No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS D. WINSTON

PETITIONER,
VS.

STATE OF NEBRASKA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nebraska Supreme Court denied a petition for further review of the decision of the Nebraska Court Appeals which affirmed convictions and sentences of consecutive terms of 19 to 20 years' imprisonment for manslaughter and 20 to 30 years' imprisonment, with a five year mandatory minimum, for use of a firearm to commit a felony. The question presented is:

1. Whether the Nebraska Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court or has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court in respect to racist prosecutorial rhetoric at trial in violation of petitioner's rights to a fair trial and due process under the 5th, 6th, and 14th Amendments to the United States Constitution.

LIST OF PARTIES

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

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IN THE

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No. _____

Marcus D. Winston,

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v.

State of Nebraska

Respondent

On Petition for a Writ of Certiorari to the

Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The unreported decision of the Nebraska Court of Appeals which affirmed convictions and sentences of consecutive terms of 19 to 20 years' imprisonment for manslaughter and 20 to 30 years' imprisonment, with a five year mandatory minimum, for use of a firearm to commit a felony appears at Appendix A. *State v. Winston*, No. A-21-941, 2022 WL 17814257, (Neb. Ct. App. Dec. 20, 2022), *review denied* (Feb. 27, 2023)

The sentencing order of the Lancaster County District Court of Nebraska appears at Appendix B to the petition and is unpublished.

The Order denying review (denial of petition for further review) appears at Appendix C and is unpublished.

JURISDICTION

The date on which the Supreme Court of the State of Nebraska declined review of the case was February 27, 2023. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 5th Amendment to the United States Constitution which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The 6th Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public 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 the assistance of counsel for his defense."

Section 1 of the 14th Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. BACKGROUND

1. Introduction

This case involved constitutional challenges by petitioner, Mr. Marcus D. Winston, to his convictions and sentences and sentences of consecutive terms of 19 to 20 years' imprisonment for manslaughter and 20 to 30 years' imprisonment, with a five year mandatory minimum, for use of a firearm to commit a felony. This was a jury trial in a first degree murder case that ended with a conviction for a lesser-included offense. The theory of defense was self defense and defense of others. Petitioner is Afro-American. "Spook" is a racial slur used to dehumanize a person. Prosecutors, throughout the trial, referred to petitioner as "Spook" or "Spookzilla." Defense counsel never objected.

Petitioner was represented by new counsel on direct appeal. Constitutional challenges of ineffective assistance of counsel and the denial of a fair trial and due process were raised. The Nebraska Court of Appeals found no error holding the challenged terms were nicknames for petitioner. Discretionary relief was denied.

2. Procedural Summary

Following a jury trial, petitioner was sentenced on October 21, 2021 to consecutive terms of 19 to 20 years' imprisonment for manslaughter and 20 to 30 years' imprisonment, with a five year mandatory minimum, for use of a firearm to commit a felony. *See* Appendix B. The convictions and sentences were affirmed by the Nebraska Court of Appeals on December 20, 2022. *See* Appendix A. A petition for further review was filed and on February 27, 2023, the Nebraska Supreme Court denied discretionary review. *See* Appendix C.

3. Preservation of Issues

The federal questions for which review is sought were raised on direct appeal as part of a constitutional challenge under the 6th Amendment right to effective assistance of counsel which resulted in the denial of the 5th and 14th Amendment rights to a fair trial and due process of law. In the Nebraska Court of Appeals, the federal questions were raised in Assignments of Error number 6 and 7 of the Brief of Appellant and were as follows:

6. The prosecution committed misconduct by referring to petitioner as "Spook" and "Spookzilla" throughout [petitioner's] jury trial in violation of [petitioner's]s substantial rights to a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 11 of the Nebraska Constitution.

7. [Petitioner's] trial counsel were ineffective for failing to object when the prosecutors committed misconduct by referring to [petitioner]as "Spook" and "Spookzilla" throughout [petitioner's] jury trial in violation of [petitioner's] right to the effective

assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 11 of the Nebraska Constitution.

Appellant's Brief to the Nebraska Court of Appeals addressed those questions beginning at page 40.

The Nebraska Court of Appeals held that no prosecutorial misconduct occurred because the prosecution introduced the challenged terms "for the express purpose of preparing the jury to hear witnesses identify" petitioner by those terms as those terms were also his nicknames. *See* Appendix A at page 5. In the absence of an underlying error, the Nebraska Court of Appeals found no constitutional ineffective assistance of counsel. *Id.* at page 6.

The constitutional challenges were presented to the Nebraska Supreme Court on pages 5 through 10 of the Petition for Further Review. Discretionary review was denied on Februay 27, 2023. *See* Appendix C.

4. Summary of Facts

Petitioner shot and killed Timothy Montgomery during a nighttime altercation outside a bar in Lincoln, Nebraska. Montgomery was in an ongoing struggle with petitioner's cousin. Petitioner pulled a gun and fired. The homicide charge was first degree murder but the jury arrived at a verdict of the lesser included offense of manslaughter. On at least 33 pages in the bill of exceptions, the prosecutors and/or prosecution witnesses referred to petitioner as "Spook" or "Spookzilla." (286, 288, 290, 291, 293, 305, 308, 310, 339, 342, 782, 818, 948, 949, 950, 951, 952, 953, 954, 955, 956, 960, 963, 1023, 1141, 1142, 1144, 1145, 1156, and 1368) Some examples of this include the following:

Prosecutor: Do you know a Marcus Winston?

Ray Gordon: Yeah, I met him before, several times.

Prosecutor: Do you know him by another name?

Gordon: Spook.

Prosecutor: And do you see Spook and Mr. Win - - Spook, Mr. Winston here in the courtroom here today?"

(286:7-13)

Prosecutor: Oh, okay. You know that Untavius Kellum is friends with Spook, Marcus Winston ...?

(288:17-19)

Prosecutor: Was Spook, Mr. Winston, there in the Main Street that evening?

(290:24-25)

Prosecutor: And you tell Spook to get involved because he knows you?

(291:15-16)

Prosecutor: And you learn that at some point in between there Spook and your cousin, Antwan Gary, had talked over the phone?

(293:9-11)

Prosecutor: And you saw Spook walk out of the bar ...?

(305:2)

Prosecutor: You were standing right about there and Tim and Spook ...?

(310:10)

Prosecutor: Would you hang out with Spook and Tim together?

(339:24)

Prosecutor: All right, earlier you mentioned that Spook was like a brother to you ...?

(342:9-10)

Prosecutor: When did you meet Spookzilla and where?

(949:6)

Prosecutor: Did you have any contact with Spookzilla besides that you would be at Main Street?

(950:2-3)

Prosecutor: Where was Mr. - - well, I guess, where was Spookzilla and the other gentleman initially having that discussion at?

(953:7-9)

Prosecutor: Did you see where he or Spook went after that?

(956:12)

Prosecutor: What was Spookzilla doing, where was he?

(957:14)

Prosecutor: At the time you see Spookzilla ...?

(958:4)

Prosecutor: Do you know a Marcus Winston, or a Spook, Spookzilla?

Untavius Kellum: Yes, I do. * * * We worked together ....

(1023:19-22)

Petitioner's trial counsel did not object when the prosecutors or prosecution witnesses used the racial slurs "Spook" or "Spookzilla." Nebraska has rule of courtroom decorum which

provides: "Witnesses and parties shall be referred to and addressed by their surnames." Neb. Ct. R. § 6-1511.

B. NEBRASKA COURT OF APPEALS RULING

The holding of the Nebraska Court of Appeals is best captured in this quote:

> There was no dispute in the present case that many of the witnesses knew Winston by the nicknames "Spook" or "Spookzilla." Winston himself testified that those were nicknames of his and that "everybody," including his mother, referred to him by those names. The prosecution introduced those terms to the jury, not to mislead or unduly influence the jury, but for the express purpose of preparing the jury to hear witnesses identify Winston by those names. The prosecution similarly identified other individuals involved in this case by their nicknames, and defense counsel adopted the same practice when it was convenient to do so. Winston himself did not object to the use of his nickname at trial, and his defense counsel even referred to Winston by his nickname on multiple occasions. The fact that Winston's admitted nicknames also can be construed in other settings as racial slurs does not, in and of itself, render the prosecution's use of those terms improper. In this case, we find no plain error in the prosecution's use of Winston's nicknames, and we thus conclude that the record affirmatively rebuts Winston's claim that trial counsel was ineffective for failing to object to that practice.

(Appendix A at pages 5-6)

REASONS FOR GRANTING THE PETITION

A. The United States Supreme Court Should Settle for All Courts How Racial Rhetoric by Prosecutors Should Be Analyzed.

Clarity is needed in order to identify what conduct and language is offensive to the dignity and assurances afforded by the 5th, 6th and 14th Amendments to the United States Constitution and what remedies should be employed. In the absence of a working framework, a "helpless peity" has emerged. A case by case approach has not sufficiently mitigated the damage to the administration of justice caused by racist rhetoric. An appreciable problem persists and a workable solution from the United States Supreme Court is needed.

"Racist rhetoric" in this petition means "language, conversation, words and images involved in persuasive communication" which involve "appeals to racial stereotypes, whether deployed consciously or unconsciously," "regardless of the individual prosecutor's intent in using it, because of the likelihood or triggering racial stereotypes in those who hear it." Mary Nicol Bowman, Confronting Racist Prosecutorial Rhetoric at Trial, 71 Case W. Rsrv. L. Rev. 39, 42 (2020).

The terms "Spook" and Spookzilla" are racist rhetoric and are dehumanizing. Using the imagery of monsters is an invocation of racial stereotypes and a powerful invitation to a jury to be fearful, to loathe, and have less empathy for a person so labeled. Praatika Prasad, Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response, 86 Fordham L. Rev. 3091, 3105-79 (2018); Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 Seattle U. L. Rev. 795, 820 (2012); Ryan Patrick Alford, Appellate Review of Racist Summations: Redeeming the Promise of Searching

Analysis, 11 Mich. J. Race & L. 325, 345 (2006); David Pilgrim, The Brute Caricature, Ferris State Univ. (Nov. 2000) http://www.ferris.edu/news/jimcrow/brute/).

The terms also fit the dictionary definition of a slur, which is "an insult or disparaging remark or innuendo" and "a shaming or degrading effect." https://www.merriam-webster.com/dictionary/slur.

The broad condemnation of racism in the administration of justice by the United States Supreme Court is undeniable. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The Court has set forth that racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224, (2017). "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice. " *McCleskey v. Kemp*, 481 U.S. 279, 309–10 (1987) (internal citations and footnotes omitted).

The issue of prosecutorial misconduct involving racist prosecutorial rhetoric at trial, however, has not been specifically addressed. In 2013, Justice Sotomayer proclaimed in an order denying a petition for certiorari that racial rhetoric from a prosecutor "diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice." *Calhoun v. United States*, 568 U.S. 1206 (2013). Justice Sotomayer cited *McCleskey v. Kemp*, 481 U.S. *supra* at

309, n. 30, for the proposition that "The Constitution prohibits racially biased prosecutorial arguments." *McCleskey* cited *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Professor Mary Nicol Bowman, Clinical Prosessor of Law, Sandra Day O'Connor College of Law at Arizona State University has written extensively on the role racism plays in our court system. She explained the limitations on the United States Supreme Court decisions on prosecutors' racial rhetoric as follows:

McCleskey cited *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), for the proposition that the Constitution prohibits racially biased prosecutorial arguments. *McCleskey*, 481 U.S. at 309 n.30. But the dissent in a later case noted that there were only two allegedly improper comments in the closing in *Donnelly*, and one of those was ambiguous. *Darden v. Wainwright*, 477 U.S. 168, 193 (1986) (Blackmun, J., dissenting). *Darden* involved more racist comments, but those comments were interwoven with other improper appeals. *See id.* at 189–92 n.2. Neither *Darden* nor *Donnelly* directly confronted the racial components of the comments, and both held that the trials were not so infected with unfairness as to justify reversal of the convictions. *Darden*, 477 U.S. at 181–82; *Donnelly*, 416 U.S. at 645.

Bowman, *supra* at 42 n. 13.

The broad condemnation of racist rhetoric has been insufficient to thwart its abuse. At the appellate levels, these cases often arise in the context of claims involving prosecutorial misconduct and ineffective assistance of counsel. Rather than tackling the impropriety of a racially charged comment, courts frequently apply a plain error or harmless error analysis, concluding that even if improper, the comment does not require reversal. Bowman, *supra* at 42, 71-82; Michael D. Cicchini, Combating Prosecutorial Misconduct in Closing Arguments, 70

Okla. L. Rev. 887, 992 (2018); Craig Lee Montz, Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases, 28 Ohio N.U. L. Rev. 67, 76, 78 (2001); V.A. Richelle, Racism as a Strategic Tool at Trial: Appealing Race-Based Prosecutorial Misconduct, 67 Tul. L. Rev. 2357, 2359-60 (1993). A focus on the intent of a prosecutor might also overlook the effect of a well-meaning prosecutor who has inappropriately guided jurors into the minefields of implicit bias. Bowman, *supra* at 74.

Ethical obligations imposed on attorneys have also been insufficient to curb prosecution abuse of racist rhetoric. "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." ABA Criminal Justice Standards for the Prosecution Function § 3-1.2(b) (4th ed. 2017) Prosecutors "may strike hard blows [but are] not at liberty to strike foul ones. It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Prosecutorial reliance on racial rhetoric is a problem that persists beyond the circumstances of petitioner's trial. Professor Bowman tracked numerous cases of racist prosecutorial rhetoric across the country and arrived at the humbling conclusion that "Current law fails to prevent prosecutorial rhetoric or adequately dealt with it, when it occurs." Berger, *supra* at 68-71. "When appellate courts label conduct as improper but refuse to impose any meaningful remedy, the appellate courts' warnings about impropriety are easily seen as empty threats." *Id.* at 78 The task of responding to this misconduct is made more difficult by the reality that decision making is infused with implicit bias and racialized outcomes may derive

from racial stereotypes despite the best intentions of a prosecutor or a rejection at the conscious level of racism by jurors and other participants. Subtle coding of how to view evidence may adversely influence decision making even if the intention of the speaker was honorable.

The problem of prosecutorial racist rhetoric is of such a magnitude that the warning of Associate Justice Harry Blackmun in his the dissenting opinion of *Darden, supra* rings an alarm.

> Twice during the past year—in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), and again today—this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:
>
> > This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of *helpless piety* is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of

> "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary" (footnote omitted). *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661, *cert. denied*, 329 U.S. 742, 67 S.Ct. 49, 329 U.S. 742 (1946).
>
> I believe this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent.

477 U.S. at 205–06.

State courts have not successfully taken measures to cure the lack of specific guidelines from this nation's highest court.

California's legislative branch has implemented legislation designed to address and remedy the concerns of racially charged language and imagery. In 2020, California passed the Racial Justice Act, Cal. Penal Code § 745. This Act prohibits "racially discriminatory language" in criminal trials and covers both implicit and explicit bias. Among the protections afforded by the Act are the following:

(a) The state shall not seek or obtain a criminal conviction or seek, obtain, or impose a sentence on the basis of race, ethnicity, or national origin. A violation is established if the defendant proves, by a preponderance of the evidence, any of the following:

(1) The judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin.

(2) During the defendant's trial, in court and during the proceedings, the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or juror, used racially discriminatory language about the defendant's race, ethnicity, or national origin, or otherwise exhibited bias or animus towards the defendant because of the defendant's race, ethnicity, or national origin, whether or not purposeful. This paragraph does not apply if the person speaking is relating language used by another that is relevant to the case or if the person speaking is giving a racially neutral and unbiased physical description of the suspect.

Petitioner avers that the regulation of attorney conduct is the realm of a different branch of government. A solution to prosecutorial abuse of racial rhetoric should come from the judiciary. Piecemeal approaches have failed. Workable solutions and guidelines are achievable. In addition to the language utilized in the California legislation, the United States Supreme Court might consider the propriety of other solutions. Based upon Professor Bowman's suggestions the following is a list of approaches and guidelines to address prosecutorial racist rhetoric: (1) Impose a rebuttable presumption of harm, *id.* at 47 (2) Explicitly prohibit racial slurs, animal

references/analogies or animal imagery, language that invoking stererotypes, us/them references, unnecessary emphasis on locations with racial connotations or race of the accused or victim beyond what is necessary to the case, and arguments suggesting the severity of the crime or trauma is worse because of the race of the participants, *id.* at 118; (3) Utilize an analysis similar to balancing formulation in Evidentiary Rule 403 considering the probative value of the racist rhetoric, the potential for prejudice, and any court provided jury instruction or admonition, *id.* at 95-107; (4) Require a motion in limine by prosecutors for proposed references to race *id.* at 107; (5) charge trial courts with the responsibility to manage trials to prevent and appropriately respond to racist rhetoric including through *sua sponte* action in the absence of a timely objection, *id.* at 110-13; and (6) provide structured guidelines on when prosecutorial racist rhetoric merits a mistrial. *Id.* at 113-15.

B. The Nebraska Court of Appeals Has Decided this Case in a Way That Conflicts with Relevant Decisions of the United States Supreme Court.

As noted in the preceding argument, the broad condemnation of racism in the administration of justice by the United States Supreme Court has been undeniable. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The Court has set forth that racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224, (2017). "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ...

is a vital principle, underlying the whole administration of criminal justice. " *McCleskey v. Kemp*, 481 U.S. 279, 309–10 (1987) (internal citations and footnotes omitted).

The United States Supreme Court has instructed our nation's courts that racial bias is a problem that mandates vigilance. The Nebraska Court of Appeals did nothing more than acknowledge that Spook and Spookzilla can be construed as racial slurs and that the use of the language was repeated on multiple occasions during the trial. No consideration was given to the potential of prejudice on the trier-of-fact. Such an analysis gave short-shrift to a developed body of law by the United States Supreme Court which has been mindful of the scientific developments behind the understanding of the pernicious effects of explicit and implict racial bias and the ever present struggle to confront them.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Date: May 25, 2023