No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

CARL HUMPHREY, WARDEN,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

STEPHEN B. BRIGHT
Counsel of Record
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
pmulvaney@schr.org

January 30, 2015

CAPITAL CASE

QUESTION PRESENTED

In this capital case involving a black defendant and a white victim, Georgia struck all four black prospective jurors and provided roughly a dozen "race-neutral" reasons for each of the four strikes. The prosecutor later argued that the jury should impose a death sentence to "deter other people out there in the projects." At the trial level and on direct appeal, Georgia's courts denied the defendant's claim of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

In habeas proceedings, the defendant obtained the prosecution's notes from jury selection, which were previously withheld. The notes reflect that the prosecution (1) marked the name of each black prospective juror in green highlighter on four different copies of the jury list; (2) circled the word "BLACK" next to the "Race" question on the juror questionnaires of five black prospective jurors; (3) identified three black prospective jurors as "B#1," "B#2," and "B#3"; (4) ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors;" and (5) created strike lists that contradict the "race-neutral" explanation provided by the prosecution for its strike of one of the black prospective jurors. The Georgia courts again declined to find a *Batson* violation.

The question presented is this:

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

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. The Georgia Courts Failed to Give Meaningful Consideration to "All Relevant Circumstances" as *Batson* Requires. 11

II. The Totality of the Evidence Establishes That the Prosecution Discriminated on the Basis of Race in Violation of *Batson*. 12

A. The Prosecution Struck One Hundred Percent of the Black Prospective Jurors Who Were Qualified to Serve. 12

B. The Prosecution Focused Heavily on Race in Its Preparation for Jury Selection. 13

C. The Prosecution's Purported Reasons for Striking the Four Qualified Black Prospective Jurors Are Belied by the Evidence. 13

1. Marilyn Garrett 14

2. Eddie Hood 17

3. Mary Turner 20

4. Evelyn Hardge 21

D. The Prosecutor's Closing Argument at the Penalty Phase Confirms His Discriminatory Intent. 22

CONCLUSION..... 22

CERTIFICATE OF SERVICE

APPENDIX

APPENDIX A	Order of the Supreme Court of Georgia denying Foster's application for a certificate of probable cause to appeal the denial of habeas relief
APPENDIX B	Order of the Superior Court of Butts County, Georgia, denying Foster habeas relief
APPENDIX C	Decision of the Supreme Court of Georgia affirming Foster's conviction and death sentence on direct appeal
APPENDIX D	Order of the Superior Court of Floyd County, Georgia, denying Foster's motion for new trial
APPENDIX E	Section of the transcript in which the Superior Court of Floyd County, Georgia, denied Foster's pretrial objection under *Batson v. Kentucky*, 476 U.S. 79 (1986)
APPENDIX F	Prosecution's notes and records from jury selection at Foster's trial, which were admitted at the habeas hearing

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79 (1986) ..... passim

Foster v. Georgia, 490 U.S. 1085 (1989) 4

Foster v. Georgia, 531 U.S. 890 (2000) 4

Foster v. State, 374 S.E.2d 188 (Ga. 1988) ..... passim

Foster v. State, 525 S.E.2d 78 (Ga. 2000) 4

Hernandez v. New York, 500 U.S. 352 (1991) 10

Miller-El v. Cockrell (Miller-El I), 537 U.S. 322 (2003) 10, 13

Miller-El v. Dretke (Miller-El II), 545 U.S. 231 (2005) ..... passim

Snyder v. Louisiana, 552 U.S. 472 (2008) 10, 12, 16

Swain v. Alabama, 380 U.S. 202 (1965) 12

Constitutional Provisions

U.S. Const. amend. VIII 2

U.S. Const. amend. XIV 2

Statutes

28 U.S.C. § 1257 1

PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy Tyrone Foster respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of Butts County, Georgia, denying his petition for a writ of habeas corpus in this death penalty case.

OPINIONS BELOW

The order of the Supreme Court of Georgia denying Foster's application for a certificate of probable cause to appeal from the denial of habeas relief is unreported and is attached as Appendix A. The order of the Superior Court of Butts County, Georgia, denying habeas relief is unreported and is attached as Appendix B. The decision of the Supreme Court of Georgia affirming Foster's conviction and death sentence on direct appeal, *Foster v. State*, 374 S.E.2d 188 (Ga. 1988), is attached as Appendix C. The order of the Superior Court of Floyd County, Georgia, denying Foster's motion for new trial is unreported and is attached as Appendix D. The section of the transcript in which the Superior Court of Floyd County, Georgia, denied Foster's pretrial objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), is attached as Appendix E. The prosecution's notes and records from jury selection, which were admitted at the habeas hearing, are attached as Appendix F.

JURISDICTION

The Supreme Court of Georgia denied Petitioner Foster's application for a certificate of probable cause to appeal the denial of habeas relief on November 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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

> No state shall . . . 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

Petitioner Timothy Tyrone Foster was a poor, black, intellectually compromised eighteen-year-old when he was charged in 1986 with murdering Queen White, an elderly white woman who worked as a school teacher before her retirement.

At Foster's trial in 1987, there were forty-two qualified prospective jurors. T. 1336-44.[1] Four of the forty-two—Marilyn Garrett, Eddie Hood, Mary Turner, and Evelyn Hardge—were black. The prosecution removed all four black prospective jurors by peremptory strike. T. 1337-43. Defense counsel objected pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), which prohibits the use of peremptory strikes on the basis of race. T. 1354. The trial court found a prima facie showing of

[1] "T. __" refers to the designated page of the reporter's transcript from Foster's trial. "R. __" refers to the designated page of the clerk's record from Foster's trial. "M.N.T. __" refers to the designated page of the reporter's transcript from Foster's motion for new trial hearing. "H. __" refers to the designated page of the transcript and exhibits from the habeas hearing.

race discrimination, so the burden shifted to the prosecution to provide race-neutral explanations for each of the four strikes. T. 1356; *see Batson*, 476 U.S. at 96-98 (explaining *Batson*'s three-step process). Relying on his team's notes, T. 1374, the prosecutor proffered a combined *forty* reasons for striking Garrett, Hood, Turner and Hardge, T. 1361-77. The defense countered that the prosecutor's reasons were pretextual, T. 1365-80, but the trial court overruled the *Batson* objection, T. 1380.[2] Foster was then tried before an all-white jury and convicted of murder. T. 2444.

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

After the trial, Foster filed a motion for post-judgment discovery, requesting that the trial court "impanel all notes and records regarding jury selection in the possession of the State," "conduct an in camera inspection of those notes and records," and preserve "the notes and records . . . for appellate review and/or post conviction . . . ." R. 495. The trial court denied the motion. R. 501-03.

In his motion for new trial, Foster reasserted his argument that the prosecution had violated *Batson*. R. 375, 382-98. The prosecution responded by repeating the explanations it proffered at trial and by adding additional

[2] The trial court actually overruled defense counsel's *Batson* objection with regard to all four black prospective jurors *before* the prosecutor provided his reasons for striking three of the four. T. 1366. After the trial court announced its ruling, the prosecutor requested permission to "perfect the record" by stating his reasons for striking the other three black prospective jurors. T. 1367. The trial court allowed further argument before overruling the objection again. T. 1377, 1380.

explanations, again relying on the prosecution team's notes. R. 424-45, 438. The trial court denied the motion for new trial. R. 563-76.

On direct appeal, the Georgia Supreme Court affirmed the trial court's ruling on the *Batson* issue. *See Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988). In doing so, the court acknowledged several of the prosecution's race-neutral explanations with respect to each black prospective juror and concluded that "[t]he trial court did not err by finding [the race-neutral explanations] to be sufficiently neutral and legitimate." *Id.* The court also affirmed the trial court's denial of Foster's discovery motion. *Id.* This Court denied certiorari. *Foster v. Georgia*, 490 U.S. 1085 (1989).

Foster filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, in 1989. The habeas court initially ordered further proceedings on the issue of intellectual disability, holding the remainder of the case in abeyance. A Floyd County jury found that Foster was not intellectually disabled in 1999, and the habeas case resumed the following year.[3]

In 2006, Foster gained access to the prosecution's jury selection notes from the 1987 trial through a request pursuant to Georgia's Open Records Act.[4] The notes include the following evidence, which Foster presented to the habeas court in support of a new *Batson* challenge:

---

[3] The Superior Court of Butts County sent the case to the Superior Court of Floyd County, where Foster's original trial was held, for a trial on the issue of intellectual disability. On March 18, 1999, a Floyd County jury determined that Foster was not intellectually disabled. The Georgia Supreme Court affirmed on appeal, *Foster v. State*, 525 S.E.2d 78 (Ga. 2000), and this Court denied certiorari, *Foster v. Georgia*, 531 U.S. 890 (2000). The case then returned to the Superior Court of Butts County for the continuation of the habeas proceedings.

[4] The District Attorney for the Rome Judicial Circuit who provided Mr. Foster with access the notes and records in 2006 was Leigh Patterson. H. 897. The District Attorney for the Rome Judicial Circuit who prosecuted Foster in 1987 was Steve Lanier. *See* R. 11.

First, the prosecution marked the name of each black prospective juror in green highlighter on four different copies of the jury list. H. 903-26.[5] Each of the four lists includes a key in the top-right corner of the first page indicating that "[Green highlighting] Represents Blacks." H. 903, 909, 915, 921.

State v Foster 86-F-2218-2
6/103

REPORT NO JUR100-01 FLOYD COUNTY SUPERIOR COURT SD NO: 53 PAGE 1
REPORT DATE: 01/21/87 TRAVERSE JURY APRIL 20, 1987
JUDGE: ROBERT G WALTHER JURORS REQUESTED: 130 TIME: 9:30 A.M.

001. DEMPSEY NEAL BARRY
129 BARRON RD NE
ROME GA 30161

002. HARPER BONNIE Oper. Desota Beauty Shop Note: She is Ronnie Duck's Great Aunt
3 PRIMULAS DR
ROME GA 30161

003. LANIER SARAH Elaine Clk. Belk's
711 LEE AVENUE
ROME GA 30161

004. RATLIFF WILEY KELVIN works at Revco pharmacist
4915 CALHOUN RD NE
ROME GA 30161

005. HACKETT MARY A husb. V. Pres. Valley Vend see attached sheet
3 MITCHELL CIR
ROME GA 30161

006. CECIL KIP ALAN WM
52 PINERIDGE DR
SILVER CREEK GA 30173

007. BEYSIEGEL MARY ELLEN Co. Dept. Family & Child. Services
4 NORTHWOOD DR
ROME GA 30161

008. CAGLE RICKEY Fireman City of Rome see attached sheet
3651 CAVE SPRING RD SW
ROME GA 30161

009. HOOD EDDIE Age 47 hlpr. Ga. Kraft see attached sheet
13 COPELAND ST
ROME GA 30161

010. NICHOLSON JOYCE M tchr. Elm St. Elem. Sch.
5 CONWAY PL
ROME GA 30161

011. MCGINNIS NONA ADLINE Retired
7 MCGINNIS DR SE
ROME GA 30161

012. CLEMENTS J TERRY
201 TURNER CHAPEL RD
ROME GA 30161

013. HOELZER MARGARET D husb. Pediatrist on Brd. st.
907 EAST 2ND AVE
ROME GA 30161

014. STANSELL MARY H husb. works for Power Co.
1928 L TEXAS VLY RD NW
ROME GA 30161

015. WILSON LOUISE B Age 68 Retired owns her home see attached sheet
1603 FLANNERY ST
ROME GA 30161

016. BARBOGELLO MAUREEN B husb. is Superv. Triplitt Sales Inc.
207 AUSBURN RD
ROME GA 30161

017. CARR ANNA W Retired
31 MAPLEWOOD SQ
ROME GA 30161

018. BING PATRICIA A OK
5452 FOSTER MILL RD SW
CAVE SPRINGS GA 30124

019. HINES CORRIE LEE B Age 65 Retired owns his home see attached sheet
121 CHAMBERS ST
ROME GA 30161

020. EVANS MYRTLE FRANCES
186 TURK MT RD NE
ARMUCHEE GA 30105

021. BLACK DOROTHY M
5117 ALA RD SW
ROME GA 30161

022. HARDGE EVELYN B Age 69 Retired he & her husb. own their home
334 WEST ROSS ST
ROME GA 30161

023. COULTAS ANNE B works for Security Berry College
482 OLD BELLS FERRY RD
ROME GA 30161

024. HOBGOOD LOU ELLA husband is officer w/ Ga. State Bank
28 PINE VALLEY RD
ROME GA 30161

025. DEDEURWAERDER VICTOR Retired owns his hom
28 WINGFIELD ST
ROME GA 30161

026. STANLEY RUBY BARNES
296 PAINTER RD NE
ROME GA 30161

027. HOUSE CHARLOTTE She is related to Mrs Hubbard: neighbor of Mrs White
333 FREEMAN FERRY RD husb. w/Ga. Power
ROME GA 30161

028. JOHNSON BOBBIE JEAN B Age 56
5 ROONEY RD
ROME GA 30161

H. 903.

[5] *See* H. 202 (the prosecution's investigator explaining that the four lists are "four different versions of the same document [with] different handwritten notations on them").

Second, the prosecution circled the word "BLACK" next to the "Race" question on the juror questionnaires of five black prospective jurors. H. 961, 967, 973, 979, 984.

JUROR NUMBER: 009

THE FOLLOWING LIST OF QUESTIONS HAVE BEEN PROPOUNDED BY THE COURT TO FACILITATE THE JURY SELECTION PROCESS. THE QUESTIONS ARE NOT INTENDED TO PRY INTO YOUR PRIVATE AFFAIRS NOR TO EMBARRASS YOU, BUT TO ASSURE ALL PARTIES THE BEST POSSIBLE JURY FOR THIS CASE.

NOTE: SHOULD YOU REQUIRE ADDITIONAL SPACE FOR YOUR ANSWERS, ATTACHED HERETO IS A BLANK SHEET OF PAPER FOR YOUR USE. PLEASE INDICATE THE QUESTION NUMBER IN WHICH YOU ARE ANSWERING. THERE IS NO NEED TO WRITE THE QUESTION IF YOU WILL INDICATE THE QUESTION NUMBER ONLY.

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

H. 979.

Third, the prosecution identified black prospective jurors Eddie Hood, Louise Wilson and Corrie Hines as "B#1," "B#2," and "B#3," respectively, in its notes.

B#1 Eddie Hood

B#2 — Batson issue Louise Wilson

B#3 Corrie Hines

H. 945-47.

Fourth, Clayton Lundy, the prosecution's investigator, ranked the black prospective jurors against each other in case "it comes down to having to pick one of the black jurors." H. 995. Lundy explained in a draft affidavit that he advised the prosecutor: "if we had to pick a black juror then I recommend that [Marilyn] Garrett be one of the jurors; with a big doubt still remaining." H. 995.[6]

MARILYN GARRETT

Ms. Garrett lives at 306 East 18th Street, which is a low to middle income range. She lives in a possible duplex apartment. Mrs. Garrett comes from a neighborhood called Morton Bend, a community near Coosa, Georgia. The community is possibly all related. Ms. Garrett works possibly two jobs. One job, is at Pepperell and the other is at Headstart. Ms. Garrett deals everyday with low income parents and children that live in the projects close to where Tim Foster ~~possibly~~ lived. I advised Mr. Lanier to Be very careful in picking Ms. Garrett for a juror in this case due to the case we have on Angela Garrett who lost a teaching and coaching job due to a ~~drug~~ cocaine arrest. violation. ~~If it comes down to having to pick one of the black~~ jurors, ~~Ms. Garrett, might be okay.~~ This is solely my opinion.

During jury selection I observed Ms. Garrett, that she was nervous and short with her answers. I was shocked when Ms. Garrett said that she was not familiar with the North Rome area when she worked in this area, possibly two to three blocks away from the area where Mrs. White was killed.

I still in my mind have to say no to Ms. Garrett, the relationship with Anglea Garrett whom we have warrants on for Violation of Georgia Controlled Substance Act.

~~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 Ms. Garrett be one of the jurors; with a big doubt still remaining.~~

H. 995. When the prosecution submitted Lundy's final affidavit to the trial court in response to the defense's *Batson* objection, the sentences referring to the race of Garrett and the other black prospective jurors had been deleted. *See* R. 556.

[6] The prosecutor stated expressly that he relied on Lundy's advice in striking Garrett. M.N.T. 41.

Fifth, the prosecution's strike lists contradict the "race-neutral" explanations proffered for the strikes of the black prospective jurors. For example, the prosecutor claimed that his team "had, in [its] jury notes, listed [Marilyn Garrett] as questionable," and only decided to strike her when Shirley Powell, the fifth black prospective juror, was removed for cause on the morning of jury selection. R. 438. But Garrett was identified as a "No" or "Definite No" on all four of the prosecution's strike lists. H. 939, 950, 951, 999.[7]

6 ~~086~~. N MARILYN H. GARRETT N

086 N Marilyn H. Garrett N BF

definite NO's

(1) HOOD

(2) HARDGE reser

(3) Powell

(4) Garrett

086 N Marilyn H. Garrett N BF

H. 939, 950, 951, 999.

[7] All four lists also include Powell, the prospective juror who was removed for cause shortly before the jury was struck, as a "No." H. 939, 949, 951, 998. Therefore, the prosecution clearly created the lists *before* Powell was removed for cause. The lists also identified other prospective jurors as "Questionable," H. 951, which further undermines the prosecutor's explanation regarding Garrett.

Having admitted those documents and other evidence, the state habeas court denied relief on December 9, 2013. On the *Batson* issue, the court concluded:

> The notes and records submitted by Petitioner fail to demonstrate purposeful discrimination on the basis that the race of prospective jurors was either circled, highlighted or otherwise noted on various lists. Furthermore, the State has offered evidence sufficient to rebut such a claim. The court finds that the State put forward multiple race-neutral reasons for striking each juror, and the Petitioner's claim of inherent discrimination is unfounded by the record. Importantly, this court notes that on direct appeal, trial counsel raised a claim that the trial court erred in finding that the prosecution provided race-neutral reasons for striking the four African-American jurors. The Georgia Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific. The Georgia Supreme Court held that the trial court did not err by finding these reasons to be sufficiently neutral and legitimate. *Foster v. State*, [374 S.E.2d 188, 191-92] (1988).
>
> Accordingly, the court finds the Petitioner's renewed *Batson* claim is without merit.

Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013).

Foster sought review in the Georgia Supreme Court by filing an application for a certificate of probable cause to appeal. The court denied the application on November 3, 2014. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

"[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). At Foster's trial, the prosecution struck all four black prospective jurors, and its notes reflect an

explicit reliance on race in the jury selection process. In light of the ensuing death sentence, these extraordinary circumstances warrant this Court's intervention.

In *Batson*, this Court established a three-step process for addressing claims of race discrimination in the use of peremptory strikes. The defendant first must make a prima facie showing of race discrimination in the prosecution's exercise of peremptory strikes. *See Batson*, 476 U.S. at 96-98; *see also Snyder v. Louisiana*, 552 U.S. 472, 476 (2008). If that showing has been made, the process moves to the second step, at which the prosecution must offer a race-neutral explanation for the strikes in question. *Id.* at 476-77. Finally, at step three, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 478.

Since the Georgia courts reached step three, the *Batson* analysis in this case hinges on whether Foster has established purposeful discrimination. The "decisive question" at the critical third step is "whether [the State's] race-neutral explanation[s] . . . should be believed." *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). In the consideration of that question, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478; *see Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 240 (2005) (requiring consideration of "all relevant circumstances"); *Batson*, 476 U.S. at 96 (same).

As explained below, the Georgia courts failed to give meaningful consideration to "all relevant circumstances" when reviewing Foster's *Batson* claim

in the state habeas proceedings. Consequently, they failed to recognize the race discrimination that defined the prosecution's jury selection process.

I. The Georgia Courts Failed to Give Meaningful Consideration to "All Relevant Circumstances" as *Batson* Requires.

In ruling that Foster failed to prove a *Batson* violation, the state habeas court deferred to the rulings of the original trial court, which overruled Foster's *Batson* objection, and the Georgia Supreme Court, which affirmed the trial court on direct appeal. Order at 16-17 (Butts Co. Sup. Ct. Dec. 9, 2013). However, neither of those courts had access to the prosecution's notes from jury selection, which demonstrate an explicit focus on race. By deferring to the prior rulings—which were based on a fraction of the evidence now available—the state habeas court necessarily failed to give full consideration to "all relevant circumstances" as required by *Batson*.

The state habeas court's cursory treatment of the prosecution's "race-neutral" reasons demonstrates the error in the court's analysis. The court stated: "The court finds that the State put forward multiple race-neutral reasons for striking each juror . . . . The Georgia Supreme Court affirmed the trial court's denial of this claim, finding that the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific." Order at 17 (Butts Co. Sup. Ct. Dec. 9, 2013). However, the ultimate question is not whether the prosecution's "race-neutral" reasons were related to the case and reasonably specific, but instead whether the stated reasons were the *actual reasons* for the strikes in light of all relevant

circumstances.[8] The state habeas court failed to consider the ways in which the prosecution's notes, which were unavailable to Foster at the time of the trial and direct appeal, undermine the credibility of the "race-neutral" reasons proffered for the strikes. As such, the court failed to give meaningful consideration to "all relevant circumstances."[9]

II. The Totality of the Evidence Establishes That the Prosecution Discriminated on the Basis of Race in Violation of *Batson*.

The evidence of race discrimination in this death penalty case, considered cumulatively, establishes a constitutional violation.

A. The Prosecution Struck One Hundred Percent of the Black Prospective Jurors Who Were Qualified to Serve.

The prosecution struck all four black prospective jurors qualified to serve on Foster's jury. T. 1337-43. It also planned to strike Shirley Powell, the fifth black prospective juror, H. 939, 949, 951, 998, but Powell was excused for cause on the morning of jury selection, T. 1329. The prosecution's one hundred percent strike rate for black prospective jurors stands in sharp contrast to its rate for the remainder of the venire. It struck just six of the thirty-eight nonblack prospective jurors—sixteen percent. T. 1336-44. "Happenstance is unlikely to produce this disparity." *Miller-El II*, 545 U.S. at 241.

---

[8] *See Miller-El II*, 545 U.S. at 240 ("If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965), which placed a "crippling burden of proof" on defendants challenging race discrimination in jury selection, *Batson*, 476 U.S. at 92]).

[9] This Court provided an example of the interconnectedness of relevant circumstances in *Snyder*: "Here, as just one example, if there were persisting doubts as to the outcome, a court would be required to consider the strike of Ms. Scott for the bearing it might have upon the strike of Mr. Brooks." *Id.* at 478.

B. The Prosecution Focused Heavily on Race in Its Preparation for Jury Selection.

At trial, the prosecution claimed that race was "not a factor" in its jury selection process. T. 1357. Its notes prove otherwise.

In its decisions in *Miller-El*, this Court found discriminatory intent in the prosecutors' use of peremptory strikes in part because the prosecutors "marked the race of each prospective juror on their juror cards." *Miller-El II*, 545 U.S. at 264. The Court explained that the markings on the juror cards supported "[t]he supposition that race was a factor." *Miller-El I*, 537 U.S. at 347.

Here, the prosecution highlighted four different copies of the jury list, H. 903-26, circled the word "BLACK" on multiple juror questionnaires, H. 961, 967, 973, 979, 984, referred to black prospective jurors as "B#1," "B#2," and "B#3," H. 945-47, and wrote the race and gender of every prospective juror on various other lists, H. 949-50, 998-99. Like the juror cards in *Miller-El*, those documents provide a clear indication of discriminatory intent.

C. The Prosecution's Purported Reasons for Striking the Four Qualified Black Prospective Jurors Are Belied by the Evidence.

The prosecution proffered forty reasons for its peremptory strikes of the four black prospective jurors at trial—and still more reasons in response to Foster's motion for new trial. T. 1361-76; M.N.T. 40-41; R. 424-25. The sheer quantity of reasons casts suspicion on the genuineness of each individual reason. In addition, the proffering of additional reasons after the trial is a red flag for discrimination. *See Miller-El II*, 545 U.S. at 252 (stating that a prosecutor must stand or fall on his

original reasons); *id.* at 246 (criticizing a subsequently proffered reason as "reek[ing] of afterthought"). When viewed in light of the prosecution's notes and the other available evidence, the dozens of proffered reasons are simply not believable. Each of the four strikes is addressed in turn.

1. Marilyn Garrett

In the trial court, the prosecution proffered twelve reasons for its strike of Marilyn Garrett—ten in response to Foster's original objection, T. 1374-76, and two more in response to Foster's motion for new trial, R. 425; M.N.T. 41. On direct appeal, the Georgia Supreme Court focused on two purported reasons: (1) Garrett worked with underprivileged children; and (2) Garrett responded inaccurately to the question of whether she knew anyone with a drug problem because her cousin had been arrested for drug possession. *Foster*, 374 S.E.2d at 192. Given what the prosecution's notes reveal about its jury selection process, neither of those reasons is convincing.

In preparation for jury selection, Clayton Lundy, the prosecution's investigator, offered the following advice to the prosecutors: "If it comes down to having to pick one of the black jurors, Ms. Garrett might be okay." H. 995. He also stated: "[I]f we had to pick a black juror I recommend that Ms. Garrett be one of the jurors; with a big doubt still remaining." H. 995. Those comments make clear that the prosecution's preferred outcome was to secure an all-white jury. Moreover, since the prosecutor expressly based the strike of Garrett on Lundy's advice, M.N.T. 41, the comments establish a discriminatory perspective with respect to the strike.

The prosecution's notes also reveal that the explanation proffered for the strike of Garrett was fabricated. The prosecutor represented to the trial court that he did not intend to strike Garrett and only decided to do so when Shirley Powell, another black prospective juror, was excused for cause. R. 438. But Garrett was listed as a "No" on all four of the prosecution's strike lists, which were made before Powell was excused. *See* H. 939, 950, 951, 999.

Significantly, the prosecution did not ask Garrett *any* questions about *any* of the twelve reasons it ultimately proffered for striking her. T. 952-53. "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246.

The first reason acknowledged by the Georgia Supreme Court, that Garrett worked "with low income, underprivileged children" through her job as a teacher's aide, *Foster*, 374 S.E.2d at 192,[10] is unpersuasive given the circumstances. Beyond the fact that the prosecution had focused on Garrett's race throughout its preparations, it accepted a teacher's aide and three public school teachers who were white.[11] "If a prosecutor's proffered reason for striking a black panelist applies just

---

[10] The Georgia Supreme Court erroneously referred to Garrett as a "social worker." *Foster*, 374 S.E.2d at 192. Garrett stated that she was a teacher's aide, not a social worker. T. 954 (voir dire); J.Q. 86 at *2 (questionnaire).

[11] The prosecution did not strike white prospective juror Martha Duncan, who, like Garrett, was employed as a "teacher's aide." J.Q. 88 at *2. Duncan served on Foster's jury. T. 1343-44. In addition, the prosecution chose not to strike white prospective jurors Joyce M. Nicholson, Patricia Larson Bing and Virginia Berry, all of whom were employed as teachers. J.Q. 10 at *2, (Nicholson); J.Q. 18 at *2, (Bing); J.Q. 114 at *2 (Berry). Nicholson and Bing served on the jury, T. 1337, while Berry was accepted as an alternate by the prosecution but struck by the defense, T. 1346-47.

as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." *Miller-El II*, 545 U.S. at 241.

The second reason, that Garrett responded inaccurately to the question of whether she knew anyone with a drug problem because her cousin had been arrested for drug possession, has no basis in the record. The prosecution did not ask Garrett whether she was in contact with her cousin, whether or what she knew about her cousin's arrest, or what she would consider to be a drug problem. Without any inquiry into those matters, there was no way of knowing whether Garrett's response was inaccurate. *See Snyder*, 552 U.S. at 479 (declining to accept a reason with no basis in the record). Also, the prosecutor did not even mention Garrett's cousin in response to the defense's original *Batson* objection. T. 1374-76. He first noted it in response to Foster's motion for new trial, M.N.T. 41; R. 425, which "reeks of afterthought," *Miller-El II*, 545 U.S. at 246.

The prosecution's additional reasons, which the Georgia Supreme Court did not acknowledge, are internally inconsistent. For example, the prosecution stated that he struck Garrett in part because she "didn't ask off [the jury] because of sequestration." T. 1375. But the same prosecutor said he struck Eddie Hood, another black prospective juror, because Hood "asked to be off the jury." T. 1362. The prosecutor also claimed he struck Garrett because she was too young, yet he accepted five white prospective jurors who were younger.[12]

---

[12] *Compare* J.Q. 86 at *1 (Garrett, age 34) *with* J.Q. 4 at *1, T. 1336 (Wiley Ratliff, 24); J.Q. 70 at *1, T. 1342 (Stephen Horner, 30); J.Q. 92 at *1, T. 1344 (Mark Floyd, 21); J.Q. 106 at *1, T. 1344 (Don Huffman, 20); J.Q. 115 at *1, T. 1347 (William Howell, 31).

2. Eddie Hood

In the trial court, the prosecution provided nine reasons for the strike of Eddie Hood. T. 1361-64. The Georgia Supreme Court acknowledged five of them: (1) Hood had a son who was the same age as Foster and had been convicted of theft; (2) Hood was married to a woman who worked at Northwest Regional Hospital, which houses mentally ill patients; (3) Hood appeared reluctant to say that he could vote for the death penalty; (4) Hood belonged to the Church of Christ; and (5) Hood's brother was a drug counselor. *Foster*, 374 S.E.2d at 192. None of the five reasons holds up as genuine in light of the evidence now available.

Before jury selection even began, the prosecution identified Hood as "B#1" in its notes. H. 945. In addition, the prosecution circled four answers that Hood provided on his juror questionnaire: his race ("BLACK"), his son's age, his wife's occupation, and his religious affiliation. H. 979-81. In later justifying its peremptory strike of Hood, the prosecution cited three of the four answers it had circled on Hood's questionnaire as reasons for striking him: his son's age, T. 1361, his wife's occupation, T. 1362, and his religious affiliation, T. 1363. The only answer that the prosecution circled but did not acknowledge as a reason for its strike was Hood's race. If the prosecution had not deemed Hood's race important, it would not have circled it on the questionnaire.

As with Garrett, the prosecution did not ask Hood *any* questions about *any* of the nine reasons it proffered in support of its peremptory strike. T. 274-78. Again, "[t]he State's failure to engage in any meaningful voir dire examination on a subject

the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246.

The first reason acknowledged by the Georgia Supreme Court was that Hood had a son Foster's age with a misdemeanor theft conviction. However, the prosecution never expressed any interest in the non-violent misdemeanors of prospective jurors' family members. Prior to trial, both the prosecution and the defense submitted proposed questionnaires to the trial court. Both proposed the question, "Do you have a close friend or relative who has been accused or convicted of a crime of violence?" R. 252 (the prosecution's proposed questionnaire), 256 (the defense's proposed questionnaire). Neither party proposed a question about non-violent misdemeanors. Nonetheless, the prosecution claimed it struck Hood because of his son's misdemeanor theft conviction. T. 1361-62. It did so even though it did not ask Hood any questions about his son's conviction during voir dire. T. 274-78.

Even apart from the misdemeanor issue, the prosecutor claimed concern over the fact that Hood's son was eighteen, the same age as Foster. T. 1361. But the prosecution accepted thirteen white prospective jurors with children between seventeen and twenty-three.[13]

The second reason acknowledged by the Georgia Supreme Court, that Hood's wife worked at Northwest Regional Hospital, is also unpersuasive. Hood's wife

---

[13] *See* J.Q. 31 at *3 (Bill Graves, son, 17); J.Q. 33 at *3 (James Cochoran, two sons, 21 and 24); J.Q. 46 at *3 (Claibore Leroy, son, 23); J.Q. 72 at *3 (Margaret Hibbert, son, 20); J.Q. 88 at *3 (Martha Duncan, son, 20, daughter, 23); J.Q. 117 at *3 (Robert Summers, son, 21, daughter, 20); J.Q. 122 at *3 (Orvil Talieaferro, two sons, 24 and 22); J.Q. 20 at *3 (Myrtle Evans, daughter, 18); J.Q. 44 at *3 (Donald Hall, daughter, 23); J.Q. 64 at *3 (Elbert Robertson, daughter, 20, son, 16); J.Q. 73 at *3 (Robert Milam, daughter, 23); J.Q. 99 at *3 (Hugh Hubbard, two daughters, 24 and 22); J.Q. 111 at *3 (Nancy Cadle, daughter, 20); T. 1336-47 (the prosecution accepting those jurors).

worked in food services, J.Q. 9 at *2, and the prosecution accepted Arlene Blackmon, a white prospective juror who had worked at Northwest Regional in the kitchen and in housekeeping, J.Q. 83 at *2.

The third reason, that Hood appeared reluctant to say he could vote for the death penalty, is not supported by the record. Hood stated initially that he would automatically vote for life in prison instead of death, T. 270, but it quickly became clear that he had misunderstood the question, T. 274. The totality of his responses reflects that he was no more reluctant to impose a death sentence than several white prospective jurors whom the prosecutor accepted.[14] The prosecution's purported reliance on Hood's church affiliation is also suspicious. No one asked Hood about his church's view of the death penalty. If asked, Hood would have said, "To my knowledge, my church does not take a stand against capital punishment." R. 420 (Hood's post-trial affidavit).

Finally, with regard to Hood's brother working as a drug counselor, Hood stated that his brother worked as a drug counselor "*with* the law enforcement." T. 279 (emphasis added). If anything, that should have made Hood more appealing to the prosecution, not less so.

---

[14] Initially, Hood answered affimatively when asked by the trial court whether he would "automatically vote to impose a life imprisonment sentence in a murder case." T. 270. After the court realized that Hood had misunderstood the question, it asked, "If the evidence warrants the death penalty, could you vote for the death penalty?" T. 274. Hood replied, "Yes. I could vote for the death penalty." T. 274. The voir dire examinations of Mark Floyd and Don Huffman went exactly the same way. Floyd and Huffman answered affirmatively when asked by the trial court if they would "automatically vote to impose a life imprisonment sentence in a murder case." T. 994, 1101. But it then became clear that they had misunderstood the question, and they both stated that they could vote for the death penalty if the evidence warranted it. T. 994, 1101. Another prospective juror, Mildred Hill, stated, "I am opposed to the death penalty." T. 1011. But then she was asked, "[W]hat did you mean by your answer before?" T. 1011. She replied, "I am for the death penalty." T. 1011.

3. Mary Turner

In the trial court, the prosecution provided fourteen reasons for its strike of Turner—twelve in response to Foster's original objection, T. 1369-72, and two more in response to Foster's motion for new trial, R. 425; M.N.T. 40. Of the fourteen purported reasons, the Georgia Supreme Court acknowledged two: (1) Turner stated that she was prosecution investigator Clayton Lundy's half-sister, but Lundy said she was not; (2) Turner stated on her questionnaire that she did not know anyone who had been convicted of a crime of violence, yet her brother-in-law had been convicted of burglary and drug offenses and her husband had been convicted of carrying a concealed weapon. *Foster*, 374 S.E.2d at 192.

The prosecutor relied on the advice of his investigator, Clayton Lundy, when striking Turner. *See* R. 570-71. Therefore, the strike must be evaluated in the context of Lundy's view of the jury selection process, which was that the ideal jury for Foster's trial would include only white people. *See* H. 995 ("If it comes down to having to pick one of the black jurors . . . .").

Both of the reasons noted above involved a supposed concern about Turner's "lack of candidness with the Court." R. 436. However, the prosecutors did not ask Turner about supposed inaccuracies in her statements, and they did not mention any concern about her lack of candor until it was time to justify their peremptory strikes. *See Miller-El II*, 545 U.S. at 246 (explaining that the State's failure to

question a prospective juror on an issue that becomes a reason for a strike indicates discriminatory intent).[15]

4. Evelyn Hardge

In the trial court, the prosecution provided ten reasons for its strike of Evelyn Hardge—nine in response to Foster's original objection, T. 1367-69, and one more in response to Foster's motion for new trial, R. 424. Foster conceded in his brief in support of his motion for new trial that "the prosecution had more reason to strike Evelyn Hardge than the other black prospective jurors." R. 387. This was likely because Hardge had spoken with Foster's mother outside the courtroom. T. 1367. However, the prosecution's notes, which were not available to Foster at trial, indicate that the prosecution was as racially motivated in striking Hardge as it was in striking Garrett, Hood and Turner. Lundy compared Hardge to the other black prospective jurors, H. 944, as he did with Garrett, H. 995.

Moreover, the prosecutor provided a litany of unconvincing reasons for striking Hardge. For example, he claimed he struck Hardge in part because she had a son who was twenty-three years old, which was too close to Foster's age. T.

[15] If the prosecution had asked Turner about the questions it believed she had answered incorrectly, she would have demonstrated that the prosecution's concerns were unfounded. As Turner explained in a post-trial affidavit: "I did not state that [my brother-in-law] had a record of a crime of violence because I did not interpret burglary convictions as crimes of violence." R. 400. Given that Turner did not consider burglary to be a violent crime, she likely would not have considered carrying a concealed weapon to be a violent crime either. As for her relationship with Lundy, Turner further explained the situation regarding her parents, one of whom was Clayton Lundy's father, in her affidavit in this habeas case. H. 767-68; *see also* H. 685 (Emma Gibson stating that Turner is her daughter and that William Lundy, Clayton Lundy's father, was Turner's father).

1367. But he accepted five white prospective jurors with sons between seventeen and twenty-three, and eight others with daughters in the same age range.[16]

D. The Prosecutor's Closing Argument at the Penalty Phase Confirms His Discriminatory Intent.

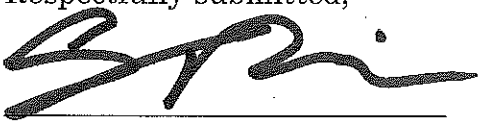
Having used his peremptory strikes to obtain an all-white jury, the prosecutor stated in his closing argument at the penalty phase: "We have got to believe that . . . if you send somebody to death, that you deter other people out there in the projects from doing the same again." T. 2505. Black families occupied more than ninety percent of the units in the local housing projects at the time of the trial. R. 551. The prosecutor's argument would have been far more precarious—and likely would not have been made—if the jury was racially diverse. In the context of *Batson*, the prosecutor's argument provides further support for a finding of race discrimination.

CONCLUSION

This Court should grant certiorari to review the important issue of race discrimination in this death penalty case.

[16] *See supra* note 13 (listing the thirteen white prospective jurors with children between seventeen and twenty-three).

Respectfully submitted,



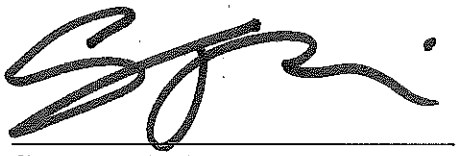
STEPHEN B. BRIGHT
Counsel of Record
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org
pmulvaney@schr.org

CERTIFICATE OF SERVICE

I, Stephen B. Bright, hereby declare that on January 30, 2015, I served this Petition for Writ of Certiorari, including the appendix, on the State of Georgia by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

Richard Tangum
Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334

Respectfully submitted,



STEPHEN B. BRIGHT
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
sbright@schr.org