CAPITAL CASE

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

FARRRIS GENNER MORRIS,

Petitioner

vs.

STATE OF TENNESSEE

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS,
WESTERN DIVISION

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Tennessee courts have granted relief under *Batson v. Kentucky* one time in the three decades since this Court's landmark decision. Farris Morris is black. His jury was all-white. The county where they lived was one-third African-American. This statistically improbable jury[1] was asked to make two decisions. First, was Mr. Morris guilty of two counts of premeditated murder, or of lesser offenses? Second, if guilty of premeditated murder, did he deserve to live or die?

In answering both questions, the jury was asked by defense counsel to view Mr. Morris as a human being in the throes of an acute episode of irrational behavior. The jury was asked to decide whether his abuse of crack cocaine (a drug popularly, if incorrectly, associated with black America) could reduce his culpability or act as sufficient mitigation.[2] If the jurors perceived him to be a flawed human like themselves, he might live. If they saw him as a monstrous "other" he would die.

The all-white jury that was charged with making these fateful decisions took some work to create (in a county with such a large black population). However, after cause challenges, only one non-white juror was left, Savanah Ingram. He was removed by the prosecution with a peremptory challenge. Prosecutor's notes which were discovered post-trial indicate Ingram was struck due to having a relative with a drug problem. Two similarly situated white jurors who had relatives with drug problems were allowed to remain. While such conduct might raise concerns in other states, in Tennessee, where only one *Batson* reversal has ever been issued by the appellate courts, such (mis)behavior is almost certain to be condoned.

It is the removal of Savanah Ingram that is the subject of this petition.

It is his removal that assured an all-white jury.

That all-white jury sentenced Farris Morris to death.

QUESTION PRESENTED

Where the trial prosecutor's rationale for striking the lone black juror applied "just as well" to two white jurors, *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016), and just as in *Foster*, the proof that the prosecutor's strike was "motivated in

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[1] If you were to roll a dozen standard dice the odds that you would not roll a single 5 or 6 are the same as the odds that you would end up with an all-white jury in Madison County, Tennessee. The equation: $(2/3)^{12} = 4{,}096/531{,}441 = .0077 = 0.77\%$

[2] Not at issue in this petition is the decision of trial counsel to hide from the jury that Mr. Morris was profoundly mentally ill. The only mental disability used to challenge premeditation and presented as mitigation was cocaine intoxication. *See Morris v. Bell*, No. 07-1084-JDB, 2011 WL 7758570 (W.D. Tenn. Sept. 29, 2011), *aff'd in part, vacated in part, remanded sub nom. Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015).

substantial part by discriminatory intent" was discovered in collateral proceedings, did the Tennessee court's err in failing to apply *Foster* on collateral review?

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JURISDICTION

This court has jurisdiction under 28 U.S.C. §1257. The Tennessee Supreme Court's order denying relief was entered June 7, 2018. On August 24, 2018, Justice Kagan granted an extension of time, up to and including November 4, 2018, within which to file a petition for writ of certiorari. *Morris v. Tennessee*, No. 18A211 (Aug. 24, 2018)(Kagan, J.). November 4, 2018 was a Sunday, thus this petition is timely filed on Monday, November 5, 2018. U.S. Sup. Ct. R. 30.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV provides, in pertinent part: "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

In 1997, in the Circuit Court for Madison County, Tennessee, Farris Morris was tried before an all-white jury for two counts of first-degree murder, and one count of aggravated rape. *Morris v. Bell*, No. 07-1084-JDB, 2011 WL 7758570, at *12 (W.D. Tenn. Sept. 29, 2011), *aff'd in part, vacated in part, remanded sub nom.*

Morris v. Carpenter, 802 F.3d 825 (6th Cir. 2015). Madison County, Tennessee, the venue for Mr. Morris' capital trial, had a population that, according to the 2000 Census, was 32.8% African-American.[3] Farris Morris is black.

One African-American juror made it through cause challenges and potentially could have been a member of the jury, Savanah Ingram. However, the prosecution used a peremptory challenge to remove Mr. Ingram, and an all-white jury was preserved.

Based on notes obtained in collateral proceedings, Farris Morris alleged in his motion to reopen before the Circuit Court for Madison County, Tennessee, that the prosecution's strike of Savanah Ingram was motivated in substantial part by discriminatory intent. The only explanation for Mr. Ingram's exclusion comes from the prosecutor's notes which indicate that Mr. Ingram had a relative with drug problems. The prosecution did not strike similarly situated white jurors who had relatives with drug or alcohol problems, including Mr. Bowman who had a daughter with a drug problem. Similarly Ms. Crouse, who had a niece with an alcohol problem, was allowed to remain. Ultimately, there were three jurors who had close relatives with drug problems; two were white and allowed to remain on the jury, one was black and was removed by the prosecution.

The all-white jury found that, despite profound cocaine intoxication, Mr. Morris was capable of premeditation and thus guilty of first degree murder. *State v.*

[3] https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_QTP5&prodType=table (last visited, November 2, 2018 at 1:24 p.m.).

Morris, 24 S.W.3d 788, 795-96 (Tenn. 2000) *cert. denied* 531 U.S. 1082 (2001). They sentenced him to death. *Id.* at 791.

Farris Morris's convictions were upheld on direct appeal. *State v. Morris*, 24 S.W.3d at 788. He pursued post-conviction relief, which was also denied. *Morris v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006).

In 2011, the District Court granted Mr. Morris partial *habeas* relief and vacated his death sentence based on trial counsel's defective failure to investigate and present evidence of mental illness and a traumatic childhood. *Morris v. Bell*, at *28 (finding that presenting proof that Mr. Morris had done well in prison and was a "dependable gravedigger" merely "scratched the surface" of the potential mitigation). However, this decision was reversed on appeal. *Morris v. Carpenter,* 802 F.3d at 844-45 (finding that the Tennessee court's conclusion that trial counsel had "strategic reasons" for failing to present evidence of mental illness at sentencing was adequate under deferential AEDPA review). In those same proceedings, Mr. Morris raised a *Batson* claim, which the District Court found to be procedurally defaulted. *Morris v. Bell,* at *12.

On May 23, 2016, this Court decided *Foster v. Chatman*, concluding that the petitioner, like Morris, whose case was on collateral review and who discovered evidence proving the prosecutor's discriminatory intent on collateral review, was entitled to relief for discriminatory jury selection. *Id.*, 136 S. Ct. at 1754-55. Foster had unsuccessfully raised a *Batson* claim on direct appeal. Like Morris, it was only

after Foster obtained the prosecutor's notes that he was able to establish the prosecutions discriminatory intent. In *Foster*, this Court applied a "motivated in substantial part by discriminatory intent" test, and concluded that "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." *Id.*

On May 19, 2017, pursuant to Tenn. Code Ann. § 40-30-117(a)(1), Farris Morris filed a motion to reopen his post-conviction proceedings, requesting retrospective application of *Foster* and post-conviction relief, because the prosecution's removal of the lone possible black juror, Savanah Ingram, was "motivated in substantial part by discriminatory intent." The trial court denied the motion to reopen, and on February 1, 2018, the Tennessee Court of Criminal Appeals denied permission to appeal. *Morris v. State*, No. W2017-01700-CCA-R28-PD (Tenn. Crim. App. Feb. 1, 2018); Appendix 2a. The Court of Criminal Appeals denied reopening post-conviction proceedings solely based on that court's conclusion that *Foster* was not retroactive. Appendix 2a. If *Foster* is retroactive, then reopening would have been warranted.

The Tennessee Supreme Court denied permission to appeal on June 7, 2018. *Morris v. State*, No. W2017-01700-SC-R11-PD (Tenn. 2018); Appendix 1a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because: (1) the Tennessee courts' denial of relief is contrary to the clear precedent of *Foster v. Chatman* where the "motivated in substantial part by discriminatory intent" test was applied on collateral review;

and (2) review is warranted where, for over thirty (30) years, Tennessee has only once granted relief for the race-based strike of a juror, and Farris Morris has presented a meritorious claim involving a statistically absurd all-white jury.

I. The Tennessee courts failure to provide Farris Morris the protection of *Foster v. Chatman* warrants review.

It is evident that under *Foster v. Chatman*, Farris Morris would receive relief. The facts set forth in the Statement of the Case, *supra*, make clear that the prosecutor's removal of the single possible black juror was "motivated in substantial part by discriminatory intent." 136 S.Ct. at 1754. The ostensible reason for striking the lone non-white juror "applied just as well" to two "otherwise-similar" nonblack jurors. *Id.* (citing *Miller–El v. Dretke,* 545 U.S. 231, 241 (2005)). Clearly, the all-white jury in no way represented a "fair cross-section" of Madison County, Tennessee, with its one-third black population, and the statistical improbability belies any race-neutral explanation for the prosecution's peremptory challenge.

Foster was the first case on collateral review in which this Court applied the "motivated in substantial part" test. Thus, *Foster* made this test retroactive to cases on collateral review as of May 23, 2016. *Tyler v. Cain*, 533 U.S. 656, 664 (2001) (the right to seek relief under a new rule accrues at the time this Court makes the rule retroactive). This finding was binding on state courts. *Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016) ("a state court's refusal to give the rule retroactive effect is reviewable by this Court.").[4]

4 Mr. Morris filed his Motion to Reopen within one-year of *Foster*, as was required under Tennessee law. Tenn. Code Ann. §40-30-117. Thus, he complied with all

Additionally, this test was newly applied in *Foster*. *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) was quoted by this Court in *Foster* as the basis for this analysis. *Id.,* 136 S. Ct. at 1754. However, in *Snyder*, the applicability of this test to claims of discriminatory jury selection was not firmly determined:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.

Snyder, 552 U.S. at 485 (internal citations deleted).

Additionally, *Snyder* was decided on direct appeal—not on collateral review. *Snyder,* 552 U.S. at 474. Thus, *Foster* is (1) the first opinion of this court to unequivocally employ the "motivated in substantial part by discriminatory intent" test, and (2) the first to apply it to a case on collateral review, where judgment was already final.

That Morris is entitled to application of *Foster* on collateral review is illuminated by the procedural history of *Foster* where such relief was granted long after judgment was final. The petitioner in *Foster* first raised a *Batson* claim on direct appeal, and lost. *Foster v. State,* 374 S.E.2d 188, 191-192 (Ga. 1988) *cert. denied* 490 U.S. 1085. He then pursued post-conviction remedies related to his

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procedural rules. Tennessee's denial of relief was based solely on the retroactive applicability of *Foster*. Appendix 2a.

intellectual disability, and lost. *Zant v. Foster*, 406 S.E.2d 74 (Ga. 1991) *cert. denied* 503 U.S. 921 (1992). Subsequently, he tried to raise both intellectual disability and *Batson* claims on collateral review, and lost. *Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000), *cert. denied Foster v. Georgia*, 531 U.S. 890 (2000). Thus, no less than twice did this Court determine that his claims, under older *Batson* analysis were inadequate. Only on his third attempt at securing collateral review of his conviction did this Court grant certiorari and then relief through application of the "motivated in substantial part by discriminatory intent" test. *Foster*, 136 S. Ct. at 1743.

It seems proper that if the "motivated in substantial part by discriminatory intent" test was justly applied to Foster's nearly-30-year-old conviction, Farris Morris is entitled to that same relief on his younger and quite similar case. To ensure consistent application of the principles enunciated and applied in *Foster*, this Court should grant certiorari here and reverse.[5]

II. Tennessee's historical reticence to apply *Batson* warrants further scrutiny by this Court.

In the 32 years since this Court decided *Batson v.* Kentucky, 476 U.S. 79 (1986), it appears that "the Tennessee Supreme Court has *never* granted a *Batson* claim." Meghan Daly, *Foster v. Chatman*: Clarifying The *Batson* Test For Discriminatory Peremptory Strikes," 11 Duke J. of Constitutional Law and Public Policy Sidebar 149, 160 (2016)(emphasis in original). The Tennessee Court of

5 The recent grant of certiorari in *Flowers v. Mississippi*, 17-9572, also warrants consideration of this petition. It would be proper for this Court to hold this case for consideration pending the outcome of *Flowers*.

Criminal Appeals has only once granted relief for the discriminatory strike of an African-American juror, and that just occurred in 2017 in an unreported opinion. *State v. Collins*, No. M2015-01030-CCA-R3-CD, 2017 WL 2126704, at *14 (Tenn. Crim. App. May 16, 2017).[6]

Given the thousands upon thousands of criminal cases in Tennessee over the past three decades, one cannot reasonably believe that in Tennessee, African-American jurors (and African-American defendants like Farris Morris) are truly being protected from peremptory strikes motivated in substantial part by discriminatory intent.

This Court has made manifest the "imperative to purge racial prejudice from the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). To eliminate racial discrimination in cases like *Foster*, *Pena-Rodriguez*, and *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court has had to intervene, because this Court alone can remedy racism when the lower courts (as here) have refused to eradicate it. The imperative is particularly great, because like *Buck* and *Foster* this is a capital case. To entrust the valuation of a black man's life to a jury that

[6] Factually, *Collins* is nearly identical to this case: "the record reflects that the prosecutor excused the only prospective African–American juror, that the trial court asked for a race-neutral explanation, and that the prosecutor did not dispute the allegation that he did not challenge other jurors for the reason he challenged Juror S. The prosecutor's explanation for challenging Juror S. was not consistent with his treatment of other similarly situated jurors. Jurors L. and Ly. were not challenged in spite of their experiences with a 'drug problem,'" *Collins*, at *14.

excluded the one-third of the county that was black was wrong, and the Fourteenth Amendment requires a remedy.

CONCLUSION

In this capital case, this Court should grant certiorari to decide whether *Foster v. Chatman*, 136 S. Ct. 1737 (2016) must be applied retroactively in collateral proceedings, to protect the rights of African-American citizens to sit on the juries that will decide the fate of African-American defendants.

Respectfully Submitted,

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CERTIFICATE OF SERIVCE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 5th day of November, 2018, to John Bledsoe, Asst. Attorney General, 425 Fifth Avenue North, Nashville, Tennessee, 37243. Hard copies will follow in the United States Mail.

/s/ *Kelley J. Henry*
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