CAPITAL CASE

No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

FARRRIS GENNER MORRIS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Farris Morris is African-American. An all-white jury heard his case. The county where they lived was one-third African-American. This statistically improbable jury[1] was asked to make two decisions. First, was Mr. Morris guilty of two counts of premeditated murder, or, due to extreme intoxication of lesser offenses? Second, if guilty of premeditated murder, did he deserve to live or die?

With respect to both questions, defense counsel asked the jury to view Mr. Morris as a human being in the throes of an acute episode of irrational behavior. The jury was asked to decide whether his abuse of crack cocaine (a drug popularly, if incorrectly, associated with black America) could reduce his culpability or act as sufficient mitigation.[2] If the jurors perceived him to be a flawed human like themselves, he might live. If they saw him as a monstrous "other" he would die.

To ensure that an all-white jury made these fateful decisions took some work by the prosecution (in a county with such a large black population). However, cause challenges removed all but one African-American juror, a man named Savanah Ingram. The prosecution then removed Mr. Ingram with a peremptory challenge. The prosecutor's notes – discovered during collateral post-trial proceedings – indicate Ingram was struck due to having a relative with a drug problem, however, the prosecutor left unchallenged two similarly situated white jurors who had relatives with substance abuse problems.

The all-white jury found that Farris Morris, despite extreme intoxication, had premeditated two nonsensical murders.

The all-white jury found that Farris Morris deserved to die.

Since his death sentence, Farris Morris has sought to have a hearing where the prosecutor would be required to testify about his reasons for selecting an all-white jury, and excluding Savanah Ingram, while keeping two similarly situated white jurors. Critically, following this Court's decision in *Foster v. Chatman*, 578 U.S. ___,

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[1] The odds that an all-white jury would be randomly selected in Madison County, Tennessee are preposterous: $(2/3)^{12} = 4{,}096/531{,}441 = .0077 = 0.77\%$. That is: 1 in 130.

[2] Not at issue in this petition is the unreasonable decision of trial counsel to conceal from the jury that Mr. Morris was profoundly mentally ill. The only mental disability used to challenge premeditation and presented as mitigation was cocaine intoxication. *See Morris v. Bell*, No. 07-1084-JDB, 2011 WL 7758570 (W.D. Tenn. Sept. 29, 2011), *aff'd in part, vacated in part, remanded sub nom. Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015).

136 S. Ct. 1737, 1754 (2016), Mr. Morris sought leave to file a second or successive habeas petition to apply this Court's precedent. The Sixth Circuit Court of Appeals denied leave to do so, finding that *Foster* was merely derivative of *Batson* and that (a) Mr. Morris had previously raised *Batson* claims (which had been procedurally defaulted by inadequate lawyers),[3] and (b) *Foster* was not a new rule subject to retroactive application.

The lower court's decision that 28 U.S.C. § 2244(b)(2)(A) prevents review of Mr. Morris' claims under *Foster* conflicts with this Court's prior decision in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). In *Stewart*, this Honorable Court recognized that certain claims, even if raised subsequently, are still entitled to merits review. The question presented to this Court is Farris Morris entitled to a merits hearing—for the first time—on his claim that the complete exclusion of black jurors from his capital jury violated the Fourteenth Amendment to the United States Constitution

QUESTIONS PRESENTED

1. Does the Constitution permit Congress to enact 28 U.S.C. § 2244(b)(3)(E) to divest this Court of its authority, recognized by *Tyler v. Cain*, to determine what opinions are subject to retroactive application?

2. Should *Foster v. Chatman* be applied retroactively to protect the rights of a petitioner who makes a prima facie case that the trial prosecutor's decision to seat an all-white jury in a one-third African-American county was "motivated in substantial part by discriminatory intent?"

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[3] If *Foster v. Chatman* established a new rule of law, subject to retroactive application, then the finding that he had previously raised a *Batson* claim would not be dispositive.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 2241 and 28 U.S.C. § 1254 to consider the issues raised in this Petition. The Sixth Circuit Court of Appeal's order that is subject to this Petition was entered on November 13, 2018. On February 8, 2019, Justice Sotomayor granted an extension of time, up to and including April 12, 2019, within which to file a petition for writ of certiorari. *Morris v. Tennessee*, No. 18A805 (Feb. 8, 2019) (Sotomayor, J.).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. I, § 9, clause 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

U.S. Const. Amend. XIV provides, in pertinent part: "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."

STATEMENT OF THE CASE

In 1997, in the Circuit Court for Madison County, Tennessee, Farris Morris was tried before an all-white jury for two counts of first-degree murder, and one count of aggravated rape. *Morris v. Bell*, No. 07-1084-JDB, 2011 WL 7758570, at

*12 (W.D. Tenn. Sept. 29, 2011), *aff'd in part, vacated in part, remanded sub nom. Morris v. Carpenter*, 802 F.3d 825 (6th Cir. 2015). Madison County, Tennessee, the venue for Mr. Morris' capital trial, had a population that, according to the 2000 Census, was 32.8% African-American.[4] Farris Morris is African-American.

After cause challenges, only one African-American juror, Savanah Ingram, remained among the jurors that would adjudicate Mr. Morris's case. The prosecution, however, exercised its peremptory challenge to remove Mr. Ingram to ensure that an all-white jury would determine Mr. Morris's guilt and death sentence.

After substantial litigation in collateral proceedings, Mr. Morris was able to obtain the prosecutor's contemporaneously prepared notes of his jury selection decisions. Based on these notes, Farris Morris alleged in his Motion for Leave to File a Second or Successive Petition that the prosecution's peremptory strike of Savanah Ingram was motivated in substantial part by discriminatory intent. With the prosecutor's notes, Mr. Morris was able to explain that the excusal of Mr. Ingram's was motivated by racial considerations. The notes demonstrated that the prosecutor allegedly struck Mr. Ingram because he had a relative with drug problems. The prosecution did not strike at least two similarly situated white jurors who had relatives with drug or alcohol problems.

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[4] https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_DP1&prodType=table (last visited, April 11, 2019 at 10:17 a.m.).

The all-white jury found that, despite profound cocaine intoxication and despite the nonsensical nature of the crimes, Mr. Morris was capable of premeditation and thus guilty of first degree murder. *State v. Morris,* 24 S.W.3d 788, 795-96 (Tenn. 2000) *cert. denied*, 531 U.S. 1082 (2001). It thereafter sentenced him to death. *Id.* at 791.

Farris Morris's convictions were upheld on direct appeal. *State v. Morris*, 24 S.W.3d at 788. He pursued post-conviction relief, which was also denied. *Morris v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App. Oct. 10, 2006).

In 2011, the District Court granted Mr. Morris partial *habeas corpus* relief and vacated his death sentence based on trial counsel's defective failure to investigate and present evidence of mental illness and a traumatic childhood. *Morris v. Bell,* No. 07-1084-JDB, 2011 WL 7758570, at *28 (W.D. Tenn. Sept. 29, 2011) (finding that presenting proof that Mr. Morris had done well in prison and was a "dependable gravedigger" merely "scratched the surface" of the potential mitigation). However, this decision was reversed on appeal. *Morris v. Carpenter,* 802 F.3d at 844-45 (finding that the Tennessee court's conclusion that trial counsel had "strategic reasons" for failing to present evidence of mental illness at sentencing was adequate under deferential AEDPA review). In those same proceedings, Mr. Morris raised a *Batson* claim, which the District Court found to be procedurally defaulted. *Morris v. Bell,* at *12. That is, the same lawyers who chose not to present a case for Mr. Morris' life at sentencing (outside of his skill digging

graves), were found to have failed to object to the prosecution's selection of an all-white jury. *Id.*

Following these proceedings, on May 23, 2016, this Court decided *Foster v. Chatman*, concluding that the petitioner, like Morris, who discovered evidence proving the prosecutor's discriminatory intent while his case was on collateral review was entitled to relief for discriminatory jury selection. *Foster*, 136 S. Ct. at 1754-55. Although Foster had unsuccessfully raised a *Batson* claim on direct appeal, like Mr. Morris, it was only after Foster obtained the prosecutor's notes that he was able to establish the prosecutions' discriminatory intent. In *Foster*, this Court applied a "motivated in substantial part by discriminatory intent" test, and concluded that "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." *Id.*

On June 18, 2018, Farris Morris filed a motion for leave to file a second or successive habeas corpus petition, requesting retrospective application of *Foster* to his case, because the prosecution's removal of the lone possible black juror, Savanah Ingram, was "motivated in substantial part by discriminatory intent." The Sixth Circuit denied leave to file such a petition on November 13, 2018, finding that (a) Mr. Morris had already raised a *Batson* claim (which had been procedurally defaulted by prior (deficient) counsel) and (b) that *Foster* was not a new rule of entitled to retrospective application. *In re: Farris Genner Morris*, 18-5626, at *3-4 (6th Cir. Nov. 13, 2018); Appendix 1a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to ensure that lower courts properly apply this Court's decisions. First, this Court should grant certiorari to provide a coherent interpretation of 28 U.S.C. § 2244(b)(3)(E) to ensure that lower courts properly apply the retroactive applications of this Court's decisions pursuant to 28 U.S.C. § 2244(b)(2)(A). Second, this case presents a compelling case of invidious racial discrimination, directly contrary to the rule of *Foster v. Chatman,* which warrants further review and an evidentiary hearing in the District Court; as such this Court should make clear that *Foster* applies retroactively to cases on collateral review.

I. Certiorari is warranted to resolve the circular conundrum of 28 U.S.C. § 2244(b)(3)(E): a decision of the Supreme Court is not entitled to retrospective application on collateral review until this Court says it is entitled to such application—however, this Court cannot review decisions finding that a decision is not entitled to retrospective application.

Farris Morris is fortunate, he is not presently under warrant, and Tennessee has executions scheduled through 2020. He is thus not the typical defendant who seeks federal court review—and a stay of execution—on the eve of his scheduled execution. Ironically, those men and women who seek such a stay, pursuant to 28 U.S.C. § 2244, find themselves facing a one-way ratchet: if they are granted leave to file a second or subsequent habeas petition, and a stay of execution, that State may request that this Honorable Court dissolve the stay of execution, even though the Court of Appeal has determined that the petitioner properly has presented a second application for federal habeas corpus relief. However, if that defendant is denied

relief in the Court of Appeals, that decision is statutorily not subject to review pursuant to 28 U.S.C. § 2244(b)(3)(E). Moreover, as was the case here, if the Court of Appeals does not have before it a clear declaration that the Supreme Court decision, upon which the petitioner relies, is entitled to retroactive application, then the Court of Appeals has no choice but to deny relief. 28 U.S.C. § 2244(b)(2)(A). Only this Court can declare a case subject to retroactive application, but, in this paradoxical structure, and under these circumstances, this Court has no opportunity to do so. *Id.*

As Chief Justice Rehnquist held in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998), a petitioner is "entitled to only one merits judgment on his federal habeas claims." Where, as here, no merits adjudication has ever taken place, and where a new rule of the Supreme Court would permit such an adjudication IF it is entitled to retrospective application, then there is the need for this Court to be given the opportunity to address the limited question of retroactivity.

Moreover, this Court and only this Court has the authority to declare one of is precedents retroactive to cases on collateral review. *Tyler v. Cain*, 533 U.S. 656, 663 (2001). "[T]he Supreme Court is the only entity that can 'make' a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court." *Id.* *Tyler* made clear that there are only two ways that this Court can "make" a new rule retroactive: (1) by a specific

holding stating this result, or (2) "through multiple holdings that logically dictate the retroactivity of the new rule." *Id.*, at 668 (O'CONNOR, J., concurring).

Implicit in this Court's unilateral power to announce the retroactive applicability of new rules is this Court's authority to review decisions finding that new rules are not retroactive and/or have not (yet) been declared retroactive.

II. The Sixth Circuits' failure to provide Farris Morris the protection of *Foster v. Chatman* warrants review; *Foster* should be applied retroactively to this case on collateral review.

It is evident that under *Foster v. Chatman*, Farris Morris would receive relief, or at the very least that he has presented a prima facie case that justifies a hearing where, for the first time, the prosecutor can attempt to provide a race-neutral explanation for selecting an all-white jury, and for striking the only possible African-American juror.

The facts set forth in the Statement of the Case, *supra*, demonstrate that the prosecutor's removal of the single possible black juror was "motivated in substantial part by discriminatory intent." 136 S. Ct. at 1754. The ostensible reason for striking the lone non-white juror "applied just as well" to two "otherwise-similar" nonblack jurors. *Id.* (citing *Miller–El v. Dretke,* 545 U.S. 231, 241 (2005)). Clearly, the all-white jury in no way represented a "fair cross-section" of Madison County, Tennessee, with its one-third black population, and the statistical improbability belies any race-neutral explanation for the prosecution's peremptory challenge.

Foster was the first case on collateral review in which this Court applied the "motivated in substantial part" test. Thus, it seems clear that this Court intended to "make" *Foster* retroactive to cases on collateral review. 28 U.S.C. § 2244(b)(2)(A).

The "motivated in substantial part" test was newly applied in *Foster*. *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) was quoted by this Court in *Foster* as the basis for this analysis. *Id.,* 136 S. Ct. at 1754. However, in *Snyder*, the applicability of this test to claims of discriminatory jury selection was not firmly determined:

> In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.

Snyder, 552 U.S. at 485 (internal citations deleted).

Additionally, *Snyder* was decided on direct appeal—not on collateral review. *Snyder,* 552 U.S. at 474. Thus, *Foster* is (1) the first opinion of this court to unequivocally employ the higher standard of "motivated in substantial part by discriminatory intent," and (2) the first to apply it to a case on collateral review, where judgment was already final. Under Justice O'Connor's logic in her *Tyler* concurrence, *Foster* was the first of (ideally) multiple opinions wherein this Court applied the "motivated in substantial part" test to cases on collateral review. *Tyler*, 533 U.S. at 668 (O'CONNOR, J., concurring).

That Morris is entitled to application of *Foster* on collateral review is illuminated by the procedural history of *Foster* where such relief was granted long after judgment was final, and on that petitioner's third attempt to raise a claim of racially discriminatory jury selection. The petitioner in *Foster* first raised a discriminatory jury selection claim on direct appeal, and lost. *Foster v. State,* 374 S.E.2d 188, 191-192 (Ga. 1988), *cert. denied*, 490 U.S. 1085.[5] He then pursued post-conviction remedies related to his intellectual disability, and lost. *Zant v. Foster*, 406 S.E.2d 74 (Ga. 1991), *cert. denied,* 503 U.S. 921 (1992). Subsequently, he tried to raise both intellectual disability and discriminatory jury selection claims on further collateral review, and lost. *Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000), *cert. denied*, 531 U.S. 890 (2000).[6] Only on his third attempt at securing collateral review of his conviction did this Court grant certiorari and then relief through application of the "motivated in substantial part by discriminatory intent" test. *Foster*, 136 S. Ct. at 1743.

It seems proper that if the "motivated in substantial part by discriminatory intent" test was justly applied on the third round of collateral review to Foster's

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[5] According to the Bench Memo regarding *Foster v. Georgia,* 88-6804, the 1988 petition for certiorari sought relief based on a claim of racially discriminatory jury selection in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986). *See* Digital Archive of Justice Harry Blackmun, at http://epstein.wustl.edu/research/blackmunMemos/1988/DM1988-pdf/88-6804.pdf (Last visited, April 11, 2019 at 6:32 p.m.).

[6] Whether this third petition for certiorari raised a claim of discriminatory jury selection under *Batson* or only an *Atkins* intellectual disability claim, is not known to undersigned counsel.

nearly-30-year-old conviction, Farris Morris is entitled to that same relief. To ensure consistent application of the principles enunciated and applied in *Foster*, this Court should grant certiorari, make clear that the "motivated in substantial part by discriminatory intent" test is retroactive and applicable to cases on collateral review, and grant Farris Morris a hearing in the District Court wherein the prosecution will be required, for the first time, to explain why they selected an all-white jury, and why they struck Mr. Ingram, while keeping similarly situated white jurors. Invidious racial discrimination, which is designed to secure a sentence of death, should not be tolerated.

CONCLUSION

In this capital case, petitioner respectfully requests that this Court grant certiorari to (1) determine how 28 U.S.C. §2244(b)(3)(E) interacts with this Honorable Court's sole power to determine which of its decisions are entitled to retrospective application , and (2) to decide whether *Foster v. Chatman*, 136 S. Ct. 1737 (2016), must be applied retroactively in collateral proceedings to protect the rights of African-American citizens to sit on the juries that will decide the fate of African-American defendants.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 12th day of April, to John Bledsoe, Asst. Attorney General, 425 Fifth Avenue North, Nashville, Tennessee, 37243. Hard copies will follow in the United States Mail.

/s/ *Richard Lewis Tennent*
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