And while the Criminal Punishment Code provides objective criteria for establishing a minimum sentence, it plays no role in determining the ultimate sentence imposed (other than setting the minimum). In fact, the judge's discretion in selecting a sentence above the lowest permissible sentence is not channeled by any rules, standards, or guidelines. As the Fourth District Court of Appeal said in the case at bar, judges have "unlimited discretion to sentence a defendant up to the maximum term set by the legislature for a particular crime." *Delancy v. State*, 256 So. 3d 940, 947 (Fla. 4th DCA 2018) (quoting *Alfonso-Roche v. State*, 199 So. 3d 941, 946 (Fla. 4th DCA 2016) (Gross, J., concurring)). The longstanding metaphor has been that that the lowest permissible sentence merely establishes a "sentencing floor" and that judges have unlimited discretion to impose any sentence up to and including the statutory maximums. *Torres v. State*, 879 So. 2d 1254, 1255 (Fla. 3d DCA 2004).

To make matters worse, judges are not required to explain their sentencing

---

[1] Burglary of a dwelling was a level 7 offense and grand theft was a level 2 offense under the sentencing guidelines. § 921.0012(3)(b)&(g), Fla. Stat. (1997). Burglary of a dwelling scored 56 points as primary offense, and grand theft scored 1.2 points as additional offense. § 921.0014(1)(a), Fla. Stat. (1997). 57.1 minus 28 equals 29.2. The sentencing range was established by multiplying that number by 1.25 for the upper range (36.5 months) and .75 for the lower range (21.9 months). § 921.0014(2), Fla. Stat. (1997).

[2] Same computation as in note 1 except that only the lower bound is calculated (29.2 times .75 yielding a lowest permissible sentence of 21.9 months). §§ 921.0022(3)(b)&(g), 921.0024(1)(a)&(2), Fla. Stat. (2014).

decisions.[3] *Taylor v. State*, 253 So. 3d 631, 632 (Fla. 4th DCA 2018); *see also Venter v. State*, 901 So. 2d 898, 898 (Fla. 4th DCA 2005) (judges need not explain why they denied a request to impose a sentence below the lowest permissible sentence). Further, there is no appellate review of a sentence within the statutory limits. *Winther v. State*, 812 So. 2d 527, 529 (Fla. 4th DCA 2002) ("[J]udicial discretion in sentencing is not appealable."). The only exception is a judge's voluntary—again, judges need not explain their sentences—announcement that he or she relied on an improper sentencing consideration.[4]

Petitioner's lowest permissible sentence was 13.5 months in state prison. A23. He scored 22 points for primary offense, 0.2 points for an additional offense (a misdemeanor), and 23.8 points for prior record (46 minus 28 times .75 equals 13.5 months). Thus, petitioner's sentencing range was 13.5 months in state prison to 15 years in state prison.

At sentencing, the judge focused on the nature of the offense (a brief but high speed chase through a residential neighborhood) and its particular location: low

---

[3] By contrast, federal judges and the judges in many states must explain their sentencing decisions. 18 U.S.C § 3553(c); Mont. Code Ann. § 46–18–102(3)(b); N.D. Cent. Code. Ann. § 12.1-32-02(6); Or. Rev. Stat. Ann. § 137.120(1); Alaska R. Crim. P. 32.2(c)(1); Conn. Practice Book 43-10(6); Iowa R. Crim. P. 2.23(3)(d); Me. R. Crim. P. 32(a)(3); Md. Rule 4-342(f); N.J. Ct. R. 3:21-4(g); Pa. R. Crim. P. 704(C)(2); Wis. J.I.—Crim. SM–34 at 8–9; *State v. Hussein*, 229 P.3d 313, 327-28 (Haw. 2010); *State v. Harrison*, 985 P.2d 486 (Ariz. 1999) (en banc); *People v. Walker*, 724 P.2d 666, 669 (Colo. 1986) (en banc).

[4] Judges have volunteered that they relied on race, *Senser v. State*, 243 So. 3d 1003, 1011 (Fla. 4th DCA 2018), religion, *Torres v. State*, 124 So. 3d 439, 442 (Fla. 1st DCA 2013), and nationality, *Nawaz v. State*, 28 So. 3d 122, 124 (Fla. 1st DCA 2010), in selecting the sentence.

income east Stuart "where people have the same right to be safe as they do in Sewall's Point or any[where] else."[5] A8.

Petitioner was sentenced to 10 years in state prison. A23. The judge said he had sentenced other defendants to less severe sentences for the same crime, but those cases did not "involve such aggravating factors…." A10. Petitioner moved to correct his sentence on the ground the judge had sentenced at least four higher-scoring defendants to less time for offenses equally or more aggravated than petitioner's.[6] A7-20. This included one defendant who was fleeing from police at high speed on Interstate 95 while drunk and throwing cocaine out the window. A18. His lowest permissible sentence was 15.975 months and he was sentenced to 6 years. A18.

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal. This was one month after the Sarasota Herald Tribune published an explosive series of reports about racial disparity in Florida sentencing. Josh Salman et al, *Bias on the Bench*, Sarasota Herald Tribune, Dec. 8, 2016.[7] One of the reports featured the Nineteenth Judicial Circuit, where petitioner was convicted. Josh

---

[5] East Stuart was known as "Colored Town" until the 1950s. Josh Salman et al, *Tough on Crime: Black Defendants Get Longer Sentences in Treasure Coast System*, Sarasota Herald Tribune, Dec. 8, 2016, available at http://projects.heraldtribune.com/bias/bauer/. By contrast, Sewall's Point, less than four miles away, is 97.4% white and has a median income of $118,571.00. https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml

[6] In Florida, a defendant whose direct appeal is pending can file a motion in the trial court to correct certain sentencing errors. Fla. R. Crim. P. 3.800(b)(2).

[7] http://projects.heraldtribune.com/bias/.

Salman et al, *Tough on Crime: Black Defendants Get Longer Sentences in Treasure Coast System*, Sarasota Herald Tribune, Dec. 8, 2016.[8] It described the Nineteenth Judicial Circuit as "one of the worst courts in Florida to be black, according to a statistical analysis of every felony case across the state during the past 12 years." *Id.*

The Project on Accountable Justice—a policy think tank associated with the Florida State University College of Social Sciences and Public Policy, the St. Petersburg College Institute for Strategic Policy Solutions, and the Tallahassee Community College Florida Public Safety Institute—conducted a sentencing study in 2017, and it found that "[s]tatewide, blacks are 4.8 times more likely to be incarcerated than whites" and that the Nineteenth Judicial Circuit "had the most severe racial disparities." Cyrus O'Brien et al., *Florida Criminal Justice Reform: Understanding the Challenges and Opportunities*, Florida State University Project on Accountable Justice (2017).[9]

Petitioner obtained from Florida's Department of Corrections sentencing spreadsheets for the two years preceding his sentencing. From these, he could see the sentencing patterns for defendants who had the same lowest permissible sentence under the Criminal Punishment Code. A7-24.

In fiscal year 2015-16, there were 55 defendants sentenced to prison in the

---

[8] http://projects.heraldtribune.com/bias/bauer/. The four counties comprising the Nineteenth Circuit is north of Palm Beach County and is called the Treasure Coast.

[9] https://accountablejustice.github.io/report/

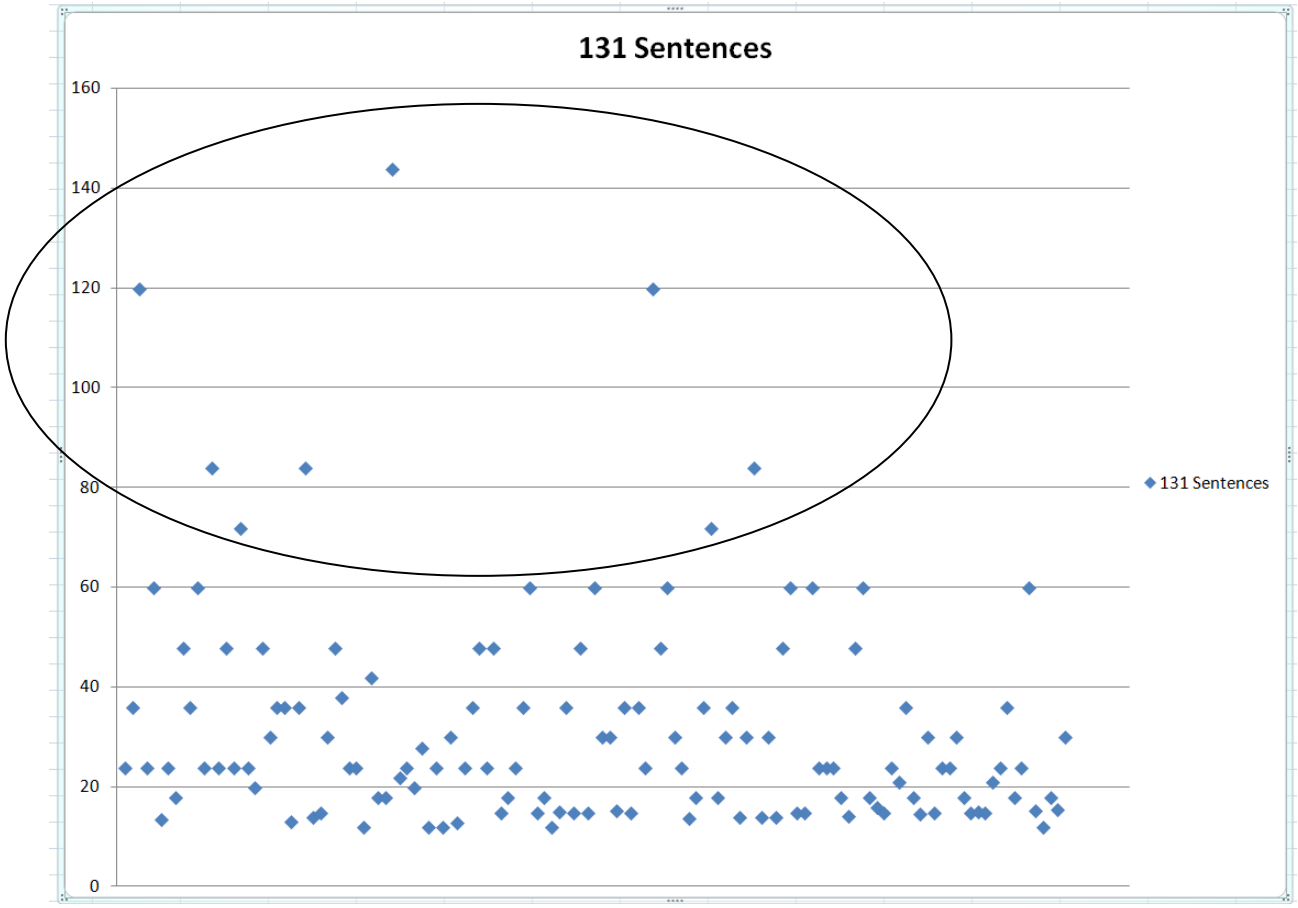
Nineteenth Judicial Circuit who scored 13.5 to 15.5 months. The average sentence was 27.21 months; the median sentence was 24 months; the sentence imposed most frequently ("mode") was also 24 months. However, the average white sentence was 20.44 months, and the average black sentence was 40.28 months.

In fiscal year 2016-17, there were 76 defendants sentenced to prison in the Nineteenth Judicial Circuit who scored 13.5 to 15.5 months. The average sentence was 35 months; the median sentence was 24 months; and the mode sentence was 24 months. The racial disparity was again pronounced: the average white sentence was 31.42 months; the average black sentence was 39.67 months.

The statistics for the two fiscal years are summarized here:

DEFENDANTS SENTENCED TO PRISON IN THE NINETEENTH JUDICIAL CIRCUIT SCORING 13.5 TO 15.5 MONTHS UNDER THE CRIMINAL PUNISHMENT CODE						
FISCAL YEAR	NO. OF DEFS.	MEAN SENTENCE	MEDIAN SENTENCE	MODE SENTENCE	MEAN-WHITE	MEAN-BLACK
2016-17	76	35 mos.	24 mos.	24 mos.	**31.42 mos.**	**39.67 mos.**
2015-16	55	27.21 mos.	24 mos.	24 mos.	**20.44 mos.**	**40.28 mos.**

Here is a scatter graph of these 131 sentences:



These are the eight offenders who received the harshest sentences (circled above); petitioner is lower right:

Lewis Terry 144 Months	Demetric Gordon 84 Months	Rodolfo Juarez 84 Months	Charles Stokes 72 Months

Jerman Heyward 72 Months	Donmare Parchment 84 Months	Branden Corriveau 120 Months	Joseren Delancy 120 Months

On appeal, petitioner argued that given the track record of the Criminal Punishment Code, together with our better understanding of implicit racial bias, it was time for courts to reconsider the use of statistical evidence in proving an equal protection violation at sentencing.

The Fourth District Court of Appeal rejected petitioner's argument. The court said, "It is not within our province to reconsider and reject the United States Supreme Court's determination in *McCleskey* [*v. Kemp*, 481 U.S. 279 (1987)]." *Delancy*, 256 So. 3d at 947. Nonetheless, the court said the "DOC statistics showing a disparity between average sentences for white defendants and minority defendants are disturbing…." It noted that that the Sarasota Herald Tribune

reports had spurred the Legislature to conduct a study of fairness in sentencing. *Delancy*, 256 So. 3d at 948 (citing Florida Senate Bill 1392 (2018), https://www.flsenate.gov/Session/Bill/2018/01392). "From that study," the court said, "we certainly hope and desire that any necessary protections against actual racial bias in sentencing can be implemented to assure that it is not present in the criminal justice system." *Id.*

Petitioner sought review in the Florida Supreme Court.

The Florida Supreme Court denied review on *Juneteenth 2019*. A1.

REASONS FOR GRANTING THE PETITION

It is time to reconsider *McCleskey v. Kemp*. Racial disparity in sentencing is not an inevitable part of our criminal justice system. This Court should adopt the framework of *Batson v. Kentucky*, and hold that a defendant may establish a prima facie case of racial discrimination in sentencing by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.

Florida has the kind of sentencing system that Judge Marvin Frankel wrote a book about,[10] and the kind that the dissenters in *Blakely v. Washington*, 542 U.S. 296 (2004), decried: a wildly disparate system (see the scatter graph on page 11, for example) of "unguided discretion" with no "meaningful appellate review," *Id.* at 316-17 (O'Connor, J., dissenting); a system where the "ultimate sentencing determination could turn as much on the idiosyncrasies of a particular judge as on the specifics of the defendant's crime or background," *Id.* at 317; the kind of system where the length of sentence may "depend on 'what the judge ate for breakfast' on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence." *Id.* at 332 (Breyer, J., dissenting).

One factor that should not make a difference to the length of the sentence is race. But it does make a difference in Florida. This should not be surprising. Florida's sentencing history is similar to Washington's, which this Court examined in *Blakely*.

Before 1983, Florida, like Washington and most states, employed an indeterminate sentencing scheme. William H. Burgess, *Fla. Sentencing* § 2:1 (2018-

[10] M. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

19 ed.). The statutory maximums (5 years for a third-degree felony; 15 years for a second-degree felony; 30 years for a first-degree felony; and life imprisonment for a life felony) were the only constraint on judges' sentencing discretion. *Id.* Early release, however, was available through parole. § 947.16(1), Fla. Stat. (1981).

In 1978, the Florida Supreme Court established a Sentencing Study Committee. *Alfonso-Roche v. State*, 199 So. 3d 941, 947 (Fla. 4th DCA 2016) (Gross, J., concurring). The Committee's goal was "to 'devise a system in which individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the differing penal philosophies of legislators, correctional authorities, parole authorities, or judges.'" *Id.* (quoting Alan C. Sundberg et al., *A Proposal for Sentence Reform in Florida*, 8 Fla. St. U. L. Rev. 1, 3 (1980)).

In 1979, the Sentencing Study Committee found "that after holding legally relevant factors constant, non-white offenders were significantly more likely to receive a jail or prison sentence than white offenders." *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida* 34 (March 1997). In short, the Committee found there was racial disparity in sentencing: similarly situated black defendants were sentenced more harshly than white defendants.

The result of the study was the replacement of the indeterminate sentencing system with the Florida Sentencing Guidelines, *Manning v. State*, 452 So. 2d 136, 138 (Fla. 1st DCA 1984) (Ervin, C.J., specially concurring), and they became

effective October 1, 1983. Ch. 82-145, Laws of Fla. The judge's sentencing discretion was greatly narrowed and parole was abolished for nearly all offenses. § 921.001(4)(a)&(8), Fla. Stat. (1983). In the guidelines' last iteration, the judge's sentencing discretion was limited to 25% above and below the scoresheet computation, with exceptions for low scoring offenders and with limited departure grounds. § 921.0014(2), Fla. Stat. (1997); Fla. R. Crim. P. 3.991. Petitioner's sentencing range, for example, would have been probation or county jail (or both) up to 18 months in prison. *Id.*

The guidelines led to a great reduction in racial disparity (and arguably its elimination). In 1997, the Florida Department of Corrections found that an offender's race has no "meaningful effect on decisions made by Florida courts under the 1994 and 1995 sentencing guideline structure." *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida* 36 (March 1997).

Thus, Florida's experience with sentencing guidelines was the same as Washington's: a "substantial reduction in racial disparity in sentencing across the State" that was "directly traceable to the constraining effects of the guidelines . . . ." *Blakely*, 542 U.S. at 317 (O'Connor, J., dissenting).

When the Florida Legislature enacted the Criminal Punishment Code it knew that the guidelines had greatly reduced racial disparity in sentencing. The bill analysis prepared for the House of Representatives discussed both the 1979 and 1997 studies, and it acknowledged that "there are some benefits of well

implemented sentencing guidelines, primarily, control of prison populations and limiting disparate treatment of similarly situated offenders." H.R. Comm. on Crim. Justice, Bill Analysis & Econ. Impact Statement, CS/HB 241 (Mar. 19, 1997), at 2-3, 13. Nonetheless, the Legislature enacted the Criminal Punishment Code effective 1998 and the upper bound of the guidelines was removed.

What could go wrong with the return of "sweeping penalty statutes [that] allow sentences to be 'individualized' not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench"?[11]

Answer: the return of racial disparity, and now not even with the safety valve of parole.[12] This should not be surprising. In *Blakely*, Justice O'Connor noted that judges in Washington still retained "unreviewable discretion" in cases of first-time offenders and certain sex offender cases. 542 U.S. at 317 (O'Connor, J., dissenting). In those cases, "unjustifiable racial disparities have persisted …." *Id.* (O'Connor, J., dissenting). "'The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion.'" *Id.* at 318 (O'Connor, J., dissenting) (quoting Boerner

---

[11] M. CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1973); *see also* Michael Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America*, 47 Crime & Just. 119, 147 (2018) ("Conferring authority on individual judges to choose among and apply irreconcilable [sentencing] purposes assures outcomes often based more on judicial idiosyncrasies, personalities, and ideologies than on differences between offenses and offenders. Broad discretions are especially vulnerable to influence by invidious considerations including racial and class bias, negative stereotypes, and unconscious bias.").

[12] *See Stanford v. State*, 110 So. 2d 1, 2 (Fla. 1959) ("[I]f the sentences are harsh and unjust, relief may be obtained upon proper showing before the parole authorities of this state.").

& Lieb, *Sentencing Reform in the Other Washington*, 28 Crime and Justice 128 (M. Tonry ed. 2001)).

Florida's experience has also proved the powerful lesson that "racial disparity is correlated with unstructured and unreviewed discretion." *Id.* Reasons for this are not hard to find. Studies have found that "people automatically devalue the lives of Black Americans compared to White Americans" and "implicitly associate retributive concepts with Blacks and leniency with Whites." Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J. Forum 406, 407-08 (2017). Judges are people, too, of course, and so they are susceptible to these implicit racial biases. "[J]udges harbor the same kinds of implicit biases as others [and] these biases can influence their judgment . . . ." Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1195 (2009).

~ ~ ~

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court said that a "defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *Id.* at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)). "Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). This Court rejected McCleskey's argument that a statistical study (the Baldus study), standing alone, "compel[led] an inference that his sentence rest[ed] on purposeful discrimination." *Id.* at 293. This Court said that

although the "Baldus study indicates a [sentencing] discrepancy that appears to correlate with race," "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id.* at 312.

McCleskey is overdue for reconsideration. We now know much more about implicit biases, how they are "activated involuntarily and without an individual's awareness or intentional control." *Understanding Implicit Bias*, Ohio St. U. Kirwan Inst. For the Study of Race and Ethnicity.[13] *See also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 966 (2006) ("[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans."); Levinson & Smith, *supra*.

Moreover, the "very evidence that the Court demanded in *McCleskey*—evidence of deliberate bias in his individual case—would almost always be unavailable…." Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 111 (rev. ed. 2012). Judges rarely admit they harbor racial biases. And Judge Frankel was right when he observed that "[o]ne never encounter[s] any judges who doubt[] the fair and just and merciful character of their own sentences," though they may "doubt whether all of their colleagues [are] equally splendid." Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2044 (1992).

"Our law punishes people for what they do, not who they are." *Buck v. Davis*,

---

[13] http://kirwaninstitute.osu.edu/research/understanding-implicit-bias.

137 S. Ct. 759, 778 (2017). But in Florida people are punished more severely for who they are rather than what they have done. This "injures not just the defendant, but 'the law as an institution, ... the community at large, and ... the democratic ideal reflected in the processes of our courts.'" *Id.* at 759 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

In his dissent, Justice Brennan considered the issue from McCleskey's point of view: "At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing." *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting).

At some point in *any* criminal case, a defendant doubtless asks his or her lawyer about the likely sentence if convicted. And defense counsel has a professional duty to answer the question the best he or she can.[14] Unfortunately, if the defendant is an African American in Florida, and especially an African American in Florida's Nineteenth Judicial Circuit, a "candid reply to this question [will be] disturbing." *Id.* Counsel would have to explain that in Florida the darker the skin the higher the sentence.

This Court should overrule *McCleskey* and adopt the framework of *Batson v.*

---

[14] *See* ABA Crim. J. Stds. for the Def. Function 4-8.3(b) (4th Ed. 2015) ("Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion . . . and the normal pattern of sentences for the offense involved."); ABA Crim. J. Stds. for the Def. Function 4-6.3(e) (4th Ed. 2015) ("Defense counsel should investigate . . . the practices of the sentencing judge, and advise the client on these topics before permitting the client to enter a negotiated disposition."); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (noting that ABA standards "are guides for determining what is reasonable" in determining whether counsel was constitutionally defective).

Kentucky, 476 U.S. 79 (1986): a defendant may establish a prima facie case of racial discrimination in sentencing "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 94; *McCleskey*, 481 U.S. at 351-52 (Blackmun, J., dissenting). Once that showing is made, "the burden shifts to the prosecution to rebut that case." *McCleskey*, 481 U.S. at 352 (Blackmun, J., dissenting).

Under the *Batson* framework, a defendant: "First … must establish that he is a member of a group that is a recognizable, distinct class, singled out for different treatment. Second, he must make a showing of a substantial degree of differential treatment. Third, he must establish that the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral." *Id.* (Blackmun, J., dissenting) (citation, quotation marks, and footnote omitted).

Petitioner has made these showings. African Americans are a distinct group singled out for different treatment in Florida's sentencing regime. There was racial disparity in sentencing before the guidelines, as evidenced by the 1979 study. Indeed, before that Florida used its criminal justice system to re-enslave African Americans. *See* Douglas A. Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 7-8 (2008) ("Revenues from the [criminal justice] neo-slavery poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina…."). The guidelines successfully addressed the issue of racial disparity, but under the Criminal

Punishment Code it has returned, as explained above.

Petitioner has made a showing of a substantial degree of differential treatment. He showed that similarly situated black defendants—defendants with similar scores under the Criminal Punishment Code—were sentenced to more prison time than their white counterparts. It might be argued that petitioner's simple statistics were insufficient, that he needed to conduct a multiple regression analysis to account for other variables. But the Criminal Punishment Code—whatever its defects in removing the upper bound of the sentencing range—at least does the heavy lifting of accounting for the relevant variables (that is, the variables the Legislature cares about). "[S]entences for defendants with the same [Criminal Punishment Code] score should be more uniform than sentences lumped together by offense … because [that] score takes into account the characteristics of the offender, most notably his prior record, and characteristics of the offense committed, such as its severity, victim injury, and firearm possession, as well as additional offenses at conviction." *Alfonso-Roche*, 199 So. 3d at 951 (Gross, J., concurring).

Finally, petitioner showed that Florida's Wild West sentencing regime—"law without order," as Judge Frankel put it—is susceptible to abuse. Again, "'racial disparity is correlated with unstructured and unreviewed discretion.'" *Blakely*, 542 U.S. at 318 (O'Connor, J., dissenting)

Petitioner made a prima facie showing that race influenced the judge's sentencing decision by showing that black defendants in his judicial circuit and in Florida routinely receive harsher sentences than comparable white defendants

Florida routinely receive harsher sentences than comparable white defendants based solely on their race, an equal protection error facilitated and compounded by Florida's Wild West sentencing regime.

Accordingly his sentence violates the Equal Protection Clause, and he respectfully requests that the Court grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender

Paul Edward Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600
ppetillo@pd15.state.fl.us
appeals@pd15.org

OCTOBER 17, 2019