RECORD NO. _____

IN THE
Supreme Court of the United States

REGINALD ERIC SPROWL,

Petitioner,

v.

MERCEDES-BENZ U.S. INTERNATIONAL, INC.,

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

1. Should the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden shifting test remain a part of the summary judgment analysis?

PARTIES TO THE PROCEEDING BELOW

All the parties to the proceedings are listed in the caption of the complaint.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reproduced at App. 1

The opinion for the Northern District of Alabama is reproduced at App. 20.

JURISDICTION

The Eleventh Circuit entered Judgment on July 7, 2020.

CONSTITUTIONAL, STATUTORY, FEDERAL RULES OF CIVIL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be reexamined in any Court of the United States, than according to the rules of the common law"

In relevant part 42 U.S.C. § 1981 provides:

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Federal Rule of Civil Procedure 56:

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

§ 2000e-2. Unlawful employment practices

a) Employer practices
It shall be an unlawful employment practice for an employer--
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 USCA § 2000e-3 Other unlawful employment practices,

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF CASE

A. Factual Background

1. Reginald Sprowl, Black, a former Mercedes-Benz U.S International employee filed an internal complaint in 2015 when his team leader called a group of black employees "wild animals swinging in trees." Sprowl complained about the comment to his manager and the HR department investigated the complaint. The offender was terminated. App. A3.

2. Sprowl contended that other employees blamed him for the other employee's discharge, including his supervisor. App. 22-23.

3. A few months later, Sprowl sought to advance to a Team Leader position. As part of the promotional process, your fellow employees provide a peer input rating. Following Sprowl's complaint and the other employee's discharge, he received a low "peer input rating. from his fellow co-workers. App. 23-26

4. Other of Sprowl's co-workers observed the hostile treatment Sprowl received following his complaint. Dennis Finnen, a MBUSI employee from 2004-2016, related to the EEOC investigator, "He reports after CP complained about Gamble he was shunned by the rest of the maintenance crew. He asserts that three White employees who were selected as Team Leaders were not as qualified as CP." App.63

5. Similarly, Maintenance Team Member Cecil Agee agreed that, "…. CP would have done a fine job as the TL. He asserts that he equally or better qualified than those who were promoted. He states he believes that the issue with Gamble caused CP to not get the promotion. He reports that there was a huge uproar of Gamble's termination and CP was blamed." App 64.

6. Sprowl working in a maintenance capacity received a score which meant he was Not Ready for promotion consideration. App. A7.

7. After missing the fourth promotion to Team Leader and being informed he was still Not Ready for consideration, Sprowl expressed on the employee comment form that it was a "travesty" that as a ten-year Navy veteran, he was ready not ready for promotion to a Team Leader position while younger white males were rated as "Ready." App.8., fn. 9.

8. Sprowl's supervisor cited his lack of "leadership skills" as why he was not ready for promotion. Sprowl disputed that assessment. App. A41.

7. After being informed he was Not Ready for promotion to a Team Leader, missing the 4th opportunity, and experiencing continued harassment from co-workers, Sprowl resigned. A9.

B. Procedural Background

1. The appellate court ruled accepted Mercedes-Benz's arguments and ruled that Sprowl's claims failed as mere disagreements with the employer's choices. App. 17.

2. In applying the *McDonnell Douglas* framework, the Court of Appeals held that Sprowl could not satisfy the third step in the process to show pretext under Title VII. App17.

3. While district court recognized that Sprowl presented "some" evidence that would permit a factfinder to disbelieve Mercedes explanation that Sprowl, a ten year Navy veteran, did not possess "leadership" skills like the successful white candidates, no pretext existed. App.41.

4. Against the same factual framework with respect to the retaliation claim, the United States Equal Employment Opportunity Commission reached a different conclusion when it issued a Letter of Determination that there was "reasonable" cause to believed determination that Mercedes retaliated against Sprowl. App. 56-57.

5. The 11th Circuit declined to address the exclusion of the investigator memorandum and found the statements therein were, "inferences based on speculation" (citation

omitted) and "did not advance Sprowl's case." App 12, fn.12.

6. The district court acknowledged the EEOC's investigative memorandum where two co-workers remarked on the hostility Sprowl experienced from co-workers when the other employee was terminated. App. 22-23. However, the district court held even if considered the Letter of Determination finding reasonable cause as to retaliation and/or the investigation memorandum made no difference to the outcome. App. 54 fn. 5.

7. The district court explained that if the EEOC's Letter of Determination and the investigator memorandum were admissible, the result would not change. App.A54 fn. 5.

REASONS TO GRANT THE WRIT

1. *McDonnell Douglas* Test

Well in advance of this petition, litigants, academics, judges (district and appellate) decry the continuing reliance on the *McDonnell Douglas* burden shifting analysis to assess whether discrimination claims using indirect evidence can proceed to trial.1

While originally considered helpful to plaintiffs in discrimination cases, "it is no longer helpful to anyone". Hon. Denny Chin *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*. 57 N.Y.L. Sch. L. Rev. 671, 681 (2012-2013).2

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1 Sandra F. Sperino, Flying Without a Statutory Basis: Why *McDonnell Douglas* Is Not Justified by Any Statutory Construction Methodology, 43 HOUS. L. REV. 743, 762 (2006)

2 Since the 1973 opinion there has been a sea change in summary judgment grants for employment discrimination cases, what was once rare is now common place. See e.g. Mark W. Bennett *Essay: From the "No Spittin', No Cussin' and No Summary Judgment to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judges Four-Decade Perspective.* 56 N.Y.L. Sch. L. Rev 685 (2012-2013).

Or consider that,

"The dichotomy produced by the McDonnell Douglas framework is a false one. In practice, In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational. The *992 Court does not see the efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court's ruling in *Desert Palace*. When possible, this Court seeks to avoid those machinations of jurisprudence that do not comport with common sense and basic understandings of human interaction.

Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 991–92 (D.Minn. 2003)

Prompted by the admonishment in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (C.A.7 (Ill.), 2016) that

courts within the 7th Circuit stop sifting discrimination evidence into "direct" and "indirect" categories, "Accordingly, we hold that district courts must stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards.", a district court summed up the dilemma:

"Though the *Ortiz* court noted that its decision did "not concern *McDonnell Douglas* or any other burden-shifting framework," ……. We struggle to reconcile the Seventh Circuit's clear preference for a single, simplified approach in analyzing claims of discrimination with the continued existence and applicability of the Supreme Court's directives in *McDonnell Douglas*." *Reymore v. Marian University*, 2017 WL 4340352, at *8 (S.D.Ind., 2017)

In the test's progenitor case, there was a four day non-jury trial (at that time jury trials were not permitted in Title VII cases), where this Court explained, "The critical issue before us

concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. "*McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 1823, 411 U.S. 792, 800 (U.S.Mo. 1973).

The context was post-trial appellate review and originally did not address the predicate question of whether there can be a trial or Federal Rule 56(a)'s requirement, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The *McDonnell Douglas* test is: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection,

the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" *Id.*

After the prima case is established then burden shifts "to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas,* 411 U.S. at 802. Then, the burden shifts back to plaintiff to present evidence to show that the stated reason is a "pretext," which, if proven, givens rise to an inference of unlawful discrimination. *Id.* at 804.

McDonnell Douglas is ubiquitous in assessing discrimination claims pre-trial and is the divining rod whether a trial can be held in cases with "indirect evidence", never the intended purpose.3 The judicially crafted test has crept into other discrimination statutes. See *Raytheon Co. v. Hernandez*,

3 Direct evidence is considered exceedingly rare, "Stated otherwise, direct evidence is essentially an "admission by the decision maker that the adverse employment action was motivated by discriminatory animus." *Darchak v. City of Chi. Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009)" *Reymore v. Marian University*, 2017 WL 4340352, at *7 (S.D.Ind., 2017).

124 S.Ct. 513, 516, 540 U.S. 44, 46 (U.S.2003) applying McDonnell Douglas to the Americans with Disabilities Act.

In last term's harmonious opinion (9-0), *Comcast Corporation v. National Association of African American-Owned Media*, 140 S.Ct. 1009, 1019 (U.S., 2020), this Court itself questioned, "Whether or not *McDonnell Douglas* has some useful role to play in 1981 cases, it does not mention the motivating factor test, let alone endorse its use only at the pleadings stage. Nor can this come as a surprise: This Court didn't introduce the motivating factor test into Title VII practice until years *after McDonnell Douglas*."

Now with the benefit of the *Comcast* decision separating § 1981 "but for" analysis from Title VII's "motivating factor" following the 1991 amendments to the Civil Rights Act, *McDonnell Douglas* adds unnecessary layer of complexity.

Also last term, *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1739 (U.S., 2020) explained there can be multiple

"but for" factors that impact liability, if any.

The traditional "but for" analysis is more direct and clear without a quixotic quest to prove "pretext".

"Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U.S. 204, 211–212, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U.S. at 350, 133 S.Ct. 2517."
Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, 1739 (U.S., 2020)

The *McDonnell Douglas* paradigm is not used at trial, thus applying the burden shifting back and forth like a tennis game at the summary judgment stage, a trial in paper form no longer makes sense. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, (1983);

> But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof," *Burdine, supra,* at 252, 101 S.Ct., at 1093, in deciding this ultimate question.

See also *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106, 530 U.S. 133, 142–43 (U.S.,2000)

"Accordingly, "the *McDonnell Douglas* framework—with *143 its presumptions and burdens"—disappeared, *St. Mary's Honor Center, supra,* at 510, 113 S.Ct. 2742, and the sole remaining

issue was "discrimination *vel non*," *Aikens, supra,* at 714, 103 S.Ct. 1478."

CONCLUSION

If fealty to the statute is the ultimate goal then the *McDonnell Douglas* test should be grounded in favor of a summary judgment approach consistent with Federal Rule of Civil Procedure 56 and the 7th Amendment to the United States Constitution.

The Court should grant the petition and hear this case.

Respectfully submitted,

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