No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

CHRISTOPHER FLOYD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Christopher Floyd was tried by an all-white jury in Houston County, Alabama, where African Americans comprise twenty-seven percent of the population. The prosecutor, who has a documented history of racial discrimination in jury selection, marked African American venire members with a "B" on his strike list, then struck ten of eleven qualified African American prospective jurors. One of the African American jurors this prosecutor struck, Inez Culver, provided answers to all of the prosecution's questions during voir dire, yet when asked to explain his peremptory strike of her the prosecutor asserted that he could not come up with a race-neutral explanation because she failed to respond to any questions and he did not know anything about her. Even though this was not true and was merely an explanation for not having a race-neutral reason, the Alabama courts refused to find an Equal Protection violation.

1. Did the Alabama courts' failure to find racial and gender discrimination in the selection of Mr. Floyd's jury conflict with this Court's precedent in Batson v. Kentucky and J.E.B v. Alabama?

2. Should this Court hold this case in abeyance pending its resolution of Foster v. Chatman, 136 S. Ct 290 (2015) (No. 14-8349)?

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Petitioner Christopher Floyd respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

On November 17, 2005, a jury in Houston County, Alabama convicted Christopher Floyd of capital murder during the course of a robbery, in connection with the death of Waylon Crawford. (C. 12, R. 1140.) The trial judge accepted the jury's 11-1 recommendation and sentenced Mr. Floyd to death on February 15, 2006.

On September 28, 2007, the Alabama Court of Criminal Appeals found a prima facie case of discrimination under Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994), and remanded the case for a Batson hearing. Floyd v. State, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Sept. 28, 2007). In its order following the hearing, the trial court found no Batson or J.E.B. violation. (C.R. 19.) The Court of Criminal Appeals upheld the trial court's decision on the Batson and J.E.B. claims and affirmed Mr. Floyd's conviction. Floyd v. State, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Aug. 29, 2008) (opinion on return to remand) (Attached as Appendix A). The Alabama Supreme Court granted certiorari on January 19, 2011, and on September 28, 2012 remanded the case to the trial court for specific findings of fact. Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. Sept. 28, 2012). (Attached as Appendix B.)

At the second remand, on February 8, 2013, the trial court again denied Mr. Floyd's Batson and J.E.B. claims. The Alabama Court of Criminal Appeals affirmed. Floyd v State, CR-05-0935, 2013 WL 5966917, at *6 (Ala. Crim. App. Nov. 8, 2013) (Attached as Appendix C). Rehearing was denied on February 7, 2014. The Alabama Supreme Court granted certiorari and affirmed the Court of Criminal Appeals' decision denying relief. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. May 29, 2015). The Court modified its opinion and denied rehearing on August 21, 2015. (Attached as Appendix D.)

JURISDICTION

The date on which the Alabama Supreme Court denied Mr. Floyd's appeal was May 29, 2015. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. May 29, 2015). His application for rehearing was overruled on August 21, 2015. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. Aug. 21, 2015)(modified on denial of reh'g). On November 12, 2015, Justice Thomas extended the time to file this petition for a writ of certiorari until December 18, 2015. Floyd v. Alabama, No. 15A493 (U.S. Nov. 12, 2015). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law[.]

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Waylon Crawford was shot and killed at his grocery store in Houston County, Alabama on February 15, 1992. For over twelve years, the death went unsolved. There were no witnesses, and there was no probative physical evidence collected at the crime scene. (R. 618, 624-26.)[1] Law enforcement suspected Christopher Floyd was involved in the shooting after the police obtained an inculpatory statement from him on September 27, 2004. (R. 735-47.) Investigators took five additional statements from Mr. Floyd, all of which contained conflicting details and inconsistent accounts of this crime.

Mr. Floyd's capital murder trial commenced in Houston County November 15, 2005. In a county where African Americans constitute twenty-seven percent of the population, he was tried by an all-white jury after the Houston County District Attorney removed ten of eleven qualified African American veniremembers from the jury. The prosecutor also used twelve of his first fourteen strikes to remove women.

At trial, a statement obtained by law enforcement officers from Mr. Floyd provided the primary evidence against him, as the District Attorney repeatedly told

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[1]References to the reporter's transcript at trial are cited herein as "R._." and references to the clerk's record of trial are cited as "C._." The clerk's record of the hearing on return to remand is cited as "C.R._." and the transcript of the hearing on return to remand is cited as "R.R_." The supplemental record is cited as "S.R._." Finally, the clerk's record on the second return to remand is "C.R.2_."

the jury. (R. 525-27, 536-37, 1030.) The defense's theory was that Mr. Floyd falsely confessed after being threatened by his cousin, Paul Wayne Johnson, the initial suspect in the crime, while the two were incarcerated together. (See e.g., R. 889, 895, 903.)

On November 17, 2005, Mr. Floyd was convicted of capital murder during the course of a robbery. (C. 12, R. 1140.) Mr. Floyd moved for a new trial based on newly discovered evidence of innocence after a previously unknown witness came forward with information implicating Paul Wayne Johnson in the killing. (C. 360-66.) The trial court denied the motion. (C. 386-88.) The trial judge accepted the jury's 11-1 recommendation and sentenced Mr. Floyd to death on February 15, 2006.

On September 28, 2007, the Alabama Court of Criminal Appeals found that the prosecution's exclusion of 91 percent of African Americans qualified for jury service and the use of twelve of its first fourteen peremptory strikes against women constituted a prima facie case of discrimination under both Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994), and remanded the case for a hearing. Floyd v. State, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Sept. 28, 2007).

A remand hearing was held on November 13, 2007. At the beginning of the

hearing, the trial court expressed deep frustration[2] with having to conduct the hearing based on the appellate court's findings, (R.R. 8 ("[I]t would appear that now instead of the Court being neutral, detached, and impartial, that the Court must now take sides if the defendant doesn't make a Batson challenge, then the Court has to make it for them.") He also stated his belief, before the State actually offered any reasons for its strikes, that the State did not engage in race-based jury strikes: "We don't get into situations where the State might strike an individual for racial reasons because the State knows that I am going to make them give their reasons, so you don't have that situation." (R.R. 7.)

At that hearing, the State attempted to justify its strikes of 10 of 11 African Americans from the venire. The prosecutor began by explaining that his system for evaluating jurors is partially based on "gut reaction," which he acknowledged includes the labeling African-American veniremembers by placing a "B" for black beside their names. (R.R. 57-58.) After asserting that five African Americans were struck because of misdemeanors, felony convictions, or traffic tickets, the prosecutor gave the following reasons for its strikes of the remaining African-American

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[2] The trial court's hostility about being required to make findings about the state's strikes of African Americans and women continued throughout the hearing; at one point, for example, he sarcastically interjected: "Should you also give your reasons for striking white males – but that's okay isn't it? It's proper to do that. I forgot." (R.R. 51.)

veniremembers that he removed:

> **Doris Barber**: She was not paying attention to the prosecutor or the Court and had no eye contact, but was nodding at the defense. (R.R. 73.)
>
> **Inez Culver**: **She was not on the background check list compiled by the State containing criminal records and prior jury service information on all veniremembers, and "she failed to respond to any question." (R.R. 67-68.)**
>
> **Martha Culver**: She was opposed to the death penalty but reluctantly indicated she could follow the law. (R.R. 69.)
>
> **Lillie Curry:** She knew the defense attorneys, the district attorneys, and a State witness; too familiar with everyone on the case. She had an ex-husband who was in law enforcement. (R.R. 69-70.) Later he added that she had religious beliefs against sitting in judgment of another. (R.R. 71-72.)
>
> **Ramona Cleveland:** She was 77-years-old and was struck because of her age and the complexity of the case. (R.R. 66-67.)

As to the strike of Teena Allen, a 48-year-old white woman, the prosecutor said that he "struck her basically on the age part." (R.R. 74.) The trial court later noted that the prosecutor's reliance on age was "all over the map." (R.R. 82.)

In its order following the hearing, the trial court found that the State had provided race- or gender-neutral reasons for all of these strikes with the exception of the strikes of Inez Culver, an African-American female, and Teena Allen. (C.R. 18.) However, the judge nevertheless determined that there was no Batson or J.E.B. violation. Reasoning that "not remembering is not tantamount to discrimination," the trial court stated that it would be "inconsistent that the State would give a reason for

its strikes of other African-Americans and females and yet strike these two based on race or gender." (C.R. 18.) The Court determined "that the State gave race and gender neutral reasons for its strikes." (C.R. 19.)

In its opinion, the Alabama Court of Criminal Appeals conducted its own review of the record in order to find race-neutral reasons for the strike of Ms. Culver, and gender-neutral reasons for the strike of Ms. Allen. The appeals court determined that the prosecution had stated that Ms. Culver was struck because she did not respond to any questions during voir dire. Additionally, the court determined that the prosecutor stated that he struck Ms. Allen because of her age and because his initial impression of her was that she would not make a favorable juror for the State. The Court of Criminal Appeals upheld the trial court's decision on the Batson and J.E.B. claims and affirmed Mr. Floyd's conviction. Floyd v. State, No. CR-05-0935, 2007 WL 2811968 (Ala. Crim. App. Aug. 29, 2008) (opinion on return to remand). **One judge dissented, finding that there was no race-neutral reason for the strike of Ms. Culver. Floyd, 2007 WL 2811968, at *3 (opinion on return to remand) (Welch, J., dissenting) ("I believe that the record provides clear evidence of disparate treatment of white venire members and treatment of Juror No. 58 [Ms. Culver] and that the State improperly struck Juror No. 58 based solely upon her race.").**

On September 28, 2012, the Alabama Supreme Court reversed and held that "the trial court did not enter specific findings concerning the reasons the State offered as to why it struck the African-American and/or female jurors it struck." Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. September 28, 2012). The case was remanded with instructions for the trial court to make those findings. Id.

At the second remand, the prosecution provided no new reasons for its strikes. In its order on second return to remand, the trial court changed his finding with respect to the most critical issue in the case. Instead of finding that the prosecution **did not** provide any reasons for the strikes of Ms. Culver and Ms. Allen, as he did at the first remand (C.R. 18 ("the State has presented race and gender neutral reasons for its strikes **with the exception** of juror Inez Culver, a black female, and juror Teena Allen, a white female . . ."), the judge this time found that the prosecution *did* give reasons for its strikes of Ms. Culver and Ms. Allen. (C.R. 2 31-33.))

In this second order, the trial court found the State had satisfied the requirements of Batson with respect to its strike Ms. Culver: "[T]he State could not remember much about her. . . . she was struck because she did not respond to any questions and she did not appear on the State's list." (C.R. 2 32.). According to the trial court, this was adequate to rebut the inference of discrimination.

Contrary to this finding, the record in this case shows that Ms. Culver did, in

fact, give responses to many voir dire questions. When the prosecutor asked the venire if anyone had seen someone get shot on television, Ms. Culver responded that she had, as the prosecutor noted that *everybody* responded that they had. (R.316) ("Everybody seen that during their lifetime?...Everybody? Anybody who has not?"). In addition, during group voir the prosecutor asked veniremembers to raise their hands if they knew the defense attorneys, (R.317), if he had ever prosecuted their relatives, (R. 333), and if they had ever seen anyone get shot. (R. 315.) Ms. Culver, like many other jurors, responded to these questions by not raising her hand.

Ms. Culver also responded in the negative by not raising her hand to the following questions asked of her during voir dire: Would you consider that someone was only 21-years-old before imposing the death penalty? (R. 307-08); Do you think the burden of proof in a death penalty case should be 100 percent? (R. 310); Have you ever testified in a criminal case? (R. 314); Did any of the defense attorneys ever represent you? (R. 317); Would you spare someone's life for sympathy because of your religion? (R. 319); Does anyone think you should automatically give up your wallet during a robbery? (R. 322); Does anyone believe the district attorney's office selectively prosecutes based on race, color, or creed? (Id.) At one point, the prosecutor emphatically stated his insistence that everyone on the venire respond by letting him know whether they understood reasonable doubt, stating, "Come on people. I'm looking at you. If you don't, I need to know. It's very important." (R.

311.) Again, by not raising her hand like many other jurors, Ms. Culver responded that she understood. (Id.)

Following these questions and answers, the prosecution did not address any followup questions to Ms. Culver.

As to the strike of Ms. Allen, the trial court in its order on second return to remand found that the State struck her because of age, (C.R. 2 32), and that this was a gender-neutral reason. Neither the prosecutor, nor the trial court, explained how her age was related to the case. Ms. Allen was 48 years old at the time of the trial, fifteen years older than Mr. Floyd. The State left on the jury a 38-year-old male, Kelly Colbert, (R.R. 84-85), and a 54-year-old male, Robert Earl Davis. (R.R. 23, 27.) Additionally, the prosecutor used age as a justification to strike a 77-year-old, (R.R. 67), a 36-year-old (R.R. 83), and a 28-year-old. (R.R. 105.)

As the trial court noted at the initial remand hearing, the prosecutor's reliance on age was "all over the map." (R.R. 82.)

On February 8, 2013, the trial court issued its order on second return to remand denying Mr. Floyd's Batson and J.E.B. claims. The Alabama Court of Criminal Appeals affirmed. On May 29, 2015, the Alabama Supreme Court Court affirmed the Court of Criminal Appeals' decision denying relief. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. May 29, 2015) (modified on denial of reh'g, Aug. 21, 2015).

REASONS FOR GRANTING THE WRIT

In Christopher Floyd's trial, the Houston County District Attorney excluded ten of eleven, or 91 percent, of the qualified African-American veniremembers from the jury and used seven of his first eight peremptory strikes against African Americans.[1] As a result, Mr. Floyd was tried before an all-white jury in a county that is twenty-seven percent African American.

The trial court determined that the prosecutor did not illegally discriminate based on race and gender, in part because of a legally impermissible presumption that this Alabama prosecutor simply would not do so. (See R.R. 7 ("We don't get into situations where the State might strike an individual for racial reasons because the State knows that I am going to make them give their reasons, so you don't have that situation."); C.R. 19 ("It is unlikely that the State would make a preemption (sic) strike on the basis of illegal race or gender grounds.")).

To the contrary, the record at the Batson hearing evinces the prosecution's clear reliance on race in selecting this jury, as demonstrated by his use of the letter "B" to label black veniremembers and subsequent reliance on those "B" labels as part

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[1] After strikes for cause there were 48 jurors on the venire. Thirty-seven were white, 11 were African American, 23 were men, and 25 were women. Defense counsel used 18 peremptory strikes to remove 17 white jurors, one African American, 11 men and 7 women. The District Attorney used peremptory strikes to remove 8 white jurors, 10 African Americans, 6 men, and 12 women. The jury consisted of 12 white jurors, no African American jurors, 6 men, and 6 women. (C. 301-03.)

of his "initial gut-reaction rating system." (R.R. 58.) The prosecutor explained his system as follows:

> In a capital murder case where voir dire is extensive, and ordinarily the process lasts a day or longer, I try to rate each and every juror initially on gut reaction. If you will look at State's Exhibit No. 1 there, in black outside of a lot of juror's names, I will write "Okay." I will write a dash for a minus. I might write a plus, being – minuses are a bad gut reaction, pluses are a good gut reaction. Okay is just okay. All right. Also, in doing so – I do that when the clerk is calling the names of the jurors and asking them to stand. Now, also, as is the Court's practice – when I say the Court, the list that we have, I will but a "B" outside the names of those who are black.

(R. 58.)

After which, the following exchange occurred:

Court: You put a what?

Mr. Maxwell: "B."

Court: "B," as in black?

Mr. Maxwell: Yes, sir. All right. I have done this same procedure, the initial gut-reaction rating system, for over thirty years. It's proven to be pretty accurate, I think.

Based on this system, the prosecutor placed a "B" beside the names of all African-American jurors who were eventually struck, and a "minus" beside seven of these ten. (R.R. 22-23.) As this Court has found, marking the race of prospective jurors supports "[t]he supposition that race was a factor." Miller-El v Cockrell, 537

U.S. 322, 347 (2003).

In addition to this demonstration of race-consciousness, the prosecutor failed to provide legitimate, race-neutral reasons for its strikes of African-American prospective jurors. After two Batson remands in this case, the prosecution failed to provide any race-neutral reason for why it struck Inez Culver, a 57-year-old African-American woman. In response, the trial court changed his mind concerning whether the prosecutor had provided a race-neutral reason for its strike of Ms. Culver, first finding that he had not, then at the second remand finding that the prosecution **did** give race-neutral reasons for this strike even though no new justifications were offered (C.R. 2 31-33), thus ruling the defense had not met its burden of proving purposeful discrimination. The trial court additionally changed his finding regarding the State's strike of Teena Allen. First, the trial court found the State had not provided a reason for this strike (C.R. 18), then in its second order finding that the state struck Ms. Allen "because of age," (C.R. 2 32). The trial court denied the J.E.B. challenge.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 476 U.S. 79, 86 (1986). The Constitution forbids striking a single prospective juror for a discriminatory purpose.

Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

The Alabama Supreme Court upheld the trial court's decision. Floyd v. State, No. 1130527, 2015 WL 3448098, at *8 (Ala. May 29, 2015), as modified on denial of reh'g (Aug. 21, 2015). In denying Mr. Floyd's Batson claim, the Alabama courts overlooked numerous examples of explicit reliance on race by the prosecution, and failed to consider "all relevant circumstances" when reviewing Mr. Floyd's claim. "[T]he rule in Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." Miller-El v. Dretke, 545 U.S. 231, 252 (2005).

Given this Court's consideration of similar facts and claims in Foster v. Chatman, these circumstances warrant this Court's intervention in Mr. Floyd's unlawful capital murder conviction and death sentence.

I. THE EVIDENCE ESTABLISHES THAT THE PROSECUTION REMOVED PROSPECTIVE JURORS BASED ON RACE.

Despite the prosecutor's failure to provide **any** reason for his strike of Juror 58, Inez Culver, an African-American woman with no criminal record, no objections to the death penalty, and who responded to every question asked of her, the trial judge and the Alabama Supreme Court found that there was no Batson violation in this case. This decision conflicts with this Court's precedent.

A. The Lower Court's Determination that the Prosecution Provided A Race Neutral Reason For the Strike of Inez Culver Is Contradicted By the Record and Conflicts with Precedent From This Court.

The Houston County District Attorney has never given a reason for his strike of Inez Culver. There were no reasons given at trial, where she was the State's sixteenth strike. On the first remand, the trial judge found that the prosecutor could not remember the reason for this strike, but reasoned that "not remembering is not tantamount to discrimination." (C.R. 18.) The Alabama Supreme Court then remanded again to give the trial court an opportunity to determine whether the district attorney could provide reasons for this strike. Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. Sept. 28, 2012). On remand, again, no new reasons were offered. This time the trial court simply excused the failure of the prosecutor to give a race-neutral justification by crediting the prosecutor's assertion that there was a lack of information about this juror in the record. (C.R. 2 32-33.) But this was merely an explanation for not having a legitimate reason; it is not a reason itself. That is, not knowing enough about a juror to provide a race neutral reason is not among this Court's numerous, recognized race neutral reasons for a strike.

The district attorney stated the following regarding his peremptory strike of Ms. Culver: "I guess she was inadvertently left off our list.[2] We knew nothing about

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[2] The list, identified in the record as "STATE'S LIST **W/B'DAYS, RACE**," (C.R. 20)(emphasis added), is compiled by the Houston County District Attorney

her from that. Also, she was nonresponsive to any question that we had." (R.R. 75.)

Based on this assertion from the district attorney, the trial court initially found that no reason was given for removing Ms. Culver. But on remand from the Alabama Supreme Court, the trial judge altered his finding and found - without receiving any new proffer from the District Attorney - that the explanation that Ms. Culver "was struck because she did respond to any questions and she did not appear on the State's list" was adequate to rebut the inference of discrimination. (C.R.2 32.) The Alabama Supreme Court agreed, "[i]n light of the prosecutor's explanation of the process he used for striking a jury, the prosecutor's candor that he knew nothing about [Ms. Culver], his stated reluctance to seat a juror he did not believe was good for the State, [and] the fact that the [remand hearing] was not held immediately following the jury selection." Ex Parte Floyd, 2015 WL 3448098, at *9.

As an initial matter, the record makes clear that the District Attorney's assertion that he knew nothing about Ms. Culver ignores that fact that she answered every question asked of her during voir dire, providing him with all of the information he requested. For example, during group voir dire the prosecutor asked veniremembers to raise their hands if they knew the defense attorneys, (R. 317), if he

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based on information provided by the Dothan Police Department and the Houston County Sheriff's Department, and includes the date of birth, gender, race, outcome of prior jury service, and criminal records of prospective jurors. (C.R. 24-34.)

had ever prosecuted their relatives, (R. 333), and if they had ever seen anyone get shot. (R. 315.)[3] Like many jurors, Ms. Culver responded to those questions by not raising her hand. At one point, the prosecutor emphatically stated his insistence that everyone on the venire respond by letting him know whether they understood reasonable doubt, stating, "Come on people. I'm looking at you. If you don't, I need to know. It's very important." (R. 311.) Again, by not raising her hand, like many of the other jurors, Ms. Culver responded that she, in fact, understood. (Id.) Moreover, when the prosecutor asked the venire if anyone had seen someone get shot on television, he noted that *everybody* responded that they had. (R. 316.) ("Everybody seen that during their lifetime?. . .Everybody? Anybody who has not?"). These examples show that, contrary to the District Attorney's assertion and the Alabama Supreme Court's finding, Ms. Culver *did* respond to questions during voir dire which provided information about herself to the District Attorney.

By failing to consider that the prosecutor used a lack of information about Ms.

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[3] Ms. Culver also responded in the negative by not raising her hand to the following questions: Would you consider that someone was only 21-years-old before imposing the death penalty? (R. 307-08); Do you think the burden of proof in a death penalty case should be 100 percent? (R. 310); Have you ever testified in a criminal case? (R. 314); Did any of the defense attorneys ever represent you? (R. 317); Would you spare someone's life for sympathy because of your religion? (R. 319); Does anyone think you should automatically give up your wallet during a robbery? (R. 322); Does anyone believe the district attorney's office selectively prosecutes based on race, color, or creed? (Id.)

Culver as a reason for this strike, yet failed to engage in additional voir dire of Ms. Culver, the courts below flatly contradicted long-standing precedent from this Court that the failure of a prosecutor to engage in additional voir dire where there are gaps in information about a juror should be considered evidence that the reason given for a strike is a sham. Miller-El v. Dretke, 545 U.S. 231, 246 (2005) (finding that explanation for removal of African American juror "reeks of afterthought" where prosecutor failed to ask followup questions about topic of alleged concern). Here, the gist of the State's assertion about Ms. Culver is that there was a dearth of knowledge about her, yet the prosecutor did nothing to address this purported deficiency. See Johnson v. California, 545 U.S. 162, 172 (2005) (Batson framework designed to produce actual answers to suspicions of discrimination, not produce mere speculation). The Alabama Supreme Court erroneously accepted this reason at face value. Floyd v. State, 2015 WL 3448098, at *9.

B. The Lower Court's Failure to Consider the Fact That the Prosecutor Made Notations About Race Conflicts With United States Supreme Court Precedent.

The Alabama Supreme Court also failed to consider the fact that the prosecutor's background "list" compiled by law enforcement agencies contained the race of every veniremember, thus a "B" for black was beside Ms. Culver's name. At the Batson hearing, the prosecutor explained that he also used a strike list in which he "put a 'B' outside the names of those who are black," as part of an "initial gut

reaction rating system" he has followed for more than thirty years. (R.R. 58.) This is strong evidence of discriminatory intent that reviewing courts are required to consider. See Miller-El v. Cockrell, 537 U.S. 322, 347 (2003) ("The supposition that race was a factor could be reinforced by the fact that the prosecutor marked the race of each prospective juror on their juror cards.").

C. The Lower Court's Failure to Find Disparate Treatment of White Jurors Conflicts With Miller-El v. Dretke.

The Alabama Supreme Court additionally excused the prosecutor's disparate treatment of Ance Barr, a white juror who responded to voir dire questions in an identical manner as Ms. Culver. Like Ms. Culver, Mr. Barr answered no (by remaining silent) to all of the group voir dire questions except the one about whether he had seen someone get shot on television, to which he answered yes. (R. 316) (prosecutor noting for record that everyone answered yes to that question). However, the court below found that because Mr. Barr was not left off the State's strike list the State knew that he had never served on a jury and that he had never been convicted of a crime, information that the State asserted it did not have about Ms. Culver because she was left off its list. The Alabama Supreme Court held that, "[u]nder the facts of this case, these known facts about [Mr. Barr] negate the evidence of any disparate treatment of [Ms. Culver] and [Mr. Barr.]" Ex Parte Floyd, 2015 WL 3448098, at *8.

In so doing, the court below overlooked the fact that the prosecutor's reliance on knowing less about Ms. Culver than Mr. Barr was created by the prosecutor himself when he failed to conduct individual voir or ask any followup questions to Ms. Culver, despite his clear knowledge that she was not on his "list," in violation of this Court's precedent. Miller-El v. Dretke, 545 U.S. at 246 (explanation for removal of African-American juror "reeks of afterthought" where prosecutor failed to ask followup questions). Moreover, during voir dire, the trial judge elicited from everyone on the venire, including Ms. Culver, whether they had been convicted of a crime (R. 204-05), and neither Ms. Culver nor Mr. Barr answered this question in the affirmative. This type of disparate treatment provides strong evidence of discrimination, and the lower court's failure to consider it conflicts with United States Supreme Court precedent and this Court's precedent. Miller-El, 545 U.S. at 241("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . "); Snyder v. Louisiana, 552 U.S. 472, 483 (2008) (reversing and finding "implausibility" of prosecutor's explanation for strikes reinforced by acceptance of white jurors with similarities to African Americans removed).

D. Additional Strikes of African American Jurors Demonstrate Racial Bias in Jury Selection.

Lillie Curry

The prosecutor gave two reasons for striking 59-year-old African-American veniremember Lillie Curry: that she had religious convictions against sitting in judgment of another and that she knew the defense attorneys and a witness. (R.R. 71-72.) The first reason is explicitly contradicted by the record. The trial court specifically asked, "Do any of you have a religious conviction or moral conviction which would prohibit you from sitting in judgment on your fellow man or woman?" No one raised a hand and the court noted, "I see no hands." (R. 209.) Nevertheless, the trial court found "religious convictions" as a valid race-neutral reason for this strike.

As to the second, Ms. Curry indicated she knew attorneys on both sides and a witness for the State, Dr. Alfredo Paredes, the State's forensic pathologist. (R. 250-51, 267.) Ms. Curry affirmed that her knowledge of this individual would not affect her ability to follow the law. (R. 268.) The prosecutor failed to ask any follow-up questions to Ms. Curry. Therefore, there is no evidence in the record that Ms. Curry's acquaintance with any of these individuals would affect her ability to be impartial. To the contrary, the record indicates Ms. Curry had been married to a law enforcement officer and believed law enforcement officers to be more truthful than

other witnesses (R. 250), suggesting she would be a strong witness for the State. Further, the fact that she knew people involved in the case is unpersuasive in light of the fact that five of the seated jurors knew individuals involved in the case, including Kelly Colbert, a white male who served as the jury foreman, and Glenn Brackin, a white male alternate, both of whom knew the State's attorneys.[4]

Joe Butler

The prosecutor stated that he struck Joe Butler, a 37-year-old African American man, as part of an effort to remove jurors with criminal convictions, because Mr. Butler had been convicted for harassment twice and had numerous traffic tickets. (R.R. 65.) However, as defense counsel pointed out, one of the harassment cases occurred in 2007, and Mr. Floyd's trial was in 2005, so there is no way for a conviction that had not occurred to be a legitimate reason for a strike. (R. 77.)

Furthermore, Mr. Butler's purported convictions should have been considered along with multiple responses he provided that showed a respect for law enforcement:

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[4] During the Batson hearing, the prosecutor also pointed out that he wrote a "minus" and "no" beside Ms. Curry's name during his initial juror evaluation, and offered this fact as an additional race-neutral reason for this strike. (R.R. 72. ("I didn't just write a plus or minus. I wrote a "no" out beside Ms. Curry's name.")). But, as he had previously explained, this "gut-reaction" rating system relied upon "B" labels beside the names of African-American prospective jurors and demeanor-based evaluations, and thus cannot fairly be used to support a finding of non-discrimination. Johnson v. California, 545 U.S. 162, 172 (2005) (Batson framework designed to produce actual answers to suspicions of discrimination, not produce mere speculation).

his belief that law enforcement officers had a better memory (R. 351), and the fact that he had friends on the local police department (R. 347). Instead, the trial court found the prosecution's stated reasons – two harassment convictions and twelve traffic tickets[5] – to be sufficiently race-neutral (C.R. 2 31; C.R. 17), and the appeals courts' agreed. Ex parte Floyd, 2015 WL 3448098, at *9.

Martha Culver

Another one of African Americans struck was 50-year-old Martha Culver, whom the State said it struck because she expressed reservations about the death penalty. (R.R. 68-69.) However, Martha Culver was clear that she could put aside those reservations and base her decisions on the law and the evidence (R. 332), which the trial court acknowledged at the remand hearing. (R. 69 ("[S]he indicated later she could follow the law.")). In addition, her removal was inconsistent with the State's retention of Caroline Dove, a white female venire member who served on the jury, who had serious doubts about her ability to render a death sentence for Mr. Floyd because he was only 21-years old at the time of the crime, and she had sons that age.

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[5]The trial court contradicted himself regarding traffic tickets. At the Batson hearing, the court stated that he did not believe traffic tickets were a valid reason for strikes: "Everybody has traffic tickets." He added, "I did not write traffic tickets down on any of those African Americans that were struck by the State." (R. 86.) However, his order states that traffic tickets were one of the State's reasons for striking Mr. Butler that he considered to be race-neutral. (C.R. 2 31.)

(R. 457-58.) When asked about her ability to follow the law, Ms. Dove again expressed doubts, responding both that she "could not" recommend a death sentence, then that she "possibly" could.[6] (R. 458-59.)

The disparity between how the prosecutor treated Ms. Culver, who is African-American, and Ms. Dove, who is white, suggests that the strike of Ms. Culver was based on race.

II. SIMILARITIES BETWEEN THE EVIDENCE OF DISCRIMINATION IN THIS CASE AND IN FOSTER v. CHATMAN WARRANT THIS COURT'S INTERVENTION.

This Court has granted certiorari in Foster v. Chatman, 136 S. Ct 290 (2015) (mem) to address Timothy Foster's claims that the prosecutor in his case illegally removed all African Americans from his jury and that the Georgia courts failed to consider all relevant circumstances tending to show racial discrimination when they denied his Batson claim. Many of the same kinds of evidence of racial discrimination that were presented by Mr. Foster are present in Mr. Floyd's case.

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[6]Instead of properly examining the disparity between the State's treatment of Martha Culver and Caroline Dove, the trial court offered its own reasons as to why the prosecutor would keep her, stating in its order, "the Court was familiar with Ms. Dove who comes from an old Dothan family with extensive ties to the community. Mr. Valeska knew the family." (C.R.2 35.) This sort of conjecture by judges has been condemned in the Batson context. Miller-El, 545 U.S. at 252 (Trial judge or appeals court cannot "imagine" a reason if stated reason for strike does not hold up). Also, Ms. Culver's right to serve on a jury should not be violated simply because she does not come from a family familiar to the judge or District Attorney.

Both District Attorneys' offices have a demonstrated history of discriminating against potential black jury members in criminal cases. In Mr. Foster's case, the Floyd County, Georgia, District Attorney's Office "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." (Brief of Petitioner in Foster v. Chatman, No. 14-8349, 2015 WL 4550211, * 4 (July 24, 2015). The prosecutor's office in this case also has a documented history of discrimination during jury selection.[7] See Miller-El, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). Instead of properly considering that history, the Alabama Supreme Court pointed out its determination that prosecutor Gary

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[7]Alabama courts have reversed seven criminal convictions wrongfully obtained by this office after finding that the prosecutor intentionally removed prospective jurors in a discriminatory fashion. See Grimes v. State, 93-cv-215 (M.D. Ala. June 12, 1996) (Houston County prosecutor illegally discriminated against prospective jurors); McCray v. State, 738 So. 2d 911 (Ala. Crim. App. 1998) (Houston County prosecutor admitted race was motivating and deciding factor for striking prospective black juror); Ashley v. State, 651 So. 2d 1096 (Ala. Crim. App. 1994) (Houston County prosecutor illegally discriminated against prospective jurors); Andrews v. State, 624 So. 2d 1095 (Ala. Crim. App. 1993) (same); Bush v. State, 615 So. 2d 137, 140 (Ala. Crim. App. 1992)(prosecutor made unsubstantiated allegations that African-American prospective jurors's family members were criminals); Williams v. State, 620 So. 2d 82 (Ala. Crim. App. 1992) (Houston County prosecutor illegally exercised peremeptory strikes in a discriminatory fashion); Roger v. State, 593 So. 2d 141 (Ala. Crim. App. 1991) (prosecutor encouraged African Americans to indicate they did not wish to serve). All of these reversals occurred during the trial prosecutors' tenures.

Maxwell struck this jury and there was no claim that *he* had been involved in the prior cases reversed because of Batson violations. Ex parte Floyd, 2015 WL 3448098 *4, n.5. However, the record is clear that District Attorney Doug Valeska, who has been found to have repeatedly struck jurors based on race, was closely involved in jury selection in this case; he asked the questions in voir dire (R. 300-08), and intervened to stop Maxwell from removing a juror (R.R. 95).

Similarities between Mr. Foster's claims and Mr. Floyd's claims include the fact that prosecutors in both cases demonstrated race-consciousness prior to and during jury selection by marking the race of each black prospective juror, which this Court has found provides evidence of discriminatory intent. Miller El, 545 U.S. at 264. In Mr. Foster's case, "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." See Brief of Petitioner, Foster v. Chatman, 2015 WL 4550211, at *16. In this case, black jurors were also identified with the letter "B," followed by a plus symbol, a minus symbol, or the word "okay." (R.R. 22-23.)

Additionally, prosecutors in both cases proffered reasons for the strikes of African Americans that were belied by the record. As discussed above, the prosecution's reliance on "nonresponsiveness" in its strike of Inez Culver is contradicted by the record, and the prosecution's assertions that struck juror Joe

Butler had two convictions for harassment is also contradicted by the record, which makes clear one of these conviction occurred *after* Mr. Floyd's trial. A similar rationale was given in Mr. Foster's case when the prosecutor asserted he struck an African-American woman in part because of her cousin's drug arrest. However, the prosecution was not aware of that arrest until after the jury selection. Finally, prosecutors in both cases proffered religious reasons that were unsupported by the record as justifications for striking African American prospective jurors. (See Martha Culver supra; Foster, 2015 WL 4550211, at *23-24 (describing State's strike of Eddie Hood because of affiliation with Church of Christ even though Mr. Hood stated neither he, nor church was opposed to death penalty).

At a minimum, Mr. Floyd's case should be held pending the resolution of Foster v. Chatman.

Conclusion

For these reasons, Mr. Floyd prays that this Court grant a writ of certiorari to review whether the lower court's decision that the prosecutor did not engage in racial discrimination during jury selection conflicts with this Court's precedent and the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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APPENDIX A

2007 WL 2811968
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Christopher Anthony FLOYD
v.
STATE of Alabama.

CR–05–0935. | Sept. 28, 2007. | Opinion on Return to Remand Aug. 29, 2008.

Synopsis

Background: Defendant was convicted in a jury trial in the Houston Circuit Court, No. CC–04–1670, Larry K. Anderson, J., of capital murder and sentenced to death. Defendant appealed. The Court of Criminal Appeals remanded the case with directions for the trial court to conduct a *Batson* hearing.

Holdings: On return to remand, the Court of Criminal Appeals, Wise, J., held that:

[1] defendant's statements to police were admissible;

[2] evidence was sufficient to support conviction for capital murder;

[3] testimony of witness who claimed to have seen someone other than defendant in bloody clothing on night of murder was not newly discovered evidence warranting a new trial;

[4] admission of videotape of crime scene into evidence did not constitute plain error;

[5] state did not use its peremptory strikes in discriminatory manner to remove prospective jurors based on race and gender;

[6] failure to issue limiting instruction to jury as to proper use of evidence that defendant was serving three sentences of life imprisonment was not plain error; and

[7] sentence of death was appropriate and was not disproportionate.

Affirmed.

Welch, J., filed dissenting opinion on return to remand.

Attorneys and Law Firms

Eric Clark Davis, Dothan, for appellant.

Troy King, atty. gen., and Kevin W. Blackburn, asst. atty. gen., for appellee.

Opinion

WISE, Judge.

*1 The appellant, Christopher Anthony Floyd, was convicted of capital murder for intentionally murdering Waylon Crawford during the course of a robbery. See § 13A–5–40(a)(4), Ala.Code 1975. The jury recommended by a vote of 11 to 1 that Floyd be sentenced to death. The trial court accepted the jury's recommendation and sentenced Floyd to death. This appeal followed.

Floyd raises a number of issues for this Court's review. However, our initial review of the record reveals that we must remand this case for additional action by the circuit court so that we may adequately address the merits of one of Floyd's claims.

Floyd contends on appeal that his due-process rights were violated when the prosecution used its peremptory challenges to remove African–Americans and females from the jury venire, thus violating the rule of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

[1] [2] In *Batson,* the United States Supreme Court held that prospective African–American jurors could not be struck from an African–American defendant's jury based solely on their race. The Supreme Court later extended its holding in *Batson* to apply to white defendants in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); to civil cases in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); to defense counsel in criminal cases in *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); and to gender-based peremptory challenges in *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

> "Under the 'plain error' doctrine, as enunciated in Rule 45A, [Ala.R.App.P.,] the Court of Criminal Appeals is required to search the record in a death penalty case and notice any error (ruling or omission) of the trial court, and to take appropriate action, 'whenever such error has or probably has adversely affected the substantial right of the [defendant],' in the same manner as if defendant's counsel had preserved and raised such error for appellate review."

Ex parte Johnson, 507 So.2d 1351, 1356 (Ala.1986). The plain-error analysis has been applied to death-penalty cases when counsel fails to make a *Batson* objection. *Pace v. State,* 714 So.2d 316, 318 (Ala.Crim.App.1995), opinion after remand, 714 So.2d 320 (Ala.Crim.App.1996), reversed in part on other grounds, 714 So.2d 332 (Ala.1997). For plain error to exist in the *Batson* context, the record must raise an inference that the State engaged in "purposeful discrimination" in the exercise of its peremptory challenges. See *Ex parte Watkins,* 509 So.2d 1074 (Ala.1987).

[3] [4] The State contends that Floyd did not meet his burden of making a prima facie showing of purposeful discrimination and that the error, if any, does not rise to plain error. A defendant makes out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" surrounding a prosecutor's conduct during the defendant's trial. *Batson,* 476 U.S. at 94, 106 S.Ct. 1712."Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging" a targeted class of jurors. 476 U.S. at 97, 106 S.Ct. 1712.While there may be " 'any number of bases' on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause ..., the prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."476 U.S. at 98 n. 20, 106 S.Ct. 1712.It is then left to the trial court to determine whether the defendant has established "purposeful discrimination." 476 U.S. at 98 106 S.Ct. 1712.See also *Ex parte Trawick,* 698 So.2d 162 (Ala.1997) (discussing the relevant factors applicable to allegations of gender discrimination in jury selection).

*2 [5] The record here supplies an inference of racially based discrimination on the part of the State. The initial list of potential jurors consists of 264 individuals. The strike list indicates that Floyd's jury was struck from potential jurors no. 1–75. (C. 301–03.) Of the 75 potential jurors on the strike list, 20 were African–American. Although the transcript indicates that the roll of jurors was called and that all were present, the individual names were not recorded by the court reporter so this Court

cannot determine the exact number of prospective jurors present for voir dire. The record does, however, indicate that 1 of the 20 African–American prospective jurors was struck during initial voir dire by the trial court for cause.

The trial court stated during voir dire that Floyd's jury was struck from a panel of 55 prospective jurors. (R. 232.) The record indicates that seven potential jurors were excused from further service, based on their responses during individual voir dire. Of the 7 jurors excused, 4 were white and 3 were African–American, leaving 11 African–Americans. [1] After voir dire concluded, the prosecutor and defense counsel exercised 36 peremptory challenges to select Floyd's jury. The State used its 18 strikes to strike 10 of the 11 remaining African–Americans from the venire. Defense counsel struck one African–American. Floyd's jury thus consisted of 12 white jurors and no African–American jurors. One alternate juror, the State's final strike, was African–American.

The State contends that no inference exists that the State engaged in purposeful discrimination because Floyd offered only "bare assertions of discrimination and statistics showing that black veniremembers were struck by the prosecutor" (State's brief at p. 43) and that Floyd's assertions regarding voir dire of the complained-of stricken African–American veniremembers—that some African–American veniremembers who did not respond during voir dire were struck by the prosecution, while other African–American veniremembers who answered questions in a manner Floyd deemed favorable to the State were also struck by the State—did not constitute a showing of purposeful discrimination. However, as Floyd correctly argued, the State used 55.5% of its strikes to remove 90.9% of the African–American veniremembers. Further, Floyd did not rely on statistics alone. Rather, Floyd correctly noted that four of the stricken veniremembers did not provide any response in voir dire that would provide a basis for being stricken from the panel. Floyd also argued that five of the African–American veniremembers struck by the State provided answers during voir dire which, according to Floyd, were favorable to the State. Floyd's argument regarding the State's allegedly improper gender-based strikes is considerably less detailed than his race-based argument. However, he does aver that the State used 12 of its 18 strikes to remove women from the venire. [2]

[6] [7] [8] The record indicates that some of the African–American jurors as well as some of the white jurors responded to questions posed during voir dire, and that some of the prospective jurors did not respond to any questions posed during voir dire. Moreover, it appears that some of the African–American jurors and some of the white jurors who gave similar responses to the questions posed were struck, while other white jurors were not. With regard to the gender-based strikes, although, as noted above, Floyd's argument is less developed than his race-based claim, the record also indicates similar occurrences regarding striking females while seemingly not striking similarly situated male veniremembers. Although the State may have race-neutral, gender-neutral, and nondiscriminatory reasons for its actions, we conclude that it is necessary to remand this case for a *Batson* and *J.E.B.* hearing, in light of the many levels of judicial scrutiny that occur when a defendant is convicted of a capital offense and sentenced to death. As the United States Supreme Court noted in *Miller–El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005):

> ***3** "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. 476 U.S., at 96–97, 106 S.Ct. 1712; *Miller–El v. Cockrell*, 537 U.S. [322] at 339, 123 S.Ct. 1029 [(2003)]. It is true that peremptories are often the subjects of instinct, *Batson v. Kentucky*, 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring), and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals' [ ] and the dissent's substitution of a reason for eliminating [the prospective juror] does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions."

545 U.S. at 251–52, 125 S.Ct. 2317.

Based on the foregoing, we remand this case to the circuit court with directions that that court hold a *Batson* and *J.E.B.* hearing. See *Lewis v. State,* [Ms. CR–03–0480, April 28, 2006] —— So.2d —— (Ala.Crim.App.2006). If the prosecution cannot provide race-neutral reasons for its use of peremptory challenges against African–American jurors and gender-neutral reasons for its use of peremptory challenges against female jurors, then Floyd shall be entitled to a new trial. See *Ex parte Bankhead,* 585 So.2d 112 (Ala.1991); *Pace v. State,* 714 So.2d 316 (Ala.Crim.App.1995), opinion after remand, 714 So.2d 320 (Ala.Crim.App.1996), reversed in part on other grounds, 714 So.2d 332 (Ala.1997); *Guthrie v. State,* 616 So.2d 913 (Ala.Crim.App.1992).

The circuit court shall take all necessary action to see that the circuit clerk makes due return to this Court at the earliest possible time and within 90 days of the release of this opinion. The return to remand shall include a transcript of the remand proceedings conducted by the circuit court and the circuit court's specific findings of fact. Because it is necessary to remand this case, we pretermit discussion of Floyd's remaining claims.

REMANDED WITH DIRECTIONS.

On Return to Remand

WISE, Judge.

Christopher Anthony Floyd was convicted of capital murder for intentionally murdering Waylon Crawford during the course of a robbery. See § 13A–5–40(a)(4), Ala.Code 1975. The jury recommended by a vote of 11 to 1 that Floyd be sentenced to death. The trial court accepted the jury's recommendation and sentenced Floyd to death. This appeal followed.

One of the issues raised on appeal by Floyd was that his due-process rights were violated when the prosecution used its peremptory challenges to remove African–Americans and females from the jury venire, thus violating *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). On September 28, 2007, this Court remanded this case for additional action by the circuit court with regard to this claim. *Floyd v. State,* [Ms. CR–05–0935, Sept. 28, 2007] —— So.2d —— (Ala.Crim.App.2007). The circuit court has complied with our instructions and on return to remand has submitted a transcript of the *Batson* and *J.E.B.* hearing conducted by the circuit court, together with a copy of the circuit court's specific findings of fact regarding Floyd's *Batson* and *J.E.B.* claim.

Facts

The State's evidence tended to show that at the time of his death, the victim, Waylon Crawford, and his wife Melinda owned and operated Waller's Grocery, a small grocery store in Houston County. The evidence further indicated that on the evening of February 15, 1992, while working at the store, Crawford was shot in the chest and throat with a shotgun and died as a result of his injuries.

Melinda Clements testified that she was married to the victim at the time of his death. She stated that Crawford typically carried a wallet in his pocket and that he usually kept currency in his pocket but not in his wallet. According to Clements, she had opened the store on the morning of February 15, 1992, and left around 6:00 or 6:30 that evening because of a medical condition. She stated that when she left for the evening, there was approximately $200–$400 in cash in the wooden cash drawer behind the counter. [1] She stated that she received a telephone call at approximately 8:30 that evening telling her to return to the store. [2]

Ricky Vann testified that at the time of the murder, he was an investigator with the Houston County Sheriff's Department. According to Vann, the victim's body was discovered lying against the front door of the store at approximately 8:30 p.m. The

testimony further indicated that investigators did not discover a wallet or any currency in the victim's pockets, nor was there any currency in the wooden cash drawer behind the counter.

Dr. Alfredo Paredes, a forensic pathologist with the State of Alabama, testified that he conducted the autopsy on the victim. According to Dr. Paredes, the victim was shot in the chest and neck area with a shotgun. Dr. Paredes stated that he observed more than 20 entrance wounds inflicted by individual pellets discharged from a single shotgun blast. He further testified that the shot cup or wadding was lodged in the victim's throat.

Eddie Roberts, a correctional officer at Easterling Correctional Facility, testified that in September 2004 Floyd told him that he was "having suicidal thoughts" and wanted to speak with a supervisor. (R. 547.) Officer Roberts stated that Floyd then admitted to him that he had killed someone. According to Officer Roberts, Floyd claimed that he committed the murder while he was drinking and on drugs to get money and that he watched the individual die.

Keith Cook, an investigator with the Houston County Sheriff's Department, testified that he interviewed Floyd on September 27, 2004, at which time Floyd confessed to the murder. In that confession, Floyd told Investigator Cook that he had borrowed a truck from Paul Wayne Johnson, driven to Waller's Grocery, entered the store wearing a mask and brandishing a shotgun, and demanded money. Floyd further claimed that Crawford grabbed the shotgun, that the shotgun discharged, that Crawford was struck by the blast, and that Floyd then took money from the cash register and fled. He further testified that Floyd provided details consistent with the crime scene such as the location of the victim's body. Investigator Cook also stated that Floyd claimed to have taken approximately $400 in the murder-robbery. In his confession, Floyd stated that after he fled the store he went to his grandmother's house and changed clothes. During the statement Floyd claimed to have ingested alcohol and cocaine before the murder-robbery, that he did not intentionally shoot Crawford, that he did not think he even had his hand on the trigger, and that he did not think the shotgun was even operational. Floyd further indicated in his statements that he had disposed of the shotgun by placing it in an automobile crusher in Panama City, Florida. Floyd spoke with authorities a number of times following his initial confession and claimed responsibility for the robbery-murder during each interview.[3]

Robert Floyd, Jr., testified for the defense that he was Floyd's cousin. According to Robert, on the night of the murder, he was at his house, which he stated was approximately four or five miles from Waller's Grocery, and that his brother, Paul Wayne Johnson, borrowed his pickup truck around 7:00 or 7:45 p.m., and returned approximately 45 minutes later. Robert stated that Johnson's .410 shotgun was in the truck at the time Johnson borrowed the truck. Robert conceded on cross-examination that it could have been as late as 8:30 p.m. when Johnson borrowed the truck. Robert further conceded that he was smoking marijuana on the evening of the murder, and that he did not see any blood on Johnson's clothing or the truck.

Robert Charles Dixon testified for the defense that he met Paul Wayne Johnson several years earlier when they were both incarcerated at Fountain Correctional Facility. In 2000, Dixon wrote letters to the district attorney's office and police investigators indicating that he had information in Crawford's murder. Dixon claimed that Johnson had confessed to committing the offense.

Johnson testified that he had used alcohol and crack cocaine on the evening of the murder. He stated that he was unsure as to whether his .410 shotgun was in the house or in his brother's truck on the evening of the murder. He admitted to borrowing his brother's truck on the evening of the murder to go to where his girlfriend, whom he claimed was coming to pick him up, had gotten lost. Johnson stated that he returned to his brother's a few minutes later and that he later went with his girlfriend to a nightclub. According to Johnson, sometime after the murder he eventually traded the shotgun to a drug dealer in Malone, Florida, for $40 worth of crack cocaine. Johnson denied telling anyone he had committed the murder.

The jury found Floyd guilty of the capital offense charged in the indictment. A separate sentencing hearing was held. See § 13A–5–46, Ala.Code 1975. The jury recommended, by a vote of 11 to 1, that Floyd be sentenced to death. A presentence report was then prepared as required by § 13A–5–47, Ala.Code 1975, and the circuit court held a separate sentencing hearing. After

hearing testimony, the circuit court sentenced Floyd to death. This appeal, which is automatic in a case involving the death penalty, followed. See § 13A–5–53, Ala.Code 1975.

Standard of Review

Floyd has been sentenced to death. According to Rule 45A, Ala.R.App.P., this Court must review the record of the proceedings for "plain error." Rule 45A, Ala.R.App.P., states:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

In describing this standard of review, this Court has stated:

> " 'The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is "particularly egregious" and if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."See *Ex parte Price,* 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State,* 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State,* 620 So.2d 679, 701 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993).' "

Smith v. State, 795 So.2d 788, 797–98 (Ala.Crim.App.2000), quoting *Hall v. State,* 820 So.2d 113, 121–22 (Ala.Crim.App.1999).

A number of the specific arguments raised on appeal were never brought to the circuit court's attention. However, the "failure to object at trial does not bar our review of these issues; however, it does weigh against any claim of prejudice he now makes on appeal."*Brooks v. State,* 973 So.2d 380, 387 (Ala.Crim.App.2007) (opinion on application for rehearing).

Issues

I.

[9] **[10]** **[11]** Floyd first argues that the trial court erred in denying his motion to suppress his statements to the police. Specifically, Floyd contends that his statements were due to be suppressed because they were taken while he was in custody at Easterling Correctional Facility, they were made while he was in the presence of two deputies with the Houston County Sheriff's Department, he only had a 9th-grade education, and he told the deputies that he had been under considerable mental anguish.

> "It has long been the law that a confession is prima facie involuntary and inadmissible and that, before a confession may be admitted into evidence, the burden is upon the State to establish voluntariness and a *Miranda* predicate.*Jackson v. State,* 562 So.2d 1373, 1380 (Ala.Crim.App.1990). A two-pronged test is used to determine whether an accused's statement is admissible. First, the trial court must determine whether the accused was informed of his *Miranda* rights before he made the statement. Second, the trial court must determine whether the accused voluntarily and knowingly waived his *Miranda* rights before

making his statement. *Holder v. State,* 584 So.2d 872, 878 (Ala.Crim.App.1991); *Carpenter v. State,* 581 So.2d 1277, 1278 (Ala.Crim.App.1991)."

Jones v. State, 987 So.2d 1156, 1163–64 (Ala.Crim.App.2006).

Here, the trial court conducted a hearing on Floyd's general motion to suppress the statements as having been obtained without a knowing, intelligent, voluntary waiver of his *Miranda* rights. The evidence at the suppression hearing indicated that Floyd was incarcerated at the time of each interview with authorities. There is no indication, however, that Floyd's status as an inmate affected the voluntariness of his statements. Further, the circuit court found the statements to be admissible based on Investigator Cook's testimony at the suppression hearing.

Investigator Cook testified at the suppression hearing that Floyd was advised of his *Miranda* rights before each interview. According to Investigator Cook, Floyd did not appear to be under the influence of alcohol or narcotics and indicated that he understood his rights and was freely and voluntarily waiving those rights. Investigator Cook further testified that neither he nor anyone else in his presence threatened Floyd in order to get him to make a statement or offered him any promises as to the outcome of the investigation or any other hope, reward, or inducement if he agreed to speak with them. There is no indication that Floyd did not understand his rights, nor is there any discussion as to "mental anguish" that Floyd now includes for the first time on appeal.

We have reviewed the tapes of Floyd's interviews as well as the transcript of the trial proceedings. The evidence and testimony support the trial court's findings that the statements were admissible.

II.

[12] Floyd next argues that the trial court erred in denying his motion for a judgment of acquittal. Specifically, Floyd contends that, excluding his confession, the State proved only that the victim had died as the result of a shotgun blast.

" 'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution.'"*Ballenger v. State,* 720 So.2d 1033, 1034 (Ala.Crim.App.1998), quoting *Faircloth v. State,* 471 So.2d 485, 488 (Ala.Crim.App.1984), aff'd, 471 So.2d 493 (Ala.1985)." 'The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt.'"*Nunn v. State,* 697 So.2d 497, 498 (Ala.Crim.App.1997), quoting *O'Neal v. State,* 602 So.2d 462, 464 (Ala.Crim.App.1992)." 'When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision.'"*Farrior v. State,* 728 So.2d 691, 696 (Ala.Crim.App.1998), quoting *Ward v. State,* 557 So.2d 848, 850 (Ala.Crim.App.1990)."The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is *legally* sufficient to allow submission of an issue for decision [by] the jury."*Ex parte Bankston,* 358 So.2d 1040, 1042 (Ala.1978).

Despite Floyd's desire to exclude his confession, his statements to investigators were properly before the jury and, therefore, are properly considered in answering the question of whether the State presented a prima facie case of robbery-murder.[4] Thus, the evidence, viewed in the light most favorable to the State, indicated that the victim's body was found lying against the inside of the front door of his grocery store and that the victim had been shot in the chest and neck with a shotgun. Additional evidence indicated that several hundred dollars was missing from the cash drawer. The evidence further indicated that Floyd had confessed to shooting the victim in the chest with a shotgun and to taking money from the store. In his statements to authorities, Floyd admitted that he went to the store intending to rob the victim of money. Certain details of the offense, including Floyd's description of the timeline of events, the layout of the store, and the location of the victim's body, were consistent with details

uncovered at the scene. Thus, after examining the record in this case, we find that the State presented legally sufficient evidence to support the trial court's decision to deny Floyd's motion for a judgment of acquittal on the ground of insufficiency of the evidence. Any questions as to whether the killing was intentional or unintentional, and discrepancies in certain details such as the color of the truck and the location and type of container holding the money were for the jury to resolve, and, the jury having resolved those questions adversely to Floyd, this Court will not go behind the jury's verdict to reweigh the evidence.

III.

[13] Floyd next argues that the trial court erred in denying his motion for a new trial. Specifically, Floyd argued that he was entitled to a new trial based on what he contended was the newly discovered testimony of a witness who claimed to have seen Paul Wayne Johnson in bloody clothing the night of the murder.

At the hearing on Floyd's motion for a new trial, Dorothy Dyson testified that she was working at the Red Carpet Lounge on the night of February 15, 1992. She stated that she walked a friend out to the parking lot at approximately 9:00 p.m. at which time she observed Paul Wayne Johnson talking with another man, whom she identified as James Granger. According to Ms. Dyson, Johnson's shirt was bloody. She testified that she asked Johnson about his clothes and he told her he had been in a fight. Ms. Dyson testified that she then told Johnson that she did not "see any scratches on [him] or bruises," and that Johnson did not respond but merely looked down at the ground. (R. 1360.)

[14] **[15]** **[16]** Ms. Dyson testified that she learned of Crawford's murder when she stopped at a local gasoline service station after leaving work at 3:00 a.m., approximately six hours after seeing Johnson in the parking lot. Ms. Dyson stated that she knew Johnson as a customer at the lounge, that she knew Waylon Crawford from shopping at his grocery store, that she had known Floyd "all his life" (R. 1372), that Floyd's mother had been her close friend for a number of years, and that Floyd's aunt was her daughter-in-law.

> "[I]n order to establish the necessity for a new trial based on newly discovered evidence, the appellant must prove: (1) that the evidence was discovered after the trial; (2) that the evidence could not have been discovered prior to trial by due diligence on the part of the movant; (3) that the evidence is material to the issue of the appellant's guilt; (4) that the evidence is not merely cumulative or impeaching; and (5) that the evidence would probably change the outcome if a new trial was granted."

Gillespie v. State, 644 So.2d 1284, 1289 (Ala.Crim.App.1994). Additionally, "a trial court's decision to deny a motion for a new trial will not be disturbed on appeal unless there is a clear showing of abuse of discretion, and this Court will indulge every reasonable presumption in favor of the correctness of the trial court's ruling."*Mims v. State*, 816 So.2d 509, 515 (Ala.Crim.App.2001). Finally, " 'a condition to the granting of a new trial on the basis of newly discovered evidence is that the trial court must believe the evidence presented.'"*Travis v. State*, 776 So.2d 819, 847 (Ala.Crim.App.1997), quoting *McMillian v. State*, 594 So.2d 1253, 1264 (Ala.Crim.App.1991), remanded, 594 So.2d 1288 (Ala.1992), rev'd on return to remand on other grounds, 616 So.2d 933 (Ala.Crim.App.1993).

Here, the trial court thoroughly questioned Ms. Dyson as to why she did not come forward with her information until after Floyd had been convicted and sentenced. In its order denying Floyd's motion for a new trial, the trial court stated:

> "[Floyd] presented one witness, Ms. Dorothy Dyson. She testified that on the day of the murder, February 15, 1992, she was a waitress at a local lounge. She recalled seeing Paul Wayne Johnson at approximately 9:00 p.m. in the parking lot of the lounge. She noticed that Johnson's shirt was bloody and asked him why. He told her that he had been in a fight. She stated to him that she didn't see any scratches or marks on him. At this point Johnson looked down at the ground. It was not until the next morning that she learned of the murder of [Waylon] Crawford.

"She further testified that she did not make the connection between Christopher Anthony Floyd and Paul Wayne Johnson until Floyd's trial and sentencing for capital murder. After sentencing she went to Judy Dyson's house, who happened to be [Floyd's] aunt, and told her of the chance meeting with Paul Wayne Johnson at the lounge some 13 years ago. She then gave an affidavit to [Floyd's] attorney which was admitted into evidence as Defendant's exhibit A.

"The gist of [Floyd's] motion for a new trial is based primarily on what he characterizes as newly discovered evidence. While this evidence could be beneficial to the defense it is not without its problems. It is indeed true that the defense theory was that Paul Wayne Johnson had committed the murder and was initially a suspect in the case. However, the Court must look at Ms. Dyson's testimony carefully insofar as she is closely associated with [Floyd's] family. Additionally, it was extremely fortuitous that she comes forward after the trial alleging that she did not learn of the events and association until [Floyd's] trial for capital murder even though the case appeared in the media on many occasions prior to trial. After learning of the situation she does not come forward until much later.

"The Court is reluctant to place much weight on the testimony of Ms. Dyson. The evidence, if believed, does not prove that Paul Wayne Johnson killed anyone. Further, the Defendant Floyd confessed to the murder. Additionally, the Court determines that the evidence presented by Ms. Dyson is not newly discovered evidence but, rather newly disclosed evidence. In this regard see *Watkins v. State,* 601 So.2d 187 (Ala.Crim.App.1992), cert. denied, 1992 Ala. Lexis 947 (Ala.1992)."

(C. 386–88.)

It is clear to this Court from the trial court's questioning of the witness at the hearing and the trial court's statements at the conclusion of the hearing, and in the trial court's order denying the motion that the trial court viewed with great scepticism the contention that Ms. Dyson's testimony was truly newly discovered evidence. The record supports the circuit court's findings, and we find no abuse of the trial court's discretion in denying the motion for a new trial.

IV.

[17] **[18]** **[19]** **[20]** Floyd also contends that the trial court erroneously admitted the videotape of the crime scene into evidence. Specifically, he claims that the videotape was gruesome, cumulative, and more prejudicial than probative. Because Floyd did not object to the admission of State's exhibit 11, we review this claim for plain error. See Rule 45A, Ala.R.App.P.

" 'The same rule applies for videotapes as for photographs: "The fact that a photograph is gruesome and ghastly is no reason for excluding it, if relevant, even if the photograph may tend to inflame the jury."' *Siebert v. State,* 562 So.2d 586, 599 (Ala.Crim.App.1989), aff'd, 562 So.2d 600 (Ala.1990), quoting *Walker v. State,* 416 So.2d 1083, 1090 (Ala.Crim.App.1982). See also *Ward v. State,* 814 So.2d 899 (Ala.Crim.App.2000). Generally, '[a] properly authenticated video tape recording of the scene of the crime constitutes competent evidence' and 'is admissible over the defendant's objections that the tape was inflammatory, prejudicial, and cumulative.'*Kuenzel v. State,* 577 So.2d 474, 512–13 (Ala.Crim.App.1990), aff'd, 577 So.2d 531 (Ala.1991).'Provided that a proper foundation is laid, the admissibility of videotape evidence in a criminal trial is a matter within the sound discretion of the trial judge.'*Donahoo v. State,* 505 So.2d 1067, 1071 (Ala.Crim.App.1986)."

Brooks v. State, 973 So.2d 380, 393 (Ala.Crim.App.2007).

State's exhibit 11 is a videotape of the crime scene. The tape is approximately 6 minutes and 40 seconds long and includes both video and audio. The tape appears to have been taken from a handheld video camera, and the person tape-recording the scene walks around the store during the recording. The vast majority of the tape consists of panning around the store and zooming in on assorted grocery items, the counter, the cash drawer, blood spatter and the pool of blood on the floor, and the victim's body. The final portion of the tape is exclusively focused on the victim's body and the bloody floor as the emergency technicians begin to roll the body over. At that time one of the technicians points out the shotgun packing lodged in the victim's throat, and there is a brief discussion of that matter.

The burden was on the State to prove not only that Waylon Crawford was dead, but that he was murdered by Floyd during the course of a robbery. Because there were no eyewitnesses to the crime, details such as the location of Crawford's body inside the store were necessary to corroborate Floyd's confessions. The location of the cash drawer and the victim's body were relevant and admissible as showing the nature and extent of the victim's wounds, as showing the shotgun packing lodged in the victim's skin that the medical examiner extrapolated on during his testimony, and as corroborating and lending credibility to Floyd's confession to the murder-robbery.[5] Therefore, we find no error, much less plain error, in the admission of State's exhibit 11.

V.

Floyd argues that the State engaged in a pattern of improper argument during closing argument of the guilt and penalty phases of his trial.

[21] [22] [23] [24] [25] In reviewing claims of prosecutorial misconduct arising out of improper argument, this Court has followed the following principles:

> "A reviewing court must evaluate allegedly improper comments made by the prosecutor in the context of the entire proceeding in which the comments were made. *Duren v. State,* 590 So.2d 360 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). ' "In judging a prosecutor's closing argument, the standard is whether the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).
>
> > " 'In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial and not to view the allegedly improper acts in the abstract. *Whitlow v. State,* 509 So.2d 252, 256 (Ala.Cr.App.1987); *Wysinger v. State,* 448 So.2d 435, 438 (Ala.Cr.App.1983); *Carpenter v. State,* 404 So.2d 89, 97 (Ala.Cr.App.1980), cert. denied, 404 So.2d 100 (Ala.1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Cr.App.1984); *Sanders v. State,* 426 So.2d 497, 509 (Ala.Cr.App.1982).'
>
> "*Bankhead v. State,* 585 So.2d 97, 106 (Ala.Cr.App.1989), aff'd in relevant part, remanded on other grounds, 585 So.2d 112, 127 (Ala.1991), aff'd on return to remand, 625 So.2d 1141 (Ala.Cr.App.1992)."

Lockhart v. State, 715 So.2d 895, 902–03 (Ala.Crim.App.1997) (quoted with approval in *McWhorter v. State,* 781 So.2d 257, 317–18 (Ala.Crim.App.1999), aff'd, 781 So.2d 330 (Ala.2000), cert. denied, 532 U.S. 976, 121 S.Ct. 1612, 149 L.Ed.2d 476 (2001)). Further,

> " '[d]uring closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.' *Rutledge v. State,* 523 So.2d 1087, 1100 (Ala.Cr.App.1987), rev'd on other grounds, 523 So.2d 1118 (Ala.1988) (citation omitted). Wide discretion is allowed the trial court in regulating the arguments of counsel. *Racine v. State,* 290 Ala. 225, 275 So.2d 655 (1973). 'In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, ... each case must be judged on its own merits,' *Hooks v. State,* 534 So.2d 329, 354 (Ala.Cr.App.1987), aff'd, 534 So.2d 371 (Ala.1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989) (citations omitted) (quoting *Barnett v. State,* 52 Ala.App. 260, 264, 291 So.2d 353, 357 (1974)), and the remarks must be evaluated in the context of the whole trial, *Duren v. State,* 590 So.2d 360 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991). 'In order to constitute reversible error, improper argument must be pertinent to the issues at trial or its natural tendency must be to influence the finding of the jury.' *Mitchell v. State,* 480 So.2d 1254, 1257–58 (Ala.Cr.App.1985)

(citations omitted).'To justify reversal because of an attorney's argument to the jury, this court must conclude that substantial prejudice has resulted.'*Twilley v. State*, 472 So.2d 1130, 1139 (Ala.Cr.App.1985) (citations omitted)."

Coral v. State, 628 So.2d 954, 985 (Ala.Crim.App.1992), aff'd, 628 So.2d 1004 (Ala.1993).

A.

Quoting portions of the prosecutor's closing argument of the guilt phase of his trial, Floyd argues that the prosecutor attempted to inflame the jury, vouched for the credibility of Paul Wayne Johnson, and used the prestige and integrity of his office to imply that he had additional knowledge other than the evidence presented to the jury. Because Floyd did not object to the allegedly improper remarks, we review his claim under the plain-error standard.

In *DeBruce v. State*, 651 So.2d 599, 610–11 (Ala.Crim.App.1993), aff'd, 651 So.2d 624 (Ala.1994), this Court stated:

"A distinction must be made between an argument by the prosecutor personally vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credibility of a witness based upon the testimony presented at trial. '[P]rosecutors must avoid making personal guarantees as to the credibility of the state's witnesses.'*Ex parte Parker*, 610 So.2d 1181 (Ala.1992). See *Ex parte Waldrop*, 459 So.2d 959, 961 (Ala.1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985).

" ' "Attempts to bolster a witness by vouching for his credibility are normally improper and error."...The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility.... This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity.... Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.'

"*United States v. Sims*, 719 F.2d 375, 377 (11th Cir.1983), cert. denied, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984)."

Accord *Wilson v. State*, 777 So.2d 856, 903 (Ala.Crim.App.1999), aff'd, 777 So.2d 935 (Ala.2000), cert. denied, 531 U.S. 1097, 121 S.Ct. 826, 148 L.Ed.2d 709 (2001); *Price v. State*, 725 So.2d 1003, 1030 (Ala.Crim.App.1997), aff'd, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999).

As part of his closing argument, the prosecutor essentially stated that Paul Wayne Johnson had not been indicted because he was not involved in Crawford's murder, and that the decision not to prosecute Johnson was the proper course of action by the police department, the sheriff's department, and the district attorney's office.

[26] **[27]** After carefully reviewing the closing arguments of both the prosecutor and defense counsel, we conclude that the prosecutor's comments did not constitute vouching for the State's case. Instead, it appears that most of the prosecutor's remarks were an explanation of the State's case and his impressions based on the evidence. Therefore, those comments do not constitute error. See *Boyd v. State*, 715 So.2d at 841.Further, his rebuttal remarks about Johnson constituted a reply-in-kind to defense counsel's arguments regarding the defense's theory that Johnson, not Floyd, had killed Crawford." 'A prosecutor has a right based on fundamental fairness to reply in kind to the argument of defense counsel.'"*Johnson v. State*, 823 So.2d 1, 47 (Ala.Crim.App.2001) (quoting *DeBruce v. State*, 651 So.2d at 609).

We have carefully reviewed the prosecutor's entire closing argument during the guilt phase of Floyd's trial, paying particular attention to the context of the prosecutor's remarks quoted in Floyd's brief. Based on that review, it is clear that the prosecutor's remarks at the guilt phase of Floyd's trial were made in the heat of debate, were proper comments on facts in evidence, were

in reply to various remarks made during defense counsel's closing argument, and were not improperly designed to inflame the passions of the jury. Therefore, no basis for reversal exists.

B.

Quoting portions of the prosecutor's argument at the penalty phase of his trial, Floyd argues that the prosecutor's argument was an improper attempt to inflame the passions of the jury and suggested that death was an appropriate penalty because if the death penalty was not imposed Floyd might escape and kill again.

We have carefully reviewed the prosecutor's entire closing argument during the penalty phase of Floyd's trial, paying particular attention to the context of the prosecutor's remarks quoted in Floyd's brief. Based on that review, it is clear that the prosecutor's remarks at the penalty phase of Floyd's trial were made in the heat of debate, were proper comments on facts in evidence, were in reply to various remarks made during defense counsel's closing argument, and were not improperly designed to inflame the passions of the jury. Therefore, no basis for reversal exists.

VI.

[28] Floyd next contends that the trial court erroneously allowed the State to introduce, prior to presenting any evidence of the corpus delicti, evidence indicating that Floyd had confessed to committing the offense. Specifically, Floyd argues that it was improper for the State to elicit testimony from its first witness, Eddie Roberts, indicating that Floyd had claimed to have shot someone. Because Floyd did not object to the complained-of testimony, we review this claim for plain error. See Rule 45A, Ala.R.App.P.

[29] **[30]** **[31]** **[32]** **[33]** It is well settled that "[u]nder Alabama law, a confession is not admissible unless there is independent evidence tending to prove the corpus delicti."*Slaton v. State*, 680 So.2d 879, 897 (Ala.Crim.App.1995), aff'd680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997) (citing *Spear v. State*, 508 So.2d 306 (Ala.Crim.App.1987)).

> "It has been the rule in Alabama that the State must offer independent proof of the corpus delicti of the charged offense to authorize the admission of a defendant's confession or inculpatory statement. *Robinson v. State*, 560 So.2d 1130, 1135–36 (Ala.Cr.App.1989); see C. Gamble, *McElroy's Alabama Evidence*, 200.13 (5th ed. 1996).' "The corpus delicti consists of two elements: '(1) That a certain result has been produced, ... and (2) that some person is criminally responsible for the act.'"*Johnson* [*v. State*, 473 So.2d 607, 608 (Ala.Cr.App.1985),] (quoting C. Gamble, *McElroy's Alabama Evidence* § 304.01 (3d ed. 1977)).'*Spear v. State*, 508 So.2d 306, 308 (Ala.Cr.App.1987).' "Positive, direct evidence of the corpus delicti is not indispensable to the admissions of confessions."' *Bracewell v. State*, 506 So.2d 354, 360 (Ala.Cr.App.1986), quoting *Ryan v. State*, 100 Ala. 94, 14 So. 868 (1894).'The corpus delicti may be established by circumstantial evidence.'*Sockwell v. State*, 675 So.2d 4, 21 (Ala.Cr.App.1993), aff'd, 675 So.2d 38 (Ala.1995), cert. denied, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 67 (1996)."

Maxwell v. State, 828 So.2d 347, 357 (Ala.Crim.App.2000).

Initially, we note that Floyd's argument encompasses only Officer Roberts's testimony that Floyd had told him that he was suicidal and that he had "shot a man one time." (R. 547.) According to Officer Roberts, Floyd never identified the person he claimed to have killed, only that he had shot the person because he had been drinking and was under the influence of drugs at the time and needed money. That testimony did not encompass the subsequent interviews between Floyd and Investigator Cook in which Floyd specified the details of the offense.

Based on the facts of this case, we conclude that although the facts and circumstances surrounding the offenses may be inconclusive without Floyd's confession, "they do tend to prima facie show the corpus delicti of [the offense]." See *Bush v. State,* 695 So.2d 70, 119 (Ala.Crim.App.1995), aff'd, 695 So.2d 138 (Ala.1997), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997). The State presented sufficient evidence to establish the corpus delicti of the crime. The State proved that Waylon Crawford was dead and that the cause of death was injuries he sustained from a gunshot to the chest and neck inside the store he operated with his wife. Additionally, the State presented evidence indicating that a few hundred dollars had been taken from the cash drawer of the victim's store. Further, when Floyd's confession is considered along with the other evidence presented by the State, there was legally sufficient evidence establishing the corpus delicti of the capital offense of murder during the commission of a first-degree robbery. See *Irvin v. State,* 940 So.2d 331 (Ala.Crim.App.2005). The victim's wife testified that there was a few hundred dollars in the cash drawer when she left the store a few hours before the victim was killed, and that she had previously had discussions with the victim in which the victim stated that he would not give a robber any money if he were ever robbed. The evidence further indicated that the victim had been shot once in the chest and neck with a shotgun and that his body was found against the front door of the store.

We find that the facts of the case and reasonable inferences from those facts support and corroborate Floyd's confession, in which he stated that the victim refused to acquiesce when Floyd demanded his money and that the victim's body was against the front door of the store. Thus, the State sufficiently proved the corpus delicti of the offense. The fact that evidence of Floyd's admissions was presented at trial before the presentation of the aforementioned evidence establishing the corpus delicti did not result in reversible error.

VII.

Floyd next argues that the trial court improperly admitted into evidence State's exhibit 7, two diagrams purportedly made by Floyd during his statements to the police because, he claims, the State failed to establish the proper evidentiary predicate for the admission of the diagram based on "identification, chain of custody, and lack of *Miranda* warnings as to the statements taken and the diagram being made...." (Floyd's brief at p. 39.)Floyd concedes that this issue should be reviewed for plain error because, although trial counsel objected to the admission of the exhibit, the objection was on different grounds than the ground being argued on appeal.

Initially, with regard to Floyd's assertion that the State did not comply with the mandates of *Miranda,* we note simply that as discussed more fully in Part I of this opinion, the State sufficiently established a *Miranda* predicate.

[34] **[35]** With regard to Floyd's identification and chain-of-custody assertions, we note that the Alabama Supreme Court has established the following chain-of-custody analysis to be applied:

> "This opinion sets forth an analysis to be followed in deciding whether a proper chain of custody has been shown. We have held that the State must establish a chain of custody without breaks in order to lay a sufficient predicate for admission of evidence. *Ex parte Williams,* 548 So.2d 518, 520 (Ala.1989). Proof of this unbroken chain of custody is required in order to establish sufficient identification of the item and continuity of possession, so as to assure the authenticity of the item. *Id.* In order to establish a proper chain, the State must show to a 'reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.'*McCray v. State,* 548 So.2d 573, 576 (Ala.Crim.App.1988). Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, we require that the proof be shown on the record with regard to the various elements discussed below.
>
> "The chain of custody is composed of 'links.' A 'link' is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: '(1) [the] receipt of the item; (2)[the] ultimate disposition of the item, *i.e.,* transfer, destruction, or retention; and (3)[the] safeguarding and handling of the item between receipt and disposition.'Imwinklereid, *The Identification of Original, Real Evidence,* 61 Mil. L. Rev. 145, 159 (1973).

> "If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link,' as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak,' a question of credibility and weight is presented, not one of admissibility."

Ex parte Holton, 590 So.2d 918, 919–20 (Ala.1991). Further, " '[a]rticles or objects which relate to or tend to elucidate or explain issues or form a part of the transaction in question are admissible in evidence when duly identified and shown to be in substantially the same condition as at the time of the occurrence.' " C. Gamble, *McElroy's Alabama Evidence,* § 319.02 (4th ed. 1991).*Davis v. State,* 647 So.2d 52, 55 (Ala.Crim.App.1994).

> "Physical evidence connected with or collected in the investigation of a crime shall not be excluded from consideration by a jury or court due to a failure to prove the chain of custody of the evidence. Whenever a witness in a criminal trial identifies a physical piece of evidence connected with or collected in the investigation of a crime, the evidence shall be submitted to the jury or court for whatever weight the jury or court may deem proper. The trial court in its charge to the jury shall explain any break in the chain of custody concerning the physical evidence."

§ 12–21–13, Ala.Code 1975.

Here, Investigator Cook identified one page of State's exhibit 7 as a diagram drawn by Floyd during his September 27, 2004, interrogation of Floyd, and the second page of the exhibit as a diagram drawn by him and Floyd together during the October 1, 2004, interrogation. Investigator Cook stated that the exhibit had not been marked, altered, or changed in any way other than the addition of defense counsel's initials, which were added when the diagrams had been provided for the defense's review as a part of discovery. Thus, Investigator Cook sufficiently identified the exhibit, and his testimony further indicated that the exhibit was in the same condition and was not substantially different than when first drawn during the interviews. (R. 744–47.)

Finally, we note that Investigator Cook, when testifying about other exhibits related to his interviews with Floyd, i.e., the *Miranda* waiver sheet and the tape-recordings of the assorted statements, provided additional testimony about the care, custody, and control of those exhibits and indicated that the materials had been maintained together; although he did not specifically reference the diagrams that constituted State's exhibit 7 when he made that assertion, it logically follows that the exhibits were among the materials related to the interviews Investigator Cook was describing.

Moreover, even if the State failed to provide a textbook chain of custody, the predicate laid sufficiently identified the diagrams and established that the diagrams had not been changed, and further there is no indication that the diagrams are not what they were purported to be. In short, we have carefully reviewed Floyd's claim and we conclude that the trial court did not abuse its discretion in admitting the exhibit and further, that Floyd's rights were not affected by the trial court's admission of the exhibit. No plain error exists with regard to this claim.

VIII.

[36] Floyd argues that the State used its peremptory strikes in a discriminatory manner to remove prospective jurors based on their race and gender in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

After the jury was struck, the trial court asked whether the State or the defense had any motions, and no *Batson* objection of any kind was made. Accordingly, we review this claim for plain error. Rule 45A, Ala.R.App.P.

In *Batson*, the United States Supreme Court held that prospective African–American jurors could not be struck from an African–American defendant's jury based solely on the jurors's race. The Supreme Court later extended its holding in *Batson* to white defendants in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); to defense counsel in criminal cases in *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); and to gender-based peremptory challenges in *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

> "Under the 'plain error' doctrine, as enunciated in Rule 45A, [Ala.R.App.P.,] the Court of Criminal Appeals is required to search the record in a death penalty case and notice any error (ruling or omission) of the trial court, and to take appropriate action, 'whenever such error has or probably has adversely affected the substantial right of the [defendant],' in the same manner as if defendant's counsel had preserved and raised such error for appellate review."

Ex parte Johnson, 507 So.2d 1351, 1356 (Ala.1986). The plain-error analysis has been applied to death-penalty cases when counsel fails to make a *Batson* objection. *Pace v. State*, 714 So.2d 316, 318 (Ala.Crim.App.1995), opinion after remand, 714 So.2d 320 (Ala.Crim.App.1996), reversed in part on other grounds, 714 So.2d 332 (Ala.1997). For plain error to exist in the *Batson* context, the record must raise an inference that the State engaged in "purposeful discrimination" in the exercise of its peremptory challenges. See *Ex parte Watkins*, 509 So.2d 1074 (Ala.1987).

[37] In *Ex parte Branch*, 526 So.2d 609 (Ala.1987), the Alabama Supreme Court announced the standard a reviewing court should use when evaluating whether a *Batson* violation has occurred. The Court stated:

> "The burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination. In determining whether there is a prima facie case, the court is to consider 'all relevant circumstances' which could lead to an inference of discrimination. *See Batson*, 476 U.S. at 93, 106 S.Ct. at 1721, citing *Washington v. Davis*, 426 U.S. 229, 239–42, 96 S.Ct. 2040, 2047–48, 48 L.Ed.2d 597 (1976). The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:
>
> "1. Evidence that the 'jurors in question share[d] only this one characteristic—their membership in the group—and that in all other respects they [were] as heterogeneous as the community as a whole.'[*People v.] Wheeler*, 22 Cal.3d [258], 280, 583 P.2d [748], 764, 148 Cal.Rptr. [890], 905.For instance 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,'*Wheeler*, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n. 27, indicating that race was the deciding factor.
>
> "2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723.
>
> "3. The past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire. *Swain [v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)].
>
> "4. The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *Wheeler*, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.
>
> "5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. *Slappy v. State*, 503 So.2d 350, 355 (Fla.Dist.Ct.App.1987); *People v. Turner*, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 (1978).
>
> "6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in *Slappy*, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. *Slappy*, [503] So.2d at 352 and 355.
>
> "7. Disparate examination of members of the venire; e.g., in *Slappy*, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. *Slappy*, 503 So.2d at 355.

"8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury.*Batson,* 476 U.S. at 93, 106 S.Ct. at 1721; *Washington v. Davis,* 426 U.S. at 242, 96 S.Ct. at 2049.

"9. The state used peremptory challenges to dismiss all or most black jurors. See *Slappy,* 503 So.2d at 354, *Turner,* supra."

526 So.2d at 622–23.When reviewing a trial court's ruling on a *Batson* motion, this court gives deference to the trial court's ruling and will reverse that court's decision only if it is clearly erroneous. *Yancey v. State,* 813 So.2d 1, 3 (Ala.Crim.App.2001); *Farrior v. State,* 728 So.2d 691 (Ala.Crim.App.1998); *Merriweather v. State,* 629 So.2d 77 (Ala.Crim.App.1993); *Nance v. State,* 598 So.2d 30 (Ala.Crim.App.1992); and *Jackson v. State,* 594 So.2d 1289 (Ala.Crim.App.1991).

As previously discussed, on original submission this Court concluded that the record supplied an inference of inconsistent strikes by the prosecution, and we remanded Floyd's case for additional findings regarding Floyd's *Batson* and *J.E.B.* claim. The prosecutor and defense counsel exercised 36 peremptory challenges to select Floyd's jury. The State used its 18 strikes to strike 10 of the 11 remaining African–Americans and 12 of the 18 remaining females from the venire. Defense counsel struck one African–American and seven females. Floyd's jury consisted of 6 white male jurors and 6 white female jurors; none of the jurors were African–American. One of the alternate jurors was an African–American female (the State's final strike), and the other two alternate jurors were white males.

On remand, the court conducted an evidentiary hearing concerning the merits of Floyd's *Batson* and *J.E.B.* claim. During the hearing, the prosecutor stated that his general practice in capital cases was to make a notation on the strike list as to his initial impression of each prospective juror; he further stated that he then would adjust that initial rating based on the prospective juror's responses, or lack of response, to the questions posed to the venire by the prosecution, the defense, and the court. The prosecutor also indicated that he considered race- and gender-neutral factors such as the prospective juror's general demeanor and attentiveness or lack thereof during voir dire, the manner in which the prospective juror responded to questions posed to him or her during voir dire, whether the prospective juror appeared to have difficulty understanding the court's instructions or the questions posed to the juror by the court or the attorneys, the juror's age, place of employment or lack of employment, and apparent physical ability. The prosecution then offered the following reasons for striking 10 of 11 African–American prospective jurors:

Juror no. 19: The State's eleventh strike. She was struck because she was not attentive during jury qualification or voir dire, and failed to make eye contact with the State but was "nodding in agreement with the defense."(Supp. R. 64.)

Juror no. 28: The State's first strike. She was struck because she had 32 bad-check cases and her probation had been revoked. (Supp. R. 64.) The prosecutor also noted that she was in the same age range as Floyd. (Supp. R. 74.)

Juror no. 38: The State's fourth strike. He was struck because he had been convicted of disorderly conduct, because he knew a potential witness who was rumored to have been involved in the commission of the offenses Floyd was charged with committing, and because a member of law enforcement had reviewed the list of prospective jurors and indicated that he would be a bad juror for the State. (Supp. R. 64–65.)

Juror no. 43: The State's second strike. He was struck because he had two convictions for harassment and had approximately 12 traffic tickets with the City of Dothan. (Supp. R. 65.)

Juror no. 46: The State's sixth strike. She was struck because she had six convictions and her brother had felony convictions, because she at one point during voir dire questioned the veracity of law enforcement testimony, and because she was familiar with members of the district attorney's office because that office had prosecuted her and her brother. (Supp. R. 65–66.)

Juror no. 51: The State's eighteenth and final strike; this juror served as an alternate juror. She was struck because she was 77 years of age and due to her demeanor during voir dire and the length and complexity of the case, the prosecution had concerns about her ability to serve as a juror in the case.

Juror no. 57: The State's seventh strike. She was struck because she had convictions for theft and negotiating worthless negotiable instruments.

Juror no. 58: The State's sixteenth strike. She was struck because she did not respond to any questions during voir dire and the prosecution did not know anything about her. (Supp. R. 67–68; 75.)

Juror no. 59: The State's third strike. She was struck because she initially indicated that she could not vote for the death penalty and that she was personally opposed to capital punishment, and she vacillated when questioned by the trial court. (Supp. R. 69.)

Juror no. 60: The State's eighth strike. She was struck because she knew the defense attorneys, members of the district attorney's office, the forensic pathologist who performed the autopsy on the victim; the prosecutor believed she was "too familiar with everybody involved." (Supp. R. 69–70.) She was also struck because her religious beliefs impacted her ability to sit in judgment of the accused. (Supp. R. 71–72.)

The prosecutor further stated that he had considered the lone African–American prospective juror struck by the defense, prospective juror no. 30, to be "an excellent juror for the State" based on his rating system. (Supp. R. 60.)

In addition to the reasons offered for striking the eight African–American *female* prospective jurors listed above, the prosecution offered the following reasons for striking four white female prospective jurors:

Juror no. 5: The State's twelfth strike. She was struck because of her age. (Supp. R. 74.) The prosecutor further stated that he could not recall the specific reasons, but that his initial impression was that she would not make a good juror for the State. (Supp. R. 103.)

Juror no. 23: The State's tenth strike. She was struck because she failed to respond to any questions during voir dire and because the prosecutor's initial impression of her was that she would not be a strong juror for the State. (Supp. R. 73; 101–02.)

Juror no. 35: The State's fifteenth strike. She was struck because although the prosecutor's initial impression was that she would be "okay," she failed to respond to any questions during voir dire and because she appeared to be approximately the same age range as Floyd. (Supp. R. 74–75; 106–07.)

Juror no. 70: The State's thirteenth strike. She was struck because she was approximately the same age as Floyd. (Supp. R. 74; 105.)

The prosecutor further stated that he had determined during voir dire that female prospective jurors nos. 32 and 42, both of whom served on the jury, would be good jurors and he had written "okay" on his strike sheet; that he had determined that female prospective juror no. 8, who also served on the jury, would be an excellent juror for the State; and that he had determined female prospective jurors nos. 18 and 62, both of whom were struck by the defense, would be good jurors based on his rating system. (Supp. R. 104–05.)

The prosecution offered into evidence its strike list containing the prosecutor's notations about assorted prospective jurors, a list showing each prospective juror's prior jury service and any criminal charges, and a strike list containing notations by law enforcement about various jurors and his impression as to whether they would be a good juror for the State.

Defense counsel was given an opportunity to rebut the prosecutor's reasons for striking these jurors. Defense counsel submitted a legal memorandum setting out a list of cases from Houston County involving *Batson* objections, including five instances where this Court had reversed convictions from the Houston Circuit Court based on *Batson* violations. Next, defense counsel addressed the prosecutor's reasons for striking 10 African–American jurors in Floyd's case. Defense counsel argued that although the prosecutor claimed that a number of the challenged strikes were based upon assorted offenses for which the contested veniremembers or their family members had been convicted, many of those convictions were not in the record or in documents

available to the defense. Additionally, defense counsel argued that the prosecution failed to ask follow-up questions to a number of veniremembers with regard to the reasons being given for striking them from the jury. Finally, with regard to the prosecution's assertion that several of the prospective jurors were struck because of their age, he noted that those veniremembers ranged in age from as young as 28 years old to as old as 77 years.

Defense counsel further argued that although the prosecution claimed to have struck prospective juror no. 67, a Caucasian male, because of traffic tickets, a number of the jurors seated on the jury had assorted traffic violations; defense counsel then asserted that the prosecution had articulated "tickets" as reasons for a number of the challenged strikes. (Supp. R. 85.) However, we note that prospective juror no. 67 was neither African–American nor female. Furthermore, the prosecution did not indicate that any of the contested strikes were based solely upon traffic violations. Rather, many of the legal transgressions articulated by the State as to the contested veniremembers were for felony or misdemeanor convictions: juror no. 28 (32 bad-check cases and probation revocation); juror no. 38 (disorderly conduct conviction); juror no. 46 (six convictions and a brother with felony convictions); juror no. 57 (convictions for theft and negotiating worthless negotiable instruments). Although the prosecution did state that juror no. 43 had 12 traffic cases, he also referenced two convictions for harassment as a reason for exercising a strike as to this prospective juror.

At the conclusion of the evidentiary hearing, the court took the case under advisement. Thereafter, the circuit court entered a written order making written findings of fact concerning the prosecutor's reasons for striking exercising its peremptory strikes to remove 10 African–American jurors and 12 female jurors. The court concluded that the prosecutor had given race- and/or gender-neutral reasons for striking jurors no. 19, 23, 28, 35, 38, 43, 46, 51, 57, 59, 60, and 70. We agree.

The court also concluded that the State had been unable to articulate race- or gender-neutral reasons for striking jurors no. 5 and 58, but that failing to remember its reasons for a strike was not tantamount to discrimination; the court further found that it would be inconsistent for the prosecution to have removed those two jurors for improper reasons, particularly in light of the fact that the prosecution was aware that the trial court, as a matter of routine, required the State to articulate its reasons for strikes had the defense merely made a timely *Batson* motion. Although we express no opinion as to the trial court's rationale for finding that the State had articulated race- and gender-neutral reasons for striking jurors no. 5 and 58, we note that our review of the supplemental record indicates that the prosecution did articulate the following reasons for these two strikes. The prosecutor stated that he struck juror no. 5 because of her age and because his initial impression of her was that she would not make a favorable juror for the State. In light of the prosecutor's detailed explanation at the *Batson* hearing on remand as to his method of striking jurors—that he first gathers information regarding their previous jury service, and any legal transgressions, and solicits recommendations from law enforcement, that he then makes a notation on his jury strike list as to his initial impression of the juror at voir dire, and that he makes modifications of that initial impression based on the prospective juror's responses, conduct, demeanor, etc., during voir dire before deciding how to exercise his strikes—we find no indication in the record that juror no. 5 was struck for an improper reason or that the strike resulted in disparate treatment.

Similarly, with regard to prospective juror no. 58, the prosecution stated that she was struck because she did not respond to any questions during voir dire. We note that the prosecution articulated nonresponsiveness as a ground for striking jurors no. 19, 23, and 35. The defense argued that jurors no. 8 (Caucasian female) and 21 (Caucasian male) served on the jury despite failing to respond to any questions during voir dire. The prosecution noted that juror no. 8 had served on a jury in 1996 that voted to convict the accused in a criminal case. In light of the fact that a number of convictions from Houston County have been reversed as a result of *Batson* violations,[6] and in light of the fact that this Court remanded this case for the trial court to conduct a *Batson* and *J.E.B.* hearing, the trial court was certainly aware of the potential for abuse. After careful review of the facts and circumstances in this case and relevant legal authority, and with appropriate consideration for the heightened scrutiny in a case such as this where the defendant has been sentenced to death, the strike of juror no. 58 simply did not evidence disparate treatment based on the record before this Court. Based on the foregoing, we conclude that the trial court's ruling was not clearly erroneous. Accordingly, no basis for reversal exists as to this claim.

IX.

[38] Floyd argues that the trial court improperly failed to consider the statutory mitigating circumstance of no significant criminal history. See § 13A–5–51(1), Ala.Code 1975. Specifically, Floyd contends that the trial court improperly considered criminal activity that occurred after the commission of the robbery-murder in this case. Floyd attempts to analogize this statutory mitigating offense in § 13A–5–51(1) with the Habitual Felony Offender Act contained in § 13A–5–9, Ala.Code 1975, in that, he argues, only activity for which there has been a conviction before the commission of the current offense is eligible for consideration. However, such an analogy is improper. Section 13A–5–39, Ala.Code 1975, provides:

"As used in this article, these terms shall be defined as follows:

"....

"(6) PREVIOUSLY CONVICTED and PRIOR CRIMINAL ACTIVITY. As used in Sections 13A–5–49(2) and 13A–5–51(1), these terms refer to events occurring before the date of the sentence hearing."

Thus, the trial court's use of Floyd's criminal history, including the fact that he was already serving three life sentences at the time of the sentencing hearing in this case, as an aggravating circumstance is proper under Alabama law. See *Ray v. State*, 809 So.2d 875 (Ala.Crim.App.2001).

X.

[39] Floyd next argues that the trial court erroneously allowed evidence before the jury that Floyd was serving three sentences of life imprisonment. Specifically, Floyd asserts that the prosecutor elicited testimony to that effect from two witnesses and also referenced that fact during closing arguments, and that the information was not relevant and served only to inflame the jury.

Floyd first cites the prosecutor's questioning of Robert Floyd, Jr., who is Floyd's cousin and who was called as a witness for the defense. On direct examination, during questioning by the defense about Floyd's reputation as being nonviolent, Robert responded that he did not believe Floyd had committed the murder because he only knew Floyd to have previous legal problems for writing bad checks. On cross-examination, the prosecutor had Robert clarify his earlier response and then reminded Robert that he had also testified that Floyd had stolen an automobile—to which Robert stated that that incident also involved a bad check. Robert testified that he was unaware of Floyd having any convictions for impersonating a police officer. The prosecutor then asked whether Robert had "heard about [Floyd's] other life sentences for theft, for stealing" to which Robert responded "Well, I know he had three life sentences."(R. 847.) The prosecutor began asking Robert, "So you heard really more than just his—" (R. 847), at which time defense counsel objected and the trial court heard arguments on the objection outside of the hearing of the jury. After discussion, in which defense counsel indicated that if Floyd testified he was going to elicit testimony to that effect anyway, the trial court instructed the prosecutor to limit his questioning to the specific trait of violence rather than Floyd's general character; the trial court noted that the defense's objection to the line of questioning was untimely but offered to give a curative instruction if the defense wanted, an offer defense counsel declined.

Floyd also cites to the testimony of Paul Wayne Johnson, another of Floyd's cousins who testified as witness for the defense; according to the defense's theory of the case Johnson, not Floyd, committed the murder. Defense counsel vigorously questioned Johnson in a manner designed to elicit testimony that he had committed the murder by establishing that Johnson was a violent person and that he had admitted to assorted inmates that he had committed the murder, accusations Johnson repeatedly denied. During direct examination, the defense questioned Johnson about conversations he had had with Floyd about the murder while the two were briefly incarcerated together; Johnson stated that he asked why Floyd lied to the police and told them he was involved, that Floyd initially denied implicating Johnson but then claimed the authorities had forced him to name Johnson.

Johnson then opined that Floyd "tried to blow the door down to get the sentences he got on him off."(R. 890.) On cross-examination, the prosecutor asked Johnson about his conversations with Floyd; the following exchange then occurred:

"[Prosecutor]: ... The question—in those conversations, the time, you had a 15–year sentence to do, didn't you?

"[Johnson]: Yes, sir.

"[Prosecutor]: And he had life sentences to do, didn't he?

"[Johnson]: Yes, sir, he did.

"[Prosecutor]: And that's the time he started talking or telling people more openly or more that you were the person who did the killing of Waylon Crawford, in other words, to help get his sentences reduced, right?

"[Johnson]: That's my opinion of it, sir."

(R. 923.) On redirect-examination, defense counsel attempted to elicit testimony to portray Johnson as trying to get Floyd to take the blame for the murder:

"[Defense counsel]: Let me ask you this: You said he had a life sentence and you have a 15–year sentence.

"[Johnson]: He had three life sentences.

"[Defense counsel]: Right. So you told him—you told him with your three life sentences, you ain't never going to get out anyway, they are not going to bother you on this murder, I get out in 15 years, don't let them stick it on me. It's not going to hurt you."

(R. 925–26.)

Finally, during his closing remarks to the jury, both after the guilt phase of the trial and again at the sentencing phase, the prosecutor referenced the fact that Floyd was serving three sentences of life imprisonment.

In *Ex parte Minor,* 780 So.2d 796 (Ala.2000), the Alabama Supreme Court held that it was plain error where the trial court failed to sua sponte instruct the jury that evidence of the defendant's prior convictions introduced for impeachment purposes could not be considered as substantive evidence of the defendant's guilt of the crime for which he was now on trial. See also *Snyder v. State,* 893 So.2d 482 (Ala.2001). However, the holdings in *Minor* and *Snyder* have been repeatedly held to apply only to those cases in which the defendant testified and the evidence of prior convictions was admitted for impeachment purposes, and then on a case-by-case basis. See, e.g., *Johnson v. State,* [Ms. 1041313, Oct. 6, 2006] — So.2d — (Ala.2006); *Ex parte Martin,* 931 So.2d 759 (Ala.2004); *Key v. State,* 891 So.2d 353 (Ala.Crim.App.2002).

[40] **[41]** Here, Floyd did not testify, and the evidence was not introduced for impeachment purposes. Rather, evidence that Floyd was serving three life sentences went to the defense's assertion that Paul Wayne Johnson, who was serving a 15–year sentence for an unrelated conviction, had committed the murder and that he asked Floyd to take the blame because Floyd was already serving sentences of life imprisonment that would likely prevent his release from prison anyway. Further, we note that Floyd contributed to the lack of instruction by declining the trial court's offer to issue a curative instruction when the testimony was first elicited by the prosecution. It is well settled that

" ' "[u]nder the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby."*Phillips v. State,* 527 So.2d 154, 156 (Ala.1988)."The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error."*Snyder v. State,* 893 So.2d 488, 518 (Ala.Crim.App.2003).' "

Sharifi v. State, 993 So.2d 907, 936 (Ala.Crim.App.2008), quoting *Robitaille v. State,* 971 So.2d 43, 59 (Ala.Crim.App.2005). We find no plain error in the trial court's failure to issue a limiting instruction to the jury as to the proper use of the complained-of evidence.

XI.

[42] Floyd also argues that the trial court erred in allowing Dr. Paredes to testify that the victim's injuries were caused by a .410 shotgun based on the findings of another expert who did not testify. Specifically, Floyd contends that this testimony was violative of the Confrontation Clause principles espoused in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Initially we note that Floyd objected to Dr. Paredes testifying about the gauge of shotgun; however, that objection was founded on the grounds that Floyd was not competent to testify as a firearms expert, not the hearsay and Confrontation Clause assertions Floyd now advances on appeal. Thus, we review this claim for plain error. See Rule 45A, Ala.R.App.P.

In *Crawford v. Washington,* the United States Supreme Court held that the admission of a witness's out-of-court statement that is testimonial under the Confrontation Clause is barred unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statement is deemed reliable by the trial court. We note that Dr. Paredes's testimony is mixed in terms of his own experiences with shotguns and cases involving shotguns and in terms of the findings of Joe Saloom—Saloom, who was characterized as a state firearms expert, did not testify and there is no indication in the record as to his availability. Even assuming, without deciding, that *Crawford* is applicable to the facts of this case, we note that this Court has traditionally applied a harmless-error analysis to alleged violations of the Confrontation Clause. See *King v. State,* 929 So.2d 1032 (Ala.Crim.App.2005), citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See also *Perkins v. State,* 897 So.2d 457 (Ala.Crim.App.2004); and *Smith v. State,* 898 So.2d 907 (Ala.Crim.App.2004). Here, even if the complained-of testimony was error, it was harmless beyond a reasonable doubt. The gauge of shotgun, although certainly relevant to help lend trustworthiness to Floyd's confession, was not such a critical matter as to require a reversal. Therefore, no plain error exists which would necessitate a reversal of this case.

XII.

Last, as required by § 13A–5–53, Ala.Code 1975, we address the propriety of Floyd's conviction for capital murder and his sentence of death. Floyd was indicted and convicted of murdering Waylon Crawford during the course of committing a robbery, an offense defined as capital by §§ 13A–5–40(a)(4), Ala.Code 1975, and punishable by death.

The record reflects that Floyd's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Section 13A–5–53(b)(1), Ala.Code 1975.

The circuit court found that the aggravating circumstance that the murder was committed while Floyd was engaged in a first-degree robbery outweighed the mitigating circumstances and warranted that Floyd be sentenced to death. With regard to statutory mitigating circumstances, the trial court found that although Floyd was competent to stand trial and at the time of the offense, there was some evidence indicating that he was under the influence of drugs and alcohol at the time of the murder, see § 13A–5–51(6), Ala.Code 1975; the court also found that Floyd was 19 at the time he committed the murder, see § 13A–5–51(7). The court found the following nonstatutory mitigating circumstances:

> "[Floyd's] aunt, Wendy Harper, testified that Christopher Floyd grew up in a broken home without a strong father influence. [Floyd] was two years of age when his father left his mother. His parents parted

> on bad circumstances. He tried to establish a relationship with his father but the father would not have anything to do with him. Christopher Floyd's mother had a difficult time financially being a single parent and raising her children. There were numerous stepfathers in the home over a period of years and he never established a good relationship with these stepfathers. His mother and various stepfathers drank alcohol to excess. His mother had been physically abused in front of him and he himself had been verbally and physically abused on occasions. He started drinking at an early age. On many occasions he had to take care of his little brother. His stepfather put his mother in the hospital because of domestic violence. She had never known Christopher Floyd to be in a fight and believed he could be a good inmate in prison. They moved a lot when he was young. He was married one time for two years and had no children."

(C. 376.) The circuit court's findings are supported by the record.

[43] Section 13A–5–53(b)(2), Ala.Code 1975, provides that this Court must independently weigh the aggravating circumstances and the mitigating circumstances to determine the propriety of Floyd's sentence of death. After an independent weighing we are convinced that death is the appropriate sentence.

[44] Section 13A–5–53(b)(3), Ala.Code 1975, provides that this Court must address whether Floyd's sentence of death was disproportionate to the penalties imposed in similar cases. Floyd's death sentence is neither. "In fact, two-thirds of the death sentences imposed in Alabama involve cases of robbery/murder." *McWhorter v. State*, 781 So.2d 257, 330 (Ala.Crim.App.1999), aff'd, 781 So.2d 330 (Ala.2000), cert. denied, 532 U.S. 976, 121 S.Ct. 1612, 149 L.Ed.2d 476 (2001). See, e.g., *Beckworth v. State*, 946 So.2d 490 (Ala.Crim.App.2005), cert. denied, 549 U.S. 1120, 127 S.Ct. 936, 166 L.Ed.2d 717 (2007) (burglary/murder); *Walker v. State*, 932 So.2d 140 (Ala.Crim.App.2004) (burglary/murder); *Wynn v. State*, 804 So.2d 1122 (Ala.Crim.App.2000), cert. denied, 804 So.2d 1152 (Ala.2001), cert. denied, 535 U.S. 972, 122 S.Ct. 1440, 152 L.Ed.2d 383 (2002) (robbery/burglary/murder).

Finally, we have searched this record for any error that may have adversely affected Floyd's substantial rights and have found no error, plain error under Rule 45A, Ala.R.App.P., preserved error, or other error.

Floyd's capital-murder conviction and his sentence of death are due to be, and are hereby, affirmed.

AFFIRMED.

BASCHAB, P.J., and McMILLAN and SHAW, JJ., concur. WELCH, J., dissents, with opinion.

WELCH, Judge, dissenting.

*3 I cannot agree with the analysis in the majority's opinion concluding that, because the trial court was necessarily aware of the Houston Circuit Court's history of successful *Batson*[7] challenges and was thus cognizant of the potential for disparate treatment of certain discrete groups of venire members, and because of the heightened scrutiny this Court would give to this issue on return to remand, there was no basis for a finding that the trial court improperly determined that the State properly struck Juror No. 58. That, to me, is not a valid reason for such a finding.

The opinions reversing the Houston Circuit Court on *Batson* grounds date from 1991, 17 years ago. The most recent of those opinions was published in 1998, ten years ago. The judge presiding over this case was not the judge sitting in any of the five cases cited in the opinion in which defendants in the Houston Circuit Court had made successful *Batson* challenges, requiring reversal of their cases. The argument that the trial court would not have made an improper ruling because improper rulings had been made in the circuit in the past is specious.

I agree with the majority and the trial court that the State articulated proper race- and gender-neutral reasons for the majority of its strikes. I write only to address the efficacy of the strike of Juror No. 58, the subject of the argument set forth above.

The record on return to remand shows the following. Juror No. 58 was a black female. In its order entered after the *Batson* hearing, the trial court noted that "the State could not remember why she was struck."(Supp. CR. 17.) On the State's strike list, which was submitted into evidence at the *Batson* hearing, there was no notation by Juror 58's name, only the letter "B," which indicated that the venire member was black. (Supp. R. 58.) A second document submitted by the State shows each juror's name, past jury service, and any criminal charges against that juror. I note that Juror No. 58's name appears to have been cut off at the bottom of a page of the list. At any rate, the name does not appear on the list.

At the hearing, the prosecutor testified that Juror No. 58 failed to respond to any questions posed by the State, the defense, or the court. It is true that the stated reason for striking venire members who are nonresponsive to questions posed by the prosecutor has been held to be a race-neutral reason for a peremptory challenge. *Jackson v. State,* 686 So.2d 429 (Ala.Crim.App.1996); and *Johnson v. State,* 648 So.2d 629 (Ala.Crim.App.1994). However, in this case, the record shows that the State did not strike two white members of the venire, M.A. and A.B., who did not respond to any questions posed during voir dire. In fact, one of those venire members, M.A., had a "plus" by her name, which meant that the prosecutor believed that she would be a good juror for the State.

In *Ex parte Branch,* 526 So.2d 609, 623 (Ala.1987), the Alabama Supreme Court stated that a relevant factor to consider when determining whether a defendant had established a prima facie case of racial discrimination was, among other things, "[d]isparate treatment of members of the jury venire with the same characteristics, or who answered a question in the same or similar manner."

After Floyd pointed out that the State did not strike two white jurors who had not answered any questions on voir dire, the State did not provide any other basis for its decision to strike Juror No. 58.

"The trial court's ruling [regarding whether the prosecutor offered race-neutral explanations for peremptory challenges] will be overturned only if it is 'clearly erroneous.' *Ex parte Branch,* 526 So.2d 609, 625 (Ala.1987)."*Hall v. State,* 816 So.2d 80, 87–88 (Ala.Crim.App.1999).

I believe that the record provides clear evidence of disparate treatment of white venire members and treatment of Juror No. 58 and that the State improperly struck Juror No. 58 based solely upon her race. " '[T]he removal of even one juror for a discriminatory reason is a violation of the equal protection rights of both the excluded juror and the minority defendant. Moreover, this is true even though blacks may be seated on the petit jury and there were valid race-neutral reasons for striking other blacks from the jury.'"*Pruitt v. State,* 871 So.2d 101, 103 (Ala.Crim.App.2003), quoting *Carter v. State,* 603 So.2d 1137, 1138–39 (Ala.Crim.App.1992).

Because the State violated the requirements of *Batson* in this case, I believe the conviction in this case is due to be reversed and Floyd is entitled to a new trial. Accordingly, I must respectfully dissent.

All Citations

--- So.2d ----, 2007 WL 2811968

Footnotes

1 Thus, based on the initial jury list and the strike list, of the 20 African–American jurors, a total of 5 were struck for cause and 11 remained in the pool of potential jurors. It is unclear what happened to the remaining 4 African–American potential jurors on the jury list and initial strike list.

2 The record further indicates that Floyd used 7 of his 18 strikes to remove females from the venire. Floyd's jury consisted of six female jurors and six male jurors. One of the three alternate jurors, the State's final strike, was female.

1 Clements later stated that there could have been as much as $500 in the cash drawer.

2 Clements did not indicate who called her and told her to return to the store, nor did she explain what the caller told her other than that she needed to return to the store. She testified after receiving that call and as she was preparing to go to the store, that she telephoned a mutual friend, Gerald Morgan, and asked him to go to the store because she believed Crawford was having heart problems, and Morgan lived closer to the store than Clements.

3 Floyd continued to maintain that he committed the robbery-murder, but added or changed details of the events. In one statement he claimed that he was hired to commit the murder. In another statement he recanted the portion of the statement wherein he claimed to have disposed of the shotgun in an automobile crusher and instead claimed to have thrown the shotgun into a river.

4 In Part VI of this opinion we address Floyd's argument that his confession was improperly admitted into evidence before any independent evidence of the corpus delicti of the robbery-murder.

5 Floyd does not argue that the videotape was authenticated or that the proper foundation was not laid.

6 See, e.g., *McCray v. State*, 738 So.2d 911, 914 (Ala.Crim.App.1998); *Ashley v. State*, 651 So.2d 1096, 1101 (Ala.Crim.App.1994); *Andrews v. State*, 624 So.2d 1095, 1099 (Ala.Crim.App.1993); *Williams v. State*, 620 So.2d 82, 86 (Ala.Crim.App.1993); *Roger v. State*, 593 So.2d 141, 142 (Ala.Crim.App.1991).

7 *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

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APPENDIX B

REL: 05/29/2015
Modified on denial of reh'g: 08/21/2015

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

1130527

Ex parte Christopher Anthony Floyd

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Christopher Anthony Floyd

v.

State of Alabama)

(Houston Circuit Court, CC-04-1670;
Court of Criminal Appeals, CR-05-0935)

STUART, Justice.[1]

This Court issued a writ of certiorari to determine whether the following holdings of the Court of Criminal Appeals in Christopher Anthony Floyd's appeal from his capital-murder conviction are proper: that the Houston Circuit Court ("the trial court") did not err in holding that the State provided valid race- and gender-neutral reasons for its exercise of its peremptory strikes during jury selection, that the trial court did not err by refusing to admit into evidence all of Floyd's statements made to law-enforcement officers, and that the trial court did not err in denying Floyd's motion for a new trial based on newly discovered evidence. We affirm.

Facts and Procedural History

In 2005 Floyd was convicted of the murder of Waylon Crawford. The murder was made capital because it was committed during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975. Floyd was sentenced to death. In selecting the jury for Floyd's case, the prosecutor and Floyd's counsel exercised

[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Stuart on January 5, 2015.

a total of 36 peremptory challenges. The State used its 18 challenges to remove 10 of 11 African-American veniremembers and 12 of 18 female veniremembers. Floyd's counsel removed one African-American and seven female veniremembers. The jury consisted of six white male jurors, six white female jurors, two alternate white male jurors and one alternate African-American female juror. Floyd did not object to the jury based on Batson v. Kentucky, 476 U.S. 79 (1986)(prohibiting racial discrimination in jury selection), or J.E.B. v. Alabama, 511 U.S. 127 (1994)(prohibiting gender discrimination in jury selection).

On direct appeal, the Court of Criminal Appeals held that the record indicated that the prosecutor's use of his peremptory challenges created a prima facie case of discrimination under both Batson and J.E.B. That court remanded the case for the trial court to conduct a Batson/J.E.B. hearing. Floyd v. State, [Ms. CR-05-0935, Sept. 28, 2007] ___ So. 3d ___ (Ala. Crim. App. 2007).

On remand, the trial court conducted a hearing and required the prosecutor, Gary Maxwell,[2] to provide

[2]Maxwell stated that he selected the jury for the State with the exception of one juror, who, although he had

explanations for the exercised peremptory challenges. Before providing explanations for his peremptory challenges, the prosecutor explained his general practice in selecting a jury for a capital case:

> "In a capital murder case where voir dire is extensive, and ordinarily the process lasts a day or longer, I try to rate each and every juror initially on gut reaction. If you will look at State's Exhibit 1 there, in black outside of a lot of the juror's names, I will write 'Okay.' I will write just a dash for a minus. I might write a plus, being -- minuses are bad gut reaction, pluses are a good gut reaction. Okay is just okay. All right.
>
> "Also, in doing so -- I do that when the clerk is calling the names of the jurors and asking them to stand. Now, also, as is the Court's practice -- when I say the Court, the list that we have, I will put a 'B' outside of the names of those who are black. I do that not only from the appearance in court but from the jury list that's propounded by the clerk's office.[3]
>
> "....

---

reservations about her serving in light of her responses to questions about capital murder, the district attorney directed not be removed by a State peremptory challenge.

[3]The record indicates that the court provided at least three types of strike lists for the State and the defense to use during jury selection. One strike list provided each veniremember's name with an assigned juror number; another strike list included each veniremember's name, juror number, date of birth, sex, race, and address, and a third strike list provided each veniremember's name, juror number, date of birth, sex, race, occupation, employer, partial address, spouse's name, and spouse's employer.

"I have done this same procedure, the initial gut reaction rating system, for over 30 years. It's proven to be pretty accurate, I think. Then as questioning proceeds -- I adjust those ratings based on responses or lack of responses to the questions, questions the Court asks, questions the State asks, and the questions that the defendant propounds as to whether I feel they would favor the State or the defense, on their demeanor, the way they answer the questions, and not just the answer to the questions, the answer or again their failure to respond.

"Now, ... I do that second rating system basically in red. I may go back, I may change a minus to a plus. I may change a plus to a minus.

"Ultimately, I try to strike those most likely to lean towards the defense, not on race. I consider such factors as their age, their place of employment or lack of employment, their physical ability based on appearance, and/or responses to the questions that the Court propounds or the attorneys propound or on their failure to respond to questions. If they appear to be having a hard time understanding the Court's instructions or questions or those questions of the attorneys, I take that into consideration. If they do not pay attention, if they daydream, act as if they are bored or just don't care, I take that into consideration in this second rating system.

"In my rating system, for example, Juror [no. 30/]J.B.,[4] who was struck by the defense, I considered to be an excellent juror for the State.

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[4]The State refers to prospective jurors using initials, e.g., "Juror J.B."; Floyd uses numbers, e.g., "Juror no. 30." For purposes of this opinion, the first time a prospective juror is referenced in a discussion, we will identify the juror by both number and initials. Thereafter, we will refer to that juror using initials.

> And I think you can see that on my list out there, that there is a plus beside [Juror no. 30/J.B.'s] name.
>
> "The State seeks jurors who are stable members of the community and due to the complexity of a capital murder case, we prefer jurors who have had jury experience and who have rendered a guilty verdict in the past. We prefer jurors who have jobs or education that requires concentration and attention to detail and also analysis.
>
> "A juror's demeanor or body language, his lack of eye contact with attorneys when they are asking questions can be a factor especially when he appears disinterested or shows more animosity towards the prosecution or law enforcement.
>
> "So that's just a basic background of what I do in preparation for striking the jury."

After explaining his methodology for selecting a jury, the prosecutor offered the following reasons for his exercised peremptory strikes of African-Americans and females:

> Prospective juror no. 28/P.B.: The prosecutor stated that he struck P.B., an African-American female, because P.B. had 32 bad-check cases, her probation had been revoked, and she was in the same age range as Floyd.
>
> Prospective juror no. 43/J.B.: The prosecutor stated that he struck J.B., an African-American male, because J.B. had two convictions for harassment and had approximately 12 traffic tickets with the City of Dothan.
>
> Prospective juror no. 59/M.C.: The prosecutor stated that he struck M.C., an African-American female, because M.C. initially indicated that she could not

vote for the death penalty and was personally opposed to capital punishment, and because she vacillated when questioned by the trial court.

Prospective juror no. 38/K.B.: The prosecutor stated that he struck K.B., an African-American male, because K.B. had been convicted of disorderly conduct, because he knew a potential witness who was rumored to have been involved in the commission of the offense charged, and because a member of law enforcement had indicated that he would be a bad juror for the State.

Prospective juror no. 46/T.C.: The prosecutor stated that he struck T.C., an African-American female, because T.C. had six convictions and her brother had felony convictions, because during voir dire she questioned the veracity of testimony from members of law enforcement, and because of her familiarity with members of the district attorney's office as a result of that office's prosecution of her and her brother.

Prospective juror no. 57/A.C.: The prosecutor stated that he struck A.C., an African-American female, because A.C. had been convicted of theft and negotiating worthless negotiable instruments.

Prospective juror no. 60/L.C.: The prosecutor stated that he struck L.C., an African-American female, because he believed that L.C. was "too familiar with everybody involved" in the case because she knew the defense attorneys, members of the district attorney's office, and the forensic pathologist who performed the autopsy on the victim. He further explained that he believed L.C.'s expressed religious beliefs would impact her ability to sit in judgment of the accused.

Prospective juror no. 19/D.B.: The prosecutor stated that he struck D.B., an African-American female, because she was inattentive during voir dire. The

prosecutor further stated that D.B. failed to make eye contact with members of the prosecution team, but at times during voir dire nodded in agreement with defense counsel.

Prospective juror no. 58/I.C.: The prosecutor stated that he struck I.C., an African-American female, because I.C. did not respond to any questions during voir dire and the prosecution did not know anything about her.

Prospective juror no. 51/R.C.: The prosecutor stated that he struck R.C., an African-American female who ultimately served as an alternate juror, because R.C. was 77 years of age and he had concerns, based on her demeanor during voir dire and the length and complexity of the case, that she would be able to serve as a juror.

Prospective juror no. 5/T.M.A.: The prosecutor stated that he struck T.M.A., a Caucasian female, because of her age. He further stated that, although he could not provide a specific reason, his initial impression of T.M.A. was that she would not be a good juror for the State and because of "the age part."

Prospective juror no. 23/R.B.: The prosecutor stated that he struck R.B., a Caucasian female, because his initial impression of R.B. was that she would not be a strong juror for the State and she did not respond to any questions during voir dire.

Prospective juror no. 35/S.B.: The prosecutor stated that he struck S.B., a Caucasian female, because, although his initial impression was that she would be an "okay" juror for the State, S.B. did not respond to any questions during voir dire and appeared to be close to Floyd's age.

> Prospective juror no. 70/K.D.: The prosecutor stated that he struck K.D., a Caucasian female, because K.D. was approximately the same age as Floyd.

The prosecutor further stated that, based on his notes and rating system, he had determined that prospective jurors no. 8/M.W.A., no. 32/L.J.B., and no. 42/R.S.B, Caucasian females who ultimately served on the jury, would be good jurors for the State and that prospective jurors no. 18/K.P.B. and no. 62/M.D., Caucasian females, and prospective juror no. 30/J.B., an African-American female, each of whom was struck by the defense, would have also been good jurors for the State.

The prosecutor explained that, during the selection process, he noticed that the defense was using its peremptory strikes to remove veniremembers who were not similar in age to Floyd. He stated that, after he had removed veniremembers that he believed would not be good jurors for the State, he challenged veniremembers in the age group the defense was trying to seat on the jury, i.e, those similar in age to Floyd.

The prosecutor offered into evidence his strike list that provided the names and numbers of the veniremembers, upon

which he had made notations about each of the veniremembers; a list showing each veniremember's prior jury service and any criminal charges; and the strike list that contained information about the veniremembers, including race, sex, occupation, etc., and upon which members of law enforcement had made notations about various veniremembers and whether those veniremembers would be good jurors for the State.

To rebut the prosecutor's reasons and to show that the prosecutor engaged in actual, purposeful discrimination, Floyd argued that the reasons offered by the prosecutor for his strikes were pretextual and a sham because, he said, the Houston County district attorney's office had in the past engaged in discrimination during the jury-selection process. In support of his argument, Floyd named five cases in which convictions from the Houston Circuit Court had been reversed based on the State's having exercised its peremptory challenges in a discriminatory manner.[5] He further argued that, although the prosecutor claimed that a number of the removed veniremembers or their family members had criminal

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[5]Floyd did not argue that Maxwell had selected the juries for the State in any of the cases in which the defendant's conviction had been reversed.

convictions, many of those convictions were not in the record and/or were unavailable for verification by the defense; that the prosecutor failed to ask follow-up questions during voir dire of veniremembers who had been struck to associate the reason provided to this case; that the prosecutor's exercise of his peremptory strikes based on the race-neutral reason of age was disingenuous because the prosecutor used age as a reason to strike veniremembers ranging from age 28 years old to 77 years old; and that, although the prosecutor stated that he struck African-American veniremembers based on traffic tickets and opinions they had regarding the death penalty, the prosecutor did not strike two similarly situated Caucasian veniremembers.

In support of his argument, Floyd submitted a legal memorandum listing various cases in Houston County involving Batson objections, including five cases in which an appellate court had reversed convictions based on a Batson violation; a copy of defense counsel's strike list; and a strike list providing additional information about the various veniremembers, including date of birth, sex, race, occupation, etc.

After the hearing, the trial court entered a written order finding that the prosecutor had proffered race- and gender-neutral reasons for exercising his peremptory strikes.

On return to remand, the Court of Criminal Appeals upheld the trial court's finding that the State had provided race- and gender-neutral reasons for its use of its peremptory strikes, considered the other issues presented on direct appeal, and affirmed Floyd's conviction and sentence. Floyd v. State, [Ms. CR-05-0935, August 29, 2008] ___ So. 3d ___ (Ala. Crim. App. 2007) (opinion on return to remand).

On certiorari review, this Court held that on remand the trial court had failed to comply with the order of the Court of Criminal Appeals that it provide specific findings concerning the reasons proffered by the prosecutor for striking African-American and/or female veniremembers and that the Court of Criminal Appeals had erred in assuming the role of the trial court and finding that the State's reasons for striking prospective jurors no. 5/T.M.A. and no. 58/I.C. were nondiscriminatory. Ex parte Floyd, [Ms. 1080107, September 28, 2012] ___ So. 3d ___, ___ (Ala. 2012). This Court reversed the judgment of the Court of Criminal Appeals and

remanded the case for that court to remand the case with directions for the trial court

> "to make necessary findings of fact and conclusions of law on the following issues: whether the State's offered reasons for striking the African-American jurors it struck were race neutral; whether the State's offered reasons for striking the female jurors it struck were gender neutral; and 'whether the defendant has carried his burden of proving purposeful discrimination.'"

Ex parte Floyd, ___ So. 3d at ___.

Pursuant to this Court's order, the Court of Criminal Appeals remanded the case with instructions that the trial court make the necessary findings of fact and conclusions of law. Floyd v. State, [Ms. CR-05-0935, December 14, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012). The trial court on second remand entered an order, making specific findings of fact with regard to the State's proffered reasons for striking African-American and female veniremembers and finding that Floyd had not demonstrated that the prosecutor had engaged in actual, purposeful discrimination on the basis of race or gender during the jury-selection process. The trial court rejected Floyd's claims that the prosecutor had violated Batson and J.E.B. during the jury-selection process and found that the prosecutor had proffered race- and gender-neutral reasons for

his peremptory strikes and that Floyd had not satisfied his burden of proving that the prosecutor's reasons had been pretextual or sham or that the prosecutor had engaged in actual, purposeful discrimination during the jury-selection process.

On return to second remand, the Court of Criminal Appeals affirmed Floyd's conviction and sentence, holding that the trial court's judgment was not clearly erroneous because the record supported the trial court's conclusion that the prosecutor had presented facially race- and gender-neutral reasons for his strikes, that the prosecutor's reasons were not pretextual or sham, and that Floyd had not satisfied his burden of proving that the prosecutor engaged in actual, purposeful discrimination against African-American and female veniremembers during the jury-selection process. Floyd v. State, [Ms. CR-05-0935, November 8, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2012) (opinion on return to second remand).

This Court has now granted certiorari review to consider whether the Court of Criminal Appeals properly upheld the trial court's denial of Floyd's Batson and J.E.B. claims, the trial court's refusal to admit into evidence all of Floyd's

statements made to law-enforcement officers, and the trial court's denial of Floyd's motion for a new trial based on newly discovered evidence

Standard of Review

On certiorari review, this Court does not accord the legal conclusions of an intermediate appellate court a presumption of correctness. Therefore, this Court applies de novo the standard of review that was applicable in the intermediate appellate court. Ex parte Toyota Motor Corp., 684 So. 2d 132, 135 (Ala. 1996).

Discussion

Floyd contends that the judgment of the Court of Criminal Appeals upholding the trial court's finding that the State's reasons for striking I.C. and T.M.A. were race- and gender-neutral and that he did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination during the jury-selection process conflicts with Batson and J.E.B.

Floyd's contention that the trial court erred in not finding a Batson or J.E.B. violation focuses on the second and third step in a Batson/J.E.B. inquiry. In the second step of

the inquiry, the party against whom the prima facie case has been established, i.e., the nonmoving party, has the burden of proving that its reasons for its peremptory challenges were race or gender neutral. Ex parte Branch, 526 So. 2d 609, 623 (Ala. 1987). The nonmoving party must provide "a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." Ex parte Branch, 526 So. 2d at 623. The nonmoving party's reason, however, does not have to equal the reason for a strike for cause; rather, the nonmoving party's explanation must be facially valid. Ex parte Branch, 526 So. 2d at 623.

> "Within the context of Batson, a 'race-neutral' explanation 'means an explanation based on something other that the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reasons offered will be deemed race neutral.' Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.' Id. '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judge's province."' Hernandez, 500 U.S. at 365, 111 S. Ct at 1969."

Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994).

After the trial court determines that the nonmoving party has provided facially valid race- and gender-neutral reasons for its peremptory challenges, the burden then shifts to the moving party to prove that the nonmoving party has engaged in actual, purposeful discrimination. During this third step of the Batson/J.E.B. inquiry, the trial court evaluates the persuasiveness of the nonmoving party's reasons to determine whether the nonmoving party has engaged in purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995). The trial court's determination of the moving party's showing of intent to discriminate is "a pure issue of fact subject to review under a deferential standard." Hernandez v. New York, 500 U.S. 352, 364 (1991). As this Court explained in Ex parte Branch:

> "[T]he trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he knows them, his knowledge of trial techniques, and his observation of the manner in which the prosecutor examined the venire and the challenged jurors. People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 858, 197 Cal.Rptr. 71 (1983); see also [People v.] Wheeler, 22 Cal. 3d [258] at 281, 583 P.2d [748] at 764, 148 Cal. Rptr. [890] at 906 [(1978)].

> "In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias. Furthermore, the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge:
>
> > "'The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as "a bias relating to the particular case on trial or the parties or witnesses thereto." Wheeler, 22 Cal. 3d at 276, 148 Cal. Rptr. at 902, 583 P.2d at 760. ...'
>
> "Slappy [v. State], 503 So. 2d [350] at 354 [(Fla. Dist. Ct. App. 1987)]. The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, see Hall, 35 Cal. 3d at 168, 672 P.2d at 858-59, 197 Cal. Rptr. at 75; Slappy, 503 So. 2d at 356; the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination."

526 So. 2d at 624.

An appellate court may reverse the trial court's determination that the nonmoving party's peremptory challenges were not motivated by intentional discrimination, the third consideration in a Batson/J.E.B. inquiry, only if that determination is clearly erroneous. Ex parte Branch, 526 So. 2d at 625. Whether the nonmoving party engaged in actual, purposeful discrimination involves consideration of not only

the nonmoving party's credibility, but also the veniremember's demeanor, and such determinations rest on the trial court's firsthand observations. As the United States Supreme Court stated in Hernandez, when determinations rest upon credibility and demeanor, they rest "'peculiarly within a trial judge's province.'" Hernandez, 500 U.S. at 365 (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985)).

With regard to Floyd's claim that the prosecutor, the nonmoving party in this case, purposefully excluded African-Americans from his jury, Floyd focuses on the prosecutor's exercise of a peremptory challenge to remove prospective juror no. 58/I.C. from the venire. The prosecutor, when asked to provide reasons why he exercised a peremptory challenge to remove I.C. from the venire, stated that he removed I.C. because he did not know much about her in that she had been omitted from the State's strike lists and because she did not respond to questions. The trial court found these reasons to be race neutral, see Jackson v. State, 686 So. 2d 429, 431 (Ala. Crim. App. 1996)(holding that nonresponsiveness to questioning can be a race-neutral reason), and State v. Harris, 184 Ariz. 617, 620, 911 P.2d 623, 626 (Ariz. Ct. App.

1995)(finding the prosecutor's proffered reason that she lacked knowledge about the veniremember to be race neutral). The trial court further found that Floyd did not satisfy his burden of proving that the prosecutor's reasons were pretextual or sham and that he engaged in actual, purposeful discrimination in the jury-selection process.

Floyd maintains that the reasons offered by the prosecutor for his strikes of African-Americans and females do not adequately rebut the inference of actual, purposeful discrimination because, he says, those reasons are pretextual or sham. He argues that I.C.'s alleged lack of responsiveness to questions is pretextual or sham and is not supported by the record because during group voir dire I.C., as did a Caucasian veniremember, responded to questions as requested by the questioner by either raising or not raising her hand. See Ex parte Branch, 526 So. 2d at 625 (holding that disparate treatment of veniremembers with the same characteristics or who answer questions in the same manner suggests that the reason for striking one over the other is pretextual or sham). Similarly, he further argues that the prosecutor's lack of knowledge about I.C. is pretextual or sham because the

prosecutor did not engage in additional voir dire with I.C. to learn more about her. Ex parte Bird, 594 So. 2d 676, 683 (Ala. 1991)("[T]he failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination.").

This Court, in light of the deference to be accorded the trial court in its determination of whether Floyd satisfied his burden of proving that the prosecutor engaged in actual, purposeful discrimination, cannot conclude from the record that the trial court's holding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination is clearly erroneous. We cannot agree with Floyd that the prosecutor engaged in disparate treatment because he used a peremptory challenge to remove I.C. and did not use a peremptory challenge to remove prospective juror no. 21/A.B., a Caucasian male. The record indicates that the prosecutor, who relied heavily upon his impressions and knowledge of the veniremembers in the exercise of his peremptory challenges, knew little about I.C. because she was omitted from his strike lists. The record further

indicates that the prosecutor from his strike lists knew that A.B. had not served previously on a jury and that he did not have a criminal history. Under the facts of this case, these known facts about A.B. negate the evidence of any disparate treatment of I.C. and A.B.

Additionally, the prosecutor's admission of his lack of knowledge about I.C. when proffering reasons for the exercise of the peremptory challenge does not require the conclusion that the prosecutor engaged in actual, purposeful discrimination. This Court in State v. Bui, 627 So. 2d 855 (Ala. 1992), agreed with the United States Court of Appeals for the Fifth Circuit that the "'"[f]ailure by a prosecutor to explain every peremptory strike of black jurors is not necessarily fatal to the prosecutor's ability to rebut a prima facie case ...."'" State v. Bui, 627 So. 2d at 859 (quoting United States v. Forbes, 816 F. 2d 1006, 1011 n. 7 (5th Cir. 1987), quoting in turn Unites States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986)). Here, the prosecutor admitted that I.C. had been inadvertently omitted from his strike lists and that, consequently, he had little information about her. In light of the prosecutor's explanation of the process he used

in striking a jury, the prosecutor's candor that he knew nothing about I.C., his stated reluctance to seat a juror he did not believe was good for the State, and the deference accorded the trial court in making credibility determinations concerning the prosecutor, we cannot hold that the trial court's finding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination in the selection of the jury in this regard is clearly erroneous.

Floyd's contention that the prosecutor purposefully excluded females from the jury focuses on the prosecutor's exercise of a peremptory challenge to remove prospective juror no. 5/T.M.A. from the venire. According to Floyd, the trial court accepted at face value the prosecutor's proffered reason of her age for the removal of T.M.A. from the jury. He maintains that because the prosecutor did not connect T.M.A.'s age to the case, the reason is pretextual or sham and evidences actual, purposeful discrimination on the part of the prosecutor. See Ex parte Branch, 526 So. 2d at 624 (providing

that a guideline for determining whether a prosecutor's reason for an allegedly discriminatory strike was valid or sham includes "'an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically'" (quoting Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987))). See also Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997)(recognizing that "age, employment status, and marital status are not sufficiently race-neutral reasons for a peremptory strike, if the prosecutor gives that reason as the sole basis for the strike, where that reason is unrelated to the case").

The record, however, does not support Floyd's argument that the prosecutor engaged in disparate treatment because the record establishes that the prosecutor did relate the reason of age to the case. The record establishes that Floyd, a Caucasian, was 33 years old and that T.M.A. was 48 years old at the time of the trial. At the Batson/J.E.B. hearing, the prosecutor stated that he struck T.M.A. because he believed she was within the age range of the juror the defense was trying to seat. A review of the prosecutor's strikes indicates that, after he struck veniremembers he believed

would not be good jurors for the State, he exercised his peremptory challenges to remove veniremembers whose ages were in Floyd's age range in an effort to prevent the defense from seating the type juror it believed would be pro-defense. Thwarting the defense's objective in jury selection is a race-neutral reason, and we cannot conclude based on the record before us that the trial court's finding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination by striking T.M.A. is clearly erroneous.

This Court has reviewed the record in light of Floyd's contention that the State did not provide race- and/or gender-neutral reasons for striking prospective juror no. 59/M.C., prospective juror no. 19/D.B., prospective juror no. 60/L.C., prospective juror no. 23/R.B., prospective juror no. 35/S.B., and prospective juror no. 70/K.D. The record, however, supports the trial court's conclusion that the State proffered race- and/or gender-neutral reasons for its peremptory challenges of those jurors. See Whatley v. State 146 So. 3d 437, 456 (Ala. Crim. App. 2010) (noting that, "'"[a]lthough a juror's reservations about the death penalty need not be

sufficient for a challenge for cause, his view may constitute a reasonable explanation for the exercise of a peremptory strike."'" (quoting Dallas v. State, 711 So. 2d 1101, 1104 (Ala. Crim. App. 1997), quoting in turn Johnson v. State, 620 So. 2d 679, 696 (Ala. Crim. App. 1992)), and finding a juror's demeanor to be a race-neutral reason); Smith v. State, 838 So. 2d 413 (Ala. Crim. App. 2002) (finding a juror's religious/moral conviction against sitting in judgment to be a race-neutral reason); Jackson, supra (finding a juror's nonresponsiveness to be a race-neutral reason); and Sanders v. State, 623 So. 2d 428, 432 (Ala. Crim. App. 1993)(recognizing that age can provide a race-neutral reason). Additionally, in light of the deference accorded to the trial court in determining whether a prosecutor's reasons are pretextual or sham, we cannot hold that Floyd satisfied his burden of proving that the prosecutor engaged in actual, purposeful discrimination.

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will 'largely turn on evaluation of credibility.' 476 U.S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be

> believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' Wainwright v. Witt, 469 U.S. 412, 428 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038 (1984)."

Hernandez v. New York, 500 U.S. at 364.

Nothing before this Court establishes that the trial court's finding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination in the selection of the jury is clearly erroneous. "'[A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Because this Court does not have a firm conviction from the record before us that the prosecutor committed a Batson or J.E.B. violation during the selection of Floyd's jury, Floyd has not established that the decision of the Court of Criminal Appeals affirming the trial court's finding that no Batson or J.E.B.

violation occurred in the selection of his jury conflicts with prior caselaw.

Next, Floyd contends that the decision of the Court of Criminal Appeals upholding the trial court's refusal to admit into evidence all of Floyd's statements to law-enforcement officers conflicts with Rule 801(c), Ala. R. Evid. Specifically, Floyd argues that the trial court exceeded the scope of its discretion by refusing to admit into evidence all the statements he made to law-enforcement officers because, he says, those statements were admissible nonhearsay statements and their preclusion from evidence inhibited the jury's ability to evaluate the credibility and reliability of his September 27, 2004, statement, which was admitted into evidence, and prevented him from presenting a complete defense.

On September 27, 2004, Floyd admitted to law-enforcement officers that he shot Waylon Crawford. The trial court admitted Floyd's confession into evidence. During the 12-year investigation of the offense, Floyd made several other statements to law-enforcement officers. In those statements, Floyd either denied participation in the offense or provided

Floyd contends that the trial court erred in refusing to admit into evidence all of his statements to law-enforcement officers because, he says, the statements are not hearsay. He maintains that he did not offer the statements to prove the truth of the contents of the statements; rather, he says, he offered the statements for the sole purpose of proving that he made other statements and that those other statements are inconsistent with his September 27, 2004, confession. However, to achieve Floyd's objective for admitting the other statements into evidence -- proving that his September 27, 2004, confession was unreliable in light of the inconsistency of that statement with other statements he had made to law-enforcement officers -- Floyd offered the other statements to prove "the truth of the matter asserted" in each statement, i.e., that he did not commit the offense. Thus, Floyd's statements, other than his confession, which was submitted into evidence by the State, made to law-enforcement officers were hearsay, and the trial court did not exceed the scope of its discretion by refusing to admit them into evidence. The judgment of the Court of Criminal Appeals upholding the trial court's refusal to admit all statements Floyd made to law-

enforcement officers into evidence does not conflict with Rule 801(c), Ala. R. Evid.[6]

Lastly, Floyd contends that the decision of the Court of Criminal Appeals that the trial court did not err in denying his motion for a new trial based on newly discovered evidence conflicts with Ex parte Heaton, 542 So. 2d 931 (Ala. 1989). Specifically, Floyd contends that the trial court exceeded the scope of its discretion in denying his motion for a new trial because, he says, the evidence satisfied all the requirements for a new trial.

At trial Floyd maintained that Paul Wayne Johnson, not he, had committed the offense and that Johnson, by threatening to harm Floyd and his family, had pressured him into confessing that he committed the offense. After Floyd had been convicted and sentenced, Dorothy Dyson, a friend of Floyd's family, came forward stating that on the night Crawford was murdered she saw Johnson and that his shirt was

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[6]Because Floyd's statements made to law-enforcement officers, other than his confession, were inadmissible hearsay; do not fall within an exception to the hearsay rule, see Rules 803 and 804, Ala. R. Evid.; and were not by definition not hearsay, see Rule 801(d), Ala. R. Evid., we pretermit discussion of the other grounds of conflict Floyd raises in this regard.

covered with blood. In light of this newly discovered evidence, Floyd moved for a new trial, arguing that the evidence supported the defense's theory that Johnson, not he, committed the offense. The trial court, after conducting a hearing at which Dyson testified, entered an order questioning Dyson's credibility and denying Floyd's motion for a new trial.

> "'"The appellate courts look with disfavor on motions for new trials based on newly discovered evidence and the decision of the trial court will not be disturbed absent abuse of discretion." Further, "this court will indulge every presumption in favor of the correctness" of the trial judge's decision. The trial court is in the best position to determine the credibility of the new evidence.'
>
> "Isom v. State, 497 So. 2d 208, 212 (Ala. Crim. App. 1986) (citations omitted). To establish a right to a new trial based on newly discovered evidence, the petitioner must show the following: (1) that the evidence will probably change the result if a new trial is granted; (2) that the evidence has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. ... While all five requirements ordinarily must be met, the law has recognized that in certain exceptional circumstances, even if the newly discovered evidence is cumulative or impeaching, if it appears probable from looking at the entire case that the new

> evidence would change the result, then a new trial should be granted."

Ex parte Heaton, 542 So. 2d at 933 (emphasis added; some citations omitted).

> "The granting of a new trial on the basis of newly discovered evidence 'rests in the sound discretion of the trial court and depends largely on the credibility of the new evidence.' Robinson v. State, 398 So. 2d 144 (Ala. Crim. App.)[,] cert. denied, 389 So. 2d 151 (Ala. 1980). The trial court is the factfinder in a hearing on a motion for new trial. One condition of the trial court's granting a new trial based on newly discovered evidence is that the court must believe the evidence presented at the hearing. Seibert v. State, 343 So. 2d 788 (Ala. 1977)."

McDonald v. State, 451 So. 2d 440, 442 (Ala. Crim. App. 1984)(emphasis added).

Applying the guidelines for granting a new trial in light of newly discovered evidence set forth in Ex parte Heaton and McDonald to the facts of this case, we conclude that the trial court did not exceed the scope of its discretion in denying Floyd's motion for a new trial. At the end of Dyson's testimony, the trial court questioned Dyson to address its concerns about the credibility of her testimony. The record indicates that the trial court's concerns were not abated by Dyson's responses. Because "a condition to the granting of a

new trial on the basis of newly discovered evidence is that the trial court must believe the evidence presented," McMillian v. State, 594 So. 2d 1253, 1264 (Ala. Crim. App. 1991), and the record indicates that Dyson's testimony did not satisfy this criteria, this Court cannot conclude that the trial court exceeded the scope of its discretion by denying Floyd's motion for a new trial based on newly discovered evidence. Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979) ("A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." (citing Premium Serv. Corp. v. Sperry & Hutchinson, Co., 511 F.2d 225 (9th Cir. 1975)).

The decision of the Court of Criminal Appeals affirming the trial court's denial of Floyd's motion for a new trial does not conflict with Ex parte Heaton and the applicable caselaw.

Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Moore, C.J., and Bolin, Parker, Main, and Bryan, JJ., concur.

Murdock, J., dissents.

Shaw and Wise, JJ., recuse themselves.*

*Justice Shaw and Justice Wise were members of the Court of Criminal Appeals when that court considered this case.

MURDOCK, Justice (dissenting).

Christopher Anthony Floyd argues, among other things, that the trial court erred in not admitting statements he made to police that were inconsistent with his out-of-court confession to police. He contends that the excluded statements tend to prove that his confession was not credible and that their exclusion prevented him from presenting a complete defense. The main opinion rejects this contention with the reasoning that the proffered statements were inadmissable hearsay because "to achieve Floyd's objective for admitting the other statements into evidence -- proving that his September 27, 2004, confession was unreliable in light of the inconsistency of that statement with other statements he had made to law-enforcement officers -- Floyd [necessarily sought to introduce] the other statements to prove 'the truth of the matter asserted' in [those statements]." ____ So. 3d at ___.

Given the unique circumstances of this case and the content of many of those other statements, I am not persuaded that the stated rationale for upholding their exclusion -- that "Floyd [necessarily sought] ... to prove the 'truth of

the matter asserted'" in them -- is correct. Even if the trial court erred in excluding the subject statements on the ground now urged by Floyd, however, this ground was not raised below, and I cannot conclude that the exclusion of the statements represents plain error.

That said, after reviewing the record in this case as it now stands following a second remand, I have substantial concerns regarding the so-called Batson/J.E.B. challenges to prospective jurors no. 5/T.M.A. and no. 58/I.C., and I therefore respectfully must dissent.[7]

[7]For the reason expressed in my special writing in Ex parte Floyd, [Ms. 1080107, September 28, 2012] ___ So. 3d ___, ___ (Ala. 2012) (Murdock, J., concurring in the result), I continue to be concerned about the appropriateness of allowing Batson challenges to be made in capital cases for the first time on appeal. As I noted in Ex parte Floyd, however, the State has not objected to this procedure in the present case, and, as a result, I and the other members of this Court have been placed in the position of assessing the Batson issues as best we can under the circumstances.

APPENDIX C

2012 WL 6554696
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Christopher Anthony FLOYD
v.
STATE of Alabama.

CR–05–0935. | Dec. 14, 2012. | Opinion on Return to Second Remand Nov. 8, 2013.

Synopsis

Background: Defendant was convicted in the Houston Circuit Court, No. CC–04–1670, Larry K. Anderson, J., of capital murder and sentenced to death. Defendant appealed. The Court of Criminal Appeals remanded the case with directions for the trial court to conduct a Batson hearing. On return to remand, the Court of Criminal Appeals, 2007 WL 2811968, —— S.W.3d ——, affirmed.Defendant sought certiorari review. The Supreme Court, 2012 WL 4465562, —— S.W.3d ——, reversed and remanded to the Court of Criminal Appeals, which in turn remanded the matter to the trial court.

Holdings: On second return to remand, the Court of Criminal Appeals, Burke, J., held that:

[1] state's reasons for exercising peremptory challenges against prospective African–American jurors and female jurors were race-neutral, and

[2] state's strikes of two African–American jurors based on their criminal activity were not pretextual.

Affirmed.

Kellum, J., concurred in the result.

Attorneys and Law Firms

Eric Clark Davis, Dothan; and Randall S. Susskind and Carla Camille Crowder, Montgomery, for appellant.

Troy King and Luther Strange, attys. gen., and Kevin W. Blackburn, asst. atty. gen., for appellee.

BURKE, Judge.

*1 On September 28, 2012, the Alabama Supreme Court issued an opinion reversing this Court's judgment and directing it to remand this case to the Circuit Court of Houston County with specific instructions. *Ex parte Floyd,* [Ms. 1080107, September 28, 2012] —— So.3d —— (Ala.2012). Pursuant to that opinion, on remand, the circuit court is ordered to make all necessary findings of fact and conclusions of law concerning: "whether the State's offered reasons for striking the African–American jurors it struck were race neutral; whether the State's offered reasons for striking the female jurors it struck were gender neutral; and 'whether the defendant has carried his burden of proving purposeful discrimination.' *Hernandez*[*v. New York,* 500 U.S. 352,] 359 [(1991)]; see also the Court of Criminal Appeals' opinion on original submission." —— So.3d at ——. (Footnote omitted).

The circuit court shall file its return to this Court within 56 days of the date of this opinion.

REMANDED WITH INSTRUCTIONS.

WINDOM, P.J., and WELCH, KELLUM, and JOINER, JJ., concur.

On Return to Second Remand

BURKE, Judge.

Christopher Anthony Floyd was convicted of capital murder for intentionally murdering Waylon Crawford during the course of a robbery. *See* § 13A–5–40(a)(4), Ala.Code 1975. Following the jury's advisory recommendation of death, the trial court sentenced Floyd to death. On September 28, 2007, this Court remanded this case to the trial court to hold a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), during which the prosecutor was to come forward with race-neutral and gender-neutral reasons for his strikes. If the prosecutor was unable to do so, Floyd was to be entitled to a new trial. On September 29, 2008, following the trial court's return to remand, this Court affirmed Floyd's capital-murder conviction and sentence to death. Thereafter, on September 28, 2012, the Alabama Supreme Court reversed this Court's decision and remanded the case with directions to this Court based on the trial court's failure to enter specific findings as to the reasons offered by the State for its strikes of African–American and female potential jurors. This case was then remanded to the circuit court for a second time pursuant to the Alabama Supreme Court's decision with directions to make all necessary findings of fact and conclusions of law concerning: "[W]hether the State's offered reasons for striking the African–American jurors it struck were race neutral; whether the State's offered reasons for striking the female jurors it struck were gender neutral; and 'whether the defendant has carried his burden of proving purposeful discrimination.' *Hernandez*[*v. New York*, 500 U.S. 352,] 359 [(1991)]; see also the Court of Criminal Appeals' opinion on original submission." —— So.3d at —— (footnote omitted).

The trial court has filed a second return to remand, including Floyd's proposed order arguing that he had met his burden of proving purposeful discrimination by the prosecutor and that the State had failed to provide race-neutral and gender-neutral reasons for its strikes.

*2 The trial court entered an order, finding that the first of the three-step analysis for determining whether the State used its strikes in a discriminatory manner had been determined by this Court on direct appeal. *Batson v. Kentucky*, 476 U.S. at 97, 98, 106 S.Ct. 1712 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.... The trial court then will have the duty to determine if the defendant has established purposeful discrimination."). *See also McCray v. State*, 88 So.3d 1, 17 (Ala.Crim.App.2010) ("In evaluating a *Batson*, or *J.E.B.*, claim, a three-step process must be followed. As the United States Supreme Court explained in *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003): 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [*Batson v. Kentucky*,] 476 U.S. [79,] 96–97[, 106 S.Ct. 1712, 1723 (1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97–98. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Id.*, at 98.' 537 U.S. at 328–29, 123 S.Ct. 1029."). On direct appeal of this case, this Court determined that a prima facie case of racial and gender discrimination had been established. *Floyd v. State*, [Ms. CR–05–0935, September 28, 2007] —— So.3d —— (Ala.Crim.App.2007 [1]). Thus, as found by the trial court, the first step of a showing of discrimination in striking the jury was met.

In its order on return to second remand, the trial court stated that Floyd is white and the jury was all white except for the alternate juror, who was African–American. The court had directed the State to provide reasons for its 10 strikes of the 11 African–American potential jurors. The court outlined the State's reasons as having been as follows:

"Juror number 28: [P.B.], black female, was struck because she had 32 bad check cases and her probation had been revoked. This was the State's first strike.

"Juror number 43: [J.B.], black male, had been convicted of harassment twice and had 12 traffic tickets. He was the State's second strike.

"Juror number 59: [M.C.], black female, was opposed to the death penalty but reluctantly indicated that she could follow the law though. She was the third strike. The state indicated she vacillated on the death penalty.

"Juror number 38: [K.B.], black male, was convicted of disorderly conduct and knew a potential witness. A juror list reviewed by a law enforcement officer indicated this individual would be a bad juror. This was the State's fourth strike.

***3** "Juror number 46; [T.C.], black female, had 6 convictions and was the state's sixth strike. During voir dire she questioned the veracity of law enforcement testimony. She knew prosecutors who prosecuted her and her brother.

"Juror number 57: [A.C.], black female, had been convicted of theft of property and NWNI [negotiating worthless negotiable instruments]. She was the seventh strike.

"Juror number 60; [L.C.], black female, knew the attorneys and a witness and was the eighth strike. She was also struck because her religious beliefs impacted her ability to sit in judgment of the accused.

"Juror number 19: [D.B.], black female, had not been paying attention. She was the State's eleventh strike. She failed to make eye contact with the prosecution but was 'nodding in agreement with the defense.'

"Juror number 58; [I.C.], black female, the State could not remember much about her. She was the State's sixteenth strike. The State indicated she was struck because she did not respond to any questions and she did not appear on the State's list.

"Juror number 51: [R.C.], black female, was struck because of her age. She was born in 1928. Actually, she sat on the jury as an alternate."

(R 3.[2] 31–32.) The trial court also found that Floyd had struck J.B., a black male.

As to the female potential jurors, under the *J.E.B.* claim, the court found that the jury was composed of six males and six females. The court further stated that the State presented the following reasons for its strikes:

> "[J]uror number 23: [R.B.] because the prosecutor determined that she was a weak juror and failed to respond to any questions. Juror number 70: [K.D.] was stuck because of age as being close in age to the defendant. Juror number 35: [S.B.] did not respond to any one and was close in age to the defendant. The State struck juror number 5: [T.A.M.] because of age."

(R 3. 32.)

The trial court then determined in its order that the State had presented race- and gender-neutral reasons for its strikes. The court noted that the reasons given by the State concerning the racial-bias challenge had previously been held to be race neutral, "such as: opposition to the death penalty; age; nonresponsiveness to questioning; religious beliefs; prosecutions or conviction of prospective juror or family member; acquaintance with attorneys involved in the case; bias; lack of mental acuity; inattentiveness to questioning; and demeanor." (R 3. 33). As part of this third stage of the analysis, the court noted that the burden again was on Floyd to offer evidence that the reasons given by the State had been pretextual or shams and that the prosecutor had intentionally discriminated. The court also noted that this is a factual determination. As to Floyd's arguments to rebut the reasons given by

the prosecutor, the trial court found that Floyd contended that the prosecutor had failed to meaningfully question the jurors who were struck concerning the stated reasons for the strikes. Floyd also argued that the prosecutor had historically discriminated in his striking of the jury and cited five cases in which convictions were reversed by this Court on the basis of that prosecutor's discriminatory strikes. Floyd also argued that, although the prosecutor had stated that certain jurors were struck based on their or their family's criminal backgrounds, the defense had no means to check this information. Moreover, Floyd argued, some of the jurors were allegedly struck by the prosecutor based on age, but the record showed that their ages varied from 28 to 77 years old. Finally, Floyd alleged that two white jurors, who were similarly situated to black jurors whop were struck based on traffic tickets and opinions as to the death penalty, were allowed to remain on the jury. As to these two white jurors, the court found no indication of discrimination and distinguished the two white jurors as follows:

> "[J]uror number 54, K.C., a white male, also had a traffic ticket. This Court was aware of Mr. C.'s law and order philosophy—as was the State. The State strike list indicated he would be a good juror. Floyd also questioned the reason the State struck a black female because she vacillated on the death penalty, and yet, failed to strike C.D., juror number 74, a white female who expressed, similar reservations. The State strike list had a 'no' beside her name. In fact, Chief Assistant District Attorney Gary Maxwell, who struck the jury, stated that he intended to strike C.D. but was directed by District Attorney Doug Valeska to keep her on the jury. Again, the Court was familiar with Ms. D. who comes from an old Dothan family with extensive ties to the community. Mr. Valeska knew the family. These were valid reasons expressed by the State for keeping these two individuals on the jury. Floyd argued that these two white jurors were similarly situated as to black jurors struck by the State. The Court does not find that to be the case."

***4** (R 3. 35–36.)

The court in its order stated that it had improperly focused on Floyd's "invited error" because he had indicated that he was satisfied with the jury, rather than having addressed the third step of a *Batson* inquiry. (R 3. 36.) According to the trial court, it had a "long-standing practice of ordering the State to give its reasons for strikes of African–Americans *whenever* a *Batson* motion is made *even if a prima facie case is not made by the defense.*" (R 3.36.) (Emphasis in original.) Thus, the court stated that the State was put on standing notice that it would have to provide reasons regardless of a prima facie showing by the defendant, and the court stated that it had considered this when evaluating the state's reasons and weighing them against Floyd's objections.

The trial court ultimately considered the above-stated reasons from the State and arguments from Floyd concerning those reasons and concluded:

> "This Court already has held an evidentiary hearing in this case. Having again considered the evidence presented at the hearing, the Court determines that the reasons offered by the prosecution for its use of peremptory strikes against African–Americans were race-neutral and its reasons for striking women were gender-neutral. Therefore, it is this Court's determination that Floyd has failed to prove that the prosecution purposely discriminated against African–Americans and women during jury selection. Further, the Court finds that the evidence taken at the *Batson* hearing does not suggest that the prosecution's facially race and gender-neutral reasons for striking African–American and female jurors were a mere sham or pretext. Floyd has failed to carry his burden of proving purposeful discrimination on the basis of race or gender. The Court hereby denies Floyd's *Batson* and *J.E.B.* claims."

(R 3. 36–37.) The trial court thereby found no purposeful discrimination by the State on the basis of race or gender in striking the jury.

***5** As the court noted in its order, this Court has previously determined, on direct appeal of this case, that a prima facie case of discrimination was made as to race and, out of an abundance of caution, as to gender. Thus, a presumption of discrimination then existed as to the use of the peremptory challenges. *Batson,* 476 U.S. at 97, 106 S.Ct. 1712.

[1] [2] [3] The State then provided reasons for its strikes of African–Americans and females; those reasons had to be clear and to relate to the case, but they did not need to rise to the level of a challenge for cause. *Ex parte Branch*, 526 So.2d 609, 623 (Ala.1987).

> " ' " 'Within the context of *Batson*, a "race-neutral" explanation "means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). "In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." *Id.* "[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within the trial judges's province.' " *Hernandez*, 500 U.S. at 365, 111 S.Ct. at 1869.'
>
> " ' "*Allen v. State*, 659 So.2d 135, 147 (Ala.Crim.App.1994)."
>
> " '*Martin v. State*, 62 So.3d 1050, 1058–59 (Ala.Crim.App.2010).' "

Riley v. State, [Ms. CR–10–0988, August 30, 2013] — So.3d ——, —— (Ala.Crim.App.2013), quoting *Thompson v. State*, [Ms. CR–05–0073, February, 17, 2012] — So.3d ——, —— (Ala.Crim.App.2012).

[4] [5] [6] [7] [8] [9] [10] [11] [12] [13] Here, the State presented clear reasons that were facially race- and gender-neutral. The reason that potential jurors were struck because of criminal activity is race-neutral. *See, Sharp v. State*, [Ms. CR–05–2371, June 14, 2013] — So.3d ——, —— (Ala.Crim.App.2012) (opinion on remand from the Supreme Court on application for rehearing on return to second remand) ("As to Juror no. 11, the State asserted that, 'through its records,' it had noted that Juror no. 11 had also been convicted in Madison County of negotiating a worthless check, a crime of moral turpitude. This is a valid race-neutral reason." (Footnote omitted.)) *See also Wilson v. State*, 142 So.3d 732, 756 (Ala.Crim.App.2012); *Welch v. State*, 63 So.3d 1275, 1283 (Ala.Crim.App.2010); *Thomas v. State*, 611 So.2d 416, 418 (Ala.Crim.App.1992). The reason that an African–American juror knew a witness was also race-neutral. *Temmis v. State*, 665 So.2d 953 (Ala.Crim.App.1994) (noting that the fact that a prospective juror knows a witness is a valid race-neutral reason for removing the juror). The reason given for the strike of an African–American potential juror—because she knew the prosecutors who had prosecuted her brother—has also been held to be race-neutral. *Jackson v. State*, [Ms. CR–07–1208, March 29, 2013] — So.3d ——, —— (Ala.Crim.App.2013) ("As to Juror 284 who was struck by the prosecutor, the court affirmed that she 'has a brother who has been prosecuted in this very court and sent to prison by the undersigned. Her brother was prosecuted by this District Attorney's office.' (Record on Return to Remand, 6.) Th[is] reason[ ] [is] race neutral."). Further, the prosecutor's reason for striking an African–American potential juror, that she vacillated on being able to impose the death penalty, has been held to be race-neutral. *Mashburn v. State*, 7 So.3d 453, 461 (Ala.Crim.App.2007) ("The prosecutor stated that he struck the challenged veniremembers based on their ambiguous answers to questions regarding the imposition of the death penalty or based on their opposition to the death penalty. ' "Although a juror's reservations about the death penalty may not be sufficient for a challenge for cause, his view may constitute a reasonable explanation for the exercise of a peremptory strike." *Johnson v. State*, 620 So.2d 679, 696 (Ala.Cr.App.1992), reversed on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993).' *Dallas v. State*, 711 So.2d 1101, 1104 (Ala.Crim.App.1997), aff'd, 711 So.2d 1114 (Ala.1998)."). The prosecutor's reason for striking an African–American juror—because her religious beliefs prevented her from sitting in judgment—was also race-neutral. *Smith v. State*, 838 So.2d 413 (Ala.Crim.App.2002).

Moreover, the prosecutor gave as reasons the older age of a potential juror and the fact that law enforcement or the prosecutor did not believe that the potential juror would be a good juror. [3] The prosecutor also referred to another African–American juror's older age [4] and to the ages of two female jurors who were similar in age to Floyd. These reasons have been held to be facially nondiscriminatory. "Age, place of employment and demeanor of the potential juror have been held to be sufficiently race-neutral reasons for exercising a peremptory challenge." *Sanders v. State*, 623 So.2d 428, 432 (Ala.Crim.App.1993). *See Floyd v. State*, [Ms. CR–05–0935, September 28, 2007] — So.2d ——, —— (Ala.Crim.App.2007) (finding no improper reason for

strike when "prosecutor stated that he struck juror no. 5 because of her age and because his initial impression of her was that she would not make a favorable juror for the State").

*6 " 'Indeed, this sort of situation is precisely why *Batson* jurisprudence requires reviewing courts to give "great deference" to a trial judge's determination of no racial motivation in a peremptory strike. See, e.g., *United States v. Bernal–Benitez*, 594 F.3d 1303, 1312 n. 5 (11th Cir.2010) (recognizing importance of deference because "[t]he judge presiding over jury selection is in a better position than we are to consider the relevant evidence-including the interactions between counsel and the venire during voir dire, counsels' questions and comments, and the venire persons' demeanors"); [*United States v.*] *Cordoba–Mosquera*, 212 F.3d [1194] at 1198 [(11th Cir.2000)] ("Deference is particularly warranted here, where the proffered race-neutral explanation centered on ... behaviors that are especially given to on-the-spot interpretation.")....' "

Jackson v. State, [Ms. CR–07–1208, March 29, 2013] — So.3d ——, —— (Ala.Crim.App.2010) (opinion on return to remand), quoting *Lee v. Thomas*, (No. 10–0587–WS–M, May 30, 2012) note 24 (11th Cir.2012) (not reported in F.Supp.2d).

[14] Finally, the prosecutor stated that nonresponsiveness to his questioning was a reason that he struck two females and one African–American. This reason has also been held to be facially nondiscriminatory. *Jackson v. State*, 686 So.2d 429, 431 (Ala.Crim.App.1996) (stating that, despite claims of gender and racial discrimination in striking the jury, "[t]he reason for the prosecutor's striking of Juror No. 209, Juror No. 57 and Juror No. 75, a black male and two white females, i.e., they were nonresponsive to questions by the prosecutor, has been held to be a race-neutral reason. See *Macon v. State*, [659 So.2d 221 (Ala.Crim.App.1994)]; *Johnson v. State*, 648 So.2d 629 (Ala.Cr.App.1994).").

" 'A valid race-neutral reason for striking a juror is because he is inattentive, hostile, or impatient, or is evasive and ambiguous when answering questions. *Mitchell v. State*, 579 So.2d 45 (Ala.Cr.App.1991), cert. denied, 596 So.2d 954 (Ala.1992).... See *Stephens v. State*, 580 So.2d 11 (Ala.Cr.App.), affirmed, 580 So.2d 26 (Ala.), cert. denied, 502 U.S. 859, 112 S.Ct. 176, 116 L.Ed.2d 138, rehearing denied, 502 U.S. 1000, 112 S.Ct. 625, 116 L.Ed.2d 647 (199[1]) (holding that strike based on juror's demeanor was valid race-neutral reason and did not violate *Batson*).'

*7 "*Brown v. State*, 623 So.2d [416,] 419 [(Ala.Crim.App.1992)].. *See also Nesbitt v. State*, 531 So.2d 37, 40 (Ala.Crim.App.1987) (holding that the fact that a juror 'appeared to be inattentive' was neutral reason)."

Riley v. State, supra at ——.

[15] [16] [17] [18] Thus, the prosecutor presented reasons for his strikes that were facially race- and gender-neutral.

" ' "Once the prosecutor has articulated a race-neutral reason for the strike, the moving party can then offer evidence showing that those reasons are merely a sham or pretext." *Ex parte Branch*, 526 So.2d 609, 624 (Ala.1987). "A determination regarding a moving party's showing of intent to discriminate under *Batson* is ' "a pure issue of fact subject to review under a deferential standard." ' *Armstrong v. State*, 710 So.2d 531, 534 (Ala.Crim.App.1997), quoting *Hernandez v. New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)." *Williams v. State*, 55 So.3d 366, 371 (Ala.Crim.App.2010). "The trial court is in a better position than the appellate court to distinguish bona fide reasons from sham excuses." *Heard v. State*, 584 So.2d 556, 561 (Ala.Crim.App.1991).' "

Riley v. State, — So.3d at ——, quoting *Thompson v. State*, — So.3d at ——.

"[T]he trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he knows them, his knowledge of trial techniques, and his observation of the manner in which the prosecutor examined the venire and the challenged jurors. *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854, 858, 197 Cal.Rptr. 71 (1983); see also [*People v.*] *Wheeler*, 22 Cal.3d [258] at 281, 583 P.2d [748] at 764, 148 Cal.Rptr. [890] at 906 [(1978)].

"In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias. Furthermore, the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge:

" 'The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as "a bias relating to the particular case on trial or the parties or witnesses thereto." *Wheeler,* 22 Cal.3d at 276, 148 Cal.Rptr., at 902, 583 P.2d at 760. Further, a review of the record demonstrated that the prosecutor had not, in fact, satisfied his burden of showing that he excluded the Spanish surnamed jurors on the grounds of specific bias.'

*8 "*Slappy*[*v. State*], 503 So.2d [350] at 354 [(Fla.Dist.Ct.App.1987)]. The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, see *Hall,* 35 Cal.3d at 168, 672 P.2d at 858–59, 197 Cal.Rptr. at 75; *Slappy,* 503 So.2d at 356; the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination."

Ex parte Branch, 526 So.2d 609, 624 (Ala.1987).

[19] In its order, the trial court considered arguments by Floyd that the State's reasons were pretextual. Floyd argued that two African–American jurors were struck for reasons that were shared by white jurors who were not struck by the prosecutor. The first concerned the prosecutor's strikes of African–American jurors based on their criminal activity. Floyd argued disparate treatment in comparison to white jurors and referred to a white juror who was not struck, although, like an African–American juror, the juror had been issued traffic tickets. However, this argument is misplaced, as the trial court found. The African–American juror was not struck for that sole reason but also because of other criminal activity. " '[W]hen more than one reason was given for striking some veniremembers, we need only find one race neutral reason among those asserted to find that the strike was race-neutral; we need not address any accompanying reasons that might be suspect. See *Powell v. State,* 608 So.2d 411 (Ala.Cr.App.1992); *Davis v. State,* 555 So.2d 309 (Ala.Cr.App.1989).' " *Zumbado v. State,* 615 So.2d 1223, 1231 (Ala.Crim.App.1993). Moreover, the trial court stated that both the prosecutor and the trial court knew this juror to be a strong advocate of law and order. *Giles v. State,* 815 So.2d 585, 589 (Ala.Crim.App.2000) ("a prosecutor's personal knowledge about a veniremember can provide a race neutral reason for a strike.").

[20] [21] Floyd also argued that the prosecutor's reason for striking an African–American juror for vacillating as to her ability to impose the death penalty was also shared by a white juror who was not struck by the prosecutor. However, the trial court found that the State's reason was in fact race-neutral because the State's strike list revealed a "no" written by the white juror; however, she was not struck because the district attorney was familiar with the juror's family and stated that she should not be struck. *Compare Giles v. State,* 815 So.2d 585, 589 (Ala.Crim.App.2000) ("[A] prosecutor's personal knowledge about a veniremember can provide a race neutral reason for a strike. See *Weaver v. State,* 678 So.2d 260 (Ala.Crim.App.1995), rev'd on other grounds, 678 So.2d 284 (Ala.1996) (prosecutor's 'personal knowledge' that potential juror's brother had been prosecuted by district attorney's office was race-neutral reason for a strike); *McLeod v. State,* 581 So.2d 1144, 1154–55 (Ala.Crim.App.1990) (on the basis of personal knowledge, prosecutor refuted veniremember's assertion that he had previously served on a jury that had returned a guilty verdict in a cocaine case and reason for strike was race-neutral.).").

" ' " 'When the defendant challenges as pretextual the prosecutor's explanations as to a particular venireperson, the inquiry becomes factual in nature and moves to step three. At this step the trial court must resolve the factual dispute, and whether the prosecutor intended to discriminate is a question of fact. *Hernandez v. New York,* 500 U.S. 352, 364–65, 111 S.Ct. 1859, 1868–69, 114 L.Ed.2d 395 (1991). In the third step, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. At this stage, the trial court must consider the persuasiveness of the explanations, and it is also at this stage that "implausible or fantastic justifications may (and probably will) be found to be pretext for purposeful discrimination." *Purkett* [*v. Elem*], 514 U.S. [765] at 768, 115 S.Ct. [1769] at 1771 [131 L.Ed.2d 834 (1995)].' " ' "

*9 *Smith v. State,* 838 So.2d 413, 434–35 (Ala.Crim.App.2002), quoting *Fletcher v. State,* 703 So.2d at 435–36, quoting in turn *Bush v. State,* 695 So.2d 70, 96 (Ala.Crim.App.1995).

Here, the trial court evaluated the State's facially race- and gender-neutral reasons in light of Floyd's arguments that those reasons were pretextual and that the State intended to discriminate against those jurors. The trial court found that the prosecutor's reasons were not discriminatory, despite Floyd's claims to the contrary. Thus, Floyd did not meet his burden of proving discrimination by the State.

> " 'On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. See *Hernandez v. New York,* 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395, (1991) (plurality opinion); *id.,* at 372, 111 S.Ct. 1859, (O'Connor, J., joined by Scalia, J., concurring in judgment). The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, see 476 U.S. at 98, n. 21, 106 S.Ct. 1712 and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez,* 500 U.S. at 365, 111 S.Ct. 1859 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie " 'peculiarly within a trial judge's province,' " *ibid.* (quoting *Wainwright v. Witt,* 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." 500 U.S. at 366, 111 S.Ct. 1859.' "

Sharp v. State, — So.3d at ——, quoting *Snyder v. Louisiana,* 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008).

> ***10** " ' " 'When reviewing a trial court's ruling on a Batson motion, this court gives deference to the trial court and will reverse a trial court's decision only if the ruling is clearly erroneous.' *Yancey v. State,* 813 So.2d 1, 3 (Ala.Crim.App.2001). 'A trial court is in a far better position than a reviewing court to rule on issues of credibility.' *Woods v. State,* 789 So.2d 896, 915 (Ala.Crim.App.1999). 'Great confidence is placed in our trial judges in the selection of juries. Because they deal on a daily basis with the attorneys in their respective counties, they are better able to determine whether discriminatory patterns exist in the selection of juries.' *Parker v. State,* 571 So.2d 381, 384 (Ala.Crim.App.1990).
>
> " ' " 'Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will "largely turn on evaluation of credibility" 476 U.S., at 98, n. 21. In the typical challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.'
>
> " ' "*Hernandez v. New York,* 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)."
>
> " '*Doster v. State,* 72 So.3d 50, 73–74 (Ala.Crim.App.2010).' "

Riley v. State, — So.3d at ——. " ' " '[A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.' " ' " *Harris v. State,* 2 So.3d 880, 899 (Ala.Crim.App.2007), quoting *Fletcher v. State,* 703 So.2d 432, 436 (Ala.Crim.App.1997), quoting in turn *Davis v. State,* 555 So.2d 309, 312 (Ala.Crim.App.1989).

In light of the deference to be accorded to the trial court and based on the record, including the court's order on return to second remand, the trial court's finding that the prosecutor did not purposefully discriminate against African–American and female potential jurors during the striking process was not clearly erroneous. Thus, there was no plain error as to the prosecutor's striking of the jury and, as all other matters have previously been resolved, the conviction and sentence are due to be affirmed.

AFFIRMED.

WINDOM, P.J., and WELCH and JOINER, JJ., concur.

KELLUM, J., concurs in the result.

All Citations

--- So.3d ----, 2012 WL 6554696

Footnotes

1 This Court determined that the gender-based challenge was not as strong or supported as the race-based challenge; however, out of an abundance of caution, reasons were also required for those strikes.

2 R 3 denotes the record filed on return to second remand.

3 This finding by the trial court addresses one of the two potential jurors the Alabama Supreme Court noted as having been struck despite the prosecutor's inability to remember the reason for his strike. This Court stated on return to remand that the prosecutor had in fact stated that the juror was struck because of her age and because he did not believe that she would make a favorable juror. On return to second remand, the trial court gave these reasons for finding that the State's striking of this potential juror was not discriminatory.

4 This juror served as an alternate.

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APPENDIX D

REL: 05/29/2015
Modified on denial of reh'g: 08/21/2015

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

1130527

Ex parte Christopher Anthony Floyd

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Christopher Anthony Floyd

v.

State of Alabama)

(Houston Circuit Court, CC-04-1670;
Court of Criminal Appeals, CR-05-0935)

STUART, Justice.[1]

This Court issued a writ of certiorari to determine whether the following holdings of the Court of Criminal Appeals in Christopher Anthony Floyd's appeal from his capital-murder conviction are proper: that the Houston Circuit Court ("the trial court") did not err in holding that the State provided valid race- and gender-neutral reasons for its exercise of its peremptory strikes during jury selection, that the trial court did not err by refusing to admit into evidence all of Floyd's statements made to law-enforcement officers, and that the trial court did not err in denying Floyd's motion for a new trial based on newly discovered evidence. We affirm.

Facts and Procedural History

In 2005 Floyd was convicted of the murder of Waylon Crawford. The murder was made capital because it was committed during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975. Floyd was sentenced to death. In selecting the jury for Floyd's case, the prosecutor and Floyd's counsel exercised

[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Stuart on January 5, 2015.

a total of 36 peremptory challenges. The State used its 18 challenges to remove 10 of 11 African-American veniremembers and 12 of 18 female veniremembers. Floyd's counsel removed one African-American and seven female veniremembers. The jury consisted of six white male jurors, six white female jurors, two alternate white male jurors and one alternate African-American female juror. Floyd did not object to the jury based on Batson v. Kentucky, 476 U.S. 79 (1986)(prohibiting racial discrimination in jury selection), or J.E.B. v. Alabama, 511 U.S. 127 (1994)(prohibiting gender discrimination in jury selection).

On direct appeal, the Court of Criminal Appeals held that the record indicated that the prosecutor's use of his peremptory challenges created a prima facie case of discrimination under both Batson and J.E.B. That court remanded the case for the trial court to conduct a Batson/J.E.B. hearing. Floyd v. State, [Ms. CR-05-0935, Sept. 28, 2007] ___ So. 3d ___ (Ala. Crim. App. 2007).

On remand, the trial court conducted a hearing and required the prosecutor, Gary Maxwell,[2] to provide

[2]Maxwell stated that he selected the jury for the State with the exception of one juror, who, although he had

explanations for the exercised peremptory challenges. Before providing explanations for his peremptory challenges, the prosecutor explained his general practice in selecting a jury for a capital case:

> "In a capital murder case where voir dire is extensive, and ordinarily the process lasts a day or longer, I try to rate each and every juror initially on gut reaction. If you will look at State's Exhibit 1 there, in black outside of a lot of the juror's names, I will write 'Okay.' I will write just a dash for a minus. I might write a plus, being -- minuses are bad gut reaction, pluses are a good gut reaction. Okay is just okay. All right.
>
> "Also, in doing so -- I do that when the clerk is calling the names of the jurors and asking them to stand. Now, also, as is the Court's practice -- when I say the Court, the list that we have, I will put a 'B' outside of the names of those who are black. I do that not only from the appearance in court but from the jury list that's propounded by the clerk's office.[3]
>
> "....

---

reservations about her serving in light of her responses to questions about capital murder, the district attorney directed not be removed by a State peremptory challenge.

[3]The record indicates that the court provided at least three types of strike lists for the State and the defense to use during jury selection. One strike list provided each veniremember's name with an assigned juror number; another strike list included each veniremember's name, juror number, date of birth, sex, race, and address, and a third strike list provided each veniremember's name, juror number, date of birth, sex, race, occupation, employer, partial address, spouse's name, and spouse's employer.

"I have done this same procedure, the initial gut reaction rating system, for over 30 years. It's proven to be pretty accurate, I think. Then as questioning proceeds -- I adjust those ratings based on responses or lack of responses to the questions, questions the Court asks, questions the State asks, and the questions that the defendant propounds as to whether I feel they would favor the State or the defense, on their demeanor, the way they answer the questions, and not just the answer to the questions, the answer or again their failure to respond.

"Now, ... I do that second rating system basically in red. I may go back, I may change a minus to a plus. I may change a plus to a minus.

"Ultimately, I try to strike those most likely to lean towards the defense, not on race. I consider such factors as their age, their place of employment or lack of employment, their physical ability based on appearance, and/or responses to the questions that the Court propounds or the attorneys propound or on their failure to respond to questions. If they appear to be having a hard time understanding the Court's instructions or questions or those questions of the attorneys, I take that into consideration. If they do not pay attention, if they daydream, act as if they are bored or just don't care, I take that into consideration in this second rating system.

"In my rating system, for example, Juror [no. 30/]J.B.,[4] who was struck by the defense, I considered to be an excellent juror for the State.

---

[4]The State refers to prospective jurors using initials, e.g., "Juror J.B."; Floyd uses numbers, e.g., "Juror no. 30." For purposes of this opinion, the first time a prospective juror is referenced in a discussion, we will identify the juror by both number and initials. Thereafter, we will refer to that juror using initials.

> And I think you can see that on my list out there, that there is a plus beside [Juror no. 30/J.B.'s] name.
>
> "The State seeks jurors who are stable members of the community and due to the complexity of a capital murder case, we prefer jurors who have had jury experience and who have rendered a guilty verdict in the past. We prefer jurors who have jobs or education that requires concentration and attention to detail and also analysis.
>
> "A juror's demeanor or body language, his lack of eye contact with attorneys when they are asking questions can be a factor especially when he appears disinterested or shows more animosity towards the prosecution or law enforcement.
>
> "So that's just a basic background of what I do in preparation for striking the jury."

After explaining his methodology for selecting a jury, the prosecutor offered the following reasons for his exercised peremptory strikes of African-Americans and females:

> Prospective juror no. 28/P.B.: The prosecutor stated that he struck P.B., an African-American female, because P.B. had 32 bad-check cases, her probation had been revoked, and she was in the same age range as Floyd.
>
> Prospective juror no. 43/J.B.: The prosecutor stated that he struck J.B., an African-American male, because J.B. had two convictions for harassment and had approximately 12 traffic tickets with the City of Dothan.
>
> Prospective juror no. 59/M.C.: The prosecutor stated that he struck M.C., an African-American female, because M.C. initially indicated that she could not

vote for the death penalty and was personally opposed to capital punishment, and because she vacillated when questioned by the trial court.

Prospective juror no. 38/K.B.: The prosecutor stated that he struck K.B., an African-American male, because K.B. had been convicted of disorderly conduct, because he knew a potential witness who was rumored to have been involved in the commission of the offense charged, and because a member of law enforcement had indicated that he would be a bad juror for the State.

Prospective juror no. 46/T.C.: The prosecutor stated that he struck T.C., an African-American female, because T.C. had six convictions and her brother had felony convictions, because during voir dire she questioned the veracity of testimony from members of law enforcement, and because of her familiarity with members of the district attorney's office as a result of that office's prosecution of her and her brother.

Prospective juror no. 57/A.C.: The prosecutor stated that he struck A.C., an African-American female, because A.C. had been convicted of theft and negotiating worthless negotiable instruments.

Prospective juror no. 60/L.C.: The prosecutor stated that he struck L.C., an African-American female, because he believed that L.C. was "too familiar with everybody involved" in the case because she knew the defense attorneys, members of the district attorney's office, and the forensic pathologist who performed the autopsy on the victim. He further explained that he believed L.C.'s expressed religious beliefs would impact her ability to sit in judgment of the accused.

Prospective juror no. 19/D.B.: The prosecutor stated that he struck D.B., an African-American female, because she was inattentive during voir dire. The

prosecutor further stated that D.B. failed to make eye contact with members of the prosecution team, but at times during voir dire nodded in agreement with defense counsel.

Prospective juror no. 58/I.C.: The prosecutor stated that he struck I.C., an African-American female, because I.C. did not respond to any questions during voir dire and the prosecution did not know anything about her.

Prospective juror no. 51/R.C.: The prosecutor stated that he struck R.C., an African-American female who ultimately served as an alternate juror, because R.C. was 77 years of age and he had concerns, based on her demeanor during voir dire and the length and complexity of the case, that she would be able to serve as a juror.

Prospective juror no. 5/T.M.A.: The prosecutor stated that he struck T.M.A., a Caucasian female, because of her age. He further stated that, although he could not provide a specific reason, his initial impression of T.M.A. was that she would not be a good juror for the State and because of "the age part."

Prospective juror no. 23/R.B.: The prosecutor stated that he struck R.B., a Caucasian female, because his initial impression of R.B. was that she would not be a strong juror for the State and she did not respond to any questions during voir dire.

Prospective juror no. 35/S.B.: The prosecutor stated that he struck S.B., a Caucasian female, because, although his initial impression was that she would be an "okay" juror for the State, S.B. did not respond to any questions during voir dire and appeared to be close to Floyd's age.

Prospective juror no. 70/K.D.: The prosecutor stated that he struck K.D., a Caucasian female, because K.D. was approximately the same age as Floyd.

The prosecutor further stated that, based on his notes and rating system, he had determined that prospective jurors no. 8/M.W.A., no. 32/L.J.B., and no. 42/R.S.B, Caucasian females who ultimately served on the jury, would be good jurors for the State and that prospective jurors no. 18/K.P.B. and no. 62/M.D., Caucasian females, and prospective juror no. 30/J.B., an African-American female, each of whom was struck by the defense, would have also been good jurors for the State.

The prosecutor explained that, during the selection process, he noticed that the defense was using its peremptory strikes to remove veniremembers who were not similar in age to Floyd. He stated that, after he had removed veniremembers that he believed would not be good jurors for the State, he challenged veniremembers in the age group the defense was trying to seat on the jury, i.e, those similar in age to Floyd.

The prosecutor offered into evidence his strike list that provided the names and numbers of the veniremembers, upon

which he had made notations about each of the veniremembers; a list showing each veniremember's prior jury service and any criminal charges; and the strike list that contained information about the veniremembers, including race, sex, occupation, etc., and upon which members of law enforcement had made notations about various veniremembers and whether those veniremembers would be good jurors for the State.

To rebut the prosecutor's reasons and to show that the prosecutor engaged in actual, purposeful discrimination, Floyd argued that the reasons offered by the prosecutor for his strikes were pretextual and a sham because, he said, the Houston County district attorney's office had in the past engaged in discrimination during the jury-selection process. In support of his argument, Floyd named five cases in which convictions from the Houston Circuit Court had been reversed based on the State's having exercised its peremptory challenges in a discriminatory manner.[5] He further argued that, although the prosecutor claimed that a number of the removed veniremembers or their family members had criminal

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[5]Floyd did not argue that Maxwell had selected the juries for the State in any of the cases in which the defendant's conviction had been reversed.

convictions, many of those convictions were not in the record and/or were unavailable for verification by the defense; that the prosecutor failed to ask follow-up questions during voir dire of veniremembers who had been struck to associate the reason provided to this case; that the prosecutor's exercise of his peremptory strikes based on the race-neutral reason of age was disingenuous because the prosecutor used age as a reason to strike veniremembers ranging from age 28 years old to 77 years old; and that, although the prosecutor stated that he struck African-American veniremembers based on traffic tickets and opinions they had regarding the death penalty, the prosecutor did not strike two similarly situated Caucasian veniremembers.

In support of his argument, Floyd submitted a legal memorandum listing various cases in Houston County involving Batson objections, including five cases in which an appellate court had reversed convictions based on a Batson violation; a copy of defense counsel's strike list; and a strike list providing additional information about the various veniremembers, including date of birth, sex, race, occupation, etc.

After the hearing, the trial court entered a written order finding that the prosecutor had proffered race- and gender-neutral reasons for exercising his peremptory strikes.

On return to remand, the Court of Criminal Appeals upheld the trial court's finding that the State had provided race- and gender-neutral reasons for its use of its peremptory strikes, considered the other issues presented on direct appeal, and affirmed Floyd's conviction and sentence. Floyd v. State, [Ms. CR-05-0935, August 29, 2008] ___ So. 3d ___ (Ala. Crim. App. 2007) (opinion on return to remand).

On certiorari review, this Court held that on remand the trial court had failed to comply with the order of the Court of Criminal Appeals that it provide specific findings concerning the reasons proffered by the prosecutor for striking African-American and/or female veniremembers and that the Court of Criminal Appeals had erred in assuming the role of the trial court and finding that the State's reasons for striking prospective jurors no. 5/T.M.A. and no. 58/I.C. were nondiscriminatory. Ex parte Floyd, [Ms. 1080107, September 28, 2012] ___ So. 3d ___, ___ (Ala. 2012). This Court reversed the judgment of the Court of Criminal Appeals and

remanded the case for that court to remand the case with directions for the trial court

> "to make necessary findings of fact and conclusions of law on the following issues: whether the State's offered reasons for striking the African-American jurors it struck were race neutral; whether the State's offered reasons for striking the female jurors it struck were gender neutral; and 'whether the defendant has carried his burden of proving purposeful discrimination.'"

Ex parte Floyd, ___ So. 3d at ___.

Pursuant to this Court's order, the Court of Criminal Appeals remanded the case with instructions that the trial court make the necessary findings of fact and conclusions of law. Floyd v. State, [Ms. CR-05-0935, December 14, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012). The trial court on second remand entered an order, making specific findings of fact with regard to the State's proffered reasons for striking African-American and female veniremembers and finding that Floyd had not demonstrated that the prosecutor had engaged in actual, purposeful discrimination on the basis of race or gender during the jury-selection process. The trial court rejected Floyd's claims that the prosecutor had violated Batson and J.E.B. during the jury-selection process and found that the prosecutor had proffered race- and gender-neutral reasons for

his peremptory strikes and that Floyd had not satisfied his burden of proving that the prosecutor's reasons had been pretextual or sham or that the prosecutor had engaged in actual, purposeful discrimination during the jury-selection process.

On return to second remand, the Court of Criminal Appeals affirmed Floyd's conviction and sentence, holding that the trial court's judgment was not clearly erroneous because the record supported the trial court's conclusion that the prosecutor had presented facially race- and gender-neutral reasons for his strikes, that the prosecutor's reasons were not pretextual or sham, and that Floyd had not satisfied his burden of proving that the prosecutor engaged in actual, purposeful discrimination against African-American and female veniremembers during the jury-selection process. Floyd v. State, [Ms. CR-05-0935, November 8, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2012) (opinion on return to second remand).

This Court has now granted certiorari review to consider whether the Court of Criminal Appeals properly upheld the trial court's denial of Floyd's Batson and J.E.B. claims, the trial court's refusal to admit into evidence all of Floyd's

statements made to law-enforcement officers, and the trial court's denial of Floyd's motion for a new trial based on newly discovered evidence

Standard of Review

On certiorari review, this Court does not accord the legal conclusions of an intermediate appellate court a presumption of correctness. Therefore, this Court applies de novo the standard of review that was applicable in the intermediate appellate court. Ex parte Toyota Motor Corp., 684 So. 2d 132, 135 (Ala. 1996).

Discussion

Floyd contends that the judgment of the Court of Criminal Appeals upholding the trial court's finding that the State's reasons for striking I.C. and T.M.A. were race- and gender-neutral and that he did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination during the jury-selection process conflicts with Batson and J.E.B.

Floyd's contention that the trial court erred in not finding a Batson or J.E.B. violation focuses on the second and third step in a Batson/J.E.B. inquiry. In the second step of

the inquiry, the party against whom the prima facie case has been established, i.e., the nonmoving party, has the burden of proving that its reasons for its peremptory challenges were race or gender neutral. Ex parte Branch, 526 So. 2d 609, 623 (Ala. 1987). The nonmoving party must provide "a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." Ex parte Branch, 526 So. 2d at 623. The nonmoving party's reason, however, does not have to equal the reason for a strike for cause; rather, the nonmoving party's explanation must be facially valid. Ex parte Branch, 526 So. 2d at 623.

> "Within the context of Batson, a 'race-neutral' explanation 'means an explanation based on something other that the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reasons offered will be deemed race neutral.' Hernandez v. New York, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.' Id. '[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within the trial judge's province."' Hernandez, 500 U.S. at 365, 111 S. Ct at 1969."

Allen v. State, 659 So. 2d 135, 147 (Ala. Crim. App. 1994).

After the trial court determines that the nonmoving party has provided facially valid race- and gender-neutral reasons for its peremptory challenges, the burden then shifts to the moving party to prove that the nonmoving party has engaged in actual, purposeful discrimination. During this third step of the Batson/J.E.B. inquiry, the trial court evaluates the persuasiveness of the nonmoving party's reasons to determine whether the nonmoving party has engaged in purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 767 (1995). The trial court's determination of the moving party's showing of intent to discriminate is "a pure issue of fact subject to review under a deferential standard." Hernandez v. New York, 500 U.S. 352, 364 (1991). As this Court explained in Ex parte Branch:

> "[T]he trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he knows them, his knowledge of trial techniques, and his observation of the manner in which the prosecutor examined the venire and the challenged jurors. People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 858, 197 Cal.Rptr. 71 (1983); see also [People v.] Wheeler, 22 Cal. 3d [258] at 281, 583 P.2d [748] at 764, 148 Cal. Rptr. [890] at 906 [(1978)].

> "In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias. Furthermore, the trial judge must be careful not to confuse a specific reason given by the state's attorney for his challenge, with a 'specific bias' of the juror, which may justify the peremptory challenge:
>
> > "'The latter, a permissible basis for exclusion of a prospective juror, was defined in Wheeler as "a bias relating to the particular case on trial or the parties or witnesses thereto." Wheeler, 22 Cal. 3d at 276, 148 Cal. Rptr. at 902, 583 P.2d at 760. ...'
>
> "Slappy [v. State], 503 So. 2d [350] at 354 [(Fla. Dist. Ct. App. 1987)]. The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, see Hall, 35 Cal. 3d at 168, 672 P.2d at 858-59, 197 Cal. Rptr. at 75; Slappy, 503 So. 2d at 356; the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination."

526 So. 2d at 624.

An appellate court may reverse the trial court's determination that the nonmoving party's peremptory challenges were not motivated by intentional discrimination, the third consideration in a Batson/J.E.B. inquiry, only if that determination is clearly erroneous. Ex parte Branch, 526 So. 2d at 625. Whether the nonmoving party engaged in actual, purposeful discrimination involves consideration of not only

the nonmoving party's credibility, but also the veniremember's demeanor, and such determinations rest on the trial court's firsthand observations. As the United States Supreme Court stated in Hernandez, when determinations rest upon credibility and demeanor, they rest "'peculiarly within a trial judge's province.'" Hernandez, 500 U.S. at 365 (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985)).

With regard to Floyd's claim that the prosecutor, the nonmoving party in this case, purposefully excluded African-Americans from his jury, Floyd focuses on the prosecutor's exercise of a peremptory challenge to remove prospective juror no. 58/I.C. from the venire. The prosecutor, when asked to provide reasons why he exercised a peremptory challenge to remove I.C. from the venire, stated that he removed I.C. because he did not know much about her in that she had been omitted from the State's strike lists and because she did not respond to questions. The trial court found these reasons to be race neutral, see Jackson v. State, 686 So. 2d 429, 431 (Ala. Crim. App. 1996)(holding that nonresponsiveness to questioning can be a race-neutral reason), and State v. Harris, 184 Ariz. 617, 620, 911 P.2d 623, 626 (Ariz. Ct. App.

1995)(finding the prosecutor's proffered reason that she lacked knowledge about the veniremember to be race neutral). The trial court further found that Floyd did not satisfy his burden of proving that the prosecutor's reasons were pretextual or sham and that he engaged in actual, purposeful discrimination in the jury-selection process.

Floyd maintains that the reasons offered by the prosecutor for his strikes of African-Americans and females do not adequately rebut the inference of actual, purposeful discrimination because, he says, those reasons are pretextual or sham. He argues that I.C.'s alleged lack of responsiveness to questions is pretextual or sham and is not supported by the record because during group voir dire I.C., as did a Caucasian veniremember, responded to questions as requested by the questioner by either raising or not raising her hand. See Ex parte Branch, 526 So. 2d at 625 (holding that disparate treatment of veniremembers with the same characteristics or who answer questions in the same manner suggests that the reason for striking one over the other is pretextual or sham). Similarly, he further argues that the prosecutor's lack of knowledge about I.C. is pretextual or sham because the

prosecutor did not engage in additional voir dire with I.C. to learn more about her. Ex parte Bird, 594 So. 2d 676, 683 (Ala. 1991)("[T]he failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination.").

This Court, in light of the deference to be accorded the trial court in its determination of whether Floyd satisfied his burden of proving that the prosecutor engaged in actual, purposeful discrimination, cannot conclude from the record that the trial court's holding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination is clearly erroneous. We cannot agree with Floyd that the prosecutor engaged in disparate treatment because he used a peremptory challenge to remove I.C. and did not use a peremptory challenge to remove prospective juror no. 21/A.B., a Caucasian male. The record indicates that the prosecutor, who relied heavily upon his impressions and knowledge of the veniremembers in the exercise of his peremptory challenges, knew little about I.C. because she was omitted from his strike lists. The record further

indicates that the prosecutor from his strike lists knew that A.B. had not served previously on a jury and that he did not have a criminal history. Under the facts of this case, these known facts about A.B. negate the evidence of any disparate treatment of I.C. and A.B.

Additionally, the prosecutor's admission of his lack of knowledge about I.C. when proffering reasons for the exercise of the peremptory challenge does not require the conclusion that the prosecutor engaged in actual, purposeful discrimination. This Court in State v. Bui, 627 So. 2d 855 (Ala. 1992), agreed with the United States Court of Appeals for the Fifth Circuit that the "'"[f]ailure by a prosecutor to explain every peremptory strike of black jurors is not necessarily fatal to the prosecutor's ability to rebut a prima facie case ...."'" State v. Bui, 627 So. 2d at 859 (quoting United States v. Forbes, 816 F. 2d 1006, 1011 n. 7 (5th Cir. 1987), quoting in turn Unites States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986)). Here, the prosecutor admitted that I.C. had been inadvertently omitted from his strike lists and that, consequently, he had little information about her. In light of the prosecutor's explanation of the process he used

in striking a jury, the prosecutor's candor that he knew nothing about I.C., his stated reluctance to seat a juror he did not believe was good for the State, and the deference accorded the trial court in making credibility determinations concerning the prosecutor, we cannot hold that the trial court's finding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination in the selection of the jury in this regard is clearly erroneous.

Floyd's contention that the prosecutor purposefully excluded females from the jury focuses on the prosecutor's exercise of a peremptory challenge to remove prospective juror no. 5/T.M.A. from the venire. According to Floyd, the trial court accepted at face value the prosecutor's proffered reason of her age for the removal of T.M.A. from the jury. He maintains that because the prosecutor did not connect T.M.A.'s age to the case, the reason is pretextual or sham and evidences actual, purposeful discrimination on the part of the prosecutor. See Ex parte Branch, 526 So. 2d at 624 (providing

that a guideline for determining whether a prosecutor's reason for an allegedly discriminatory strike was valid or sham includes "'an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically'" (quoting Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987))). See also Ex parte Brooks, 695 So. 2d 184, 190 (Ala. 1997)(recognizing that "age, employment status, and marital status are not sufficiently race-neutral reasons for a peremptory strike, if the prosecutor gives that reason as the sole basis for the strike, where that reason is unrelated to the case").

The record, however, does not support Floyd's argument that the prosecutor engaged in disparate treatment because the record establishes that the prosecutor did relate the reason of age to the case. The record establishes that Floyd, a Caucasian, was 33 years old and that T.M.A. was 48 years old at the time of the trial. At the Batson/J.E.B. hearing, the prosecutor stated that he struck T.M.A. because he believed she was within the age range of the juror the defense was trying to seat. A review of the prosecutor's strikes indicates that, after he struck veniremembers he believed

would not be good jurors for the State, he exercised his peremptory challenges to remove veniremembers whose ages were in Floyd's age range in an effort to prevent the defense from seating the type juror it believed would be pro-defense. Thwarting the defense's objective in jury selection is a race-neutral reason, and we cannot conclude based on the record before us that the trial court's finding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination by striking T.M.A. is clearly erroneous.

This Court has reviewed the record in light of Floyd's contention that the State did not provide race- and/or gender-neutral reasons for striking prospective juror no. 59/M.C., prospective juror no. 19/D.B., prospective juror no. 60/L.C., prospective juror no. 23/R.B., prospective juror no. 35/S.B., and prospective juror no. 70/K.D. The record, however, supports the trial court's conclusion that the State proffered race- and/or gender-neutral reasons for its peremptory challenges of those jurors. See Whatley v. State 146 So. 3d 437, 456 (Ala. Crim. App. 2010) (noting that, "'"[a]lthough a juror's reservations about the death penalty need not be

sufficient for a challenge for cause, his view may constitute a reasonable explanation for the exercise of a peremptory strike."'" (quoting Dallas v. State, 711 So. 2d 1101, 1104 (Ala. Crim. App. 1997), quoting in turn Johnson v. State, 620 So. 2d 679, 696 (Ala. Crim. App. 1992)), and finding a juror's demeanor to be a race-neutral reason); Smith v. State, 838 So. 2d 413 (Ala. Crim. App. 2002) (finding a juror's religious/moral conviction against sitting in judgment to be a race-neutral reason); Jackson, supra (finding a juror's nonresponsiveness to be a race-neutral reason); and Sanders v. State, 623 So. 2d 428, 432 (Ala. Crim. App. 1993)(recognizing that age can provide a race-neutral reason). Additionally, in light of the deference accorded to the trial court in determining whether a prosecutor's reasons are pretextual or sham, we cannot hold that Floyd satisfied his burden of proving that the prosecutor engaged in actual, purposeful discrimination.

> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding will 'largely turn on evaluation of credibility.' 476 U.S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be

> believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' Wainwright v. Witt, 469 U.S. 412, 428 (1985), citing Patton v. Yount, 467 U.S. 1025, 1038 (1984)."

Hernandez v. New York, 500 U.S. at 364.

Nothing before this Court establishes that the trial court's finding that Floyd did not satisfy his burden of proving that the prosecutor engaged in actual, purposeful discrimination in the selection of the jury is clearly erroneous. "'[A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Because this Court does not have a firm conviction from the record before us that the prosecutor committed a Batson or J.E.B. violation during the selection of Floyd's jury, Floyd has not established that the decision of the Court of Criminal Appeals affirming the trial court's finding that no Batson or J.E.B.

violation occurred in the selection of his jury conflicts with prior caselaw.

Next, Floyd contends that the decision of the Court of Criminal Appeals upholding the trial court's refusal to admit into evidence all of Floyd's statements to law-enforcement officers conflicts with Rule 801(c), Ala. R. Evid. Specifically, Floyd argues that the trial court exceeded the scope of its discretion by refusing to admit into evidence all the statements he made to law-enforcement officers because, he says, those statements were admissible nonhearsay statements and their preclusion from evidence inhibited the jury's ability to evaluate the credibility and reliability of his September 27, 2004, statement, which was admitted into evidence, and prevented him from presenting a complete defense.

On September 27, 2004, Floyd admitted to law-enforcement officers that he shot Waylon Crawford. The trial court admitted Floyd's confession into evidence. During the 12-year investigation of the offense, Floyd made several other statements to law-enforcement officers. In those statements, Floyd either denied participation in the offense or provided

information about the offense to law-enforcement officers that differed from the statement he had made on September 27, 2004. The State filed a motion in limine asking the trial court to prevent Floyd from making any reference either directly or indirectly to any statement he had made to law-enforcement officers or to the contents of the statement unless the State notified the Court and the defense that it intended to introduce that statement. The trial court granted the motion and refused to admit any evidence regarding any of the statements Floyd made to law-enforcement officers other than evidence concerning the statement he made on September 27, 2004.

> "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion ...."

Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000).

Rule 802, Ala. R. Evid., provides: "Hearsay is not admissible except as provided by these rules or other rules adopted by the Supreme Court of Alabama or by statute." Rule 801(c), defines hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted." Generally, "'[t]he declarations of the accused made after the commission of the crime, are not admissible in his favor unless they constitute a part of the res gestae or are introduced by the State.'" Wilsher v. State, 611 So. 2d 1175, 1186 (Ala. Crim. App. 1992) (quoting Harrell v. State, 470 So. 2d 1303, 1306 (Ala. Cr. App. 1984)).

In Miller v. State, 441 So. 2d 1038, 1039 (Ala. Crim. App. 1983), the Court of Criminal Appeals addressed a defendant's attempt to admit into evidence a statement he had made to law-enforcement officers in an effort to present his testimony without being subjected to cross-examination. That court stated:

> "'A "self-serving declaration" is a statement made out of Court which is favorable to the interest of the declarant. Unless, for some recognized reason, it comes within the exception to the general rule, such a declaration is not admissible in evidence when tendered by the favored party, if not a part of the res gestae. The prime objection to this character of proof is that it does violence to the hearsay rule. Further, it opens the door to the introduction of untrustworthy declarations and permits a party to manufacture his own evidence.'"

Miller, 441 So. 2d at 1039 (quoting Jarrell v. State, 35 Ala. App. 256, 50 So. 2d 767 (1950)).

Floyd contends that the trial court erred in refusing to admit into evidence all of his statements to law-enforcement officers because, he says, the statements are not hearsay. He maintains that he did not offer the statements to prove the truth of the contents of the statements; rather, he says, he offered the statements for the sole purpose of proving that he made other statements and that those other statements are inconsistent with his September 27, 2004, confession. However, to achieve Floyd's objective for admitting the other statements into evidence -- proving that his September 27, 2004, confession was unreliable in light of the inconsistency of that statement with other statements he had made to law-enforcement officers -- Floyd offered the other statements to prove "the truth of the matter asserted" in each statement, i.e., that he did not commit the offense. Thus, Floyd's statements, other than his confession, which was submitted into evidence by the State, made to law-enforcement officers were hearsay, and the trial court did not exceed the scope of its discretion by refusing to admit them into evidence. The judgment of the Court of Criminal Appeals upholding the trial court's refusal to admit all statements Floyd made to law-

enforcement officers into evidence does not conflict with Rule 801(c), Ala. R. Evid.[6]

Lastly, Floyd contends that the decision of the Court of Criminal Appeals that the trial court did not err in denying his motion for a new trial based on newly discovered evidence conflicts with Ex parte Heaton, 542 So. 2d 931 (Ala. 1989). Specifically, Floyd contends that the trial court exceeded the scope of its discretion in denying his motion for a new trial because, he says, the evidence satisfied all the requirements for a new trial.

At trial Floyd maintained that Paul Wayne Johnson, not he, had committed the offense and that Johnson, by threatening to harm Floyd and his family, had pressured him into confessing that he committed the offense. After Floyd had been convicted and sentenced, Dorothy Dyson, a friend of Floyd's family, came forward stating that on the night Crawford was murdered she saw Johnson and that his shirt was

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[6]Because Floyd's statements made to law-enforcement officers, other than his confession, were inadmissible hearsay; do not fall within an exception to the hearsay rule, see Rules 803 and 804, Ala. R. Evid.; and were not by definition not hearsay, see Rule 801(d), Ala. R. Evid., we pretermit discussion of the other grounds of conflict Floyd raises in this regard.

covered with blood. In light of this newly discovered evidence, Floyd moved for a new trial, arguing that the evidence supported the defense's theory that Johnson, not he, committed the offense. The trial court, after conducting a hearing at which Dyson testified, entered an order questioning Dyson's credibility and denying Floyd's motion for a new trial.

> "'"The appellate courts look with disfavor on motions for new trials based on newly discovered evidence and the decision of the trial court will not be disturbed absent abuse of discretion." Further, "this court will indulge every presumption in favor of the correctness" of the trial judge's decision. The trial court is in the best position to determine the credibility of the new evidence.'
>
> "Isom v. State, 497 So. 2d 208, 212 (Ala. Crim. App. 1986) (citations omitted). To establish a right to a new trial based on newly discovered evidence, the petitioner must show the following: (1) that the evidence will probably change the result if a new trial is granted; (2) that the evidence has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. ... While all five requirements ordinarily must be met, the law has recognized that in certain exceptional circumstances, even if the newly discovered evidence is cumulative or impeaching, if it appears probable from looking at the entire case that the new

> evidence would change the result, then a new trial should be granted."

Ex parte Heaton, 542 So. 2d at 933 (emphasis added; some citations omitted).

> "The granting of a new trial on the basis of newly discovered evidence 'rests in the sound discretion of the trial court and depends largely on the credibility of the new evidence.' Robinson v. State, 398 So. 2d 144 (Ala. Crim. App.)[,] cert. denied, 389 So. 2d 151 (Ala. 1980). The trial court is the factfinder in a hearing on a motion for new trial. One condition of the trial court's granting a new trial based on newly discovered evidence is that the court must believe the evidence presented at the hearing. Seibert v. State, 343 So. 2d 788 (Ala. 1977)."

McDonald v. State, 451 So. 2d 440, 442 (Ala. Crim. App. 1984)(emphasis added).

Applying the guidelines for granting a new trial in light of newly discovered evidence set forth in Ex parte Heaton and McDonald to the facts of this case, we conclude that the trial court did not exceed the scope of its discretion in denying Floyd's motion for a new trial. At the end of Dyson's testimony, the trial court questioned Dyson to address its concerns about the credibility of her testimony. The record indicates that the trial court's concerns were not abated by Dyson's responses. Because "a condition to the granting of a

new trial on the basis of newly discovered evidence is that the trial court must believe the evidence presented," McMillian v. State, 594 So. 2d 1253, 1264 (Ala. Crim. App. 1991), and the record indicates that Dyson's testimony did not satisfy this criteria, this Court cannot conclude that the trial court exceeded the scope of its discretion by denying Floyd's motion for a new trial based on newly discovered evidence. Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979) ("A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." (citing Premium Serv. Corp. v. Sperry & Hutchinson, Co., 511 F.2d 225 (9th Cir. 1975)).

The decision of the Court of Criminal Appeals affirming the trial court's denial of Floyd's motion for a new trial does not conflict with Ex parte Heaton and the applicable caselaw.

Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Moore, C.J., and Bolin, Parker, Main, and Bryan, JJ., concur.

Murdock, J., dissents.

Shaw and Wise, JJ., recuse themselves.*

*Justice Shaw and Justice Wise were members of the Court of Criminal Appeals when that court considered this case.

MURDOCK, Justice (dissenting).

Christopher Anthony Floyd argues, among other things, that the trial court erred in not admitting statements he made to police that were inconsistent with his out-of-court confession to police. He contends that the excluded statements tend to prove that his confession was not credible and that their exclusion prevented him from presenting a complete defense. The main opinion rejects this contention with the reasoning that the proffered statements were inadmissable hearsay because "to achieve Floyd's objective for admitting the other statements into evidence -- proving that his September 27, 2004, confession was unreliable in light of the inconsistency of that statement with other statements he had made to law-enforcement officers -- Floyd [necessarily sought to introduce] the other statements to prove 'the truth of the matter asserted' in [those statements]." ____ So. 3d at ___.

Given the unique circumstances of this case and the content of many of those other statements, I am not persuaded that the stated rationale for upholding their exclusion -- that "Floyd [necessarily sought] ... to prove the 'truth of

the matter asserted'" in them -- is correct. Even if the trial court erred in excluding the subject statements on the ground now urged by Floyd, however, this ground was not raised below, and I cannot conclude that the exclusion of the statements represents plain error.

That said, after reviewing the record in this case as it now stands following a second remand, I have substantial concerns regarding the so-called Batson/J.E.B. challenges to prospective jurors no. 5/T.M.A. and no. 58/I.C., and I therefore respectfully must dissent.[7]

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[7]For the reason expressed in my special writing in Ex parte Floyd, [Ms. 1080107, September 28, 2012] ___ So. 3d ___, ___ (Ala. 2012) (Murdock, J., concurring in the result), I continue to be concerned about the appropriateness of allowing Batson challenges to be made in capital cases for the first time on appeal. As I noted in Ex parte Floyd, however, the State has not objected to this procedure in the present case, and, as a result, I and the other members of this Court have been placed in the position of assessing the Batson issues as best we can under the circumstances.