IN THE UNITED STATES SUPREME COURT OF APPEALS

No._____

JAMES ROLAND L'HEUREUX,
PETITIONER

vs.

STATE OF WEST VIRGINIA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Filed By:

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One Mountainside Way
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QUESTION PRESENTED

I. Under *Mabry v. Johnson*, the prosecution may not breach a term of a plea agreement that can be said to have induced a plea, although jurisdictions are divided as to whether an implicit repudiation constitutes a breach. Below, the prosecution agreed to make sentencing arguments "based upon" the PreSentence Investigation, before making arguments with material outside the PSI. Does such conduct rise to the level of a contractual breach in derogation of the Fourteenth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page, however, they are also briefly denoted here.

Petitioner:
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Respondent:
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OPINION BELOW

On August 12, 2020, the Circuit Court of Barbour County, West Virginia re-sentenced James L'Heureux ("Petitioner") to the West Virginia Department of Corrections and Rehabilitation for a term of fifteen to seventy-five years, following his conviction for multiple counts of Sexual Assault in the Third Degree. *Appendix Record* ("*A.R.*") 10-11. The purpose of this hearing was to reinstate Petitioner's appellate rights, although at the resentencing hearing, Petitioner's counsel objected to the State's Breach of the plea agreement at his original sentencing hearing *A.R.* 60-62. In declining to rule on Petitioner's objection, the Circuit Court of Barbour County noted:

> And whatever happened before happened. If it is an error then you can put that in his appeal and the supreme court can take a look at it. I don't see any reason to make it worse or fix it. I think those are things that are in the past and have happened.

A.R. 63. Thereafter, Petitioner filed a Direct Appeal with the West Virginia Supreme Court of Appeals ("WVSCA"). On September 27, 2021, in a unanimous Memorandum Decision, the WVSCA affirmed the circuit court's ruling. *A.R.* 1-7.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The West Virginia Supreme Court of Appeals decided Petitioner's case on September 27, 2021 in a unanimous Memorandum Decision. *A.R.* 1-8.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution

"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 any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In August of 2013, Petitioner was enrolled at Alderson-Broaddus University in Barbour County, West Virginia. While enrolled at Alderson-Broaddus University in the fall of 2013, he began working at Barbour County Emergency Squad ("BCES"), a private, rural Emergency Medical Services agency. *Supplemental Appendix* ("*S.A.*") 14. During his tenure at BCES, he became involved in an inappropriate relationship with S.M., the minor daughter of one of his co-workers. *S.A.* 2. During and immediately after this time frame, the Petitioner was in the grips of a serious drug and alcohol abuse disease. *S.A.* 8.

Following the conclusion of the inappropriate relationship with S.M., the Petitioner attempted suicide on April 1, 2016. *S.A.* 24. On April 2, 2016, the Petitioner contacted his therapist and, at her request, the Petitioner's parents traveled to West Virginia. The Petitioner's parents picked him up and took him back home to Maine for treatment. The Petitioner was admitted to Southern Maine Healthcare's emergency department on April 3, 2016, and was subsequently admitted to the mental health unit. Petitioner eventually graduated to intensive outpatient treatment until his discharge on April 28, 2016. *S.A.* 20. During this time, Petitioner was unaware of any criminal charges pending against him in West Virginia. *S.A.* 5. The Petitioner remained in Maine until his arrest on October 27, 2016. *S.A.* 2.

The Petitioner was arrested in Maine on October 27, 2016 by Detective Stephen M. Borst of the Kennebunk Police Department for the felony offense of Sexual Assault in the Third

Degree. *Id.* The Petitioner signed a waiver of his extradition hearing on November 16, 2016. The Petitioner was extradited from Maine back to West Virginia by the investigating officer, Trooper Austin H. Clark, on December 14, 2016, and was transported to the Tygart Valley Regional Jail in Randolph County, West Virginia. *Id.*

Subsequently, an indictment was returned against the Petitioner by the February 2017 term of the Barbour County Grand Jury. *Id.* The indictment alleged five counts of Sexual Assault in the First Degree, five counts of Solicitation of a Minor via Computer, and fifteen counts of Sexual Assault in the Third Degree. *Id.* On April 20, 2017, the Petitioner pled guilty, pursuant to a plea agreement, to fifteen counts of Sexual Assault in the Third Degree; the remaining counts were dismissed. *A.R.* 12-13. Further, the parties agreed "[t]he State shall make a sentencing recommendation based upon the Pre-sentence Investigation [PSI]." *A.R.* 13.

Prior to the sentencing hearing, the Petitioner underwent three comprehensive psychological evaluations for the purpose of determining if he could safely be released into the community. These evaluations were attached to the probation officer's PSI report. These evaluations determined that the Petitioner "presents a low to moderate risk to reoffend," *A.R.* 14; *S.A.* 27, and further stated that "this set of circumstances will not present itself again, and [Petitioner] is learning about the damage he has done to the victim." *A.R.* 19. As stated, these evaluations were provided to, and reviewed by, Probation Officer Jennifer Freeman in preparing the PSI report. *S.A.* 8.

At the sentencing hearing held on December 5, 2017, the State of West Virginia, by her prosecuting attorney, Thomas Hoxie, made the comment, "[t]his is a sexual predator." *A.R.* 47. This statement is not in line with what was provided in the psychological evaluations or PSI.

Prosecutor Hoxie also accused Petitioner of being a flight risk when he stated, "When he left and fled to Maine...." *A.R.* 46. Prosecutor Hoxie also made false mention of a second victim when he said "he contacted another female who would have been a witness in this case. And her initials or her first name is Emma...." *A.R. 47.* In his rebuttal, Prosecutor Hoxie suggested "an implicit bias" against the State and stated "we have very much an implicit bias in all the reports that have been submitted to you. Any advice by the defense would be that they are all based upon the [Petitioner's] interpretation of the facts." *A.R.* 46. The Court sentenced the Petitioner to fifteen to seventy-five years in prison with forty years of supervised release and lifetime sex offender registration requirement. *A.R.* 8-9.

The Petitioner requested that his then retained attorney, James Zimarowski, withdraw as his counsel due to a breakdown in communication regarding the appeals process and Mr. Zimarowski's deficient performance in not filing a direct appeal on Petitioner's behalf. On April 12, 2019, Mr. Zimarowski's motion to withdraw was granted during a hearing in front of the Honorable Shawn D. Nines. The Petitioner also filed a *pro se* request for appointment of counsel to represent him during the appeals process. The request for appointment of counsel was taken under advisement and subsequently granted by the Honorable Judge Nines. On December 12, 2019, Ashley Joseph Smith, Esq. was appointed to represent the Petitioner. On August 12, 2020, the Petitioner was resentenced for purposes of allowing the Petitioner the right to file a timely appeal. *A.R.* 3. The order was entered on October 2, 2020. *A.R.* 10-11.

Petitioner timely appealed on, *inter alia*, Prosecutor Hoxie's breach of the plea agreement. In a unanimous decision, the West Virginia Supreme Court of Appeals affirmed Petitioner's sentence. The WVSCA opined that:

> Because the State recommended the same sentence recommended by the probation officer and requested by the victim and the State's recommendation was not contrary to the PSI, we find that the State did not breach the plea agreement.

A.R. 7.

Petitioner now asks this Court to grant his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. Importance of Review

This case presents an issue of fundamental importance for this Honorable Court to review. "Most plea-bargaining historians agree that plea bargaining became pervasive in the United States in the second half of the nineteenth century." William Ortman, *When Plea Bargaining Became Normal* 100 B.U. L. REV. 1435, 1441 (2020). It "did not enter the consciousness of the American legal profession as a normal practice. It became normal in the four decades following its discovery in the 1920s." Ortman, 100 B.U. L. REV. at 1438. In 1970, this Court specifically recognized the constitutionality of plea bargaining. *Brady v. United States* 397 U.S. 742, 751-752 (1970). In the fifty years following, this Court has shed little light on what constitutes a violation of a plea agreement. Although one year after *Brady* this Court ruled that the prosecution may not breach a plea agreement's sentencing neutrality clause, *Santobello v. New York* 404 U.S. 257 (1971), it has been virtually silent on the matter since.

In 2009, this Court ruled that plain error analysis applies when a plea breach is asserted for the first time on appeal. *Puckett v. United States* 556 U.S. 129, 133-134 (2009). Then, in 2010 when this Court decided *Padilla v. Kentucky* 559 U.S. 356 (2010), it started to look "more critically at plea bargaining." Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 570 (2014). However,

the conduct that constitutes a breach of a plea contract has still remained virtually untouched. In the eleven years since *Padilla* – eleven years since the Court has taken a closer look at plea bargains, and nearly fifty years since it approved of plea bargains – the Court has yet to address a jurisdictional split that answers whether undercutting a plea agreement's substance still constitutes a breach of contract. It has also failed to address how harshly the plea bargain must be undercut to constitute such a breach. The WVSCA's ruling in this case has aligned West Virginia's jurisprudence with those districts which argue that undercutting the substance of the deal is *not* a breach of the plea agreement.

This jurisdictional split must be addressed because today, the criminal justice system is, for the most part, "a system of pleas, not a system of trials." *Lafler v. Cooper* 566 U.S. 156, 170 (2012). Therefore, plea bargaining "is not some adjunct to the criminal justice system, it *is* the criminal justice system." *Missouri v. Frye* 566 U.S. 134, 144 (2012). If the criminal justice system is to continue functioning properly, plea bargaining is an essential part of the process. However, justice requires that this process must be fair and reasonable to both parties. As the Fourth Circuit held in *United States v. Lewis* 633 F.3d 262 (4th Cir. 2011):

> The breach of a promise made to induce a defendant to enter a guilty plea... involves the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.

633 F.3d at 269. *See also Rosales-Mireles v. United States* 138 S.Ct. 1897, 1908 (2018)("the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair"). The prosecution must play by the same rules as the defense when offering a plea in which both sides are required to make up a compromise, and both sides intend to benefit from the bargain.

The West Virginia Supreme Court has made a constitutionally intolerable ruling: that the prosecution is not held to the same standards of honesty in bargaining that the defense is required to afford the prosecution. *See United States v. Peglera* 33 F.3d 412, 414 (4th Cir. 1994)("Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which cannot be tolerated."). As discussed in depth below, the WVSCA implicitly held that breaches of this nature are within the constitutionally permissible conduct afforded to prosecuting attorneys.

Rulings like this, by their very nature, implicate our criminal justice system because today, over 90% of criminal cases are resolved by a plea agreement, not a trial. *See* Alkon, 41 HASTINGS CONST. L.Q. at 562 ("Overall, ninety-four percent to ninety seven percent of criminal cases are resolved by guilty pleas and not through trials"). If prosecutors are not required to give credence to their own bargains – bargains that cause criminal defendants to waive several constitutional rights – then the whole system becomes unfair and threatens the "integrity and public reputation of the proceedings." *Puckett* at 135; *United States v. Munoz* 408 F.3d 222, 226 (5th Cir. 2005). Furthermore, as discussed infra, there is a jurisdictional split as to whether an implicit breach of a plea agreement even constitutes an actual breach. Therefore, this case is of fundamental importance for this Court to review.

II. Legal Standard

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law...." "As a matter of criminal jurisprudence, a plea agreement is subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled." *State ex rel.*

Brewer v. Starcher 465 S.E.2d 185, 192 (W.Va. 1995). The State violates a petitioner's due process rights and breaches a plea agreement when it makes a promise to induce a criminal defendant's guilty plea, and then fails to uphold it's promise. *See Mabry v. Johnson* 467 U.S. 504, 507 (1984); *Santobello* at 262 (1971)("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled."). Although it is not clearly established, all twelve federal circuits agree that the terms of a plea agreement should be interpreted based upon the criminal defendant's reasonable understanding of the agreement,[1] and ambiguities contained therein should be construed against the government.[2] The prosecution must appropriately balance its duty to convey relevant information to the sentencing court and its duty to honor the plea agreement. *See e.g. State v. Duckett* 781 N.W.2d 522 (Wis. Ct. App. 2010)("[A] prosecutor has a duty to give the court relevant sentencing information but must do it in a way that honors the plea agreement: the State must walk a fine line at a sentencing hearing"); *Peglera* at 413 ("[T]he government's duty in carrying out its obligation under a plea agreement is no greater than that of fidelity to the agreement"); *Munoz* at 227 (although the prosecution "has a duty to provide the sentencing court with relevant factual information and to correct misstatements, it may not hide behind this duty to advocate a position that contradicts its promises in a plea agreement"); *Colvin*

1 *United States v. Giorgi* 840 F.2d 1022, 1029 (1st Cir. 1988); *United States v. Wilson* 920 F.3d 155, 165 (2nd Cir. 2019); *United States v. Saferstein* 673 F.3d 237, 242 (3rd Cir. 2012); *United States v. Obey* 790 F.3d 545, 547-48 (4th Cir. 2015); *United States v. Chavful* 781 F.3d 758, 762-63 (5th Cir. 2015); *United States v. McIntosh* 484 F.3d 832, 836 (6th Cir. 2007); *United States v. Gonzalez* 765 F.3d 732, 741 (7th Cir. 2014); *United States v. Guardado* 863 F.3d 991, 993 (8th Cir. 2017); *United States v. Spear* 753 F.3d 946, 969-70 (9th Cir. 2014); *United States v. Porter* 905 F.3d 1175, 1179-80 (10th Cir. 2018); *United States v. Hunter* 835 F.3d 1320, 1324-25 (11th Cir. 2016); *United States v. Murray* 897 F.3d 298, 304 (D.C. Cir. 2018).

2 *United States v. Sánchez-Colberg* 856 F.3d 180, 184 (1st Cir. 2017); *United States v. Mergen* 764 F.3d 199, 209 (2nd Cir. 2014); *United States v. Castro* 704 F.3d 125, 137 (3rd Cir. 2013); *Lewis* at 269 (4th Cir. 2011); *United States v. Escobedo* 757 F.3d 229, 233-34 (5th Cir. 2014); *United States v. Ligon* 937 F.3d 714, 719 (6th Cir. 2019); *Cross v. United States* 892 F.3d 288, 298-99 (7th Cir. 2018); *United States v. Parrott* 906 F.3d 717, 719 (8th Cir. 2018); *Spear* 753 F.3d at 968; *Porter* 905 F.3d at 1179; *United States v. Hardman* 778 F.3d 896, 900-02 (11th Cir. 2014); *In re* Sealed Case 901 F.3d 397, 401-403 (D.C. Cir. 2018).

v. Taylor 324 F.3d 583, 586 (8th Cir. 2003)("As an officer of the court, the prosecutor had the duty to convey to the court facts about the case and the defendant as long as the specific terms of the plea agreement were not violated."). However, although it is not required to do so enthusiastically, the prosecution must still uphold its end of the bargain. *United States v. Benchimol* 471 U.S. 453, 455-56 (1985).

Indeed, technical compliance should not be used to excuse prosecutorial error at the sentencing hearing. *See e.g. United States v. Marín-Echeverri* 846 F.3d 473, 478 (1st Cir. 2017) ("[W]e frown on technical compliance that undercuts the substance of the deal"); S*tate v. Bearse* 748 N.W.2d 211, 215 (Iowa 2008)("violations of either the terms or the spirit of the agreement require reversal of the conviction or vacation of the sentence); *State v. Miller* 122 Haw. 92, 105 (Haw. 2010)("Even where the state technically complies with every term, a breach of the plea agreement may be found if the spirit of the agreement is breached"). However, some jurisdictions hold that a plea breach must be substantial, and not just an implicit repudiation of the agreement. *See e.g. People v. Walker* 54 Cal.3d 1013, 1024 (Cal. 1991)(holding that prosecutorial deviance from a plea bargain must be "significant" to constitute a breach of the contract); *Campbell v. Smith* 770 F.3d 540, 548 (7th Cir. 2014)("relief is not available unless a breach is substantial").

This Court explained in *Puckett* that an individual aggrieved by a breach of an agreement has two available remedies: specific performance in the trial court, or plea withdrawal. *Puckett* 556 U.S. at 137. It is under this standard that Petitioner's claim should be reversed and remanded for a decision on whether to resentence him, or allow him to withdraw the plea agreement – although the Petitioner would note his preference of the former.

III. When The Prosecution Undermines A Plea Agreement The Petitioner Has Suffered A Fourteenth Amendment Due Process Violation

A. The Petitioner's Argument

In the present case, the Petitioner alleges that Prosecuting Attorney Hoxie undermined the plea agreement in three distinct ways at the sentencing hearing: 1) he stated that Petitioner was a flight risk and accused him of fleeing the state to evade arrest and prosecution, 2) he negatively characterized the Petitioner as predatory and alluded to a second, unidentified victim, and 3) he suggested that the PreSentence Investigation contained an implicit bias against the State and in favor of the Petitioner.

1. The Petitioner Was Not A Flight Risk

In April of 2016, the Petitioner returned to Maine, to his family home, and sought medical treatment at a facility where he could be surrounded by strong familial support. *S.A.* 4. As stated above, in April of 2016, the Petitioner was a permanent resident of Maine, with no prior or additional ties to West Virginia. The Petitioner's only tie to West Virginia was his enrollment and attendance at Alderson-Broaddus University. The psychological report of Dr. Curry shows that the Petitioner was at home in Maine for mental health and substance abuse in the Spring of 2016. Dr. Curry's report states that he received mental health records from Southern Maine Health Care regarding the care received by the Petitioner between April 3, 2016 and April 28, 2016. *S.A.* 20. This does not meet the legal definition of "flight," even though the State of West Virginia attempted to create that narrative during the sentencing hearing.

Flight is defined as "the act or an instance of fleeing, especially to evade arrest or prosecution." BLACK'S LAW DICTIONARY 765 (10th ed. 2014). When the Petitioner returned home

to receive substance abuse and mental health treatment, he did not know of any criminal charges against him, nor that anyone outside of the family knew of the events that had transpired between S.M. and the Petitioner. *S.A.* 5. He did not flee the State of West Virginia in hopes that he could not be found. The West Virginia State Police had the Petitioner's permanent home address and the Petitioner never attempted to hide from law enforcement or stay at an alternate location that law enforcement would be unaware of. The Petitioner did not know there was a warrant for his arrest out of West Virginia until the police arrived to arrest him at his place of employment in Maine on October 27, 2016. *Id.*

As stated in the report of Criminal Investigation included in the PreSentence Investigative Report, he was arrested without incident. *S.A.* 18. The Petitioner did not attempt to run or evade the police in this instance either. In support of the assertion that he was not "fleeing to evade arrest or prosecution," the Petitioner waived his extradition hearing and willingly returned to West Virginia with Trooper A.H. Clark to face the charges against him. *S.A.* 2. Evidence of flight to evade arrest or prosecution was never a finding of the PreSentence Investigation. Therefore, when Prosecuting Attorney Hoxie made a statement regarding fleeing with the intent to characterize the Petitioner as a flight risk, he undermined paragraph number seven of the plea agreement, which stated that he would make his sentencing recommendation *based upon* the PreSentence Investigation. *A.R.* 13.

2. The Petitioner Is Not A Predator

During the sentencing hearing, Prosecuting Attorney Hoxie mentioned a second, unidentified, alleged victim. *A.R.* 47. This allegation was grossly prejudicial to the Petitioner and wholly without merit. The PreSentence Investigation, nor any other portion of the record, ever

mentions a second victim. The Petitioner was not tried on charges against multiple victims, but instead multiple counts with respect to the same victim. *S.A.* 2. The PreSentence Investigation clearly states that while there were other young girls present at the squad building for CPR classes while the Petitioner was in the building, it is not believed that those two juvenile females were victims of the Petitioner. *S.A.* 16. This was an act of gross misconduct by the prosecution and does not fall under the purview of permissible conduct at the sentencing hearing – the Prosecution may reveal relevant factual information so long as it does not undercut the substance of the deal. *Marín-Echeverri* 846 F.3d at 478; *United States v. Vaval* 404 F.3d 144 (2nd Cir. 2005); *Bearse, supra*; *Miller, supra.*

Based on the results of the Petitioner's psychological report, the "relationship" at incident in this matter occurred secondary to the Petitioner's maturity level *A.R. 18*, and psychological experts deemed the Petitioner safe for the community. *S.A.* 28, *A.R.* 19. Dr. Curry even characterized the Petitioner's actions as "regressed and situational" as opposed to "fixated and preferential." *S.A.* 27.

However, Prosecuting Attorney Hoxie did not agree with the characterizations made by professionals and took it upon himself to give a recommendation that opposed the PreSentence Investigation report and recommendation *A.R.* 46-47. The State negatively characterized the Petitioner as "predatory" and "fixated and preferential," which was the exact opposite of how he was characterized by psychological professionals who were sought for their expert opinions for the purpose of the PreSentence Investigation report. *Id.*

In that respect, this case is similar to the *Vaval* case because in that case, the Second Circuit found that the Government's proffer of negative characterizations of the defendant was

not within the category of what should be considered permissible conduct protected by the plea agreement's requirement of candor to the Court. Similarly, in *United States v. Edgell* 914 F.3d 281 (4th Cir. 2019), the Fourth Circuit found that the Government undermined a plea agreement by recommending a sentence inconsistent with the plea agreement. In the instant case, Prosecuting Attorney Hoxie proffered his own negative characterizations that were impermissible by, and inconsistent with, the plea agreement. Moreover, they were not statements of truth that the Court needed to consider in order to make a sentencing decision, but instead negative opinions of Petitioner held by Prosecuting Attorney Hoxie. Therefore, the Court should find that the State breached the terms of the plea agreement when Prosecuting Attorney Hoxie made statements of personal and prejudicial nature against the Petitioner's character.

3. There Was No Implicit Bias Against The State of West Virginia

During the Sentencing Hearing, Prosecuting Attorney Hoxie suggested an implicit bias against itself in the PreSentence Investigation. *A.R.* 46. The State of West Virginia argued that this was because "[t]he Petitioner's understanding of and point of view of the events were skewed." *Id.* All three psychological experts interviewed the Petitioner and reviewed the available lower court record before preparing their reports *S.A.* 20; *A.R.* 17, 22. It is unreasonable for the State of West Virginia to argue that all three of those reports could have shared the same implicit bias in favor of the Petitioner because each report was created independently and without collaboration between professionals. Alternatively, it seems likely that if the reports had been in Prosecuting Attorney Hoxie's favor, he would not have been concerned about any implicit bias against the Petitioner which would not have fit into the narrative he was creating.

And indeed, there was an implicit bias *against the Petitioner* in this matter, specifically as

it relates to Psychologist Amber Gump's sentencing recommendation and Probation Officer Jennifer Freeman's sentencing recommendation. All three psychological evaluators read the same criminal investigation reports *S.A.* 20; *A.R.* 17, 22, interviewed the same defendant, and came to similar objective conclusions: that Defendant is a low-moderate risk for reoffense. *S.A.* 27; *A.R.* 19, 29. It is exceptionally curious, then, that the State's psychological evaluator and the Probation Officer would recommend the maximum term of imprisonment *S.A.* 13; *A.R.* 30 when the other two evaluators recommended alternative sentencing and community based treatment *S.A.* 28; *A.R.* 19. Although discussing a racial discrimination case, in *Furnco Construction Co. v. Waters* 438 U.S. 567, 577 (1978), this Court wrote:

> [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons . . . . Thus, when all legitimate reasons for [a negative outcome] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

This has been applied to the criminal context as well, particularly towards racially biased sentencing. *See* Anthony G. Greenwald & Linda H. Kriegar, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006). If all "racially neutral" explanations for a behavior have been eliminated on the basis of sound research evidence, then assuming that "none of the relevant decisionmakers [have] reported consciously holding negative racial attitudes or stereotypes" and none of them have had a test of implicit bias administered, it is "highly probable" that implicit racial bias was at least partially the cause of an unfavorable result. Greenwald & Krieger, 94 CAL. L. REV. at 966.

The logic easily transfers to this case. All neutral explanations for the disparate sentencing recommendations have been eliminated. Ms. Gump read the same reports as the other evaluators,

talked to the same individual, and came to the same objective conclusions. It is a fair presumption that as a psychological evaluator, Ms. Gump is able to consciously abstain from discriminatory cognition, so, assuming she has never had an implicit bias test administered, it should be regarded as highly probable that Ms. Gump held an implicit bias of some form, and it manifested itself in her sentencing recommendation which was highly disparate to that of the other two psychological experts.

Furthermore, Ms. Freeman's report from the probation office was implicitly biased against the Petitioner because she had the benefit of reading all three psychological evaluations before making her recommendation, yet seemed to disregard anything that the Petitioner's evaluators had to say about him. Using purely "Holmsian" logic, "when you have eliminated all which is impossible, then whatever remains, however improbable, must be the truth." Sir Arthur Conan Doyle, THE SIGN OF FOUR (1890), *reprinted in* SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 87, 111 (1930)(emphasis removed). Thus, when Prosecuting Attorney Hoxie "flipped the script" on who was biased by the reports, he undermined the plea agreement.

B. The WVSCA's Decision

The Memorandum Decision by the WVSCA hardly addresses any of the above arguments. *A.R.* 1-7. It made mere mention, in passing, of the psychological evaluations *A.R.* 2, which were a significant part of the PreSentence Investigation, and relied solely on the Probation Officer's sentencing recommendation to defeat the Petitioner's claims with hardly any legal analysis. Especially concerning is the fact that Petitioner raised not only a State Constitutional Violation, but also a Federal Constitutional violation *A.R.* 79-80, and neither were reasonably addressed.

C. The Decision Before The Court

Prosecuting Attorney Hoxie agreed to make a sentencing recommendation based upon the PreSentence Investigation. He then undermined this agreement by arguing outside the facts and opinions of the PreSentence Investigators. The Petitioner relied on this promise to enter into the guilty plea. He took a calculated risk, not knowing if the reports would be in his favor or the State's favor. When the reports came back in Petitioner's favor, the State took it upon themselves to create a narrative that did not fit the PreSentence reports; they told a story that fit how they wanted the Petitioner to be seen by the courts in clear derogation of *Mabry v. Johnson*, *supra*. Had the plea agreement called for the Petitioner to make a sentencing recommendation based upon the PSI, and had the court-ordered evaluations come back against the Petitioner, it would have been manifestly unjust for the Petitioner to make arguments inconsistent with the plea agreement; had the roles been reversed, the State would have been entitled to relief. However, the roles are not reversed and it is the Petitioner who is entitled to relief.

This Honorable Court has a decision to make. Either the prosecution can undermine a plea agreement and hide behind its duty of candor to the court to implicitly repudiate a plea agreement, or the terms of the plea agreement must be adhered to. Because of the fundamental importance of the plea bargaining process to our system of justice, prudence and due process require that undermining an agreement should be highly disfavored. Jurisdictions are split as to this issue, and this Court's wisdom and guidance are necessary to resolve the conflict.

CONCLUSION

It is clear that Prosecuting Attorney Hoxie breached the plea agreement by undermining the substance of the deal, and making a recommendation outside the "spirit" of the agreement.

Unfortunately, the jurisdictional split makes it unclear whether this is permissible behavior or not. For the foregoing reasons, the Petitioner humbly requests that this Honorable Court grant him a Writ of Certiorari, as well as any relief deemed just and proper. The Petitioner understands that this Court will act within the confines of justice.

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