

NO. 18-6624

IN THE
SUPREME COURT OF THE UNITED STATES

FARRIS GENNER MORRIS,
Petitioner,

v.

TENNESSEE,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Does this Court have jurisdiction to decide whether its opinion in *Foster v. Chatman*, 136 S.Ct. 1737 (2016), requires Tennessee courts to grant successive collateral review of a criminal judgment?

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OPINIONS BELOW

The order of the Tennessee Supreme Court denying the petitioner's application for permission to appeal is unreported. *Morris v. State*, W2017-01700-SC-R11-PD, order (Tenn. June 7, 2018); (Pet. App. 1a). The order of the Tennessee Court of Criminal Appeals denying the petitioner's application for permission to appeal the denial of his motion to re-open state post-conviction proceedings is also unreported. *Morris v. State*, W2017-01700-CCA-R28-PD, order (Tenn. Crim. App. Feb. 1, 2018); (Pet. App. 2a).

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied the petitioner's application for permission to appeal on June 7, 2018. (Pet. App. 1a.) Justice Kagan extended the time for filing a petition for writ of certiorari until November 4, 2018. *Morris v. Tennessee*, No. 18A211 (U.S. Aug. 24, 2018). The petitioner filed his petition on November 5, 2018.¹ The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet. 1.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of the 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.

U.S. Const., Article III, Section 2 provides in pertinent part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority

. . . .

In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

¹The due date, November 4, 2018, fell on a Sunday; thus, the petition was timely filed on Monday, November 5, 2018. See U.S. Sup. Ct. R. 30(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Tennessee Code Annotated § 40-30-102 establishes filing limitations for petitions under the Tennessee Post-Conviction Procedure Act. Section 40-30-102(c) provides in pertinent part:

This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. . . . A petitioner may move to reopen a post-conviction proceeding that has concluded, under the limited circumstances set out in § 40-30-117.

Tennessee Code Annotated § 40-30-117(a) authorizes the reopening of state post-conviction proceedings under the following pertinent circumstance:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial

Tennessee Code Annotated § 40-30-122 defines the appellate rulings that qualify as a basis for reopening:

[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds.

STATEMENT OF THE CASE

In the early morning hours of September 17, 1994, the petitioner entered the home of his neighbors, Charles and Angela Ragland, and held a shotgun to the head of Angela's 15-year-old cousin, Erica Hurd. *State v. Morris*, 24 S.W.3d 788, 792 (Tenn. 2000). Shortly thereafter, the petitioner ordered Charles Ragland to the floor, placed a pillow over his head, and shot him once in the head. *Id.* The petitioner tied up Angela Ragland and left her in one of the bedrooms. *Id.* In another room, he killed Erica Hurd by beating and stabbing her 37 times. *Id.* at 792-93. After killing Hurd, the petitioner raped Angela Ragland multiple times before leaving the residence. *Id.* at 792. The petitioner eventually confessed to the crimes. *Id.* at 793.

In January 1997, a jury convicted the petitioner of two counts of first-degree premeditated murder and one count of aggravated rape. *Id.* at 791. The jury imposed the death penalty for the murder of 15-year-old Hurd and life without the possibility of parole for the death of Charles Ragland. *Id.* The trial court imposed a consecutive 25-year sentence for the aggravated rape of Angela Ragland. *Id.*

The Tennessee Court of Criminal Appeals affirmed the petitioner's convictions and sentences. *State v. Farris Genner Morris, Jr.*, No. 02C01-9801-CC-00012, 1999 WL 51562 (Tenn. Crim. App. Feb. 5, 1999). Following an automatic transfer, the Tennessee Supreme Court affirmed the decision of the intermediate court. *Morris*, 24 S.W.3d 788. This Court denied certiorari. *Morris v. Tennessee*, 121 S.Ct. 786 (Jan. 8, 2001).

The petitioner filed a petition for post-conviction relief, which the trial court denied. The Court of Criminal Appeals affirmed the denial of relief, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal. *Farris Genner Morris, Jr. v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 30, 2006), *perm. app.*

denied, (Tenn. Feb. 26, 2007).

The petitioner sought a writ of habeas corpus under 28 U.S.C. § 2254. The federal district court granted relief on the petitioner's claim that trial counsel was ineffective for failing to present certain mitigation evidence at the sentencing hearing and denied relief on all other claims. On cross-appeals from that decision, the United States Court of Appeals for the Sixth Circuit affirmed in part, vacated in part, and remanded to the district court for entry of judgment denying the writ of habeas corpus. *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015), *cert denied*, 137 S.Ct. 44 (2016).²

On May 23, 2016, this Court issued its opinion in *Foster v. Chatman*, 136 S.Ct. 1737 (2016). On May 19, 2017, the petitioner moved to re-open state post-conviction proceedings under Tenn. Code Ann. § 40-30-117, arguing that this Court's decision in *Foster* created a new constitutional right that is retroactively applicable to his case. The trial court summarily denied the motion, concluding that *Foster* did not establish a new rule of constitutional law.³ (Resp. App. 1.) The Tennessee Court of Criminal Appeals denied permission to appeal, agreeing with the trial court that *Foster* did not create a new constitutional right retroactively applicable to the petitioner's case. (Pet. App 2a-5a). On June 7, 2018, the Tennessee Supreme Court denied further review. (Pet. App 1a.)

Thereafter, on June 18, 2018, the petitioner filed a motion for leave to file a successive habeas corpus petition. In the motion, he alleged that the prosecution's strike of African-American

²The petitioner raised a claim in his petition that trial counsel was ineffective for not for not challenging the exclusion of juror Savannah Ingram. The district court found that the issue was procedurally defaulted, *Morris v. Bell*, No. 07-1084-JDB, 2011 WL 7758570, at *12 (W.D. Tenn. Sept. 29, 2011), and later declined to grant a certificate of appealability on that issue, *Morris v. Westbrooks*, No. 07-1084-JDB-egb, 2017 WL 2199010, at * 4 (W.D. Tenn. May 8, 2017).

³Because the trial court denied the motion on the threshold question of whether *Foster* announced a new rule of constitutional law retroactively applicable, it never made any findings on the assertions of discrimination during jury selection.

prospective juror Savanna Ingram was motivated in substantial part by discriminatory intent and that this Court's decision in *Foster* created a new rule of constitutional law made retroactive to cases on collateral review. The Sixth Circuit concluded that the motion raised a claim that was presented in a prior petition. *In re: Farris Genner Morris*, No. 18-5626, Order (6th Cir. Nov. 13, 2018) (Resp. App. 2.) The Court explained that the petitioner previously presented a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), and that *Foster* "is an application of *Batson* and not the basis for a new claim." *Id.* The Court additionally concluded that *Foster* did not involve a new rule of constitutional law, that it has not been made retroactive to cases on collateral review, and that the rule it applied was previously available. *Id.*

The petitioner is now attempting to appeal the state court's determination that he was not entitled to re-open his post-conviction proceedings.

REASONS FOR DENYING THE WRIT

This Court lacks jurisdiction to decide whether its opinion in *Foster* requires Tennessee courts to grant successive collateral review of a criminal judgment. In short, the state court decided that the petitioner's claim does not satisfy Tennessee's statutory criteria for successive collateral review, and that decision did not resolve any federal question that would implicate this Court's jurisdiction.

In any event, certiorari should also be denied because the state court correctly found that the holding in *Foster* merely applies this Court's prior holding in *Batson*.

I. THIS COURT LACKS JURISDICTION TO REVIEW A DECISION ENFORCING A STATE STATUTORY RESTRICTION ON SUCCESSIVE COLLATERAL REVIEW.

This Court lacks jurisdiction to entertain the question presented by the petitioner because it is solely a question of state law. Section 2 of Article III of the United States Constitution grants

this Court “appellate Jurisdiction” to review state cases “arising under” the Constitution, federal laws, or treaties “with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const., art. III, § 2. With 28 U.S.C. § 1257(a), Congress has limited the Court’s jurisdiction over “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had” to issues governed by binding federal law. *See Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding that the Court’s appellate jurisdiction under § 1257(a) is limited “to enforcing the commands of the United States Constitution”). *See* Stephen M. Shapiro, *Supreme Court Practice* 208 (10th ed. 2013) (“[T]he Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. § 1257.”).

“[I]n a case coming from a state court this court can consider only Federal questions, and . . . it cannot entertain the case unless the decision was against the plaintiff in error upon those questions.” *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). In contrast, this Court “must accept as controlling” a state court ruling on a state law issue. *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927). Consequently, this Court’s appellate jurisdiction over state court decisions is limited to “correct[ing] them to the extent that they incorrectly adjudge federal rights.” *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). That is, this Court may intervene on a state court decision “only to correct wrongs of constitutional dimension.” *Smith v. Phillips*, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982).

Here, the state court’s decision that successive collateral review is not available to petitioner’s jury-selection claim does not involve an issue of constitutional dimension because the States have no constitutional obligation to provide any procedures for the collateral review of criminal judgments. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

Though not compelled by the Constitution, Tennessee provides several avenues for collaterally attacking criminal judgments. One avenue is through the “Post-Conviction Procedure Act.” Tenn. Code Ann. § 40-30-101. The Act has built-in restrictions on the availability of collateral review. For example, it permits the filing of only one petition for post-conviction relief. Tenn. Code Ann. § 40-30-102(c). But, as pertinent here, “[a] petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in [Tenn. Code Ann.] § 40-30-117.” Tenn. Code Ann. § 40-30-102(c).

Under Tenn. Code Ann. § 40-30-117(a)(1) reopening is permitted if (1) the claim in the motion to reopen is based on a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, (2) retrospective application of that right is required, and (3) the motion is filed within one year of the qualifying appellate ruling. By statutory definition, “a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner’s conviction became final and application of the rule was susceptible to debate among reasonable minds.” Tenn. Code Ann. § 40-30-122.

The Tennessee Court of Criminal Appeals affirmed the denial of the petitioner’s motion to reopen post-conviction proceedings under the state Post-Conviction Procedure Act. Applying the definition in the Act, it concluded that *Foster* does not provide a basis for reopening because it did not meet Tennessee’s statutory definition of a qualifying appellate ruling.

This Court lacks jurisdiction to review the Court of Criminal Appeals’ decision because the decision “rests on a state law ground that is independent of [any] federal question and adequate to support the judgment.” *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies regardless of whether the state law ground is substantive or procedural. *Id.* The state court simply applied Tennessee statutes that restrict successive collateral review—Tenn. Code Ann. §§ 40-30-

117, -122—and concluded that *Foster* does not meet the criteria for such review. (Pet. App. 2a-5a.) Because the state court’s decision rests solely on the application of state law, there is no federal question invoking this Court’s jurisdiction.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016), requires no different result. In *Montgomery*, this Court held that the conclusion in *Teague v. Lane*, 489 U.S. 288 (1989), “establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises.” 136 S. Ct. at 729. But *Montgomery* says nothing about a state court’s authority to determine, as a matter of limiting successive collateral review, when a “final ruling of an appellate court establish[es] a constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. § 40-30-117(a). Tennessee Code Annotated § 40-30-122 sets forth the state law criteria for qualifying appellate rulings. The petitioner can produce no authority that those criteria encompass a federal question.

Moreover, *Montgomery*’s discussion about the supremacy of this Court’s decisions on the retroactivity of new constitutional rules is inapposite under the circumstances of this case. *Montgomery* held that “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” 136 S. Ct. at 729. But *Montgomery* concerned the retroactive application of a new rule to an Eighth Amendment claim that was “properly presented in the case,” holding that “[i]n *adjudicating claims* under its collateral review procedures a State may not deny a controlling right asserted under the Constitution.” *Id.* at 732 (emphasis added).

Here, the state court never adjudicated the petitioner’s constitutional claim because the claim did not meet the procedural criteria for review under Tenn. Code Ann. §§ 40-30-117, -122. *Montgomery* does not preclude Tennessee’s enforcement of these gate-keeping provisions for

successive collateral review. And *Foster* does not require Tennessee courts to adjudicate the petitioner's claim when it was not properly presented under state law.

Through application of Tenn. Code Ann. §§ 40-30-117, -122, the state court's decision that *Foster* does not provide a basis for successive collateral review rests on a state law ground that is independent of any federal retroactivity question and adequate to support the judgement. This Court lacks jurisdiction to second-guess that enforcement of a state procedural bar on successive collateral review, particularly since such review is not constitutionally required.

II. THE STATE COURT CORRECTLY FOUND THAT *FOSTER* DID NOT CREATE A NEW RULE OF CONSTITUTIONAL LAW.

Even if this Court were to find that it has jurisdiction, certiorari should be denied because the state court correctly concluded that *Foster v. Chatman*, 136 S.Ct. 1737 (2016), merely applied the test adopted by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). It did not create a new rule of constitutional law requiring retroactive application.

Under Tennessee's post-conviction statute, "a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122; *see also see Bush v. State*, 428 S.W.3d 1 (Tenn. 2014). This rule is similar to the federal rule, which provides that, "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* "And a holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S. 342, 348 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

In *Batson*, this Court reaffirmed the principle that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. This Court adopted the following three-step analysis to determine whether the constitutional rights of a defendant or prospective jurors have been infringed upon by impermissible discriminatory practices: (1) the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race, (2) if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96-98; *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008); *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003).

In *Foster*, this Court, applying the three-step process from *Batson*, reversed the Georgia Supreme Court, and found that the prosecution had engaged in purposeful discrimination in a murder case involving a black male defendant and an elderly white female victim.⁴ 136 S.Ct. at 1747. The analysis in *Foster* was limited to *Batson*'s third step and focused on case-specific evidence, which supported the conclusion that *Foster* had met his burden of showing that the prosecution had purposefully discriminated during jury selection.

The decision in *Foster* “did not change the applicable principles for analyzing a *Batson* claim. Instead, [the Court] in *Foster* reaffirmed the teaching in *Batson*.” *State v. Jabari Williams*, 199 So.3d 1222, 1230 (La.App. 4 Cir. Sept. 7, 2016). Indeed, in *Foster*, the Court “reiterated the well-settled principle that the Constitution forbids striking even a single prospective juror for a

⁴In *Foster*, the petitioner raised a *Batson* claim in his 1987 trial and in his direct appeals, which ended in 1989. Immediately thereafter, he sought habeas corpus relief in Georgia state court. While that proceeding was pending, the petitioner obtained new documents related to the jury selection in his trial. The state court concluded that the renewed *Batson* claim was barred by res judicata because the petitioner had failed to establish a change in facts. This Court granted certiorari. See *Foster*, 136 S.Ct. 1737; *Foster v. State*, 374 S.E.2d 188 (Ga. 1988), cert. denied, 109 S.Ct. 2110 (May 22, 1989).

discriminatory purpose.” *Id.* (citations omitted); *see also Flowers v. Mississippi*, 136 S.Ct. 2157 (2016), Alito, J., dissenting, (stating that “*Foster* did not change or clarify the *Batson* rule in any way”); *United States v. Carlos Ramos*, No. CR15-4058-LTS, 2016 WL 3906650, at *5 n.2 (N.D. Iowa July 14, 2016) (stating that *Foster* did not expand the *Batson* framework in any meaningful way). The petitioner cites no discernable factor from *Foster* that was not previously established in *Batson* and its progeny.

Because *Foster* did not create a new rule of constitutional law entitled to retroactive application, the post-conviction court properly denied the motion to re-open. Additionally, although the petitioner has devoted a considerable portion of his petition to the underlying claim of discrimination during jury selection, that issue is not properly before the Court. In denying relief, the state court dismissed the motion to re-open post-conviction proceedings on the threshold question of whether *Foster* created a new rule of constitutional law entitled to retroactive application and thus did not reach the merits of the underlying claim.

Finally, the petitioner suggests that review is warranted because Tennessee courts rarely grant relief on *Batson* claims. “A petition for a writ of certiorari will be granted only for compelling reasons.” Sup. Ct. R. 10; *see also City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. ___, 135 S. Ct. 1765, 1774 (2015) (“Because certiorari jurisdiction exists to clarify the law, its exercise ‘is not a matter of right, but of judicial discretion’”) (citing Sup. Ct. R. 10). An allegation that Tennessee courts rarely grant relief on *Batson* claims is not a compelling reason to grant certiorari nor does it transform this state-law gate-keeping issue into a federal constitutional claim appropriate for this Court’s review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to counsel for petitioner: Kelley J. Henry and Richard Lewis Tennant, Office of the Federal Public Defender, Middle District of Tennessee, 810 Broadway, Suite 200, Nashville, Tennessee 37203 on the 7th day of December, 2018. I further certify that all parties required to be served have been served.

s/ Leslie E. Price

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