No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

BRIEF OF PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

Timothy Tyrone Foster, a black defendant, was charged with killing an elderly white woman, Queen Madge White. The prosecutor struck all four black prospective jurors and argued for a death sentence to "deter other people out there in the projects." At trial and on direct appeal, Georgia's courts denied Foster's claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

During state habeas corpus proceedings, Foster obtained the prosecution's notes from jury selection, which were previously withheld. The notes reveal that the prosecution (1) marked the names of the black prospective jurors with a "B" and highlighted them in green on four copies of the venire list; (2) circled the word "BLACK" next to the "Race" question on five juror questionnaires; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors"; and (5) gave explanations for its strikes that were contradicted by its notes. The Georgia courts again declined to find a *Batson* violation.

The question presented is this:

> Did the Georgia courts err in failing to recognize race discrimination under *Batson* in the extraordinary circumstances of this death penalty case?

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ORDERS AND OPINIONS BELOW

The order of the Supreme Court of Georgia denying Foster's application for a certificate of probable cause to appeal from the denial of habeas relief is unreported and appears in the Joint Appendix (J.A.) at 246. The order of the Superior Court of Butts County, Georgia, denying habeas relief is unreported and appears at J.A. 172-245. The decision of the Supreme Court of Georgia affirming Foster's conviction and death sentence on direct appeal, *Foster v. State*, 374 S.E.2d 188 (Ga. 1988), appears at J.A. 145-67. The order of the Superior Court of Floyd County, Georgia, denying Foster's motion for new trial is unreported and appears at J.A. 131-44. The section of the transcript from the Superior Court of Floyd County, Georgia, in which the court denied Foster's pretrial objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), appears at J.A. 36-60.

STATEMENT OF JURISDICTION

The Superior Court of Butts County, Georgia, denied Foster's application for habeas corpus relief on December 9, 2013. J.A. 172-245. The Supreme Court of Georgia denied Foster's application for a certificate of probable cause to appeal on November 3, 2014. J.A. 246. Foster's petition for a writ of certiorari was filed in this Court on January 30, 2015, and granted on May 26, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2012).

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or 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." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

STATEMENT OF THE CASE

Timothy Tyrone Foster, an eighteen-year-old African-American, was charged in 1986 with killing Queen Madge White, an elderly white woman, in Rome, Georgia. At Foster's capital trial the following year, the prosecutors used four of their nine peremptory strikes to remove all four black prospective jurors, resulting in an all-white jury to try this racially charged case. They claimed that the strikes were not based on race, asserting eight to twelve "race-neutral" reasons for each. The lead prosecutor later urged the jury to impose a death sentence to "deter other people out there in the projects." T.T. 2505.[1]

[1] "J.A." refers to the Joint Appendix. "T.R." refers to the clerk's record from Foster's 1987 trial. "T.T." refers to the transcript from Foster's 1987 trial. "P.T." with a date in parentheses refers

(Continued on following page)

Ninety percent of the families living in the local housing projects were black.

Despite maintaining that race was "not a factor" in its jury selection strategy, J.A. 41, the prosecution had focused extensively on the race of prospective jurors in preparing for jury selection. Its notes, which Foster obtained years after the trial and presented in state habeas corpus proceedings, include lists in which the black prospective jurors were marked with a "B" and highlighted in green, notations identifying black prospective jurors as "B#1," "B#2," and "B#3," notations that ranked the black prospective jurors against each other in case the prosecution had to accept a black juror, and a strike list in which the five black panelists qualified to serve were the first five names in the "Definite NOs" column, meaning they were slated for definite strikes. Some of the notes directly contradict the prosecution's "race-neutral" explanations for its strikes and its representations to the trial court.

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to the transcript of a pretrial or post-trial hearing on the specified date. "J.Q." refers to a juror questionnaire from Foster's 1987 trial. (The questionnaires comprise two separate volumes of the clerk's record; they appear in order of juror number.) "H.R." refers to the clerk's record from Foster's habeas corpus case. "H.T." refers to the transcript and exhibits from Foster's 2006 habeas corpus hearing.

A. Pretrial Motion Under *Batson*

Foster's defense attorneys expected the prosecution to strike black prospective jurors on the basis of race. Prior to trial, they filed a motion to prevent the practice pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), stating:

> 1. [Foster] is an indigent eighteen year old black person accused of the capital murder of an elderly white lady, and the State is seeking the death penalty.
>
> 2. The District Attorney's office in this County and his staff have over a long period of time excluded members of the black race from being allowed to serve on juries with a black Defendant and a white victim. . . .
>
> 3. It is anticipated that the District Attorney's office will attempt to continue its long pattern of racial discrimination in the exercise of its peremptory challenges.

J.A. 17-18. At a pretrial hearing, the parties and the court agreed to defer the *Batson* motion until after the striking of the jury. P.T. 83-85 (Feb. 5, 1987).

B. Jury Selection

During the week of April 20, 1987, ninety-five prospective jurors were either questioned by the court

or summarily excused.[2] Ten of the ninety-five were black.

The court instructed all of the prospective jurors on the panel to fill out questionnaires, T.T. 20-22, and then conducted individually sequestered voir dire, T.T. 182-1322. It gave both parties the opportunity to question each prospective juror about a broad range of issues, including pretrial publicity, religion, occupation, and mitigation. T.T. 182-1322.

After questioning and challenges for cause, forty-two prospective jurors were designated for the striking of the jury, with the prosecution allotted ten peremptory strikes and the defense twenty, as provided by Georgia law at the time.[3] Five of the forty-two were black. However, on the morning of jury selection, Shirley Powell, one of the five black prospective jurors, was excused for cause and replaced with a white woman. T.T. 1326-29. That left four black prospective jurors: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. The prosecution

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[2] This number does not include those prospective jurors who did not report or those who were never reached by the trial court because their juror numbers on the venire list were higher than 133 – the number of the final panelist questioned by the trial court. T.T. 1310-22.

[3] *See* Ga. Code. Ann. § 15-12-165 (1985) (current version at § 15-12-165 (LexisNexis through 2014 Reg. Sess.)).

struck all four to obtain an all-white jury. J.A. 22-31, 38-40.[4]

After the striking of the jury, the trial court addressed the defense's *Batson* objection, stating, "Let's take care of the black jurors first." J.A. 37. In response, Stephen Lanier, the district attorney and lead prosecutor, began by explaining that his general approach was to discriminate against women, not black people: "Women have a tendency in a case of this nature where the death penalty is being sought – they have serious reservations, time conflicts or whatever it may be, but that is what I look at when I am trying a death penalty case. . . ." J.A. 42. He later said that "eighty percent" of his strikes were against women and that "three of the four blacks were women." J.A. 57.

Lanier then addressed Eddie Hood, stating: "He was exactly what I was looking for in terms of the age, between forty and fifty, good employment and married. The only thing that I was concerned about, and I will state it for the record. He has an eighteen year old son which is about the same year old as the defendant." J.A. 44. Even though the age of Hood's son was "the only thing" he was concerned about, Lanier gave at least eight more reasons for striking

[4] The prosecution used nine of its ten peremptory strikes in striking the jury; it had saved its tenth strike for the final juror in the qualified pool, but she was not reached until the selection of alternates. J.A. 31-32.

Hood, including that Hood had a son with a misdemeanor conviction from five years earlier, J.A. 44-45, he did not make enough eye contact during voir dire, J.A. 46, and he "asked to be off the jury," J.A. 45. Lanier also said Hood might oppose the death penalty because he belonged to the Church of Christ, J.A. 46, although Hood had said he was not opposed to the death penalty and was willing to impose it, T.T. 269-70, 274, 278.[5] The prosecution had not questioned Hood about any of its purported reasons for striking him. T.T. 274-78. Lanier then said, "All I have to do is have a race neutral reason, and all of these reasons that I have given the Court are racially neutral." J.A. 48.

Although Lanier had not yet addressed the other three black prospective jurors, the trial court denied the *Batson* motion and was prepared to move on to other things: "Well, the Court overrules the motion, and finds that Batson has been met." J.A. 49. However, Lanier stated that he wanted to "perfect the record" by giving reasons for the other three strikes. J.A. 49. Referring to his notes at times, he went on to proffer more than thirty reasons for the strikes of

[5] Lanier also said that he struck Hood because he had food poisoning during voir dire, J.A. 45-46, his wife worked at Northwest Regional Hospital, J.A. 45, the defense did not ask him enough questions about certain issues, J.A. 47, and his brother was formerly a consultant with law enforcement toward people involved in drugs, J.A. 46.

Evelyn Hardge, Mary Turner, and Marilyn Garrett. J.A. 49-57.

Lanier said that Garrett had the "most potential." J.A. 55. In a brief filed after trial, he made clear that he considered Garrett to have "the most potential to choose from *out of the four remaining blacks* in the 42 panel venire." T.R. 438 (emphasis added). The opportunity to strike Garrett came about, he said, because he had planned to strike another black venire member, Shirley Powell, but she was excused for cause on the morning of jury selection. T.R. 438-39. Lanier said that he would have accepted Garrett "except for this one thing, her association and involvement in Head Start," which "deals with low income, underprivileged children," and "her age being so close to the defendant." J.A. 56. Garrett was thirty-four; Foster was nineteen. J.Q. #86 at 1; T.R. 588. The prosecutors later labeled Garrett a "social worker" with Head Start and said they "wanted to stay away from any social worker." J.A. 103. But Garrett was not a social worker; she was a teacher's aide. J.Q. #86 at 2. Lanier then asserted at least seven other reasons for striking Garrett, including that she was a woman, J.A. 57, she appeared nervous, J.A. 55, and she "didn't ask off" the jury, J.A. 56 (even though one reason asserted for the strike of Hood was that he "asked to be off the jury," J.A. 45).[6] As with Hood, the

[6] Lanier also said he struck Garrett because she was divorced, J.A. 56; she said "yeah" to the court four times, J.A. 55; the defense did not ask her about certain issues, J.A. 56; and she

(Continued on following page)

prosecution had not asked Garrett about any of these issues in voir dire. T.T. 952-53.

With respect to the strike of Turner, Lanier gave at least twelve reasons, including that Turner was not candid on her questionnaire and in statements to the court. J.A. 51-54. The prosecution had not asked Turner about any of the supposed inaccuracies in her statements. T.T. 595-98. Lanier also stated that Turner was "hostile to the Court and counsel," J.A. 52, and confused and hesitant about certain questions, J.A. 53. As for Hardge, Lanier gave at least nine reasons for striking her, including that she was "confused" and "irrational." J.A. 51. Lanier asserted that all four black prospective jurors were some combination of confused, J.A. 46, incoherent, J.A. 51, hostile, J.A. 52, disrespectful, J.A. 55, and nervous, J.A. 55, and that three of the four did not make sufficient eye contact, J.A. 46, 53, 55. After Lanier stated the reasons for each strike, the trial court promply upheld them and found no *Batson* violation. J.A. 51, 55, 58.

C. Trial

With an all-white jury selected, the prosecution presented its evidence. White, a retired schoolteacher, T.T. 1603, was killed by strangulation, T.T. 2053, during a burglary of her home in which a large air

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indicated that she was not familiar with the victim's neighborhood, but Lanier thought she was, J.A. 55-56.

conditioner and other items were taken, T.T. 1675-98. Foster was arrested after his girlfriend informed the police that he was involved in the crime and had given her several items taken from White's home. T.T. 1710-12. Upon interrogation, Foster gave two statements in which he acknowledged entering the home and participating in the crime. T.T. 1726-71. He was found guilty on all three counts – murder, burglary, and theft by taking. T.T. 2444-45.

The issue of penalty was sharply contested. There were questions about how many people were involved in the crime and the precise role of Foster,[7] who is intellectually limited.[8] The circumstances of Foster's life also weighed against a death sentence. In addition to his intellectual deficits, Foster was young

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[7] Defense counsel stated to the jury, "I think a lot of you find it hard to believe that Tim was there alone." T.T. 2347-48. The prosecution's investigator later testified in the habeas proceedings: "No one can carry an air conditioner as big as he had that he took out that window to get into that lady's house, and carried it home. He couldn't have done it by himself." H.T. 216. The investigator believed that Foster's father was involved in the crime. H.T. 216-17.

[8] Dr. Douglas Laipple, a psychiatrist, testified at trial that Foster was in the borderline range for intellectual disability. T.T. 2232. Subsequent to trial, Foster presented sufficient evidence of intellectual limitations to warrant a separate trial to determine whether he was ineligible for the death penalty under Georgia's law prohibiting the execution of people with intellectual disability. H.R. 132-33. Although Foster had received IQ scores ranging from 58 to 80 throughout his life, the jury found that he failed to meet his burden of proving intellectual disability. *See Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000).

and the product of parents who introduced him to drugs at an early age and showed little concern for him. T.T. 2185-86, 2234. When defense counsel met with Foster's parents to discuss mitigation and the possibility that Foster could receive a death sentence, Foster's father refused to cooperate, saying he "could always make another child." H.T. 38.

District Attorney Lanier argued at the penalty phase that the jury should impose a death sentence in part to "deter other people out there in the projects." T.T. 2505. At the time, thirty-two of the thirty-four units in the local housing projects were occupied by black families. T.R. 551. The jury sentenced Foster to death. T.T. 2547-51.

D. Post-trial Litigation

After the death sentence was imposed, Foster's counsel renewed their *Batson* objections in a motion for new trial. T.R. 375-421. They also filed a motion for discovery of the prosecution's notes from jury selection. J.A. 61-65. They argued that because "the State use[d] part of its notes to justify its exclusion of black jurors in this case," the notes "should be available to this Court and other Courts which examine[ ] the intent of the State." J.A. 62-63. The trial court denied the motion for discovery. J.A. 66-68.

Lanier filed a response to Foster's motion for new trial asserting even more reasons for his strikes of the black prospective jurors than he asserted at the *Batson* hearing. T.R. 424-45. For example, he claimed

he had struck Marilyn Garrett in part because her cousin had been arrested on drug charges. T.R. 424; J.A. 105. However, he had stated after the death verdict was returned that he did not learn about Garrett's cousin until after jury selection. P.T. 8-9 (May 1, 1987).[9]

At the hearing on Foster's motion for new trial, Lanier stated that he wanted "to voluntarily take the stand" to provide further explanation of his reasons for the strikes, J.A. 78, but he added, "I just would like, if I take the stand, I would like for defense counsel to be put on notice that I don't want him to have access to my file," J.A. 79. After receiving assurances from the trial court that the defense could not gain access to his file, Lanier testified. He reiterated several of his reasons, offered new ones, J.A. 79-113, and stated that he struck Garrett because she was a social worker, J.A. 95, 102-03. The trial court later issued a written order denying the motion for new trial and stating that the prosecution did not violate *Batson*. J.A. 131-44.

Foster appealed his conviction and death sentence to the Georgia Supreme Court, arguing in part that the trial court erred in overruling his *Batson* objection and denying his motion for discovery of the

[9] Although this separately paginated transcript states the date as April 20, 1987, which was the first day of the trial, it also states that it reflects a "hearing held at the bench after the trial of the case and sentencing phase." The sentencing phase concluded on May 1, 1987. T.T. 2547.

prosecution's notes from jury selection. The Georgia Supreme Court affirmed, holding that the trial court did not err in finding that the strikes were "sufficiently neutral and legitimate." J.A. 152.[10] The court also held that Foster was not entitled to the prosecution's notes. J.A. 152.

E. Habeas Corpus Proceedings

In 1989, Foster filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. H.R. 5-24. The following year, the case was remanded to the Superior Court of Floyd County for a trial on whether Foster was ineligible for the death penalty under Georgia's intellectual disability exclusion. H.R. 132-33. After a Floyd County jury returned a verdict in 1999 finding that Foster did not meet the definition of intellectual disability in the trial court's instructions,[11] the habeas case resumed in Butts County.

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[10] The Georgia Supreme Court upheld the strike of Marilyn Garrett based on two of the reasons asserted – that she was a social worker, and that her cousin had been arrested on drug charges. J.A. 151. But Garrett was not a social worker, J.Q. #86 at 2, and Lanier did not know about her cousin's drug issue until after jury selection, P.T. 8-9 (May 1, 1987).

[11] *See Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000). During the intellectual disability trial proceedings, which included a pretrial appeal to the Georgia Supreme Court, *Zant v. Foster*, 406 S.E.2d 74 (Ga. 1991), the remainder of Foster's habeas petition was held in abeyance. J.A. 173.

In 2006, Foster's habeas counsel obtained the prosecution's jury selection notes from the 1987 capital trial pursuant to a request under the Georgia Open Records Act.[12] The notes include the following evidence, which Foster presented at a 2006 habeas hearing in support of his *Batson* challenge:

First, the prosecution's file includes four different copies of the venire list of prospective jurors with the names of the black prospective jurors marked with a "B" and highlighted in green. J.A. 253-76.[13] Each of the four lists includes a key in the top-right corner of the first page indicating that "[Green highlighting] Represents Blacks." J.A. 253, 259, 265, 271.[14] The following is the first page of one of the four lists, which shows black prospective jurors (9) Eddie Hood, (15) Louise Wilson, (19) Corrie Hines, (22) Evelyn Hardge, and (28) Bobbie Johnson marked with a "B" and highlighted in green:

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[12] *See* Ga. Code Ann. §§ 50-18-70 to -77 (2002).

[13] The prosecution's investigator confirmed that the four lists are "four different versions of the same document, that is, they had different handwritten notations on them." H.T. 202. The lists were circulated around the district attorney's office so that various staff members, including "[s]ecretaries, investigators, [and] district attorneys" could make notes on them. H.T. 219; *see also* H.T. 190-91.

[14] The lists also include yellow highlighting for venire members with "prior case" experience. J.A. 253-76.

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represents prior case

REPORT NO JUR100-01
REPORT DATE: 01/21/87
JUDGE: ROBERT G WALTHER

FLOYD COUNTY SUPERIOR COURT
TRAVERSE JURY
JURORS REQUESTED: 130

SD NO: 53 PAGE
APRIL 20, 1987
TIME: 9:30 A.M.

001. DEMPSEY NEAL BARRY
[redacted]
ROME GA 30161

002. HARPER BONNIE — Oper. Desota Beauty Shop — Note — She is Ronnie Duck's Great Aunt
[redacted]
ROME GA 30161

003. LANIER SARAH Elaine Clk. Belk's
[redacted]
ROME GA 30161

004. RATLIFF WILEY KELVIN — Works At Revco Pharmacist
[redacted]
ROME GA 30161

005. HACKETT MARY A — hush. V. Pres. Valley Vend — see attached sheet
[redacted]
ROME GA 30161

~~006. CECIL KIP ALAN WM~~ off
[redacted]
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN — Co. Dept. family & child. Services
[redacted]
ROME GA 30161

008. CAGLE RICKEY J — Fireman City of Rome — see attached sheet
[redacted]
ROME GA 30161

B 009. HOOD EDDIE — Age 47 hlpr. Ga. kraft — see attached sheet
[redacted]
ROME GA 30161

010. NICHOLSON JOYCE M — tchr. Elm St. Elem. Sch.
[redacted]
ROME GA 30161

011. MCGINNIS NONA ADLINE — Retired
[redacted]
ROME GA 30161

~~012. CLEMENTS J TERRY~~ off
[redacted]
ROME GA 30161

013. HOELZER MARGARET D — husb. Podiatrist on Bod. st.
[redacted]
ROME GA 30161

014. STANSELL MARY H — husb. works for Power Co.
[redacted]
ROME GA 30161

015. WILSON LOUISE — B Age 68 Retired owns her home — see attached sheet
[redacted]
ROME GA 30161

016. BARBOGELLO MAUREEN B — husb. is Superv. Triplett Sales Inc.
[redacted]
ROME GA 30161

017. CARR ANNA W — Retired
[redacted]
ROME GA 30161

018. BING PATRICIA A — OK
[redacted]
CAVE SPRINGS GA 30124

019. HINES CORRIE LEE — B Age 65 Retired owns his home — see attached she[et]
[redacted]
ROME GA 30161

020. EVANS MYRTLE FRANCES
[redacted]
ARMUCHEE GA 30105

021. BLACK DOROTHY M
[redacted]
ROME GA 30161

022. HARDGE EVELYN — B Age 69 Retired her & her husb. own their hom[e]
[redacted]
ROME GA 30161

023. COULTAS ANNE B — Works for Security Berry College
[redacted]
ROME GA 30161

024. HOBGOOD LOU ELLA — husband is officer w/ GA. State Bank
[redacted]
ROME GA 30161

025. DEDEURWAERDER VICTOR — Retired owns his.
[redacted]
ROME GA 30161

~~026. STANLEY RUBY BARNES~~ off
[redacted]
ROME GA 30161

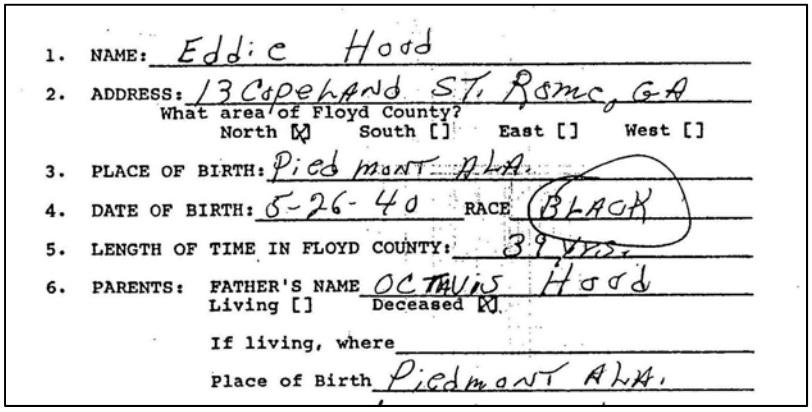
027. HOUSE CHARLOTTE S — She is related to Mrs Hubbard neighbor of Mrs White — husb. w/ GA. Powe[r]
[redacted]
ROME GA 30161

028. JOHNSON BOBBIE JEAN — B Age 56
[redacted]
ROME GA 30161

903

J.A. 253.

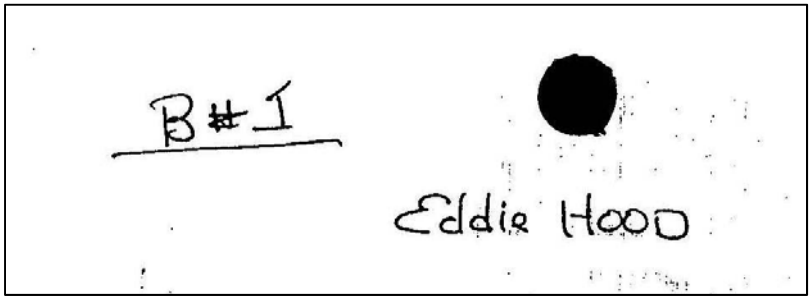
Second, the word "BLACK" next to the "Race" question was circled on the juror questionnaires of five black prospective jurors. J.A. 311, 317, 323, 329, 334. For example:



1. NAME: Eddie Hood
2. ADDRESS: 13 Copeland ST. Rome, GA
   What area of Floyd County?
   North [X] South [ ] East [ ] West [ ]
3. PLACE OF BIRTH: Piedmont Ala.
4. DATE OF BIRTH: 5-26-40 RACE BLACK
5. LENGTH OF TIME IN FLOYD COUNTY: 39 yrs.
6. PARENTS: FATHER'S NAME Octavis Hood
   Living [ ] Deceased [X]
   If living, where
   Place of Birth Piedmont Ala.

J.A. 329.

Third, the prosecution identified black prospective jurors Eddie Hood, Louise Wilson, and Corrie Hines as "B#1," "B#2," and "B#3," respectively, in its notes. J.A. 295-97. For example, Eddie Hood was identified as follows:



J.A. 295.

Fourth, the notes reveal that the prosecution compared the black prospective jurors against each other in case it had to accept one of them. A note about Evelyn Hardge states, "Might be the [b]est one to put on [j]ury." J.A. 294. A draft affidavit from the prosecution's investigator relates his view that "if it comes down to having to pick one of the black jurors, [Marilyn] Garrett, might be okay." J.A. 345.[15]

Fifth, the prosecution's strike lists prioritize the striking of black prospective jurors and contradict the representations made by Lanier to the trial court with regard to his strike of Marilyn Garrett. Lanier claimed in his post-trial pleading that his team "had, in [its] jury notes, listed [Marilyn Garrett] as questionable," T.R. 438, and only decided to strike her after Shirley Powell was excused for cause, T.R. 439. However, Garrett was included on the prosecution's list of "Definite NOs," which was created *before* Powell, who was also on the list, was excused:

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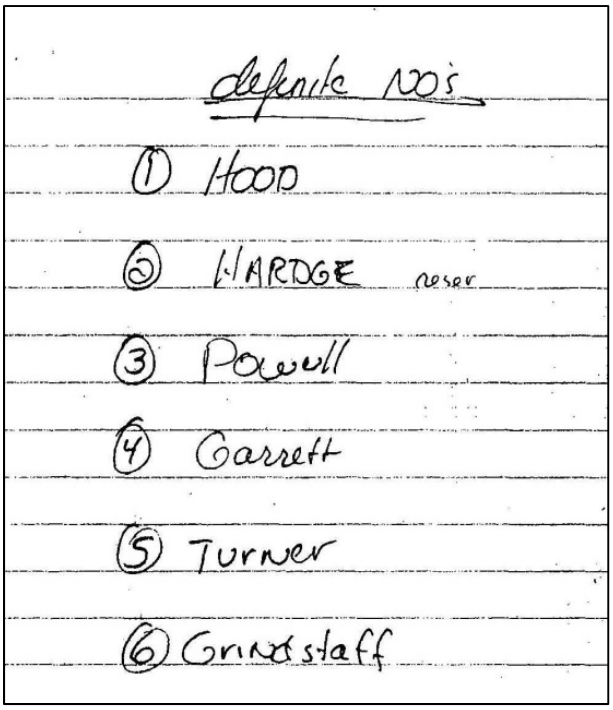
[15] The investigator discussed ten black prospective jurors in his draft affidavit. J.A. 343-47. When District Attorney Lanier submitted the final version of the affidavit to the trial court in response to Foster's motion for new trial, it discussed only three of the ten, and the sentences referring to the race of Garrett and the other black prospective jurors had been deleted. *Compare* J.A. 343-47 (draft affidavit) *with* T.R. 555-57 (affidavit filed with trial court).



J.A. 301. The first five names on the "Definite NOs" list are the five black prospective jurors who were on the panel when the list was made. The same page includes a "Questionables" list including the names of six white prospective jurors from the final pool, four of whom were struck by Lanier. J.A. 301. The lists of "Definite NOs" and "Questionables" correspond precisely to the strikes Lanier ultimately made.[16]

[16] The prosecution struck the four black prospective jurors on the list of "Definite NOs," J.A. 22, 23, 26, 29, and the one white prospective juror on the list, Bobbie Grindstaff, when she was called as a possible alternate, J.A. 33. The prosecution struck George McMahon, who was listed second under "Questionables" but with an arrow pointing to the "Definite

(Continued on following page)

They also are consistent with the three other juror lists from the prosecution's file in which the jurors to be struck were marked "N" for "No." J.A. 287-90, 299-300, 348-49.[17]

In response to Foster's evidence at the habeas hearing, Georgia presented affidavits from Lanier and Douglas Pullen, the other prosecutor. J.A. 168-71. Lanier and Pullen stated that they did not make the marks on the four highlighted venire lists or instruct others to do so, but they did not address the other information from their file. J.A. 168-71.

The state habeas court denied relief. J.A. 192-96. It explained the *Batson* framework and stated that it would "reach[ ] step three again on the basis of the new evidence presented in [the state habeas] proceedings." J.A. 193. It addressed two categories of notes from the prosecution's file: the highlighted copies of

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NOs." J.A. 27, 301. It also struck the prospective jurors listed first (Lou Ella Hobgood), third (Anna Jo Gale), and fifth (Mary Hackett) on the list of "Questionables," J.A. 22, 23, 27, 301, as well as one prospective juror (James Bevels) from its "Alternates" list who was added to the final pool on the morning the jury was struck, J.A. 30, 301.

[17] Georgia objected to the admission of any evidence regarding Foster's *Batson* claim on the ground that the claim had been raised and addressed on direct appeal. H.R. 1156. However, state law permits habeas petitioners to raise issues previously decided where there is new evidence that was not "reasonably available" at the time of the prior proceeding. *Gibson v. Head*, 646 S.E.2d 257, 260 (Ga. 2007). The state habeas court overruled Georgia's objection and admitted a certified copy of the documents described above. H.T. 19-20.

the venire list and two lists of qualified jurors that identified the race of each prospective juror. J.A. 193. With respect to the highlighted lists, the court noted that the lists had been circulated to "10 to 12 different individuals" in the office of the district attorney "to help pick a fair jury, especially given that this was a death penalty case." J.A. 195. The court did not address any of the other lists or notes.

The court expressly relied on the *Batson* rulings from Foster's trial and direct appeal. J.A. 193, 196. It stated that "both the trial court and the Georgia Supreme Court conducted lengthy examinations of [Foster's] initial *Batson* claims and found no error," and the highlighted lists and other material in the file did not "override this previous consideration." J.A. 193. The court concluded, "[Foster's] renewed *Batson* claim is without merit." J.A. 196.[18]

Foster filed an application for a certificate of probable cause to appeal in the Georgia Supreme Court, which was denied on November 3, 2014. J.A. 246. This Court granted certiorari on May 26, 2015,

[18] Although the state habeas court referenced res judicata because Foster's *Batson* claim had been raised and addressed on direct appeal, it made clear that it was conducting a step three analysis under *Batson* in light of the new evidence and that if Foster had prevailed, he would have overcome any res judicata bar. J.A. 192-96. Thus, the res judicata issue was determined entirely by the constitutional *Batson* analysis.

to evaluate Foster's claim of race discrimination under *Batson*.

SUMMARY OF THE ARGUMENT

The evidence of racial motive by the prosecution in this racially charged capital case is extensive and undeniable. The prosecutor struck all four black citizens who were in the venire from which the jury was selected. The exclusion of these citizens was not the product of "happenstance,"[19] but the result of the prosecution's identification of them as black and its determination to keep them off the jury.

The names of the black citizens were marked with a "B" and highlighted in green on four lists of the entire venire that were circulated among staff members in the prosecution's office. J.A. 253-76; H.T. 190-91, 219. The race of black citizens was circled on the prosecution's juror questionnaires, J.A. 311, 317, 323, 329, 334, and three black citizens were labeled "B#1," "B#2," and "B#3," J.A. 295-97. The black citizens were compared to each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

[19] *See Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005) (describing the prosecution's disproportionate use of strikes against black prospective jurors and observing that "[h]appenstance is unlikely to produce this disparity") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)).

After voir dire and challenges for cause, five black citizens remained in the venire. Their names were the first five of six names on the prosecution's list of "Definite NOs," J.A. 301 – prospective jurors who were definitely to be struck – showing that the prosecution's highest priority was striking black venire members. One of the five, Shirley Powell, was removed for cause shortly before jury selection. T.T. 1326-29. The prosecution struck the remaining four: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. J.A. 22-31.

In response to Foster's objection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), the prosecutors piled on eight to twelve reasons for each strike. J.A. 41-57. They even advanced new reasons for the strikes at the hearing on Foster's motion for new trial, which was six months after jury selection and the verdicts in the case. J.A. 79-115. Some of the reasons were incredible; others were contradicted by the record or the prosecution's own notes; and many applied to white prospective jurors the prosecution accepted.[20]

For example, District Attorney Lanier said he struck Marilyn Garrett because she was affiliated with Head Start and "her age being so close to the

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[20] *See Miller-El v. Dretke*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.").

defendant." J.A. 56. Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588. The prosecution accepted eight white prospective jurors who were thirty-five or under, including a white man who was just two years older than Foster and served on the jury. With respect to Head Start, the prosecutors labeled Garrett a "social worker," J.A. 95, and said they "wanted to stay away from any social worker," J.A. 102-03. But Garrett was not a social worker; she was a teacher's aide. J.Q. #86 at 2. The prosecution accepted every white teacher and teacher's aide in the venire.

The prosecutors said their only concern with Eddie Hood, who was identified as "B#1," was that he had an eighteen-year-old son. J.A. 44. However, the final jury included two white jurors who had sons in the same age range, as well as the juror noted above who was two years older than Foster. The prosecutors also said one of Hood's three sons had been convicted of misdemeanor theft – "basically the same thing that this defendant is charged with." J.A. 45. But it was hardly the same charge. Hood's son received a suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier. T.R. 446. Foster was facing the death penalty for murder and other crimes.

At the motion for new trial hearing, the prosecutors changed their main reason for striking Hood, stating that "the bottom line" for the strike was Hood's affiliation with the Church of Christ. J.A. 110-11. Even though Hood said repeatedly that he was

not opposed to the death penalty and could impose it, T.T. 269-70, 274, 278, Lanier told the trial court at the *Batson* hearing that he struck Hood because the church "definitely takes a stand against the death penalty." J.A. 46. This was contradicted by the prosecution's notes, which said the church "doesn't take a stand on [the] Death Penalty," leaving the issue "for each individual member." J.A. 302. The notes also said: "*NO*. NO *Black* Church." J.A. 302 (emphasis in original). The prosecutors did not ask Hood if he knew whether his church had a position on the death penalty and, if so, whether he followed it. T.T. 274-78. Similarly, they did not ask other black citizens about the reasons they gave for striking them, even though in many instances doing so would have established whether their supposed concerns were valid.[21]

Taken together, the evidence clearly establishes purposeful discrimination by the prosecution in securing an all-white jury that would respond to its plea "to deter other people out there in the projects," T.T. 2505, by imposing a death sentence on Foster, a black youth from the projects, T.T. 2212.

The Georgia habeas court, which issued the decision under review, failed to consider "all relevant

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[21] *See Miller-El v. Dretke*, 545 U.S. at 246 ("'[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.'") (quoting *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000)).

circumstances" as *Batson* requires because it relied upon and deferred to the rulings from Foster's trial and direct appeal proceedings even though those rulings were made without the prosecution's jury lists and notes. J.A. 192-96. Under a proper *Batson* analysis, the totality of the evidence establishes a constitutional violation.

ARGUMENT

THE PROSECUTION, DISPLAYING A "MIND TO DISCRIMINATE," OBTAINED AN ALL-WHITE JURY BY STRIKING BLACK PROSPECTIVE JURORS ON THE BASIS OF RACE.

Because peremptory strikes "constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)), this Court has established a three-step process for addressing claims of race discrimination in this context. The defendant first must make a prima facie showing of discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008). If that showing is made, the prosecution must offer race-neutral explanations for the strikes in question. *Id.* at 476-77. Finally, at step three, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 477. At step three, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Id.* at 478. The *Batson* issue in this case hinges on step three –

whether Foster has established purposeful discrimination in light of all relevant circumstances.

I. The Prosecution Exhibited Discriminatory Intent When Evaluating the Prospective Jurors.

The prosecution's venire lists and notes reveal a sharp focus on the race of the prospective jurors and a determination to prevent black citizens from serving on the jury. When combined with the prosecution's total exclusion of black prospective jurors through peremptory strikes, the notes and records establish that the prosecution was motivated by discriminatory intent.

The names of the black prospective jurors were marked with a "B" and highlighted in green on four separate copies of the list of the entire venire. J.A. 253-76.[22] This required using a green highlighter to go through each list as evidenced by the differences in the highlighting on the different copies. The race-coded lists were circulated throughout the entire district attorney's office for the notations of secretaries, investigators, and assistant district attorneys,

[22] *See Adkins v. Warden*, 710 F.3d 1241, 1256 (11th Cir. 2013) ("[O]ur conclusion that the state struck Mr. Morris for racial reasons is buttressed as well by the fact that the prosecution explicitly noted the race of every black veniremember (and only black veniremembers) on its jury list in preparation for voir dire. . . .").

H.T. 190-91, 219,[23] showing a culture and comfort level with circulating jury lists coded by race throughout the office.[24]

Beyond the highlighted lists, the race of five black prospective jurors was circled on the prosecution's juror questionnaires. J.A. 311, 317, 323, 329, 334. The first three black prospective jurors in the pool – Eddie Hood, Louise Wilson, and Corrie Hines – were marked as "B#1," "B#2," and "B#3," with notes about each. J.A. 295-97.

A separate list contained notes on seven black prospective jurors, J.A. 293-94, and included the notation that Evelyn Hardge "[m]ight be the [b]est one to put on [j]ury," J.A. 294. No white prospective jurors were included on the list. The prosecutor's investigator expressed the view that "[i]f it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay." J.A. 345.

However, the prosecution did not accept any black citizens for jury service. All of the black prospective jurors were on the "Definite NOs" list – the four who were ultimately struck and Shirley Powell,

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[23] The highlighted lists were created prior to voir dire, as reflected by the fact that they included information on prospective jurors who did not report to court as well as prospective jurors who were quickly excused for cause. J.A. 253-76.

[24] *See Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (relying on "the culture of the District Attorney's Office" as a factor indicating discrimination).

who was excused for cause on the morning of jury selection. J.A. 301. Moreover, the names of the five black prospective jurors were the first five names on the "Definite NOs" list. Only one white person appeared on the "Definite NOs" list – a woman the prosecutors unsuccessfully challenged for cause because they believed she was "definitely against the death penalty." J.A. 87; T.T. 1152.

Thus, the prosecution's intention was to strike every black prospective juror, and that took priority over any strikes of white prospective jurors.

II. The Prosecution's Purported Reasons for the Strikes of the Black Prospective Jurors Are Not Credible in Light of the Evidence of Discriminatory Intent and the Prosecution's Misrepresentations to the Trial Court.

The prosecutors piled reason upon reason for their strikes of the black venire members, undermining their credibility in the process.[25] They exaggerated

[25] *See McGlohon v. State*, 492 S.E.2d 715, 717 (Ga. App. 1997) (finding discrimination in jury selection in part because the striking party "proffered a 'laundry list' of reasons for almost every strike"); *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) (observing in an employment discrimination case that an employer's "strategy of simply tossing out a number of reasons to support its employment action in the hope that one of them will 'stick' could easily backfire" if " 'the multiple grounds offered . . . are so intertwined, or . . . fishy and

(Continued on following page)

facts to make the black panelists seem problematic, gave reasons that also applied to white prospective jurors,[26] and contradicted themselves and their own notes. They asserted two reasons lifted verbatim from a case in which a *Batson* challenge was denied.[27] They even continued to give new reasons after the trial was over.[28] Significantly, they had not asked questions in voir dire about the reasons they later gave for the strikes.[29] Because *Batson* is not "a mere exercise in

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suspicious'" (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995))).

[26] *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (explaining that if a proffered reason for the strike of a black prospective juror applies just as well to a white prospective juror who was accepted, that is evidence of discrimination); *see also Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (comparing a black panelist who was struck with white panelists who were accepted and finding discrimination).

[27] *Compare* T.R. 424 ("[Eddie Hood] avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."), *with United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("She avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."); *compare also* T.T. 425 (stating that Marilyn Garrett "appeared to have a low income occupation"), *with Cartlidge*, 808 F.2d at 1071 (stating that a black prospective juror "appeared to have a low income occupation"). *Cartlidge* was decided four months before Foster's trial and was cited by Lanier in the trial court. J.A. 117.

[28] These reasons "reek[ ] of afterthought." *Miller-El v. Dretke*, 545 U.S. at 246.

[29] *See Miller-El v. Dretke*, 545 U.S. at 246 (recognizing that a prosecutor's failure to ask questions about a purported reason for a strike suggests that the reason is a pretext for discrimination).

thinking up any rational basis"[30] and a "pretextual reason bears on the plausibility of other reasons given,"[31] the prosecutors' stated reasons are not credible in light of the totality of the circumstances.

A. Marilyn Garrett

Marilyn Garrett was a stable, lifelong member of the Floyd County community. She went to grade school and high school in Floyd County in the 1950s and 1960s and was raising her two children there at the time of Foster's 1987 trial. J.Q. #86 at 1, 3. At thirty-four years old, she had two jobs – one in manufacturing, which she had held for nine years, and a second as a teacher's aide, which she had held for three years. J.Q. #86 at 1-2. She attended church every Sunday and sang in the choir. J.Q. #86 at 2, 5. She stated clearly that she was willing to impose the death penalty. T.T. 951.

Lanier represented to the trial court that he had not intended to strike Garrett and decided to strike her only after he learned that he would not need to use a strike on another black prospective juror, Shirley Powell, who was excused for cause on the

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[30] *Miller-El v. Dretke*, 545 U.S. at 252.

[31] *Harris v. Hardy*, 680 F.3d 942, 960 (7th Cir. 2012). As the United States Court of Appeals for the Seventh Circuit observed, "The implausibility of [one] rationale is reinforced by the pretextual significance of the other justifications offered for the strike[.]" *Id.* at 958.

morning the jury was struck. T.R. 438-39. The prosecution's notes reveal that this was not true. Although the prosecution's investigator thought that if it came down to accepting a black juror, Garrett "might be okay,"[32] Garrett was listed as a "Definite NO," J.A. 301, and was marked with an "N" for "N[o]" on all three of the prosecution's other strike lists, J.A. 287-90, 299-300, 348-49. All four lists were made before Powell was excused and correspond precisely to the strikes Lanier ultimately made.[33]

Lanier also provided an elaborate explanation of his purported thought process following the excusal of Powell, none of which was true. He stated initially that Garrett had the "most potential," J.A. 55, later clarifying in his response to Foster's motion for new trial that he meant "the most potential to choose from out of the four remaining blacks in the 42 panel venire," T.R. 438. He claimed that "the State had to choose between [white prospective] Juror [Arlene] Blackmon or Juror Garrett, the only two questionable jurors the State had left on the list." T.R. 439. He then went on to compare Garrett and Blackmon. T.R. 439-41. But again, Garrett was on the "Definite NOs" list, not the "Questionables" list. J.A. 301. Moreover,

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[32] J.A. 345. In the final version of the affidavit submitted to the trial court, this statement and another statement about Garrett's strength as a prospective juror relative to other black prospective jurors had been deleted. T.R. 556.

[33] *See supra* note 16 (explaining that the lists correspond with Lanier's strikes).

the "Questionables" list makes clear that the prosecution's final decisions were between Blackmon and two other white prospective jurors.[34] The final decisions had nothing to do with Garrett.

Lanier said that he would have accepted Garrett "except for this one thing, her association and involvement in Head Start," which "deals with low income, underprivileged children," and "her age being so close to the defendant." J.A. 56.[35] Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588.[36] Lanier accepted eight white prospective jurors who were thirty-five or under, two of whom served on the jury.[37] Don Huffman, one of the two who served, was twenty-one – just two years older than

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[34] The "Questionables" list states: "Hatch or Blackmon" and "Hackett Blackmon." J.A. 301. The prosecution ultimately struck Hackett, J.A. 22, and accepted Blackmon and Hatch, J.A. 29, 31.

[35] When Lanier said this was the "one thing" that kept him from accepting Garrett, he had already given six other reasons for striking her. J.A. 55-56.

[36] *See Adkins v. Warden*, 710 F.3d 1241, 1257 (11th Cir. 2013) (finding the prosecutor's age explanation pretextual where the struck jurors were not actually close in age to the defendant).

[37] *See* J.Q. #4 at 1 (Ratliff, 24); J.Q. #10 at 1 (Nicholson, 35); J.Q. #23 at 1 (Coultas, 36); J.Q. #48 at 1 (Hammond, 26); J.Q. #70 at 1 (Horner, 32); J.Q. #71 at 1 (Fincher, 34); J.Q. #92 at 1 (Floyd, 21); J.Q. #106 at 1 (Huffman, 21). Nicholson, 35, and Huffman, 21, served on the jury. J.A. 34-35. The others were struck by defense counsel.

Foster and thirteen years younger than Garrett. J.Q. #106 at 1.

With respect to her involvement with underprivileged children, Garrett worked with Head Start as a teacher's aide. J.Q. #86 at 2. Lanier claimed to want jurors who were "teachers [and] those associated with teachers" because the victim was a retired school teacher. T.R. 427. Accordingly, he accepted every white teacher and teacher's aide in the qualified pool, all of whom were women, without asking them any questions about the children with whom they worked.[38]

Garrett, a teacher's aide, had the same job in the same school district as Martha Duncan, a white juror Lanier said he accepted *because* she was a teacher's aide. T.R. 430. The questionnaires of Garrett and Duncan are practically identical:

Garrett

[Occupation]: Rome City Schools Head Start – Teachers aide

[38] *See* J.Q. #10 at 2 (Nicholson); J.Q. #18 at 2 (Bing); J.Q. #88 at 2 (Duncan); J.Q. #114 at 2 (Berry); *see also* T.T. 288-91 (prosecution's voir dire of Nicholson); T.T. 335-40 (prosecution's voir dire of Bing); T.T. 961-63 (prosecution's voir dire of Duncan); T.T. 1346-47 (prosecution's voir dire of Berry). Nicholson, Bing, and Duncan served on the jury. J.A. 34-35. Berry was in the alternate pool and was struck by the defense. J.A. 33.

> [Position and duties]: Teachers Aide – help teacher as needed with 20 children

J.Q. #86 at 2.

> *Duncan*
>
> [Occupation]: teacher's Aide – North Heights [a Rome City School] Kindergarden [sic]
>
> [Position and duties]: teacher's Aide. I help the teacher with the children.

J.Q. #88 at 2. Without any follow-up in voir dire, there was no meaningful way to distinguish between Garrett and Duncan on the basis of their jobs. Yet Garrett was struck, and Duncan served on the jury.[39]

At the motion for new trial hearing, the prosecutors for the first time called Garrett a "social worker," J.A. 95, 102-03, and said that they "wanted to stay away from any social worker," J.A. 103. But Garrett was not a social worker. She was a teacher's aide, just like Duncan.[40] Moreover, Duncan had a son Foster's age – a factor that was supposedly a key reason

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[39] *See Miller-El v. Dretke*, 545 U.S. at 241, 246 (holding that the failure to ask questions and the acceptance of similarly situated white panelists are evidence of pretext and discrimination).

[40] *See Conner v. State*, 327 P.3d 503, 510 (Nev. 2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination."); *Addison v. State*, 962 N.E.2d 1202, 1215 (Ind. 2012) ("[M]ischaracterization of [a juror's] voir dire testimony is troubling and undermines the State's proffered race-neutral reason for the strike.").

Lanier struck Eddie Hood, J.A. 44, who had been identified as "B#1."

Lanier made it clear that Garrett's affiliation with Head Start and her age were the reasons he struck her – not the many other reasons he gave. J.A. 56. Regardless, the other reasons fall far short of showing that the strike was not the product of discriminatory intent.

Both Garrett and Duncan, the other teacher's aide, answered questions from the trial court by stating that they were not familiar with the neighborhood in North Rome where the victim lived. T.T. 950-51, 959. Lanier said he struck Garrett because he believed she was in fact familiar with the area since she went to high school nearby. Yet he accepted Duncan, who lived in the area. In explaining his strike of Garrett, Lanier said:

> [Garrett] said she was not familiar with the North Rome area, and unfortunately, in her questionnaire, she grew up – she went to Main Elementary or Main School, which is again two blocks from where this crime happened. She said – and yet she drives by the North Rome area every day from Morton Bend Road when she goes to work.

J.A. 55-56. Remarkably, even though Duncan also said that she lacked familiarity with the neighborhood in which the victim lived, T.T. 959, Lanier claimed he accepted her *because* she lived "less than a half mile from the murder scene and [the school at

which she worked was] located less than 250 yards [away]," T.R. 430. Lanier could have asked either juror about their familiarity with the area, but he did not.[41]

Even though Lanier professed that Garrett had good potential and that he would have accepted her but for her job with Head Start, he described her as showing "complete disrespect for the Court" and being "[n]ot a very strong juror." J.A. 55. He said:

> I looked at her, and she would not look at the Court during the voir dire, kept looking at the ground. . . . Her answers were very short, if the Court will recall. . . . Said yeah to the Court on four occasions. Shows a complete disrespect for the Court and its authority. She appeared very shaky, very nervous. Her voice quivered. Not a very strong juror.

J.A. 55. Lanier could not have actually believed those things and still viewed Garrett as a good potential juror whom he almost accepted, as he represented to the trial court. Moreover, Lanier's representation that Garrett said "yeah" to the trial court is contradicted by the transcript, which shows that she answered "yes" to the trial court's questions on three occasions

[41] If asked, Garrett would have explained – as she did in a post-trial affidavit – that she went to Main High School from 1964 through 1966 because it was the only black school in the county; she was bused there from twenty miles away. T.R. 420.

and did not say "yeah" to the trial court a single time. T.T. 950-52.[42]

The trial court did not make any findings about Garrett's demeanor. J.A. 58, 60, 141-43. As a result, Lanier's assertions are all that support his demeanor-based reasons, and such reasons are susceptible to abuse.[43] This is particularly relevant since Lanier claimed to have problems with the demeanor of all four black prospective jurors, whom he described as "bewildered," J.A. 51, "hostile," J.A. 52, "defensive," J.A. 53, "nervous," J.A. 55, and "impudent," J.A. 55. He also claimed that three of the four – Garrett, Eddie Hood, and Mary Turner – had problems with eye contact. J.A. 46, 53, 55. With Hood, Lanier lifted his explanation verbatim from a reported case, saying that Hood "avoided eye contact with the prosecutor" and that "as a personal preference, eye contact is

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[42] This was not a matter of imprecise transcription. The transcript reflects that numerous white prospective jurors answered "yeah" to questions on voir dire. *See*, *e.g.*, T.T. 960, 970 (Martha Duncan); T.T. 529, 532 (Billy Graves); T.T. 941, 946 (Arlene Blackmon).

[43] *See, e.g.*, *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) ("Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination."); *Brown v. Kelly*, 973 F.2d 116, 121 (2d Cir. 1992) ("[B]ecause such after-the-fact rationalizations are susceptible to abuse, a prosecutor's reason for discharge bottomed on demeanor evidence deserves particularly careful scrutiny."); *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) ("Determining who is and is not attentive requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson*.").

highly valued as a jury selection technique." T.R. 424.[44]

Lanier also claimed to be concerned that Garrett "didn't ask off" the jury despite her two jobs and two children. J.A. 56. But among the many reasons he gave for striking Eddie Hood ("B#1") was that Hood "asked to be off the jury" because of his other commitments. J.A. 45. The fact that Lanier used both "ask[ing] off" and not "ask[ing] off" as reasons for his strikes of black prospective jurors suggests that the reasons were pretextual.

Adding even more reasons, Lanier mentioned that Garrett was divorced, J.A. 56, but he accepted three of the four white prospective jurors who were divorced.[45] He also said he struck Garrett because defense counsel did not ask her any questions about insanity, J.A. 56, but they did,[46] or alcohol, J.A. 56,

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[44] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("She avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique.").

[45] The final pool of forty-two prospective jurors included four people other than Garrett who were divorced: Anne Coultas, James Cochran, George McMahon, and Leslie Hatch. J.Q. #23 at 2; J.Q. #33 at 2; J.Q. #45 at 2; J.Q. #107 at 2. Lanier struck McMahon, J.A. 27, and accepted the other three, who were struck by the defense, J.A. 23, 24, 31.

[46] Defense counsel asked Garrett, "How do you feel about the use of the insanity defense?" T.T. 955; "[H]ave you ever had any feelings on the insanity defense or thought a lot about it or read anything?" T.T. 955; and "Do you believe in the concept of mental illness?" T.T. 955.

but they did.[47] He added that defense counsel did not ask Garrett many questions about publicity, but they asked her several questions about publicity and learned that she knew little about the case.[48]

Lanier also said he struck Garrett because she was a woman, J.A. 56, asserting that he used "eighty percent" of his strikes on women, J.A. 57.[49] Not including alternates, he used six of his nine strikes on women, J.A. 22-31, but even that number is inflated because three of the seven women he struck were the black women. He struck three white women and two white men, J.A. 22-31 – a disparity that pales in comparison to his pattern of strikes against black people. The final jury included five women. J.A. 34-35.

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[47] The defense asked, "Have you ever known anyone with a drug or alcohol problem?" T.T. 955; "[H]ave you ever consumed alcoholic beverages?" T.T. 956; and "Are you against the use of alcohol now?" T.T. 956.

[48] *See* T.T. 956-57 ("Q: I believe you said that you only read the Sunday paper of the Rome News Tribune, so you haven't read a whole lot about this case, have you? A: No. Q: Have you heard anything on the radio? A: Some. Q: What have you heard on the radio about Tim? A: I heard that he was arrested for the crime. Q: What have you heard about Ms. White on the radio? A: That she was a retired teacher. Q: Have you heard anything in your community about this case? A: No.").

[49] This Court later recognized that "[b]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination." *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994).

Even after the trial, Lanier continued to pile on additional reasons for his strike of Garrett, asserting that she "appeared to have a low income occupation." T.R. 425. But Garrett worked two jobs, J.Q. #86 at 2, one of which was the same job as white juror Martha Duncan, as explained above. Lanier also stated in the post-trial proceedings that he struck Garrett because she said she did not know anyone with a drug problem even though her cousin had been arrested for drug possession. J.A. 105; T.R. 425. But Lanier had said earlier, after the death verdict was returned, that he did not learn about Garrett's cousin's drug issue until after jury selection.[50]

B. Eddie Hood

Like Marilyn Garrett, Eddie Hood was a long-time resident of Floyd County. He moved there as a child and had lived there for thirty-nine years. J.Q. #9 at 1. He was married with four adult children, and he had worked in the same job in a pulp mill for seventeen years. J.Q. #9 at 2-3. He also worked part-time painting houses. J.Q. #9 at 5.

The prosecution was fixated on Hood's race from the outset, noting a "B" beside his name on the venire

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[50] *See* P.T. 8-9 (May 1, 1987) ("It has come to our attention *since the trial of this case* that Angela Garrett whom the Metro Drug Task Force has just arrested for cocaine, who is a teacher at a school and has been subsequently dismissed from school because of the drug problem.") (emphasis added).

list and highlighting him in green, J.A. 253, 259, 265, 271, identifying him as "B#1," J.A. 295, and circling his race on his juror questionnaire, J.A. 329. It also singled him out in voir dire. The prosecutors encouraged seven of the first eight prospective jurors they questioned to give acceptable answers about pretrial publicity by prefacing their questions with some variation of this statement: "What we are just looking for is what you know so that you can be a fair and impartial juror and base your verdict solely on what you hear in the courtroom." T.T. 190.[51] However, they omitted any such preface for Hood, the only black prospective juror in the first eight. T.T. 274-78. They then questioned Hood aggressively about exposure to pretrial publicity despite his consistent responses that he knew little about the case. T.T. 276-77. This type of differential treatment is evidence of discrimination.[52]

Lanier said that "[t]he only thing that [he] was concerned about" with Hood was that he "has an eighteen year old son which is about the same year old as the defendant." J.A. 44. However, the final jury included two white jurors who had sons close in age

[51] *See also* T.T. 218-19 (Ratliff); T.T. 244 (Hackett); T.T. 290 (Nicholson); T.T. 314 (Barbogello); T.T. 339 (Bing); T.T. 364 (Evans).

[52] *See Miller-El v. Dretke*, 545 U.S. at 255-56 (recognizing contrasting voir dire questions as evidence of discrimination).

to Foster,[53] as well as Don Huffman, a white juror who himself was just two years older than Foster. J.Q. #106 at 1. When Hood was asked if the defendant's age would be a factor to him in sentencing, he answered, "None whatsoever," T.T. 280, whereas white juror Billy Graves, who had three teenage sons, said "[p]robably so" in response to the same question, T.T. 527. Yet the prosecution struck Hood and accepted Graves, who served on the jury.

Lanier also said that one of Hood's three sons had been convicted of theft – "basically the same thing that this defendant is charged with." J.A. 45. But Hood's son had been given a suspended sentence for stealing hubcaps from a car in a mall parking lot five years earlier, T.R. 446; Foster was charged with murder and other crimes and was facing the death penalty.

By the time of the motion for new trial hearing, Lanier had changed his main reason for striking Hood, declaring that "the bottom line on Eddie Hood is the Church of Christ affiliation." J.A. 110-11. Hood had indicated repeatedly that he could impose the death penalty. T.T. 269, 270, 274, 278. Nevertheless, at the initial *Batson* hearing, Lanier said, "[I]t is my experience that the Church of Christ definitely takes

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[53] Lanier accepted Martha Duncan, the teacher's aide, even though she had sons who were twenty and twenty-five. J.Q. #88 at 3. He also accepted Billy Graves, whose sons were thirteen, fifteen, and seventeen. J.Q. #31 at 3.

a stand against the death penalty." J.A. 46. At the motion for new trial hearing, Lanier said that his knowledge of the church came from Douglas Pullen, the assistant prosecutor. J.A. 101. Pullen stated at the hearing that a lay minister from a "majority black" Church of Christ in Columbus had warned him to be cautious with members of his faith, although he had never said that there was "any tenet of [the Church of Christ] that involved the death penalty." J.A. 114. Pullen also said that in his experience, members of the Church of Christ usually were disqualified because of their opposition to the death penalty. J.A. 114. Hood had expressed no such opposition.

Pullen's representation about the church's position is consistent with the prosecution's notes, which say under the heading "Church of Christ" that the church "doesn't take a stand on [the] Death Penalty" and the issue is "left for each individual member," J.A. 302. But underneath that is written, "*NO*. NO *Black* Church." J.A. 302 (emphasis in original). These notes suggest that the prosecutors did not have a problem with the Church of Christ because it had a position on the death penalty. They had a problem with the Church of Christ because it was a "*Black* Church." J.A. 302.

Of course, the prosecutors could have asked Hood if he knew his church's position on the death penalty and, if so, whether he agreed with it. Their failure to inquire may have been because Hood stated *five times* during voir dire that he was not opposed to the death

penalty and that he could impose it.[54] So instead of questioning Hood about his church and its position, the prosecutors simply asserted that he might be opposed to the death penalty, despite all evidence to the contrary, based on his religious affiliation.[55] At the same time, they accepted Arlene Blackmon, who was Catholic, J.Q. #106 at 2, even though they believed that Catholics would have reservations about imposing the death penalty, J.A. 83-86.

To suggest that his concerns about the Church of Christ were justified, Lanier stated repeatedly that three white prospective jurors who were members of the Church of Christ – Vonda Waters, Gertrude Green, and Thelma Terry – had been struck for cause

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[54] *See* T.T. 269 ("[Court]: Are you opposed to or against the death penalty? A: I am not opposed to it. Q: If the facts and circumstances warrant the death penalty, are you prepared to vote for the death penalty? A: Yes."); T.T. 270 ("[Court]: [A]re you prepared to vote for the death penalty? Now you said yes to that. A: All right. Q: Are you still saying yes? A: Uh-huh."); T.T. 274 ("[Court]: If the evidence warrants the death penalty, could you vote for the death penalty? A: Yes. I could vote for the death penalty."); T.T. 278 ("[Pullen]: And if the facts and circumstances warranted, you could vote to impose the death penalty? A: Yes.").

[55] If the prosecution had asked Hood about his church's view on the death penalty, he would have said the following, as he did in a post-trial affidavit: "To my knowledge, my church does not take a stand against capital punishment. I answered the Court's questions on my views of capital punishment as honestly as I could, and there is nothing in my religious beliefs that would prevent me from giving the death penalty." T.R. 421.

due to their opposition to the death penalty. J.A. 46.[56] This was false. Waters was excused because she was five-and-a-half months pregnant; she was never questioned during voir dire. T.T. 893. Green was excused by joint motion after she said she could vote for the death penalty but could not vote for life imprisonment. T.T. 729-30. Terry was excused because she had already formed an opinion about Foster's guilt. T.T. 557-58.

Lanier also said that Hood "appeared to be confused and slow in responding to questions concerning his views on the death penalty." T.R. 434. However, as previously noted, Hood was unequivocal in his willingness to impose death. He showed some confusion when answering questions about life imprisonment, T.T. 269-74, but his confusion was no different than that shown by many white members of the panel, including Don Huffman, T.T. 1100-01, who served on the jury, J.A. 35. The trial court acknowledged that its death qualification questions were confusing, stating: "I think these questions should be reworded. I haven't had a juror yet that understood

[56] *See also* T.R. 435 ("Church of Christ affiliates are reluctant to return a verdict of death. This fact is substantiated by Church of Christ jurors Terry (#35), Green (#53) and Waters (#78) being excused for cause due to feeling against the death penalty."); J.A. 114 ("[T]hree out of four jurors who professed to be members of the Church of Christ, went off for Witherspoon or Witherspoon/Witt reasons.").

what that meant." T.T. 994.[57] In its order on the motion for new trial, the trial court reiterated that Hood's "particular confusion about the death penalty questions was not unusual." J.A. 138. In sum, Lanier sought to exploit an ambiguous question that confused virtually all of the jurors to suggest that Hood opposed the death penalty, even though Hood expressed no reservations about imposing it.

Yet another reason offered for the strike of Hood was that he had been hospitalized for food poisoning during voir dire. J.A. 45-46. Because of that, Lanier argued, "I was not sure of his medical – or health capability." J.A. 46. But on the Friday before the jury was struck, the trial court was told that Hood had recovered and was "out painting" a house. T.T. 1303. The court responded: "I believe that would qualify him physically to be here Monday at 9:30. If he can paint a house, he can sit in the jury box." T.T. 1303.[58]

Lanier also expressed concern that Hood's wife worked at Northwest Regional Hospital, where she was a supervisor in food services. J.Q. #9 at 2. Lanier said that the hospital "deals a lot with mentally disturbed, mentally ill people. . . . [T]hey intend [sic] to be more sympathetic and are for the underdog."

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[57] The trial court made other similar comments throughout voir dire. *See*, *e.g.*, T.T. 1052, 1101-02.

[58] In its order on Foster's motion for new trial, the trial court observed that Hood "seemed well on the day of jury selection." T.R. 568.

J.A. 45. But Lanier expressed no such concern about Arlene Blackmon, a white woman who had worked at the same hospital in food services and housekeeping and served on the jury. J.Q. #83 at 2; T.T. 939. The prosecution asked Blackmon about her work at the hospital in voir dire, T.T. 939,[59] but it did not ask Hood about his wife's work, T.T. 274-79.

Adding more reasons, Lanier said that he struck Hood because "the defense did not ask him a lot of questions," such as questions about insanity, the age of the defendant, and pretrial publicity. J.A. 47. But the defense did ask Hood about those subjects, and Hood gave clear answers.[60] Lanier also said that the defense did not ask Hood about his membership in any social or fraternal organizations. J.A. 47. However, Hood had written on his questionnaire that he did not belong to any social or fraternal organizations,

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[59] *See* T.T. 939 ("[Pullen]: I noticed that you had formerly worked at the Regional Hospital. Do you have any particular training, education or interest in psychiatry, psychology or mental health or anything of that nature? A: No, sir. Q: What did you do when you were at the hospital? A: When I first started there, I was in the kitchen, and after that I was in housekeeping.").

[60] *See* T.T. 280 ("Q: Do you have a feeling about the insanity defense? A: Do I have any opinion about that? I have not formed an opinion on that."); T.T. 280 ("Q: Is age a factor to you in trying to determine whether or not a defendant should receive a life sentence or a death sentence? A: None whatsoever."); T.T. 281 ("Q: Okay. The publicity that you have heard, has that publicity affected your ability to sit as a juror in this case and be fair and impartial to the defendant? A: No, it has no effect on me.").

J.Q. #9 at 4, and, as Lanier must have observed, the defense did not ask *a single prospective juror* about social or fraternal organizations.

Lanier said that it "concerned [him] . . . that [Hood] had a relative who did counsel people involving drugs," because intoxication was "the primary defense in this case." J.A. 46. But Hood, when asked if any member of his family was involved in law enforcement, said, "I have a brother who was involved with the law enforcement some years ago as a – sort of a consultant toward people involved in drugs." T.T. 279. That statement revealed very little about what Hood's brother actually did, and Hood added, "I don't know anything about the nature of his work." T.T. 279.[61]

By Lanier's purported criteria, white venire members Martha Duncan, Arlene Blackmon, and Don Huffman were prime candidates for prosecution strikes. Duncan was a teacher's aide in the Rome City Schools and had a son close in age to Foster. J.Q. #88 at 2-3. Blackmon was Catholic, J.Q. #106 at 2, a religion the prosecutors connected to reservations about the death penalty, J.A. 83-85, 91, and she used

[61] Lanier also said he struck Hood because Hood "asked to be off the jury." J.A. 45. But as explained in the discussion of Garrett, Lanier said he struck Garrett because she "didn't ask off" the jury. J.A. 56. In addition, Lanier said that Hood made "no eye contact," J.A. 46; this issue is discussed in the section on Garrett since Lanier claimed that Garrett, Hood, and Turner all had problems with eye contact.

to work at Northwest Regional Hospital, J.Q. #83 at 2. And Huffman was just two years older than Foster, J.Q. #106 at 1, and was confused by the death qualification questions, T.T. 1100-01. Yet all three of those prospective jurors were accepted and served, and Garrett and Hood were struck.

Lanier's strikes "correlate with no fact as well as they correlate with race." *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). Even if some of the stated reasons, "when examined in isolation, appear to have some validity," the totality of the circumstances renders it "obvious that these explanations were merely pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons." *State v. McFadden*, 191 S.W.3d 648, 657 (Mo. 2006).

As this Court has recognized, there is a unique opportunity for racial prejudice to operate in a capital case involving an interracial crime "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing." *Turner v. Murray*, 476 U.S. 28, 35 (1986). After Lanier struck all four black prospective jurors, he urged the jury to impose a death sentence to "deter other people out there in the projects," T.T. 2505, which were ninety percent black, T.R. 551. That argument simply would not have been made if the jury was racially diverse. But Lanier ensured that he would have an all-white jury, and Foster, a black youth from the projects, was sentenced to death.

Race discrimination in the selection of jurors "offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Id*. at 413-14. In addition, this type of discrimination "casts doubt on the integrity of the judicial process" and places the fairness of a criminal proceeding in doubt. *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). It is not only unconstitutional but unseemly that black citizens who were called to do their civic duty in this case were thoroughly disrespected by the prosecution and reduced to "B"s and "Definite NOs."

III. The State Habeas Court's Decision Is Not Entitled to Deference.

The order of the state habeas court does not warrant deference because it relies upon the rulings of the trial court and the Georgia Supreme Court, J.A. 193, 196, even though neither of those courts had considered the prosecution's venire lists and notes, which made the discrimination in this case abundantly clear. The state habeas court, in conducting its own step three analysis under *Batson*,[62] failed completely to recognize the racial motivations revealed by the prosecution's notes, characterizing them as nothing

[62] As the court stated, it "reach[ed] step three [of *Batson*] again on the basis of the new evidence." J.A. 193.

more than the "highlighting of the names of black jurors and the notation of their race" in concluding that they did not "override" the prior rulings. J.A. 193. The state habeas court found nothing wrong with circulating race-coded jury lists to "secretaries, investigators and other assistant district attorneys" – "10 to 12 different individuals." J.A. 195. It did not evaluate any of the stated reasons in light of the new evidence. It did not address how the strike lists undermine the prosecutors' credibility. And remarkably, it relied on the affidavit of the prosecution's investigator as evidence of non-discrimination even though the original draft of the affidavit had ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." J.A. 345.

Because the state habeas court deferred to prior decisions that were based on just a fraction of the evidence that was ultimately presented, it failed to give meaningful consideration to "all relevant circumstances" as *Batson* requires. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 96 (1986)).[63]

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[63] In addition, the rationale for applying the deferential standard of clear error on *Batson* issues is not present in this case. In a typical case, the trial court is best positioned to observe the prosecutors and jurors and evaluate the evidence of discrimination firsthand. *See Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion); *id.* at 372 (O'Connor, J., joined by Scalia, J., concurring in judgment). In this case, however, the habeas court was not involved in the selection of

(Continued on following page)

Even if granted some level of deference, the state habeas court's decision rejecting Foster's *Batson* claim must be reversed. The evidence of race discrimination in this case is overwhelming, such that this Court should be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (reversing conviction pursuant to *Batson* under the clear error standard).

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the jury at trial and considered the *Batson* claim nineteen years after trial. *See Holder v. Welborn*, 60 F.3d 383, 388 (7th Cir. 1995) ("[The] rationale given by the Supreme Court for the use of the clearly erroneous standard is inapplicable to the circumstances in this case, where a magistrate conducted the *Batson* hearing more than eight years subsequent to the voir dire proceeding.").

CONCLUSION

For the foregoing reasons, Petitioner Foster respectfully requests that this Court reverse the decision of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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