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IN THE SUPREME COURT OF THE UNITED STATES

Takiese Naceer Bethea, *Petitioner*,

v.

State of West Virginia, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does it violate the equal protection clause of the Fourteenth Amendment when the African-American co-defendants in a case receive vastly less favorable treatment by the prosecutor and the court compared to the co-defendants who do not share their racial classification?

PARTIES TO THE PROCEEDINGS BELOW

1. Takiese Naceer Bethea.

a. Mr. Bethea is a criminal defendant in the Circuit Court of Upshur County West Virginia, whose conviction is the subject of the instant Petition for Writ of Certiorari.

b. Mr. Saunders is the Petitioner in the direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. Bethea*, Docket No. 19-1011, (W.Va., December 7, 2020).

2. The State of West Virginia.

a. The State of West Virginia is the Plaintiff in Mr. Bethea's criminal case in Upshur County, West Virginia.

b. The State of West Virginia is the Respondent in Mr. Bethea's direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. Bethea*, Docket No. 19-1011, (W.Va., December 7, 2020).

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Takiese Naceer Bethea, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

State v. Bethea, Docket No. 19-1011, (W.Va., December 7, 2020). Memorandum Decision of the Supreme Court of Appeals of West Virginia (included in the Appendix to this Petition at p. 1).

STATEMENT OF JURISDICTION

The Petitioner's convictions were affirmed on direct appeal by Memorandum Decision issued by the Supreme Court of Appeals of West Virginia on December 7, 2020. This Honorable Court has jurisdiction over final judgments of the highest court of a state pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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

The Petitioner was indicted along with three co-defendants on January 15, 2019, following the investigation of an alleged robbery taking place in Buckhannon, Upshur County, West Virginia. The Upshur County Grand Jury returned an indictment charging the Defendant with Kidnapping, First Degree Robbery, Conspiracy, and Malicious Assault. The Petitioner's co-defendant Lamere Troup was indicted for identical crimes. Co-Defendant Michaelina Sarne was indicted for Kidnapping, First Degree Robbery, and Conspiracy. Co-Defendant Alayna Puglia was indicted only for Conspiracy. (Appendix, at 80-81). The Petitioner and Mr. Troup, unlike the other two co-defendants, are African-American.

The Petitioner entered into a plea agreement on March 7, 2019, in which he agreed to plead guilty to one count of First Degree Robbery and one Count of Malicious Assault in exchange for the dismissal of the other two counts and truthful testimony, among other terms. The plea agreement anticipated the filing of a Pre-Sentence Investigation, and a recommendation by the State of a 10 year determinate sentence on robbery, to be served concurrently with a 2-10 year sentence on malicious assault. (Appendix, at 2-3). Although the recommendation of the parties was for a determinate sentence of 10 years to be imposed on the robbery count, West Virginia's First Degree Robbery statute, W. Va. Code § 61-2-12(a), has no upper limit on the number of years. The Petitioner was sentenced in significant excess to the parties' recommendation, with 36 years for the robbery charge and 2-10 running consecutively for malicious assault. (Appendix, at 82-86).

The Petitioner filed a direct appeal of his conviction and sentence, alleging a violation of proportionality and equal protection stemming from the difference in the treatment between himself and an African-American co-defendant on the one hand, and two non-black co-defendants on the other. (Appendix, at 8-36). That federal issue, which is the subject of this instant petition for certiorari, was raised for the first time on direct appeal as an appeal of the sentencing order. The Petitioner also alleged the violation of certain state law procedural requirements at sentencing. Finally, the Petitioner alleged, although it was a direct appeal and not a collateral proceeding, that his trial counsel was ineffective on the face of the record, resulting in his plea being involuntary. The Supreme Court of Appeals of West Virginia rejected the Petitioner's claims. (Appendix, at 1-7). The Petitioner now seeks this Court's review of the determination concerning his equal protection challenge.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, the Petitioner asserts that the Supreme Court of Appeals of West Virginia, a state court of last resort, has decided an important federal question in a way that conflicts with relevant decisions of this Court; i.e., that the disparity in treatment of the African-American co-defendants, including the Petitioner, constitutes a violation of equal protection as understood in the decisions of this Court.

In *Oyler v. Boles*, 368 U.S. 448 (1962), this Court previously considered an equal protection charge from West Virginia. In rejecting that challenge, this Court noted that:

[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged. [Citation omitted].

Id., at 456.

The Petitioner asserts that the vast disparity in outcome between the two African-American co-defendants compared to the two co-defendants who were of another race, is indicative of the precise sort of arbitrary classification that may not permissibly be the basis for discriminatory action. In this case, the disparate treatment between the black co-defendants and their non-black co-defendants started at the earliest phase of the felony proceedings. The Petitioner and Mr. Troup were charged with kidnapping, first-degree robbery, conspiracy, and malicious assault. The State declined to prosecute Ms. Sarne for malicious assault, and declined to prosecute Ms. Puglia for robbery, kidnapping and malicious assault, when the two white co-defendants could almost certainly have been charged with all of those crimes as accessories before the fact or aiders and abettors.

In the next phase of discriminatory treatment, Ms. Sarne, despite being charged with a capital offenses carrying a potential life without parole sentence (kidnapping), and another charge which carries no limitation in the number of years of incarceration that may be imposed (robbery), will be parole eligible after a year due to her plea agreement to plead guilty to conspiracy in exchange for dropping the more serious charges. The Petitioner and Mr. Troup, on the other hand, were offered plea agreements to Malicious Assault, which carries twice the time as Conspiracy, in addition to First Degree Robbery, which has no upper limit.

The final form of discriminatory treatment was when the circuit court, which could have limited the damage caused by the disparate handling of the case by the State, instead multiplied the recommended sentences of the Petitioner and Mr. Troup, turning a moderate gap into a chasm with the two black men sentenced to 9 times as much time as Ms. Sarne and 46 times as much as Ms. Puglia. (Appendix, at 82).

West Virginia, unfortunately, has a history, long predating this case, of racial equal

protection violations in the administration of criminal justice, dating back to *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879), in which this Court reversed the Supreme Court of Appeals of West Virginia, which had affirmed the conviction of a black man who had been tried by a jury that was limited, per statute, to white men only. This is a systemic problem in West Virginia, as recognized by Justice Starcher in his concurrence in *State ex rel. Regional Jail v. Cabell County*, 657 S.E.2d 176, 190-91 (W. Va. 2007). But apart from being simply one statistic in a sea of cases, what happened to the Petitioner is a violation of his own rights under equal protection principles.

In order to show an equal protection violation in the criminal context, it is necessary (with some exceptions not germane to this case) to demonstrate that decision makers in a defendant's own case acted with discriminatory purpose, rather than simply showing a systemic disparity. *Cleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). In *Cleskey*, a death-row defendant challenged Georgia's capital punishment scheme on the grounds that it systematically treated black defendants worse than similarly-situated white defendants. Because he could not show the discrimination in the context of his own case, this Court declined to grant him relief.

In *United States v. Armstrong*, 517 U.S. 456 (1996), this Court examined the question of selective prosecution, and observed that:

In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U. S. 357, 364 (1978).

Of course, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder*, 442 U. S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles*,

368 U. S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins*, 118 U. S. 356, 373 (1886).

Armstrong, at 464-465.

The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." *Id.*, at 608. The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Ibid.*; accord, *Oyler, supra*, at 456. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

Armstrong, at 465.

In this case, the invidious discrimination based upon race is clear and obvious: treatment by the prosecutor and the Circuit Court that was undeniably harmful to the two black co-defendants, in stark contrast with the two co-defendants who did not share their racial characteristics. The prosecutor brought the kidnapping and robbery charges to the grand jury against Ms. Sarne, apparently believing she had criminal responsibility. Yet she was treated with overwhelming leniency. The two black men in this case wound up with nine times more time than the next closest co-defendant who did not share their arbitrary racial category. That type of conduct by state agents is outside the scope of constitutional acceptability.

For the reasons set forth herein, this Court should grant certiorari to the lower court.

Respectfully Submitted,

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