No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

GREGORY HENDERSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

At Gregory Henderson's capital murder trial, the prosecutor used her first six peremptory strikes to eliminate African American veniremembers in alphabetical order by their last names (Fears, Hardge, Harris, Ross, Vinson, and Wimberly), removing six of eight black potential jurors. The prosecutor then returned to the beginning of the alphabet and used her next five strikes to remove white veniremembers in that same alphabetical order (Albin, Kilgore, Kromminga, Owens, and Padgett). Subsequently, the prosecutor used all three of her peremptory strikes for choosing alternate jurors to remove three African American veniremembers. All total, the prosecutor removed nine of thirteen qualified African American veniremembers. Only two African American jurors ultimately served on Mr. Henderson's jury.

The trial court declined to find a prima facie case of discrimination under Batson, and, on appeal, the Alabama Court of Criminal Appeals refused to consider the evidence in the record supporting the prosecutor's pattern of striking veniremembers alphabetically by race because the record did not also contain race-based lists created by the prosecution. The court also refused to conduct comparative juror analysis despite the prosecutor sua sponte offering her purported race-neutral reasons for striking African American veniremembers on the record. Ultimately, the court denied Petitioner's claim of race discrimination under Batson v. Kentucky, 476 U.S. 79 (1986), and failed to apply this Court's decision in Foster v. Chatman, 136 S. Ct. 1737 (May 23, 2016).

The question now presented is:

> Did the Alabama court violate Foster and Batson when it refused to consider relevant record evidence bearing on the question of purposeful discrimination when denying Petitioner's Batson claim in this capital case?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory Henderson respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

On October 4, 2011, a jury in Lee County, Alabama convicted Gregory Henderson of capital murder, in connection with the vehicular death of Lee County Deputy James Anderson. (C. 3; R. 2500.)[1] The jury rendered a nine (9) to three (3)

[1]References to the clerk's record are cited herein as "C. __." The reporter's transcript at trial is cited as "R. __." The first supplemental record is cited as "S1. __." The second supplemental record is cited as "S2. __."

verdict sentencing Mr. Henderson to life without parole. (C. 325; R. 2715.) However, Judge Jacob Walker III rejected and overrode the jury's verdict, sentencing Mr. Henderson to death on September 20, 2012. (R. 2967, 3011-12.)

On February 10, 2017, the Alabama Court of Criminal Appeals affirmed Mr. Henderson's conviction and death sentence by a vote of three to two. Henderson v. State, No. CR–12–0043, 2017 WL 543134 (Ala. Crim. App. Feb. 10, 2017). The court's opinion is not yet reported and is attached at Appendix A, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Henderson's petition for a writ of certiorari, Ex parte Henderson, No. 1160768 (Ala. Sept. 22, 2017), is unreported and attached at Appendix B.

JURISDICTION

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Henderson's conviction and death sentence was issued on February 10, 2017. Henderson v. State, No. CR–12–0043, 2017 WL 543134 (Ala. Crim. App. Feb. 10, 2017). On May 26, 2017, the Court of Criminal Appeal denied rehearing. Henderson v. State, No. CR–12–0043, 2017 WL 543134 (Ala. Crim. App. May 26, 2017). The date on which the Alabama Supreme Court denied Mr. Henderson's petition for a writ of certiorari was September 22, 2017. Ex parte Henderson, No. 1160768 (Ala. Sept. 22, 2017). On December 7, 2017, Justice Thomas extended the time for filing this petition for a writ of certiorari to January 22, 2018. Henderson v. Alabama, No. 17A610 (U.S. Dec. 7, 2017). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

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 Eighth Amendment to the United States Constitute 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 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

Petitioner Gregory Henderson was under the influence of methamphetamine–a drug that he began using when he was sixteen years old and had abused for over a decade–when he got lost while driving to a friend's house on September 24, 2009. (R. 1748, 1779, 2798, 2806.) He pulled into a residential driveway to turn around and, shortly after, a Lee County Sheriff's Department vehicle driven by Deputy Katie Bonham turned on its lights and pulled in behind Mr. Henderson's vehicle. (R. 1780, 2806.) Deputy James Anderson exited the patrol vehicle with his weapon drawn. (R. 1791, 2808-09.) As Deputy Anderson moved from the passenger's side to the driver's side, Mr. Henderson's car accelerated and struck Deputy Anderson, pinning him

beneath the car. (R. 1792, 2809.) Mr. Henderson cried while pleading with those on the scene to lift the car with a jack from his trunk and save Deputy Anderson's life. (R. 1797-99, 1812-14, 2096, 2809-11.) However, by the time first responders lifted Mr. Henderson's car, Deputy Anderson had no vital signs; his cause of death was traumatic asphyxiation. (R. 1899, 1933, 1942.)

Mr. Henderson's capital murder trial commenced in Lee County on September 26, 2011. (R. 306.) At the conclusion of voir dire, there were seventy-one (71) eligible potential jurors remaining and the trial court directed the court administrator to generate a random list of forty-five (45) people from that pool. (C. 137-38, R. 1575-86.) The first thirty-six (36) veniremembers on this list comprised the pool from which the jury was formed, while the last nine people were divided into three groups of three from which the alternate jurors were to be selected.[2] (C. 137-38.) Within each group, the veniremembers were listed alphabetically by last name. (Id.) Both the prosecution and the defense reviewed the list for two hours to plan their strikes; each side could strike twelve people from the list of thirty-six (36) and one veniremember from each of the three groups of three potential alternate jurors. (R. 1585-86.)

The prosecutor's first six peremptory strikes were used to eliminate African American veniremembers in alphabetical order by their last names–Jonathan Fears, Melvin Hardge, Latonia Harris, Clevrese Ross, Jacquita Vinson, and Sabrina Wimberly–removing six of eight qualified potential black jurors. (C. 139, R. 1587-92.)

[2]Due to programming difficulties, the jurors previously excused and struck for cause were also included on this list; their names were manually blacked out. (C. 137-38, R. 1576.)

The prosecutor then went back to the beginning of the alphabet to strike five white veniremembers in that same alphabetical pattern: Lisa Albin, Thomas Kilgore, Glenn Kromminga, Linda Owens, and David Padgett.[3] (C. 137-39; R. 1590-91.) The State's twelve strikes thus occurred in the following order:

1. Fears, African American (venire number 60);
2. Hardge, African American (venire number 77);
3. Harris, African American (venire number 81);
4. Ross, African American (venire number 157);
5. Vinson, African American (venire number 185);
6. Wimberly, African American (venire number 204);
7. Albin, white (venire number 3);
8. Kilgore, white (venire number 106);
9. Kromminga, white (venire number 109);
10. Owens, white (venire number 134);
11. Padgett, white (venire number 135);
12. Brown, white (venire number 23).

(C. 137-39.) After striking the twelve members of the jury, the State then used all three of its peremptory strikes for choosing alternate jurors to eliminate three of four qualified African American veniremembers. (C. 139, R. 1592-93.) Only two jurors and one alternate juror were black. (C. 137-39; R. 1587-94.)

When the parties finished selecting the jury, the prosecutor sua sponte stated, "we would like to put on the record our reasons for – race neutral reasons for strikes at some point." (R. 1595.) Before providing those alleged reasons for the State's strikes of African American veniremembers, the prosecution noted, "the first six strikes were African American individuals." (R. 1596.) The trial court failed to conduct any Batson

[3]Only the State's last strike of a sixth white veniremember, Barry Brown, did not fit this pattern. (C. 137-39; R. 1590-93.)

analysis and made no finding before entering a court recess. (R. 1599.) The jury was thereafter empaneled and convicted Mr. Henderson of capital murder on October 4, 2011. (C. 3; R. 2500.) Nearly a year later, Judge Jacob Walker III overrode the jury's life without parole verdict and sentenced Mr. Henderson to death. (R. 2967, 3011-12.)

On direct appeal, Mr. Henderson argued that the totality of the circumstances demonstrated that the prosecutor's removal of nine of thirteen qualified African American veniremembers violated Batson v. Kentucky, 476 U.S. 79 (1986). Mr. Henderson presented the following as evidence demonstrating purposeful discrimination: (1) the prosecutor's unique and targeted pattern of strikes; (2) the prosecutor's disparate questioning of African American veniremembers during voir dire; (3) the heterogeneity of the African American veniremembers struck by the prosecution; and (4) the pretext of the prosecution's purported race-neutral reasons offered for its strikes. For the fourth category of evidence, Mr. Henderson compared the prosecution's treatment of five African American veniremembers struck by the State–Deborah Frazier, Jonathan Fears, Takeeya Moss, Clevrese Ross, and Sabrina Wimberly–to seated white jurors.

For example, Mr. Henderson argued that a comparison of the State's treatment of Deborah Frazier with white jury foreman Stephen Colley revealed that the prosecution's reason for striking Ms. Frazier was pretext. The prosecution offered a single reason for striking Ms. Frazier: she was related to an individual who had been prosecuted by the Lee County District Attorney's Office. (R. 1598.) On their questionnaires, Ms. Frazier and Mr. Colley both responded identically to questions

thirty-two (that they had been arrested) and thirty-three (that they and/or a close relative or friend had been convicted of a crime). (S2. 178, 319.) However, the State only questioned Ms. Frazier regarding these responses during individual voir dire. (R. 1065, 1478-81.) This questioning elicited that Ms. Frazier's husband was on probation, which formed the sole basis for the prosecutor's striking of Ms. Frazier.[4] (R. 1598.) By comparison, the State wholly failed to ask white jury foreman Mr. Colley a single question about his identical responses to questions thirty-two and thirty-three. (R. 1065, S2. 178, 319.)

However, this evidence was not considered by the Alabama Court of Criminal Appeals, because that court explicitly refused to consider two categories of evidence when analyzing Mr. Henderson's Batson claim. Henderson v. State, No. CR–12–0043, 2017 WL 543134, at *14-19 (Ala. Crim. App. Feb. 10, 2017) First, the lower court refused to consider the State's unique pattern of striking veniremembers alphabetically by race, because the court determined that the record did not demonstrate "that the State created two lists."[5] Id. at *16. Second, the court refused to analyze the prosecutor's purported race-neutral reasons for striking African American veniremembers, because the reasons were freely "volunteered" by the State, rather

[4]The State similarly asserted that African American veniremembers Melvin Hardge, Latonia Harris, and Jacquita Vinson were struck because each had a relative who had been convicted of a crime. (R. 1596-98.) The State justified striking Clevrese Ross, an African American woman, on the basis that she was present when a search warrant was executed at the home of an acquaintance several years earlier. (R. 883-84, 1597.)

[5]This was a red herring. All of the evidence cited by Mr. Henderson in support of his Batson claim was in the record on appeal, including the name and race of all veniremembers and their completed juror questionnaires.

than arising from a Batson objection. Id. at *18. Ultimately, the Court of Criminal Appeals rejected Mr. Henderson's Batson claim, and affirmed his conviction and death sentence by a narrow vote of three to two. Id. at *19.

After rehearing was denied by the Court of Criminal Appeals, Mr. Henderson sought review in the Alabama Supreme Court by filing a petition for a writ of certiorari. The Alabama Supreme Court declined to review Mr. Henderson's case. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

This capital case is the second since Foster v. Chatman, 136 S. Ct. 1737 (May 23, 2016),[6] that this Court has been presented with "sufficiently troubling" evidence that appellate courts in Alabama are disregarding and carelessly undertaking the constitutionally mandated review of a claim of race discrimination under Batson. See Floyd v. Alabama, 138 S. Ct. 311 (Dec. 4, 2017) (Sotomayor, J., statement respecting denial of certiorari). Until this Court intervenes, defendants sentenced to death in Alabama can have no confidence that a claim of race discrimination in jury selection will be reviewed in Alabama's appellate courts in conformance with this Court's decision in Foster. Consequently, as was true with the Georgia courts prior to Foster, Alabama's appellate courts will continue to affirm capital murder convictions and

[6]The briefs filed in Mr. Henderson's direct appeal predate Foster, but oral argument at the Alabama Court of Criminal Appeals was held the day after Foster was decided and counsel brought that opinion to the court's attention. Further, in his petition for a writ of certiorari to the Alabama Supreme Court, Mr. Henderson cited Foster in support of his argument that the lower court's Batson review was constitutionally deficient. Thus, the Alabama courts have had multiple opportunities to review Mr. Henderson's Batson challenge in light of Foster, but have refused to do so.

death sentences despite clear indications of race discrimination in the prosecution's use of peremptory strikes.

A long line of precedent from this Court clearly establishes that the pattern of striking veniremembers alphabetically by race in Mr. Henderson's case is relevant evidence that the Alabama Court of Criminal Appeals was constitutionally required to consider. See, e.g., Foster, 136 S. Ct. at 1748, Snyder v. Louisiana, 552 U.S. 472, 478 (2008); Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("Miller-El II"). However, the court refused to do so. Henderson v. State, No. CR–12–0043, 2017 WL 543134, at *16 (Ala. Crim. App. Feb. 10, 2017).

Additionally, once the prosecutor provided her alleged race-neutral reasons for striking African American veniremembers, the Court of Criminal Appeals was required to consider this evidence in determining whether the prosecutor's strikes were racially motivated. See Hernandez v. New York, 500 U.S. 352, 359 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). Instead, the court refused to examine the prosecutor's purported reasons for striking African American potential jurors. Henderson, 2017 WL 543134, at *18.

As described below, consideration of all relevant circumstances regarding the State's use of peremptory strikes at Mr. Henderson's trial establishes a constitutional violation under Batson. However, at a minimum, this Court should remand this case and direct the Alabama appellate court to consider the State's pattern of striking

potential jurors alphabetically by race and the prosecutor's alleged race-neutral reasons for striking African American veniremembers in its Batson analysis. Mr. Henderson's case warrants certiorari review to ensure that his Batson claim and those of other defendants sentenced to death in Alabama are constitutionally reviewed and decided in light of Foster.

I. THE ALABAMA COURT FAILED TO CONSIDER "ALL RELEVANT CIRCUMSTANCES" AS BATSON AND ITS PROGENY REQUIRES.

This Court has repeatedly made clear "that in considering a Batson objection, or in reviewing a ruling claimed to be Batson error, all of the circumstances that bear upon the issue of racial animosity must be consulted." Foster v. Chatman, 136 S. Ct. 1737, 1748 (May 23, 2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008)) (emphasis added); see also Miller-El v. Dretke, 545 U.S. 231, 242 (2005) ("Miller-El II"); Batson v. Kentucky, 476 U.S. 79, 96 (1986).

In Foster, this Court was confronted with a case in which the Georgia courts failed to give meaningful consideration to all of the circumstances bearing on the issue of purposeful discrimination as Batson requires. See 136 S. Ct. at 1748. Despite the State encouraging this Court to "blind" itself to the existence of particular notes in the prosecution's file that indicated race consciousness and bias, this Court rightfully refused to do so. Id.

By comparison, here, the Alabama Court of Criminal Appeals refused to give any consideration–let alone the meaningful consideration that Batson requires–to the State's unique pattern of striking veniremembers alphabetically by race. See

Henderson v. State, No. CR–12–0043, 2017 WL 543134, at *16 (Ala. Crim. App. Feb. 10, 2017) ("There being no support for the repeated claim that the State created two lists and that the creation of those lists demonstrates discriminatory intent, we do not address it further."). The court also refused to consider evidence that the prosecution's offered "race-neutral" reasons were mere pretext. See id. at *18 (holding court was "not require[d] . . . to review the State's volunteered reasons for its peremptory strikes").

As such, there is no question that the Court of Criminal Appeals failed to consider "all of the circumstances that bear upon the issue of racial animosity" in jury selection at Mr. Henderson's trial, as the Constitution requires. See Foster, 136 S. Ct. at 1748; Snyder, 552 U.S. at 478; Miller-El II, 545 U.S. at 242; Batson, 476 U.S. at 96.

II. THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATE THAT THE STATE DISCRIMINATED ON THE BASIS OF RACE IN VIOLATION OF BATSON.

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (internal quotation marks omitted). Under Batson v. Kentucky, 476 U.S. 79 (1986), this Court has provided a three-step process for determining when a peremptory strike is discriminatory:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder, 552 U.S. at 476-77 (internal quotation marks and brackets omitted).

If the Alabama Court of Criminal Appeals had properly considered all of the circumstances bearing upon the prosecution's race conscious use of peremptory strikes, the only reasonable conclusion is that Mr. Henderson established a prima facie case of discrimination. Because the prosecution freely offered alleged race-neutral reasons for its strikes of African American veniremembers, a Batson stage two remand would have been, at best, redundant and, at worst, an improper opportunity for the State to get a second bite at the apple. See Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("Miller-El II") (prosecution must stand or fall on its original reasons for peremptory strikes). As such, the record on its face is sufficiently complete for a reviewing court to reach stage three of the Batson analysis.

Considered in its totality, the following evidence establishes a constitutional violation under Batson: (1) the prosecutor's unique and targeted pattern of strikes; (2) the prosecutor's disparate questioning of African American veniremembers during voir dire; (3) the heterogeneity of the African American veniremembers struck by the prosecution; and (4) the pretext of the prosecution's purported race-neutral reasons offered for its strikes.

A. The Prosecution Struck Veniremembers Alphabetically By Race.

At Mr. Henderson's trial, the prosecution plainly exercised its strikes in a race conscious manner when it used its first six strikes to eliminate African American veniremembers in alphabetical order, and then returned to the beginning of the alphabet to use its next five peremptory strikes to eliminate white veniremembers in alphabetical order. (C. 137-39; R. 1588-91.) The State eliminated three-fourths of the

African American veniremembers from the jury pool by this pattern and then continued to use all three of its strikes for selecting alternate jurors against black veniremembers. (Id.)

There is no reasonable explanation for the prosecutor's pattern of striking of veniremembers alphabetically by race except that the State's primary consideration when deciding who to strike was race. See Foster v. Chatman, 136 S. Ct. 1737, 1755 (May 23, 2016) ("[T]he focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."); Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("Miller-El II") ("Happenstance is unlikely to produce this disparity."); Miller-El v. Cockrell, 537 U.S. 322, 347 (2003) ("Miller-El I") ("The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards."); see also Hernandez v. New York, 500 U.S. 352, 360 (1991) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (footnote and citation omitted)).

B. The Prosecution Disparately Targeted and Questioned White and African American Veniremembers.

The record establishes that the State targeted African Americans throughout individual voir dire. This targeting resulted in the State individually questioning roughly seventy percent (eighteen of twenty-six) of black veniremembers during individual voir dire. (R. 793-1571.) In comparison, the State only questioned fifty-one

percent (thirty-three of sixty-five) of white veniremembers, even though every veniremember was called by the trial court and made available for individual questioning. (Id.)

Further, the prosecution differently questioned white and black veniremembers regarding the same subjects in ways that evinced racial bias. For example, the State interrogated over half (six of eleven) of African American potential jurors who reported previous arrests on their questionnaires, but questioned less than one third (two of seven) of white potential jurors who responded to the same question and reported arrests. (R. 892, 905-07, 930-31, 986, 1000-07, 1010, 1052, 1065, 1137-38, 1189, 1244, 1304, 1372-75, 1385, 1460-61, 1480, 1485-86, 1517-19; S2. 150, 178, 298, 319, 382, 510, 594, 608, 636, 650, 699, 762, 881, 916, 972, 979, 1000.)

Similarly, when questioning veniremembers regarding any past arrests, convictions, or negative experiences with law enforcement, the prosecution took care to ask white veniremembers whether such experiences would affect their ability to be fair and impartial nearly eighty percent of the time (eleven of fourteen instances). (R. 799, 859, 907, 930-31, 951, 1095-96, 1121, 1176, 1187-88, 1223-25, 1445, 1465-66, 1490.) In contrast, the State asked whether the same experiences would affect the impartiality of black veniremembers less than one third of the time (three of ten instances). (R. 985-87, 1028, 1136-38, 1307-08, 1460-61, 1478-81, 1485-86, 1517-19.)

Moreover, the State disparately targeted African American veniremembers to challenge for cause. Three white potential jurors and four black potential jurors were successfully challenged for cause by the State, because of unequivocal opposition to the

death penalty. (R. 1015, 1062-63, 1129-32, 1170-73, 1240-43, 1337-40, 1514-16.) However, the State also challenged for cause an additional five African American veniremembers, but all five of these challenges were denied by the trial court as improper. (R. 965-66, 1309-10, 1321-23, 1376-77, 1569-70.) Thus, in total, the State challenged for cause thirty-four percent (nine of twenty-six) of African American veniremembers. (C. 140-43.) In comparison, the State challenged for cause only four percent (three of sixty-five) of white veniremembers. (Id.)

The Court of Criminal Appeals concluded, however, "[o]ur review of the jury-selection proceedings demonstrates that the State did not treat black veniremembers differently than it treated white veniremembers." Henderson v. State, No. CR–12–0043, 2017 WL 543134, at *17 (Ala. Crim. App. Feb. 10, 2017).

Certiorari is appropriate because, "[t]he evidence suggests . . . that the manner in which members of the venire were questioned varied by race." Miller-El v. Cockrell, 537 U.S. 322, 332 (2003) ("Miller-El I"); see also id. ("To the extent a divergence in responses can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.").

C. The African American Veniremembers Struck By the Prosecution Were As Heterogenous as the Community as a Whole.

The African Americans peremptorily struck by the State were as heterogenous as the community as a whole and shared no common characteristic except their race. These veniremembers included men and women who ranged broadly in age from twenty-three to fifty-nine. (C. 137-39.) Four were married, three were single, one was

separated, and one was widowed. (R. 356, 359-60, 362, 365, 373, 375, 522; S2. 294, 506.) Eight held jobs, while one was on disability. (Id.) Their employment varied greatly: an insurance sales analyst, an employee of Flowers Foods, a natural gas distributor, an Auburn University food service employee, a hotel housekeeper, an assembly line worker, an accounts receivable specialist, and a general manager were among those struck. (Id.) In short, the record reveals that these veniremembers shared only one characteristic: race.[7]

D. The Prosecution's Proffered Race-Neutral Reasons for Striking African American Veniremembers Were Mere Pretext.

When viewed in light of the State's pattern of alphabetically striking veniremembers by race and the other available evidence, the prosecution's proffered reasons for striking five African American veniremembers–Deborah Jones Frazier, Clevrese Ross, Takeeya Moss, Jonathan Fears, and Sabrina Wimberly–were pretext for discrimination. Each of the five strikes is addressed below.

1. Deborah Jones Frazier

The prosecution offered just one reason for striking African American veniremember Deborah Jones Frazier: she was related to an individual who had been prosecuted by the Lee County District Attorney's Office. (R. 1598.) A comparison of

[7]The Court of Criminal Appeals disagreed that the struck African American veniremembers were as heterogenous as the community as a whole because four of them indicated arrests on their juror questionnaires and five indicated that they and/or a close family member had been convicted of a crime. Henderson v. State, No. CR–12–0043, 2017 WL 543134, at *18 (Ala. Crim. App. Feb. 10, 2017). However, if these veniremembers' responses had truly formed the basis for the State's peremptory strikes, it is suspect that similarly situated white veniremembers were not also struck. For example, the State failed to strike, much less question, white jury foreman Stephen Colley and at least four other white individuals who indicated an arrest on their jury questionnaires. (R. 1052, 1189, 1244, 1303-04; S2. 150, 594, 636, 650.)

the State's treatment of Ms. Frazier with white jury foreman Stephen Colley reveals this reason as pretext.

On their questionnaires, Ms. Frazier and Mr. Colley both responded affirmatively to question thirty-two that they had been arrested, and to question thirty-three that they and/or a close relative or friend had been convicted of a crime. (S2. 178, 319.) However, the State only questioned Ms. Frazier regarding these responses during individual voir dire. (R. 1065, 1478-81.) This questioning elicited that Ms. Frazier's husband was on probation for shooting at his son-in-law, a fact which the State later relied upon as its sole justification for striking Ms. Frazier.[8] (R. 1478-81, 1598.) By comparison, the State failed to ask white jury foreman Stephen Colley any questions about his responses to questions thirty-two and thirty-three. (R. 1065; S2. 178, 319.)

Here, as in Foster, the prosecution's purported race-neutral reason for striking Ms. Frazier is "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [her] an unattractive juror." Foster v. Chatman, 136 S. Ct. 1737, 1750 (May 23, 2016). Additionally, as this Court reaffirmed in Foster, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." 136 S. Ct. at 1754 (quoting Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("Miller-El II")).

[8]In Foster, this Court recognized that a State's focus on an African American veniremember's family member's criminal history to justify a peremptory strike can "be regarded as pretextual." 136 S. Ct. 1737, 1758 (May 23, 2016).

2. Clevrese Ross

The State's first proffered reason for striking African American veniremember Clevrese Ross was that she was present during the execution of a search warrant at a house. (R. 1597.) During general voir dire, Ms. Ross raised her hand when the trial court asked if anyone had been present during the execution of a search warrant. (R. 727.) The State then questioned Ms. Ross regarding this during individual voir dire.[9] However, the State's alleged concern over Ms. Ross's presence during a search warrant is belied by the State's failure to ask white jury foreman Stephen Colley even a single question during voir dire, despite indicating an arrest and that he or a close relative had been convicted of a crime on his questionnaire. (R.1065; S2. 178.) There is no meaningful reason to strike an African American potential juror for contact with police not resulting in an arrest while failing to question, much less strike, a white veniremember who has reported a previous arrest and possible convictions. See Foster 136 S. Ct. at 1750, 1754; Miller-El II, 545 U.S. at 241.

The State's second proffered reason for striking Ms. Ross was that she "indicated on her questionnaire that she had problems with her vision and sitting, that might influence her ability to be a juror in this case." (R. 1597.) Ms. Ross did write the single word "vision" in response to whether she had any medical problems that may prevent her from serving as a juror, and indicated she had a "problem with sitting" when listing

[9]Ms. Ross stated than when she had happened to stop by a friend of her sister's when the warrant was executed, but she did not know why the warrant had been issued. (R. 883-84.) She said that it had "been so long" she could not even remember which police agency was involved that "[i]t was just kind of scary," but would not affect her ability to be fair and impartial. (R. 884.)

reasons she did not want to serve. (S2. 764.) However, despite questioning Ms. Ross on the whole more extensively than almost all white veniremembers, the State failed to ask a single question regarding these medical conditions during individual voir dire. (R. 880-85.) This lack of meaningful questioning suggests this reason was pretextual. See Miller-El II, 545 U.S. at 246.

Further, the disparate treatment of Ms. Ross and white juror Brittany Duke supports a finding of racial bias. See Foster 136 S. Ct. at 1750, 1754; Miller-El II, 545 U.S. at 241. The State did not question white juror Ms. Duke on any matter, much less strike her, even though she indicated twice on her questionnaire–in response to the same two questions as Ms. Ross–that her Type I diabetes was a medical problem that would affect her ability to serve as a juror.[10] (S2. 244.)

3. Takeeya Moss

The State offered one reason for striking African American veniremember Takeeya Moss: "she indicated that she had had run-ins, multiple with law enforcement, [] had negative feelings towards the Sheriff's Office and other law enforcement agencies, [and] indicated that the police were overly aggressive." (R. 1599.) However, the State's disparate questioning of Ms. Moss compared to white juror Glenn Walker reveals that this proffered reason was pretextual.

"[I]f the use of disparate questioning is determined by race at the outset, it is

[10]The prosecution repeatedly ignored reported medical issues during voir dire for several other white veniremembers who were in the final pool of thirty-six from which the jury was struck. (R. 1117, 1431-33, 1524-27; S2. 561, 722, 785.) The State did not peremptorily strike any of these white veniremembers. (R. 137-39.)

likely a justification for a strike based on the resulting divergent views would be pretextual." Miller-El v. Cockrell, 537 U.S. 322, 344 (2003) ("Miller-El I"). Ms. Moss and Mr. Walker both raised their hands during general voir dire to indicate they had negative feelings towards law enforcement, but during individual voir dire, the State questioned them in markedly different ways concerning these identical responses. (R. 723.) While the State asked Ms. Moss to provide factual details of traffic stops that had caused these feelings, it never asked her whether these incidents would affect her ability to be fair and impartial. (R. 985-86.) In contrast, rather than asking white juror Mr. Walker to elaborate on the factual details underling his negative feelings towards law enforcement, the State merely noted in passing that Mr. Walker had raised his hand earlier and asked him to confirm that he could still be a fair and impartial juror, and that the previous encounter did not involve the victim in this case. (R. 1444-46.) Mr. Walker then served on the jury. (C. 137-39; R. 1593.) This disparate treatment suggests that the sole reason later offered for striking Ms. Moss was mere pretext. Miller El-I, 537 U.S. at 344.

4. Jonathan Fears

The State offered three reasons for striking African American veniremember Jonathan Fears. First, the State proffered that he "indicated an arrest on his questionnaire." (R. 1596.) However, as explained above, white jury foreman Stephen Colley was allowed to serve on the jury despite reporting a previous arrest on his questionnaire. (S2. 178, 298.)

Second, the State offered that Mr. Fears "indicated he had been to court for child

support." (R. 1596.) On his questionnaire, Mr. Fears did write "child support" in response to question thirty-one, asking whether he had ever been to court for any reason besides divorce, traffic cases, or a civil suit. (S2. 298.) Despite ample opportunity, however, the State failed to ask Mr. Fears anything regarding this answer during individual voir dire, so the nature of his prior court proceedings was never ascertained. (R. 1369-77.) The State's lack of interest in questioning Mr. Fears regarding this questionnaire response suggests this proffered reason was merely pretextual. See Miller-El II, 545 U.S. at 246.

The third reason offered for striking Mr. Fears was that he "indicated that he intended to defy the Court's order and read the Opelika/Auburn News against the Court's instructions." (R. 1596.) This is a mischaracterization of the record. In fact, while Mr. Fears stated in response to questioning by the State that he had been planning on reading the classified advertisements of the newspaper, he then responded affirmatively to the Court's question of whether he could "wait and find out what's on sale." (R. 1374.) Far from intending to defy any order, Mr. Fears readily indicated he could follow the trial court's instructions. The State's mischaracterization of Mr. Fears's statements is evidence of racial bias. See Miller-El II, 545 U.S. at 244.

5. Sabrina Wimberly

The prosecution offered a single reason for striking African American veniremember Sabrina Wimblerly: "she indicated during voir dire that she would automatically impose life without the possibility of parole." (R. 1598.) As in Foster, on its face, the prosecutor's alleged reason "for the strike seem reasonable enough";

however, an independent examination of the record reveals that "the reasoning provided by [the prosecutor] has no grounding in fact." 136 S. Ct. at 1749.

While Ms. Wimberly did raise her hand during general voir dire in response to the trial court's question whether anyone believed the only punishment for capital murder should be life without parole, (R. 658-59), she later thoughtfully articulated why, after reconsideration, she could consider both possible punishments of life without parole and death. (R. 1163-64.) The State's mischaracterization of Ms. Wimberly's testimony when trying to justify its peremptory strike is evidence of discriminatory intent. See Miller-El II, 545 U.S. at 244 (prosecution's mischaracterization of African American veniremember's testimony regarding ability to impose death penalty evidence of race conscious exercise of peremptory strikes).

Further, if the State had actually believed that Ms. Wimberly would automatically impose life without parole, this would have formed the basis of a challenge for cause. The State failed to challenge Ms. Wimberly for cause although similar challenges for cause were made by the State against seven other veniremembers. (R. 1015, 1062-63, 1129-32, 1170-73, 1240-43, 1337-40, 1514-16.) Moreover, the State chose not to strike white veniremember Tina Rabren, who responded to defense counsel's question of whether she was "for the death penalty" by stating, "I don't know. I don't know. . . . I mean I am not against it, but I am not– I mean . . . " before finally stating responsively that she could consider both punishment. (R. 878-79.) This failure to further question or challenge for cause white veniremember Ms. Rabren supports the conclusion that the State's proffered reason for striking black

veniremember Ms. Wimberly was mere pretext.[11] See Miller El-I, 537 U.S. at 344.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review whether the Alabama Court of Criminal Appeals's failure to consider relevant evidence bearing on the question of purposeful discrimination complies with this Court's decision in Foster.

Respectfully Submitted,

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[11]The defense eventually used its ninth peremptory strike on Ms. Rabren. (R. 1591.)