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

APPENDIX
Capital Case

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INDEX OF APPENDICES

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

JAMES RANDALL ROGERS,	*	**CIVIL ACTION NO.**
Petitioner,	*	**2017-HC-1**
v.	*	
	*	**HABEAS CORPUS**
ERIC SELLERS, Warden,	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
Respondent.	*	

Filed 1/16/18 at 8:02 a M.
Morgan Venelene
Deputy Clerk, Butts Superior Court

ORDER

This is Petitioner's fourth habeas corpus petition challenging his murder and aggravated assault convictions and death sentence. Upon consideration of all pleadings and the entire record in this case, the claims in the petition as amended are DISMISSED.

1. On January 12, 2017, Petitioner filed his fourth state habeas corpus petition. In Petitioner's fourth state habeas petition he has alleged three claims. Petitioner's first claim is that Mr. Stephen Lanier, the prosecutor, had a "policy" of striking all black potential jurors from capital cases in violation of the Fourteenth Amendment under *Strauder v. West Virginia*, 100 U.S. 303 (1880). Petitioner's second and third claims are a Fourteenth Amendment challenge to the prosecutor's alleged exclusion of blacks on capital juries under either *Swain v. Alabama*, 380 U.S. 202 (1965) or *Batson v. Kentucky*, 476 U.S. 79 (1986).

Of important note with respect to Petitioner's claim is the fact that Petitioner's race is white. At the time of Petitioner's trial and direct appeal, state law held "a

defendant may raise an equal-protection claim of discrimination only with respect to the removal from the venire of members of his *own* race." *Skipper v. State*, 257 Ga. 802, 805 (1988) (emphasis in original). Five years after Petitioner's convictions and sentence became final, the Supreme Court held for the first time in *Powers v. Ohio*, 499 U.S. 400 (1991), that a defendant had a Fourteenth Amendment right to challenge the peremptory strikes of the prosecutor based upon bias of *another* race.

2. After Petitioner's first trial was overturned by the Georgia Supreme Court due to a disparity in the grand jury composition, Petitioner was again convicted of the murder of Grace Perry, who died as a result of being impaled by a rake handle, and the aggravated assault of Edith Polston with the intent to rape. *Rogers v. State*, 256 Ga. 139, 140-41 (1986), *cert. denied, Rogers v. Georgia*, 479 U.S. 995 (1986). Petitioner did not raise at trial or on direct appeal a challenge to the peremptory strikes of the prosecutor.

Following direct appeal, over the next two decades, Petitioner petitioned this Court on three separate occasions for state habeas relief. Petitioner did not raise a challenge to the peremptory strikes of the prosecutor in any of the three prior habeas proceedings. This Court denied Petitioner habeas relief for the first time on February 10, 1989. The Georgia Supreme Court denied Petitioner's application for certificate of probable cause to appeal on May 24, 1989. The United States Supreme Court denied certiorari review on October 16, 1989. *Rogers v. Kemp*, 493 U.S. 923 (1989).

On November 28, 1994, Petitioner filed a second state habeas petition and alleged that he was intellectually disabled. Again, Petitioner did not raise a claim challenging the peremptory strikes of the prosecutor. On May 19, 1995, this Court remanded Petitioner's case for a jury trial on the issue of Petitioner's alleged intellectual disability. A jury trial was held on August 1-11, 2005, and the jury found Petitioner was not intellectually disabled by a preponderance of the evidence. *Rogers v. State*, 282 Ga. 659, (2007). The Georgia Supreme Court affirmed the jury's finding on November 5, 2007. *Id.*, *cert. denied* 552 U.S. 1311 (2008).

On April 13, 2009, Petitioner filed his third state habeas corpus petition and amended on June 21, 2010. Yet again Petitioner did not raise a claim challenging the peremptory strikes of the prosecutor during his original trial. However, Petitioner did raise other claims alleging constitutional violations during his original trial. This Court denied Petitioner's third state habeas petition on April 11, 2014. The Georgia Supreme Court denied Petitioner's application for certificate of probable cause to appeal on October 19, 2015. The United States Supreme Court denied certiorari review on May 31, 2016. *Rogers v. Chatman*, 136 S. Ct. 2388 (2016).

3. OCGA § 9-14-51 governs the filing of successive state habeas corpus petitions:

> [a]ll grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds

> for relief asserted therein which could not reasonably have been raised in the original or amended petition.

Additionally, the Georgia Supreme Court has long-held the following regarding successive habeas petitions:

> [T]he habeas court must determine, as the threshold matter, whether the petitioner is entitled to a hearing on the merits of his belated claims. [Cit.] In order to be so entitled, the petitioner must raise grounds which are either constitutionally nonwaivable or which could not reasonably have been raised in the earlier petition. [Cits.] *Tucker v. Kemp*, 256 Ga. 571, 573 (351 SE2d 196) (1987).

State v. Cusack, 296 Ga. 534, 535 (2015). Consequently, pursuant to binding state law, absent a showing by Petitioner that a claim could not have been raised in an earlier habeas proceeding, the Court is precluded from granting habeas relief. *See id.* at 538 (the Court held "habeas relief **could not be granted** on Cusack's second habeas petition" because his claim was reasonably available during his first state habeas proceeding) (emphasis added).

4. All three of Petitioner's claims are based upon the singular issue of whether the prosecutor discriminatorily struck all black potential jurors from his capital case in 1985 in violation of his Fourteenth Amendment rights as defined in *Strauder*, *Swain*, and *Batson*. The standard for determining whether Petitioner has waived his claim under O.C.G.A. § 9-14-51 is whether *the claim* could "not reasonably have been raised in the earlier petition." *Cusack*, 296 Ga. at 535 Petitioner was well-aware at the time of trial that the prosecutor had struck all black potential jurors. Both *Strauder* and *Swain* existed at the time of Petitioner's trial; and obviously so did the

basis for the challenge—the prosecutor's striking of all prospective black jurors. *Batson* was decided on April 30, 1986, but Petitioner's convictions did not become final until the United States Supreme Court denied his petition for writ of certiorari review in December of 1986. *See Batson v. Kentucky*, 476 U.S. 79; *Rogers v. Georgia*, 479 U.S. 995.[1] Therefore, *Batson* was available to be raised in all three of Petitioner's prior state habeas proceedings.

Petitioner ostensibly argues that the alleged new found unwritten "policy" of the prosecutor to strike all black potential jurors from all capital cases excuses his failure to raise his claims in his past three state habeas petitions. While the unwritten "policy" may be alleged evidence in support Petitioner's claims of discriminatory removal of black potential jurors by the prosecutor, the "policy" *alone* does not give rise to a constitutional claim as by itself it is merely an internal thought process of the prosecutor which has not yet resulted in any action against a defendant. Therefore, it is not the unwritten "policy" but the action of striking the jurors that made the claim "reasonably" available during Petitioner's three previous state habeas proceedings.

Consequently, this Court finds Petitioner's claims are barred from habeas relief under O.C.G.A. § 9-14-5 and are hereby DISMISSED.

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[1] In *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court held that *Batson* was retroactive to cases pending on direct appeal prior the Court's decision in *Batson*. 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

5. In the alternative, even Petitioner's claims were not barred under O.C.G.A. § 9-14-5, the Court finds they are also procedurally defaulted. The failure to object at trial to a perceived error or to "pursue the same on appeal" will result in the procedural default of a claim absent a showing by the petitioner of cause and prejudice or miscarriage of justice. *Black v. Hardin*, 255 Ga. 239, 240 (1985); O.C.G.A. § 9-14-48(d). Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the default of his claims.

As repeatedly held by the Georgia Supreme Court, a challenge to the prosecutor's strikes must be raised at trial or it is waived. *See, e.g., Powell v. State*, 297 Ga. 352, 355-56 (2015). The Georgia Supreme Court has also held that *Swain/Batson* claims are procedurally defaulted in a habeas proceeding when a petitioner has failed to raise them on direct appeal. *See Cherry v. Abbot*, 258 Ga. 517, 518 (1988) (finding Cherry defaulted his *Batson* claim because the "the legal basis for a *Batson* claim was reasonably available to petitioner at the time of his trial," and Cherry had failed to show cause to overcome the default).

Petitioner has not shown cause to overcome the default of his claims. The legal basis for Petitioner's claims existed at the time of his trial and direct appeal. Although Petitioner did not have a Fourteenth Amendment right to challenge the prosecutor's strikes at the time of his trial and appeal because he was white, this does

not excuse the default.[2] The Georgia Supreme Court has explained that where a claim is not so "novel" around the time of a defendant's trial and direct appeal, failure to raise it will result in a procedural default. Petitioner's claim was not "novel" around the time of his trial in 1985. *See, e.g., Brantley v. State*, 262 Ga. 786, 789 (1993) ("Merely because *Powers* [], had not been decided at the time Brantley's case was tried does not excuse the procedural default. That a white defendant has standing to raise a *Batson* issue concerning the exclusion of black jurors was not a novel issue in 1989."); *Pope v. State*, 256 Ga. 195, 202-203 (1986). Accordingly, Petitioner has failed to show cause to overcome the default of his claims.

Likewise, Petitioner has also failed to show prejudice. Petitioner is a white male and at the time of his trial and the finality of his conviction, contrary to Petitioner's arguments, 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. That right was not recognized until 1991 in *Powers v. Ohio*, approximately five years after Petitioner's convictions and sentences became final when the United States Supreme Court denied certiorari review, *Rogers v. Georgia*, 1986 U.S. 107 S. Ct. 600 (1986). Both state and federal courts have long-held that *Powers* is not retroactive on collateral review. *See, e.g., Zant v. Moon*, 264 Ga. 93 (1994); *Fortenberry v. Haley*, 297 F.3d 1213, 1221 (11th Cir. 2002). Given this, Petitioner has failed to show prejudice as he cannot prove a reasonable probability of a different

[2] *See, e.g., Skipper v. State*, 257 Ga. at 805.

outcome either at trial or on direct appeal as the law at the time did not support his claims.

Therefore, as Petitioner has failed to show cause and prejudice to overcome the procedural default of his claims, this Court hereby finds his claims are defaulted and are DISMISSED.

SO ORDERED, this 8 day of January, 2018.

THOMAS H. WILSON
Chief Judge, Towaliga Judicial Circuit

Prepared by:
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SUPREME COURT OF GEORGIA
Case No. S18E0923

Atlanta, August 27, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JAMES RANDALL ROGERS v. ERIC SELLERS, WARDEN

After a thorough review of Rogers's application for a certificate of probable cause to appeal the dismissal of his fourth petition for habeas corpus, the Warden's response, Rogers's reply, the habeas court's order, and the entire trial and habeas records, the application is denied as lacking arguable merit. See Supreme Court Rule 36; Redmon v. Johnson, 302 Ga. 763 (809 SE2d 468) (2018) (explaining this Court's procedure in considering applications for certificates of probable cause to appeal).

SUPREME COURT OF THE STATE OF GEORGIA

Clerk 's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sui C. Sulton , Chief Deputy Clerk

AFFIDAVIT OF HAROLD CHAMBERS

Harold Chambers, who appeared before the undersigned notary public duly authorized to administer the oath, and after being sworn, states as follows:

1. My name is Harold Chambers. I am 65 years old. I am competent to testify, and the facts in this affidavit are based on my personal knowledge.

2. I currently live in Asheville, North Carolina, and I work in Greenville, South Carolina.

3. From 1985 through 1991, I served as an assistant district attorney in the Office of the Floyd County District Attorney in Rome, Georgia.

4. Stephen Lanier was the District Attorney and my boss during the entire time I worked as an assistant district attorney. I learned through working in the office and working with Lanier that Lanier's approach to jury selection in death penalty cases was to strike the black jurors. It was a well-known fact within the office that Lanier would not accept a black juror in a death penalty case. By that, I mean that it was well understood that Lanier would use his peremptory strikes to remove any black prospective jurors who were qualified to serve.

5. Lanier's reason for excluding black jurors in death penalty cases also was well known within the office. Clayton Lundy, an investigator in the office who worked closely with Lanier, told me that Lanier left a black citizen on a death penalty jury in the early 1980s, and the jury voted 11 to 1 for death, with the black

juror voting for life. Lanier said that as a result of that case he would never put another black juror on a murder case as long as he was a prosecutor.

6. I was not one of the trial prosecutors in State of Georgia v. Timothy Tyrone Foster, but I was involved in the case in a limited capacity. Around the time of the offense for which Foster was charged, I had been to a training on blood spatter. Because there had been blood evidence in the offense for which Foster was charged, I assisted Lanier in preparing for trial.

7. During the trial in Foster in 1987, I sat in the front row, just behind Lanier. After court and during breaks, I discussed the case and issues with Lanier, Lundy, and sometimes others. On one occasion during the week of voir dire, I was with Lanier and Lundy in the district attorney's office. Lundy told Lanier, "You can't strike all the blacks. You know you're going to have to put a black on this jury." Lanier replied, "No. I won't do it." Lundy said, "You're going to get in trouble for this if you don't." Lanier struck all the black jurors anyway.

8. Lanier's practice of striking black jurors troubled me.

9. On November 2, 2015, I learned that the United States Supreme Court had heard oral argument that morning in the Foster case. The issue before the Court was whether Lanier had discriminated on the basis of race when he struck all of the black prospective jurors at Foster's trial. That same day, I contacted the Southern Center for Human Rights, which represents Foster.

10. Four days later, on November 6, 2015, I met with Patrick Mulvaney, an attorney from the Southern Center for Human Rights, in Greenville, South Carolina. During that meeting, I shared with him what I knew about the case and Lanier's approach to jury selection.

11. I swear under penalty of perjury that the information given herein is true and correct.

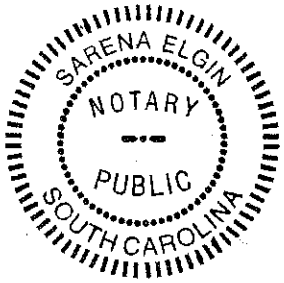
Sworn by me this 9th day of February, 2016.

Harold Chambers

Sworn and subscribed before me this 9th day of February, 2016.

Notary Public

My Commission Expires
November 5, 2023



to get excu--be excused and be relieved of the subpoena. He did not--he indicated he did not have an attorney and that he didn't know what to do, and I suggested that he perhaps could call Your Honor. He--when I got here this morning he was in the hallway. He indicates that he still would like to assert an objection to being here, and his--materially, his objection is one of relevance and whether or not he--he says he doesn't--he's not a witness in this case and he doesn't know anything about it, and he wants to have Your Honor hear him out on his motion for--to be excused and relieved from the purviews of the subpoena.

THE COURT: What do you expect to show by him?

MR. FULLER: We have filed a Motion to Recuse the District Attorney, which is limited to--which is limited to a matter that Mr. McGlotha is not--we originally--we originally subpoenaed him on that, but we--we see that on our Motion for Change of Venue, which is going to be heard this morning, we intend to call Mr. McGlotha, who was a juror in the prior case--

MR. SMITH: In the Duck case.

MR. FULLER: --in the Duck case, and not in the Rogers case, 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.

THE COURT: He would testify that his opinion--in his opinion, he was held up to public scorn and ridicule because he voted against the death penalty?

MR. SMITH: Yes.

MR. FULLER: That is our--

THE COURT: That's what you--

MR. FULLER: That is the purpose for which we subpoenaed him,--

MR. SMITH: That's our understanding, from talking to him.

MR. FULLER: --and that's our understanding, and for the--as that relates to the Motion for Change of Venue, that is simply the reason that we called him. He--

THE COURT: Can't the State stipulate that that would be his--

MR. LANIER: Certainly.

THE COURT: --his opinion; that--that he was held up to scorn and ridicule in the community because of his vote on the--not to impose the death penalty in the Duck case?

MR. LANIER: We'll so stipulate.

THE COURT: You'll stipulate that?

MR. LANIER: Yes, sir.

THE COURT: And that's what you expect to prove from him?

MR. FULLER: Yes, Your Honor. We--

THE COURT: Okay. Well, then, doesn't that answer it, then? They've stipulated that he would--not to the admissibility of it, but that if he were called and questioned that that would be his testimony?

MR. FULLER: Yes, Your Honor.

THE COURT: If that's what you wanted to get from him and the State stipulates it, then we don't need to call him.

MR. FULLER: We would anticipate that he would testify that he fears for his life; that if--for that reason, he didn't want to come in the courtroom, and for that reason he had asked the Court to relieve him of this; that he would not ever want to serve on a jury again, and if he--if he did, that his discretion would not be unfettered any longer because of his fear for his life.

THE COURT: And this would be his own opinion of his--

MR. FULLER: This is his opinion. This is--

THE COURT: Okay. And--

MR. FULLER: --what I would expect him to say.

THE COURT: Okay. And the State would stipulate that if he's called and--to testify, that's what his

testimony would be?

MR. LANIER: Yes, sir.

THE COURT: Okay. So, we can relieve him, then.

MR. FULLER: Yes, sir.

THE COURT: And you can--Mr. Gentry?

DEPUTY SHERIFF: Yes, sir?

THE COURT: Oh, have you got somebody else here? All right. There's a witness in the hall, a Mr. McGlotha,--

MR. LANIER: He's outside the courtroom.

THE COURT: Outside the courtroom? Tell him he's--

MR. SMITH: He's in the court--he's in the courtroom now.

THE COURT: All right. You can go back there and just call him outside and tell him he's been excused.

Okay. Let's move on.

MR. FULLER: Okay. Thank you, Your Honor.

MR. SMITH: Thank you.

THE COURT: Okay.

(Whereupon, the Bench conference concluded.)

THE COURT: All right. This witness has been sworn and we're hearing him in connection with the Motion for--to Quash the Indictment and the Challenge to the Composition of the Grand and Petit Jurors.

Whereupon,

HOYT BLAYLOCK

AFFIDAVIT OF DAVID GOLDSMAN, Ph.D.

David Goldsman, who appeared before the undersigned notary public duly authorized to administer the oath, and after being sworn, states as follows:

1. My name is David Goldsman. I am a professor of Industrial and Systems Engineering in the College of Engineering at the Georgia Institute of Technology. My research areas are in applied probability and statistics. My curriculum vitae is attached to this affidavit.

2. I was contacted by attorneys at the Southern Center for Human Rights, and asked to perform a simple statistical analysis of data that I was provided. The statistical analysis is one that I teach in basic introduction to statistics classes; in fact, this methodology is taught in many high school statistics classes. First I will illustrate the methodology via a simple example. For our example, assume that we have some number of socks in a drawer, some of which are colored black and the rest of which are colored white. Suppose that we pick a certain number of socks randomly from the group of socks in the drawer. Using what is known as the *hypergeometric probability distribution*, one can easily calculate the probability that we would obtain a certain number of black socks from the whole.

3. We can define the total number of socks in the drawer as N, the total number of black socks as a, and the total number of white socks as N-a. We can

further define the number of socks pulled from the drawer as n, the number of blacks socks pulled randomly from the drawer as k, and the number of white socks pulled randomly from the drawer as n-k. Those values can be plugged into a simple equation to determine the probability as follows. If we define the usual integer factorial operation $a! = (a)(a\text{-}1)\cdots(2)(1)$ and then the "number of combinations of a objects taken k-at-a-time" by $C_{a,k} = a!/(k!(a\text{-}k)!)$, then the probability that we observe exactly k black socks in the sample of n socks is

$$\text{Prob}(k \text{ black socks}) = \frac{C_{a,k}C_{N-a,n-k}}{C_{N,n}}.$$

4. My results are based on the above equation and now follow.

5. I reviewed portions of the trial transcripts from *State v. Timothy Foster*, which revealed that there were $N = 41$ qualified prospective jurors, $a = 4$ of whom were black. The State exercised $n = 9$ peremptory strikes and struck all 4 black prospective jurors. If race was not a factor, then the above equation shows that the probability that the State would strike all 4 black jurors is Prob(strikes of all $k = 4$ black jurors) = 0.001244.

6. I then reviewed portions of the trial transcripts from *State v. James Rogers*, which revealed that there were $N = 38$ qualified prospective jurors, $a = 4$ of whom were black. The State exercised $n = 8$ peremptory strikes and struck all 4

black prospective jurors. If race was not a factor, the probability that the State would strike all 4 black jurors is Prob(strikes of all $k = 4$ black jurors) = 0.000948.

7. I was also provided information that there were 6 prospective alternate jurors in *State v. James Rogers*, one of whom was black, and that the State used only one peremptory strike, striking that black juror. *A fortiori*, if we also take into account the selection of alternate jurors in the *State v. James Rogers* case, this additional information reveals that there were a total of $N = 44$ qualified prospective jurors, $a = 5$ of whom were black. The State exercised $n = 9$ peremptory strikes and struck all 5 black prospective jurors. If race was not a factor, the probability that the State would strike all 5 black jurors is Prob(strikes of all $k = 5$ black jurors) = 0.000116.

8. I then made the reasonable assumption that the two trials under analysis were independent of each other. Therefore, taking the results from paragraphs 5 and 7 together, the probability that the State would strike all the black jurors in both the *Foster* and *Rogers* trials, without race playing a role, is the product of (0.001244)(0.000116) = 0.0000001443. Stated otherwise, the probability that the State would strike all the black jurors in both the *Foster* and *Rogers* trials, without race playing a role, is approximately 1 in 7 million.

9. The probability listed in paragraph 8 is, for all practical purposes, zero; and in any event it is so miniscule as to raise serious concerns about the demographic composition of the juries in the *Foster* and *Rogers* cases.

10. I swear under penalty of perjury that the information given herein is true and correct to the best of my knowledge and ability.

Sworn by me this 23rd day of May, 2016.

David Goldsman, Ph.D.

Sworn and subscribed before me this 23 day of May, 2016.

Notary Public