No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

TIFFANY LEIGH MARION,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

Whether *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny apply to equal protection claims challenging a prosecutor's decision of whether to extend a plea offer to a criminal defendant, or the terms of any offer, based on the defendant's race.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Swain County Criminal Superior Court:

State v. Marion, No. 08 CRS 935-36; 938-40 (N.C. Super. Ct. July 23, 2019) (order with written findings of fact and conclusions of law denying motion for appropriate relief) (unreported, attached in Appendix)

North Carolina Court of Appeals:

State v. Marion, No. COA20-729 (N.C. Ct. App. Jan. 4, 2022) (opinion affirming N.C. trial court's denial of motion for appropriate relief) (unpublished, available at 2022 WL 29767, attached in Appendix)

State v. Marion, No. COA13-200 (N.C. Ct. App. Apr. 1, 2014) (direct appeal opinion remanding to trial court to arrest judgment on one of defendant's felony convictions and otherwise affirming convictions) (reported at 756 S.E.2d 61)

Supreme Court of North Carolina:

State v. Marion, No. 149P14-2 (N.C. June 17, 2022) (order denying petition for discretionary review of post-conviction appeal) (reported at 873 S.E.2d 11, attached in Appendix)

State v. Marion, No. 149P14 (N.C. Aug. 25, 2014) (order denying petition for discretionary review of direct appeal) (reported at 762 S.E.2d 444)

U.S. District Court for the Western District of North Carolina:

Marion v. Hooks, 1:20-cv-00073-MR (W.D.N.C.) (pending)

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Petitioner Tiffany Leigh Marion respectfully petitions this Court pursuant to Supreme Court Rules 10, 12, 13, and 14, to issue a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina declining merits review, entered in the above case on June 17, 2022.

INTRODUCTION

This case presents an important question of federal law that has not been, but should be settled by this Court: whether *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny apply to equal protection claims challenging a prosecutor's decision

of whether to extend a plea offer to a criminal defendant, or the terms of any offer, based on the defendant's race. *See* U.S. Sup. Ct. R. 10(c).

In this case, prosecutors offered favorable plea bargains to two white co-defendants who were equally or significantly more culpable than Tiffany Marion, a Black woman, but refused to offer any plea to Ms. Marion. Ms. Marion was then tried and convicted by a jury, and sentenced to life without parole. Ms. Marion was a twenty-five-year-old technical college student whose only criminal history was a high school shoplifting charge. Moreover, by all accounts, Ms. Marion was among the least culpable of all defendants.

As in the use of peremptory challenges, although prosecutors are afforded wide discretion as to whether to offer a plea, all defendants have a right to have a plea determination made pursuant to nondiscriminatory criteria. This is especially important because "[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992). Plea bargains account for nearly 95% of all criminal convictions. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). A defendant's right to equal protection is violated where race affects the plea bargaining process.

The Equal Protection Clause of the Fourteenth Amendment does not allow for veiled racial discrimination – it forbids racial discrimination. In the thirty years since *Batson*, this Court has provided a template for lower courts showing direct and circumstantial evidence that can be offered to uncover equal protection violations. Exposing when race has factored into prosecutorial decision making has proved extremely challenging. "The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences… [.]" *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). And so it is in plea bargaining just as in jury selection. *Batson* and its progeny must inform courts' analysis of whether prosecutors' actions have violated a criminal defendant's right to equal protection in plea bargaining so that no indicium of discrimination is ignored.

In this case, the prosecutors' reasons for their actions shifted over time, their proffered reasons for not offering a plea applied just as well to the white co-defendants, and their reasons were directly contradicted by the record evidence so as to make them unworthy of belief. Yet the state court failed to apply *Batson* and its progeny, shielding the prosecutors' discrimination from exposure. Under these circumstances, had the state court applied this Court's equal protection case law, and properly scrutinized the prosecutors' pretextual reasons against the record evidence, it should have held that the prosecutors violated Ms. Marion's right to equal protection.

This case provides an ideal vehicle to settle an important issue of federal law that has not been, but should be settled by this Court: whether *Batson* and its progeny apply to equal protection claims challenging a prosecutor's decision on whether to extend a plea offer to a criminal defendant, or the terms of any offer, based on the defendant's race. *See* U.S. Sup. Ct. R. 10(c). The Court should settle this important federal question by granting certiorari in this case, and provide clear guidance to lower courts so that defendants are not discriminated against in plea bargaining based on their race.

OPINION BELOW

The order of the Supreme Court of North Carolina issued on June 17, 2022, denying discretionary review of Ms. Marion's appeal is attached hereto at 1a. The underlying North Carolina Court of Appeals judgment entered January 4, 2022, is attached at 3a. The order denying Ms. Marion's post-conviction motion for appropriate relief entered on July 23, 2019, is attached at 24a.

JURISDICTION

The judgment of the Supreme Court of North Carolina denying discretionary review of Ms. Marion's case on appeal was entered June 17, 2022. *See* 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as Ms. Marion is asserting a deprivation of her rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

This petition invokes the Fourteenth Amendment to the United States Constitution, which provides: "No State shall . . . 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." U.S. Const. amend. XIV.

PROCEEDINGS BELOW

Ms. Marion was indicted for first-degree murder. Prosecutors did not extend her a plea offer and she was convicted by jury trial on March 19, 2012. She was then sentenced to life without the possibility of parole. Following her direct appeal, Ms. Marion filed a motion for appropriate relief ("MAR") in Superior Court alleging that her right to equal protection had been violated when the prosecution chose not to offer her a plea while offering pleas to her similarly or substantially more culpable white co-defendants.

On appeal, the North Carolina Court of Appeals held that Ms. Marion was not similarly situated to her co-defendants so she could not demonstrate an equal protection violation. In its opinion, the Court of Appeals stated that the lower court made this prior finding, but combing the lower court's order reveals no language that can plausibly be read as any finding of whether the defendants were similarly situated. That order failed to apply this Court's equal protection jurisprudence at all. The state court's holding was also in error because it required the defendants to be identically situated rather than similarly situated.

Throughout the state court proceedings, Ms. Marion argued that *Batson* and its progeny apply to equal protection claims involving racial discrimination in plea bargaining. The State argued that *Batson* was inapplicable to cases involving discriminatory plea bargaining, relying on *United States v. Armstrong*, 517 U.S. 456, 467-68 (1996). The state court agreed with the State, concluded that the reasoning contained in selective prosecution precedent was persuasive, and did not apply this Court's equal protection jury selection jurisprudence in its analysis.

Ms. Marion sought discretionary review of the Court of Appeals' decision in the North Carolina Supreme Court on two bases: (1) that the Court of Appeals' determination that Ms. Marion was not similarly situated to her co-defendants was incorrect; and (2) that Ms. Marion was entitled to further discovery, having made the necessary showing under *Armstrong*. The North Carolina Supreme Court denied Ms. Marion's petition in an order entered on June 17, 2022.

FACTUAL BACKGROUND

I. The Offense and Case Dispositions

Ms. Marion was charged with murder and other offenses along with five co-defendants: Jeffrey Miles, Jason Johnson, and Jada McCutcheon, who were Black; and Dean Mangold and Mark Goolsby, who were white.

On August 4, 2008, Ms. Marion traveled with Miles, Johnson, McCutcheon, and a boy known as "Freak" from Georgia to a North Carolina casino. (T pp 1904-

07). [1] Ms. Marion had never been to North Carolina and only knew McCutcheon before that night. (T pp 2444-51). She brought only her clutch purse and no money. (T p 2452).

On the evening of August 7, Miles, Johnson, and "Freak" met Mangold and Goolsby at Wal-Mart. Once there, they invited them back to the hotel where the group was partying. That evening, Ms. Marion took ecstasy and smoked marijuana.

At some point, Mangold suggested to Miles that they could sell a gun to Scott Wiggins, a man for whom Mangold had worked and at whose house he had stayed. (R p 333). Mangold said Wiggins could also sell them drugs. (T p 968). During that conversation, no one talked about a robbery, kidnapping, murder, or any other violent felony. (T p 1111). Everyone in the group left in Johnson's van for Mr. Wiggins' house, except "Freak." (T p 969).

Mangold directed Miles along dark, winding local roads before telling Miles to park a distance from the driveway to avoid cameras. (R p 321). Miles, Johnson, and McCutcheon then went up to the Wiggins home with guns and ransacked it, killing Messrs. Wiggins and Compton. They also shot Timothy Waldroup, who walked in on the robbery. Ms. Marion and Goolsby remained at the van. (R p 244).

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[1] "(T pp)" refers to the trial transcript.
"(R pp)" refers to the state court record on appeal.
"(M pp)" refers to the post-conviction hearing transcript.

Mangold walked at least part of the way up the driveway, but returned to the van five to ten minutes later and said that they were killing people. (T pp 979, 981). Ms. Marion responded, "What do you mean?" and "For real?" (T pp 1127, 1158). Mangold and Goolsby ran off into the woods. They asked Ms. Marion if she wanted to go with them, but she said, "no." (T pp 980-81).

Johnson, McCutcheon, and "Freak" rode back to Georgia in the van, while Ms. Marion rode with Miles in Mr. Wiggins' white truck that Miles stole. Johnson was arrested in Georgia with the van. McCutcheon and Ms. Marion were arrested at McCutcheon's apartment, which contained stolen property. (R p 325).

Mangold and Goolsby stayed in the woods for most of the night until they walked to a friend's house. Law enforcement heard Mangold and Goolsby were involved and convinced both to give statements, in which neither was completely truthful. They were not arrested, and then fled. They later turned up in Atlantic City, "where Goolsby had been arrested on a weapons charge," namely possessing the gun that Mangold had used the night of the murders. They had claimed, during their earlier police interview, that they had abandoned it in a field in North Carolina. (R pp 327-28, 372-74). After his arrest, Goolsby changed his statement and implicated Mangold in planning the robbery with Miles. (R p 327).

McCutcheon committed suicide in jail in 2009. (R pp 248-49). Former-Assistant District Attorney ("ADA") Jason Smith, who initially handled the cases, and Chief ADA James Moore, who later took them over, both worked the defendants

from what they perceived as most culpable to least culpable: Miles, Johnson, Mangold, Ms. Marion, and then Goolsby. (M pp 223-24, 568-69).

On December 28, 2010, Miles and Johnson entered pleas to first-degree murder and received sentences of life without parole to avoid capital trials. (R pp 218-24, 240, 260-69, 281). On August 15, 2011, Mangold entered a plea to second-degree murder and related charges for an agreed-upon sentence of 22 years, 9 months, minimum. (R pp 316-17). Goolsby was offered a plea to second-degree murder in exchange for a promise to testify against Ms. Marion, but the State withdrew the plea before he could accept. (T pp 1016-17). Weeks after testifying at Ms. Marion's trial, Goolsby entered a plea to accessory after the fact to second-degree murder and other charges for a minimum sentence of seven years. This sentence was to run concurrently with the five-year New Jersey sentence, with credit for forty-four months already credited to the New Jersey sentence. (R pp 350-53, 365, 381-82). Goolsby was released from prison in 2016. Prosecutors never offered Ms. Marion a plea. She was tried and sentenced to life without parole.

The factual bases supporting pleas for the co-defendants were consistent with the evidence at Ms. Marion's trial.

II. Pretrial Refusal to Offer a Plea

Michael Bonfoey was the elected District Attorney ("DA") during the pendency of Ms. Marion's case. (M pp 63-65). Bonfoey delegated the decision of

whether to offer a plea to Ms. Marion and her co-defendants to Moore. (M pp 67-68). Moore and ADA Ashley Welch prosecuted Ms. Marion's case. (M pp 90-92, 99).

Swain County was 1.3% African American in 2014. (R p 163). Victim Wiggins' family was prominent in the community; his father was the former sheriff. They communicated primarily with Moore and were very vocal and involved in the case; they referred to the Black defendants as "n-------." (R p 422).

Jack Stewart was appointed to represent Ms. Marion as lead counsel and Caleb Decker as co-counsel. (M pp 299-301). Mr. Stewart did not want to try this case because of the racial component and considered a trial a "measure of last resort." (M p 318). Mr. Stewart thought the evidence showed Dean Mangold was more culpable than Ms. Marion, but, "Dean was white and Dean was local and Dean had family in the area." (M p 322). Based on his experience in the district, Mr. Decker hoped that Ms. Marion would receive a plea, but he did not expect that she would "[b]ecause she was a black woman involved in the killing of . . . two white males." (M p 366).

Early on, Mr. Stewart approached ADA Smith, who indicated he thought that Ms. Marion was less culpable than the others. However, he did not want to commit himself to anything until the cases of the "principals" or shooters were resolved. (M pp 304-05). After Miles and Johnson entered pleas, Mr. Stewart approached Moore, who had taken over the case. Moore indicated that he wanted a proffer, so Mr.

Stewart sent a written proffer. (M p 310; R pp 299-301). However, Moore did not respond to the proffer and never offered Ms. Marion a plea. (M pp 301, 359).

III. Prosecution's Asserted Reasons for Not Offering a Plea

At the MAR hearing, ADA Moore testified that he was operating with the understanding that Mr. Stewart and Ms. Marion would not accept any plea. (M pp 155-56). In contrast, ADA Welch testified that defense counsel were working very hard to get a plea for Ms. Marion (M p 480). This was consistent with a jail call Ms. Marion made to her mother weeks before trial and with her trial testimony.

Moore also testified he determined Ms. Marion's level of responsibility by considering that she did not separate herself from her co-defendants, profited from the robberies, and did not testify against Miles or Johnson. (M pp 243-44). Moore contrasted this to Mangold and Goolsby, claiming that their fleeing from the scene was separating themselves from the other defendants and withdrawing from the crime. He claimed this despite the fact that neither of them called 911 or made any effort to help the victims. He also stated that they did not profit from the murders and that they made statements to law enforcement that factored into them getting a plea. (M pp 259, 263, 265).

Welch claimed that Ms. Marion was not offered a plea because her statements were "self-serving" and incomplete. However, Welch agreed that Mangold and Goolsby were not truthful in their first statements about the discussion of the robbery. (M pp 476, 479).

Welch also claimed that, based on Ms. Marion's psychological evaluation[2] – which she did not have pretrial – that Ms. Marion's risk to reoffend was high enough that, if she received a twenty-year sentence, she was so young she would be released again. (M p 540). But Mangold's psychological report, which Welch *did* have pretrial, detailed numerous risk factors, including a history of assaultive conduct and personality traits making him "quick to fly off the handle." (R pp 406-09). He was twenty years old when he entered a plea to less than twenty-three years. He is eligible for release at forty-three years old. (M pp 555-56).

Moore and Welch both testified that Ms. Marion did not get a plea because she would not testify against Miles and Johnson. They claimed this prohibited the State from proceeding capitally because they needed testimony "from someone in the hotel." (M pp 226, 466-67, 528-30). But they did not condition Mangold or Goolsby's pleas on testifying against Miles and Johnson, despite their having spoken with Miles and Johnson at the hotel, which Ms. Marion did not. (R pp 316-17, 321, 365).

Finally, for the first time, in contradiction to all record evidence and their earlier representations to trial counsel and the trial court, Moore and Welch also

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[2] Ms. Marion was evaluated at post-conviction counsel's request. The report described how Ms. Marion grew up in a high-crime area with limited supervision and exposure to drugs. The psychologist explained that the "heavy concentration of risk factors, with relatively few protective factors" may have increased the likelihood of later criminal activity. (R pp 210-17).

testified at the MAR hearing that they thought Ms. Marion may have gone up to the house rather than staying at the van. (M pp 103, 464-65).

REASONS FOR GRANTING THE PETITION

I. *Batson* and its progeny must apply to equal protection claims of discriminatory plea bargaining because of jury selection and plea bargaining processes are highly discretionary and subject to veiled discrimination.

This Court has never directly addressed the issue of whether equal protection jury selection jurisprudence applies to equal protection claims challenging a prosecutor's decision of whether to extend a plea offer to a criminal defendant, or the terms of any offer, based on the defendant's race.

"[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). This Court made clear in establishing its equal protection jury selection jurisprudence that courts should draw from all areas of equal protection law to inform their analysis and to uncover purposeful discrimination. *See Batson v. Kentucky*, 476 U.S. 79, 93-95 (1986) (looking to equal protection challenges to rezoning, recruitment procedures, and other areas to inform the Court's analysis).

This Court has recognized that there is a heightened risk for bias and discrimination where prosecutors are given significant discretion. *See Batson*, 476 U.S. at 96. ("The defendant is entitled to rely on the fact, as to which there can be

no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " (quoting *Avery v. Georgia,* 345 U.S. 559, 562 (1953)). The decision of whether to offer a plea, like the decision of whether to strike a juror, is one where a prosecutor has substantial discretion. It follows, therefore, that *Batson* and its progeny should apply to equal protection claims of racially discriminatory plea bargaining since "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985).

II. Discriminatory Effect: The state court refused to apply *Batson,* required defendants to be identically situated rather than similarly situated, and dismissed probative data.

Racially discriminatory selective prosecution violates the right to equal protection guaranteed by the United States Constitution. *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). As with all equal protection claims, a claim of selective prosecution will succeed where the defendant demonstrates that the prosecution of the case had a discriminatory effect and was motivated by a discriminatory purpose. *Wayte*, 470 U.S. at 608.

This Court has held that discriminatory effect is shown when similarly situated individuals belonging to one racial group were not prosecuted, or received more favorable treatment, than individuals belonging to another. *Armstrong*, 517 U.S. at 465 (threshold for discovery is "a credible showing of different treatment of similarly situated persons"); *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008).

Further, in the context of jury selection, this Court has rejected the idea that subjects need to be identical in all respects in order to be similarly situated. *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) ("A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."). But the North Carolina Court of Appeals' holding would render the Equal Protection Clause functionally inoperable by requiring that criminal defendants be identical in all respects in order to be "similarly situated."

In deciding whether defendants are different enough to be "dissimilarly situated," a court clearly must focus on distinctions in their culpability. To focus on other distinctions would be to invite precisely the kinds of pretextual explanations and cloaked discrimination that equal protection forbids. Notably, Anglo-American law has always demanded that criminal liability attach based on conduct before and during the time an offense occurs.

In this case, Ms. Marion, Mangold, and Goolsby were all indicted for first-degree murder under the felony-murder rule based on acting in concert. None of them went into the victim's house armed with guns like Miles and Johnson. Thus, they were similarly situated because they committed "roughly the same crime under roughly the same circumstances." *Lewis*, 517 F.3d at 27. By any reasonable view of the evidence, Mangold was more culpable than Ms. Marion or Goolsby since he was the sole connection to the victims, planned the robbery, directed Miles to the

victim's house, went up toward the house, and was armed with a gun. Yet the prosecutors offered Mangold a plea to about twenty-three years, without requiring him to do anything to merit a reduction from first-degree murder.

To summarize the distinctions between them:

Mangold	**Ms. Marion**
White male (R p 302)	Black female (R p 29)
Knew victims, stayed with them, and worked for Mr. Wiggins (R p 333)	No connection to victims
Actively planned robbery with Miles and Johnson (T p 974-75; R p 321)	No evidence Ms. Marion planned or encouraged a robbery
Went with Miles and Johnson to sell firearms and drugs earlier in the evening (T p 964)	Stayed at the hotel, not involved in selling drugs or firearms (T p 964)
Directed Miles to victim's home through numerous turns and was the only one who knew house's location (T p 975; R p 321)	No evidence Ms. Marion had any idea where she was; had never been to North Carolina (T p 2452)
Had Miles stop short of driveway because he believed there were cameras (R p 321)	High on ecstasy and marijuana; not involved in any conversation (T pp 961-62, 1025-27, 1069-72, 1081, 1123)
Walked up driveway toward house, alongside Johnson, Miles, and McCutcheon (T p 1163)	Stayed at van with Goolsby (T p 1163)
Possessed gun and lied to law enforcement about disposing of it (R pp 373-74)	Did not have a gun (R p 369)
Prior record level II (R p 302)	Prior record level I (R p 33)

Not required to testify in exchange for plea (R pp 310-44)	No plea offered
Eligible for release in early forties (R pp 302-08)	No opportunity for release; life without parole (R pp 29-40)

The state court declared the two not to be "similarly situated" for several reasons, all of which focused on actions after the crime occurred. First, the Court found that Mangold fled from the scene of the crime after the shooting started. However, the first place he fled was to the location where Ms. Marion and Goolsby had been the entire time. The Court of Appeals also found merit in Mangold's having "warned" Goolsby and Ms. Marion of the crime. But that fact only serves to highlight that, unlike Mangold, Goolsby and Ms. Marion were too far from the shooting to even know that it had happened or to have taken any action to stop it. By contrast, Mangold, who was there, could have acted to stop the violence or give aid to the victims. Finally, the state court opined that Ms. Marion "profited" from the shooting. The court concluded this because she rode back in the stolen truck at Miles' direction and then remained in an apartment where the shooters stored some of the property they had stolen.

Here, Mangold was more responsible than Ms. Marion and the State had a stronger case against him. For all relevant purposes then, the two were similarly situated – or Mangold was even worse situated. Yet the state court focused on immaterial distinctions, and conduct after it was too late to take any action to help

the victims, to conclude that Ms. Marion was not similarly situated to Mangold or to Goolsby. Under that analytic framework, it would be nearly impossible for any defendants to be "similarly situated" enough to allow for a comparison of their pleas. This Court should grant certiorari in this case in order to clearly state that a prosecutor cannot circumvent equal protection law with after-the-fact justifications that would require defendants to be identically situated rather than similarly situated. This Court should also make clear that focusing on conduct after the offense, while disregarding all of the conduct before the offense, is inappropriate.

Ms. Marion not only established that the prosecution of her case had a discriminatory effect because her similarly situated or more culpable white co-defendants received more favorable treatment, but also because the pattern of prosecution in her case matched a well-documented pattern for the prosecution of Black defendants in the district. In other equal protection contexts, this Court has clearly held that evidence of discriminatory effect can be shown both within a defendant's case and through a pattern over time. *See Batson*, 476 U.S. at 95-97. For more than one hundred years, equal protection law has recognized that statistics can be used to prove discriminatory effect. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding ordinance was discriminatorily applied to some two hundred Chinese launderers who petitioned for exception but granted in all but one of the eighty petitions of non-Chinese launderers); *Hunter v. Underwood*, 471 U.S. 222

(1985) (African Americans were 1.7 times as likely as whites to suffer disenfranchisement under law in question).

But, in this case, the state court applied a different standard, one that is wholly foreign to equal protection jurisprudence. It effectively required that pattern data could only help prove a discriminatory effect if it was drawn solely from cases handled by the prosecutors involved in the case rather than the prosecutor's office as a whole. It then compounded this confusion by declaring that data from the office that prosecuted Ms. Marion from 1994 to 2013 did not implicate her prosecution ("none of the prosecutors involved in Defendant's trial were represented by the statistics presented"). But the DA for that office, Bonfoey, had been elected to that post in 2003. (M p 64). Moore was an ADA in the district from 1991 to 1996 and then again from 2003 to 2014. (M p 90). And Welch was an ADA from 2005 until she was elected DA in 2014. (M pp 450-51). Clearly, then, even under the state court's own baseless standard, the data Ms. Marion presented was drawn from the actions of the same prosecutors who controlled the outcome of her case.

Ms. Marion presented data summaries to the court based on a public records request and other public information. (M pp 419-20). In the prosecutorial district, white defendants entered pleas to less than first-degree murder at a substantially higher rate than Black defendants. From October 1, 1994, to the date of Ms. Marion's conviction, March 19, 2012, there were forty-five white defendants and six Black defendants indicted for first-degree murder. White defendants pled guilty to

a lesser offense than first-degree murder in 64.4% of cases, while Black defendants never pled guilty to a lesser offense. (R p 433). And this pattern held, regardless of a defendant's prior criminal history—white defendants with lengthy prior records received lesser pleas, while Ms. Marion had only shoplifted as a teenager. (R pp 33, 436-38). In fact, the data showed that 50% of Black murder defendants pled guilty to first-degree murder and life without parole, while only 8.9% of white defendants pled guilty to first-degree murder and life without parole. (R p 435).

Ms. Marion also demonstrated a discriminatory effect by a direct comparison of her case with the other district defendants who were serving life without parole sentences. Nearly everyone serving life without parole from the district as of December 13, 2013 was the only person prosecuted for the crime, indicating each was solely responsible. (R pp 445-47). Of the three who were not the primary defendant or fatal shooter, one was a murder for hire, one had five victims, and in all three cases there was evidence that the defendant was physically present and either orchestrated the attack, or actually fired a gun.

By contrast, there was no evidence that Ms. Marion planned, coordinated, or set up the robbery in her case. There was no evidence that Ms. Marion went up to or went inside of Mr. Wiggins' home, and there was absolutely no evidence that she had or fired a gun. By all accounts, Ms. Marion stayed by the van and was minimally involved in the crimes.

Given the stark difference between the handling of Ms. Marion's case and cases with similarly situated white defendants, Ms. Marion demonstrated a discriminatory effect. This Court should grant review to confirm that a pattern of discriminatory conduct in plea bargaining by a prosecutor's office, as revealed by both statistics and individual comparisons, is relevant to show a discriminatory impact of that office's conduct on an individual defendant.

III. Discriminatory Intent: The prosecutors' reasons for not offering Ms. Marion a plea were so far at odds with the record evidence that pretext was the only reasonable conclusion.

The second prong of an equal protection challenge is to show that the prosecution of a case was motivated by a discriminatory purpose or discriminatory intent. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 266 (1977). "[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster v. Chatman*, 578 U.S. 488, 501 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). Courts must look beyond the four corners of a case to "all relevant circumstances" to determine if a prosecutor's reason is false and raises an inference of purposeful discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 239-40 (2005).

The facts presented in Ms. Marion's case more than proved discriminatory purpose under this standard. First, the prosecution radically shifted their stated

reasons for denying Ms. Marion a plea offer over the course of this case, revealing that those reasons were merely convenient pretexts. Every piece of evidence leading up to and presented during Ms. Marion's trial established that Ms. Marion did not go into the house, and the prosecution never suggested during her trial that she went into the house. In fact, the prosecutors represented to the court *four* times – both before and after Ms. Marion's trial – that Ms. Marion did *not* go up to the house. (R pp 244, 285, 322, 370). However, at the MAR hearing, Moore testified it was not clear whether Ms. Marion was the Black female in the house (M p 103), and Welch testified that she "never necessarily believed [Marion] was not in the house." (M p 465).

The prosecution also proffered reasons for not offering Ms. Marion a plea that applied equally to her white co-defendants, therefore further evidencing their purposeful discrimination. These reasons included that: 1) her risk to re-offend was high; 2) she was too young; 3) she did not cooperate with law enforcement; and 4) she was not truthful with law enforcement.

Welch also claimed that if she had known of the information in Ms. Marion's psychological evaluation concerning her "risk to reoffend," she would not have been able to offer Ms. Marion anything but a plea to life without parole. (M pp 550-51). However, since the prosecutors did not know of Ms. Marion's evaluation before her trial, the results could not have had anything to do with denying her a plea.

In reality, Mangold's *pretrial* evaluation identified more numerous and more serious risk factors for reoffending than Ms. Marion's post-conviction evaluation did. These included having his "anger and emotions poorly controlled," being "quick to fly off the handle," getting "overwhelmed by more emotion than he can tolerate," and "los[ing] control of his thoughts and behaviors."[3] (R pp 406-09). Despite this, the prosecutors offered Mangold a plea, but not Ms. Marion.

Welch further claimed that she could not offer Ms. Marion a plea to twenty years because she was young enough to discharge that sentence. (M p 540). But Mangold, twenty years old at the time of the crime, was younger than Ms. Marion. He was offered a plea that could allow him to be released when he is in his early forties. (M pp 555-57).

The prosecution then claimed it did not offer Ms. Marion a plea because she did not cooperate with law enforcement, was not completely truthful, and did not have credible knowledge about the planning of the crime that the prosecutors needed to get a death sentence for Miles and Johnson. (M pp 528-29, 532, 539). But Mangold gave several statements to law enforcement that were not truthful. His statements also limited his own responsibility or were self-serving. (M pp 133, 476-78). And the information that he had was exactly what the prosecution claimed it

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[3] Mangold's IQ of 96 was also significantly higher than Ms. Marion's IQ of 78. (Rpp 213, 408).

needed to secure a death sentence for Miles or Johnson. Still, the prosecution did not condition his twenty-three-year plea on testifying against the shooters.

The prosecutors also claimed that they could not prove flight as to Mangold, and that they treated Ms. Marion differently because she "profited," while Mangold and Goolsby "withdrew." But those claims were unreasonable and contradicted by the evidence. Mangold left the scene after hearing shots, took steps to avoid apprehension, and did not make any effort to render aid to the victims. (R pp 372-74). Then, Mangold left for New Jersey after failing to show up to meet with law enforcement. *Id.* The prosecutors' claims that this was not evidence of flight were unreasonable.

Further, the prosecutors claimed they treated Ms. Marion differently from Mangold and Goolsby because she profited from the robberies and didn't "withdraw" like they did. (M pp 141, 143, 243, 263, 265). But, as noted above Mangold and Goolsby did not "withdraw"; they fled, after the shooting had started (Mangold) or after it had ended (Goolsby) to avoid apprehension. Further, the fact that this justification was offered for the first time at the MAR hearing, and contradicted earlier statements made by Moore, is evidence of discriminatory intent. Moore e-mailed pretrial that Goolsby "help[ed] Mangold get away." (R p 419). Meanwhile it is preposterous to suggest that Ms. Marion should have run into the woods with two strange men, in the dark, in an area where she had never been, with nothing but an empty pocketbook.

Finally, Moore's claim that Ms. Marion "wasn't going to plead to anything," and Welch's claim that Ms. Marion was "just as guilty," were so incredible that they are evidence of intentional discrimination. (M pp 120, 538). Moore's claim that he thought Ms. Marion would not plead was refuted by every other source, including defense counsel, the jail call, and even his co-counsel Welch. Meanwhile, Welch's claim that she thought Ms. Marion was "just as guilty" as Miles and Johnson was contrary to her own contemporaneous emails. (R pp. 419, 448).

Ultimately nothing on this laundry list of reasons that the prosecution proffered for not offering Ms. Marion a plea hold up when subjected to any scrutiny. "The prosecutors chosen race-neutral reasons [for not offering Ms. Marion a plea] do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." *Miller-El*, 545 U.S. at 265. When race affects the decision of whether to offer a plea, as it did here, it violates the Equal Protection Clause. The threshold for a showing of purposeful discrimination cannot be a "crippling burden of proof" on the defendant that leaves prosecutors "largely immune from constitutional scrutiny." *Id*. at 239. This Court should grant review in order to clearly declare that the well settled rules for uncovering equal protection violations in jury selection also apply to claims of discriminatory plea bargaining.

This case presents an ideal medium for this Court to squarely hold that this Court's equal protection jury selection jurisprudence applies to equal protection

claims in which a prosecutor has allowed race to influence the decision of whether to extend a plea offer and the terms of any offer. The lower courts here failed to apply this Court's equal protection jurisprudence and to meaningfully scrutinize the prosecutors' pretextual reasons against the record evidence. Such laxness in analyzing equal protection claims of discriminatory plea bargaining must be corrected. Lower courts require this Court to provide them the necessary tools and guidance to help ferret out discrimination in plea bargaining.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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