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 RESPONDENT

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QUESTION PRESENTED

Prior to trial, Petitioner Timothy Foster challenged the array of the jury venire based on race and made it known that he would be mounting a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge if the State struck *any* black prospective juror. The question presented is:

Did the state habeas corpus court commit clear error in finding that Foster failed to show that the State's strikes were based on purposeful discrimination when the State identified and took notes on black prospective jurors to prepare for those defense challenges?

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INTRODUCTION

The facially neutral notes on black prospective jurors, taken eight months after *Batson v. Kentucky*, 476 U.S. 79 (1986), are not evidence of the State's intention to *engage* in purposeful discrimination as alleged by Foster. Instead, they are the result of the State's efforts to *rebut* contentions of discrimination. When presented with pre-trial challenges to the alleged disparity of black prospective jurors on the array and a pretrial request that the State be required to show that *any* strike of a black prospective juror was not racially motivated, the State had to identify the black prospective jurors and ensure they noted the advantages and disadvantages of placing them as potential jurors. The notes are a reflection of this consideration.

The State's reasons, given both at trial and in sworn testimony in two subsequent proceedings, show that each black prospective juror had characteristics entirely apart from their race that would have put any prosecutor on notice that they may well be inclined against the State's case. Foster's attempted comparisons of white prospective jurors who served on the jury with the black prospective jurors ignore the multi-faceted nature of jury selection. Jurors possess multiple strengths and weaknesses from the perspective of the prosecution. It is the sum of the individual that the State assessed. It is not untoward that a venire member was selected as a juror even though that individual possessed a particular attribute cited by the prosecution as a

reason for exercising a peremptory challenge on another juror.

Although he calls attention to the fact that four black prospective jurors were struck, Foster provides a substantive challenge to only two of them, conceding that a third strike was proper and failing to challenge the fourth in his argument to this Court. Moreover, Foster has not identified a single statement by the prosecution that is itself derogatory of any particular prospective juror. In short, he has failed to show anything but an attempt by a racially diverse prosecution team to demonstrate its compliance with the new evidentiary requirements outlined in *Batson*.

Recognizing this, and that Foster supported his interpretation of the new evidence with only speculation, the state habeas court concluded that Foster had not met his burden of overcoming the Georgia Supreme Court's finding that Foster had failed to prove the third prong of *Batson*. That factual finding by the state courts must be upheld, for Foster has failed to show clear error.

STATEMENT OF THE CASE

1. In 1986, Queen Madge White, a 79-year-old widow and retired elementary school teacher, lived alone in her long-time residence. The neighborhood in

which White lived had, through the years, declined and seen an influx of crime.[1] During the night, in August of 1986, Petitioner Timothy Foster broke into White's home. He broke her jaw, coated her face with talcum powder, sexually molested her with a salad-dressing bottle, and strangled her to death, all before taking items from her home. A month later, Foster threatened his live-in companion, Lisa Stubbs, who was aware of the crimes against White. She, in turn, reported the crimes to police. Once arrested, Foster confessed and Stubbs, who was also black, became the State's main witness against Foster. Foster was indicted for murder and burglary, and the State sought the death penalty. TR 8-11.

2. Applicable to Foster's case was this Court's new evidentiary formula for raising equal protection challenges to the strikes of black prospective jurors. Until April of 1986, *Swain v. Alabama*, 380 U.S. 202 (1965), was the firmly established precedent on how a defendant could attempt to prove purposeful discrimination by the State in the selection of the jury. It required the defendant to show a pattern, "in case after case," of systematic exclusion of blacks from petit juries. *Batson*, 476 U.S. at 92 (citing *Swain*, 380 U.S. at 223). Prior to *Batson*, therefore, the

[1] While not a part of the voir dire process, Foster repeatedly references the State's closing argument to "deter other people out there in the projects." T 2505. The housing project area was where White lived and the crime occurred. *See* T 1592, 1628, 1768, 1783.

peremptory challenge was one that was "exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220. Indeed, in *Swain*, the Court held, "we cannot hold that the Constitution requires an examination of the prosecutor's reason for the exercise of his challenge in any given case." *Id.* at 222.

A fundamental change came in the year prior to Foster's trial. In *Batson*, this Court rejected *Swain*'s evidentiary formulation and directed a new procedure for determining racial discrimination in the selection of the petit jury. *Id.* The Court held that, instead of examining for a pattern of discrimination, the trial court must look only at the current case and the peremptory strike of each prospective juror who was allegedly struck on a discriminatory basis. Thus, *Batson* sharpened the focus solely to the individual strikes of black prospective jurors in Foster's specific case.[2]

3. On December 11, 1986 – four months prior to trial and eight months after this Court's *Batson* decision – the defense filed a "Motion to Preclude the Prosecution from Using Its Peremptory Challenges to Exclude Blacks." JA 17-20.[3] In the motion, Foster

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[2] There was no Georgia law to assist the prosecutors in their implementation of *Batson* as the Georgia Supreme Court's first foray into providing some guidance came two months after Foster's trial. *See Gamble v. State*, 357 S.E.2d 792 (1987).

[3] "JA" refers to the Joint Appendix. "TR" refers to the trial court record from Foster's criminal case. "T" refers to the trial

(Continued on following page)

argued that questionnaires be sent to prospective jurors "so that there can be an accurate determination of the State's motives when or if the State attempts to exclude blacks from this jury." JA 19. Foster's motion further requested that the State be required to show that *any* strike of a black prospective juror was not racially motivated. *Id*. This motion put the State on notice that if *any* black prospective juror was peremptorily struck, the defense would ask the prosecutor to explicitly justify his reasoning for the strike. The prosecutors were therefore attempting to determine how to implement the new requirements of *Batson* and, at the same time, contending with a motion that was imprecise and all-encompassing in its challenge to the prosecutors' potential strikes of black prospective jurors.

Foster also filed a pretrial challenge to the jury array, which alleged that black prospective jurors were underrepresented. TR 199. Five days prior to trial, the court held a hearing on that motion, specifically reviewing the alleged disparity of the black prospective jurors. PTH 4/15/87. The trial court denied the motion; but once voir dire commenced, defense counsel announced they were renewing their challenge to the array of the jurors. T 40. These

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transcript from the criminal case. "HT" refers to the state habeas corpus transcript. "PTH" refers to pretrial hearings, followed by the date of the hearing. "JQ" refers to juror questionnaires in the trial record, which are in sequential order by juror number.

challenges required the prosecutors to identify the black prospective jurors in some manner. Also, both the challenges and *Batson* itself required the prosecutors not only to be thoughtful and non-discriminatory in their consideration of the black prospective jurors, but also to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding their selections were pretextual.[4] With the prosecution on notice of both the *Batson* challenge and the defense's intent to vigorously challenge any strikes of black prospective jurors, voir dire began on Monday, April 20, 1987.

4. Voir dire was completed that Friday. The parties had the weekend to assess the prospective jurors and determine how to allot their peremptory strikes. To assist in their selection, the District Attorney circulated the venire list throughout his office for individuals to make notes about particular prospective jurors whom they knew. The circulated list contained no highlighting,[5] though it had a "B" next

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[4] The same level of attention was not required for other prospective jurors because, at the time of Foster's trial, *Batson* had not been expanded to include additional cognizable classes. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 364 (1991); *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

[5] This is shown by the fact that the sheets, prior to being photocopied, contained notes about individual jurors, which are identical on each page. The highlights were not photocopied, as shown by the differences in the "key" at the top and the differences in the highlights.

to black prospective jurors' names. In addition, the District Attorney's Investigator, Clayton Lundy, who was also black, made detailed notes concerning black prospective jurors whom he knew "off the top of [his] head" and kept specific notes on the prospective jurors' voir dire answers. HT 206, 207. Not surprisingly, in light of the pretrial motions and *Batson* itself, someone in the prosecutors' office noted which prospective jurors were black.

When the jury was selected on Monday, April 27, the prosecutor peremptorily struck ten prospective jurors,[6] four of whom were black, and the defense challenged only three of those four strikes. The State's strike of Evelyn Hardge, who was one of the four black prospective jurors struck, was not challenged by the defense at trial or on appeal. JA 106, 150. The chosen jury consisted of twelve white jurors. As anticipated, the defense made a *Batson* objection.

The trial court found that a prima facie case had been established and directed the prosecutor to explain his strikes of the black prospective jurors. JA 41. The prosecutor gave several reasons for striking each black prospective juror. Eddie Hood attended the Church of Christ, which the prosecutors believed generally opposed capital punishment. JA 46. Hood also had a son the same age as Foster, and who had been previously prosecuted by the same district

[6] The defense was allotted 20 strikes and the State 10. O.C.G.A. §15-12-165.

attorney's office for a theft charge. JA 44-45. Marilyn Garrett worked with low-income, underprivileged children, had a cousin who was currently being prosecuted by the same district attorney, and was less than candid with the court during voir dire about her family and her knowledge of the crime scene area. JA 55-56. Mary Turner was also deceptive during voir dire about her family members with criminal histories and drug problems, and she worked at the local hospital that treated the mentally ill where Foster had been evaluated for trial. T 2315-17. The trial court found no purposeful discrimination and denied the *Batson* challenge.

5. Foster was convicted of malice murder and burglary, and sentenced to death. He filed a motion for new trial, again raising his *Batson* claim. The District Attorney filed a lengthy written rebuttal and testified under oath at the motion-for-new-trial hearing setting forth race-neutral reasons for the strikes. These reasons closely mirrored those given at the initial *Batson* challenge prior to trial. *Compare* JA 44-57; JA 92, 125; TR 424-44. The trial court examined the State's reasons as to each juror, and considered the "many, many aspects of each venireman." JA 134. The trial court, which had of course observed the voir dire process, held that the prosecutors' strikes were "honest," "sound," and "credible," and did not violate *Batson*. JA 133, 137, 138, 140, 142, 143.

The Georgia Supreme Court affirmed. It reviewed the three juror strikes challenged by Foster

(*see* JA 150) and found that "[t]he prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific." *Id.* The Court concluded that the trial court's finding was not clearly erroneous. *Foster v. State*, 374 S.E.2d 188 (1988). This Court denied certiorari. *Foster v. Georgia*, 490 U.S. 1085, *reh'g denied*, 492 U.S. 928 (1989).

6. Foster then raised his *Batson* claim in his state habeas corpus proceedings in July of 1989.[7] As part of those proceedings (during which Foster asserted more than 40 claims), Foster obtained portions of the district attorney's file, which contained some of the prosecution team's notes from before and during jury selection.[8] The notes show, among other things, that the State identified the black prospective jurors at some point through highlights and circling the race on the venire sheets and juror questionnaires.

The state habeas court held a two-day evidentiary hearing. Although Foster had five years to conduct discovery during those proceedings and took the

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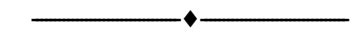
[7] On April 4, 1990, the state habeas court remanded Foster's case to the trial court for a jury trial on the issue of his alleged intellectual disability. Foster's habeas corpus case was held in abeyance pending the intellectual disability trial. A jury concluded he was not intellectually disabled and the Georgia Supreme Court affirmed that finding on January 18, 2000. *Foster v. State*, 25 S.E.2d 78 (2000), *cert. denied, Foster v. Georgia*, 531 U.S. 890, *reh'g denied*, 531 U.S. 1045 (2000).

[8] Foster did not establish that these were a complete copy of the district attorney's file or a complete copy of all the notes relevant to jury selection.

affidavit testimony of 46 witnesses and the depositions of five witnesses, Foster's counsel never took depositions of the prosecutors or called them as witnesses to ask them when or why the notes were written. Instead, Foster relied on his deposition of Lundy, the investigator, who testified that he wrote the majority of the notes and identified other handwritten notations as something the prosecution may have used in the case. HT 185-202, 208. Lundy was never questioned as to when the notes were taken.

On December 4, 2013, the habeas court held that the "notes and records submitted by [Foster] fail to demonstrate purposeful discrimination," and that the renewed *Batson* claim was without merit. JA 195-96. The Georgia Supreme Court summarily denied Foster's application for a certificate of probable cause to appeal.



SUMMARY OF THE ARGUMENT

The state habeas court reviewed the new evidence submitted by Foster in the state habeas proceedings in conjunction with the factual findings of the trial court and the holding of the Georgia Supreme Court. Following that review, the habeas court found that Foster had failed to overcome the prior findings that the prosecutors' strikes were not racially discriminatory. That factual finding is not clearly erroneous; Foster's *Batson* claim therefore fails.

Foster urges this Court to revisit the state courts' repeated holdings that he failed to show that the prosecution's race-neutral justifications for its strikes were pretextual. He claims that the new evidence, on its face, establishes purposeful discrimination by the prosecution. Neither argument has merit.

I. An accurate assessment of this new evidence does not establish that the prosecutors were motivated by race to strike prospective jurors. To the contrary, Foster's new evidence is perfectly consistent with conscientious, non-discriminatory prosecutors preparing to rebut a defense challenge to the array of the jury and a pretrial *Batson* challenge to *any* black prospective juror that may be peremptorily struck. Further, although Georgia law provided Foster channels for questioning the prosecutors on the meaning of the new evidence, he did not take advantage of those means, but chose to submit the documents and then base his arguments on conjecture. He therefore relies on unfounded speculation, as shown by looking at the various notes that comprise the new evidence.

a. The notes from the prosecution's file show that, at some juncture, the black prospective jurors' names were highlighted and a "B" placed by the name of each. Additionally, at some point, six black prospective jurors' names were circled on their questionnaires. Responding to the defense's pretrial challenges by identifying the black prospective jurors, as was also done by the defense in requesting a list of prospective jurors identifying the race of each, was not racially discriminatory.

b. There are also notes written by Lundy. They include his personal opinion of individuals, but do not establish racial animosity. Lundy's focus does appear to be on the black prospective jurors; however, that is likely based on his having lived in Floyd County his entire life and the black community being relatively small. The notes, and record as a whole, do not establish that black prospective jurors were singled out. Instead, the record shows that all prospective jurors, both black and white, were investigated by the prosecution team as testified to by both Lundy and the district attorney.

c. Also undermined by the notes is Foster's suggestion that the State was attempting to select an all-white jury. The notes from the prosecution's file support the district attorney's testimony at the motion-for-new-trial hearing that the State was attempting to place a black person on the jury for the State's benefit. The State's main witness against Foster was black and the State wanted to avoid an argument from the defense in closing that the jury was a "white lynch mob." Notes from the district attorney's investigator, expressing his opinion as to which black prospective jurors may be acceptable even in light of their voir dire, corroborate the testimony that the State was actively seeking a black juror.

d. Finally, Foster argues that notes from the prosecution's file show ten strikes were allotted, including strikes for both Powell and Garrett. He failed to show anything else. Although Foster had the means to determine in the state habeas proceedings,

it is unclear as to who made these notes, when they were made, or that the individual prosecutor that made the statements even saw these notes. With the exception of one juror, the notes merely reflect the peremptory strikes of the State. Nothing in the notes indicates the reasoning for the strikes or support Foster's argument that they were pretextual.

e. Speculation aside, the notes largely corroborate the in-court statements and the testimony of the prosecutors as to the basis of their strikes of black prospective jurors. The notes mirror the reasons given for the strikes of the black prospective jurors. So, instead of relating to purposeful discrimination in the selection of the jury, the notes correlate to prosecutors attempting to properly implement the new holding in *Batson* and rebut pretrial challenges to the jury array.

The state habeas court properly concluded that Foster had not carried his burden of establishing that the notes showed the strikes were pretextual or racially motivated and denied relief. Foster's speculative arguments do not establish that the state habeas court's finding was clearly erroneous.

II. Foster's claim that the justifications offered by the prosecution for its strikes were pretextual also fails. The state habeas court credited the trial court's factual finding, relied on by the Georgia Supreme Court, that the State had presented credible, race-neutral reasons for each peremptory strike of each black prospective juror challenged by Foster. And it

found Foster's new evidence did not overcome that conclusion. The voir dire responses, in combination with the State's knowledge of the defense strategies, establish that any prosecutor justifiably would have believed the four black prospective jurors not struck for cause had interests against the State, unrelated to race, and used a peremptory strike to validly remove them from the jury. Foster asserts that the prosecutors acted with racial intent only as to two of those jurors (Hood and Garrett). Yet just as the prosecution had good reason to strike the other two, they also had good (race-neutral) reasons to strike Hood and Garrett.

a. The State was aware that Foster was presenting a theory at trial that he was temporarily insane, under the influence of drugs and alcohol, and had come from a deprived background, all of which led to the murder of White. The State struck jurors it believed would be partial to Foster and this defense. Hood was struck, in part, because he had a son the same age as Foster who had been prosecuted by the district attorney trying Foster's case. Hood also had a wife who worked at the local mental health hospital and a brother who had counseled individuals addicted to drugs. Garrett was struck, in part, because she worked with underprivileged youth in the Head Start Program and had a cousin being prosecuted by the same district attorney trying Foster's case.

Garrett was struck, in part, based on her failure to be truthful during voir dire. Garrett stated that she did not know the area in which the crime occurred. Garrett, however, had gone to school and

worked near the crime scene area. And, while claiming not to know anyone with a drug problem, the State was aware that Garrett's cousin had recently been arrested on drug charges.

b. Foster's argument that there were similarly situated white prospective jurors that were not struck by the State, which showed purposeful discrimination, is unpersuasive, and ignores important differences between the jurors aside from their races. While white prospective juror Graves had a son near the same age as Foster, unlike Hood, Grave's son had not been prosecuted by the same district attorney as Foster. White prospective juror Duncan had a nephew that had been charged with armed robbery; however, she was distinguishable in that it did not appear that she was close to her nephew and the nephew had not been prosecuted by the same district attorney trying Foster's case. These differences are not subtle, and any prosecutor would take them into account.

Nor were there jurors similarly situated to Garrett. There were other white prospective jurors that were teachers or teacher's aides, but Garrett's strike was not based on her position as a teacher's aide. Instead, Garrett was struck in part, because she worked with the Head Start Program. Unlike typical school programs, Head Start specifically provides services for low-income families and underprivileged children. Knowing Foster's strategy at trial to present evidence that he "came from a low income underprivileged, disadvantaged youth," which led to the murder of White, this qualitative difference justified the

strike of Garrett. Foster fails to inform the Court that white prospective juror Lou Ella Hobgood, who also worked at "a home for disadvantaged youth," was also struck, in part, on the same basis. TR 425, 428.

c. The trial court found these reasons to be credible and race-neutral, and concluded that Foster had failed to show purposeful discrimination. On direct appeal, the Georgia Supreme Court, giving proper deference to those fact findings, affirmed. The state habeas court, reviewing both the new evidence and the fact findings of the trial court, concluded Foster could not overcome the Georgia Supreme Court's denial of the *Batson* challenge. That finding – which is based on the court's own fact-finding regarding the new evidence and the deference it properly gave to the trial court with respect to old evidence – merits deference. *See Hernandez v. New York*, 500 U.S. 352, 366-69 (1991) (holding that "clearly erroneous" standard applies to this Court's review of state trial court *Batson* rulings).

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ARGUMENT

THE STATE HABEAS COURT DID NOT COMMIT CLEAR ERROR WHEN IT REJECTED FOSTER'S *BATSON* CLAIM.

"Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Defendants are not entitled, however, to a

jury of any particular composition, *Taylor v. Louisiana*, 419 U.S. 522 (1975), and the Constitution does not prohibit the "accused or the State to eliminate persons thought to be inclined against their interest" regardless of race. *Holland v. Illinois*, 493 U.S. 474, 480 (1990); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Hernandez*, 500 U.S. at 460 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977)). Foster, the opponent of the strikes, bore the burden of establishing purposeful discriminatory intent in the trial court and on direct appeal. *Purkett v. Elm*, 514 U.S. 765, 768 (1995). In the state habeas court, Foster again bore the burden and had to show he had new facts to overcome that presumptively valid finding of the Georgia Supreme Court. He failed to make this showing.

Before this Court, Foster relies on the new evidence in two ways. First, he argues that, standing alone, "the notes and records establish that the prosecution was motivated by discriminatory intent." Pet'r Br. 26. Next, he argues that the new evidence – most of which did not touch upon the specific reasons offered by the prosecution for its strikes – should lead this Court to revisit and overturn the state courts' repeated conclusion that the prosecution's race-neutral reasons for striking the black prospective jurors were not pretextual. Neither argument has merit.

Reviewed in context, the new documents should be seen for what they are – notes preparing for a jury array challenge and a preordained *Batson* challenge to any and all peremptory challenges to black prospective jurors. The new evidence does not show discriminatory intent; and Foster – who declined to obtain any testimony from the prosecutors regarding the notes – can only speculate that it does. As to most of the notes, we do not know who wrote, who saw, who authorized, or who relied upon them. The habeas court was correct in discounting their relevance. They assuredly do not, standing alone, prove that "the prosecution's intention was to strike every black prospective juror." Pet'r Br. 28.

The state habeas court also did not commit clear error in adhering to the Georgia Supreme Court's affirmance of the trial court's rejection of Foster's *Batson* challenge. The prosecution set forth multiple reasons why no reasonable prosecutor would want Hood or Garrett (or the other two black prospective jurors peremptorily struck) on their jury. Foster relies on a distorted form of comparative-juror analysis, which ignores that most jurors have some strengths and some weaknesses (from the prosecution's perspective). It is altogether unsurprising that a few white jurors, when dissected, possessed a negative attribute cited by the prosecution as one of the many bases for striking Hood or Garrett. The trial court's ruling on the third step of *Batson* was eminently reasonable, as was the habeas court's adherence to that

ruling even after taking the new evidence into account. This Court should affirm.

I. The State Habeas Court Did Not Commit Clear Error When It Found that the New Evidence Failed to Show that the Prosecution Acted with Discriminatory Intent When Evaluating Prospective Jurors.

Under Georgia law, the doctrine of res judicata ordinarily bars a petitioner from asserting on state habeas a claim – such as Foster's *Batson* claim – that was rejected on direct review. *Bruce v. Smith*, 553 S.E.2d 808, 810 (2001); *Humphrey v. Morrow*, 717 S.E.2d 168, 178 (2011). Attempting to overcome the res judicata bar, Foster introduced in his habeas proceeding documents he had obtained from the district attorney's file after direct review had ended. These documents included (1) the jury venire sheets, which highlighted the black prospective jurors in green (JA 253-78); (2) six black prospective jurors' questionnaires, which had the race of the individuals circled (JA 311-42); (3) Investigator Lundy's notes on certain black prospective jurors (JA 293-94); and (4) additional notes whose author(s) is unknown, including a list of jurors who were a "definite no" (JA 287-90, 295-98, 299-310).

After a thorough review of the prior state courts' decisions and the new evidence, the state habeas court held that Foster failed to "show[ ] any change in the facts sufficient to overcome the res judicata bar."

JA 192. Stated the court, "[t]he notes and records submitted by Petitioner fail to demonstrate purposeful discrimination on the basis that the race of prospective jurors was either circled, highlighted or otherwise noted on various lists." JA 195.[9] That decision – based on a record created in the state habeas court and following a hearing at which live witnesses testified – is reviewed for clear error. *See Hernandez v. New York*, 500 U.S. 352, 366-69 (1991) (holding that "clearly erroneous" standard applies to this Court's review of state trial court *Batson* rulings).

A. None of the Specific Pieces of New Evidence Shows an Intent to Discriminate.

Foster insists that "the notes and records establish that the prosecution was motivated by discriminatory intent." Pet'r Br. 26. But his new evidence suffers from two fundamental flaws. First, because he did not call either of the prosecutors to the stand, he can only speculate as to the meaning of various markings and writings, the author of many of them, and whether the two prosecutors at trial (District Attorney Lanier and Assistant District Attorney Pullen) even saw many of them. Second, given the pre-voir dire motions filed by the defense, the prosecution team had ample *non*-discriminatory reason to

[9] Foster's claim (Br. 20) that the habeas court "did not address any of the other lists or notes" is therefore incorrect.

note who the black prospective jurors were. For these and additional reasons, the state habeas court had ample grounds to reject Foster's claim that the new evidence showed that the prosecution acted with discriminatory intent. This can be seen by walking through the four types of new evidence relied upon by Foster.

1. Juror venire sheets and juror questionnaires

Foster did not wait for jury selection to begin before asserting *Batson* challenges. Rather, well before voir dire even began, he filed a blunderbuss motion asking the trial court to "require the State to show that each one of its peremptory strikes of black persons is not racially motivated." JA 20. And to assist the court in making "an accurate determination of the State's motives," he asked the court to have "Questionnairs [sic] be sent to all the prospective jurors in the case." JA 19. On top of that, Foster filed a pre-jury-selection motion challenging the racial composition of the jury array. TR 199. It is hardly surprising, therefore, that persons in the prosecutor's office made notations indicating which prospective jurors were black.

Foster places great emphasis on the four copies of the jury venire sheets from the district attorney's file which show that black prospective jurors' names are highlighted in green and had a "B" beside them (*see* Pet'r Br. 14-15, 26-27); and that the race is circled on

the questionnaires of six black prospective jurors (*see* Pet'r Br. 16, 27). Yet Foster ignores his own role in prompting members of that office to do that. How could the prosecution respond to a challenge to the racial composition of the jury array without noting which prospective jurors were black? Indeed, the typed list from the prosecutor's file listing "name, address, *race*, sex, and age" of each person on the jury venire (JA 279-86) was compiled at *defense counsel's* request in preparation for the jury-array challenge. *See* PTH 4/15/87 at 6, Defense Ex. 1.

And given the *Batson* challenge repeatedly threatened, even prior to the excusal of any prospective juror, the notations on the jury venire sheets and questionnaires indicating which prospective jurors were black is not surprising and is not evidence of invidious intent. Georgia prosecutors – having received no additional guidance from this Court or the Georgia Supreme Court on implementing *Batson* – could not know with certainty what they had to show in the second and third steps of the *Batson* inquiry. Thus, for example, in making his (step two) articulation of race-neutral explanations, the District Attorney Lanier addressed all eleven black prospective jurors that were on the venire, even though we now know that he only needed to address the three black prospective jurors challenged by the defense. JA 43-44.

What the prosecutors did know was that if they ultimately chose to use a peremptory strike on a black juror, they would need to defend against any

suggestion that the strike was racially motivated – and that to make such a defense, they would need to maintain detailed information on the individual black prospective jurors. That information would be necessary for the initial *Batson* hearing before the trial judge, in responding to a motion for new trial, and for briefing on direct appeal. *See, e.g.*, TR 432 (State's response to motion-for-new-trial briefing). Preparing for racial challenges by noting which prospective jurors are being challenged – including on questionnaires – does not establish a discriminatory intent.

The prosecutors gave sworn affidavits in the state habeas proceedings that they did not make, instruct anyone to make, or rely upon the green highlights on the venire sheets. JA 168-71. Both prosecutors reaffirmed that their reasoning for exercising the challenges were entirely race-neutral. *Id.* That testimony stands unrebutted because Foster did not attempt to depose or call the prosecutors for cross-examination to challenge this testimony.[10]

Foster instead relies upon unsupported speculation when he attempts to assign racial animosity to those notations. But he had the burden of showing that the new evidence overcame the res judicata bar

[10] In practice, if one party presents the affidavit as direct testimony in a state habeas proceeding, which is allowed by law in Georgia (O.C.G.A. §9-14-48(a)), the opposing party may call that affiant to testify on cross-examination at any subsequent evidentiary hearing. *See* HT 131. Foster did not even attempt to call the prosecutors for cross-examination purposes.

and changed the result reached on direct review. Yet he offered nothing beyond the bare existence of the notations on the documents. The trial court quite properly concluded that that did not suffice.

2. Investigator Lundy's notes

a. In his role of assisting in jury selection, Lundy made notes about his personal knowledge of individual prospective jurors and his personal opinion of those individuals. These documents do not establish racial animosity; to the contrary, they are entirely consistent with the State's explanation of its approach to jury selection – that the State sought to obtain all the information possible on all prospective jurors.

Lundy testified in the habeas proceeding that the prosecutors "collected the criminal records of *all* the [prospective] jurors in preparation for voir dire," HT 182 (emphasis added), and that prosecutors had members of the district attorney's office review the venire sheets and make notes on it with regard to any prospective juror with whom they were familiar. HT 190. Lundy said he created notes of information he knew "off the top of [his] head" from living in the area all his life. HT 205-08, 275, 276; JA 293-94. Thus, for example, he wrote with respect to one prospective juror, "brown car"; and as to another, "very neat." JA 293.

Lundy's focus indeed appeared to be the black prospective jurors. That seems to have been because

Floyd County had a relatively small black community in 1987 (TR 265 (11.4%)), and Lundy had been a resident of that community his entire life.[11] And it is entirely consistent with Lundy's testimony that "[the State] investigated everybody that was on that [venire] sheet," HT 218-19, and that the entire office would be involved. HT 219, 226-27; JA 116, 127.

This testimony corroborated the district attorney's testimony at the motion-for-new-trial hearing that background checks were done on *all* on the prospective jurors, both black and white. JA 116. For instance, the prosecutor stated that he learned that Nicholson and Graves, both prospective white jurors, were likely to be good jurors based on the opinion of one of his assistant district attorneys. TR 429. Blackmon, a white prospective juror, was recommended by a city police officer. TR 429-30. Hall, Nicholson, DeDuerwaerder, Horner, Hatch and Cadle, all white prospective jurors, were known by the prosecutors to have previously served on petit or grand juries. TR 429-31. For good reason, then, the habeas court found that "every prospective juror,

[11] The record does not bear out Foster's argument that his case was "racially charged." *See* Petr.'s Br. 2. Prospective jurors were asked by the defense what their opinion was of race relations in the community. The overall impression was that race relations in the community were good. *See, e.g.*, T 472 ("better than most places"), T 848 ("above average"). Additionally, a number of prospective jurors lived in integrated neighborhoods, (*see, e.g.*, T 196-97, 226, 474, 602, 712, 867, 967), and no one identified any community pressure about the resolution of the case.

regardless of race, was thoroughly investigated and considered by the prosecution before the exercise of its peremptory challenges." JA 194. Foster introduced no evidence to the contrary.

b. Foster trains his attention on Lundy's notation, with regard to prospective juror Hardge, that she "might be the best one to put on the jury" (JA 294), and his notation that "if it comes down to pick [sic] one of the black [prospective] jurors, Ms. Garrett, might be okay." JA 345. Critically, however, Foster chose not to ask Lundy what he meant by these notations and what discussions (if any) he had with the prosecutors about them.

Foster likewise failed even to attempt to cross-examine the prosecutors about any knowledge, purpose, or reliance upon these notes. At the motion-for-new-trial hearing, however, the prosecutor actually provided a race-neutral basis for these notations. In discussing their juror selection process, the prosecutor made clear that the State had no discriminatory intent, that its "purpose was, in fact, the contrary, and that there were good and sufficient reasons for us to *actively look for black jurors* in the trial of this case." JA 99 (emphasis added). Specifically, the prosecutor explained that there was no reason to discriminate on the basis of race in selecting the jury because the State's primary witness, Lisa Stubbs, was black. JA 100. He stated that he was actively seeking to place a black prospective juror on the panel to avoid the potential for the defense to make a "white lynch mob argument" in the penalty phase of trial. JA 100.

These statements bring the ambiguity of Lundy's notes into focus – an ambiguity for which he is responsible based on his tactical decision not to obtain additional information about the origins and purpose of the notes. They surely do not prove discriminatory intent; and the state habeas court had every reason to discount them.

3. Additional notes by unknown author(s)

Foster also relies heavily on notes from the district attorney's file on three black prospective jurors which lists them as "B#1, B#2, and B#3" (JA 295-97). *See* Pet'r Br. i, 3, 16, 21, 23, 27, 35, 38, 41. Once again, though, it appears these notations were prepared, at some point, to address the defense's *Batson* challenge. In fact, "Batson issue" is noted on the top of one of the pages in question. JA 296. Given that black prospective jurors were the only recognized class that *Batson* addressed at the time of Foster's trial, these notes' focus on the black prospective jurors is not proof of – or even suggestive of – discriminatory intent.

Further, Foster attempted to have Lundy identify the author of all the notes from the district attorney's files *with the exception of these*. HT 208-10. And as with all his new evidence, Foster made no effort to have the prosecutors identify these notes. Instead, he chose to create a state-court record with the author unknown, the notations' purpose unknown, and their

timing unknown. By failing to support his allegations with nothing but conjecture, Foster did not establish discriminatory intent; and the habeas court did not commit clear error in so concluding.

b. Foster also relies heavily on two lists of unknown provenance, one setting out jurors who were a "definite no" (JA 301), the other listing all the prospective jurors and placing the letter "N" next to 10 of the names (JA 299-300). The latter list correlates with the strikes ultimately made by the State with the exception of one prospective juror listed as "N," but not struck by the State. JA 33, 300. The former document listed all five prospective jurors as "definite no's." JA 301. Foster's principal contention is that the "definite no" list standing by itself shows a racially discriminatory intent. *See, e.g.*, Pet'r Br. 22. It does nothing of the sort.

The list simply shows that some unspecified member of the prosecution team decided – perhaps in consultation with other team members – that the five remaining black jurors warranted peremptory strikes. It tells us nothing about the *reason* they warranted peremptory strikes and thus tells us nothing relevant to step three of *Batson*, which is whether the prosecutors' race-neutral justifications for the strikes were pretextual.[12]

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[12] Foster also relies on the "definite no" list for a narrower reason: as purportedly showing that the prosecutor was untruthful when he explained his thought process with respect to black

(Continued on following page)

B. Some of the New Evidence Introduced in State Habeas Proceeding Corroborates the State's Reasons for the Strikes.

Instead of establishing a racially discriminatory purpose, the notes support the legitimacy of the prosecution's concerns as to the two black prospective jurors at issue and the fact finding of the habeas court.

1. Eddie Hood

One portion of notes from the State's file appears to have been taken contemporaneously with voir dire. JA 303-10. Lundy could not identify who made these notes. But with regard to Hood, the document notes:

> See Q8 – not answered – W – WGaHosp – Slow D.P. answer – Church of Christ – very ambiguous answers confused. No eye contact. Very soft spoken – bro. counsel people involved in drugs – against alcohol based on church – strange eyes – roll round and round and bug out – Δ
>
> did not asked (sic) most questions asked of other jurors (av 22-27 mins per J – here < 11 min) See Juror 35 CofC

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prospective juror Marilyn Garrett. Pet'r Br. 31. Because this is part of Foster's challenge to the specific reasons offered by the prosecution for its strikes, it is addressed in the next section of the brief.

JA 303. These notes mirror the reasons for striking Hood given by the State in open court and its subsequent pleadings. *See* §II(A)(1), *infra*. The prosecutors' explanation of why he struck Hood and not white prospective juror Blackmon, who – like Hood's wife – had previously worked at Northwest Regional Hospital, is also supported by notes admitted in the state habeas hearing. JA 308. These notes will be addressed in §II(A)(1), *infra*.

2. Marilyn Garrett

The notes from the prosecutors' file also clarify several factors Foster has taken issue with as to Garrett. Notes, which appear to have been taken contemporaneously with voir dire, state:

> Broadface – would not look at ct during V.D. Very short answers – almost impudent – not opposed to D.P. said "yeah" to judge 4 occasions – 2 jobs Wyatt changed questions on insanity – Strong reaction to Pot question – felt J used – Looked at floor during D.P.

JA 308. As with Hood, these notes mirror the reasons the State provided in open court and its subsequent pleadings for striking Garrett. *See* §II(A)(2), *infra*.

Indeed, the State specifically referenced this note in explaining why it chose to strike Garrett. JA 55. The notes also establish that these were contemporaneous observations, not "after-the-fact" rationalizations, as asserted by Foster. *See* Pet'r Br. 37 n.43. And the notes (as explained in more detail in §II(A)(2),

infra) support the prosecutor's testimony that one reason he struck Garrett was that Lundy informed him that Garrett's cousin had been arrested for drug charges and was being prosecuted by the same district attorney's office as was handling Foster's case. JA 105, 112.

* * *

All told, then, the new evidence supports the reasons actually given by the prosecutors for striking the two black prospective jurors in question; Foster's insistence that they show racial motivation is pure conjecture because of his own tactics in state habeas review; and the State's need to respond to the defense's jury-array motion and inevitable *Batson* challenges explain the majority of the notes. The habeas court did not commit clear error when it found that the new evidence did not establish that the State acted with a discriminatory motive.

In *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005), this Court found that "the [juror] strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State." 545 U.S. at 266. As found by the state habeas court, the same cannot be said for Foster.

II. Foster Failed to Show that the State Habeas Court Committed Clear Error in Crediting the Trial Court's Conclusion that the Prosecutors' Strikes Were Not Pretextual.

Under *Batson* "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003). Accordingly, in conducting this third-prong analysis, the state habeas court had to review the State's explanations from trial and the motion-for-new-trial proceedings in light of the new evidence Foster garnered from the prosecutors' files. Conducting this analysis, the state habeas court concluded "that the State put forward multiple race-neutral reasons for striking each juror, and [Foster's] claim of inherent discrimination is unfounded by the record." JA 195-96. This was not error, let alone clear error.

A. The Record Shows No Pretext in the Strikes or the Treatment of Similarly Situated White Prospective Jurors.

The purpose of the peremptory challenge since common law has been "to eliminate person[s] thought to be inclined against [the proponent of the strike's] interest." *Holland*, 493 U.S. at 480. "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminating extremes of partiality on both sides,' thereby 'assuring the selection of a

qualified and unbiased jury.'" *Id.* at 484 (quoting *Batson*, *supra* at 91).

For that reason, in preparing for their peremptory strikes, the prosecutors had to analyze all aspects of each prospective juror. The reality of jury selection is that while a prospective juror may have some answers or beliefs that make them an appealing juror for the State, the same prospective juror may have other characteristics that make them less desirable or a risk for the State in the particular case. While a white prospective juror and a black prospective juror may have one characteristic in common, each venireman is obviously the sum of all characteristics, not a single aspect. Thus, the sum, not a part, is the proper comparison. The Georgia state courts understood this phenomenon and were not giving *Batson* short shrift when they rejected Foster's effort to craft a *Batson* violation by using a distorted form of comparative-juror analysis. *See* JA 134 (trial court stating that "the nature of this selection process is one involving many, many aspects of each venireman. The possible permutations are mindboggling.").

In his brief to this Court, Foster asserts that the prosecutions race-neutral reasons for peremptory strikes were pretextual only with respect to two black prospective jurors, Eddie Hood and Marilyn Garrett. As shown below, the prosecution had multiple race-neutral reasons for not wanting either person on the jury in this particular case. Also established is that the prosecution had multiple race-neutral reasons for not wanting on this jury the other two black

prospective jurors who were removed through peremptory strikes.

1. Eddie Hood

The prosecutor agreed that, on first glance, Eddie Hood "was exactly what he was looking for" in terms of age, employment and marital status. JA 44. A more thorough review of Hood, however, revealed a prospective juror who might have been "inclined against the [State's] interest" and would "be most partial toward the other side." *Holland v. Illinois*, 493 U.S. 474, 480, 484 (1990).

The prosecutor struck Hood because he:

- had a son the same age as Foster who had been convicted by the same district attorney for theft charges;
- was a member of the Church of Christ, whose members the prosecutors believed were against the death penalty;
- had a brother who had been a drug counselor;
- had a wife who worked at Northwest Regional Hospital, where mental health patients were treated;
- was hospitalized during voir dire;
- had ambiguous responses to questions regarding the death penalty; and

- was asked very few questions by defense counsel during voir dire.

JA 45-48.

Taking into account the defendant and his crimes as well as the State's awareness that Foster "intended to assert a defense involving mental illness and drug usage" (JA 149-50), the state courts' findings that the strike of Eddie Hood was reasonable and without purposeful discrimination is not clearly erroneous.

a. Prosecutors were justifiably concerned that Hood's perspective on this case would be influenced by his son. Hood had an 18-year-old son, close in age to Foster; and he had been charged with theft by taking and had been prosecuted by the *same district attorney* as Foster. JA 44-45, 48, 104-05; TR 14. This reason is plainly race-neutral: accepting a prospective juror whose son or close family member the office had prosecuted is well-recognized as an inherent risk. *See, e.g.*, *Hernandez*, 500 U.S. at 355-56 (did not contest two prospective jurors who had brothers being prosecuted by the same district attorney prosecuting Hernandez); *United States v. Houston*, 456 F.3d 1328 (11th Cir. 2006); *United States v. Rodriguez*, 581 F.3d 775, 791-92 (8th Cir. 2009). Recognizing this risk, the prosecutor testified at the motion-for-new-trial hearing that, based on his experience, he "stay[ed] away from jurors with family members who are . . . criminally connected in some way or another." JA 104. The

trial court found this factor "most persuasive" in determining this issue. JA 135.

Foster argues (Pet'r Br. 41-42) that two other prospective jurors were similarly situated because they had sons near the same age as Foster. But neither of these prospective jurors, Martha Duncan nor Billy Graves, had a son with a prior theft charge who had been prosecuted by the same district attorney's office. In fact, no other person accepted by the State had a son or daughter prosecuted by the district attorney. The only other person that had a close relative that had been or was being prosecuted by the same district attorney was Marilyn Garrett, who was also struck by the State.

Billy Graves was not similarly situated to Hood. Although both Hood and Graves were familiar with police officers who would testify in the case (T 279, 522-23), Graves knew the police chief, as well as three other officers; his brother had been a policeman for approximately 20 years; and Graves had been in the Navy and worked shore patrol when in port. T 522-24. Adding to this juror's appeal for the State was the fact that Graves knew the District Attorney and Grave's wife had campaigned for the District Attorney. T 522. With this seeming potential to be sympathetic to the State, the prosecutor understandably accepted Graves as a juror over Hood. Even though they shared a similar characteristic or two, it is clear the two men were not similarly situated.

Likewise, Martha Duncan was qualitatively different than Hood. Duncan had a nephew, not a son, who had been convicted of armed robbery. T 966. As found by the trial court, "[a] person's feelings for a son are ordinarily much stronger than for a nephew; one's interest in a person living under one's own roof is ordinarily much stronger than one's interest in someone living in another town." JA 136. In addition, Duncan was not sure whether her nephew was the victim or the perpetrator of the armed robbery. JA 107, T 964-66. And Duncan's nephew had not been prosecuted by the district attorney in this case, and therefore had no reason to harbor resentment against the individual prosecutor in this case. Plus, unlike Hood, Duncan could identify with the victim because she was also a school teacher and lived near the crime scene. JA 107; T 966.

Foster also attempts to equate Don Huffman with Hood on this ground, which is more of a stretch than Duncan or Graves. Although Huffman was 20 years old, close to Foster's age, he had not been prosecuted by the same district attorney's office and did not have a family member who had been prosecuted by the district attorneys' office. Foster's piecemeal attack – focusing on one factor while ignoring the many other differences between prospective jurors – is a distortion of comparative-juror analysis.

b. The prosecutors also made clear their belief, based on their past experiences and speaking with ministers of the Church of Christ, that the church took a stance against the death penalty. JA 46, 84,

113-14. This was not an after-the-fact rationale by the State. Prosecutors made this belief known early in voir dire, prior to any strikes or *Batson* challenge, during a discussion about what voir dire questions were objectionable. T 372.[13] That belief was taken into account in the decision to strike Hood.

Supporting the prosecutors' stated belief concerning the Church of Christ, during the initial *Batson* challenge, the prosecutor pointed out three other members of the Church of Christ who were also removed for cause. These three members were the only other Church of Christ members in the venire and were white: Thelma Terry, Gertrude Green and Vonda Waters. JA 46. Thelma Terry was excused based on her inability to be impartial and inability to consider the death penalty. T 558. In her questionnaire, which the State pointed out to the trial court (T 558), in answer to the question was there anything that would cause her "difficulty or hardship" if selected as a juror, she answered, "Since this is a death penalty, I do not feel I have the right to decide whether a person should live or die, I feel only God can do that." JQ#35, p. 5.

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[13] Defense counsel objected to a question posed by the prosecutor alleging the prosecutor "did not have a specific factor in his question." T 372. The prosecutor responded, "I had one, Your Honor, and I didn't ask it; and that particular juror was a member of the Church of Christ which does have a position against the death penalty." *Id.*

Gertrude Green was excused for cause on a motion made by the State and joined by the defense. T 730. She did not state she could vote for the death penalty, but not life imprisonment, as alleged by Foster. *See* Pet'r Br. 45. In fact, it was entirely unclear if Ms. Green understood any of the trial court's questions and her answers are equivocal at best. T 725-30. Vonda Waters, also a white prospective juror, was excused for cause by agreement. T 893.

In the end, all the members of the Church of Christ – white and black – were excused for cause or struck peremptorily. The trial court found "very credible the state's concern regarding religious affiliation." JA 137. That finding is unaffected by a page of notes within the new evidence upon which Foster relies. *See* Petr.'s Br. 43 (citing JA 302). The page has the heading "Church of Christ" and under that heading is listed: "don't take a stand on Death Penalty," "left for each individual member," "Romans – capital punishment," "Lord decreed," . . . "D.P. have advocated," "regard life precious," "NO," "small," "No Black Church," "left up to individual parishioners." JA 302. Foster focuses on the words "No Black Church," but as with the individual prospective jurors, he handpicks sections of the notes to draw offensive inferences. Foster never sought clarification of these notes in the state habeas proceedings, and his argument is merely speculation that is not supported, particularly since three of the four Church of Christ members on the venire were white. *See* JQ#35 1-2; JQ#53 1-2; JQ#78 1-2.

c. Additional concerns about Hood centered around his potential partiality to Foster based on Hood's wife's place of employment and his brother's former job as a drug counselor. As found by the Georgia Supreme Court on direct appeal, "The prosecutor was familiar with Foster's background and knew that Foster intended to assert a defense involving mental illness and drug usage." JA 150. Based on the knowledge of the "primary defense" (JA 46), the State had legitimate concerns regarding Hood's wife, who worked at Northwest Regional Hospital, which treated the mentally ill; and his brother, who counseled individuals addicted to drugs. JA 46. These factors in Hood's life could justifiably lead any prosecutor to believe that Hood would sympathize with Foster and be more partial to the defense.

Blackmon, an alleged similarly situated white prospective juror, had previously worked at Northwest Regional Hospital, but was distinctively different from Hood and reasonably not struck by the State. T 939. The State knew the defense would allege that Foster was mentally ill and temporarily insane when he committed the crimes. JA 150. Unlike Hood, who had no opinion on an insanity defense (T 280), Blackmon stated that she had "mixed feelings about insanity" as a defense and believed that often "people just claim it looking for sympathy." T 943. In explaining his acceptance of Blackmon, the prosecutor testified at the motion-for-new-trial hearing, "She felt like anybody who pleads insanity, that that's just a trick, that they – just to – it's an excuse." JA 110.

Thus, while she worked at a hospital that treated the mentally ill, she had strong feelings favorable to the State's position as to mental health. The prosecutor took all these facts into consideration and "evaluated . . . the whole Arlene Blackmon." JA 110. The trial court found the "decision to forego the risk" of placing Hood on the jury was "understandable." JA 137. That finding was bolstered by new evidence introduced during the state habeas proceeding. Supporting the prosecutors' explanation to the trial court, there are notes regarding Blackmon which clearly state "great answers on sanity." JA 308.

d. Hood's hesitation in responding to "the death penalty questions," was also a partial basis for the State's strike. JA 45-47. White prospective jurors George McMahon and Bobbie Grindstaff were also struck for their hesitation in response to the death penalty questions. TR 425, 428; *see also* JA 306, 310. Foster does not contest that Hood hesitated, but argues that Hood was unequivocal in his ability to impose a sentence of death. Petr.'s Br. 43-44. But, of course, a transcript can show what seems to be an unequivocal answer even though hesitation preceded that answer. Foster did not contest Hood's hesitation during the initial *Batson* hearing or at the motion-for-new-trial hearing. JA 48-49, 92. And the trial court, who heard Hood's voir dire responses and whose findings should be given deference, found the explanation "credible." JA 138.

e. Also pertinent to the State's decision to strike Hood was the scant time the defense spent questioning

him. JA 47. The prosecutor noted that, compared to white prospective jurors, the defense spent considerably less time questioning Hood. JA 47; *see also* JA 303. The record bears this out as it shows the defense's questioning of Hood encompasses only four pages (T 278-82), whereas the white prospective jurors immediately before and after Hood in the venire took up more than twice that number (*see* Ratliff T 221-39;[14] Nicholson T 293-302[15]). The prosecutor properly observed that the defense did not ask Hood about a series of issues it asked of the majority of other prospective jurors, such as his opinion of: cocaine's influence or its addictive properties; publicity about the case; temporary insanity; community attitude; or community pressure. T 278-82.

If a "prosecutor's questions and statements during voir dire" can "support or refute an inference of discriminatory purpose," then the defense's lack of questions in voir dire is certainly worth an equally contrasting inference by the State. *See Batson*, 476 U.S. at 97. The trial court found these bases "credible" and "completely understandable." JA 138.

f. Additionally, Hood asked to be excused from jury service, and he acquired food poisoning and had to be hospitalized during voir dire. JA 45-46. Failure

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[14] A page and half of this portion of the voir dire encompasses a bench conference.

[15] One page of this voir dire was left blank to account for mis-numbering.

to be able to serve after hospitalization is a legitimate concern. Although the trial court was later informed that Hood had been able to return to work (T 1303), this does not negate the State's concern. The trial court, who witnessed Hood both before and after his hospitalization, found "it was understandable that the state would not want to take a chance on his continued good health." JA 136.

g. In attempting to draw a parallel with *Miller-El*, Foster alleges that Hood was "singled out" during voir dire by the State with manipulated questioning. *See* Petr.'s Br. 41. This argument is not supported by the record. Foster argues that the prosecutors "encouraged" the first eight jurors "to give acceptable answers about pretrial publicity by prefacing their questions" to these jurors with the allegedly guided phrase of "what we are looking for is what you know so that you can be fair and impartial." *Id.* Foster claims that this guided phrase was omitted from Hood's questioning, and therefore the State was attempting to manipulate his answers. Yet the record shows only that the first three prospective jurors questioned by the parties were white and received the guided phrase (T 190, 218, 244);[16] and thereafter the prosecutors gave the phrase only intermittently and without regard to race. *See e.g.*, T 432 (Coultas, not prefaced and accepted by the State, struck by defense); T 313, 325, 331 (Barbogello, not prefaced and

[16] The first and fifth prospective jurors were excused for cause after questioning solely by the trial court. T 188, 267.

excused for cause on motion by defense). Foster's allegation of manipulative questioning is without support.

Like the trial court, the Georgia Supreme Court noted the prosecution's concerns regarding Hood's son, wife, brother, church and his hesitancy in voir dire in concluding that the strike was not racially motivated. JA 150. The state habeas court credited both prior holdings and the trial court's fact findings. JA 196. If race is taken out of the equation, any prosecutor may justifiably choose to exercise a peremptory strike on a person such as Hood, particularly given the facts and defenses in this case. Foster has failed to show that the factual finding by the state habeas court that there was no racial discrimination in striking this prospective juror constitutes clear error.

2. Marilyn Garrett

The State also readily acknowledged that, based on her jury questionnaire, Marilyn Garrett possessed several characteristics they were seeking in a juror. Following her voir dire questioning, however, the State determined that Garrett was a risk given the facts of this case. The State struck Marilyn Garrett because she:

- was "curt" and disrespectful to the trial court;
- was not a strong juror;

- gave answers the prosecutor knew to be untruthful;
- was not in a stable home environment; and
- worked with underprivileged and low-income children in the Head Start program.

JA 55-57, 93-97, 105.

a. Garrett's demeanor in court during voir dire revealed qualities no prosecutor wants in a juror. JA 55. The prosecutor explained that Garrett "would not look at the Court during the voir dire, kept looking at the ground"; her answers were "almost curt and impudent"; and she was disrespectful to the trial court by answering "yeah" to the court's questions. *Id.* Even a cold record shows that Garrett's voir dire answers are indeed terse, and although her answers were not transcribed as "yeah" by the court reporter, neither the defense nor the trial court took issue with the State's assertion. Also supporting the likelihood of a transcription alteration, defense counsel argued at the motion-for-new-trial hearing that Bonnie Harper[17] said "yeah" or "uh-huh" numerous times (JA 94; TR 545); like Garrett, however, her answers are transcribed as "yes." T 191, 192, 201, 205, 209, 210, 213.

b. Even putting to the side these negative impressions from Garrett, the prosecutors' main concern

[17] The prosecutor inadvertently called this prospective juror Bonnie Thomas. Harper was not similarly situated to Turner because Harper had been White's hairdresser. T 186.

was "her association and involvement in Head Start" as a teacher's aide. JA 56, 110. Head Start, unlike general school programs, provides a number of services specifically targeting low-income families and underprivileged children. Knowing Foster would present evidence at trial that he "came from a low income underprivileged, disadvantaged youth, which caused what happened to White," the prosecutors' concerns about accepting Garrett were valid. JA 56. White prospective juror Lou Ella Hobgood, who worked for the Ethel Harpst Home for Children and Youth, "a home for disadvantaged youth," was also struck, in part, on this basis. TR 425, 428. In finding the strike of Garrett "sound," the trial court noted the defense's stated strategy of attempting to find jurors who possessed "empathy for the 'socially, culturally and educationally deprived life-style' of the Defendant." JA 141 (citing T 85-89).

Foster's argument that white prospective juror Duncan was similarly situated to Garrett is unavailing. Duncan was also a teacher's aide in the school system, as noted by Foster, but in the regular school system. Unlike Garrett, she did not specifically work with underprivileged, low-income families and children – Foster's target juror type. The two are qualitatively different.

c. Further, no prosecutor would risk placing an individual on a jury who was misleading during voir dire. Garrett alleged she was not familiar with the North Rome area, which was where the murder occurred. JA 56. Garrett's questionnaire revealed,

however, that she attended junior high school two blocks from the crime scene. JA 56, 97-98; HT 241. Garrett also drove by the North Rome area every day on her way to work. The prosecutor testified at the motion-for-new-trial hearing, "When she said that, she was not familiar with the north Rome area, and yet she went to school there, and she works there, I felt that her answer was inaccurate." JA 98; *see also* JA 97-98.

Again, Duncan is distinguishable. Although Duncan lived in the area near the crime scene, she was not asked if she was familiar with the North Rome area as was Garrett. Instead, she was asked if she was familiar with the *neighborhood* in which White had lived. T 959, 966; *see also* JA 108.[18] Duncan, unlike Garrett, candidly stated that she lived in a nearby neighborhood, but was not familiar with White's neighborhood. *Id.* The prosecutor had no basis to believe Duncan was being less than forthcoming.

d. Garrett also had another serious flaw from the prosecution's perspective. Like Hood, Garrett had a relative, a cousin, with criminal charges. Two months before trial, Garrett's cousin, Angela Garrett, was arrested for cocaine possession and was being prosecuted by the district attorney's office. JA 105,

[18] As Duncan lived in the North Rome area, there was no need to ask her if she was familiar with the general area.

116; *see also* HT 2447-48.[19] The prosecutor's investigator spoke with him about it "during the jury selection and made [him] aware of it." JA 105, 112. Although not stated in the initial *Batson* challenge colloquy, the prosecutor informed the trial court "shortly thereafter." JA 112. The trial court found that the district attorney's investigator, Lundy, had advised the prosecutors to strike Garrett. JA 141.[20] As with Hood, striking a prospective juror based on familial criminal activity or ongoing prosecution by the same district attorney's office is far from racially discriminatory. It is common sense.

Garrett also denied knowing anyone with a drug or alcohol problem. T 955. The State found this answer highly suspect because her cousin Angela had just been arrested and fired from her job as a basketball coach for cocaine possession. JA 105.

e. The trial court also credited the State's concern that Garrett's own financial situation made "her more likely to identify with the Defendant." JA 142. The court held that it believed that the prosecutors'

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[19] February 27, 1987 affidavit for arrest of Angela Garrett.

[20] In finding this testimony credible, the trial court found that it was "unclear" when the prosecutor knew the basis of this advice by Lundy, but it was "clear that the investigator believed that Mrs. Garrett's relation with a Miss Angela Garrett was a cause of concern" because she had just lost her job due to a drug arrest. JA 141-42. Notes submitted in the habeas proceedings with regard to Garrett state "a cousin of Angela Garrett" (JA 293); and "Angela" is written beside this prospective juror's name on the venire sheet (JA 256).

concerns "that the combination of holding two jobs and being the divorced mother of two indicated a less stable home environment," and these factors aligned with the "prime defense in this case." JA 142.[21]

f. Foster relies on the "definite no" list in the new evidence as purportedly showing that the prosecutor was untruthful when he explained his thought process with respect to the strike of black prospective juror Marilyn Garrett. Petr.'s Br. 31. For many of the reasons given in §I, *supra*, the record is barren of any information that supports the allegation.

The prosecutor stated in the motion-for-new-trial brief that he had "in *his* jury notes listed this juror as questionable." TR 438 (emphasis added). At the motion-for-new-trial hearing, the prosecutor elaborated, stating that he made the decision to strike Garrett after black prospective juror Shirley Powell was excused for cause. He informed the trial court that, in making this determination, he compared the attributes of white prospective juror Arlene Blackmon and Garrett and decided to use the strike on Garrett. TR 439. Foster argues that Garrett's appearance on the "definite no" list, on which Powell also appeared,

[21] Foster also takes issue with the State's concern that Hood wanted off the jury and its concern that Garrett did not claim any hardships. It is qualitatively different for Hood, a man with grown children (HT 3034), to want off the jury and Garrett, a single mother with two small children (HT 2419) and two jobs, not to claim any hardships with jury service (HT 2421).

shows this statement was false, which, in turn, establishes racial discrimination. It does not.

Critically, Foster failed to establish that the "definite no" list was drafted by this specific prosecutor, was ever seen by this specific prosecutor, or was part of his thought processes. Foster readily could have found this information out, but chose not to. Lundy was the only person asked about the notes, and he could not identify who had written on the documents or drafted them. HT 210-15.

Lundy had never seen the handwritten document listing the prospective jurors with "N" by ten names and could only "guess" its meaning. HT 212, 215; JA 299-300. Foster did not attempt to question either prosecutor in the habeas proceedings about these notes.

These documents could easily be one of several drafted by the various individuals involved with the prosecution team in selecting a jury. In fact, during the *Batson* challenge in the trial court, the district attorney referenced his co-counsel's notes on other points. T 1374. This distinction strongly suggests that each prosecutor took his own notes. Speculation as to what one prosecutor proposed in the use of the State's strikes does not establish that these notes were the thought processes of both or that one prosecutor gave false statements to the trial court concerning his thought processes in striking the jury.

Moreover, other parts of the record are consistent with the prosecutors' statements regarding Garrett

and Powell. Unwavering throughout the notes is that Powell was to be struck by the State. *See* JA 261 ("NO!"); 293 ("I believe she would not be a very good person."); 307 ("NO NO NO NO NO"). The same cannot be said for Garrett. *See* JA 256, 262, 274, 293, 308. Additional notes substantiate the prosecutor's claim that Garrett was, at one point, questionable. *See* JA 345 ("Garrett might be okay").

Nor, of course, did the prosecutor's statement at the new-trial hearing go to the actual reasons why Garrett was viewed as a bad juror for the State. Even if he did misspeak in that proceeding, it did not pertain to the many reasons the State did not want Garrett as a juror (which are described in §II(A)(2), *infra*). Foster's effort to find fault with this one statement by the prosecutor does not remotely show racial discrimination.[22]

* * *

Based upon the reasons provided by the prosecutors, the state courts did not commit clear error in finding that the strike of Garret was not race-based. It is practical for a prosecutor not to risk placing an individual with these concerns on a jury. The Georgia Supreme Court noted Garrett's work with

[22] In step three of the *Batson* inquiry "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." *Hernandez*, 500 U.S. at 365. The trial court credited the prosecutor's reasoning (JA 142-43) and that finding should be given deference.

"low-income, underprivileged children," her cousin's arrest for drugs, and her "materially untruthful answers" in finding the strike was not racially motivated. JA 151. In turn, the state habeas court reviewed the new evidence and denied relief after crediting the factual findings of the trial court and the holding of the Georgia Supreme Court. JA 196. Foster has failed to show the state court habeas court's factual finding of no purposeful discrimination was clearly erroneous.

3. Evelyn Hardge

The defense conceded at the motion-for-new-trial hearing that the State's strike of Evelyn Hardge was justified and not racially motivated. JA 106, 1324.[23] In denying the motion for new trial, the trial court found "the State had ample reason to excuse her" and found Foster was not challenging the strike of this prospective juror. JA 51, 134. Likewise, the Georgia Supreme Court found that Foster conceded the strike was justified. JA 150. This juror is not at issue before this Court.

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[23] Prior to the defense's concession, the State explained that it struck Hardge because she spoke to Foster's mother outside the courtroom during voir dire (T 395; JA 49); she was "totally incoherent"; and the defense did not ask her a single question (JA 50). Defense counsel had no response to the State's race-neutral justification for striking Hardge. JA 51.

4. Mary Turner

Foster does not challenge the strike of Mary Turner in this Court. Even a cursory review of Turner shows why. The peremptory strike was not racially motivated, but was based on Turner:

- working at Northwest Regional Hospital;
- claiming to be Investigator Lundy's half-sister;
- being "less than candid" during voir dire;
- hesitating in answering the death penalty questions;
- favoring the defense during voir dire; and
- maintaining eye contact with Foster through voir dire.

JA 52-53.

a. Explaining his strikes by sworn testimony at the motion-for-new-trial hearing, the prosecutor testified that "[t]he bottom line on Mary Turner was, obviously, she was less than truthful with the Court and because of her family's criminal history." JA 110. Question 32 on the juror questionnaire asked, "Do you have a close friend or relative who has been accused or convicted of a crime or violence?" JA 139. Turner wrote, "no." *Id.* The prosecutor was aware, however, that Turner's brother-in-law, Otis Turner, had been charged with aggravated assault and burglary in May of 1986. JA 104, 140; TR 451-54. Further, her husband had been prosecuted and sentenced

by the same district attorney's office for carrying concealed weapons at a public gathering. JA 104; TR 490-92. On top of that, Turner claimed she knew no one with a drug or alcohol problem, even though her brother-in-law had criminal drug charges. JA 52-53. The trial court found the "state's unease with this venireman" "credible." JA 140; *see also* JA 55. The Georgia Supreme Court agreed, noting Turner's husband's convictions and her brother-in-law's repeated offense for "theft by taking, burglary and drugs." JA 52-53, 151.

b. An unusual aspect of this prospective juror was that she claimed in voir dire and on her jury questionnaire to be the half-sister of Investigator Lundy. T 598. Investigator Lundy repeatedly rejected this familial relation. JA 52, 128. The trial court noted the "disagreement" and found that "this kind of friction could not have been conducive to that prosecution." JA 140. The Georgia Supreme Court also noted this race-neutral reason. JA 151.

c. The trial court also credited the State's concern that Turner was more congenial to the defense and maintained eye contact with Foster throughout her voir dire. JA 53, 140-41. "The defense has insisted that 'body language' is important in the selection of jury (Trial Transcript at 107), and the Court must agree; it is just as important to the state as the defense, and the Court rules on that basis." *Id.* This Court has likewise noted the important role that demeanor may play in the selection of jurors. *Snyder v. Louisiana*, 552 U.S. 472 (2008) ("race neutral

reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention)"); *Thaler v. Haynes*, 559 U.S. 43, 44 (2010) (*per curiam*). These factual determinations that are based on credibility determinations and demeanor are rightfully within the province of the trial court. *See Hernandez*, 500 U.S. at 366.

d. Hesitation in answering the death penalty questions was another basis for the strike of this prospective juror. JA 53. Such nuances are hard to determine from a cold record, but when asked if she was opposed to the death penalty, Turner answered, "Not really, no." T 593.[24] Notably, when the prosecution stated hesitation as part of the basis for her excusal, the defense did not contest that this prospective juror hesitated. Instead, the defense argued in its brief to the trial court that her answers were "clear," but did not discuss the hesitancy. TR 391. Given that the trial court also had the opportunity to observe Turner's demeanor, Foster failed to show that the trial court's crediting of this factor was clearly erroneous.

It is clear that Turner lied during voir dire. This fact along with the remainder of the State's reasoning clearly establish that no prosecutor, regardless of the race, would want this individual on the jury. The strike was correctly found by the state courts to be

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[24] Strikes are "often based on subtle impressions and intangible factors." *Ayala v. Davis*, 135 S. Ct. 2187, 2208 (2015).

race-neutral and Foster failed to show this factual finding was clear error.

* * *

Although Foster has attempted to dissect these individuals and compare and contrast details about each to manufacture a "similarly situated" juror, he has failed. If a true and accurate assessment is to be done of the strikes and individual jurors, it must include the entire person and his or her entire voir dire. *See* JA 89-90. Conducting its analysis, the trial court agreed, holding, "The Court declines to analyze human beings as disconnected parts with disconnected attributes as the defense invites it to do." JA 137.

It is precisely this unique combination of factors that the State fully explained by setting forth the rationale and intricacies of their strikes. In conducting this third-prong analysis of *Batson*, the trial court also took into consideration the "obvious attentiveness" the prosecutors gave to the prospective jurors' written questionnaires and the extensive voir dire. JA 133. Evaluating the prosecutors' explanation for his strikes, the trial court found that "knowing the nature of the crime *and this prosecutor*,"[25] the State's reasons were "credible" and race-neutral. JA 133 (emphasis added). *See Thaler v. Haynes*, 559 U.S. 43, 49 (2010) ("the best evidence of the intent of the

[25] The trial judge knew the district attorney who testified as to the basis of the prosecution's strikes "a long time." T 1305.

attorney exercising a strike is often that attorney's demeanor"). The trial court concluded that the "prosecutors involved undertook long and careful assessment based on many factors," which contributed to the court's finding there was no purposeful discrimination in the strikes. JA 133-34. These determinations of the credibility and demeanor of the prosecutors, found by the trial court and relied upon by the Georgia Supreme Court and the habeas court, rest "peculiarly within the trial judge's province" and "in the absence of exceptional circumstances," should be deferred to by this Court. *Snyder*, 552 U.S. at 477.

In sum, the prosecution offered numerous race-neutral reasons for the peremptory strikes of the four black prospective jurors and the record, old and new, supports those reasons. The trial court and Georgia Supreme Court were correct in rejecting Foster's *Batson* claim initially; and the habeas court was correct in concluding that the new evidence so touted by Foster proved little.

B. This Court May Reverse the State Habeas Court Only if, After Giving Deference to its Factual Findings, it Concludes that the Court Committed Clear Legal Error.

The habeas court, understanding the weak support of Foster's claim, found he had failed to show purposeful discrimination in the selection of his jury. This factual finding should be given deference by this Court. *Batson*, 476 U.S. at 98 n.21.

Foster urges this Court to give no deference to the state habeas court's factual finding because that court reviewed a "cold record"; however, Foster created the cold record and he cites to no law to support his argument that factual findings in the procedural posture of this case are not entitled to deference; particularly when the habeas court expressly relied upon the trial court's findings. Beyond Lundy, Foster failed to show who drafted the admitted portions of the notes, when those notes were written, if they are the complete notes of the district attorney's office, and whether there were other notes or documents relied upon in making the decision on the peremptory strikes. Instead, Foster relied on almost complete conjecture on a socially sensitive issue to attempt to overcome the sworn testimony of the prosecutors and factual findings of the trial court.

Foster bore the burden of establishing that the habeas court's denial of his claim was clearly erroneous. As to that burden of proof, this Court has held, "where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). The evidence clearly allows "two permissible views," as established by the state courts' repeated denial of this claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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