No. 23-5505

IN THE

Supreme Court of the United States

JACQUES LAMAR WALKER,

Petitioner,

v.

VIRGINIA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

On August 29, 2023, Petitioner Jacques Lamar Walker ("Walker" or "Petitioner") filed his Petition for a Writ of Certiorari ("Petition"). On December 9, 2023, the Commonwealth of Virginia ("Commonwealth" or "Respondent") filed its Brief in Opposition. Walker now replies.

ARGUMENT

BECAUSE THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN IT REFUSED TO PRESCREEN AND EXCLUDE A WITNESS'S IN-COURT IDENTIFICATION OF WALKER AS THE MASKED BANK ROBBER, THE SUPREME COURT OF VIRGINIA ERRED BY REFUSING TO REVERSE HIS CONVICTIONS.

In its Brief in Opposition, the Commonwealth urges the Court to reject Walker's request for review for two reasons. First, the Commonwealth contends review under Rule 10 of the United States Supreme Court is unwarranted because the Supreme Court of Virginia's Opinion is consistent with the Due Process Clause of the Fourteenth Amendment and "accords with the vast majority of courts to address this question following [Perry v. New Hampshire, 565 U.S. 228 (2012)]. (Br. in Opp., p. 9.) "That a small number of state courts have held otherwise does not necessitate this Court's intervention," the Commonwealth intones. (Br. in Opp., p. 9.) Second, the Commonwealth argues in the alternative that the Court should

deny the Petition because any Due Process Clause violation below was harmless beyond all reasonable doubt. (Br. in Opp., pp. 9-10.) The Court should reject both arguments and grant Walker a writ of certiorari.

A. Certiorari Review Is Warranted Under Rules 10(b) and (c) Of The Supreme Court Because A Growing Minority Of Courts Correctly Maintain That The Due Process Clause Requires Judicial Prescreening Of First-Time, In-Court Identifications Of The Defendant.

The Commonwealth acknowledges that a "small group of cases" has held that the same due process imperative recognized in Neil v. Biggers, 409 U.S. 188 (1972) for judicial prescreening of unnecessarily suggestive, out-of-court identifications arranged by police officers applies with equal force to first-time, in-court identifications elicited by prosecutors at trial. (Br. in Opp., p. 19.) But the Commonwealth insists the minority view is precluded by Perry, 565 U.S. at 228. According to the Commonwealth, the Due Process Clause requirement for prescreening of witness's identification testimony applies only to showups or other suggestive identification scenarios overseen by police officers prior to trial.

The Commonwealth arrives at this blinkered assessment by positing that Perry, 565 U.S. at 228 is directly on point and therefore controlling precedent with respect to the legal issue framed by Walker's Petition. Working from that faulty premise, the Commonwealth inappropriately discounts and excludes from its consideration several decisions which directly support Walker's position but preceded Perry 2012. See, e.g., United States v. Rogers, 126 F.3d 655, 656-58 (5th

Cir. 1997); United States v. Hill, 967 F.2d 226, 232 (6th Cir. 1992); United States v. Archibald, 734 F.2d 938, 942 (2nd Cir. 1984). The Commonwealth also refuses to count as relevant precedent under Rule 10(b) post-2012 decisions which support Walker's position but do not explicitly distinguish Perry, such as United States v. Greene, 704 F.3d 298, 305-07 (4th Cir. 2013) and City of Billings v. Nolan, 383 P.3d 219, 224-25 (Mont. 2016). These and other decisions the Commonwealth artificially omits from its case law count expose the depth of the current split among state and federal courts on the important constitutional objection Walker preserved in the trial court for de novo review on appeal.

The Commonwealth's sweeping dismissal of state and federal decisions which preceded or failed to distinguish Perry, 565 U.S. at 228 is unsound. The Perry Court's analysis is certainly relevant but not dispositive because it did not confront the question of first-time identifications at trial. Perry concerned a pre-trial identification of the suspect by a witness that was not arranged or influenced by law enforcement officers. Perry did not address whether a first-time witness identification elicited by prosecutors in front of jurors violates the Fourteenth Amendment. Judicial opinions which directly address or resolve that vital due process question should be included in the Supreme Court's analysis under Rule 10(b) regardless of whether those decisions expressly distinguish Perry.

Although Perry is not directly on point, the Supreme Court's analysis there supports rather than undermines Walker's Petition. At the core of Perry was the Supreme Court's conclusion that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Id. at 245. Due process requires exclusion of unreliable identifications, the Perry Court explained, only when barring the identification testimony would deter the use of unnecessarily suggestive procedures by state actors. Id. at 241-42.

Walker's Petition presents an opportunity for the Court to clarify, or extend, Perry in two interrelated respects. First, the Court should use the Petition as a vehicle for disapproving the reasoning of state and federal courts which have misread Perry to apply only to "police" misconduct. The Court should declare that its reference to "improper state conduct" in Perry encompasses unnecessarily suggestive identification procedures orchestrated by prosecutors as well as by police officers. Contrary to the inflexible stance adopted by several (but hardly all) courts, Perry should be read broadly to mandate judicial prescreening for eyewitness reliability to deter all state actors, particularly prosecutors, from resorting to unfairly suggestive procedures that pose a substantial risk of misidentification.

Second, Walker's Petition presents an opportunity for the Court to make clear whether the deterrence principles at work in Perry require judicial prescreening of first-time, in-court identifications as well as to pre-trial witness identifications. The Commonwealth in its Brief in Opposition emphasizes that the majority of courts has concluded that the defendant's right to cross-examine the eyewitnesses at trial in front of a jury renders judicial prescreening unnecessary. (Br. in Opp., pp. 15-17.) But since the Supreme Court of Virginia in June 2023 issued Walker, 887 S.E.2d at 544 (Pet. App. 1a-19a) three state courts of last resort have held or strongly suggested that a first-time, in-court identification of the defendant is subject to judicial prescreening for reliability, at least when, as here, the defendant timely requests such prescreening. These recent, post-Walker decisions by state courts of last resort accentuate the national divide on this frequently recurring due process issue. See People v. Perdue, 2023 NY Slip Op. 06404, **3, 2023 N.Y. LEXIS 1996, *6-7 (Ct. App. N.Y. Dec. 14, 2023) [to be published] ("That defense counsel may cross-examine a witness on the suggestiveness of a first-time, in-court identification, or make such arguments to the jury, does not render an in-court identification less suggestive and does not always eliminate the risk that a jury may credit a tainted identification. . . . Thus, to counteract the heightened risk of misidentification in the first-time, in-court identification context, defendants should be afforded a meaningful opportunity to

request additional procedures that would (1) demonstrate the reliability of a subsequent in-court identification . . . ."); State v. Watson, 254 N.J. 558, 588, 298 A.3d, 1049, 1066-67 (N.J. 2023); People v. Posey, 512 Mich. ___, ___ N.W.2d ___, 2023 Mich. LEXIS 1154, *20 (July 31, 2023) [to be published]; accord, State v. Dickson, 322 Conn. 410, 440, 141 A.3d 810, 832 (2016); Commonwealth v. Crayton, 470 Mass. 228, 239-40, 21 N.E.3d 157, 168 (2014).

Against these three state court opinions published since last June construing Perry to require judicial prescreening of first-time, in-court identifications, the Commonwealth champions the Supreme Court of New Mexico's recent reversal of that state's intermediate appellate court in State v. Antonio M., 536 P.3d 487 (N.M. 2023) (Br. in Opp., p. 18). The Court of Appeals of New Mexico, on plain error review, held first-time, in-court identifications of the defendant were unduly suggestive and therefore required a new trial on remand. State v. Antonio M., 516 P.3d 193, 204 (N.M. Ct. App. 2022).

While the Supreme Court of New Mexico reversed that jurisdiction's court of appeals in Antonio M., 536 P.3d at 487, it did so by applying the doctrines of harmless and plain error rather than reaching the defendant's unpreserved constitutional argument. The defendant's identity was not sufficiently in dispute to warrant reversal for plain error, the supreme court held. Antonio M., 536 P.3d at 492 (observing that "where identity [i]s not at issue as to the charges, an in-court

identification does not implicate due process concerns to constitute plain error") [internal quotations omitted]. Nonetheless, the Supreme Court of New Mexico noted its concurrence with the court of appeals' analysis that the first-time, in-court identifications at issue there violated the Fourteenth Amendment:

> We note our agreement with the Court of Appeals that the prosecutor's identification procedures may have been unnecessarily suggestive . . . but that issue escapes plain error review under the facts and procedural posture of this case.

Antonio M., 536 P.3d at 493 and note 1.

In sum, the Supreme Court of Virginia's Opinion (Pet. App. 1a-19a) qualifies for certiorari review under Rules 10(b) and (c) of the United States Supreme Court because it decided a significant question under the Due Process Clause of the Fourteenth Amendment in a manner that conflicts directly with opinions on the same identification issue published by a steadily increasing number of other state courts of last resort.[1]

[1] The Commonwealth is correct that the citation to the Seventh Circuit's Lee v. Foster, 750 F.3d at 687 (7th Cir. 2014) on page 21 of the Petition is inapt. As the Commonwealth points out on page 17 of its Brief in Opposition, Lee does not support the due process argument Walker advances. Walker's counsel regrets the error and apologizes to the Court for his improvident citation to Lee. In retrospect, counsel believes he intended to cite instead the Second Circuit's United States v. Archibald, 734 F.2d 938, 942 (2nd Cir. 1984).

B. The Trial Court's Erroneous Refusal To Prescreen For Reliability Ms. Caison's First-Time, In-Court Identification Of Walker Was Not Harmless.

The Commonwealth argues in the alternative that Walker's Petition is a poor vehicle for raising and reviewing the due process question it presents because the trial court's refusal to subject Ms. Caison's identification testimony to judicial prescreening under Neil v. Biggers, 409 U.S. 188 (1972) amounted to harmless error. (Br. in Opp., pp. 20-23.) This misguided harmless error argument consists of two parts. The Commonwealth's threshold argument is that ". . . overwhelming evidence of Petitioner's guilt . . ." renders the trial court's error harmless. (Br. in Opp., p. 20.) The Commonwealth's secondary contention is that Ms. Caison's ". . . identification of Petitioner would be admissible even under the *Biggers* standard that Petitioner contends should apply." Although the Commonwealth consistently pressed these contentions in the two appellate courts below, neither the Court of Appeals of Virginia nor the Supreme Court of Virginia resorted to the harmless error doctrine in upholding the jury's verdict.

The decision by both appellate courts below to refrain from adopting the Commonwealth's harmless error arguments is understandable. When a criminal conviction is tainted by federal constitutional error, ". . . reversal is required unless the reviewing court determines that the error is harmless beyond a reasonable doubt." Pitt v. Commonwealth, 260 Va. 692, 695, 539 S.E.2d 77, 78 (2000) (citing

Chapman v. California, 386 U.S. 18, 24 (1967)) (emphasis added). Like most if not all jurisdictions, Virginia imposes upon the prosecution the burden of proving harmless error. Grant v. Commonwealth, 54 Va. App. 714, 724-25, 682 S.E.2d 84, 89-90 (2009). This burden of proof is relatively onerous in the case of constitutional error. Such error is not harmless beyond a reasonable doubt if there exists a ". . . reasonable possibility that the evidence complained of might have contributed to the conviction." Chapman, 386 U.S. at 23.

The centrality of Ms. Caison's identification testimony to the prosecution's theory of guilt at trial precludes invocation of the harmless error doctrine here. The case at bar is unlike Antonio M., 536 P.3d at 493, discussed supra, where the due process error was harmless because the perpetrator's identity was insufficiently disputed by the defense. The prosecutor's closing argument to the jury below emphasized the importance of Ms. Caison's stated ability to identify Walker as the masked culprit. Identity of the robber was ". . . the main thrust of the case," counsel for the Commonwealth emphasized. (J.A. at 519.) The prosecutor then invited jurors to consider "Ms. Caison's identification of the Defendant in court." Id.

During its rebuttal the prosecution restated its position that Ms. Caison's identification testimony was an essential component of the Commonwealth's evidence.

> So I told you at the beginning of this trial that all paths would lead to Jacques Walker. We start with the identification by Irene Caison and we've talked about that at length.

(Va. S. Ct. J.A. 544.)

The Commonwealth's heavy reliance upon Ms. Caison's identification during closing arguments demonstrates that the trial court's erroneous admission of this testimony without judicial prescreening was not harmless beyond a reasonable doubt.

The defense's presentation of evidence contradicting critical aspects of the prosecution's case-in-chief further forecloses the Commonwealth's renewed harmless error argument. While Ms. Caison identified Walker as the perpetrator, the defense's evidence directly contradicted that damaging testimony. Witnesses called by Walker identified the perpetrator as his brother JaMichael Lindsey ("Mike") and presented an alibi for Walker.

To support Walker's theory of innocence, Avery Brooks ("Brooks") testified he unwittingly became the get-a-way driver for the bank robbery committed by Mike. (Va. S. Ct. J.A. 445-49; 452.) Walker testified that it was Mike in the still pictures from the video of the bank robbery. (Va. S. Ct. J.A. 469.) To support his alibi, Walker testified he was at work all afternoon on the day of the crime. (Va. S. Ct. J.A. 466-67.) The robbery occurred about 3:50 p.m. Two witnesses, Brooks and Germaine Palmer, corroborated Walker's alibi. (Va. S. Ct. J.A. 436-38; 445-46.)

Finally, the Commonwealth's counter-factual argument that the trial court would have admitted Ms. Caison's identification testimony (apparently as a matter of law) even if it had properly applied the Biggers factors is as speculative as it is unsupported by citations to any case law other than Biggers, 409 U.S. at 188 itself. No such alternative ruling or commentary by the trial judge exists in the record. In any event, the Commonwealth's attempt to analogize the identification circumstances here with those in Biggers is uncommonly silly. As Walker explained in his Petition, the facts surrounding the victim's recollection of her assailant's appearance seven months after the crime in Biggers were indisputably distinct from Ms. Caison's reconstruction of events three years after the bank robbery in controversy here. (Petition, pp. 25-27.)

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner Jacques Lamar Walker's Petition for Writ of Certiorari and reverse his convictions and sentences on the Due Process Clause grounds specified above.

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