No. 17-7546

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

REPLY TO STATE OF ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ANGELA L. SETZER
Counsel of Record
ALISON N. MOLLMAN
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
asetzer@eji.org

Counsel for Petitioner

March 6, 2018

CAPITAL CASE

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

RULES

REPLY TO ALABAMA'S OPPOSITION TO CERTIORARI

In this capital murder trial, the state prosecutor used sixty percent of her strikes to remove nine of thirteen qualified black veniremembers. As a result, just two black jurors sat on the jury that convicted Gregory Henderson of capital murder. It is uncontested that the Alabama Court of Criminal Appeals refused to consider the prosecutor's unique pattern of striking veniremembers alphabetically by race and her purported "race neutral" reasons for removing nine of thirteen qualified African American veniremembers when denying Mr. Henderson's Batson claim. In its Brief in Opposition, the State contends that because Mr. Henderson did not raise a Batson objection at trial, the lower court's failure to engage in its constitutionally-mandated duty to review all relevant evidence to determine whether the prosecutor engaged in racially discriminatory jury selection cannot now form the basis for certiorari review. See BIO at 4 ("Certiorari should be denied in consideration of the invited error doctrine."). The State's arguments are unavailing and cannot be squared with this Court's precedent obligating the State and the courts to protect against racial bias in jury selection.

This Court has long recognized that racial discrimination in jury selection not only violates the constitutional rights of a defendant, but also "harms the excluded jurors and the community at large," and "casts doubt on the integrity of the judicial process." Powers v. Ohio, 499 U.S. 400, 406, 411 (1991). While "[a]n individual juror does not have a right to sit on any particular petit jury, [] he or she does possess the right not to be excluded from one on account of race." Id. at 409; see also Georgia v.

McCollum, 505 U.S. 42, 49 (1992) ("Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same–in all cases, the juror is subjected to open and public racial discrimination."). For this reason, this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), "was designed to serve multiple ends," Powers, 499 U.S. at 406 (quotation marks and citations omitted), and defendants "can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race," id. at 415.

Alabama law similarly recognizes the rights of potential jurors and, as such, its trial courts have an affirmative duty to protect the record from racial discrimination during jury selection, even where there is no objection from defense counsel. See Ex parte Floyd, 190 So. 3d 972, 976-78 (Ala. 2012) (reversing and remanding Alabama Court of Criminal Appeals's decision on Batson in plain error context where defense counsel did not raise Batson objection at trial); see also Lemley v. State, 599 So. 2d 64, 70-71 (Ala. Crim. App. 1992) (courts have affirmative duty to recognize and remedy racial discrimination in jury selection, as "'[t]he overt wrong [of excluding a juror basis of race] . . . casts doubt over the obligation of the parties, the jury, and indeed the court, to adhere to the law throughout the trial of the cause.'") (quoting Powers, 499 U.S. at 412). This obligation understandably attaches regardless of defense counsel's actions, as defense counsel is also prohibited from exercising peremptory strikes in a discriminatory manner. See McCollum, 505 U.S. at 59.

Further, where a defendant has been sentenced to death, Alabama law requires appellate courts to review the record for plain error. Ala. R. App. P. 45A ("In all cases

in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."); see also Floyd, 190 So. 3d at 976 ("For plain error to exist in the Batson context, the record must raise an inference that the state [or the defendant] engaged in 'purposeful discrimination' in the exercise of its peremptory challenges.") (quotation marks and citation omitted); Ex parte Huntley, 627 So. 2d 1013, 1015-17 (Ala. 1992) ("[T]he reviewing court's inquiry, whether the State's explanations are offered voluntarily or by order of the trial judge, shall not be restricted by the mutable and often overlapping boundaries inherent within a Batson-analysis framework, but, rather, shall focus solely upon the 'propriety of the ultimate finding of discrimination vel non.'") (citation omitted); Dallas v. State, 711 So. 2d 1101, 1104 (Ala. Crim. App. 1997) ("Where the challenged party's explanations for its strikes are a part of the record, the appellate court will review those explanations regardless of the manner in which they came into the record.").

While the State now characterizes Mr. Henderson's failure to raise a Batson objection at trial as "sandbagging" and "invited error" that should preclude this Court from granting certiorari, BIO at 4-5, it cannot be said that Mr. Henderson "invited" the State to exercise its peremptory strikes in a racially discriminatory manner.[1] Further,

[1]The cases cited by the State in support of its "sandbagging" and "invited error" claims, BIO at 4-5, are inapposite to Mr. Henderson's case and did not involve Batson

at his first opportunity on direct appeal, Mr. Henderson properly raised a Batson claim and asserted that the State's use of peremptory strikes at his capital murder trial violated his constitutional rights, as well as the equal protection rights of the excluded African American veniremembers. As such, under Alabama law, the Alabama Court of Appeals was required to conduct the constitutionally-mandated review set forth in Batson and its progeny. See Floyd, 190 So. 3d at 976.

The lower court's refusal to consider two categories of evidence bearing on the question of racial discrimination during jury selection–the prosecutor's pattern of striking veniremembers alphabetically by race and the pretextual reasons proffered for removing African American potential jurors–directly conflicts with this Court's opinions in Foster v. Chatman, 136 S. Ct. 1737 (May 23, 2016), and Batson v. Kentucky, 476 U.S. 79 (1986), and certiorari is appropriate pursuant to Supreme Court Rule 10(c). This is precisely the type of question that this Court has reviewed in the past and remanded for further proceedings consistent with its opinions. See, e.g., Flowers v. Mississippi, 136 S. Ct. 2157 (2016) ("The judgment is vacated, and the case is remanded to the Supreme Court of Mississippi for further consideration in light of Foster"); Floyd v. Alabama, 136 S. Ct. 2484 (2016) ("Judgment vacated, and case

---

claims or even jury selection issues more broadly. See Puckett v. United States, 556 U.S. 129, 131 (2009) ("The question presented by this case is whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure."); United States v. Wells, 519 U.S. 482, 484 (1997) ("The principal issue before us is whether materiality of falsehood is an element of the crime of knowingly making a false statement to a federally insured bank").

remanded to the Supreme Court of Alabama for further consideration in light of Foster"); Williams v. Louisiana, 136 S. Ct. 2156 (2016) ("The judgment is vacated, and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit for consideration in light of Foster").

For these reasons and those stated in his original Petition For a Writ of Certiorari, Mr. Henderson respectfully requests that this Court grant certiorari to review whether the Alabama Court of Criminal Appeals's failure to consider relevant evidence bearing on the question of purposeful discrimination conflicts with the Court's decisions in Foster and Batson.

Respectfully Submitted,

/s/Angela L. Setzer
ANGELA L. SETZER
Counsel of Record
ALISON N. MOLLMAN
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
asetzer@eji.org

Counsel for Petitioner

March 6, 2018