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 APPENDIX

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CAPITAL CASE

APPENDIX

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APPENDIX 1

Trial Court Dismissing Motion to Re-Open Post-Conviction Petition

IN THE CIRCUIT COURT FOR MADISON COUNTY, TENNESSEE
DIVISION III

FARRIS GENNER MORRIS,
Petitioner

v.

STATE OF TENNESSEE,
Respondent.

No. C01-50
Capital Case
Post-Conviction

ORDER DENYING "MOTION TO REOPEN POST-CONVICTION PETITION"

I. Introduction

This matter is before this Court on Petitioner's May 19, 2017, motion to reopen his petition for post-conviction relief. Petitioner, Farris Morris, by and through counsel, has filed this motion to reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is entitled to relief petition based upon a new rule of law as announced in the United States Supreme Court opinion in *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737 (2016). After reviewing the motion, the State's answer, and the relevant authorities, the Court concludes the motion does not state a recognized ground for reopening Mr. Morris' post-conviction petition. Accordingly, the Court **DISMISSES** the motion to reopen.

II. Procedural History[1]

A. Trial

A Madison County Jury convicted Petitioner of two counts of first degree murder

[1] The Hon. John Franklin Murchison, retired Judge of Circuit Court Division II, presided over the petitioner's trial and post-conviction proceedings. The undersigned judge disposed of the petitioner's earlier motion to reopen after the current presiding Judge of Division II, the Hon. Don Allen, recused.

for the September 17, 1994 killings of Charles Ragland and the fifteen-year-old female cousin of Mr. Ragland's wife.[2] After a sentencing hearing, the jury sentenced Petitioner to life without parole for Mr. Ragland's killing and to death for the minor victim's murder.[3] The Tennessee Supreme Court affirmed Petitioner's convictions and sentences. *See State v. Morris*, 25 S.W.3d 788 (Tenn. 2000).

B. Post-Conviction

Mr. Morris subsequently filed a timely petition for post-conviction relief. Following an April 2004 evidentiary hearing, the post-conviction court denied relief in January 2005. The Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied Mr. Morris' application for permission to appeal. *See Farris Genner Morris, Jr., v. State*, No. W2005-00426-CCA-R3-PD (Tenn. Crim. App. Oct. 10, 2006), *perm. app. denied* (Tenn. Feb. 26, 2007).

In June 2016, Mr. Morris filed a motion to reopen his post-conviction petition based on the United States Supreme Court's opinions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). This Court summarily dismissed the motion to reopen on August 17, 2016. Petitioner unsuccessfully sought permission to appeal to the Court of Criminal Appeal. *See Farris Genner Morris v. State*, No. W2016-01887-CCA-R28-PD (Tenn. Crim. App. Nov. 1, 2016). Petitioner did not seek permission to appeal from the Court of Criminal Appeals'

[2] Although the name of the female victim appears in several opinions filed by the Tennessee appellate courts, this Court will not identify the victim here as she was a minor.

[3] The jury also found the petitioner guilty of raping Mr. Ragland's wife. The trial court imposed a twenty-five year sentence for this offense

order.

C. Federal Habeas Corpus

In April 2007, Mr. Morris filed a timely petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. After several years' worth of proceedings, the District Court granted the petition in part, denying Petitioner relief as to the guilt/innocence phase of trial but granting Petitioner a new sentencing hearing. Both parties appealed. On appeal, the Sixth Circuit reversed the District Court's findings as to the penalty phase, reinstating Petitioner's death sentence. *Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015). The Sixth Circuit subsequently denied Petitioner's motion for an *en banc* rehearing. The United States Supreme Court denied certiorari on October 3, 2016, and denied a petition to rehear on November 28, 2016

On November 8, 2016, Petitioner filed a motion to alter or amend the judgment in the federal habeas corpus case. On March 13, 2017, the United States District Court for the Western District of Tennessee denied the petitioner's motion.[4] The District Court denied a certificate of appealability (COA) on May 18, 2017.[5] Petitioner has announced his intent to seek a COA directly from the Sixth Circuit Court of Appeals.[6]

III. Applicable Law: Motions to Reopen

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[4] *Farris Genner Morris v. Bruce Westbrooks, Warden*, No. 07-1084-JDB-egb (W.D. Tenn. Mar. 13, 2017) (hereinafter "Morris Order Denying Motion to Alter or Amend Judgment").

[5] *See Farris Genner Morris v. Bruce Westbrooks, Warden*, No. 07-1084-JDB-egb, "Order Denying Application for a Certificate of Appealability, Certifying that an Appeal Would Not Be in Good Faith" (W.D. Tenn. May 18, 2017).

[6] *See Farris Genner Morris v. Bruce Westbrooks, Warden*, No. 16-6661, Petitioner's "Notice of Intent to File Motion to File Application for Certificate of Appealability within 90 Days or by September 7, 2017," at 1 (6th Cir. June 9, 2017)

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

> Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief . . . within one (1) year of the final action of the highest state appellate court to which an appeal is taken . . . ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, . . . a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." *Id.* These limited circumstances include the following:
>
> > (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. Such 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; [and]
> >
> > [. . .]
> >
> > (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.
>
> (Citing Tenn. Code Ann. § 40-30-217(a)(1) [and] (4)) (now Tenn. Code Ann. § 40-30-117(a)(1) [and] (4)). The statute further states:
>
> > The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003) (alterations added). *Foster* was decided May 23, 2016, so Petitioner's May 19, 2017 motion is timely.

The post-conviction statutes further provide

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> 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. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

Tenn. Code Ann. § 40-30-122. "[W]hen 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." *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016).

A motion to reopen "*shall be denied* unless the factual allegations, if true, meet the requirements of [Tenn. Code Ann. § 40-30-117](a)." Tenn. Code Ann. § 40-30-117(b) (emphasis added).

IV. Analysis

A. Petitioner's Claims Under Foster v. Chatman

Petitioner asserts he is entitled to relief under the United States Supreme Court's opinion in *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737 (2016). According to Petitioner, *Foster* establishes a new rule of law which is retroactive to Mr. Morris' case and entitles him to relief, because "the prosecution exercised a peremptory strike motivated in substantial part by discriminatory intent."[7] Petitioner summarizes the factual grounds giving rise to this motion to reopen as follows:

> Savanah Ingram was an African-American juror who was struck by the prosecution. The prosecutor's notes reveal that Ingram had relatives with drug problems which was the apparent reason he was struck by the prosecutor. The prosecution, however, did not strike similar white jurors who had relatives with

[7] Motion to reopen at 1.

> drug or alcohol problems, including Tommy Bowman who had a daughter with a drug problem and Teresa Crouse, who had a niece with an alcohol problem.

Motion to reopen at 4-5 (citations to exhibits omitted).[8] Although unclear from Petitioner's motion to reopen, it appears trial counsel did not raise a race-based objection to the State's challenge of Mr. Ingram.[9]

Petitioner's argument he is entitled to a new trial concludes,

> When one applies the analysis conducted in *Foster,* Farris Morris is entitled to relief. Under *Foster,* the prosecution's disparate treatment of the African-American Ingram *vis-à-vis* similarly situated white jurors demonstrates a violation of *Foster* and the Sixth and Fourteenth Amendments. Exactly as in *Foster,* because the prosecution struck Ingram yet accepted similarly-situated white jurors Bowman and Crouse, the strike was "motivated in substantial part by discriminatory intent." *Foster,* 580 U.S. at ___, 136 S. Ct. at 1754. This reason supporting the strike is discriminatory, given the prosecution's disparate treatment of white jurors.[10] The prosecution's strike of Ingram thus violated Farris Morris' right to due process and equal protection under the Fourteenth Amendment, and he is thus entitled to relief under *Foster.*

Motion to reopen at 5.

B. Pre-Foster History of United States Supreme Court Precedent Regarding Race-Based Jury Challenges

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[8] In support of these contentions, Petitioner has attached to his motion the following exhibits: an affidavit by Gaye Nease, an investigator with the Federal Public Defender's Office (who represents Petitioner in federal court), regarding the races of the jurors at issue (exhibit 1); the State's jury selection notes regarding the stricken juror (exhibit 2); and selected pages from the voir dire transcript of the two white jurors mentioned in Petitioner's motion (exhibit 3: juror Bowman; exhibit 4: juror Crouse).

[9] *See* Morris Order Denying Motion to Alter or Amend Judgment, *supra* note 5, at 28 (In motion to alter or amend federal habeas judgment, Petitioner argued trial counsel was ineffective based on "his counsel's failure to challenge the striking of Ingram as pretextual and race-based.").

[10] The footnote provides,

> The prosecutor's notes also indicate that as to Mr. Ingram, "demeanor made me uneasy." This statement, however, is not facially race-neutral, as one could be uneasy because of Mr. Ingram's demeanor as an African-American. Even so, as already noted, the primary motivation gleaned from the prosecution's notes for striking Ingram was the fact that he had relatives with substance abuse problems, and that reason has already been shown to be discriminatory. Thus, the primary reason for striking Ingram (knowledge of persons with substance abuse problems) proves that the strike was "in substantial part" motivated by discriminatory intent, which is all that *Foster* requires.

Original footnote in motion to reopen at 5 n.1

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In 1992, the Tennessee Supreme Court summarized two benchmark United States Supreme Court cases which provided (as of Petitioner's trial date) the prevailing legal standard for determining whether a juror challenge was impermissibly based on racial motives:

> The development of federal constitutional law in this area traces back to *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965). In that case, the United States Supreme Court held for the first time that prosecutors could not use peremptory challenges deliberately to exclude prospective jurors on account of their race. The Court found that racially-motivated exclusions denied a criminal defendant equal protection of the law, in violation of the Fourteenth Amendment to the United States Constitution. *Id.* at 204, 85 S. Ct. at 826. Under *Swain*, however, a defendant could prove purposeful discrimination only by demonstrating that the prosecutor had systematically used peremptory challenges against black venirepersons over a period of time. *Id.* at 227, 85 S. Ct. at 839.
>
> Hailed at the time for recognizing that the sanctity of the peremptory challenge must give way in the face of racially-imbalanced juries, the Supreme Court ultimately recognized in addition that the *Swain* approach was too cautious to solve the problem of racial discrimination in the selection of juries in criminal cases. As a result, in its 1986 decision in *Batson v. Kentucky*,[11] the Court lessened the evidentiary burden established in *Swain*, so that a defendant could make a prima facie case of purposeful discrimination without proving a past pattern of abuse, but could rely instead on evidence relating to the prosecutor's exercise of peremptory challenges at the defendant's trial. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1722.
>
> In order to establish a prima facie case of purposeful discrimination, the *Batson* court required the defendant to satisfy a three-part test. As a threshold matter, the defendant had to show that he was a member of a "cognizable racial group" and that the prosecutor had exercised peremptory challenges to exclude prospective jurors of the defendant's race. *Id.* Second, to prove the purposeful nature of the prosecutor's action, the *Batson* court allowed the defendant to "rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 891, 892, 97 L. Ed. 1244 (1953)). Third, the defendant must show that these facts and "any other relevant circumstances" raised an inference that the prosecutor had used peremptory challenges to exclude potential jurors "on account of their race." *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723. According to *Batson*, once the defendant has met this three-part test and has thereby established a prima facie case of purposeful discrimination, the burden shifts to the prosecution to prove a racially-neutral reason for excusing the jurors in question. *Id.* This explanation

[11] *Batson v. Kentucky*, 476 U.S. 79 (1986).

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must be based on something more than stereotypical assumptions, but it need not rise to the level required to justify the exercise of a challenge for cause. *Id.* at 97, 106 S. Ct. at 1723.

Finally, *Batson* requires the trial court to weigh the evidence presented by both sides and decide whether the prosecution engaged in purposeful discrimination, in violation of the defendant's equal protection rights. *Id.* at 98, 106 S. Ct. at 1724. If the trial court determines that the facts establish a prima facie case of purposeful discrimination and the prosecutor does not come forward with a neutral explanation, the defendant's conviction must be reversed. *Id.* at 100, 106 S. Ct. at 1725.

State v. Ellison, 841 S.W.2d 824, 825-26. (Tenn. 1992). Additionally, in 1991 "the United States Supreme Court modified *Batson* by eliminating the requirement that the defendant and any wrongfully excluded jurors must be of the same race." *Id.* at 826 (citing *Powers v. Ohio*, 499 U.S. 400, 415-16 (1991)).

Twenty years after *Batson*, the Tennessee Supreme Court offered this analysis of the *Batson* test in light of evolving Supreme Court jurisprudence:

At the outset, the defendant must establish a prima facie case of purposeful discrimination. In doing so, the defendant may rely "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." [*Batson*, 476 U.S.] at 96, 106 S. Ct. at 1712. That is, the defendant need not prove a past pattern of racially discriminatory jury selection practices by the prosecution. *Id.* at 92-93, 106 S. Ct. 1712; *cf. Swain v. Alabama*, 380 U.S. 202, 223, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965), *overruled in part by Batson*, 476 U.S. at 91–92, 106 S. Ct. 1712 (recognizing that an inference of purposeful discrimination may be raised on proof that the prosecution struck qualified blacks "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . ."). Once the defendant makes out a prima facie case, the State has the burden of producing a neutral explanation for its challenge. *Batson*, 476 U.S. at 97, 106 1712. This explanation must be a clear and reasonably specific account of the prosecutor's legitimate reasons for exercising the challenge. *Id.* at 98 n. 20, 106 S. Ct. 1712. However, the race or gender neutral explanation need not be persuasive, or even plausible. *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 1769, 131 L.Ed.2d 834 (1995). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." " *Id.* at 768, 115 S. Ct. 1769 (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 1859, 114 L.Ed.2d 395 (1991) (plurality opinion)). If a race-neutral explanation is provided, the trial court must then determine, from all of the circumstances, whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98, 106 S. Ct. 1712. The trial court may not simply accept a proffered race-neutral reason at face value but must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual. *See Miller–El v. Dretke*, 545 U.S. 231, 125 S. Ct.

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> 2317, 162 L.Ed.2d 196 (2005) ("*Miller–El II* "). In that case, the Court reiterated that "the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Id.* at 2331. If the trial court determines that the proffered reason is merely pretextual and that a racial motive is in fact behind the challenge, the juror may not be excluded. *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 903 (Tenn.1996).

State v. Hugueley, 185 S.W.3d 356, 368-69 (Tenn. 2006).

C. *Foster*

In *Foster*, a federal habeas corpus proceeding involving a Georgia death row inmate, the United States Supreme Court reversed conclusions reached by various state and federal courts and concluded the prosecution's strikes of two prospective black jurors were impermissibly based on race, despite the prosecution's purportedly race-neutral explanations. *See Foster*, 136 S. Ct. at 1755. The evidence upon which the Court based its opinion was contained in large part in the prosecution's jury selection notes, which Mr. Foster had obtained through Georgia Open Records Act requests and which were introduced at the state habeas corpus hearing. *Id.* at 1743-47. Regarding the applicability of these notes to the *Batson* issue in Mr. Foster's case, the Court stated,

> Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have "made it 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." *Snyder [v. Louisiana]*, 552 U.S. [472], 478 [(2008)]. As we have said in a related context, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

Foster, 136 S. Ct. at 1748.

After reviewing the prosecution's notes on prospective black jurors in Foster's case, the Court observed two black jurors were excused after State challenges based upon reasons which were not used by the State to challenge non-black jurors who

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actually possessed the shortcomings identified in challenging the black panelists. The State had argued throughout the history of Mr. Foster's case that these challenges were not race-based, and the courts had, up to this point, largely agreed. The Supreme Court, however, rejected the State's reasoning. *See id.* at 1749-54. The Court concluded:

> As we explained in *Miller-El v. Dretke*, "[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." 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L.Ed.2d 196 (2005). With respect to both Garrett and Hood [the two black prospective jurors at issue in this case], such evidence is compelling. But that is not all. There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file. Considering all of the circumstantial evidence that "bear[s] upon the issue of racial animosity," we are left with the firm conviction that the strikes of Garrett and Hood were "motivated in substantial part by discriminatory intent." *Snyder*, 552 U.S., at 478, 485, 128 1203.
>
> . . .
>
> Throughout all stages of this litigation, the State has strenuously objected that "race [was] not a factor" in its jury selection strategy. App. 41 (pretrial hearing); but see *Id.*, at 120 ([prosecutor] testifying that the strikes were "based on many factors and not *purely* on race." (emphasis added) (new trial hearing)). Indeed, at times the State has been downright indignant. See Trial Record 444 ("The Defenses's [*sic*] misapplication of the law and erroneous distortion of the facts are an attempt to discredit the prosecutor. . . . The State and this community demand an apology." (brief in opposition to new trial)).
>
> The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a "color-blind" manner. App. 41, 60 (pretrial hearing). The sheer number of references to race in that file is arresting. The State, however, claims that things are not quite as bad as they seem. The focus on black prospective jurors, it contends, does not indicate any attempt to exclude them from the jury. It instead reflects an effort to ensure that the State was "thoughtful and non-discriminatory in [its] consideration of black prospective jurors [and] to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual." Brief for Respondent 6. *Batson*, after all, had come down only months before Foster's trial. The prosecutors, according to the State, were uncertain what sort of showing might be demanded of them and wanted to be prepared.
>
> This argument falls flat. To begin, it "reeks of afterthought," *Miller-El*, 545

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> U.S., at 246, 125 S .Ct. 2317 having never before been made in the nearly 30–year history of this litigation: not in the trial court, not in the state habeas court, and not even in the State's brief in opposition to Foster's petition for certiorari.
>
> In addition, the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury. The State argues that it "was actively seeking a black juror." Brief for Respondent 12; see also App. 99 (new trial hearing). But this claim is not credible. An "N" appeared next to each of the black prospective jurors' names on the jury venire list. See, *e.g., id.*, at 253. An "N" was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on the "definite NO's" list. See *id.*, 299–301. And a draft affidavit from the prosecution's investigator stated his view that "[i]f it comes down to *having to pick* one of the black jurors, [Marilyn] Garrett, might be okay." *Id.*, at 345 (emphasis added); see also *ibid.* (recommending Garrett "if we *had to pick* a black juror" (emphasis added)). Such references are inconsistent with attempts to "actively see[k]" a black juror.
>
> The State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows.

Foster, 136 S. Ct. at 1754-55 (footnotes omitted; some alterations added).

D. Application to Petitioner's Case

Specifically, Mr. Morris argues that, just as in *Foster*, a black prospective juror in Petitioner's case (Mr. Ingram) was excused for reasons which were motivated in substantial part by discriminatory intent. As in *Foster*, Petitioner cites the notes generated by Madison County prosecutors as evidence of the State's discriminatory intent in exercising its peremptory challenge. Petitioner agues the reasons reflected in the State's notes for excusing Mr. Ingram reflected discriminatory intent because the State did not challenge two white jurors who, like Mr. Ingram, indicated a history of drug and alcohol issues in their families.

Regarding the statutory provision which would allow his post-conviction proceedings to be opened—Tennessee Code Annotated section 40-30-117(a)(1)—

Petitioner states "*Foster* itself establishes that *Foster* involves a new rule or law, retrospectively applicable in a motion to reopen."[12] However, Petitioner offers no argument or citation to authority to support this statement.

The Court is unable to concur with Petitioner's contention *Foster* announced a new rule of law which must be applied retroactively. First, Tennessee's appellate courts appear to take a narrow view of what constitutes a "new constitutional right" relative to motions to reopen. In *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), the Tennessee Supreme Court concluded the execution of persons who were then deemed "mentally retarded" (today defined by statute as "intellectually disabled") violated constitutional protections against cruel and unusual punishment. *Van Tran* resulted from a motion to reopen post-conviction proceedings; the Supreme Court concluded its holding was a new constitutional right warranting retroactive application:

> 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, 109 S .Ct. 1060, 1070, 103 L.Ed.2d 334 (1989) (citations omitted). In other words, "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.; see also Meadows v. State*, 849 S.W.2d 748, 751 (Tenn.1993).
>
> The United States Supreme Court has said that a new rule of federal constitutional law is to be applied in cases on collateral review only if it (1) places certain kinds of primary, private individual conduct beyond the power of the state to proscribe or (2) requires the observance of procedures implicit in the concept of ordered liberty. *Teague v. Lane*, 489 U.S. at 307, 109 at 1073. We have adopted a somewhat different standard in Tennessee: "a new state constitutional rule is to be retroactively applied to a claim for post-conviction relief if the new rule materially enhances the integrity and reliability of the fact finding process of the trial." *Meadows v. State*, 849 S.W.2d at 755; *see also* Tenn. Code Ann. § 40–30–222 (1997) (citing the *Teague* standard for retroactivity).
>
> In deciding *Penry*,[13] the United States Supreme Court recognized that a holding that the Eighth Amendment prohibited the execution of mentally retarded persons would be a new rule because it would " 'brea[k] new ground' and would

[12] Motion to reopen at 2.

[13] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

impose a new obligation on the States and the Federal Government." *Penry v. Lynaugh*, 492 U.S. at 329, 109 at 2952 (alteration in original) (citations omitted). The Court also said that such a rule would apply retroactively on collateral review:

> [T]he first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Thus, if we held ... that the Eighth Amendment prohibits the execution of mentally retarded persons ... regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review..

Id. at 330, 109 S. Ct. at 2953.

> We conclude that our holding under article I, § 16 of the Tennessee Constitution likewise constitutes a new rule. This is an issue of first impression by this Court, and the result is in no way dictated by our existing precedent. *See State v. Laney*, 654 S.W.2d 383, 389 (Tenn.1983) (stating that a defendant's "low intelligence" was a mitigating factor but did not render the death penalty cruel and unusual punishment). Moreover, we agree with the observation in *Penry* that such a rule warrants retroactive application to cases on collateral review. In sum, our holding that article I, § 16 of the Tennessee Constitution prohibits execution of those defendants who are mentally retarded materially enhances the integrity and the reliability of the fact finding process of the trial. *See Meadows v. State*, 849 S.W.2d at 755; Tenn. Code Ann. § 40–30–222 (1997).

Van Tran, 66 S.W.3d at 810-11.

Several death row inmates then raised the intellectual disability issue via a motion to reopen post-conviction proceedings. One such inmate was Michael Coleman; in deciding his appeal, the Tennessee Supreme Court addressed how the first requirement of intellectual disability—a functional intelligent quotient of 70 or below at the time of the offense—could be proven by means other than a raw test score. *See Coleman v. State*, 341 S.W.3d 221, 240-53 (Tenn. 2011). Before *Coleman* was released, a fellow death row inmate, David Keen—who did not raise an intellectual disability claim at trial, on direct appeal, or in his initial post-conviction proceedings—filed a motion to reopen his post-conviction proceedings after he received a score of 67

on a February 2010 IQ test. *See Keen v. State*, 398 S.W.3d 594, 598 (Tenn. 2012). Initially, Mr. Keen argued the I.Q. test result constituted "actual innocence" of the death penalty and, therefore, he was eligible to reopen his post-conviction action under TCA section 40-30-117(a)(2). *Id.* The trial court dismissed the petition, concluding "actual innocence" under the post-conviction statute "did not encompass ineligibility for the death penalty under" the intellectual disability statute. *Id.* at 599. While Mr. Keen's appeal from that ruling was pending, *Coleman* was issued; therefore, Mr. Keen added to his appeal a claim that *Coleman* "announced a new rule of constitutional criminal law which required retroactive application." The Court of Criminal Appeals rejected Mr. Keen's appeal as to both issues, and the Tennessee Supreme Court affirmed the denial. As relevant to this case, the Tennessee Supreme Court stated the following in concluding *Coleman* was not a new rule of constitutional law for purposes of the motion to reopen statute:

> As we have already noted, our holding in *Van Tran*—that executing an intellectually disabled person violated the state and federal constitutions-announced a new constitutional right that required retrospective application. *Van Tran v. State*, 66 S.W.3d at 811. Indeed, our holding in *Van Tran* was explicitly constitutional and was expressly based on the "cruel and unusual punishments" clauses of the federal and state constitutions. Michael Angelo Coleman and Leonard Smith were among those who took advantage of the one-year window created by *Van Tran* for reopening post-conviction proceedings.
>
> *Coleman* was quite different from *Van Tran*. In *Coleman*, we were not called upon to interpret the constitution. Instead, *Coleman* concerned the interpretation of Tenn. Code Ann. § 39–13–203, the statute that defined intellectual disability in the context of the death penalty. *Coleman* supplemented *Howell* and clarified that "the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below." *Coleman v. State*, 341 S.W.3d at 241. We held in *Coleman* that the courts were not limited to raw test scores, but could also consider other factors, such as the Flynn effect, the practice effect, standard error of measurement, malingering, and cultural differences. *Coleman v. State*, 341 S.W.3d at 242 n. 55, 247. *Coleman* recognized no new constitutional right. The only constitutional right at issue in *Coleman* was the one we had already announced ten years earlier in *Van Tran*. Mr. Keen cannot

piggyback *Coleman* on top of *Van Tran* in order to reopen the one-year statutory window for a constitutional rule that was articulated over a decade ago.

> Because we have determined that *Coleman*'s holding, which concerned the interpretation and application of Tenn. Code Ann. § 39–13–203, was not a constitutional ruling, there is no need to inquire whether that holding would qualify as a "new rule." Nor is there any use in discussing retroactivity. *See Teague v. Lane*, 489 U.S. 288, 301, 307, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989); *Meadows v. State*, 849 S.W.2d at 751, 755; *see also* Tenn. Code Ann. § 40–30–122 (2012). We also have no need to discuss whether Mr. Keen's claim would be subject to the "clear and convincing evidence" standard of Tenn. Code Ann. § 40–30–117(a)(4) or, as he argues, the "colorable claim" standard of Tenn. Sup. Ct. R. 28, §§ 2(H), 6(B)(6) that we applied in *Howell v. State*, 151 S.W.3d at 460–63.

Keen, 398 S.W.3d at 608-09 (footnotes omitted). Footnote 13 from the *Keen* opinion, contained in the second paragraph of the immediately preceding section, is particularly noteworthy:

> The United States Court of Appeals for the Sixth Circuit analyzed *Coleman* shortly after its release. Although the panel disagreed on whether *Coleman* primarily interpreted *Atkins* or the Tennessee Code, both the majority and the dissent viewed *Coleman* as a clarification of existing law. The majority characterized *Coleman* 's holding as an "elucidation of the *Atkins* standard under Tennessee law." *Black v. Bell*, 664 F.3d 81, 92, 96, 101 (6th Cir.2011) (remanding Black's intellectual disability claim to the U.S. District Court for reconsideration in light of *Coleman*). Judge Boggs, in dissent, offered a more accurate assessment:
>
> > In *Coleman v. State*[,] . . . the Tennessee Supreme Court construed a Tennessee statute prohibiting the execution of [intellectually disabled] defendants under Tennessee law.... *Coleman* is purely a construction of a state statute that makes only fleeting references to *Atkins* ....
> >
> > . . .
> >
> > . . . *Coleman* decided how a Tennessee state statute should apply to a Tennessee state court opinion [i.e., *Van Tran*] decided under the Tennessee state Constitution.
>
> *Black v. Bell*, 664 F.3d at 107–08 (Boggs, J., dissenting).
>
> For other cases analyzing whether one of our holdings announced a new constitutional right, see *Miller v. State*, 54 S.W.3d 743, 746–47 (Tenn. 2001) (explaining that *State v. Brown*, 836 S.W.2d 530 (Tenn.1992) did not announce a new constitutional right, but "simply reiterated" Tennessee law); *Mitchell v. State*, No. M2011–02030–CCA–R3–PC, 2012 WL 2308294, at *2–3 (Tenn. Crim. App.

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June 15, 2012) (finding that *Lane v. State*, 316 S.W.3d 555 (Tenn.2010) did not announce a new constitutional right, but "applied well-established rules of law"); *Coury v. Westbrooks*, No. M2003–01800–CCA–R3–PC, 2004 WL 2346151, at *2–3 (Tenn. Crim. App. Oct. 19, 2004) (finding that *Dixon v. Holland*, 70 S.W.3d 33 (Tenn.2002), rather than announcing a new constitutional right, clarified existing law).

Keen, 398 S.W.3d at 609 n.13 (emphasis added).

In the instant case, this Court concludes *Foster*, like *Keen*, did not announce a new rule of constitutional law but rather could be seen as "explaining," "clarifying," or "applying" well-settled rules of law that had been announced by *Batson* and its progeny. *Foster*'s "motivated in substantial part by discriminatory intent" language first appeared in *Snyder v. Louisiana*, which was filed eight years before *Foster*, and the comparative juror analysis upon which Petitioner relies in making his claims was applied by the United States Supreme Court in *Miller-el v. Dretke*, filed three years before *Snyder*. The principles of law upon which Petitioner relies, therefore, are not "new" within the meaning of the post-conviction statute. Furthermore, numerous state and federal courts have concluded *Miller-El* and *Snyder* did not announce new constitutional rules.[14] If the cases upon which *Foster* is based would not entitle Mr. Morris to reopen his post-conviction petition, then it stands to reason *Foster* is similarly unavailing to Petitioner.

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[14] *See, e.g., Hooper v. Ryan*, 729 F.3d 782, 786 (7th Cir. 2013) ("to the extent that *Miller-El* and other decisions elucidate *Batson* they are not 'new rules' for the purpose of *Teague*."); *United States v. Davis*, 609 F.3d 663, 694 (5th Cir. 2010) (*Snyder* "holding did not change the law of review of peremptory challenges"; Circuit Court "reject[ed]" petitioner's "attempts to mischaracterize *Snyder*"); *Golphin v. Branker*, 519 F.3d 168, 186 (4th Cir. 2008) ("*Miller-El II* did not alter *Batson* claims in any way . . . subsequent to *Miller-El II*, the Court has retained and continued to apply *Batson*'s three-step process."); *Boyd v. Newland*, 467 F.3d 1139, 1146 (9th Cir. 2004) (*Miller-El v. Dretke* does not "create a new rule of criminal procedure. Instead, it simply illustrates the means by which a petitioner can establish, and should be allowed to establish, a *Batson* error."); *People v. Lenix*, 187 P.3d 946, 960 (Cal. 2008) ("Neither *Miller-El II* nor *Snyder* changed the *Batson* standard); *State v. Pona*, 926 A.2d 592, 606 (R.I. 2007) ("*Miller-El II* simply applied the existing *Batson* test, albeit with an arguably newfound rigor"; the opinion did not impose "upon the state and federal courts any new obligation under the existing *Batson* rubric."); *People v. Davis*, 899 N.E.2d 238, 250 (Ill. 2008) (*Snyder* and *Miller-El* "do not represent a change in the area of *Batson* law").

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Finally, the Court notes the Federal District Court's order denying Petitioner's motion to alter or amend briefly addressed Petitioner's claim as to Mr. Ingram within an ineffective assistance of counsel context.[15] This Court will not review the District Court's findings, as such a review would involve reviewing the merits of Petitioner's current claim, and this Court concludes Petitioner's motion may be dismissed without reviewing the merits. Also, the federal motion alleged ineffective assistance of counsel, while the current motion attacks the State's exercising of what Petitioner contends was an improper race-based peremptory challenge. However, this Court notes the District Court reviewed the petitioner's issue by citing solely to *Batson*. *Foster*, although decided in 2016, was not mentioned in the 2017 order, nor were *Snyder* or *Miller-El*. The District Court's order further reinforces this Court's conclusion *Batson* remains the prevailing law in assessing whether juror challenges were impermissibly race-based, and that law was not affected by *Foster*.

Petitioner is not entitled to relief.

V. Conclusion

For the reasons stated above, Mr. Morris' motion to reopen his petition for post-conviction relief based on *Foster v. Chatman* is **DENIED**. Mr. Morris is indigent, so any costs associated with these proceedings are taxed to the State.

IT IS SO ORDERED this the 31st day of July, 2017.

Kyle Atkins, Judge
Circuit Court, Division III

[15] *See* Morris Order Denying Motion to Alter or Amend, *supra* note 5, at 27-30.

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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following persons by U.S. Mail on this, the 31 day of August, 2017:

Mr. Al Earls
Office of the District Attorney General
PO Box 2825
Jackson TN 38302

Ms. Kimberly Hodde
40 Music Square E.
Nashville TN 37203

Clerk / Deputy Clerk

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Appendix 2

Sixth Circuit Order Denying Second Habeas Petition

No. 18-5626

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: FARRIS GENNER MORRIS,

Movant.

ORDER

Before: BOGGS, SILER, and CLAY, Circuit Judges.

Farris Genner Morris, a Tennessee prisoner under sentence of death, moves for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, Morris argues that the Supreme Court's decision in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), entitles him to relief on his claim that the prosecution struck potential juror Savanah Ingram because of his race.

In 1996, Morris was convicted of murdering Charles Ragland and Erica Hurd and raping Angela Hurd. He received a death sentence for the first-degree murder of Hurd, a sentence of life without parole for the murder of Ragland, and twenty-five years of imprisonment for aggravated rape. The Tennessee Supreme Court affirmed Morris's convictions and sentences. *State v. Morris*, 24 S.W.3d 788 (Tenn. 2000). The Tennessee Court of Criminal Appeals affirmed the denial of Morris's post-conviction petition decision. *Morris v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006).

Morris filed a pro se petition for a writ of habeas corpus in April 2007, and counsel filed an amended petition in January 2008. The district court ruled that Morris had received ineffective assistance of counsel in the sentencing phase and denied his other claims. We affirmed the district court's decision to deny Morris's guilt-phase claims, vacated the district

court's decision to grant relief on his sentencing-phase claims, and remanded the case to the district court for denial of the writ. *Morris v. Carpenter*, 802 F.3d 825, 845 (6th Cir. 2015), *cert. denied*, 137 S. Ct. 44 (2016).

Morris filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) after the district court denied his petition. He argued that he had not received application of *Martinez v. Ryan*, 566 U.S. 1 (2012), to his substantial claims of ineffective assistance of counsel, including the claim that counsel failed to raise a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), claim regarding Ingram. Morris later filed a motion to amend or correct his motion to alter judgment. The district court denied Morris's motions. On appeal, Morris requested that this court certify, among other claims, the claim that counsel ineffectively failed to object to the race-based exclusion of juror Ingram. We denied Morris a certificate of appealability. *Morris v. Mays*, No. 16-6661 (Mar. 9, 2018) (order).

On June 18, 2018, Morris filed a motion for leave to file a second or successive habeas corpus petition. He argues that the prosecution's strike of African-American prospective juror Ingram was motivated in substantial part by discriminatory intent, and contends that the Supreme Court's decision in *Foster* states a new rule of law made retroactive to cases on collateral review.

"A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). To be entitled to an order authorizing the district court to consider a second habeas corpus petition, the applicant must make a prima facie showing that the claim relies on: (1) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or (2) newly discovered evidence which could not have been discovered previously through the exercise of due diligence and which would be sufficient to establish, by clear and convincing evidence, that no reasonable factfinder would have found the applicant guilty. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(C); *In re Tibbetts*, 869 F.3d 403, 405 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 661 (2018). A prima facie showing means sufficient allegations of fact and some documentation that would warrant fuller exploration in the district court. *In re*

Campbell, 874 F.3d 454, 459 (6th Cir.), *cert. denied*, 138 S. Ct. 466 (2017). The Anti-Terrorism and Effective Death Penalty Act does not define "second or successive." Courts apply the abuse of the writ doctrine to determine whether a petition is second or successive. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998); *Campbell*, 874 F.3d at 460. A numerically second petition abuses the writ and is 'second' when it raises a claim that could have been raised in the first petition. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991); *Tibbetts*, 869 F.3d at 405. An application that presents a claim that would have been unripe if it had been presented in an earlier application is not second or successive. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007); *Stewart*, 523 U.S. at 643-46.

Morris's proposed petition is barred and would be an abuse of the writ because it raises a claim that was presented in a prior petition. *See* 28 U.S.C. § 2244(b)(1); *McCleskey*, 499 U.S. at 489; *Tibbetts*, 869 F.3d at 405. In claim 24 of his amended petition, Morris alleged that the state violated *Batson* by using a peremptory challenge to remove Ingram. The district court held that Morris procedurally defaulted the claim by failing to present it in state court and had not presented cause or prejudice to excuse the default. In claim 9N, Morris alleged that his trial counsel failed to object when the prosecutor removed Ingram. The district court found that Morris had not presented the claim in state court and had failed to demonstrate cause and prejudice for the procedural default. As explained below, *Foster* is an application of *Batson* and not the basis for a new claim. Since Morris presented his *Batson* claim in his previous petition, his current petition is subject to dismissal under § 2244(b)(1).

Nor has Morris made a prima facie showing under § 2244(b)(2). *Foster* did not involve a new rule of constitutional law, it has not been made retroactive to cases on collateral review, and the rule it applied was previously available. Morris argues that the new rule of constitutional law is that a petitioner on collateral review is entitled to relief if the prosecution struck a prospective juror and the strike was "motivated in substantial part by discriminatory intent." *Foster*, 136 S. Ct. at 1754. The *Foster* opinion analyzed the petitioner's claims under *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Batson*. *Foster*, 136 S. Ct. at

1747, 1752. The Court quoted *Snyder* when it concluded that the prosecutor's jury selection notes showed that the strikes were "motivated in substantial part by discriminatory intent." *Id.* at 1754 (quoting *Snyder*, 552 U.S. at 485). *Foster* applied the Court's *Batson* precedent to the facts of the case, and did not create a new constitutional rule.

Nor did the Court in *Foster* make a new rule retroactive to cases on collateral review. Morris argues that because *Foster* was on collateral review, the Court necessarily made its ruling retroactive to cases on collateral review. "[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The Court may also make a new rule apply retroactively when multiple holdings logically dictate the retroactive nature of the new rule. *Id.* at 668 (O'Connor, J., concurring); *In re Watkins*, 810 F.3d 375, 381 (6th Cir. 2015). The Court in *Foster* applied *Batson* to a case on collateral review, but did not announce a new rule or hold it to be retroactive. Even if *Foster* announced a rule that did not exist when Morris filed his first petition, that would not make *Foster* retroactive on collateral review. *See In re Coley*, 871 F.3d 455, 457-58 (6th Cir. 2017). Morris has not identified any Supreme Court case or series of holdings demonstrating that *Foster* made a new constitutional rule retroactive to cases on collateral review.

For the foregoing reasons, we **DENY** Morris's motion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk