No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

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

BRYAN A. STEVENSON
RANDALL S. SUSSKIND
Counsel of Record
CLAUDIA B. FLORES
Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
rsusskind@eji.org
(334) 269-1803

Counsel for Petitioner

May 22, 2017

CAPITAL CASE

QUESTION PRESENTED

Petitioner Christopher Floyd was tried by an all-white jury in Houston County, Alabama, where African-Americans comprise twenty-six percent of the population, and sentenced to death. 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. Reasons the prosecutor gave for striking African-American and female jurors on the venire were contradicted by the record.

After this Court granted, vacated, and remanded Mr. Floyd's case in light of Foster v. Chatman, 578 U.S. — , 136 S. Ct. 1737 (May 23, 2016), the Alabama Supreme Court essentially reinstated its previous opinion, giving rise to the following question:

> Where the Alabama Supreme Court failed to apply the reasoning and analysis mandated by this Court's decision in Foster v. Chatman, should this Court intervene to enforce its precedents following Batson v. Kentucky, which prohibit discrimination in jury selection on the basis of race or gender?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

STATUTES

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

CHRISTOPHER FLOYD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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.)[1] 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.

---

[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_."

Floyd v State, 190 So. 3d 987, 998 (Ala. Crim. App. 2012). (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 II, 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.)

On June 20, 2016, this Court granted certiorari, vacated Mr. Floyd's conviction, and remanded the case to the Alabama Supreme Court for further consideration in light of Foster v. Chatman, 578 U.S. – , 136 S. Ct. 1737 (2016). Floyd v. Alabama, 136 S. Ct. 2484 (Jun. 20, 2016). On remand, the Alabama Supreme Court once again denied Mr. Floyd's Batson and J.E.B. claims and affirmed Mr. Floyd's conviction. Ex Parte Floyd III, No. 1130527, 2016 WL 6819656, at *11 (Ala. Nov. 18, 2016). (Attached as Exhibit E). Rehearing was denied and a certificate of judgment was issued on January 20, 2017. (Attached as Exhibit F).

JURISDICTION

The date on which the Alabama Supreme Court denied Mr. Floyd's appeal was November 18, 2016. Ex Parte Floyd, No. 1130527, 2016 WL 6819656 (Ala. Nov. 18, 2016). His application for rehearing was overruled on January 20, 2017. On April 7, 2017, Justice Thomas extended the time to file this petition for a writ of certiorari

until May 22, 2017. Floyd v. Alabama, No. 16A949 (U.S. Apr. 7, 2017). 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.) 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 the crime.

Mr. Floyd's capital murder trial commenced in Houston County November 15, 2005. In a county where African-Americans constitute twenty-six 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 with peremptory strikes from the jury.[2] The prosecutor also used twelve of his eighteen strikes to remove women.

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

[2] Counsel for the defendant excluded one African-American veniremember. (C.R. 18.)

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 eighteen 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 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.") 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.)

At that hearing, the prosecutor attempted to justify his strikes of 10 of 11 African-Americans from the venire, asserting that he had "a reason specific for each person that was struck." (R.R. 10.) The prosecutor explained that he 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 had followed for more than thirty years. (R.R. 58.) After explaining that five African-Americans were struck because of misdemeanors, felony convictions, or traffic tickets, the prosecutor gave various reasons for its strikes of the remaining African-American veniremembers that he removed. (R.R. 66-73.) Specifically, with respect to Inez Culver, the prosecutor said that she was not on the background check list compiled by the State containing criminal records and prior jury service information on all veniremembers, and that "she failed to respond to any question." (R.R. 67-68.) He asserted that he struck Lillie Curry because she knew the attorneys and was too familiar with everyone on the case. (R.R. 69-70.) Later, he added that she had religious beliefs against sitting in judgment of another. (R.R. 71-72.)

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 "presented race and gender neutral reasons for its strikes with the exception of" the strikes of Inez Culver, an African-American female, and Teena Allen, implying that the prosecutor's stated reasons for striking those jurors were inadequate. (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 concluded "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 reasons for the strikes of Ms. Culver and Ms. Allen. The appeals court determined that Ms. Culver was struck because she did not respond to any questions during voir dire, and that the prosecutor 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. Accordingly, 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 did not attempt to justify its strikes. However, in its order on second return to remand, the trial court changed its finding with respect to the most critical issue in the case. Instead of finding that the prosecution **did not** provide adequate reasons for the strikes of Ms. Culver and Ms. Allen, as it 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 adequate 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 of 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 now 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.

The record also contradicts the State's assertion that it knew nothing about Ms. Culver because she was left off a list containing information about jury service and criminal history. (R.R. 75.) Several other jurors were also left off the list, and the prosecutor was able to use alternative methods to determine whether they had criminal histories or had previously served on a jury.

As to the strike of Ms. Allen, the trial court in its order on the 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 prosecutor claimed that he was attempting to respond to defense counsel's strategy of selecting "young whites" for the jury, (R.R. 75),but 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 woman, (R.R. 67), a 36-year-old woman (R.R. 83), and a 28-year-old woman. (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.)

The State also failed to adequately explain why it struck, Lillie Curry, a black female juror. The prosecutor first claimed he struck Ms. Curry because she was "too familiar with everybody involved in the case," and later said he struck her because she had a "religious conviction" against serving on a jury. (R.R. 69-71.) There was no evidence in the record that Ms. Curry ever expressed a religious conviction; to the contrary, the record indicates that she answered in the negative when the court asked that question. (R. 209.)

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 II, No. 1130527,

2015 WL 3448098 (Ala. May 29, 2015) (modified on denial of reh'g, Aug. 21, 2015). On June 20, 2016, this Court granted certiorari, vacated Mr. Floyd's conviction, and remanded the case to the Alabama Supreme Court for further consideration in light of Foster v. Chatman, 578 U.S. – , 136 S. Ct. 1737 (2016). Floyd v. Alabama, 136 S. Ct. 2484 (Jun. 20, 2016).

On remand, the Alabama Supreme Court acknowledged the contradiction between the State's purported reasons for its strikes and the evidence in the record, but determined that, "it is understandable in this case that the record is not as clear because the prosecutor's reasons were provided several years after Floyd's jury was selected." Ex parte Floyd III, No. 1130527, 2016 WL 6819656, at *10 (Ala. Nov. 18, 2016). It noted that any "misrepresentations may be due to a lack of recollection as opposed to pretext and sham." Id. The court thus neglected to review the record to determine whether the prosecutor's reasons for striking the black and female jurors were credible, and concluded that the prosecutor's practice of marking African-American jurors on the strike list did not evidence discrimination. Id. at *11. Although the Alabama Supreme Court's findings directly conflict with this Court's holding in Foster, the court once again denied Mr. Floyd's Batson and J.E.B. claims and affirmed his conviction. Id. Two judges on the court recused themselves from consideration of the case and two other judges dissented without opinion. Id.

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.[3] Not a single African American served on Mr. Floyd's jury, in a county that is twenty-six percent African American.[4] As in Miller-El v. Dretke, "the numbers describing the prosecution's use of peremptories are remarkable." 545 U.S. 231, 240 (2005) (where the prosecutor struck ten out of eleven, or 91% of potential black jurors and only one served). As this Court has observed, "[h]appenstance is unlikely to produce this disparity." Id. at 241. Such a "remarkable" disparity, combined with disparate treatment of black panelists who were struck when compared to white panelists who were allowed to serve, is "evidence tending to prove purposeful discrimination." Id. This Court reaffirmed that holding in Foster v. Chatman, 578 U.S. – , 136 S. Ct. 1737, 1754 (2016), where – as in Mr. Floyd's case – every black juror

[3] 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.)

[4] 2010 Census Interactive Population Search, Houston County, Alabama, available at https://www.census.gov/2010census/popmap/ipmtext.php?fl=01.

whose race was pre-marked by the prosecutor was excluded from the jury. Further, the Houston County District Attorneys' office has a demonstrated history of discriminating against potential black jury members in criminal cases.[5] See Miller-El v. Dretke, 545 U.S. 231, 266 (2005) ("If anything more is needed for an undeniable explanation of what was going on, history supplies it.").

The trial court judge – whose comments that revealed contempt for the Batson and J.E.B. decisions – 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

[5] Alabama courts have reversed seven criminal convictions wrongfully obtained by this office after finding that the prosecutor illegally excluded jurors on the basis of race in violation of federal law. 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.

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, as in Foster, 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 his subsequent reliance on those "B" labels as part 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 put 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 found in Foster before remanding Mr. Floyd's case, a "focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." 136 S. Ct. at 1755. Yet, the Alabama Supreme Court dismissed the labeling as evidence of discrimination, accepting the State's argument on appeal that the list was "so marked in light of the trial court's heightened concern that the parties comply with Batson." Ex parte Floyd III, No. 1130527, 2016 WL 6819656, at *11 (Ala. Nov. 18, 2016). This Court rejected that same argument, made on appeal in Foster, as an "afterthought." 136 S. Ct. at 1755. Similarly, the Alabama court's analysis completely ignored the fact that this District Attorney's office has a long history of illegally excluding black veniremembers in a racially biased manner.

In addition to this demonstration of race-consciousness, the State's purported reasons for striking several black and female jurors were inconsistent with the record and incredible. As in Foster, the prosecutor in this case repeatedly misrepresented the record, engaged in disparate treatment of black and white and male and female jurors, and offered shifting explanations for his strikes. 136 S. Ct. at 1754. After two Batson remands to the trial court, and a remand from this Court to reconsider Mr. Floyd's

case in light of Foster, the Alabama Supreme Court refused to review the record in this case and analyze whether the State's purportedly race-neutral reasons for striking Inez Culver, Lillie Curry, and Teena Allen were supported by the facts in the record. On remand from this Court, the Alabama Supreme Court failed to address Mr. Floyd's claims with respect to those jurors at all, attributing any "misrepresentations" to a "lack of recollection." Ex parte Floyd III, 2016 WL 6819656, at *10. In Powell v. Texas, 492 U.S. 680, 682 (1989) (per curiam), this Court granted certiorari and reversed the lower court's opinion where that court failed to properly apply an intervening decision from this Court and reinstated its earlier decision, "[d]espite the close similarity between the facts of this case and those at issue in Smith," after this Court had granted, vacated and remanded the case for further consideration in light of that intervening decision. See also Wellons v. Hall, 558 U.S. 220, 226 (2010) (observing in context of issuing GVR order that lower courts "would or should [not] respond to our remand order with a 'summary reissuance' of essentially the same opinion"). The Alabama Supreme Court similarly ignored the similarity between Mr. Floyd's case and Foster v. Chatham and essentially reinstated its earlier opinion, despite this Court's remand.

"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). In denying Mr. Floyd's Batson claim, the Alabama Supreme Court overlooked numerous examples of explicit reliance on race by the prosecution, and failed to consider "all relevant circumstances" when reviewing Mr. Floyd's claim. Batson, 476 U.S. at 96. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." Foster, 136 S. Ct. at 1748 (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977)).

The Alabama Supreme Court disregarded the Court's mandate in this case to reconsider its holding in light of Foster v. Chatman; these circumstances warrant this Court's intervention in Mr. Floyd's unlawful capital murder conviction and death sentence.

I. THE ALABAMA SUPREME COURT HAS FAILED TO IMPLEMENT THIS COURT'S PRECEDENTS BARRING DISCRIMINATION ON THE BASIS OF RACE OR GENDER IN JURY SELECTION, REQUIRING AN INTERVENTION BY THIS COURT.

Despite this Court's mandate that the Alabama Supreme Court reconsider its previous decision in Mr. Floyd's case in light of Foster v. Chatman, 578 U.S. – , 136 S. Ct. 1737 (2016), the lower court refused to conduct a searching review of the record and affirmed Mr. Floyd's conviction. Under Batson v. Kentucky, where a

prima facie case has been established, the burden shifts to the state to present clear reasons for the exclusion of jurors that rebut the evidence of racial or gender discrimination. 476 U.S. 79, 97 (1986). Here, the Alabama Supreme Court failed to require such evidence, but instead allowed an inadequate rebuttal due to the passage of time, in clear violation of this Court's precedents. Rather than analyzing Mr. Floyd's claims that the prosecutor repeatedly misrepresented the record, engaged in disparate treatment of black and white and male and female jurors, and offered shifting explanations for his strikes, the court simply concluded that the trial court's finding was not "clearly erroneous." Ex parte Floyd III, No. 1130527, 2016 WL 6819656, at *11 (Ala. Nov. 18, 2016).

A. The Lower Court's Determination That the Prosecutor's Notations About Race Did Not Evidence Discriminatory Intent Ignores Foster v. Chatman and Must Be Addressed By This Court.

Despite this Court's remand, the Alabama Supreme Court disregarded the similarities between Mr. Floyd's case and Foster v. Chatman, 578 U.S. – , 136 S. Ct. 1737 (2016), with respect to the inordinate focus on race in the prosecutor's notes. See 136 S. Ct. at 1755 ("focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury"); see also 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."). While the court below acknowledged that "the prosecutors in

both cases used a list of potential jurors that was marked to indicate the prospective juror's race," Ex parte Floyd III, 2016 WL 6819656, at *11, it failed to recognize that, in both cases, the State struck every single black juror it had marked ahead of time. In Mr. Floyd's case, the prosecutor excluded every black juror marked with a "B" on the list he used to strike the jury. (C.R. 22-23.)[6] In Foster, the prosecutor struck all four black veniremembers remaining after excusals and for-cause challenges – all of whom had been pre-marked by the letter "B." 136 S. Ct. at 1743-44.

There is no meaningful distinction between the "persistent focus on race in the prosecutor's file" in Foster, 136 S. Ct. at 1754, and the "gut reaction rating system" used in Mr. Floyd's case (R.R. 58.). Yet, the Alabama Supreme Court credited the prosecutor's explanation that "the list was marked to indicate race . . . in light of the trial court's heightened concern that the parties comply with Batson." Ex parte Floyd III, 2016 WL 6819656, at *11. Neither the trial court nor the prosecutor mentioned the court's practice of requiring the State to provide race-neutral reasons for striking each black juror as a potential reason for marking those jurors with a "B," indicating that this reason was contrived on appeal. Like many of the State's other justifications for its discriminatory treatment of black and female prospective jurors, this

[6] Tellingly, the only black juror whose name was not marked with a "B" was Jan Bouier, the only one of the 11 qualified black jurors on the venire whom the State did not strike. (C.R. 22.)

explanation "reeks of afterthought." Foster, 136 S. Ct. at 1754 (quoting Miller–El v. Dretke, 545 U.S. 231, 246 (2005)). As in Foster, the argument that the prosecutor in this case wanted to "be prepared" in order to "defend against any suggestion that decisions regarding [his] selections were pretextual" "falls flat." 136 S. Ct. at 1755. As in Foster, the prosecutor here never made this argument before the trial court – instead, he explained the "B" notations as part of his "gut reaction rating system," which he had used "for over 30 years." (R.R. 58.) A system used by an individual prosecutor for over 30 years likely has nothing to do with the practice of the particular judge presiding over the case. The lower court's decision either misapprehends or disregards Foster's rejection of the very same argument the State presented in Mr. Floyd's case.

B. 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 Contradicts Foster v. Chatman.

The Houston County District Attorney failed to provide **any** valid 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. On the first remand in this case, the trial judge found that the prosecutor could not provide an adequate race-neutral reason for his strike, but surmised 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 neutral reasons for this strike. Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. Sept. 28, 2012). On the second remand, 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 his assertion that there was a lack of information about Ms. Culver 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 peremptory strike.

In Foster, the prosecutor mischaracterized the questioning of the two black jurors at issue, claiming that they had never been questioned about certain topics, when in fact they had. 136 S. Ct. at 1750, 1754. The prosecutor in this case similarly claimed that Inez Culver "failed to respond to any question," (R.R. 68), but, as discussed above, the record makes clear that the District Attorney's assertion is simply not true, and that Ms. Culver, in fact, responded to more than a dozen questions during voir dire. (e.g. R. 307-08, 310-11, 315-17, 322, 333.) Notably, any **affirmative** answers to the questions asked – such as the inquiries about discomfort with the death penalty or discrimination by the prosecutor's office (R. 310, 322) – would likely have indicated that Ms. Culver was an undesirable juror for the State.

From the voir dire, the prosecution had no reason to believe that Ms. Culver

was any different from Ance Barr – the white male juror who also answered all the questions asked during voir dire in the negative – neither had known criminal histories or prior experience serving on a jury in a criminal case. The Alabama Supreme Court held in its previous decision, however, that, because Mr. Barr appeared on the State's list,[7] "these known facts about [Mr. Barr] negate the evidence of any disparate treatment of [Ms. Culver] and [Mr. Barr.]" Ex Parte Floyd II, No. 1130527, 2015 WL 3448098, at *8 (Ala. Aug. 21, 2015). The State's claim that it "knew nothing about her" because Ms. Culver was left off the list, (R.R. 75), was a misrepresentation of the record. Ms. Culver was not the only qualified juror left off this list, yet she was the only one for whom the failure to appear on the list was a purported reason for a strike. The record shows that the prosecutor had other methods of gathering the information on the list, and that he in fact utilized those methods to determine whether the veniremembers had previously served on a jury and whether they had a criminal history – making the supposed reliance on the list a red herring.[8]

---

[7] 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 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.)

[8] The prosecution was able to obtain information on criminal history for several jurors that, like Ms. Culver, were left off the list. At the remand hearing, the prosecutor stated that he struck Pam Bigham because she had "32 NWNI convictions" and probation revocations for some of those convictions. (R.R. 64.) He said he struck

Before the prosecutor could claim that he lacked information on Ms. Culver, he should have attempted to obtain criminal background information on her, as he did for the other jurors left off the State's juror list, and for some of the white male jurors, whose names appeared on the list, but with no indication that a criminal history existed. (R.R. 64, 67, 72, 74.)[9] Indeed, the fact that the prosecutor went beyond the list to confirm criminal history for a number of jurors who did not appear to have a criminal history based on the list belies the lower court's conclusion that the list provided conclusive proof of Mr. Barr's lack of criminal history.

In Foster, this Court carefully reviewed the record and determined that the "explanations given by the prosecution, while not explicitly contradicted by the record, are difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [the black juror] an unattractive juror." 136

Angela Crews because she had a theft of property conviction, "and she had NWNI's, which I don't think are on the sheet, but we knew that." (R.R. 67.) Because Ms. Bigham and Ms. Crews were left off the State's list, the prosecutor's assertions at the remand hearing indicate that he was able to obtain information on the potential jurors' criminal history from other sources, and that he had no reason for speculation regarding a possible criminal record for Ms. Culver.

[9] White jurors Glenn Dickerson and Charles Deason were struck because of prior prosecutions by the local DA's office and multiple traffic tickets, respectively, but those offenses did not appear on the State's supposedly crucial list. (R.R. 72, 74; C.R. 27). This fact indicates that the prosecutor had additional sources of criminal history information for all the veniremembers, and further contradicts his claim that he knew nothing about Ms. Culver's criminal history.

S. Ct. at 1750. This Court repeatedly refused to defer to the trial court or to credit the prosecutor's "facially reasonable justifications." 136 S. Ct. at 1751-55. In doing so, and in remanding this case to the Alabama Supreme Court for further consideration, it required that the lower court do the same where the State's reasons are implausible and there is evidence of disparate treatment. See id. at 1752-53 ("Credibility can be measured by, among other factors, . . . how reasonable, or how improbable, the State's explanations are.") (quoting Miller–El, 537 U.S. at 339). This type of disparate treatment provides strong evidence of discrimination, and the lower court's failure to consider it conflicts with this Court's past 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).

Given that Ms. Culver was directly asked about her criminal history and jury service during voir dire (R. 204-05, 354-57), and that the prosecutor made use of other methods for obtaining juror criminal history information besides the poorly copied list, there was simply no support in the record for the State's assertion that it

knew nothing about Ms. Culver with respect to those areas.[10]

By finding that Ms. Culver was nonresponsive and that the State knew nothing about her simply because she answered "no" to all or most of the voir dire questions and her name did not appear on one of the State's lists, the trial court made a finding that the record flatly contradicts and is inconsistent this Court's decision in Foster, 136 S. Ct. at 1749 (finding that while, "on their face," State's justifications for strikes "seem reasonable enough," an "independent examination of the record reveals that much of the reasoning . . . has no grounding in fact"). The Alabama Supreme Court relied on its previous decision in Mr. Floyd's case and refused to conduct the required independent review of the record required by this Court's directive in Foster, requiring this Court's intervention.

C. Additional Strikes of African-American and Female Jurors Demonstrate Bias in Jury Selection.

The lower court also failed to address that the State misrepresented the record with respect to other improperly excluded veniremembers, like Teena Allen and Lillie

---

[10] The Alabama Supreme Court also relied on the prosecutor's supposed "stated reluctance to seat a juror he did not believe was good for the State" in concluding that Ms. Culver was struck for race-neutral reasons. Ex Parte Floyd II, 2015 WL 3448098 at *9. However, the prosecutor never stated that he did not believe Ms. Culver was not "good for the State;" he instead insisted that he knew nothing about her. (R.R. 68, 75.) Indeed, the prosecutor did not even mark Ms. Culver with a minus as part of his initial "gut reaction" rating system, (C.R. 22; R.R. 57-58), so there was no indication anywhere in the record that, but for her race, the State believed Ms. Culver would have been a bad juror.

Curry. As in Foster, the court was "not faced with a single isolated misrepresentation," but with multiple "implausible and fantastic assertion[s]" that "can only be regarded as pretextual." 136 S. Ct. at 1751-52 (internal quotation marks omitted). With respect to Ms. Allen and the State's claim that it struck her because of her age, the Alabama Supreme Court's reinstatement of its previous decision misapprehends facts in the record and ignores evidence of disparate treatment, which required a more careful review of the record after this Court's remand in light of Foster. See 136 S. Ct. at 1750.

The prosecutor stated he struck Ms. Allen because he believed she was within the age range of jurors the defense was trying to seat, but actually, defense counsel stated during the Batson hearing that he was trying to seat **male** jurors between the ages or 25 and 40. (R.R. 15, 74) Ms. Allen was 48 – not particularly young or in the same age range as Mr. Floyd – and, while the prosecutor struck **women** for age-related reasons, he declined to strike two younger white males, Kelly Colbert, age 38, and Glenn Brackin, age 44. (C.R. 22, 38-39.)[11] As in Foster, the age rationale is "difficult to credit" where there is evidence of disparate treatment. 136 S. Ct. at 1750

[11] The prosecutor was able to provide reasons unrelated to age for his all his strikes of white males: Glenn Dickerson's family had been prosecuted several times by the DA's office (R.R. 72); Charles Deason had multiple traffic tickets (R.R. 74); and Donald Beasley had expressed concerns with imposing the death penalty and Mr. Floyd's age at the time of the offense. (R.R. 75.)

(where prosecutor claimed he was "looking for older jurors that would not easily identify with the defendant" but declined to strike several young white potential jurors).

In its first order, the trial court found that the prosecutor did not provide a gender-neutral reason for striking Teena Allen (C.R. 18.) In its second order, on the same record, the trial court determined that the prosecutor's proffered reason of "age" was a gender-neutral reason for this strike. (C.R.2 32-33.) The trial court's "shifting explanations" for the prosecutor's strikes of Ms. Allen and Inez Culver in its first and second orders indicate that the court's own observations and factual determinations cannot be credited and that, contrary to the lower court's finding, they were "clearly erroneous." See Foster, 136 S. Ct. at 1754; Ex Parte Floyd III, 2016 WL 6819656, at *11. Given the trial court's failure to find any gender-neutral reason connected to the facts of this case for the prosecutor's strike of Ms. Allen, the lower court's decision upholding this strike constitutes a clear violation of this Court's precedent. J.E.B. v. Alabama, 511 U.S. 127 (1994) (prohibiting prosecutor's exercise of peremptory strikes based solely on gender).

With respect to Lillie Curry, the prosecutor claimed that he struck her from the jury because she was "too familiar with everybody involved in the case," and later said he struck her because she had a "religious conviction" against serving on a jury. (R.R. 69-71.) The first reason is implausible, where many potential jurors who were

not struck by State were familiar with the parties,[12] and the second reason – an apparent afterthought – is explicitly contradicted by the record.[13] Citing Smith v. State in its previous opinion, the lower court apparently credited the prosecutor's religion-related reason for striking Ms. Curry, even though it was flatly contradicted by both the voir dire record and the State's strike sheets. Ex Parte Floyd II, 2015 WL 3448098, at *10. (citing Smith, 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)). After this Court's remand, the lower court ignored that the ruling in Foster required this Court to reexamine the record and consider the prosecutor's shifting explanations and blatant misrepresentations of the record with respect to Ms. Curry. See Foster, 136 S. Ct. at 1752-53 (finding evidence of discrimination where prosecutor initially gave one reason for striking black potential juror, then later on stated that the most important factor behind his strike was the juror's religious

[12] Kelly Colbert, for example, knew the State's attorneys, like Ms. Curry (R. 265), and least one other juror who knew the defense attorneys was not struck by the State. (C.R. 22; R. 267.) The record also indicates that Ms. Curry had been married to a law enforcement officer and believed police officers to be more truthful than other witnesses (R. 350), suggesting that she would be a strong juror for the State.

[13] The record as a whole indicates that no one raised their hand in response to the court's question regarding religious convictions against sitting in judgment. (R. 274-75.) During the court's previous voir dire questions, such as whether anyone had a problem with circumstantial evidence, the court identified the jurors who responded in the affirmative and asked to speak to them privately. (R. 273.)

aversion to the death penalty, which was contradicted by the record).

The Alabama Supreme Court ignored this Court's mandate in Foster and refused to examine the prosecutor's reasons for striking Inez Culver, Teena Allen, and Lillie Curry. Like the trial court at Mr. Floyd's first Batson remand, the Alabama Supreme Court attributed the State's failure to provide race and gender-neutral reasons to "a lack of recollection." Ex parte Floyd III, 2016 WL 6819656, at *10. This was an impermissible basis for the trial court to rely on in denying Mr. Floyd's Batson and J.E.B. claims and it is an equally unacceptable rationale for the Alabama Supreme Court, especially in light of this Court's remand after 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 failure to review the record and reexamine Mr. Floyd's Batson and J.E.B. claims failed to comply with this Court's remand and its decision in Foster v. Chatman.

Respectfully submitted,

_____

BRYAN A. STEVENSON
RANDALL S. SUSSKIND
Counsel of Record
CLAUDIA B. FLORES
Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
rsusskind@eji.org
(334) 269-1803

May 22, 2017