No. 18-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

JAMES RANDALL ROGERS,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI
Capital Case

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CAPITAL CASE

QUESTION PRESENTED

In *Foster v. Chatman*, 136 S. Ct. 1737 (2016), this Court held that Stephen Lanier, the district attorney for Floyd County, Georgia, had purposefully discriminated against African American prospective jurors by using peremptory challenges to exclude them from service on the basis of their race.

In the proceedings below, Mr. Rogers presented newly-discovered evidence—sworn affidavit testimony by a sitting federal judge prompted to speak up by the *Foster* case—that Lanier had a stated *policy* of systematically excluding all African Americans from jury service in his capital cases during a period of time that produced death sentences for two men: Foster *and* Rogers.

The question presented is this:

Does Lanier's systematic discrimination against African Americans violate *Strauder v. West Virginia*, 100 U.S. 303 (1880), *Swain v. Alabama*, 380 U.S. 202 (1965), and *Foster*?

PARTIES TO THE PROCEEDING

This petition arises from a habeas corpus proceeding in which Petitioner, James Randall Rogers, was the petitioner before the Superior Court of Butts County and the Supreme Court of Georgia. Respondent in this Court is Benjamin Ford, in his official capacity as Warden of the Georgia Diagnostic and Classification Prison. Warden Ford's predecessor was the respondent before the Superior Court of Butts County and the Supreme Court of Georgia.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Randall Rogers ("Rogers") respectfully petitions this Court for a writ of *certiorari* to review the Supreme Court of Georgia's denial of his application for a certificate of probable cause to appeal the judgment of the Superior Court of Butts County, Georgia, in this capital case.

OPINIONS BELOW

The order of the Superior Court of Butts County denying Rogers's petition for a writ of habeas corpus is reproduced in the appendix at Pet. App. 1. The Supreme Court of Georgia's summary denial of Rogers's application for a certificate of probable cause to appeal ("CPC application") is reproduced at Pet. App. 9.

JURISDICTION

The Superior Court of Butts County entered an order denying Rogers's petition for a writ of habeas corpus on January 16, 2018. Rogers timely filed a CPC application in the Supreme Court of Georgia, which entered a summary order denying it on August 27, 2018. Pet. App. 9. On November 9, 2018, Justice Thomas extended the time for filing this petition for writ of *certiorari* through and until January 24,

2019. *See* No. 18A506. Rogers invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall … 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. amend. XIV.

STATEMENT OF THE CASE

This Court has held that Stephen Lanier, the former district attorney for Floyd County, Georgia, purposefully discriminated against African Americans by using peremptory challenges to exclude prospective jurors on account of their race in the capital case of Timothy Foster. *Foster v. Chatman*, 136 S. Ct. 1737 (2016). A sitting federal judge who once worked as an assistant district attorney under Lanier, the Honorable Harold Chambers, has now provided sworn affidavit testimony establishing that Lanier's misconduct was not limited to Foster's case; rather, Lanier imposed a *policy* of systematically excluding any African American citizen from jury service in his capital

cases.[1] Floyd County records confirm that Lanier struck *every* African American prospective juror in each of the capital cases that he tried from 1982 until 1987, during which he obtained death sentences for two men: Foster and Rogers, the petitioner.

Lanier adopted his discriminatory policy more than a century after Congress and this Court established that any state action excluding African Americans from jury service on the basis of their race is illegal and unconstitutional. 18 U.S.C. § 243 (1875); *Strauder v. West Virginia*, 100 U.S. 303 (1880). This Court had also acknowledged for

[1] As shown by the procedural history, *infra*, Rogers had federal habeas corpus proceedings pending in the Northern District of Georgia when Judge Chambers came forward. The presiding federal habeas judge, Harold L. Murphy, ordered those proceedings stayed and held in abeyance so that Rogers could exhaust his state remedies relating to this newly discovered evidence. Order (Doc. No. 118), *Rogers v. GDCP Warden*, Case No. 4:14-CV-306-HLM (N.D. Ga. April 27, 2017). Judge Murphy concluded that "no evidence indicates that [Rogers] engaged in intentionally dilatory litigation tactics," that his claims "appear to be potentially meritorious" and that Rogers had "made a credible argument that he has shown good cause for his failure to exhaust, as the factual basis for the new claims was not exposed until after Petitioner filed this § 2254 Petition." Doc. No. 118 at 2-4. "Under those circumstances," the district court concluded, "Petitioner's 'interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions.'" *Id.* at 4 (quoting *Rhines v. Weber*, 544 U.S. 269, 278 (2005)).

two decades that evidence of systematic discrimination—such as Lanier's policy—would sustain a challenge to the State's use of peremptory challenges in a particular case. *Swain v. Alabama*, 380 U.S. 202 (1965).

This Court's precedent further demonstrates that newly-discovered evidence of Lanier's misconduct entitles Rogers to review and relief. *Amadeo v. Zant*, 486 U.S. 214 (1988). As this Court held, if the evidence of the district attorney's misconduct "was not reasonably discoverable because it was concealed by … [c]ounty officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents." *Id.* at 222 (citing *Reed v. Ross*, 468 U.S. 1 (1984); *Murray v. Carrier*, 477 U.S. 478 (1986)).

The Georgia courts nonetheless denied relief to Rogers, relying upon two erroneous and internally-contradictory conclusions: first, that Rogers had all of the evidence necessary to raise his claims at the time of his trial, rendering the hiding of Lanier's policy irrelevant; and second, that *no* claim was available to Rogers at the time of his trial

because he is white. These findings reflect a fundamental misunderstanding of this Court's precedent. They would also leave Rogers and the many African American citizens whom Lanier unjustly excluded from jury service with no recourse from Lanier's knowing, flagrant and persistent violations of the Constitution. As it did when confronted with Lanier's discrimination in *Foster*, this Court should grant *certiorari* and, in this case, reverse summarily.

A. Trials and post-conviction proceedings.

Thirty-eight men and women were qualified by the Superior Court of Floyd County for the jury venire in Rogers's 1985 capital trial. Four of those prospective jurors were African American. Lanier used his peremptory challenges to remove each. One additional African American prospective juror qualified for the alternate pool. Lanier struck him as well.

Rogers was convicted and sentenced to death. After his case was affirmed on direct appeal, *Rogers v. State*, 344 S.E.2d 644 (Ga. 1986), Rogers challenged his conviction and sentence in state and federal habeas corpus proceedings, which were ultimately unsuccessful. *Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994) (reversing district court's grant of

sentencing relief); *Rogers v. Zant*, 513 U.S. 899 (1994) (denying *certiorari*).

On May 19, 1995, the Superior Court of Butts County, sitting in habeas corpus, remanded Rogers's case for an adjudication of whether he is intellectually disabled. *See Fleming v. Zant*, 259 Ga. 687 (1989). In August 2005, a jury found that he was not. Appellate and habeas proceedings stemming from Rogers's intellectual disability trial continued until April 27, 2017, when the United States District Court for the Northern District of Georgia stayed Rogers's federal habeas proceedings so that he could return to state court with the newly-discovered evidence of Lanier's discriminatory policy.

B. A federal judge comes forward.

On November 2, 2015, this Court held oral argument in *Foster v. Chatman*. *Foster* turned on whether Lanier, in his capacity as Floyd County district attorney, purposefully discriminated on the basis of race when he struck each of the four African American prospective jurors at Foster's 1987 capital trial.

In response to the media coverage of the oral argument, the Honorable Harold Chambers, a federal administrative law judge,

contacted Mr. Foster's counsel, the Southern Center for Human Rights ("SCHR").[2] Judge Chambers, who served as an assistant district attorney in Floyd County under Lanier from 1985 to 1991, disclosed that "Lanier's approach to jury selection in death penalty cases was to strike the black jurors." Pet. App. 10. Per Judge Chambers, "[i]t was a well-known fact within the office that Lanier would not accept a black juror in a death penalty case … [and] well understood that Lanier would use his peremptory strikes to remove any black prospective jurors who were qualified to serve." *Id.*

The reason Lanier adopted the policy was "also [] well known within the office." *Id.* It stemmed from Lanier's prosecution of Ronald Anthony Duck for capital murder in February 1982. After voting to convict at the conclusion of the guilt-innocence phase of Duck's trial, the jury deadlocked during the penalty phase, with eleven jurors voting to impose the death penalty and one juror voting for life. As a result, Duck was sentenced to life in prison.[3] Lanier stated publicly that he

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[2] SCHR also represented Rogers at that time, but subsequently withdrew from his representation due to a conflict of interest.

[3] *State v. Ronald Duck*, No. 17879 (Floyd Co. Sup. Ct. 1982), Tr. at 215-42.

was "very bitter" about the holdout juror's vote and bemoaned that "one juror prevent[ed] us" from obtaining a death sentence. *See* Nanette Payne, *Duck Penalty Angers 11 Jurors*, ROME NEWS-TRIBUNE, Feb. 28, 1982, at B1.

Lanier subsequently discovered that the holdout juror was an African American minister. Lanier fixed upon the juror's race as the reason for his vote, informing his staff that "as a result of [the *Duck*] case he would never put another black juror on a murder case as long as he was a prosecutor." Pet. App. 11.[4]

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[4] There is also evidence that Lanier targeted this juror, threatening to prosecute him for perjury because he had "reason to believe the juror lied when he said he would vote for the death penalty if the circumstances warranted it"—with that reason being Lanier's belief that "'if any case warranted the death penalty[,] this one did.'" *Floyd Lawmakers Back Extension for Life Sentences*, ROME NEWS-TRIBUNE, Mar. 1, 1982, at A1. Rogers's counsel in his 1985 trial filed motions for a change of venue and to recuse Lanier based upon his conduct following the *Duck* case. Counsel subpoenaed the holdout juror as a witness for each motion "for the purpose of showing that he was held up to public scorn and ridicule and subjected to harassment in the community as a result of his refusing to impose the death penalty in the *Duck* case" to the extent that "he fears for his life ... [and] would not ever want to serve on a jury again[.]" Pet. App. 13-15. Lanier stipulated that the juror would so testify. Pet. App. 14, 16.

C. Lanier imposes his unconstitutional policy and obtains death sentences for Rogers and Foster.

The evidence presented below corroborates Judge Chambers's account. In the six years following *Duck*, Lanier sought the death penalty in three cases: 1) *State v. Fred Wright*, No. 17127 (May 1982); 2) *State v. James Rogers*, No. 21295 (June 1985) (this case); and 3) *State v. Timothy Foster*, No. 86-2218-2 (April 1987).[5] Lanier had no opportunity to strike an African American juror in *Wright*, as all thirty-six of the prospective jurors were white. As noted *supra*, Lanier struck each of the four African Americans within the pool of thirty-eight qualified jurors who would have sat on Rogers's jury, also striking the one African American in the alternate pool. In *Foster*, Lanier excluded all four African American jurors out of the forty-one qualified prospective jurors, despite this Court's decision in *Batson* the year before.

[5] At each of these trials, the jury was selected through the following, statutorily-mandated procedure. The prosecution was afforded ten peremptory strikes, while the defense was afforded twenty. The court called the jurors one by one, with Lanier given the first opportunity to exercise a strike. If Lanier chose not to remove the juror, the defense could exercise one of its strikes. If neither party opted to strike the juror, he or she would serve. The process concluded when twelve jurors had been seated. *See* O.C.G.A. § 15-12-165 (1982), (1985).

Consequently, *every* capital defendant tried by Lanier during this period had an all-white jury.[6]

Judge Chambers swore to Lanier's application of this policy in Mr. Foster's case and his open disregard for its illegality. Judge Chambers recalled that he met with Lanier and investigator Clayton Lundy in the district attorney's office during the week of *voir dire*. During that meeting, Lundy told Lanier, "[y]ou can't strike all the blacks. You know you're going to have to put a black on this jury." Pet. App. 11. But Lanier refused, replying, "[n]o. I won't do it." *Id.* Lundy told Lanier, "[y]ou're going to get in trouble for this if you don't." *Id.* But Lanier "struck all the black jurors anyway." *Id.*

D. Lanier's discrimination in *Foster* is discovered.

Lundy was correct to predict "trouble." In 2006, SCHR obtained the Floyd County district attorney's files from the *Foster* trial, which included notes confirming that Lanier had singled out the African American prospective jurors for removal through peremptory strikes—

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[6] A statistical analysis of Lanier's use of peremptory strikes in the *Wright*, *Rogers* and *Foster* trials reveals that "the probability that [Lanier] would strike all the black jurors … without race playing a role, is approximately 1 in 7 million." Pet. App. 19.

highlighting the names of those jurors in green, circling their names on their juror questionnaires, and enumerating several black prospective jurors with the letter "B," *e.g.*, "B#1," "B#2," and "B#3." These notes demonstrated that Lanier had made "misrepresentations to the trial court" when providing "race-neutral" reasons for his strikes of African American prospective jurors. *See Foster*, 136 S. Ct. at 1749-55.[7]

On May 23, 2016, this Court found that Lanier was indeed "motivated in substantial part by race when [he] struck [the African American jurors] from the jury." *Id.* at 1755. This Court further recognized that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." *Id.* As a result, Foster is now entitled to a new trial. Rogers should be entitled to the same.

E. The habeas proceedings below.

On January 12, 2017, Rogers filed a petition for a writ of habeas corpus in the Superior Court of Butts County that presented new claims

[7] After discovering Lanier's notes in Foster's case, SCHR requested access to the district attorney's files from the prosecutions of Rogers and Wright. Tellingly, neither file, according to the response to the requests, included any notes or lists regarding prospective jurors or jury selection for these trials.

of constitutional error premised upon Judge Chambers's disclosure of Lanier's heretofore secret policy. Rogers sought relief, relying upon this Court's precedent in *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Swain v. Alabama*, 380 U.S. 202 (1965); and *Batson v. Kentucky*, 476 U.S. 79 (1986).

The state habeas court signed Respondent's proposed order on January 16, 2018, denying Rogers's claims as procedurally barred because he was "well-aware at the time of trial that [Lanier] had struck all black potential jurors" and, therefore, his claims were all "reasonably available" during prior state habeas proceedings. Pet. App. 4-5. The court held in the alternative that these claims were procedurally defaulted, and that Rogers could not show cause to overcome the default, because "[t]he legal basis for [his] claims existed at the time of his trial and direct appeal." Pet. App. 6. The court also held that Rogers could not show prejudice because he is white and at the time of his trial "neither state nor federal law guaranteed a white defendant the right to challenge the peremptory strikes of the prosecutor based upon bias of another race[.]" Pet. App. 7 (citing *Powers v. Ohio*, 499 U.S. 400 (1991)).

Rogers sought review in the Supreme Court of Georgia by filing a CPC application. The court summarily denied the application on August 27, 2018.

REASONS FOR GRANTING THE WRIT

I. Lanier's Policy of Systematically Excluding Black Citizens From Capital Juries was Illegal and Unconstitutional.

By the time Lanier adopted his discriminatory policy, this Court had long established that: 1) the Constitution prohibits racial discrimination in jury selection; 2) this prohibition extends to a prosecutor's use of peremptory challenges; and 3) the race of the defendant does not deprive him of standing to challenge such unconstitutional practices. Indeed, given the breadth and uniformity of this Court's precedent, it is inconceivable that Lanier did not *know* as he implemented his policy that he was violating the Constitution. Considering the range of harms inflicted by this policy—whose victims include not only Rogers, but also the excluded jurors and the community at large—this Court should grant Rogers's petition for writ of *certiorari* and summarily vacate his conviction and sentence of death.

A. A policy of racial discrimination in jury selection has been unconstitutional since *Strauder*.

Congress first made it a crime for a public official to exclude anyone from jury service "on account of race, color, or previous condition of servitude" in the Civil Rights Act of *1875*. 18 U.S.C. § 243. And in 1880, this Court affirmed the constitutionality of the Act "as well as the broader constitutional imperative of race neutrality in jury selection." *Powers*, 499 U.S. at 402 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880)). In the 139 years since, this Court has never "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts," and has sought through "the clarity of these commands to eliminate the taint of racial discrimination in the administration of justice[.]" *Id.*

In *Strauder*, this Court detailed the range of constitutional harms inflicted by an explicitly discriminatory policy. The Court found that West Virginia's law establishing that "no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State" violated the Fourteenth Amendment rights of the petitioner—a

formerly-enslaved African American—because in "discriminating in the selection of jurors, as it does, against negroes because of their color, [it] amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State[.]" 100 U.S. at 304, 310. *Strauder* recognized, however, that such a statute also infringed upon the rights of *all* citizens excluded from jury service by "denying to them the privilege of participating equally ... in the administration of justice[.]" *Id.* at 308. This Court emphasized:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is *practically a brand upon them, affixed by the law*, an assertion of their inferiority, and a stimulant to that race prejudice which is *an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others*.

Id. (emphases added).

B. Intentional discrimination through peremptory challenges is unconstitutional.

In the years that followed, this Court repeatedly emphasized that the principles first explicated in *Strauder* forbid "*any action* of a state, whether through its Legislature, through its courts, or through its *executive or administrative officers*" to discriminate on the basis of race

in selecting a jury. *Norris v. Alabama*, 294 U.S. 587, 589 (1935) (emphases added) (citing *Carter v. Texas,* 177 U.S. 442, 447 (1900); *Strauder*, *supra*; *Neal v. Delaware*, 103 U.S. 370, 397 (1881); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904); *Martin v. Texas*, 200 U.S. 316, 319 (1906)). This mandate ultimately obliged the Court "to reconcile the command of racial neutrality in jury selection with the utility, and the tradition, of peremptory challenges," which allow for the removal of a prospective juror with no cause or explanation. *Powers*, 499 U.S. at 405.

Consequently, in *Swain v. Alabama*, this Court held that it was impermissible for a prosecutor to use his peremptory challenges to deny to African Americans "the same right and opportunity to participate in the administration of justice enjoyed by the white population." 380 U.S. 202, 224 (1965). In order to "accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control," *Batson*, 476 U.S. at 91, however, this Court declined to permit an equal protection claim premised solely upon "the striking of Negroes *in a particular case*." *Swain*, 380 U.S. at 221 (emphasis added). Instead, before a defendant could even "pose the issue," he was required to "show the

prosecutor's *systematic* use of peremptory challenges against Negroes." *Id.* at 227 (emphasis added). Thus, a defendant could "support a reasonable inference" of discrimination where, for instance, he can prove that the prosecutor "in case after case, whatever the circumstances … [and] whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors[.]" *Id.* at 223-24.[8]

C. Rogers is entitled to relief under *Strauder* and *Swain.*

As this Court explained in *Strauder*, "the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race," and the "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85 (citing *Strauder*, 100 U.S. at 306-07). In spite of this century of precedent, Lanier unabashedly implemented a policy designed to accomplish such "evil." Lanier's policy of racial discrimination was so

[8] This Court would subsequently "reexamine" *Swain* in *Batson v. Kentucky* and create an evidentiary test that would allow a defendant to challenge the state's use of peremptory challenges in their particular case even without evidence of systematic discrimination. At the time of Mr. Rogers's trial, however, such evidence was still required.

anachronistic in its explicitness that this Court would express "confiden[ce]" soon after he imposed it "that no State now has such a law." *Id.* at 88. This Court could not have known that 150 years after the passage of the Fourteenth Amendment, it would again need to vindicate the profound harms "inflicted [by Lanier] on the defendant[,] the excluded juror[s and] the entire community." *Id.* at 87.

Moreover, the extraordinary and uncontroverted extra-record evidence newly disclosed to Rogers is more than sufficient to "support a reasonable inference" of discrimination under *Swain*'s heavy and now-rejected burden of proof. *Swain*, 380 U.S. at 224. Judge Chambers's affidavit is irrefutable evidence of Lanier's "systematic use of peremptory challenges against" African Americans. *Id.* at 227. With this new evidence, Rogers can prove precisely "when, why, and under what circumstances … [Lanier] used his strikes to remove Negroes," *id.* at 226, demonstrating that Lanier had "perverted" the "purpose of the peremptory challenge" in his case as surely as he did in Foster's. *Id.* at 224.

D. The race of the defendant does not deprive him of standing to challenge systematic discrimination.

Rogers's race does not deprive him of standing to raise these challenges. This Court first considered "a *white defendant's* challenge to the exclusion of Negroes from jury service" in 1972 when it granted *certiorari* in the Georgia case of *Peters v. Kiff*. 407 U.S. 493, 496 (1972) (emphasis added). While *Peters* produced no single majority opinion, six Justices agreed that the race of the defendant was irrelevant to the question of whether a constitutional violation had occurred. Writing for himself and two other Justices, Justice Marshall rejected Georgia's claim that a white defendant could not be harmed by the exclusion of African American jurors as taking "too narrow a view of the kinds of harm that flow from discrimination in jury selection." *Id.* at 498 (Marshall, J., plurality opinion). Justice Marshall emphasized *Strauder*'s recognition that "the exclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class," *id.* at 499, and cited the Court's holding in *Williams v. Florida*, 399 U.S. 78 (1970), that such exclusion "injures ... *other defendants as well*, in that it destroys the possibility that the jury will reflect a

representative cross section of the community," *Peters,* 407 U.S. at 500 (emphasis added).

Moreover, as the Due Process Clause of the Fourteenth Amendment affords defendants the "right to a competent and impartial tribunal," it "imposes limitations on the composition of [a] jury" so that "circumstances that create the likelihood or the appearance of bias," violate its protections even without a "showing of actual bias in the tribunal." *Id.* at 501-02. As "[i]llegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process[,] create the appearance of bias in the decision of individual cases, and [] increase the risk of actual bias as well," they violate due process. *Id.* at 502-03. Accordingly, by 1972, "*whatever his race*, a criminal defendant ha[d] standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily exclude[d] from service the members of any race, and thereby denie[d] him due process of law." *Id.* at 504 (emphasis added).

II. The Georgia Courts Misinterpreted This Court's Precedent in Rejecting Rogers's *Strauder* and *Swain* Claims.

The state court based its dismissal of Rogers's petition on two equally unavailing grounds. Each rationale suffers from a fatal flaw and evinces a misunderstanding of this Court's precedent.

A. *Strauder* and *Swain* claims were not available to Rogers until Judge Chambers came forward.

In finding Rogers's claims procedurally barred because they were all previously "available," the state habeas court presumed that Rogers could and should have raised a *Strauder* or *Swain* claim at trial, on direct appeal, or in his previous habeas proceedings because he was "well-aware at the time of trial that the prosecutor had struck all black potential jurors." Pet. App. 4. This analysis fails to distinguish between claims premised upon—and requiring evidence of—a *policy* of systematic exclusion, such as *Strauder* and *Swain,* and one based solely upon the State's use of peremptory challenges *in a particular case*, as authorized by *Batson*. The state habeas court therefore erred in concluding that "the basis for [all of] the[se] challenge[s] … existed at the time of [Rogers's] trial" because it was "the action of striking the

jurors" and "not [Lanier's] unwritten 'policy'" that provided the necessary evidence. Pet. App. 4-5.

This is backward. A defendant's *Batson* claim "rel[ies] solely on the facts concerning [jury] selection *in his case*," 476 U.S. at 95 (emphasis in original); therefore, a defendant *could* initiate a *Batson* challenge based upon the State's use of peremptory challenges in his case alone. But a defendant cannot sustain a *Strauder* claim by pointing only to the striking of his jurors, even if the state struck every single African American, as Lanier did here and in *Foster*. The defendant would have to present evidence that those strikes were pursuant to *a policy of discrimination.* For its part, *Swain* explicitly foreclosed a defendant from even "pos[ing] the issue" of "the striking of Negroes in a particular case" without evidence of the "systematic exclusion of … [and] discrimination" against African Americans "on the part of the State." 380 U.S. at 221, 226-227; *see also Ford v. Georgia*, 498 U.S. 411, 420 n. 5 (1991) ("*Swain* described a defendant's burden to prove systematic discrimination *as a predicate* to attacking the use of peremptory challenges in his own case.") (emphasis added).

The state court's insistence that Rogers's *Swain* and *Strauder* claims were reasonably available prior to the disclosure of Lanier's policy defies reason. Pet. App. 5. The affidavit of Judge Chambers fortuitously provided, for the first time, the evidence *necessary* to establish either a *Strauder* or *Swain* claim. Proof of Lanier's discriminatory policy was not redundant; it was a prerequisite to these claims.

B. The Georgia Courts' cause and prejudice analysis ignores *Amadeo*, *Strauder* and *Swain* altogether.

The state court alternatively concluded that Rogers has failed to show cause and prejudice to overcome the procedural default of his claims. Despite the state habeas court's conclusion that Rogers cannot show cause, Pet. App. 6-7, he can meet that requirement by demonstrating that an external factor kept him from being able to raise his *Strauder* or *Swain* claims on direct appeal. Namely, the fact central to his claims—Lanier implemented a *secret policy* of excluding African Americans from serving as jurors in capital cases—was not disclosed to him until Judge Chambers came forward.[9] Since Lanier's policy of

[9] As noted *supra* in note 1, the district court judge presiding over Rogers's federal habeas petition concluded that Rogers had "made a

systematic discrimination "was not reasonably discoverable because it was concealed," Rogers has "established ample cause to excuse his procedural default under this Court's precedents." *Amadeo*, 486 U.S. at 222. The Georgia courts' conclusion here is impossible to reconcile with such precedent.

As to prejudice, the state habeas court held that Rogers "cannot prove a reasonable probability of a different outcome either at trial or on direct appeal" as "neither state nor federal law guaranteed a white defendant the right to challenge the peremptory strikes of the prosecutor based upon bias of another race … until 1991 in *Powers,*" which is "not retroactive on collateral review." Pet. App. 7-8. The state court mistakes this Court's precedent, however, by unreasonably assuming that *Powers* controls *all* of Rogers's claims.

As *Powers* itself recognized, this Court's decision in *Peters* established a white defendant's standing "to challenge the *systematic exclusion of black persons* from grand and petit juries" in 1972. *Powers*,

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credible argument that he has shown good cause for his failure to exhaust [these claims], as the factual basis for the new claims was not exposed until after Petitioner filed this § 2254 Petition." Doc. No. 118 at 4.

499 U.S. at 408-09 (emphasis added). *Powers* further recognized that a *Swain* claim—which requires "proof of [the] *systematic exclusion of black persons* through the use of peremptories"—is precisely such a challenge. *Id.* at 405 (emphasis added). The implication is clear. Rogers had standing to challenge the "systematic exclusion of black persons" from his jury—pursuant to *Swain* or any other of the Court's cases prohibiting misconduct such as Lanier's—for more than a decade before his capital trial.[10]

The habeas court's reliance on *Powers* is accordingly misplaced. *Powers*, by its own terms, neither created nor circumscribed Rogers's right to challenge Lanier's systematic exclusion of African Americans from his jury. While *Powers* borrowed much of *Peters*'s reasoning in concluding that white defendants have standing to raise a *Batson* challenge, *Batson*'s three-step, burden shifting framework arises in—and was devised by this Court specifically *for*—only those circumstances where no evidence of systematic discrimination exists, and a trial court must determine whether the State's use of peremptory challenges *in a particular case* were motivated by discriminatory intent.

[10] The state habeas court did not even mention *Peters*. Pet. App. 6-8.

The retroactivity of *Powers* is therefore irrelevant to whether Rogers would have had standing to challenge Lanier's discriminatory policy pursuant to either *Strauder* or *Swain*. As *Peters* already established that he would, Rogers has shown sufficient prejudice to overcome any procedural default.

CONCLUSION

As Judge Chambers's testimony makes clear, the intentional racial discrimination by Stephen Lanier that this Court condemned in *Foster* infected the trial of James Randall Rogers as well. This evidence establishes that Lanier's misconduct was even more egregious than this Court previously knew. Lanier was not motivated "in substantial part by race" when he struck every single African American in Foster's venire, *Foster*, 136 S. Ct. at 1755; he was motivated *entirely* by race. This Court did not countenance Lanier's discrimination in *Foster* and should not here. Lanier's systematic exclusion of those prospective jurors denied them the "privilege of participating equally ... in the administration of justice ..." *Strauder*, 100 U.S. at 308. It also inflicted a grave injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the

processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). This Court can redress those harms once and for all.

Petitioner James Randall Rogers respectfully requests that this Court grant *certiorari* to condemn for the second and final time Mr. Lanier's unlawful exclusion of jurors on the basis of race in a capital case.

Respectfully submitted, this 24th day of January, 2019.

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