No. 16-9304
CAPITAL CASE

In the
SUPREME COURT of the UNITED STATES

CHRISTOPHER FLOYD,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED
(Restated)

1. Did the Alabama Supreme Court fulfill this Court's mandate to further consider the particular facts of this case in light of this Court's decision in *Foster v. Chatman*, 578 U.S. --, 136 S.Ct. 1737 (May 23, 2016)?

2. In further considering the facts of this case, did the Alabama Supreme Court correctly determine that the record in this case does not evidence a concerted effort to keep black prospective jurors off the jury?

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STATEMENT OF THE CASE

In February 1992, Christopher Anthony Floyd ("Floyd") killed Waylon Crawford during the robbery of a rural country store. *Floyd v. State*, CR-05-0935, 2007 WL 2811968 (Ala. Crim. App. 2007); Pet. App. A at 4. Floyd confessed to this robbery-murder in 2004 while incarcerated for another crime. *Id.* at 5. In 2005, he was convicted of capital murder pursuant to section 13A-5-40(a)(4) of the Code of Alabama (1975) for murder during the course of a robbery. *Id.* at 2, 5. The jury recommended death by a vote of eleven to one, and the trial court accepted the jury's recommendation and sentenced Floyd to death. *Id.* at 2, 5-6.

A. Despite Floyd Not Raising an Objection to the Selection of the Jury at Trial, the Court of Criminal Appeals Remanded After Finding a Prima Facie Case of Discrimination.

Floyd did not object to the composition of the jury in the trial court. But, on direct appeal, Floyd argued that the prosecution had violated *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127 (1994), by using its peremptory strikes to remove blacks and women from the venire. Pet. App. A at 2. Although Floyd's counsel did not raise a *Batson* or *J.E.B.* claim during the trial, the Court of Criminal Appeals found "an inference of racially based discrimination on the part of the State" in its preliminary review of the trial record. *Id.*

> 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. [FN 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-Americans potential jurors on the jury list and initial strike list.]. 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 on 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.

Id. at 2-3. Concerned by the bare numbers, especially because Floyd's trial was for a capital offense, the Court of Criminal Appeals remanded the matter for a *Batson* and *J.E.B.* hearing.

At the evidentiary hearing on remand, the trial court heard the testimony of defense attorney Thomas Brantley and prosecutor Gary Maxwell, who struck the

jury for the State. Brantley testified that he did not raise a *Batson* motion at trial for strategic reasons. Specifically, Brantley explained that he wanted a jury "like Chris [the defendant]." R.R. 14.[1] He stated the following regarding the type of juror he wanted:

> In this particular case I was looking for white males, 20 or 35, maybe 40 with rural addresses. I wanted somebody like Chris on the jury. I felt they could identify with our theory of defense. And I really didn't care to have anyone other than young white males on the jury. That was what I was going for.

Id. Using more colorful language, Brantley stated that he wanted "good ole boys" as jurors. *Id.* at 38. In other words, his ideal juror was a "young white male [that] goes hunting a lot, lives in the country, moderately educated, probably the lower end of [the] social and economic scale." *Id.*

Gary Maxwell, the prosecutor, explained his general practices on striking a jury and gave his specific reasons concerning his peremptory challenges in Floyd's case. *Id.* at 50-76. Maxwell stated that in capital cases, he usually made notations regarding his initial impressions of the prospective jurors when they introduced themselves which he would then adjust based on a prospective juror's responses or lack thereof to the questions posed to the venire. *Id.* at 58-59. He also considered factors such as a prospective juror's general demeanor and

[1] The State will follow the citation format used in Floyd's petition for writ of certiorari. Floyd's Pet. at 2 n.1.

attentiveness during voir dire; the manner in which the juror responded to questions; whether the juror had difficulty understanding the court's instructions or the questions posed; the juror's age, place of employment, or lack of employment; and the juror's apparent physical ability. *Id.* at 59-61.

Turning to his strikes in Floyd's case, Maxwell explained that he struck five blacks because, among other reasons, they had criminal convictions or traffic tickets.[2] RR. At 64-67. His reasons for his additional strikes of additional black venire members were as follows:

> Ramona Cleveland: She was seventy-seven years old, and due to the complexity of the case, he thought that she would be unable to "sit, listen, pay attention, [and] follow directions." *Id.* at 66-67. Because she was the prosecutor's last strike, Cleveland served as an alternate juror.
>
> Inez Culver: Culver's name was not on the list of prospective jurors compiled by the prosecutor's office to distribute to law enforcement for their input on whether that juror had served on a previous jury and had any history of criminal charges and convictions. As a result, he did not have any information on Culver. In addition, "she did not respond to any questions from the State, the defense or the Court." *Id.* at 67-68.
>
> Martha Culver: Culver initially stated that she could not vote for the death penalty under any circumstances but ultimately stated that she could follow the law. He struck her because he believed that she was personally opposed to the death penalty. *Id.* at 69.

[2] The names of those five prospective jurors are Pam Bigham, Kenneth Britt, Joe Butler, Teresa Caphart, and Angela Crews.

> Lillie Curry: She knew the defense attorneys, the prosecutors, and the State's expert pathologist, who testified as to the findings concerning the victim's autopsy. *Id.* at 69. Moreover, her ex-husband had served as an "auxiliary police officer." *Id.* The prosecutor stated that "she was too familiar with everybody involved in the case especially the fact that she knew the defense attorneys." *Id.* at 69-70. In addition, Curry had religious beliefs against sitting in judgment of another. *Id.* at 71-72.
>
> Doris Barber: She was not paying attention and refused to make eye contact when the prosecutor asked voir dire questions but she made eye contact with defense counsel and even nodded in agreement with some of his questions. *Id.* at 73.

Maxwell also provided his rationale for his strikes of four white women:

> Rachel Barron: She was fifty-one years old, Maxwell's initial impression was that she was not very assertive in introducing herself, and she failed to respond to any questions during voir dire. *Id.* at 72-73, 102.
>
> Teena Allen: She was forty-eight years old. *Id.* at 74. Maxwell had written "no" by her name, but he could offer no further explanation, apparently due to the fact that the trial had taken place two years earlier, and his memory had faded. *Id.*
>
> Shannon Braswell: She was thirty-six years old, approximately the same age as Floyd, and she never responded to any questions during voir dire. *Id.* at 74-75.
>
> Katherine Dixon: She was twenty-eight years old, similar in age to Floyd and of an age Maxwell considered to be too young to care about "law and order." *Id.* at 105.

Following the evidentiary hearing, the trial court issued an order holding that "the State gave race and gender neutral reasons for its strikes." C.R. at 16-19.[3]

The trial court issued an order holding that "the State gave race and gender neutral reasons for its strikes." C.R. 16-19.

B. The Alabama Supreme Court Remanded for a Second Time for Additional Fact-Findings

On return to remand, the Court of Criminal Appeals issued an opinion addressing all of the issues raised in Floyd's initial brief. Pet. App. A at 6-24. In particular, the court affirmed the trial court's order regarding Floyd's *Batson/J.E.B.* claim. *Id.* at 14-18. Although the trial court had said that the State was unable to remember its reasons for striking Teena Allen and Inez Culver, the Court of Criminal Appeals found that the prosecutor actually did give reasons for those strikes: Allen was struck "because of her age and because his initial impression of her was that she would not make a favorable juror for the State," and Culver was "struck because she did not respond to any questions during voir dire." *Id.* at 18.

This finding from the intermediate appellate court was insufficient to satisfy the Alabama Supreme Court, however, which reversed and remanded the matter. That court explained that because the trial court failed to find any reasons for the

[3] Floyd's petition for writ of certiorari abandons any claims concerning the prosecutor's reasons for removing white women from the jury. Despite that fact, the State lists the prosecutor's reasons to give this Court a complete summary of the prosecutor's strikes.

prosecutor's strikes concerning Teena Allen and Inez Culver, it had not performed its function of issuing specific findings of fact. Pet. App. B at pp. 12-14. The fact that the Court of Criminal Appeals had identified the prosecutor's reasons from the record was insufficient. *Id.* at 12.

C. The Trial Court Again Denied Floyd's Batson/J.E.B. Claim, and the State Appellate Courts Affirmed.

At the second remand, the trial court did not hold a new hearing but instead ordered the parties to submit proposed orders. C.R. at 2. After the parties complied, the trial court issued an order denying Floyd's *Batson/J.E.B.* claim, finding that the State provided race-neutral reasons for its strikes of black veniremembers and gender-neutral reasons for its strikes of female veniremembers, and that the prosecution's reasons were not pretextual, given the totality of the circumstances. *Id.* at 28-37.

The Court of Criminal Appeals affirmed the trial court's ruling, holding that the trial court's judgment was not clearly erroneous because the record supported its conclusions that the prosecutor had presented facially race and gender neutral reasons for his strikes, that the prosecutor's reasons were not pretextual, and that Floyd had not satisfied his burden of proving that the prosecutor engaged in discrimination against African-American and female veniremebers. *Floyd v. State*, CR-05-0935, 2012 WL 6554696 (Ala. Crim. App. 2012); Pet. App. C.

The Alabama Supreme Court affirmed as well. *Ex parte Floyd*, No. 1130527 (Ala. 2015); Pet. App. D. The court focused its discussion on Floyd's argument that the lower courts erroneously concluded that the prosecutor's removal of Inez Culver, a black woman, and Teena Allen, a white woman, were race and gender neutral. *Id.* at 15. Ultimately, the court concluded 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 was not clearly erroneous. *Id.* at 27.

REASONS FOR DENYING THE WRIT

Floyd's petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. Floyd's petition is splitless, heavily fact-bound, and he has not shown that any of the grounds for granting certiorari review set out in Rule 10 exist. His claims were rejected by the Alabama Supreme Court after a thorough consideration of the facts and circumstances of this case, and Floyd has shown no conflict between that decision and a decision of any state court of last resort, any decision of a United States court of appeals, or any decision of this Court, including *Foster v. Chatman*, 136 S. Ct. 1737 (May 23, 2016). Sup. Ct. R. 10. Additionally, Floyd's failure to raise a *Batson* claim at trial renders this case a poor vehicle to address *Batson* and *Floyd.*

For the reasons set forth below, Floyd's petition is without merit and should be denied.

I. THIS COURT CANNOT REACH THE QUESTION THAT FLOYD PRESENTS.

As an initial matter, to the extent that Floyd seeks certiorari for the review of a substantive *Batson* claim, this Court cannot consider Floyd's arguments that his Equal Protection rights were violated because his argument is directed towards jurors that he never challenged in the trial court. Because Floyd did not raise a *Batson* challenge during his trial, the state appellate courts reviewed his later claim only for plain error, a special provision of Alabama law for capital cases.[4] As one Eleventh Circuit Judge has explained, an Alabama appellate court in this procedural posture does "not decide a *Batson* claim at all; rather, it decide[s] a state law claim bearing the *Batson* label." *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1258 (11th Cir. 2013) (Tjoflat, J., dissenting).

In *Batson*, this Court laid out a tripartite procedure for making *contemporaneous* challenges to the striking of the jury: (1) the defense makes a

[4] Alabama's plain error doctrine is explained in Rule 45A of the Alabama Rules of Appellate Procedure: "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."

prima facie showing, based on "all relevant circumstances,"[5] of racially motivated striking, (2) the prosecution proffers race-neutral reasons for the strikes, and (3) the trial court determines whether the defendant established purposeful discrimination. 476 U.S. at 96-98. Although the "final step involves evaluating the persuasiveness of the justification proffered by the prosecutor ... the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (internal quotation marks omitted).

Nothing in *Batson* contemplates the problem Floyd presented the Alabama appellate courts. Rather than raise a *Batson* challenge at the time of his trial and establish a contemporaneous record of evidence of discriminatory strikes and race-neutral explanations, Floyd's counsel declined to challenge the jury he had received. This decision could hardly be considered unwise, since counsel was *pleased* with the jury. R.R. at 14.

Faced with a lack of contemporaneous fact-finding in the form of a challenge to the jury, the Court of Criminal Appeals should never have considered Floyd's *Batson* claim. Instead, that court *initiated* a *Batson* inquiry and remanded

[5] Floyd claims that the Alabama Supreme Court did not consider "all relevant circumstances" in denying his *Batson* claim. Pet. at 15. His use of this phrase is improper, as the *Batson* Court specified that a *trial* court should consider all circumstances in determining whether a criminal defendant has made a prima facie showing of discrimination. *Batson*, 476 U.S. at 96. The trial court in this case was never given that opportunity because Floyd's counsel did not challenge the jury.

the matter for fact-finding as part of its plain error review pursuant to Rule 45A of the Alabama Rules of Appellate Procedure. Pet. App. A at 2.

At the remand hearing, the trial court understandably expressed frustration with having to handle a *Batson* hearing two years after the trial, stating, "The issue on remand, as I understand it, is that of a *Batson* challenge that was never made." *Id.* at 5. He added, "[I]n this particular situation there was not even a *Batson* challenge made, and I gave the attorneys an opportunity to make such a motion, but for whatever reason it was not made." *Id.* at 6. He then rhetorically asked, "Does the Court now have to step in as a defense attorney and make a *Batson* challenge for the defendant? *Id.* at 7. The judge's candid comments exemplify why this presents an insurmountable vehicle problem.

Alabama Supreme Court Justice Murdock's concurring opinion after the first remand explains why this Court should not now review Floyd's *Batson* claims due to the procedural problems. *See* Pet. App. B at 15-30. Because Floyd did not make a contemporaneous objection, the Alabama Supreme Court could only review the case for plain error under a state procedural rule, and not as an equal protection claim that was preserved for review. *See id.* at 23 ("For this reason, the [Fifth Circuit] Court of Appeals concluded that *'[t]he evidentiary rule established in Batson does not enter the analysis of a defendant's equal protection claim unless a timely objection is made to the prosecutor's use of his peremptory*

challenges.'") (quoting *Thomas v. Moore*, 866 F.2d 803, 804 (5th Cir. 1989)) (emphasis in original). The fact that this claim was not a properly preserved equal protection claim should prevent review by this Court.

Justice Murdock then provided three reasons why a state court should not review a *Batson* claim for plain error. "First, *Batson* itself, as well as its progeny, appears to contemplate a testing of the prosecutor's reasons for his or her strikes *contemporaneously*, with the making of those strikes." *Id.* at 18 (emphasis in original). Indeed, "[n]othing in *Batson* suggests that the prosecutor is to be required to articulate and defend his or her reasons for striking certain jurors long after the selection process has ended, both sides have accepted the jury, the jurors have performed their service, and a verdict has been rendered." Id. Second, a *Batson* claim should be made contemporaneously because if a violation is found, "remedies other than reversal and retrial are available." *Id.* at 19. A trial court can immediately remedy a constitutional violation by placing an improperly struck veniremember on the jury. Permitting a defendant to raise a *Batson* challenge for the first time on appeal allows him to unfairly take a second bite at the apple: he can try his luck with the first jury, and if he is unsatisfied with the outcome, he can try again. *Id.* at 23-24.

Finally, "[a] third – and perhaps the most fundamental – reason for the proposition that plain-error review should not be available to initiate a *Batson*

inquiry on appeal, is the fact that the failure of the trial court *to initiate* a *Batson* inquiry simply is *not an 'error,'* plain or otherwise, by the trial court." *Id.* at 24 (emphasis in original). As Justice Murdock noted, "[t]he decision whether to take advantage of the right to generate evidence for consideration by the trial court pursuant to the *Batson* procedure is *a decision for the defendant, not the trial court*. Id. (emphasis in original). The lack of a request by defense counsel for a *Batson* review might well occur in the context of circumstances more than sufficient to create an inference of discrimination by the prosecution, yet the law allows for the possibility that defense counsel might have reasons for believing that the jury is acceptable or even that the jury as selected might be more favorable than some entirely new jury chosen from an unknown venire.

Because Floyd did not object to the allegedly discriminatory peremptory strikes, he did not preserve his *Batson/J.E.B.* claim. The Alabama courts thus adjudicated a state-law claim, and this Court should not grant Floyd's petition for writ of certiorari.

II. THE ALABAMA SUPREME COURT FOLLOWED THIS COURT'S INSTRUCTIONS ON REMAND AND CORRECTLY FOUND THAT THIS COURT'S DECISION IN FOSTER v. CHATMAN DID NOT ALTER ITS CONCLUSION THAT NO BATSON VIOLATION OCCURRED.

Even assuming the Court could address the supposed "*Batson* claim" that Floyd waived by failing to object to the jury, his petition seeks nothing more than

fact-bound error correction. Floyd contends that the Alabama Supreme Court's decision is in conflict with *Batson* and its progeny because the state court purportedly made erroneous factual findings, misapplied *Batson*, and failed to apply *Foster*. His arguments raise no compelling reason to invoke this Court's jurisdiction and he does not raise issues of national importance. Instead his petition presents a mere criticism of how the ASC **applied** *Foster*, cloaked in a meritless claim that the ASC **ignored** *Foster*. Therefore, Floyd's petition should be denied.

A. The Alabama Supreme Court Followed this Court's Instructions on Remand and Correctly Reconsidered the Facts of this Case in Light of this Court's Decision in *Foster v. Chatam.*

Floyd urges this court to grant certiorari review in this matter, asserting that the Alabama Supreme Court (hereinafter "ASC") "ignored" this Court's decision in *Foster v. Chatman*, 136 S. Ct. 1737 (May 23, 2016). In plain fact, it did not. Instead, the ASC "asked the parties to file supplemental briefs" addressing the applicability of *Foster*, considered the briefs, this Court's opinion in *Foster*, and concluded that *Foster* did not require any change in their prior judgment. *Ex parte Floyd*, No. 1130527, 2016 WL 6819656, *10 (Ala. Nov. 18, 2016) ("*Floyd III*"). An examination of the particular facts and circumstances of the two cases readily shows that the ASC's determination was correct.

As Justices Thomas and Alito have recognized, "*Foster* did not change the *Batson* analysis one iota," the issue in *Batson* is a pure issue of fact, and "*Foster* did not change or clarify the *Batson* rule in any way." *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157–59 (2016) (Alito, J., dissenting) (applying the same reasoning to *Floyd*). Because *Foster* did not change the *Batson* analysis, the question is whether this Court's application of the *Batson* analysis to the particular facts in *Foster* compels a different conclusion about the present case. Because the two cases are factually distinguishable, it does not. Rather, this Court's analysis in *Foster* reinforces the correctness of the ASC's decision.

The first, and most striking, distinction between the two cases involves the objective, documentary evidence. This Court's decision in *Foster* turned on documents showing a pervasive "focus on race" that "plainly demonstrate[d] a concerted effort to keep black prospective jurors off the jury." *Foster*, 136 S. Ct. at 1742. *Batson* and its progeny have long forbid such efforts. Nonetheless, in *Foster*, the record included:

1. A note from the investigator assisting the prosecution that read, "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion.... Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors."

2. Two lists of jurors with Ns (for no) next to each qualified black juror's name, and a handwritten document titled "definite NO's," listing six names. **The first five were those of the five qualified black prospective jurors.**

3. A handwritten document titled "Church of Christ." A notation on the document read: "NO. No Black Church."

4. Highlighting each black juror in green and circling the race of each juror on their questionnaires.

Foster, 136 S. Ct. at 1744–45. Confronted with that documentary evidence, this Court found that the "sheer number of references to race in that file is arresting," and that they "plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner." *Id.* at 1755. Floyd hangs his argument on the bare facial similarity here: in both *Foster* and the present case black jurors are identified by race on a document.

It is understandable that Floyd doesn't elect to proceed past this facial similarity because doing so would cut the legs out from under his argument. In the present case, the prosecutor marked the race of black venire members in a single document: the State's strike list. C.R. 22-23. Floyd attempts to paint this single document as evidence of bias, but this is inconsistent with the record. At the *Batson* remand hearing, the trial judge reiterated his normal policy:

> Now, there is a practice by this Court that the State objects to, and has objected to for many years now, and that is where a *Batson* challenge is made this Court directs the State to give reasons for their strikes of generally African-Americans – it doesn't always have to be African-Americans, but generally African-Americans – even though a prima facie case is not always made by the defendant. The Court's rational[e] is that everybody is on notice that you are going to have to give your reasons,

> then we won't even get to situations like this, where we don't – well, let me back up. We don't get into situations where the State might strike an individual for racial reasons, because the State knows that I'm going to make them give their reasons, so you don't have that situation. But in this case – in this case, and this is how far *Batson* has come – in this case the Court of the Criminal Appeals says, well, you know, there was not a *Batson* challenge made, and really we are going to send this back for the State to give its reasons.

R.R. 6-7. As the prosecutor explained, being well-aware of the trial court's practice to impose a heightened *Batson* requirement on the State, he placed a "B" beside the names of each of the black jurors because: "[W]e know going into the striking phase that your practice is, on a *Batson* motion by the defense, that whether or not they have made a prima facie case or not, you require us to give our reasons at that time." R.R. 9, 57-58. Because of the trial court's heightened *Batson* protections, it would be of critical importance that the prosecution have ready its non-discriminatory reasons for striking black jurors. Also, unlike in *Foster*, this was not an after-the-fact justification raised for the first time in this Court. *Cf. Foster*, 136 S. Ct. at 1755. Instead, it was raised before the trial judge, who, being aware of his own practice, accepted it as credible. While there are certainly instances where marking the race of a juror might imply racial bias, this is not one of them.

Floyd's petition also inaccurately states that the prosecutor noted the race of the black venire members as part of his "initial gut reaction rating system." Pet. at 7, 21. While the "B" notations were made contemporaneously with the

prosecutor's "initial gut reaction rating system," they were not a part of that system and were not indicative of any attempt to weed out black venire members. R.R. 57-58. In this system, the prosecutor made marks next to venire members' names, such as "no" or a minus sign to designate undesirable jurors and "ok" or a plus sign next to more desirable jurors. *Id.* Floyd's assertion that there is "no meaningful distinction" between these notes and *Foster*'s "persistent focus on race" is refuted by the fact that black venire members (and members of all races) were rated both positively and negatively in the prosecutor's initial rating. C.R. 22-23.

These initial ratings and notations regarding race were made when the clerk asked the entire jury pool to stand and identify themselves. R.R. 58. Later the pool was split into two panels and one was dismissed, but this Court has made clear that "in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 136 S. Ct. at 1748; *quoting Snyder,* 552 U.S. 422, 478 (2008). Thus, this Court must consider whether the entire strike list bears out Floyd's allegation of racial animosity. It does not.

The portion of the strike list addressing the strike panel does not show any uniformity with regards to the treatment of black jurors. J.W. Bouier, a black man who was struck by the defense was a desirable juror in the prosecutor's eyes, receiving a "plus" and an "ok" on the strike list, as well as a "yes" notation on the

venire list. C.R. 22, 37; *cf. Foster*, 136 S. Ct. at 1755 ("An "N" appeared next to each of the black prospective jurors' names on the jury venire list."). Indeed, as the prosecutor said, Mr. Bouier was "considered to be an excellent juror for the State." R.R. 60. The prosecutor's notes regarding the second panel also clearly demonstrate that there was no persistent effort to rule out black venire members. The second panel was struck out by two large "Xs", but the prosecutor's notations are still clearly legible. C.R. 23. In that section of the list, eight jurors have "B" listed by their names. *Id.* Of these, only two names also bear a "no" notation. Significantly, one of these names (L. Jackson), marked as black, is the **only** name in that section to be marked with both a plus sign and an "ok" notation. *Id.* At bottom, the prosecutor's notes are wholly inconsistent with Floyd's claim of "targeting" of black jurors and are refute his contention that there was a "concerted effort to keep black prospective jurors off the jury."[6] *Foster*, 136 S. Ct. at 1742. Instead they show a prosecutor, concerned with *Batson* implications, vetting the venire in a race-neutral way. Nothing in these facts offends *Batson* or *Foster*, or otherwise warrants certiorari review.

A second distinguishing factor between the two cases is that, unlike in *Foster*, Floyd did not even bring a *Batson/J.E.B.* claim at voir dire. The trial court did not have an opportunity to contemporaneously question the prosecutor or to

[6] This conclusion is reinforced by the fact the State introduced the prosecutor's notes into evidence to substantiate the race-neutral reasons for his strikes. (C.R. 52.)

observe the "demeanor of the attorney who exercises the challenge." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (citations omitted). Instead, the trial court was faced with evaluating on remand "a Batson challenge that was never made." R.R. 5. To rely on supposition and speculation now, as Floyd does, to invalidate the prosecution's race-neutral reasons for striking the jury it did would serve only to encourage sandbagging by defendants in the future.

Moreover, the trial court *did* have the opportunity to evaluate the demeanor and credibility of the prosecutor when the case was eventually remanded for a *Batson* hearing. "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 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n.21." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). "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." *Id.* "As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lie 'peculiarly within a trial judge's province.'" *Id.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038 (1984)). Given the fact-bound nature of Floyd's petition and the lack of

other compelling reasons for granting certiorari, this Court should not accept Floyd's invitation to second-guess the credibility findings of the trial court.

B. The State Provided Valid Race-Neutral Reasons for Striking Inez Culver, and the Alabama Supreme Court Correctly Held That No Purposeful Discrimination Occurred.

The remainder of Floyd's petition focuses on a reiteration of his, after-the-fact, *Batson* claim regarding the prosecutor's exercise of a peremptory challenge to remove prospective juror Inez Culver from the venire. His argument concerning this claim is meritless.

The prosecutor stated that he removed Culver because he did not know much about her—she had been omitted from the State's information list and she did not respond to any questions during voir dire. R.R. at 67-68, 75. Floyd acknowledges that Ms. Culver never gave any individual answers (or spoke at all) during voir dire. Pet. at 10-11. However, he counters with a strained argument that Ms. Culver "responded to more than a dozen questions" and that she did so "by not raising her hand." Pet. at 10, 23. However, this argument ignores the fact that these passive "answers" effectively provided no useful information to the prosecutor as they did not differentiate Ms. Culver from the remaining jurors in any way. In addition, Floyd argues that the prosecutor engaged in disparate treatment because he did not strike Ance Barr, a white man, who also did not answer any questions during voir dire. *Id.*

The Alabama Supreme 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," could not conclude from the record that the trial court's decision was clearly erroneous. Pet. App. D at 21. While the prosecutor knew little about Culver, he did know that Ance Barr had not served previously on a jury and that Barr did not have a criminal history. *Id.* at 21-22. The Court thus held that "[u]nder the facts of this case, these known facts about [Barr] negate the evidence of any disparate treatment of [Culver] and [Barr]." The court concluded that:

> 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 [Culver], 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.

Id. at 22-23.

Floyd argues that the Alabama Supreme Court erroneously accepted the prosecutor's reason concerning Culver at face value, and that this violates the precept stated in *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005), that requires a prosecutor to ask follow-up questions about areas of alleged concern or where gaps of information should be filled by additional questions. Pet. at 19. But the

facts of *Dretke* demonstrate that it is inapplicable here. In *Dretke*, a black veniremember "expressed unwavering support for the death penalty", 545 U.S. at 242, but the prosecutor mischaracterized another of the veniremember's statements to mean that he would not vote for death if the defendant could be rehabilitated, *id.* at 244. In ruling that the prosecutor violated *Batson*, the *Dretke* Court held that, in light of the veniremember's "outspoken support for the death penalty," the prosecutor had a duty to ask further questions to clear up any misunderstanding concerning the veniremember's views on the death penalty. *Id.* Here, the prosecutor had no misunderstanding to clear up because Culver did not answer any questions, and thus, *Dretke* is not on point.

Floyd fares no better by citing *Snyder v. Louisiana*, 522 U.S. 472, 483 (2008), for the proposition that the prosecutor's reasons for removing blacks are implausible if his explanations for strikes concerning blacks are countered with white jurors who had similarities but were not removed. Pet. at 21. In *Snyder*, the prosecutor struck an African-American college student because his teaching obligations would conflict with the trial—even after a dean at the college said that the student's obligation could be made up later in the semester. 522 U.S. at 480-82. The *Snyder* Court held that the prosecutor's reasons for removing the student was implausible because, among other reasons, there were several whites who expressed conflicting obligations, but the prosecutor did not strike them; rather, he

asked them questions in an effort to minimize the pressing nature of their obligations. *Id.* at 483-84. The Court held that "[t]he prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." *Id.* at 485. By contrast, the situation in Floyd's case does not demonstrate any discriminatory intent because the prosecutor did not know whether Culver had prior jury service or a criminal history because her name was cutoff the State's list of veniremembers. Furthermore, there is no evidence that the prosecutor had the same information on the black and white jurors but struck the former while not striking the latter. Nor has Floyd offered any support for his claim that a lack of information on a juror is not a race-neutral reason to exercise a peremptory strike. Pet. at 23.[7] Floyd has failed to show that the Alabama Supreme Court's ruling of no purposeful discrimination in light of the totality of the evidence violates *Batson* and its progeny.

C. The Prosecutor Provided Race and Gender-Neutral Reasons for Striking the Additional Female and Black Veniremembers Referenced in Floyd's Petition.

Floyd argues the record does not support the state court's determinations that the prosecutor offered race-neutral reasons for the strikes of Teena Allen (a white female) and Lillie Curry (a black female). However, the record supports the

[7] That this Court has not yet **recognized** lack of information about a juror as being race-neutral is not same as it not **being** race-neutral. Notably, Floyd fails to explain why it is not or to explain why ignorance cannot be "a reason itself." Pet. at 23. The State struck venire member S.B., a white female, because she also did not actively respond to questions. C.R. 22, 38; R.R. 73-74. "Better the devil you know than the devil you don't know" is an axiom for a reason.

trial court's decision, affirmed on appeal by the state appellate courts, that all of the prosecutor's reasons offered for exercising peremptory strikes on the above-referenced veniremembers were race and gender-neutral. This Court should deny Floyd's petition.

1. Lillie Curry

Floyd argues that the state courts erred in finding that two of the reasons the prosecutor offered for striking Lillie Curry were race-neutral: Curry had a religious conviction against sitting in judgment of another person, and she knew the State's expert pathologist, who was testifying concerning the autopsy's findings. Pet. at 22-23. Floyd does not challenge the validity of the prosecutor's third race-neutral reason, which was that she knew defense counsel and the prosecutor "especially ... did not want her on the jury for that reason." R.R. 69-70.

Contrary to Floyd's argument, the record shows that the prosecutor asked whether any of the prospective jurors had a religious or moral conviction that would prohibit them from sitting in judgment of another person. R. at 274-75. The record does not show which jurors responded by raising their hands. *Id.* However, the prosecutor made a written notation on his strike list that Curry responded in the affirmative to this question. R.R. at 71-72. The trial court was satisfied with the prosecutor's explanation, C.R. 2, 31, 36, and Floyd has not shown that the trial court's fact-finding was incorrect. In conclusion, the

prosecutor's reasons for striking Curry were race-neutral and her removal does not violate *Batson* and its progeny.

2. Teena Allen

Ms. Allen was struck because of her age. As the Alabama Supreme Court correctly recognized, prospective juror's age is a valid race and gender-neutral reason for exercising a peremptory strike. *Floyd III*, 2016 WL 6819656, at *4. The record shows that the prosecutor stated at the *Batson* hearing that he struck Allen "basically on the age part." R.R. 74. The prosecutor went on to explain what he meant by "the age part," stating the following:

> So I had, in the course of striking the jury, saw the pattern that Mr. Brantley was developing in trying to get a jury of young white -- I thought just young whites basically on the jury. After I took care of those strikes that we had convictions on or that we had information on, that I've already talked about, that would be bad for us, then I started trying to strike those in that age group that I saw the pattern that Mr. Brantley was trying to leave on the jury.

R.R. 75-76. The record supports the prosecutor's explanation.[8] It shows that the prosecution began striking prospective jurors within Floyd's general age range, starting with the prosecution's twelfth strike, which was Allen (white female, age 48). (C.R. 22.) After that, the prosecution's thirteenth strike was 70/K.D. (a white female, age 28); its fourteenth strike was juror no. 67 (a white male, age 36); its

[8] Floyd attacks the prosecutor's reason as pretextual because "defense counsel stated during the *Batson* hearing that he was trying to seat **male** jurors between the ages of 25 and 40." Pet. at 28. If any element in this case "reeks of afterthought" it is Floyd's suggestion that defense counsel's plan, which came out only on remand and which was unknown to the prosecutor when the jury was struck, can be a ground for finding pretext.

fifteenth strike was 35/S.B. (a white female, age 36); its sixteenth strike was juror no. 58 (a black female, age 58); and its seventeenth strike was juror no. 27 (a white male, age 54). *Id.* Of the five peremptory strikes exercised by the prosecutor after 5/T.M.A., two were used on men, and the prosecution's final strike was used on a man who was close in age to Allen. Hence, the record does not support Floyd's disparate treatment argument.

The Alabama Supreme Court held that "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." Pet. App. D at 26. After properly considering whether this Court's opinion in *Foster* had any implications for the present case, that court correctly held that the Court of Criminal Appeals did not err in affirming the trial court's finding that no *Batson* violation occurred in the selection of the jury.

CONCLUSION

For the foregoing reasons, this Court should deny Floyd's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of July, 2017, I did hereby serve a copy of the foregoing on the attorney for the Petitioner by electronic mail addressed as follows:

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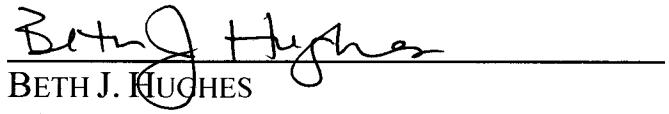

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