No. 18-7594

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Capital Case

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Respondent's Brief in Opposition ("BIO") does not dispute that Stephen Lanier, the District Attorney for Floyd County, imposed an unconstitutional policy of systematically excluding African Americans from jury service when securing death sentences for petitioner James Randall Rogers and Timothy Foster.[1] As Justice Marshall wrote in *Peters v. Kiff*, "[t]here is, of course, no question here of justifying the system under attack … it is clear beyond all doubt that th[is] exclusion of [African Americans] cannot pass constitutional muster." 407 U.S. 493, 505 (1972).

Because Respondent cannot justify the system Lanier imposed, he tries to change the subject from what Lanier *did* to what he claims Rogers *failed to do*, insisting that Rogers could and should have challenged Lanier's discrimination at some earlier point.[2] Respondent

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[1] That would require controverting the sworn affidavit testimony of the Honorable Harold Chambers, a sitting federal judge who worked under Lanier and attested to Lanier's adoption of his racist policy after the sole African American juror in the 1982 capital trial of Ronald Duck voted against a death sentence. Respondent would also have to discount county records confirming Lanier's removal of *every* African American in the Rogers and Foster venires and this Court's prior finding that Lanier purposefully discriminated in Foster's case. *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

[2] That argument has been contravened by another federal judge, Harold L. Murphy, who, in sending Rogers back to state court to exhaust his claims relating to this newly discovered evidence, concluded that "no evidence indicates that [Rogers] engaged in intentionally dilatory litigation tactics" and that Rogers had "made a credible argument that he has shown good cause for his failure to exhaust, as

drafted a proposed order for the state court below that dismissed Rogers's claims as successive or, in the alternative, procedurally defaulted. Those procedural bars, however, rest upon two unsupported and irreconcilable conclusions: first, that all of the evidence Rogers needed to challenge Lanier's discriminatory policy was "readily available" to him at the time of his trial, rendering Judge Chambers's recently disclosed evidence gratuitous; and, second, that Rogers had *no* legal recourse for challenging Lanier's discrimination because he is white.

I. The State Procedural Rulings Misread *Strauder* and *Swain*.

As this Court held in *Foster*, "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.'" *Foster*, 136 S. Ct. at 1746 (quoting *Ake v. Oklahoma,* 470 U.S. 68, 75 (1985)). This Court accordingly concluded in *Foster* that the state court's finding of *res judicata*—turning on its analysis of whether newly-disclosed evidence of Lanier's discrimination was a "sufficient change in the facts" to alter the outcome of his *Batson* claim—was "not independent of the merits of his federal constitutional challenge." *Id.*

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the factual basis for the new claims was not exposed until after Petitioner filed this § 2254 Petition." Order (Doc. No. 118 at 2-4), *Rogers v. GDCP Warden*, Case No. 4:14-CV-306-HLM (N.D. Ga. April 27, 2017).

Here, both the successive-petition and procedural-default bars depend upon the state court's holding that all of the evidence necessary for Rogers's constitutional claims was "readily available" at the time of trial. BIO at 1. That holding necessarily turns on the state court's analysis of the evidentiary predicates established by this Court for *Strauder* and *Swain* claims.[3] The state court's conclusion that Lanier's strikes, on their own, were sufficient to sustain such claims depended upon its mistaken understanding of what those "federal constitutional ruling[s]" require. *Foster*, 136 S. Ct. at 1746. Accordingly, the procedural bars are not independent of federal law and pose "no impediment" to this Court's review. *Id.* at 1747.

II. The Fact Rogers is White Would Not Have Deprived Him of Standing to Challenge Lanier's Systematic Discrimination.

Respondent also claims that Rogers would have been powerless to challenge Lanier's discriminatory policy, even if it had been disclosed to him, because he is white. BIO at 1. This argument misunderstands

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[3] As Rogers has previously detailed, *see* Petition at 14-18, the predicate for a claim pursuant to *Strauder* and its progeny is an "action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, [by which] all persons of the African race are excluded" from jury service. *Norris v. Alabama*, 294 U.S. 587, 589 (1935) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)). *Swain* forecloses 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." *Swain v. Alabama*, 380 U.S. 202, 221, 226-27 (1965).

this Court's precedent. The state court's order below concluded that a white defendant had no standing to challenge systematic discrimination in jury selection until this Court's decision in *Powers v. Ohio*, 499 U.S. 400 (1991), decided five years after Rogers's conviction became final. As the Supreme Court of Georgia has never found *Powers* retroactive on collateral review,[4] the state court concluded that Rogers had no standing to raise his *Strauder* or *Swain* claims. This is wrong. *See* Petition at 19-20, 24-26. This Court found white defendants had standing to raise such claims in *Peters v. Kiff*, 407 U.S. 493 (1972).

Respondent attempts to undermine *Peters*, suggesting that it is somehow equivocal because it "produced no majority opinion." BIO at 18. *Powers* rejects this argument. *Powers* relied on *Peters*, holding that "[w]hile *Peters* did not produce a single majority opinion, six of the Justices agreed that racial discrimination in the jury selection process cannot be tolerated and that *the race of the defendant has no relevance to his or her standing to raise the claim*." *Powers*, 499 U.S. at 409 (emphasis added).

Respondent next attempts to distinguish *Peters*, asserting that "it concerned the '*systematic' exclusion* of blacks from grand *and petit jury* [sic], not the improper striking of jurors by a prosecutor as Rogers alleges occurred in his case." BIO at 18 (emphases added). But

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[4] *See Zant v. Moon*, 264 Ga. 93 (1994). While it is unnecessary to the disposition of this petition, Rogers notes that this Court has never held that *Powers* is not retroactive on collateral review. *See* BIO at 18.

Rogers's *Strauder* and *Swain* claims allege—and, as discussed above, require a showing of—precisely such systematic exclusion. *See* n.3, *supra*. *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). Respondent insists that the fact that the exclusion here "occurred due to a supposed 'policy' [of systematic exclusion] instead of individual discrimination," BIO at 18, is irrelevant. On the contrary, it is dispositive.

III. Respondent's Remaining Arguments are Unresponsive.

Respondent devotes considerable space to debunking the argument that the legal bases of Rogers's claims were too "novel" for him to have raised them at trial or on direct appeal. *See* BIO 15-17. Rogers makes no such argument in his petition. By attributing it to him, Respondent is able to protest that *Strauder* and *Swain*—issued in 1880 and 1965 respectively—were decidedly *not* novel in 1985. Rogers agrees. Indeed, he has repeatedly cited the fact that this Court had condemned the racial discrimination in which Lanier trafficked for decades, if not a century, as underscoring the egregiousness of Lanier's misconduct. It is not the legal bases of his claims that were new, but the evidence necessary to sustain them.

Respondent's conflation of the legal bases for Rogers's claims with their evidentiary predicate is also evident in his discussion of *Amadeo v. Zant*, 486 U.S. 214 (1988), *Reed v. Ross*, 468 U.S. 1 (1984), and *Murray*

v. Carrier, 477 U.S. 478 (1986). Respondent questions why Rogers has even cited these cases, as "none … concern a *Swain* or *Batson* claim." BIO at 12. But they provide authority for the proposition that Lanier's discriminatory policy "was not reasonably discoverable because it was concealed" and "that concealment, rather than tactical considerations, was the reason for [Rogers's] failure" to raise a *Strauder* or *Swain* challenge at trial or on direct appeal. *Amadeo*, 486 U.S. at 222. As these cases would "establish[] ample cause to excuse [any] procedural default under this Court's precedents," *id.*, they are relevant to the procedural default analysis. Respondent's insistence that Rogers's claims were all reasonably available *before* Judge Chambers's disclosure of Lanier's racist policy prevents Respondent from acknowledging the relevance of this precedent here. BIO at 14-15.

Respondent next attempts to distinguish *Amadeo* by arguing that the claim there was "'reasonably unknown' to the defendant[] until certain evidence was uncovered," while "Rogers was made aware of the legal basis for his claim when the jurors were struck." BIO at 12-13. Amadeo "considered making a challenge to the grand and petit juries and w[as] aware that minorities were probably underrepresented in the [] master jury lists." *Amadeo v. Kemp*, 816 F.2d 1502, 1506 (11th Cir. 1987). As this Court recognized, however, "[a]bsent the 'smoking gun' of the [District Attorney's] memorandum or some other direct evidence of discrimination, a statistical challenge would have certainly failed." *Amadeo v. Zant*, 486 U.S. at 226. Amadeo's claim was "reasonably

unknown," therefore, only because the evidence necessary to substantiate it was concealed. The same is true here, as the disclosure of Lanier's discriminatory policy provided, for the first time, the evidence necessary to pose a claim pursuant to *Strauder* and *Swain*. *See Murray*, 477 U.S. at 488 (recognizing that where "the *factual* or legal basis for a claim was not reasonably available to counsel" due to "some interference by officials," the petitioner has shown "cause under this standard") (emphasis added).

CONCLUSION

For the reasons detailed both above and in his petition, James Randall Rogers respectfully requests that this Court grant *certiorari* to condemn Mr. Lanier's unlawful exclusion of jurors on the basis of race in this capital case.

Respectfully submitted, this 13th day of March, 2019.

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