No. 20-5048

IN THE

SUPREME COURT OF THE UNITED STATES

JOSH BOWMAN, Petitioner

vs.

BERT BOYD, WARDEN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Josh Bowman,
Petitioner *pro se*
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QUESTIONS PRESENTED

1. Whether Mr. Bowman's confession should have been suppressed due to treats by police?

2. Whether Mr. Bowman's federal constitutional rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), were violated by the trial court?

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF FACTS

At the Motion to Suppress:

Detective Yarnell of the Knox County Sheriff's Office major crimes unit testified that he was investigating the homicide of Mr. Billy Graves (Vol. I., P. 2). That based on information of the whereabouts of the appellant they went to Loudon County to meet with officers and prepare to go to a home in Philadelphia, Tennessee. (Vol. I., P. 3).

When they arrived in Philadelphia, Yarnell went to the rear of the residence. (Vol. I., P. 1, L. 19-23). He heard that Appellant had been taken into custody and came around to the front of the house. (Vol. I., P. 3-4). When he came around the house he noticed that "[Appellant] was cooperative. He was talking to officers and was speaking with Officer Hopkins that was at the scene." (Vol. I., P. 4, L. 6-9). They received consent to search his home and impounded his car. (Id.) The consent to search was signed by Appellant at 5:53 p.m. on May 12, 2009. (Vol. I., P. 9, L. 16-18). Then took Appellant to the Knox County Sheriff's office. (Vol. I., P. 4, L. 23-25).

Yarnell traveled with Appellant from Philadelphia to Knoxville. (Vol. I., P. 5). Appellant attempted to ask what was going on during transport. Yarnell told him to wait until they got to Knoxville. Yarnell did not see and mistreatment of Appellant. (Vol. I., P. 5).

Appellant was interviewed on the third floor of the Sheriff's office and the interview was recorded. (Vol. I., P. 7). Appellant twice asked that the recording be stopped. (Vol. I., P. 7, L.21-24). Appellant signed a rights waiver as to the statement at 7 p.m. the same day. (Vol. I., P. 9-10).

On cross examination Yarnell again said that he told Appellant that he, Yarnell, could not discuss the case with Appellant until he got to Knoxville and reviewed his rights. (Vol.

I., P. 17 , L. 8- 11). He agreed that on the video of the statement, he let Mr. Bowman know that they were talking to Appellant before talking to Scottie (another suspect). (Vol. I., P. 17, L. 3-11). That they did not talk to Appellant about Scottie during the drive but that Appellant did talk to Scottie during the drive as [Yarnell and the others officers] were trying to find a location on Scottie on the way back. (Id). They did not leave Appellant's phone with him and Yarnell didn't recall who gave Appellant his phone so he could call Scottie. (Id).

He testified that during Appellant's review and initializing his various rights, that when he came to no threats have been made to you and asked him to initial that one, Appellant said, :"But I told you about that. You know, they did that to me." To which Yarnell says, on the tape recording, "Well, that was those guys not us." (Vol. I., P. 20, L. 8-24).

Yarnell said that until that moment he had never heard of a threat. (Vol. I., P. 21 , L. 1-5). That when Appellant told him of the threat he cleared it up by reading him the no threats have been made section of the waiver rather than talking about the threats. Because he was investigating a homicide not any threats that had been made. (Vol. I., P.23, L. 5-17).

That the matter under investigation is all that the rights apply to and not any issue of threats though he knew that the right had to be knowingly and intelligently waived. (Vol. I., P. 24, L.2- 12).

He did nothing to determine who made the threat. (Id.)

John Hopkins of the Knox County Sheriff's Office testified that he was present at Appellant's trailer in Loundon county. (Vol. I., P. 28). That he, Captain Henderson and Lieutenant Webber took Appellant into custody. (Id at P. 28-29). That he, Hopkins, did not put a gun to Appellant's head or make any threats about Appellant not seeing his kids again if he did

Pursuant to 28 U.S.C. §2253 FRAP, Petitioner Josh Bowman (hereafter "Petitioner") hereby requests that District Court issue Certificate of Appealability (COA), permitting Petitioner to appeal from the judgment entered by the Sixth Court of Appeals, denying appellant's application for Certificate of Appealability.

ISSUES ON WHICH CERTIFICATE OF APPEALS IS SOUGHT

1. Whether Petitioner's confession should have been suppressed due to threats by police;
2. Whether Petitioner's rights under Batson were violated by trial court

STANDARD OF REVIEW FOR CERTIORARI

The standard for seeking this review is defined in Miller El v. Cockrell, 537 U.S. 322 (2003): a petitioner seeking review by this Court must demonstrate a substantial showing of the denial of a Constitutional right.

A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the District Court's resolution of his constitutional claims, or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

ARGUMENT

The Hon. Clifton L. Corker, Dist. Judge, was himself the Magistrate who initially reviewed this case and found that it merited review. In order to establish that "no reasonable jurist would disagree with the Court's finding," the Court would have to state that the Court was "not a reasonable jurist."

While this Court may have reached a final finding denying petitioner's claims, it was the U.S. District Court that initially found enough merit to require a response and a hearing.

Petitioner ultimately disagrees with the trial court's application of an inappropriate standard of review.

Sims vs GA

Petitioner, at the same time he was asked to sign a Miranda waiver, stated that he had been threatened by other police officers. Officer Aarron Yarnell admitted that he was not interested, as he was there to investigate a homicide, not threats.

Yarnell and another sergeant dismissed Petitioner's concerns and encouraged him to sign the wavier anyway, Petitioner did so.

Much has been made about Petitioner's high school diploma, both by the State and the Courts (bearing in mind concerns relating to Johnson v. Zerbst, 304 US 458). However Petitioner doesn't have a high school as he has a Special Education Certificate (see attached).

This misstatement by a material fact, on its own requires the court to reconsider or rehear this case. Certainly the court must re-evaluate Petitioner's waiver, taking into account his actual education, intelligence and background.

This court also misapplied the standard set in Sims v. GA 385 US 538. This Court held that Petitioner did not meet the burden of proof that he had been threatened, or that the threats had any effect on the voluntariness of his confession.

The Courts considers, arguendo, that if Petitioner were threatened, he still didn't confess until after he signed a Miranda wavier.

The Court's Opinion takes it for granted that all concerns are migrated or even negated by signing a wavier.

Petitioner was arrested by three police sergeants, Hopkins, Henderson, and Webber. Petitioner stated from the outlet that he was unable to identify the officer who threatened him, because the officers didn't wear name tags.

But when petitioner was transferred into custody of other officers, these officers casually dismissed petitioner's complaints he had been threatened, and showed no inclination to investigate.

Petitioner found himself in the custody of the Brotherhood of Police Officers, and could not have faith that he was any safer in the custody of one group of officers than any other.

Ultimately, petitioner learned Sgt. Webber's name through transcripts. But it was not to avail him at trial. During a pretrial hearing regarding voluntariness, the State brought Aaron Yarnell and Sgt. Hopkins, but not Sgt. Henderson or the officer petitioner believes threatened him, Sgt. Webber.

Sims, supra, holds that "since the State failed to produce testimony of officers whom defendant claimed mistreated him," after the Supreme Court had remanded the case for a hearing on the issue of voluntariness of confession, "the confession had not been satisfactorily shown to have been voluntary."

Sims, also was an accused, with limited education or mental capacity. The Court held that given that the "fact that police might have warned him of his right to remain silent prior to confession was of little significance on the issue of the voluntariness thereof."

Sgt. Hopkins did not admit to threatening petitioner, or to seeing any threats against petitioner. However, he was not the only one present; the State had every opportunity to offer Sgt. Webber to contradict petitioner's version of the events. "Their failure to do so lends to the conclusion his testimony would not, in fact, have rebutted petitioner's claims."

Moreover, Yarnell and Hopkins were not present themselves at appellant's arrest. While they were generally at the scene, Yarnell was behind the house, not at the front porch where appellant was arrested. Hopkins stated he was beside the house, and "was not present for the takedown." There are also inconsistent statements about who drove appellant to Knox County, and who remained at the scene.

The crux of Sims is rooted in the same Constitutional claims found in Bivens v. Six Unknown Federal Agents. Often, arresting rely on anonymity, ostensibly to protect themselves and their families from retribution. Defendant caught by surprise, are often confused and overwhelmed, and are unable to identify individual officers or agents that misuse or overstep their authority. The State, with its myriad advantages, is in exclusive possession of all information and material a defendant needs: rosters of officers participating in the arrest and questioning of a defendant.

While in the pursuit of a suspect, the State uses carefully combed photographic lineups, during an investigation of threat made by an officer the appellant was left to guess the identity of an unknown, unnamed man wearing the same uniform as the man around him. And when appellant raised his concerns, he was overrun by the interrogating officer, who admittedly cared not one bit that the suspect before him had been threatened or coerced into cooperating.

This is a subversion of appellant's Fifth Amendment right to remain silent, and also a violation of his right to confront his accusers; and his Sixth Amendment right to challenge the State's case in a fair trial. The State is in exclusive possession of the direct witnesses. The State

instead produced as witnesses two police officers who weren't present at the event in question. Pattern instructions regarding the exclusion of such a witness allow this Court to draw a strong inference against the State.

"Since the State failed to produce the testimony of the officers whom defendant claimed mistreated him after the Supreme Court had remanded the case for a hearing on the issue of voluntariness of confession, confession had not been satisfactorily shown to have been voluntary." Sims, supra. The Sixth Circuit's opinion is in direct contradiction to the precedent set by this Court in Sims. A refusal to grant certiorari is therefore a tacit reversal of that precedent.

Batson v. KY

The District Court held in its 07 Oct. Opinion that petitioner failed to establish prejudice in the all-white venire that empanelled an all-white jury.

The standard in Batson v. KY, 476 U.S. 79 (1986) is that prejudice is *assumed*. Upon showing that a defendant's jury venire is not a representation of his community (Knoxville is 16% Black; petitioner's jury pool was 0% Black). Petitioner has met his burden of proof.

While the State may argue that the process is random, the Court must still resolve the issue in favor of the appealing petitioner, where counsel files a contemporaneous objection.

The Post Conviction Court, as cited in this Court's memorandum, credited petitioner's assertions that he was convicted by an all-white jury, and that the population of Knoxville is approximately 16% African American.

Curiously, the Post Conviction Court then made a finding that there was no significant difference in the racial makeup of the jury pool and the community. The District Court concurred.

Petitioner would submit that the difference between 16% and 0% is substantial and significant.

The Court also held that the Petitioner was unable to prove systematic exclusion. However, Petitioner can establish with basic math that the probability of even 24 white jurors arriving for venue in Knoxville (assuming the Microsoft Encarta encyclopedia is correct) is 1.52% that's less than the odds drawing the ace of spades in a single pull. (1.92%).

Summary of Argument

Argument 1: Involuntary Confession

A standard was used to determine the voluntariness, hence the admissibility, of petitioner's confessions which was not the standard imposed by the Fourteenth Amendment. Under the Due Process Clause, any culmination of circumstances which saps the will of an accused and compels him to a confession not freely self-determined renders the confession inadmissible even if no threats or promises have been made. The narrow view taken by the courts of the constitutional obligation of a state to protect criminal defendants against the use of involuntary confessions thus runs afoul of the holding in Rogers v Richmond, 365 U.S. 534, as well as, Miranda v Arizona, 384 U.S. 436,, which should compel reversal of the petitioner's conviction.

Petitioner, a special needs and ignorant African-American (**Exhibit A**)was taken into custody and threatened by one of the arresting officers. He expressed his fear and concern to the other officers who ignored his plea. (**Exhibit B**) On these uncontested facts, his confession was coerced as a matter of law. Any confession made in police custody shortly after he has been threatened by the police is inadmissible consistent with the due process of Law. When to the verbal threat suffered by petitioner there is added his mental inadequacy, isolation in police confinement with officers who were ignoring his claims of being threatened, and the terrorizing circumstances of the charges made against him, the totality of circumstances plainly makes out duress within the forced-confession confronting the petitioner. More fundamentally, the voluntariness of a confession must be examined without regard to other evidence of guilt. See Rogers v Richmond, 365 U.S. 534, 544; Malinski v New York, 324 U.S.401, 404; Brain v United States, 168 U.S. 532, 540-542; Payne v Arkansas, 356 U.S. 560.

The same circumstances firmly establish that petitioner was denied the right tot counsel given by Escobedo v Illinois, 378 U.S. 478. While petitioner did not request counsel, Escobedo and case decided prior to it make plain that a request is not the invariable condition of the protective right to counsel that those cases assure, and in some cases fundamental fairness precludes use of a confession taken from an ignorant and un-counseled state criminal defendant. Petitioner's is such a case, as his statement to the investigating officers that he had been threatened by one of their 'Brothers in Blue' was testament to such. His incapacity to understand or protect his rights in the fearful surroundings he was being held render the "taking of his initial confessions fundamentally unfair, and violate the command of the Sixth Amendment.

Argument 2: Racial Discrimination in Jury Selection Process

The facts of the record with respect to petitioner's claim of racial discrimination in the jury selection process are set forth above, and proof of the disparity between the percentage of the African-American population in Knoxville, Tennessee and the percentage of African-American jurors in the venire is set forth in (Exhibit C) of this brief. The federal objections based on jury discrimination have been preserved throughout the proceedings concerning the challenge to the venire array in the original trial court alleged that his Fourth Amendment rights of equal protection of the laws and the Fourteenth Amendment, Due Process of Law had been violated in that Grand and Petit jury panels were selected in a racially discriminatory manner. The lower courts after hearing testimony overruled petitioner's objections.

Petitioner has shown the court's that African-American citizens are arbitrarily limited in serving on the Grand and Petit juries of Knox County, TN. By thus thwarting petitioner's rights, the Tennessee courts are in clear violation of the principle announced in Coleman v Alabama, 377 U.S. 129, and Carter v Texas, 177 U.S. 442, and Batson v Kentucky, 476 U.S. 79. Petitioner has also shown the discriminatory opportunities have created an unconstitutional probability of racial exclusion. Cf. U.S. v Louisiana, 225 F. Supp. 353, 396-97, aff'd 380 U.S. 145. The facts shown, that 0% of the jury list, from which the Grand and Petit juries were selected were identified as African-American although African-American's comprise 16% of the population make out a prima facie case of racial discrimination in this case.

These facts of the statistical computation's support petitioner's claim that there is a high degree of probability that Knox County juries are being selected with regard to race. A gross disparity between the number of African-American's available for jury service and those actually chosen appears, and suffices to make the showing of improbability of colorblind selection required by the jury discrimination cases generally. It is well established that a showing of total exclusion of African-American's from jury lists in jurisdictions where they constitute a substantial percentage of the population makes a out a prima facie case of discrimination. Norris v Alabama, 294 U.S. 587. The test of the significance of disparities is the probability that they would have occurred by chance. On occasion this court has made this explicit. In Smith v texas, 311 U.S. 128,131, the court held, "Chance and accident alone could hardly have brought about the listing for jury service of so few African-American's from among the thousands shown by the undisputed evidence to possess the legal qualification for jury service." Similar statements appear in Hill v Texas, 316 U.S. 400, 404 and Eubanks v Louisiana, 356 U.S. 584, 587.

In these and other jury discrimination cases, this court has defined the problem as that of determining the probability that, assuming the selection was made without regard to race, so few African-American's would have been chosen for jury service. When the probability is small that so few African-American's would be chosen, the jury discrimination cases in substance hold it proper to reject the assumption that jury selections were made without regard to race.

The determinations of these probabilities need not be left to the uncertain guide of common sense. There is a scientific method for solving problems of this type which has been widely used in many branches of science, economics, and social science. This is the mathematical method known as 'statistical decision theory'.The application of this method to jury discrimination problems is fully discussed in an article in the Harvard Law Review. See Finkelstein, The Application of Statistical Decision Theory to Jury Discrimination cases. 80 Harv. L. Rev. (1966). In terms of statistical theory the issue before the court is: What is the probability that no African-American's would appear on a jury list of 99 possible jurors when they made up 16% of the population from which the names of the jurors were selected and the selection was made without regard to race?

The probability of the result observed in this case is found in detail in Finkelstein ,supra. Applying that formula to the facts of this case : If a jury list of 99 is selected from a larger list that is 20% African-American, the probability that no more than (5) persons selected for the jury list would be African-American, if the selections were made without regard to race, is approximately 0.00002. In other words, only one occasion in 50,000 on the average, would a jury list selected at random under these conditions yield the observed results. The probability of this occurrence is so minute that statisticians would uniformly reject the hypothesis that the selection was made without regard to race. See Hoel, Introduction to Mathematical Statistics, 49.

The probability of the result in this case is vastly smaller than the probability of the result observed in Avery v Georgia, 345 U.S. 559, where the Supreme Court held that the statistical evidence made out a clear case of racial discrimination. The evidence in avery made out a clear case of racial discrimination. The evidence showed that African-American's comprised 5% of the jury list from which the venires were selected and no African-American's had been selected for a venire of sixty. Mr. Justice Frankfurter, concurring, observed that, "The mind of justice, not merely its eyes, would have to be blind to attribute that occurrence to mere fortuity." 345 U.S. at 564 In Avery, Id, African-American's comprised 14% of the possible juror rolls, while in this instant case African-American's comprised 16%the possible juror rolls. If in Avery, Id, the results were sufficiently improbable, the evidence here must sustain petitioner's burden of proof.

AT this stage, the petitioner is unable to prove an underlying conspiracy, and unable to go back in time to prevent it's effect. However, this case is at heart a case of Ineffective Assistance of Counsel.

Counsel did not think that the venue reflected the community's racial composition (PCR at 26-28) but did not believe he could challenge that problem.

In other words, counsel saw unusual circumstances that could work to his client's detriment. He said nothing; in fact he did not even walk to the door. The Courts have noted more than once the Petitioner did not see the whole jury pool, but merely the empanelled venue.

Petitioner submits that uncharacteristic meekness and inactivity are the exact opposite of the zealous representation required in Strickland. This failure equates to plain error; it clearly happened, verified on record; it was to Petitioner's detriment, it was not waived as any part of any strategy; and resulted in a violation of Petitioner's rights, a violation denying Petitioners claims, it was this Court that found enough merit to require a response and a hearing.

Petitioner ultimately disagrees with this Court application of an inappropriate standard of review.

RELIEF

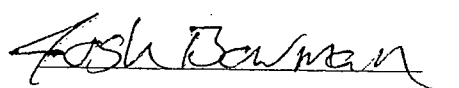
For the foregoing reasons, petitioner requests this Court:

*Reverse petitioner's conviction;

*Remand Petitioner's case to the County Court for such proceedings as the State deem fit;

*And such other relief as this Court deem appropriate.

Respectfully Submitted;



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