NO.
22-7468

IN THE

UNITED STATES SUPREME COURT

DONATUS OKECHUKWU MBANEFO

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

PREFACE: Three elderly minority physicians, with significant health issues, were arbitrarily selected, prosecuted and incarcerated, leading to the untimely death, in prison, of one of them within the first year of incarceration, from despair, major depression and sepsis.

Question 1. Whether the lower courts erred by lending themselves to a prosecution that intentionally selected minority physicians for prosecution in violation of the Equal Protection clause of the 14th Amendment?

Question 2. Whether trial counsel was constitutionally deficient in violation of the 6th Amendment for failing to file pretrial motions to dismiss the indictment on grounds of selective prosecution when the lower courts unanimously hold that the elements of the defense of selective prosecution were available to Petitioner prior to trial but waived because of failure to file requisite motions?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

This case arises from and is related to:

1). United States District Court (MD of Ga.)

a). United States v. Biggs et al, 7:16-Cr-02-06.

Judgment date December 5, 2018.

b). Donatus Mbanefo v. United States, 108-Cv-02.

Judgment date October 7, 2021.

c).Donatus Mbanefo v. United States,

New Trial Motion Denied on October 14, 2021.

2). United States Court of Appeals (11th Circuit)

a). In RE. Donatus Mbanefo.

21-12623 (09/01/2021)

b). Donatus Mbanefo v. United States.

21-13693 Denied 09/27/2022.

c). Donatus Mbanefo v. United States.

21-13575 Denied 02/02/2023

3). The United States Supreme Court.

a) Donatus Mbanefo v. United States

22-6741 Certiorari denied 03/20/2023

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CONSTITUTIONAL PROVISIONS

CERTIFICATE OF CORPORATE DISCLOSURES

INTERESTS: No publicly traded company or corporation has an interest in the outcome of this case.

OPINIONS BELOW

- The opinion of the Eleventh Circuit court of appeals on Petitioner's 28 U.S. C. § 2255 motion is reported at USCA Case 21-13575 of 02/02/2023.
- The opinion of the Eleventh Circuit court of appeals on Petitioner's new trial motion is reported at Case 21-13693 of 07/28/2022.
- The opinion of the District Court on Petitioner's new trial motion is reported on Docs. 603 of 10/14/2021 in United States v Biggs et al 7:16-Cr-02 (M.D. of Georgia).
- The opinion of the District Court on Petitioner's 28 U.S.C. § 2255 motion is reported at Doc. 601 of 10/7/21.
- The Report and Recommendations of the Magistrate Judge on Petitioner's 28 U.S.C. § 2255 motion is reported at Docs. 589 of 4/12/2021.

JURISDICTION

The Eleventh Circuit court of appeals issued its opinion on February 2, 2023. Petitioner did not file any motion for panel rehearing or en banc rehearing. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

THE 14TH AMENDMENT

No state shall make or enforce any law which shall abridge the privileges or immunities of the 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.

The lower courts denied Petitioner equal protection of the laws by allowing Petitioner's prosecution while a similarly situated physician of another race known to the authorities to have committed the same alleged crimes as Petitioner did was not prosecuted.

THE 6TH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

The district court ruled that the elements of selective prosecution were available pretrial and that defense was waived for failure to raise pretrial motions. An established prima facie case of discriminatory effect and discriminatory purpose infers that trial counsel was constitutionally deficient for not raising pretrial motions to dismiss the indictment on grounds of selective prosecution.

STATEMENT OF THE CASE

Petitioner was indicted by a grand jury on February 10, 2016 and charged with:

- Conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846;
- Unlawful dispensation of controlled substances on June 5, 2013 in violation of 21 U.S.C. § 841;
- Unlawful dispensation of controlled substances on May 7, 2013 in violation of 21 U.S.C. § 841;
- Conspiracy to launder monetary instruments in violation of 21 U.S.C § 1956;

On June 13, 2018, Petitioner was found guilty on counts 1, 2 and 3 and was sentenced to a concurrent prison term of 96 months on each of the counts to be followed by a 3 years term of supervised release. The Appeal court affirmed on April 13, 2020. Petitioner raised several grounds in a 28 U.S.C. § 2255 motion that trial counsel was constitutionally ineffective one of which was failure to file pretrial motions to dismiss the indictment on grounds of selective prosecution. The Magistrate Judge recommended the denial of the 28 U.S.C. § 2255 motion and the District Court adopted the Magistrate's Recommendation. Petitioner noticed appeals and the appeal court issued certificates of appealability on two grounds: a). Whether the Trial Counsel was constitutionally deficient for threatening to withdraw representation if Petitioner insisted on testifying:

b). Petitioner to show evidence withheld by Trial Counsel which will prove that the prescriptions Petitioner wrote were legitimate.

The appeal court eventually affirmed the decision of the district court on February 2, 2023. Petitioner did not file motions for rehearing or for rehearing en banc.

GOVERNMENT'S ERRONEOUS THEORY OF PROSECUTION.

The Government contends that 27 physicians (Doc. 415 pg. 12) were variously employed at different times at the Relief Institute of Columbus (RIC) and the Wellness Center of Valdosta (WCV). The Government averred that the three physicians with the highest longevity were indicted and prosecuted. This theory is flawed since Dr. John Moseley who worked at the RIC and had the same longevity as Petitioner was not indicted. This flawed theory is the essence of this petition.

REASONS FOR GRANTING THE WRIT

Petitioner was prosecuted while a similarly situated physician of another race was not prosecuted. This case presents an ideal vehicle for this Court to define the legal recourse in an established racially motivated selective prosecution that violated the equal protection clause of the 14th Amendment, wherein trial counsel failed to file appropriate pretrial motions in violation of adequate representations guaranteed by the Sixth Amendment. This case also affords the Court the opportunity to address the denial of a discovery motion in an established selective prosecution matter and also to formally pronounce a remedy for a racially motivated equal protection breach which violated the Fourteenth Amendment.

ARGUMENTS

The equal protection doctrine requires that people in similar circumstances must receive similar treatment under the law. That was not the case in Petitioner's investigation and prosecution wherein only minority physicians were compelled to loose life, liberty, and property in violation of the equal protection doctrine. Petitioner was prosecuted in violation of the Equal Protection clause of the 14th Amendment of the United States constitution since a similarly situated physician of another race who was known to the authorities to have committed the same alleged crimes in substantially the same manner as Petitioner allegedly did, was not prosecuted. Furthermore, the sequence of actions taken or avoided by the prosecution infer that Petitioner's prosecution had a racial animus. The Government retains "broad discretion" as to whom to prosecute. United States v. Godwin, 457 U.S. 368, n. 11 (1982). It is also undisputed that "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 charges to file or bring before a grand jury, generally rests entirely in his discretion" Bordenkircher v. Hayes, 434 U.S 357, 364 (1987). Inasmuch as the prosecutor has a broad discretion, this discretion is not 'unfettered', and selectivity in the enforcement of criminal laws is .... subject to constitutional constraints" United States v. Batchelder, 442 U.S. 114, 125 (1979). In particular the decision to prosecute may not be "deliberately based upon an unacceptable standard such as race, religion or any other arbitrary classification."' Bordenkircher v. Hayes at 364.

Quoting Oyler v. Boles, 368 U.S. 448, 456 (1962). The prosecutor has repeatedly refused to proffer a legitimate and acceptable reason why Petitioner was indicted and prosecuted but not the similarly situated physician of another race.

SELECTIVE ENFORCEMENT

This Court has held that "the constitution prohibits the selective enforcement of the laws based on considerations such as race" Whren v. United States, 517 U.S. 806, 813 (1996). Petitioner's investigation was carried out by a joint team of the Drug Enforcement Agency (DEA) led by Agent Charles Sikes and the Georgia Bureau of Investigations (GBI) led by Agent Striplin Luke. GBI Agent Janet Alford testified at trial under oath that the joint team conspired with qualified radiologists and qualified pharmacists to respectively generate falsified Magnetic Resonance Imaging (MRI) reports and Pharmacy profiles for undercover clinic consults at two pan clinics, the RIC and the WCV. Armed with these professionally prepared falsified medical documents and recording devices, the joint team staged four undercover controlled clinic visits at the two pain clinics with Agent Alford as a 'controlled' patient. The joint team specifically targeted only minority physicians in all four controlled visits in the alleged conspiracy that spanned from September 2011 to February 2014. The said conspiracy involved 27 physicians (Doc. 415 pg. 12) 20 of whom were Caucasians, was initiated by a Caucasian Dr. Bruce Tetalman, and was also terminated by another Caucasian, Dr. John Moseley.

Agent Luke swore to affidavits twice that crimes were being committed at the RIC contingent on which he was issued warrants to search and seize evidence there. He executed the warrants on December 12, 2013 and on February 4, 2014. On both occasions, Dr. Moseley was consulting and all the evidence gathered from the executed searches were used to indict and prosecute minority physicians who had left the RIC more than six months prior to the searches and seizures, but Dr. Moseley at whose instance and conduct representations were made to the Magistrate to obtain warrants was not indicted even though he had the same longevity as Petitioner in the same clinic. Agent Luke intentionally mislead the Magistrates twice that a crime was on going at the RIC as a pretext to seize evidence with which to prosecute minority physicians who had since left the RIC.

Petitioner was employed at the RIC from mid-March to md-June 2013 and within one month of Petitioner's employment, the joint team conducted an undercover consult on April 8, 2013. A second controlled undercover consult was conducted on June 5, 2013. Two similar undercover consults were also carried out on April 17, 2013 and May 29, 2013 at the WCV. Only minority physicians were targeted in these series of joint undercover investigations.

Racially selective enforcement of the law occurs when law enforcement officers make enforcement decisions based on race. Here the law enforcement officers exercised their discretion purposely to investigate and enforce the violation of the controlled substance act against only minority physicians. For law enforcement agents to selectively and discriminatorily enforce the controlled substance act as to

turn it into a scheme whereby activities prohibited by the act are enforced in the uncontrolled discretion of these officials, violates Petitioner's right to equal protection of the laws embraced within the due process clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497(1954); United States v Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972). The fact that no Caucasian physician was investigated infers that in the exercise of the discretion of the law enforcement officers, there was an intentional discrimination by design to build up evidence against minority physicians. Specifically, the two counts of unlawful dispensation of controlled substances charged against Petitioner were inextricably intertwined with the two controlled undercover consults orchestrated by the joint team of the DEA and the GBI which fronted controlled patients equipped with recording devices and armed with fictitious documents prepared by qualified medical professionals. There is no statistical or operational justification as to why two minority physicians but not any of the twenty Caucasian physicians were selected for four undercover consults. The joint team of agents could have readily investigated physicians of other races but that evidently was not their focus. Instead, two Caucasian physicians, Dr. David Poynter and Dr. Michael Suuls, who were also involved in the same alleged conspiracy and received cash payments and also cash bonus incentives were briefed by the prosecution and did testify against the minority physicians at trial. "What a legislator or any official entity is 'up to' may be plain from the results its actions achieve or the results they avoid" Personnel Administrator of Massachusetts v. Feeney, 442 US 256, 279 (1979). The results of the actions of the

joint team and their modus operandi of the controlled consult visits infer that the Agents actively set forth to investigate only minority physicians and also actively avoided the investigation of equally culpable similarly situated Caucasian physicians. This Court has held that "though the law itself be fair on its face, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution". Yo Wick v. Hopkins 118 U.S. 356, 357 (1886).

SELECTIVE PROSECUTION

Selective prosecution is the prosecution of criminal laws against a particular class of persons and the simultaneous failure to administer criminal laws against others outside the targeted class. This Court has held that selective prosecution exists where the enforcement or prosecution of a criminal law is "directed so exclusively against a particular class of persons ..... with a mind so oppressive" that the administration of the criminal law amounts to a practical denial of the Equal Protection of the law United States v. Armstrong, 517 U.S. 456 (1996).

Selective prosecution is not a defense on the merits to the criminal charge itself but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the constitution. To prevail in a selective prosecution claim, the

petitioner must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.

DISCRIMINATORY EFFECT

To establish the discriminatory effect, the claimant must show that a similarly situated individual was not prosecuted. "A similarly situated person for selective prosecution purposes is one who engaged in the same type of conduct, which means the comparator committed the same basic crime in substantially the same manner as the defendant - so that any prosecution of that individual will have the same deterrence value and would be related in the same way as the Government's enforcement priorities and enforcement plans". United States v. Smith, 231 F.3d 800, 810 (11th Cir. 2000). Petitioner worked at the RIC from March 2013 to June 2013 and had the same longevity of three months as Dr. John Moseley who worked at the same clinic from November 2013 to February 2014. Furthermore, Dr. Moseley and Petitioner were similarly situated for the following reasons:

a). They were both licensed by Georgia Medical Board to dispense controlled substances;

b). they both did not have any specialty training in pain medicine;

c). they both consulted at the same clinic for the same duration of time using the same clinic staff, stationery and prescription scripts;

d). they both treated the same pool of patients from within the state of Georgia and from out of state.

e). they both prescribed similar combinations of controlled substances to the same pool of patients.

f). they both prescribed similar quantities of controlled substances to the same pool of patients;

g). they both ordered the same range of laboratory investigations for the same pool of patients;

h). they both worked in a pain clinic that accepted cash only for payments.

i). they were both paid with checks drawn against accounts into which the cash received from the patients was paid;

j). they were both involved in the same alleged conspiracy for which Petitioner was indicted and prosecuted.

k). they were both known to DEA and GBI during their respective tenures at the RIC;

l). Patient files treated by Dr. Moseley and Petitioner were reviewed by the Government's medical expert witness. The expert opined that the prescriptions written by both Dr. Moseley and Petitioner were unlawful and were not written in the usual course of legitimate medical practice.

m). The government's medical expert found that the prescriptions Petitioner wrote for an undercover agent on two separate occasions were unlawful and Petitioner was charged with two counts of unlawful dispensation of controlled substances and was also charged with conspiracy for consulting at the RIC for three months. The same government's medical expert found after reviewing files of two patients treated by Dr. Moseley that the prescriptions written by Dr. Moseley were unlawful and were not written in the usual course of legitimate medical practice. Dr. Moseley was neither charged with conspiracy nor unlawful dispensation of controlled substances.

There are no legitimate prosecutorial factors that set Dr. Moseley and Petitioner apart, therefore Dr. Moseley and Petitioner were for selective prosecution purposes similarly situated and Petitioner's prosecution was unjustifiably and impermissibly based on Petitioner's race. See Oyler v. Boles, 398 U.S. 448, 456 (1962) quoting Snowden v. Hughes, 321 U.S. 1, (1944). Defendants are similarly situated "when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them" United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996).

Petitioner has prevailed on the first prong of the selective prosecution challenge by making out a prima facie showing that he was singled out for prosecution while a similarly situated physician who committed the same alleged basic crime in substantially the same manner as Petitioner allegedly did was not prosecuted. "Where waivers of a rule are not granted with consistency and no explanation is

given for a disparity of treatment, a finding of denial of equal protection requirement may be appropriate". Ziegler v. Jackson, 668 F.2d 776, 780 (11th Cir. 1981).

DISCRIMINATORY INTENT

Repeated stark pattern of invidiousness meted out only to minority physicians, satisfies the discriminatory intent prong of the selective prosecution claim. "Discriminatory purpose ..... implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case the prosecution, selected or re-affirmed a particular course of action at least in part 'because of', not merely 'in spite of' its adverse effects upon an identifiable group" Wayte v. United States, 470 U.S. 598, 608-09 (1985). Furthermore, "What an official entity is 'up to' may be plain from the results its action achieve, or the results they avoid" Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). Here the purpose or intent of this investigation was to build up evidence against minority physicians while deliberately avoiding the prosecution of their Caucasian counterparts. Petitioner suffered untold injury and economic deprivation fairly and squarely traceable to the discriminatory purpose of the lopsided investigation and prosecution determined by racial animus. Disparate impact occurs when a facially neutral practice nonetheless results in racial discrimination and there is no sufficient justification proffered. "The task of proving intent which is a mental operation can be proven by acts, words or policy" Washington v. Harris, 650 F.2d 447, 450 (2nd Cir. 1981). As shown below, proof of intent may be

demonstrated through direct or circumstantial evidence of a stark pattern of behavior against a particular race. See Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 US 252, 266 (1977):

a). In an alleged conspiracy that spanned four years and involved three times more Caucasian physicians than minority physicians, the joint team of investigators selected only minority physicians for investigation using undercover patients equipped with recording devices to intentionally build stronger criminal cases against them. Evidence that the prosecution "followed unusual discreet procedures in deciding to prosecute or failed to follow an office policy not to prosecute a certain crime demonstrates discriminatory intent. United States v. Greene, 697 F.2d 1229, 1235 (5th Cir. 1983). Petitioner was selected for undercover controlled consult *because of* the preponderance of the incriminating potential video footage evidence has in guaranteeing a conviction. No recorded undercover consults were conducted during the three months of Dr. Moseley's tenure at the RIC.

b). The prosecutor arbitrarily selected three physicians of color out of an overwhelming number of Caucasian physicians for prosecution in the alleged conspiracy. The prosecutor's awareness of similarly situated Caucasian physicians and refusal to prosecute them while proceeding against comparable physicians of another race infers discriminatory intent. The prosecutor was aware that the prescriptions written by Dr. Moseley were found to be unlawful by the government's medical expert witness but failed to indict Dr. Moseley. "Demonstrating the prosecutor's awareness of similarly situated offenders receiving preferable

treatment establishes discriminatory intent." State v. Rogers, 68 N.C. App. 358, 373 (1984). The prosecutor intentionally failed to indict Dr. Moseley *because of* the professional loss he stood to sustain and to shield him from a criminal sentence. The prosecutor refused to offer a legitimately acceptable reason to proceed against Petitioner but not against Dr. Moseley.

c). Dr. Vinod Shah, a minority physician of color was indicted and prosecuted even when no undercover clinic consults was conducted during his tenure. Dr. Shah who left the RIC in March 2013, was arrested in May 2018 and charged in the alleged conspiracy. This evidences that the prosecutor could have brought charges against any physician who participated in the alleged conspiracy, regardless of whether 'controlled' consults were carried out or not but the prosecutor invidiously elected to indict only minority physicians. Minority physicians were prosecuted *because of* their race and not because of controlled undercover consults. This inappropriate balance in the conduct of the joint team and the fact that no Caucasian physician was indicted confirms a racially motivated discriminatory intent satisfying the second prong of the selective prosecution claim.

d). Only minority physicians were compelled to surrender their professional licenses during the execution of search warrants. Agent Luke executed search warrants twice at the RIC on December 12, 2013 and on February 4 2014. Agent Luke met Dr. Moseley on both occasions but did not demand for his license. Agent Douglas Khan executed a search warrant at the WCV on December 12, 2013 and compelled Dr. Bacon to surrender his professional license.

Agent Charles Sikes contacted Petitioner repeatedly by phone after Petitioner had left the RIC on June 12, 2013 and also on July 29, 2013, demanding that Petitioner should surrender his professional license. (Docs. 593-8 pg.1 and pg.2). Petitioner rebuffed all his demands. Thereafter the DEA instituted legal action against Petitioner in Washington D.C. and compelled Petitioner to surrender his professional license. No Caucasian physician surrendered his license while three physicians of color lost their professional licenses in an alleged conspiracy that Caucasian physician coconspirators far out-numbered minority physicians. When one also considers that Agent Luke of the joint investigative team, requested for Petitioner's criminal background report twice from the FBI (Docs. 593 2 pgs.1&2), the inference of discriminatory intent becomes almost compelling. Government offered no explanation for its selection of defendants other than prosecutorial discretion. That answer simply will not suffice in these circumstances.

Compelling minority physicians to relinquish their professional source of livelihood but not asking equally culpable and similarly situated Caucasians physician to do same supports a claim of discriminatory purpose *because of* the economic devastation such surrendering will have on the livelihood of the minority physicians and their respective families. Disparate impact establishes proof of discriminatory intent. Washington v. Davis 426 U.S. 229 (1976).

e). The prosecutor brought the conviction of the minority physicians to the attention of the Office of the Inspector General (OIG) of the Department of Health and Human Services (DHSS). This led to the further exclusion of the minority

physicians from participating in any federally funded program for a period of fifteen years regardless of the physician's jail term.(Doc. 593-3). So even after Petitioner has served an eight years prison term, not only does Petitioner's license remain revoked, but Petitioner is excluded from participating in any federally affiliated facility in any capacity for a period of fifteen years. Prosecution brought Petitioner's conviction to the OIG and DHSS *because of* the mandatory exclusion imposed on professionals on being found guilty. Thus part of the purpose or intent of this prosecution was not only to incarcerate frail elderly minority physicians but also to deprive them and their families of economic sustenance for a protracted period of time as determined by the exclusion. The similarly situated Dr. Moseley did not have to endure any participatory exclusions.

f). Guided by the sentencing table and Petitioner's offense level of 36, a prison term of 188 to 235 months (15 to 20 years) sought by the prosecutor was designed to guaranty that Petitioner expires in prison – a fate suffered by one of the convicted physicians, Dr. Shah who was frail with ill health at the time of his arrest and died within one year of his incarceration from sepsis due to unsanitary prison conditions. It is doubtful if a physician living a normal life in his retirement home will expire from sepsis. Hence the prosecutor did not only intend to dispossess the minority physicians of their professional means of livelihood but also to ensure that the minority physicians do not survive their prison terms given their ages at the time. The 30 and 42 years old Caucasian physicians, Dr. David Poynter and Dr. Michael Suuls who were involved in the same alleged conspiracy but testified against the

minority physicians could arguably survive a 15 to 20 years prison term but the plausibility of the charged elderly physicians of color, ages 65, 70 and 83 years, with substantial health issues, surviving a 15-20 years prison term is questionable. The elderly ailing minority physicians were selected for prosecution *because of* the possibility that they will all expire in prison. This prosecution not only had a discriminatory purpose but it also embraced an ageist agenda which when fully reviewed is also under prohibition.

g) The similarity in circumstances, longevity of three months in the same clinic, and difference in treatment between Dr. Moseley and Petitioner are sufficient to exclude the possibility that the Government acted on the basis of a mistake. Prosecution's actions were organized, orchestrated and executed with masterly precision *because of* the need to prosecute Petitioner while elevating Dr. Moseley to the prodigious sanctuary of a witness (Docs. 593-4 pg. 1) to shield him from prosecution even though he was of no assistance to the Government in the proceeding.

h) No rational trier of fact would regard the circumstances of Petitioner to differ from those of Dr. Moseley to a degree that would justify the different treatment on the basis of a legitimate Government policy. The prosecutor has repeatedly declined to offer any legitimate, acceptable and objective reason that set Petitioner apart from Dr. Moseley. Therefore Petitioner was prosecuted *because of* his race

i) The facts of Dr. Moseley's and Petitioner's case and the conspiracy charge are such that there was an unacceptable risk that race played a role in Petitioner's indictment since the prosecutor failed to exact the factors that determined a

conspiratorial meeting of the minds between Petitioner and the clinic owners but no conspiratorial meeting of the minds between Dr. Moseley and the clinic owners. See United States v. Chandler, 376 F.3d 1303, 1307 (11th Cir. 2004). The prosecutor elected not to press conspiracy charges against Dr. Moseley *because of* his race. The investigation and prosecution had been conducted selectively with intent to disenfranchise only minority physicians. Invidious discriminatory purpose was the motivating factor in this prosecution which bore heavily on minority physicians and Petitioner suffered injury and economic deprivation traceable to the acts of the prosecution purposely designed to deprive the minority physicians and their families their only source of livelihood. None of the twenty Caucasian physicians, similarly situated to Petitioner or not, who enriched themselves in the alleged conspiracy sustained any losses even though there is no evidence that any of them affirmatively withdrew from the conspiracy. As detailed above, a showing of discriminatory intent is not even necessary when the equal protection claim is based on an overtly discriminatory classification. See Stauder v. West Virginia, 100 U.S. 303 (1880). Furthermore in a case such as this where the discriminatory effect is extreme, the discriminatory effect itself may satisfy the discriminatory intent prong. See Gomillion v. Lightfoot, 364 U.S. 339 (1960). Even if probable cause existed to believe that Petitioner had broken a valid law, even if Petitioner had in fact violated the law, this Court held that discriminatory enforcement of a facially neutral law violated the 14th Amendment. See Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1896). This Court also established "that selective prosecution may

constitute illegal discrimination even if the prosecution is otherwise warranted" Wayte v. United States, 470 U.S. 598. 608 (1985). Certain classifications however, in themselves supply a reason to infer antipathy and race is a paradigm. A racial classification, regardless of purported motivation is presumptively invalid, and can only be upheld only upon an extraordinary justification. Brown v. Board of Education, 347 U.S. 483 (1954); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915) c.f. Lane v. Wilson 307 U.S. 268 (1939). The records further reveal that the prosecutors acted contrary to United States attorney's guidelines or practices anent the prosecution of similarly situated offenders.

CRIMINAL HISTORY OF PETITIONER AND COMPARATOR

As part of the "similarly situated" inquiry, courts must also consider the criminal histories of the defendants and their comparators"' United States v. Jordan, 635 F.3d 1181, 1188 (11th Cir. 2011)

- Agent Luke requested for Petitioner's background check twice from the FBI (Doc. 593-1&2) and the results showed that Petitioner had no criminal history;

- Petitioner had never been sanctioned by the Georgia Composite Medical Board, received any disciplinary action or lost any medical privileges;

- Dr. John Moseley was suspended five times in six years by the Georgia Composite Medical Board for several abuses of professional privileges See (Docs. 593-5 -1 and 593-5-2).

- Dr. Moseley's professional license was suspended for recreational drug use and addiction. See Doc 593-1.

- Dr. John Moseley was also suspended indefinitely by the North Dakota Board of Medicine for sending sexually explicit text messages to a female patient after the patient left his office. See Docs. 625 – pgs. 1-12.

- Of the two physicians with similar longevity, who also must have treated approximately the same number of patients, the prosecution intentionally selected only two files of patients treated by Dr. Moseley for review and eight files of patients treated by Petitioner for review in violation of the equal protection doctrine. The prosecutor cannot advance a legitimate reason for choosing for review two files from one physician and eight files from another physician when both physicians have the same longevity. Prosecutor selected more of Petitioner's files *because of* the possibility that the higher the number of files reviewed, the greater the chances that a physician will be found wanting. This discretionary disparity of choice in the number of files selected evidences further proof of discriminatory intent and this disparity conflicts with the equal protection clause which states that people in similar circumstances should be treated similarly.

- Petitioner was prosecuted for two prescriptions he wrote on April 8, 2013 and June 5, 2013 which the Government medical expert found to be unlawful. The same Government medical expert opined that the prescriptions issued by Dr. Moseley for the two patient files reviewed were unlawful but the prosecutor found it unnecessary to proceed against Dr. Moseley. This again confirms that Dr. Moseley and Petitioner were similarly situated and that failure to prosecute Dr. Moseley violated the equal protection clause of the fourteenth amendment.

- The decision to indict and prosecute the minority physicians was made long before the Government's medical expert gave an opinion on the selected files. Petitioner was indicted by a grand jury that was convened on February 10, 2016. GBI Special Agent Striplin Luke testified before the grand jury on February 10, 2016 that "files of the patients were being reviewed as of now". This statement infers that the decision to indict Petitioner was made before the file review was completed and confirms that the results of the file review was of no material significance in the decision to indict Petitioner. The argument for criminal history of the two physicians raised by the prosecutor to justify Petitioner's indictment is meritless.

- The records do not reflect that any of the charged and prosecuted minority physicians had any professional sanctions at the time of the proceedings.

The need to proceed against Petitioner and not Dr. Moseley, infers that professional miss-conduct, addiction of recreational drugs and criminal history of sexually inappropriate advances towards female patients was of no consideration in the decision to prosecute Petitioner. Furthermore, failure to proceed against Dr. Moseley concludes that the government's enforcement policy is not concerned with addressing abuse of physician privileges, unprofessional physician drug abuse and inappropriate physician sexual deviance as long as such misdeeds are associated with a physician from a protected class.

Simply put, the stance of the prosecution in this matter is that even though Dr. Moseley worked for three months as Petitioner did in the same pain clinic;

- Dr. Moseley was not involved in the alleged criminal conspiracy.
- He did not write any unlawful prescriptions.
- He did not dispense controlled substances outside the legitimate course of medical practice.
- He did not practice at the RIC for the purposes of enriching himself.
- There were no detectable "red flags" of controlled substances act violation during his three months tenure.
- There were no out of state patients that visited the RIC during his tenure.
- No drug seeking, drug abusing or drug dealing patients visited the clinic during his tenure.

- The cash paid by patients during his tenure did not satisfy the money laundering requirements,
- The cash paid in by patients during his tenure did not contribute to the furtherance of the alleged criminal conspiracy;
- The Georgia law passed in August 2013 required pain management clinics to be owned by physicians but the prosecution made exceptions for Dr. Moseley who practiced in a clinic owned by non-physicians at the time.
- Prosecution of Dr. Moseley is not in the purview of the Government's enforcement priorities and enforcement plans and will not have any deterrence value.
- There was sufficient funding to prosecute Petitioner but insufficient funding to press charges against Dr. Moseley.

The American Bar Association Prosecution Function Standards which is "intended to be used as a guide to professional conduct and performance" states that:

"A prosecutor should not invidiously discriminate against or in favor of any persons on the basis of race, religion, sex, sexual preference or ethnicity in exercising discretion to investigate or prosecute. A prosecutor should not use other improper considerations in exercising such discretion" (At 3-1-1; 3-3-1).

"The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in non-frivolous fashion for the purpose of fulfilling a

duty to bring violators to justice". United States v. Falk 479 F.2d 616, 620 (7th Cir. 1973)(En banc). This Court has held that "there is a presumption that a prosecutor has acted lawfully which can be displaced by clear evidence of discrimination. Oyler v. Boles, 368 US 448, 456 (1962). The failure to proceed against Dr. Moseley, who is known to the authorities to have been involved extensively in the alleged conspiracy to dispense controlled substances, unlawfully prescribed control substances, was sanctioned by two state medical boards for drug abuse and sexually inappropriate conduct towards female patients, confirms that the decision to proceed against Petitioner was not undertaken in good faith and vacates the presumption that the prosecutor acted in a non-frivolous manner. The vast array of disparate treatment and disparate impact also displaced the presumption that the equal protection doctrine was not violated. Had no disparate treatment favoring Caucasian physicians been established, Petitioner's prosecution could have been justified. See McDonald v. Santa Fe, 427 U.S. 273 (1976). Since Petitioner has presented evidence which created a strong inference of discriminatory prosecution, the Government was required to explain it away by showing that the selection process actually rested upon some valid grounds. Mere random selection would suffice since Government is not obligated to prosecute all offenders, but no effort was made to justify these prosecutions as a result of random selection and Petitioner's evidence is inconsistent with such a theory. Since no valid basis for the selection of Petitioner was ever presented in the lower courts, this Court should conclude that the only plausible explanation is the one urged by Petitioner.

PROSEUTOR FAILS TO JUSTIFY INDICTMENT

Petitioner has established a prima facie case that he was singled out for prosecution and also that the Government arbitrarily enforced facially neutral laws along racial lines sufficient to shift the burden to the Government to prove non-discriminatory enforcement of facially neutral statutes. "The burden of proof thus shifts to the state to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result" Washington v. Davis 426 U.S. 229, 241 (1976). The prosecutor in response to Petitioner's 28 U.S.C. § 2255 motion stated that as long as the prosecutor has probable cause to believe that a crime has been committed, the choice of charges to bring were within his discretion. The prosecutor further stated in response to the 2255 motion that:

> "The record shows that there were properly considered factors that influenced the government's charging decision in this case". Doc. 563 pg. 16.

The prosecutor has repeatedly refused to enumerate these factors and how they constituted distinguishable prosecutorial factors that set Petitioner apart from Dr. Moseley since the total quantity of drugs prescribed by Dr. Moseley is not in the records. Petitioner contends that the decision to prosecute him was unjustifiably and impermissibly based on Petitioner's race. Prosecutorial discretion is nonetheless subject to equal protection limits and the prosecutor's claim to "prosecutorial discretion" or "discretionary deference" without more is an answer which will not suffice in the light of strong evidence of discriminatory effect and

discriminatory intent. See United States v. Steele, 461 F.2d 1148 (4th Cir. 1972). The prosecutor rated Petitioner as one of the top three prescribers. Doc 373 pg. 133, this argument is meritless since the quantity of drugs prescribed by Dr. Moseley was not in the records.

Furthermore, 'boilerplate terminologies' will not bring closure to family members that untimely lost a loved one to sepsis in prison (Doc. 566) due to an unjustifiable, racially motivated prosecution. In the land of the free and fair, where the spirit of the departed and the bereaved family members yearn for closure, failure to proffer justifiable prosecutorial criteria that will afford them succor, concludes for them, that the fortitude which the founding fathers survived the first winter in Plymouth was an exercise in futility.

MAGISTRATE'S REPORT SUPPORTS PETITIONER'S CLAIM

The Report and Recommendations (Docs. 589) of the magistrate judge which was adopted by the. District court without an independent opinion summarized that Petitioner was prosecuted because of his *LONGEVITY*. (Docs. 589 pg.12). The Report erroneously claimed that the unindicted physicians worked for one day and for five days but failed to acknowledge that Dr. Moseley (Petitioner's comparator) worked for three months. The Report's finding that Petitioner was prosecuted because of a longevity of three months and a similarly situated physician Dr. Moseley of another race with the same longevity, in the same clinic, who committed the same alleged basic crime in substantially the same manner as Petitioner allegedly did, was not proceeded against, provides a compelling inference of

selective prosecution. "A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced" United States v. Lewis, 517 F.3d 20, 27 (1st Cir. 2008). The adoption of the magistrate's report by the district court without an independent opinion, binds the district court to the report which supports a finding of selective prosecution.

DISTRICT COURT'S OPINIONS SUPPORT PETITIONER'S CLAIM OF SELECTIVE PROSECUTION

Doc. 601 of 10/07/2021.

The district court's order (Doc. 601) "overruled Petitioner's objections and accepts and adopts the (Magistrate's) Recommendation (Doc. 596 pg. 1) in full". As established in the analysis of the Report and Recommendations above, this order, by virtue of full adoption of the magistrate's opinion, supports a finding that Petitioner was selectively prosecuted since a similarly situated physician of another race, who had the same longevity as Petitioner was not prosecuted.

Doc. 603 of 10/14/2021.

In a related proceeding Petitioner filed a motion for new trial on grounds of selective prosecution, Petitioner also filed a motion for discovery in support of the claim of selective prosecution but the district court denied both motions (Doc. 603).

The district court order denying Petitioner's new trial motion Doc. 603 conceded that the element of selective prosecution was available pretrial. Doc. 603 pg. 12.

The denial order further conceded that Petitioner has arguably established that a similarly situated physician of another race was not prosecuted (Doc. 603 pg. 13). The district court invariably admitted that trial counsel was constitutionally deficient for failing to file pretrial motions since the elements of selective prosecutions were available pretrial. Furthermore, the denial order's finding that a similarly situated physician of another race was not prosecuted satisfies both prongs of the selective prosecution requirement as follows:

First prong: Discriminatory Effect- a finding that a similarly situated physician who had the same longevity as Petitioner was not prosecuted satisfied the first prong of the selective prosecution claim. Wayte v. United States 470 U.S. 598, 609-10 (1976).

Second prong: Discriminatory Purpose – the fact that Petitioner's prosecution was based on an impermissible reason - race, a finding that the similarly situated physician was of another race satisfied the discriminatory intent prong of the selective prosecution claim. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). This Court also held that "A prima facie case of discriminatory purpose may be proved by the absence of one race which will shift the burden of proof to the state". See Washington v. Davis, 426 U.S. 229, 242 (1976).

Petitioner was prosecuted because of his race as depicted by the stark pattern of adverse treatments against minority physicians. Had any Caucasian physician been

indicted, the preponderance of the selective prosecution defense would have been unavailing.

In an equal protection of the 14th Amendment claim, the district court erred by failing to: (i). address why two physicians recognized by the district court itself to be arguably similarly situated were treated differently in the same district court, one as a criminal defendant and the other as a Government witness; (ii) identify the prosecutorial factors that justified Petitioner's indictment but not that of Dr. Moseley; (iii) recognize that direct or circumstantial evidence of a stark pattern of invidious behavior against a particular race satisfies a finding of discriminatory intent. The order (Doc. 603) denied Petitioner's discovery motion in a footnote (Doc. 603 pg. 13) holding that the evidence Petitioner sought was available pretrial. The district court here concedes that the elements of the selective prosecution defense were available pretrial and therefore do not meet the requirements of "newly discovered" evidence in support of a new trial motion. This opinion further affirms that trial counsel was functionally deficient for failing to file pretrial motions challenging the indictment on grounds of selective prosecution.

The Government's medical expert reviewed some of the files of patients treated by Dr. Moseley and opined that the prescriptions for controlled substances were unlawful and were not written for legitimate medical purposes and also not written in the usual course of legitimate medical practice. The district court opined with reference to these expert findings that this evidence was merely 'cumulative evidence'. Cumulative evidence infers that the expert findings corroborates

previously tendered evidence of the alleged conspiracy and unlawful prescription of controlled substances. This expert's findings and district court opinion squarely incriminated Dr. Moseley in the alleged offenses. Even though the district court identified that the evidence satisfied the requirement of cumulative evidence, Dr. Moseley was not charged with any offense but was given a 'bath immunity' and safely elevated to the prodigious sanctuary of a prosecution witness, (Docs. 593-4) in spite of not being of any assistance whatsoever to the Government in the prosecution. The district court's recognition of Dr. Moseley's culpability and the prosecutor's failure to proceed against him while proceeding against Petitioner, supports a claim of selective prosecution.

THE LOWER COURT CONTRADICTS SUPREME COURT'S PRECEDENCE

The district court stated in its denial of Petitioner's new trial motion that; "Petitioner has shown arguably that he was similarly situated with another physician but that Petitioner failed to show that his prosecution was motivated by a discriminatory intent. This Court had acknowledged that when a "defendant made a prima facie case of discrimination, a prosecutor must provide an explanation. McClesky v. Kemp, 481 U.S. 279, 297 n 18 (1987). The district court erred by failing to request the Government to offer a legitimately acceptable objective reason for Petitioner's prosecution after the district court conceded arguably that Petitioner had established a prima facie case of discrimination. The district court erred by failing to allow Petitioner to develop his case and also erred in denying Petitioner's motion for discovery after the district court's arguable concession that a similarly

situated physician of another race was not prosecuted. A criminal defendant may [...] be entitled to discovery on the issue of selective prosecution, if he introduces 'some evidence tending to show the existence of the elements of the defense'". United States v. Schmucker, 815 F.2d 413, 415 (6th Cir. 1987). Since Petitioner has established that a similarly situated physician of another race was not prosecuted, the district court's denial of the discovery motion contravenes this Court's precedent. The Armstrong Court stated that the defendants may have met the discovery standard if they had investigated whether similarly situated defendants of other races were "known to law enforcement officers, but .... not prosecuted". United States v. Armstrong, 517 US 456, 470 (1996). Also once a defendant makes a prima facie showing, the burden of production shifts to the prosecution to rebut the inference that the selection was made in a discriminatory manner. See United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972). Agent Luke executed search warrants twice at the RIC on December 12, 2013, and February 4, 2014 and Dr. Moseley was consulting at the RIC on both occasions. Agent Luke testified at trial that he reprimanded Dr. Moseley for operating an unlicensed pain clinic while executing the search warrant on December 12, 2013 by stating thus:

> "So when we executed the search warrant on December 2013, we told Dr. Moseley, y'all don't have a license to be a pain management clinic. The Valdosta clinic reopened. The Columbus reopened first of January 2014 and so I obtained another search warrant for a state of Georgia violation for operating a medical clinic without a pain management license. We executed

that search warrant on February 4, 2014 recovered additional files" (Doc. 367 pg. 119)

Agent Luke's testimony under oath evidences that the similarly situated physician of another race, and his violation of the controlled substance act was also well *known to the law enforcement officers but was not prosecuted.* Here Petitioner also met the discovery requirements in a selective prosecution claim stipulated by this Court but the motion for discovery was denied by the district court.

THE ELEVENTH CIRCUIT'S OPINION

The eleventh circuit did not grant a certificate of appeallability on Petitioner's claim that trial counsel was deficient for failing to file pretrial motions challenging the prosecution on grounds of selective prosecution even though the eleventh circuit holding is that; "An evidentiary hearing is only required where a defendant makes a prima facie showing that he was singled out for prosecution while others similarly situated were not". Owen v. Wainwright, 806 F.2d 1519, 1523 (11th Cir. 1986). In support, this Court stated that "If a plaintiff makes a sufficient threshold showing that a prosecutor's discretion has been exercised for impermissible reasons, judicial review is available.

In a related matter, the eleventh circuit dismissed Petitioner's motion for new trial on grounds of selective prosecution stating that the motion should have been filed pretrial and more importantly that Petitioner had access to the facts of the selective prosecution claim before and thus cannot show good cause for failing to raise a

timely selective prosecution defense. (USCA11 Case 21-13693 of 07/28/2022 pgs. 11 & 12)

The eleventh circuit surmised that a selective prosecution motion was a pretrial motion which has no bearing on the charges before defendants or on the outcome of the case and hence is not grounds for new trial motion.

In sum a case of such socio-demographic significance that resulted in the incarceration of three elderly minority physicians and the untimely death of one of them in prison had never been adjudicated on its merits in the criminal justice system. The district court opined that the elements of selective prosecution were available to the Petitioner prior to trial, effectively waived the claim as untimely but declined to find that trial counsel was constitutionally ineffective for failing to file pretrial motions to dismiss the indictment on grounds of selective prosecution. The fact that the lower courts recognized that the elements of selective prosecution were available pretrial infers that trial counsel was ineffective for failing to raise the claim pretrial and that the Sixth Amendment guarantee of effective representation of criminal defendants by counsel was not met. In this case the promise of Gideon v. Wainwright, 372 U.S. 335 (1963) was not kept and Petitioner's conviction is questionable.

THE TWO COURT RULE

The two court rule states that a court will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Graver Tank v. Linde Air 336 US 271, 275-76 (1949). The

unanimous holding by the district and appellate courts that the elements of selective prosecution were available pretrial shifts the focus of inquiry to whether trial counsel's inactions were unreasonably incompetent.

SIXTH AMENDMENT VIOLATION

Petitioner has presented sufficient facts that established a colorable entitlement to a selective prosecution defense or sufficient facts "to take the question past the frivolous state and raise reasonable doubts about the prosecutor's purpose" United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983). The district court adopted the magistrate's report and stated that the elements of selective prosecution were available to Petitioner prior to trial but Petitioner waived that defense for failing to raise appropriate motions pretrial.

The real nub of dispute in this case now is given the preponderance of elements of selective prosecution which the lower courts conceded existed prior to trial, whether trial counsel was constitutionally ineffective for failing to file pretrial motions to dismiss the indictment on grounds of selective prosecution? In the face of established prima facie case of selective prosecution, the lower courts cannot hold on one hand that the elements of selective prosecution were available pretrial and also rule that trial counsel was not functionally deficient for failing to file appropriate pretrial dismissal motions. Trial counsel admitted into evidence (M1) the picture of Dr. Moseley which he displayed in court during witness testimony and also during his closing arguments. Trial counsel repeatedly described the prosecution as "cherry picking" (Docs. 373 pg. 106, Docs. 373 pgs. 119-20) during closing arguments.

Furthermore, trial counsel spuriously attempted to appeal to the jury's race related passion in these two closing arguments.

> "And Dr. Moseley, who the Government presented expert testimony about, and he is the one I showed you the picture of, he is not indicted. He has not pled guilty. They presented some more expert testimony about him." Doc. 373 Pg. 108.

> "So if the explanation for why Dr. Mbanefo is sitting here and Dr. Moseley isn't is the number of pills, well, then how many pills is too much? I mean we already know there's no cookbook. There is no set prescription amount. The experts told you that." (Doc 373 pg. 118).

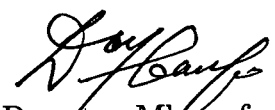
The facts of this claim infer that trial counsel clearly understood that the trial was racially motivated but the remedy he pursued was not that expected of a reasonably competent counsel. Had trial counsel not realized that this was a case of selective prosecution, the preponderance of his incompetence will have been less compelling. Therefore, trial counsel did not exercise the skill, judgment and diligence of a reasonably competent defense attorney as required by the Sixth Amendment. United States v. Poterfield, 642 F.2d 122 (10th Cir. 1980). "A defense of selective prosecution is a matter that is independent of a defendant's guilt or innocence, so it is not a matter for the jury" United States v. Abboud, 438 F.3d 554, 579 (6th Cir. 2006). Trial counsel was constitutionally deficient for presenting an argument of selective prosecution to the jury for consideration. Petitioner was prejudiced by trial

counsel's failure to file pretrial motions to dismiss the indictment on grounds of racially motivated selective prosecution because the equal protection remedy is to dismiss the prosecution, not to compel the executive to bring another prosecution" United States v. Armstrong, 517 U.S. 456, 459, 463 (1996).

CONCLUSION

The merits of this established selective prosecution of elderly minority physicians which resulted in the death of one of them in prison, has not been adjudicated in the lower courts since pretrial motions were not filed. The lower courts have repeatedly stressed that the elements of the selective prosecution defense were available pretrial but will not concede that trial counsel was not professionally efficient for failing to file the requisite pretrial motions. "The question presented for review is whether on this record the decision to prosecute defendant was selective or discriminatory in violation of the equal protection clause" Flynt v. Ohio, 451 US 619, 622 (1981). "Simply put the question is whether the defendant has been denied a right in violation of the constitution" Yick Wo v. Hopkins 118 U.S. 356, 365 (1886); and for the reasons stated heretofore, this writ should be granted.

Respectfully submitted this 25th day of April, 2023.



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