No. 18-7594

In the
Supreme Court of the United States

James Randall Rogers,
Petitioner,

v.

Benjamin Ford,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Georgia Supreme Court correctly determine that the state-law successive-petition and procedural-default bars applied to Rogers' fourth state habeas petition, which for the first time alleged claims of racial bias in jury selection that were available to Rogers at the time of his direct and collateral attacks on his conviction?

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The decision of the state habeas court for Rogers' first state habeas petition is not published, but is included in the Respondent's Appendix A.

The decision of the Georgia Supreme Court denying Rogers' application for certificate of probable cause to appeal the denial of his first state habeas petition is not published, but is included in the Respondent's Appendix B.

The decision of this Court denying certiorari review from the denial of that first state habeas petition is published at 493 U.S. 923 (1989).

The decision of the federal district court granting federal habeas relief is *Rogers v. Zant*, Case No. 4:90-CV-231 (N.D. Ga. Mar. 31, 1992).

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The Georgia Supreme Court's affirmance of his sentence following the intellectual disability trial is published at 282 Ga. 659 (2007).

This Court's denial of certiorari review from the Georgia's Supreme Court's 2007 affirmance is published at 552 U.S. 1311 (2008).

The decision of the state habeas court for Rogers' third state habeas petition is not published, but is included in the Respondent's Appendix C.

The Georgia Supreme Court's denial of Roger's application for certificate of probable cause to appeal is not published, but is included in the Respondent's Appendix D.

This Court's denial of certiorari review is published at __U.S.__, 136 S. Ct. 2388 (2016).

The decision of the state habeas court for Rogers' fourth state habeas petition is not published, but is included in Petitioner's Appendix A.

The decision of the Georgia Supreme Court denying Rogers' application for certificate of probable cause to appeal the denial of his fourth state habeas petition is not published, but is included in Petitioner's Appendix B.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime… nor be deprived of life, liberty, or property, without due process of law….

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed….

The Eighth Amendment of the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> …No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OCGA § 9-14-51 states:

> All 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.

O.C.G.A. § 9-14-48(d) states:

The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper.

INTRODUCTION

Rogers' first claim is that that the prosecutor in his case 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). Rogers' second and third claims are Fourteenth Amendment challenges to the prosecutor's alleged exclusion of blacks on capital juries under *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965) or *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

In the 30 years that Rogers has directly and collaterally attacked his convictions and sentences, it was not until his fourth state habeas petition that he first raised these claims. In entering an order of dismissal, the state habeas court correctly concluded the claims were "readily available" to Rogers in his previous habeas proceedings and thus barred under state law O.C.G.A. § 9-14-51 as successive. The state habeas court additionally and correctly held, in the alternative, that the claims were also procedurally defaulted under O.C.G.A. § 9-14-48(d); and that Rogers could not establish cause, as the claims were previously available, nor prejudice as he is a white male and the law allowing challenges to the exclusions of members of a separate race occurred after Rogers' trial and does not apply retroactively.

The state habeas court's decision, premised solely on state procedural bars, provides adequate and independent state law grounds for the dismissal of Rogers' fourth state habeas petition. *Durley v. Mayo*, 351 U.S. 277, 281-84, 76 S. Ct. 806, 809-811 (1956). Certiorari review is not warranted.

STATEMENT

A. Rogers' Crimes, Convictions, and Sentencing

Rogers, a white male, was 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, 344 S.E.2d 644, 646-47 (1986), *cert. denied*, 479 U.S. 995, 107 S. Ct. 600 (1986). On June 22, 1985, Rogers was sentenced to death. *Id.* at 141, 646, n.1. However, the Georgia Supreme Court overturned Rogers' convictions and sentences due to a disparity in the grand jury composition. *Rogers v. State*, 250 Ga. 652, 654, 300 S.E.2d 409, 491 (1983). At Rogers' second trial, he was again convicted and again sentenced to death for the murder of Perry and ten years for aggravated assault of Edith Polston, which were affirmed by the Georgia Supreme Court. *Rogers*, 256 Ga. at 139, 344 S.E.2d at 644. Rogers did not raise at trial or on direct appeal a challenge to the peremptory strikes of the prosecutor.

B. Original State Habeas Proceeding

Rogers filed his first state habeas petition on May 13, 1987, and amended on June 9, 1988. Rogers did not raise a claim challenging the peremptory strikes of the prosecutor. The state habeas court denied habeas relief (Resp. App. 2-9) and the Georgia Supreme Court denied Rogers' application for certificate of probable cause to appeal (Res. App. 11). This Court denied certiorari review on October 16, 1989. *Rogers v. Kemp*, 493 U.S. 923, 110 S. Ct. 292 (1989).

C. Original Federal Habeas Proceeding

The district court granted relief in Rogers' first federal habeas petition, concluding that trial counsel provided ineffective assistance of counsel at the sentencing phase of trial. *Rogers v. Zant*, Case No. 4:90-CV-231 (N.D. Ga. Mar. 31, 1992). The Eleventh Circuit Court of Appeals reversed the district court's grant of relief on January 21, 1994. *Rogers v. Zant*, 13 F.3d 384 (1994), *cert. denied* 513 U.S. 899, 115 S. Ct. 255 (1994). Rogers did not raise a claim challenging the peremptory strikes of the prosecutor in those proceedings.

D. Second State Habeas Proceeding

On November 28, 1994, Rogers filed a second state habeas petition raising a single claim—that he was intellectually disabled. On May 19, 1995, the habeas court remanded Rogers' case for a jury trial on the issue of Rogers' alleged intellectual disability. A jury found Rogers was not intellectually disabled by a preponderance of the evidence. *See Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), *cert. denied* 552 U.S. 1311, 128 S. Ct. 1882 (2008).

E. Third State Habeas Proceeding

On April 13, 2009, Rogers filed his third state habeas corpus petition and amended on June 21, 2010. Yet again, Rogers did not raise a claim challenging the peremptory strikes of the prosecutor during his criminal trial. The habeas court denied Rogers' third state habeas petition (Resp. App. 13-81) and the Georgia Supreme Court denied his application for a certificate of probable cause to appeal on October 19, 2015 (Resp. App. 83). This Court denied certiorari review on May 31, 2016. *Rogers v. Chatman*, __U.S.__, 136 S. Ct. 2388 (2016).

F. Second Federal Habeas Proceeding and Subsequent Stay

While his third state habeas petition was pending, Rogers filed a second federal habeas petition for writ of habeas corpus. Rogers also filed a motion requesting that the case be held in abeyance pending the completion of his third state habeas corpus proceedings. The district court granted Rogers' motion. Rogers did not challenge the peremptory strikes of the prosecutor from his criminal trial in this second federal petition.

G. Resumption of Second Federal Habeas Proceeding

On August 22, 2016, the Warden notified the district court of the completion of the third state habeas corpus proceedings and on December 1, 2016, the district court granted Rogers an extension of time to file his amended petition for writ of habeas corpus. Instead, on January 13, 2017, Rogers filed a motion requesting that his case be held in abeyance pending the completion of his fourth state habeas corpus proceedings. Over the Warden's objections, the district court granted Rogers' request on April 27, 2017.

H. Fourth State Habeas Proceeding

On January 12, 2017, Rogers filed his fourth state habeas corpus petition. In his petition, he raised three claims. Rogers' first claim was that Stephen Lanier, the prosecutor, had a "policy" of striking all black potential jurors from capital cases in violation of the Fourteenth Amendment under *Strauder*. Rogers' second and third claims were Fourteenth Amendment challenges to the prosecutor's alleged exclusion of blacks on capital juries under either *Swain* or *Batson*.

Rogers' evidence consisted of affidavits and transcript excerpts showing the jury composition and the race of the individuals struck during voir dire of his trial and two other death penalty trials—W*right v. State*, 254 Ga. 484, 330 S.E.2d 358 (1985), and *Foster v. State*, 258 Ga. 736, 374 S.E.2d 188 (1988).[1] This evidence showed that all black jurors were struck in the second trial of Rogers and the trial of Foster; and that there were no prospective black jurors to strike in the *Wright* case. *See* Petition at 9. Additionally, Rogers provided the prosecution file notes created during the *Foster* case, the opinion in *Foster v. Chatman*, __U.S.__, 136 S. Ct. 1737 (2016), which held Mr. Lanier had discriminatorily struck black prospective jurors in Foster's case, and an article from *The Atlanta Journal-Constitution* reporting the *Foster* decision. Rogers also provided a newly acquired statistical report, which took Foster's case and his case and prognosticated the chances of Mr. Lanier striking prospective black jurors.[2]

Rogers' other evidence concerned the lone hold-out juror in the death penalty trial of Ronald Anthony Duck that occurred *three years prior* to Rogers' trial. The hold-out juror in the *Duck* trial was, according to Rogers' evidence, a black male. Regarding this incident, Rogers submitted two newspaper articles from 1982 noting Mr. Lanier's public statements

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[1] Foster was tried in 1987, the year after Rogers' direct appeal was decided. *See Foster*, 258 Ga. 736, 374 S.E.2d 190, n1.

[2] Rogers states it is "telling" that there was no voir dire prosecution notes produced with regard to his case and the *Wright* case. Petition at 11, n.7. To the extent he is alleging the current district attorney's office failed to legally comply with an Open Records Act request, there is no evidence of this, and Rogers brought no case accusing the district attorney's office of such action.

immediately following the *Duck* trial criticizing the lone hold-out juror. An article from the *Rome News Tribune* reported that Mr. Lanier stated he was "bitter" with the sentence, that the jurors who voted to impose the death sentence were in "tears," and that he was concerned that "the juror who held out gave no reason, did not try to reconcilliate (sic)." Res. App. 89, 90. In a subsequent article, the *Rome News Tribune* stated that "Assistant District Attorney Steve Lanier is seeking a transcript of the jury selection phase to determine if the juror committed perjury, but he indicated he *doubted a charge* would be made." *Id.* at 86. Additionally, Rogers submitted a portion of his own trial transcript regarding his motion to recuse Mr. Lanier from his case and his motion for change of venue due to the hold-out juror's "opinion" that he was "held up to public scorn" following the *Duck* trial. Pet. App. 13-18.

In conjunction with this evidence, Rogers provided an affidavit from a former assistant district attorney, Harold Chambers, in which Mr. Chambers stated that, after the *Duck* trial, Mr. Lanier stated he would not seat another black person on a death penalty case.[3] Pet. App. 10. Mr. Chambers also stated that he came forward with this information after hearing about the *Foster* case. Pet. App. 11.

The state habeas court allowed Rogers the opportunity to brief the issues and held a hearing to determine whether Rogers could overcome the procedural barriers to his claims. On January 8, 2018, following a hearing, the state habeas court entered an order dismissing Rogers' fourth state

[3] Chambers did not call Lanier's actions a "policy." *See* Pet. App. 10-12.

habeas petition as successive, and in the alternative, dismissing the claims as procedurally defaulted. Pet. App. 1-8.

The habeas court's order detailed the procedural history of Rogers' trial, appeals and collateral attacks. Pet. App. 1-3. The court cited the state law governing successive habeas petitions and concluded that Rogers had failed to show that his claims were not "reasonably available" during his past three state habeas proceedings. *Id.* at 3-5. The habeas court found that Rogers knew the legal and factual basis for his claim at the time of trial. *Id.* at 4-5. The habeas court then rejected Rogers' argument that the alleged new evidence of an unwritten "policy" by the prosecutor excused his failure to raise his claims when they were first "reasonably available," and dismissed the claims as successive and barred from review. *Id.* at 5.

In an alternative finding, the state habeas court found that Rogers' claims were procedurally defaulted under state law, and that he had failed to establish cause and prejudice to overcome that bar. *Id.* at 6-8 (citing O.C.G.A. § 9-14-48(d); *Black v. Hardin*, 255 Ga. 239, 240, 336 S.E.2d 754, 755 (1985)). The Georgia Supreme Court summarily denied Rogers application for a certificate of probable cause to appeal. Pet. App. 9.

REASONS FOR DENYING THE APPLICATION

I. Rogers' claims rest on adequate and independent state law grounds.

"This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038, 1042 (1989). Georgia's procedural bars are

adequate and independent state law grounds. *See, e.g., Davila v. Davis*, __ U.S. __, 137 S. Ct. 2058, 2064 (2017) ("a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule.").

Rogers' first claim is that that the prosecutor, Mr. Lanier, had a "policy" of striking all black potential jurors from capital cases in violation of the Fourteenth Amendment under *Strauder*, in which this Court held that the exclusion of black prospective jurors from service was unconstitutional. *Strauder,* 100 U.S. at 310.

Rogers' second and third claims are Fourteenth Amendment challenges to the prosecutor's alleged exclusion of blacks on capital juries under either *Swain* or *Batson*. In *Swain*, this Court established a burden of proof to determine whether prospective black jurors were being unconstitutionally excluded from jury service. The Court held that "a defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges" "over a period of time." *Swain*, 380 U.S. at 227, 85 S. Ct. at 839. Twenty-one years later, *Batson* replaced *Swain's* "threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation." *Miller-El v. Dretke*, 545 U.S. 231, 236, 125 S. Ct. 2317, 2322-23 (2005).

As shown above in the procedural history, for over 30 years of directly and collaterally attacking his convictions and sentences, Rogers never raised any challenge to the prosecutor's peremptory juror strikes in his case. It was not until his fourth state habeas petition that, 31 years after his conviction,

he first alleged that the prosecutor in his case struck potential jurors on the basis of race.

In his petition for certiorari review, just as he did in the court below, Rogers focuses on the alleged merits of his claims. But the initial question the state habeas court had to answer was whether any of Rogers' claims were "reasonably available" during his prior habeas proceedings and thus potentially barred from its review under state law. The burden was Rogers', and the state court properly concluded that he failed to meet it because his claims became reasonably available when the prosecutor made his strikes at trial. Consequently, answering whether Rogers' claims in his fourth state habeas petition were "reasonably available"—not whether they had merit[4]—the state court correctly concluded they were available in Rogers' previous habeas proceedings and thus barred under state law as successive (O.C.G.A. § 9-14-51) and, in the alternative, procedurally defaulted (O.C.G.A. § 9-14-48(d)). A state court decision, premised on a procedural bar of that state, provides an adequate and independent state ground. *Durley*, 351 U.S. at 281-84, 76 S. Ct. at 809-811. Certiorari review is not warranted.

A. The state habeas court properly concluded that state law bars Rogers' claims as successive.

Georgia law requires raising all allegations for habeas corpus relief in the original or amended habeas corpus petition; otherwise the claim is "waived." *State v. Cusack*, 296 Ga. 534, 538, 769 S.E.2d 370, 373, n. 4 (2015);

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[4] Rogers misleadingly states the evidence in support of the merits of his claims is "uncontroverted." *See* Petition at 18. The state habeas court held a hearing solely to determine whether procedural bars existed. (Resp. App. 92-112). Accordingly, the Warden did not present evidence in rebuttal or argue the merits of Rogers' claims.

O.C.G.A. § 9-14-51; *Smith v. Zant*, 250 Ga. 645, 301 S.E.2d 32 (1983). O.C.G.A. § 9-14-51 states:

> All 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.

(Emphasis added).

The law and the facts allegedly supporting Rogers' *Strauder*, *Swain* and *Batson* claims existed at the time of his first three state habeas petitions, and the state court correctly concluded that O.C.G.A. § 9-14-51 bars bringing those claims barred in his fourth state habeas petition. In reviewing the law and the facts, the state habeas court found, "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*." Pet. App. 4.[5] Applying O.C.G.A. § 9-14-51, whether *the claim* could "not reasonably have been raised in the earlier petition," the state habeas court found that Rogers "was well-aware at the time of trial that the prosecutor had struck all black potential jurors." *Id.* The state court further found that *Strauder*, *Swain*, and *Batson* were viable law available at the time

[5] Rogers alleges that this is not a proper analysis as the court referred to only his case, although systemic exclusions had to be established under *Swain*. Petition at 21. Rogers confuses his claim (exclusion of black prospective jurors from his jury) with the evidentiary support required (systematic exclusion). The court's analysis is correct.

of Rogers' first three collateral attacks. *Id.* at 4-5.[6] Based on these findings, the state habeas court concluded that Rogers' claims were "reasonably available" in his prior habeas proceedings and thus barred as successive under O.C.G.A. § 9-14-51. *Id.* at 5.

With regard to the law, the state habeas court was correct. Both *Strauder* and *Swain* without question were established law at the time of Rogers' trial and each of his first three state habeas petitions. Likewise, *Batson* was decided on April 30, 1986, months before Rogers' conviction became final when this Court denied his petition for writ of certiorari review in December of 1986. *See Batson*, 476 U.S. 79, 106 S. Ct. 1712; *Rogers v. Georgia*, 479 U.S. 995, 107 S. Ct. 600. And because Rogers' case was pending on direct appeal prior to the Court's decision in *Batson*, it was available retroactively to Rogers. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct., 708, 716 (1987). Therefore, *Batson* was also available to be raised in his original state habeas proceeding or his subsequent habeas petitions filed in 1994 and 2009.

Facts sufficient to support Rogers' *Strauder*, *Swain* and *Batson* claims existed at the time of his first three state habeas petitions too. In his fourth state habeas proceedings, Rogers relied on the following evidence: that all black jurors were struck in his own trial and in *Foster*;[7] the report of a statistician on the likelihood of striking all prospective black jurors in both cases if race was not a factor; this Court's *Foster* opinion; portions of his own

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[7] Foster was tried April 20 through May 1, 1987 (*Foster*, 258 Ga. at 736, 374 S.E.2d at 190, n.1), which was two years after Rogers' conviction and two weeks before he filed his first state habeas petition.

trial transcript; two 1982 newspaper articles concerning the case of Ronald Duck, (Resp. App. 87-90); and the affidavit of Harold Chambers (Pet. App. 10-12).[8] Even assuming for the sake of argument that Mr. Chambers would not have come forward until the fourth state habeas petition,[9] all of Rogers' other relevant evidence in support of his claims, with the exception of this Court's *Foster* opinion, existed during Rogers' first state habeas proceeding. Rogers even utilized the information concerning Mr. Lanier's aggravation with the juror in the *Duck* case to file a motion to recuse Mr. Lanier prior to trial. Petition at 8, n.4.

In attempt to circumvent the state procedural bar, Rogers alleges that he could not have raised these claims prior to the discovery of Mr. Lanier's "policy." Petition at 21. But nothing in *Strauder*, *Swain* or *Batson* requires evidence that strikes "were pursuant to a policy" as Rogers contends. Petition at 22. Also, none of the cases cited by Rogers in support—*Amadeo v. Zant*, 486 U.S. 214, 108 S. Ct. 1771 (1988), *Reed v. Ross*, 468 U.S. 1, 104 S. Ct. 2901 (1984) or *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639 (1986)—concern a *Swain* or *Batson* claim. The difference being that a defendant is put on notice of a potential racial bias claim during voir dire when the prosecutor makes his strikes. But, in the cases of *Amadeo*, *Reed* and *Murray*, the claims raised were "reasonably unknown" to the defendants until certain evidence was uncovered. *Amadeo*, 486 U.S. at 222, 108 S. Ct. at 1777 ("the

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[8] Mr. Chambers never referred to Mr. Lanier's actions a "policy." *See* Pet. App. 10-12.

[9] Notably, Mr. Chambers does not state he would not have come forward prior to the *Foster* decision with the information contained in his affidavit. Pet. App. 10-12.

District Court essentially found that the basis for petitioner's claim was 'reasonably unknown' to petitioner's lawyers, because of the 'objective factor' of 'some interference by officials.'") (quoting *Reed*, 468 U.S. at 14, 104 S. Ct. at 2909; *Murray*, 477 U.S. at 488, 106 S. Ct. at 2645). Accordingly, as found by the state habeas court, while the purported "policy" may have been "alleged evidence in support" of Rogers' *Swain* claim, Rogers was made aware of the legal basis for his claim when the jurors were struck, (Pet. App. 5), and he had all the additional evidence, but for the affidavit of Chambers, prior to the filing of his first state habeas petition to raise any of these claims. It was clearly reasonably available.

Most illustrative of the availability of this claim is that in 1988 Timothy Foster challenged Mr. Lanier's jury strikes at trial without being prompted by alleged evidence of a "policy" to strike all black jurors. *See Foster*, 258 Ga. at 737-40, 374 S.E.2d at 191-92. In fact, Rogers' third state habeas proceeding overlapped in time with Foster's state habeas proceeding during which the evidence in support of Foster's *Batson* claim was presented by the same counsel as represented Rogers in his third state habeas proceeding, Patrick Mulvaney. *See* Petition at 7, n.2. Also undermining his arguments that his lack of knowledge of this alleged "policy" prevented him from raising his claim is that *Batson*, unlike *Swain*, does not require systematic exclusion, and was clearly available during his first state habeas proceeding.

The state habeas court properly concluded that Rogers has not shown that his claims "could not reasonably have been raised in the original or amended petition" or in his second or third state habeas petitions and were thus barred from review under O.C.G.A. § 9-14-51.

B. Rogers' claims are procedurally defaulted under state law.

Under Georgia law, 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 of cause and prejudice or a miscarriage of justice. *Black v. Hardin*, 255 Ga. at 240, 336 S.E.2d at 755; O.C.G.A. § 9-14-48(d).

As found by the state habeas court in its alternative holding, Rogers did not raise a *Strauder*, *Swain*, or *Batson* claim at trial, on direct appeal, or during any of his previous three state habeas proceedings and they are barred from review based on Georgia's statutory procedural default laws. Pet. App. 6-7. The state habeas court correctly found that Rogers had failed to establish cause to overcome his state procedure default as the "legal basis for Rogers' claims existed at the time of his trial and direct appeal." Pet. App. 6. The court also properly concluded that Rogers could not establish prejudice as he is a white male and the law at the time of his trial did not afford white males a right to challenge a prosecutor's strikes based upon another race; and that the subsequent change in law in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364 (1991), which allowed a white defendant to challenge the exclusion of prospective jurors of a different race, does not apply retroactively. Pet. App. 6-7.

1. Rogers has not shown cause to overcome his default.

Rogers erroneously alleges that he has proven cause as he was prohibited from raising his *Strauder* and *Swain* claims because the State

kept the evidence of the alleged "policy" secret.[10] As set forth above, the claims were reasonably available and Rogers was not prevented from making them in his previous direct and collateral attacks.

The fact that Rogers did not have a Fourteenth Amendment right to challenge the prosecutor's strikes against prospective black jurors at the time of his trial and appeal because he was white also does not excuse the default. As correctly held by the state habeas court, where a claim is not so "novel" it was not recognized around the time of trial and direct appeal, failure to raise it will result in a procedural default. Pet. App. 7 (citing *Brantley v. State*, 262 Ga. 786, 789, 427 S.E.2d 758, 762 (1993); *Pope v. State*, 256 Ga. 195, 202-203, 345 S.E.2d 831, 839 (1986)). If a claim is not "novel," the default is not excused. *See Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998) ("futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id.* at 623, 1611 (quoting *Engle v. Isaac*, 456 U.S. 107, 130, n. 35, 102 S. Ct. 1558 (1982)); *see also Reed v. Ross*, 468 U.S. 1, 104 S. Ct. 2901 (1984)).

At the time of Rogers' direct appeal in 1986 and his subsequent state habeas petitions in 1989, 1994 and 2009, a claim that a white defendant had standing to raise a *Batson* claim concerning the exclusion of black jurors was not a novel one. The issue was foreshadowed in *Holland v. Illinois*, 493 U.S. 474, 110 S. Ct. 803 (1990). In *Holland*, this Court held, "[t]he threshold

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[10] Only *Swain* requires showing a systematic exclusion, but even it does not require a showing of a "policy." *See Swain*, 380 U.S. at 227, 85 S. Ct. at 839 ("This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need elicit an admission from the prosecutor.").

question is whether petitioner, who is white, has standing to raise a Sixth Amendment challenge to the exclusion of blacks from his jury. We hold that he does." *Id.* at 476. The Court found Holland's claim to be without merit. *Id.* at 487. However, Justices Marshall, Kennedy, Blackmun, Brenan and Stevens all agreed that *Holland* likely would be able to establish a Fourteenth Amendment violation if he had raised it. Concurring in the denial of the merits on the Sixth Amendment claim, but reviewing the potential for a Fourteenth Amendment claim, Justice Kennedy wrote, "Like Justice Marshall, I find it essential to make clear that if the claim here were based on the Fourteenth Amendment Equal Protection Clause, it would have merit." *See id.* at 474 (Kennedy, J., concurring). Justice Stevens, dissenting separately, stated: "The suggestion that only defendants of the same race or ethnicity as the excluded jurors can enforce the jurors' right to equal treatment and equal respect recognized in *Batson* is itself inconsistent with the central message of the Equal Protection Clause." *Id.* at 507 (Stevens, J., dissenting).

In Georgia specifically, the issue was not "novel" at the time of Rogers' direct appeal or his subsequent collateral attacks. *See, e.g.*, *Pope,* 256 Ga. at 202-03, 345 S.E.2d at 839 ("Pope is white, and the prosecutor's use of peremptory challenges to excuse two black persons and four persons opposed to the death penalty did not violate Pope's right to equal protection of the law."); see *also Bryant v. State*, 565 So. 2d 1298, 1301 (1990); *People v. Kern*, 75 N.Y.2d 638, 654 n.3, 554 N.E.2d 1235, 1244 (1990); *State v. Massey*, 247 Kan. 79, 83, 795 P.2d 344, 347 (1990); *Pierce v. State*, 576 So. 2d 236, 242, n.2, (1990); *United States ex rel. Holland v. McGinnis*, 754 F. Supp. 1245, 1254 (N.D. Ill. 1990). Rogers seems to concede this point; he argues that he

"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." Petition at 25. While the Warden disagrees with Rogers' argument that the law at the time of trial conferred standing on him, it certainly erodes any argument that the claim was so novel it was not recognized around the time of trial and direct appeal.

Moreover, any of the claims (*Strauder*, *Swain* or *Batson*) were plainly available to Rogers in his second and third state habeas petitions. *Powers* was issued four years prior to Rogers' second state habeas petition and 15 years prior to his second state habeas petition. The claim was clearly barred from state habeas review by Rogers' fourth state habeas petition. The state habeas court properly found Rogers had failed to establish cause to overcome his state procedural default of his claims.

2. Rogers cannot show that he was prejudiced by the failure to raise a racial-bias claim.

As the state habeas court correctly concluded, (Pet. App. 7-8), Rogers also failed to show prejudice because the law did not, at that time of Rogers' trial, afford white males a right to challenge a prosecutor's strikes based upon another race and the subsequent change in law in *Powers* does not apply retroactively.[11]

Because Rogers is white, *Powers v. Ohio* controls. In *Powers*, this Court held for the first time that a Fourteenth Amendment challenge to the

[11] However, as stated above, simply because the right was not recognized, Rogers could still have raised the claim as it was not "novel."

exclusion of a particular race of jurors could be brought by a defendant not of the excluded race. But Rogers' convictions and sentences became final in December of 1986, nearly five years before *Powers* was decided. *See Rogers v. Georgia*, 479 U.S. 995, 107 S. Ct. 600 (1986). Powers is not retroactive on collateral review. *Cf. Allen v. Hardy*, 478 U.S. 255, 257, 106 S. Ct. 2878, 2879 (1986); *Trevino v. Texas*, 503 U.S. 562, 567-68, 112 S. Ct. 1547, 1550 (1992); *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989); *Griffith v. Kentucky*, 479 at 328, 107 S. Ct. at 716; *Holland v. McGinnis*, 963 F.2d 1044, 1053-55 (7th Cir.1992), *cert. denied*, __ U.S. __ , 113 S. Ct. 1053 (1993). Therefore, even if Rogers could have overcome cause, he failed to show actual prejudice.

Rogers contends that *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163 (1972), had already established that a white person could bring a *Strauder* or *Swain* claim based on systematic exclusion in 1972. He is wrong. *Peters* produced no majority opinion and it concerned the "systematic[]" exclusion of blacks from grand and petit jury, not the improper striking of jurors by a prosecutor as Rogers alleges occurred in his case. *Id.* at 494. That the alleged exclusion in Rogers' case occurred due to a supposed "policy" instead of individual discrimination of each juror does not change the ultimate basis of the claims—that the prosecutor allegedly improperly struck prospective black jurors. If Rogers' rendition of *Peters* was correct, it would make *Powers* superfluous. Instead, what Rogers' argument does accomplish is once again establishing that his claim was not so "novel" that he could not have raised it in his three prior collateral attacks on his convictions and sentences and cannot overcome the default.

Because the state Rogers failed to prove cause or prejudice, the state habeas court correctly determined that his claims are procedurally defaulted under state law. In light of this adequate and independent state-law ground for denying Rogers' racial-bias claim, this petition does not warrant this Court's review.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2019, I served this brief by mailing a copy of the brief to be delivered via email through the Court's on-line filing system, addressed as follows:

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