No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

CHRISTOPHER FLOYD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Christopher Floyd was tried by an all-white jury in Houston County, Alabama, where African Americans comprise twenty-seven percent of the population. The prosecutor, who has a documented history of racial discrimination in jury selection, marked African American venire members with a "B" on his strike list, then struck ten of eleven qualified African American prospective jurors. One of the African American jurors this prosecutor struck, Inez Culver, provided answers to all of the prosecution's questions during voir dire, yet when asked to explain his peremptory strike of her the prosecutor asserted that he could not come up with a race-neutral explanation because she failed to respond to any questions and he did not know anything about her. Even though this was not true and was merely an explanation for not having a race-neutral reason, the Alabama courts refused to find an Equal Protection violation.

1. Did the Alabama courts' failure to find racial and gender discrimination in the selection of Mr. Floyd's jury conflict with this Court's precedent in Batson v. Kentucky and J.E.B v. Alabama?

2. Should this Court hold this case in abeyance pending its resolution of Foster v. Chatman, 136 S. Ct 290 (2015) (No. 14-8349)?

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Petitioner Christopher Floyd respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

On November 17, 2005, a jury in Houston County, Alabama convicted Christopher Floyd of capital murder during the course of a robbery, in connection with the death of Waylon Crawford. (C. 12, R. 1140.) The trial judge accepted the jury's 11-1 recommendation and sentenced Mr. Floyd to death on February 15, 2006.

On September 28, 2007, the Alabama Court of Criminal Appeals found a prima facie case of discrimination under Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994), and remanded the case for a Batson hearing. Floyd v. State, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Sept. 28, 2007). In its order following the hearing, the trial court found no Batson or J.E.B. violation. (C.R. 19.) The Court of Criminal Appeals upheld the trial court's decision on the Batson and J.E.B. claims and affirmed Mr. Floyd's conviction. Floyd v. State, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Aug. 29, 2008) (opinion on return to remand) (Attached as Appendix A). The Alabama Supreme Court granted certiorari on January 19, 2011, and on September 28, 2012 remanded the case to the trial court for specific findings of fact. Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. Sept. 28, 2012). (Attached as Appendix B.)

At the second remand, on February 8, 2013, the trial court again denied Mr. Floyd's Batson and J.E.B. claims. The Alabama Court of Criminal Appeals affirmed. Floyd v State, CR-05-0935, 2013 WL 5966917, at *6 (Ala. Crim. App. Nov. 8, 2013) (Attached as Appendix C). Rehearing was denied on February 7, 2014. The Alabama Supreme Court granted certiorari and affirmed the Court of Criminal Appeals' decision denying relief. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. May 29, 2015). The Court modified its opinion and denied rehearing on August 21, 2015. (Attached as Appendix D.)

JURISDICTION

The date on which the Alabama Supreme Court denied Mr. Floyd's appeal was May 29, 2015. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. May 29, 2015). His application for rehearing was overruled on August 21, 2015. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. Aug. 21, 2015)(modified on denial of reh'g). On November 12, 2015, Justice Thomas extended the time to file this petition for a writ of certiorari until December 18, 2015. Floyd v. Alabama, No. 15A493 (U.S. Nov. 12, 2015). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent 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 Fourteenth Amendment to the United States Constitution provides, in pertinent 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.

STATEMENT OF THE CASE

Waylon Crawford was shot and killed at his grocery store in Houston County, Alabama on February 15, 1992. For over twelve years, the death went unsolved. There were no witnesses, and there was no probative physical evidence collected at the crime scene. (R. 618, 624-26.)[1] Law enforcement suspected Christopher Floyd was involved in the shooting after the police obtained an inculpatory statement from him on September 27, 2004. (R. 735-47.) Investigators took five additional statements from Mr. Floyd, all of which contained conflicting details and inconsistent accounts of this crime.

Mr. Floyd's capital murder trial commenced in Houston County November 15, 2005. In a county where African Americans constitute twenty-seven percent of the population, he was tried by an all-white jury after the Houston County District Attorney removed ten of eleven qualified African American veniremembers from the jury. The prosecutor also used twelve of his first fourteen strikes to remove women.

At trial, a statement obtained by law enforcement officers from Mr. Floyd provided the primary evidence against him, as the District Attorney repeatedly told

[1]References to the reporter's transcript at trial are cited herein as "R._." and references to the clerk's record of trial are cited as "C._." The clerk's record of the hearing on return to remand is cited as "C.R._." and the transcript of the hearing on return to remand is cited as "R.R_." The supplemental record is cited as "S.R._." Finally, the clerk's record on the second return to remand is "C.R.2_."

the jury. (R. 525-27, 536-37, 1030.) The defense's theory was that Mr. Floyd falsely confessed after being threatened by his cousin, Paul Wayne Johnson, the initial suspect in the crime, while the two were incarcerated together. (See e.g., R. 889, 895, 903.)

On November 17, 2005, Mr. Floyd was convicted of capital murder during the course of a robbery. (C. 12, R. 1140.) Mr. Floyd moved for a new trial based on newly discovered evidence of innocence after a previously unknown witness came forward with information implicating Paul Wayne Johnson in the killing. (C. 360-66.) The trial court denied the motion. (C. 386-88.) The trial judge accepted the jury's 11-1 recommendation and sentenced Mr. Floyd to death on February 15, 2006.

On September 28, 2007, the Alabama Court of Criminal Appeals found that the prosecution's exclusion of 91 percent of African Americans qualified for jury service and the use of twelve of its first fourteen peremptory strikes against women constituted a prima facie case of discrimination under both Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994), and remanded the case for a hearing. Floyd v. State, No. CR-05-0935, 2007 WL 2811968, at *3 (Ala. Crim. App. Sept. 28, 2007).

A remand hearing was held on November 13, 2007. At the beginning of the

hearing, the trial court expressed deep frustration[2] with having to conduct the hearing based on the appellate court's findings, (R.R. 8 ("[I]t would appear that now instead of the Court being neutral, detached, and impartial, that the Court must now take sides if the defendant doesn't make a Batson challenge, then the Court has to make it for them.") He also stated his belief, before the State actually offered any reasons for its strikes, that the State did not engage in race-based jury strikes: "We don't get into situations where the State might strike an individual for racial reasons because the State knows that I am going to make them give their reasons, so you don't have that situation." (R.R. 7.)

At that hearing, the State attempted to justify its strikes of 10 of 11 African Americans from the venire. The prosecutor began by explaining that his system for evaluating jurors is partially based on "gut reaction," which he acknowledged includes the labeling African-American veniremembers by placing a "B" for black beside their names. (R.R. 57-58.) After asserting that five African Americans were struck because of misdemeanors, felony convictions, or traffic tickets, the prosecutor gave the following reasons for its strikes of the remaining African-American

[2] The trial court's hostility about being required to make findings about the state's strikes of African Americans and women continued throughout the hearing; at one point, for example, he sarcastically interjected: "Should you also give your reasons for striking white males – but that's okay isn't it? It's proper to do that. I forgot." (R.R. 51.)

veniremembers that he removed:

> **Doris Barber**: She was not paying attention to the prosecutor or the Court and had no eye contact, but was nodding at the defense. (R.R. 73.)
>
> **Inez Culver**: **She was not on the background check list compiled by the State containing criminal records and prior jury service information on all veniremembers, and "she failed to respond to any question." (R.R. 67-68.)**
>
> **Martha Culver**: She was opposed to the death penalty but reluctantly indicated she could follow the law. (R.R. 69.)
>
> **Lillie Curry:** She knew the defense attorneys, the district attorneys, and a State witness; too familiar with everyone on the case. She had an ex-husband who was in law enforcement. (R.R. 69-70.) Later he added that she had religious beliefs against sitting in judgment of another. (R.R. 71-72.)
>
> **Ramona Cleveland:** She was 77-years-old and was struck because of her age and the complexity of the case. (R.R. 66-67.)

As to the strike of Teena Allen, a 48-year-old white woman, the prosecutor said that he "struck her basically on the age part." (R.R. 74.) The trial court later noted that the prosecutor's reliance on age was "all over the map." (R.R. 82.)

In its order following the hearing, the trial court found that the State had provided race- or gender-neutral reasons for all of these strikes with the exception of the strikes of Inez Culver, an African-American female, and Teena Allen. (C.R. 18.) However, the judge nevertheless determined that there was no Batson or J.E.B. violation. Reasoning that "not remembering is not tantamount to discrimination," the trial court stated that it would be "inconsistent that the State would give a reason for

its strikes of other African-Americans and females and yet strike these two based on race or gender." (C.R. 18.) The Court determined "that the State gave race and gender neutral reasons for its strikes." (C.R. 19.)

In its opinion, the Alabama Court of Criminal Appeals conducted its own review of the record in order to find race-neutral reasons for the strike of Ms. Culver, and gender-neutral reasons for the strike of Ms. Allen. The appeals court determined that the prosecution had stated that Ms. Culver was struck because she did not respond to any questions during voir dire. Additionally, the court determined that the prosecutor stated that he struck Ms. Allen because of her age and because his initial impression of her was that she would not make a favorable juror for the State. The Court of Criminal Appeals upheld the trial court's decision on the Batson and J.E.B. claims and affirmed Mr. Floyd's conviction. Floyd v. State, No. CR-05-0935, 2007 WL 2811968 (Ala. Crim. App. Aug. 29, 2008) (opinion on return to remand). **One judge dissented, finding that there was no race-neutral reason for the strike of Ms. Culver. Floyd, 2007 WL 2811968, at *3 (opinion on return to remand) (Welch, J., dissenting) ("I believe that the record provides clear evidence of disparate treatment of white venire members and treatment of Juror No. 58 [Ms. Culver] and that the State improperly struck Juror No. 58 based solely upon her race.").**

On September 28, 2012, the Alabama Supreme Court reversed and held that "the trial court did not enter specific findings concerning the reasons the State offered as to why it struck the African-American and/or female jurors it struck." Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. September 28, 2012). The case was remanded with instructions for the trial court to make those findings. Id.

At the second remand, the prosecution provided no new reasons for its strikes. In its order on second return to remand, the trial court changed his finding with respect to the most critical issue in the case. Instead of finding that the prosecution **did not** provide any reasons for the strikes of Ms. Culver and Ms. Allen, as he did at the first remand (C.R. 18 ("the State has presented race and gender neutral reasons for its strikes **with the exception** of juror Inez Culver, a black female, and juror Teena Allen, a white female . . ."), the judge this time found that the prosecution *did* give reasons for its strikes of Ms. Culver and Ms. Allen. (C.R. 2 31-33.))

In this second order, the trial court found the State had satisfied the requirements of Batson with respect to its strike Ms. Culver: "[T]he State could not remember much about her. . . . she was struck because she did not respond to any questions and she did not appear on the State's list." (C.R. 2 32.). According to the trial court, this was adequate to rebut the inference of discrimination.

Contrary to this finding, the record in this case shows that Ms. Culver did, in

fact, give responses to many voir dire questions. When the prosecutor asked the venire if anyone had seen someone get shot on television, Ms. Culver responded that she had, as the prosecutor noted that *everybody* responded that they had. (R.316) ("Everybody seen that during their lifetime?...Everybody? Anybody who has not?"). In addition, during group voir the prosecutor asked veniremembers to raise their hands if they knew the defense attorneys, (R.317), if he had ever prosecuted their relatives, (R. 333), and if they had ever seen anyone get shot. (R. 315.) Ms. Culver, like many other jurors, responded to these questions by not raising her hand.

Ms. Culver also responded in the negative by not raising her hand to the following questions asked of her during voir dire: Would you consider that someone was only 21-years-old before imposing the death penalty? (R. 307-08); Do you think the burden of proof in a death penalty case should be 100 percent? (R. 310); Have you ever testified in a criminal case? (R. 314); Did any of the defense attorneys ever represent you? (R. 317); Would you spare someone's life for sympathy because of your religion? (R. 319); Does anyone think you should automatically give up your wallet during a robbery? (R. 322); Does anyone believe the district attorney's office selectively prosecutes based on race, color, or creed? (Id.) At one point, the prosecutor emphatically stated his insistence that everyone on the venire respond by letting him know whether they understood reasonable doubt, stating, "Come on people. I'm looking at you. If you don't, I need to know. It's very important." (R.

311.) Again, by not raising her hand like many other jurors, Ms. Culver responded that she understood. (Id.)

Following these questions and answers, the prosecution did not address any followup questions to Ms. Culver.

As to the strike of Ms. Allen, the trial court in its order on second return to remand found that the State struck her because of age, (C.R. 2 32), and that this was a gender-neutral reason. Neither the prosecutor, nor the trial court, explained how her age was related to the case. Ms. Allen was 48 years old at the time of the trial, fifteen years older than Mr. Floyd. The State left on the jury a 38-year-old male, Kelly Colbert, (R.R. 84-85), and a 54-year-old male, Robert Earl Davis. (R.R. 23, 27.) Additionally, the prosecutor used age as a justification to strike a 77-year-old, (R.R. 67), a 36-year-old (R.R. 83), and a 28-year-old. (R.R. 105.)

As the trial court noted at the initial remand hearing, the prosecutor's reliance on age was "all over the map." (R.R. 82.)

On February 8, 2013, the trial court issued its order on second return to remand denying Mr. Floyd's Batson and J.E.B. claims. The Alabama Court of Criminal Appeals affirmed. On May 29, 2015, the Alabama Supreme Court Court affirmed the Court of Criminal Appeals' decision denying relief. Ex parte Floyd, No. 1130527, 2015 WL 3448098 (Ala. May 29, 2015) (modified on denial of reh'g, Aug. 21, 2015).

REASONS FOR GRANTING THE WRIT

In Christopher Floyd's trial, the Houston County District Attorney excluded ten of eleven, or 91 percent, of the qualified African-American veniremembers from the jury and used seven of his first eight peremptory strikes against African Americans.[1] As a result, Mr. Floyd was tried before an all-white jury in a county that is twenty-seven percent African American.

The trial court determined that the prosecutor did not illegally discriminate based on race and gender, in part because of a legally impermissible presumption that this Alabama prosecutor simply would not do so. (See R.R. 7 ("We don't get into situations where the State might strike an individual for racial reasons because the State knows that I am going to make them give their reasons, so you don't have that situation."); C.R. 19 ("It is unlikely that the State would make a preemption (sic) strike on the basis of illegal race or gender grounds.")).

To the contrary, the record at the Batson hearing evinces the prosecution's clear reliance on race in selecting this jury, as demonstrated by his use of the letter "B" to label black veniremembers and subsequent reliance on those "B" labels as part

[1] After strikes for cause there were 48 jurors on the venire. Thirty-seven were white, 11 were African American, 23 were men, and 25 were women. Defense counsel used 18 peremptory strikes to remove 17 white jurors, one African American, 11 men and 7 women. The District Attorney used peremptory strikes to remove 8 white jurors, 10 African Americans, 6 men, and 12 women. The jury consisted of 12 white jurors, no African American jurors, 6 men, and 6 women. (C. 301-03.)

of his "initial gut-reaction rating system." (R.R. 58.) The prosecutor explained his system as follows:

> In a capital murder case where voir dire is extensive, and ordinarily the process lasts a day or longer, I try to rate each and every juror initially on gut reaction. If you will look at State's Exhibit No. 1 there, in black outside of a lot of juror's names, I will write "Okay." I will write a dash for a minus. I might write a plus, being – minuses are a bad gut reaction, pluses are a good gut reaction. Okay is just okay. All right. Also, in doing so – I do that when the clerk is calling the names of the jurors and asking them to stand. Now, also, as is the Court's practice – when I say the Court, the list that we have, I will but a "B" outside the names of those who are black.

(R. 58.)

After which, the following exchange occurred:

Court: You put a what?

Mr. Maxwell: "B."

Court: "B," as in black?

Mr. Maxwell: Yes, sir. All right. I have done this same procedure, the initial gut-reaction rating system, for over thirty years. It's proven to be pretty accurate, I think.

Based on this system, the prosecutor placed a "B" beside the names of all African-American jurors who were eventually struck, and a "minus" beside seven of these ten. (R.R. 22-23.) As this Court has found, marking the race of prospective jurors supports "[t]he supposition that race was a factor." Miller-El v Cockrell, 537

U.S. 322, 347 (2003).

In addition to this demonstration of race-consciousness, the prosecutor failed to provide legitimate, race-neutral reasons for its strikes of African-American prospective jurors. After two Batson remands in this case, the prosecution failed to provide any race-neutral reason for why it struck Inez Culver, a 57-year-old African-American woman. In response, the trial court changed his mind concerning whether the prosecutor had provided a race-neutral reason for its strike of Ms. Culver, first finding that he had not, then at the second remand finding that the prosecution **did** give race-neutral reasons for this strike even though no new justifications were offered (C.R. 2 31-33), thus ruling the defense had not met its burden of proving purposeful discrimination. The trial court additionally changed his finding regarding the State's strike of Teena Allen. First, the trial court found the State had not provided a reason for this strike (C.R. 18), then in its second order finding that the state struck Ms. Allen "because of age," (C.R. 2 32). The trial court denied the J.E.B. challenge.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 476 U.S. 79, 86 (1986). The Constitution forbids striking a single prospective juror for a discriminatory purpose.

Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

The Alabama Supreme Court upheld the trial court's decision. Floyd v. State, No. 1130527, 2015 WL 3448098, at *8 (Ala. May 29, 2015), as modified on denial of reh'g (Aug. 21, 2015). In denying Mr. Floyd's Batson claim, the Alabama courts overlooked numerous examples of explicit reliance on race by the prosecution, and failed to consider "all relevant circumstances" when reviewing Mr. Floyd's claim. "[T]he rule in Batson provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." Miller-El v. Dretke, 545 U.S. 231, 252 (2005).

Given this Court's consideration of similar facts and claims in Foster v. Chatman, these circumstances warrant this Court's intervention in Mr. Floyd's unlawful capital murder conviction and death sentence.

I. THE EVIDENCE ESTABLISHES THAT THE PROSECUTION REMOVED PROSPECTIVE JURORS BASED ON RACE.

Despite the prosecutor's failure to provide **any** reason for his strike of Juror 58, Inez Culver, an African-American woman with no criminal record, no objections to the death penalty, and who responded to every question asked of her, the trial judge and the Alabama Supreme Court found that there was no Batson violation in this case. This decision conflicts with this Court's precedent.

A. The Lower Court's Determination that the Prosecution Provided A Race Neutral Reason For the Strike of Inez Culver Is Contradicted By the Record and Conflicts with Precedent From This Court.

The Houston County District Attorney has never given a reason for his strike of Inez Culver. There were no reasons given at trial, where she was the State's sixteenth strike. On the first remand, the trial judge found that the prosecutor could not remember the reason for this strike, but reasoned that "not remembering is not tantamount to discrimination." (C.R. 18.) The Alabama Supreme Court then remanded again to give the trial court an opportunity to determine whether the district attorney could provide reasons for this strike. Ex parte Floyd, No. 1080107, 2012 WL 4465562, at *5 (Ala. Sept. 28, 2012). On remand, again, no new reasons were offered. This time the trial court simply excused the failure of the prosecutor to give a race-neutral justification by crediting the prosecutor's assertion that there was a lack of information about this juror in the record. (C.R. 2 32-33.) But this was merely an explanation for not having a legitimate reason; it is not a reason itself. That is, not knowing enough about a juror to provide a race neutral reason is not among this Court's numerous, recognized race neutral reasons for a strike.

The district attorney stated the following regarding his peremptory strike of Ms. Culver: "I guess she was inadvertently left off our list.[2] We knew nothing about

[2] The list, identified in the record as "STATE'S LIST **W/B'DAYS, RACE**," (C.R. 20)(emphasis added), is compiled by the Houston County District Attorney

her from that. Also, she was nonresponsive to any question that we had." (R.R. 75.)

Based on this assertion from the district attorney, the trial court initially found that no reason was given for removing Ms. Culver. But on remand from the Alabama Supreme Court, the trial judge altered his finding and found - without receiving any new proffer from the District Attorney - that the explanation that Ms. Culver "was struck because she did respond to any questions and she did not appear on the State's list" was adequate to rebut the inference of discrimination. (C.R.2 32.) The Alabama Supreme Court agreed, "[i]n light of the prosecutor's explanation of the process he used for striking a jury, the prosecutor's candor that he knew nothing about [Ms. Culver], his stated reluctance to seat a juror he did not believe was good for the State, [and] the fact that the [remand hearing] was not held immediately following the jury selection." Ex Parte Floyd, 2015 WL 3448098, at *9.

As an initial matter, the record makes clear that the District Attorney's assertion that he knew nothing about Ms. Culver ignores that fact that she answered every question asked of her during voir dire, providing him with all of the information he requested. For example, during group voir dire the prosecutor asked veniremembers to raise their hands if they knew the defense attorneys, (R. 317), if he

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based on information provided by the Dothan Police Department and the Houston County Sheriff's Department, and includes the date of birth, gender, race, outcome of prior jury service, and criminal records of prospective jurors. (C.R. 24-34.)

had ever prosecuted their relatives, (R. 333), and if they had ever seen anyone get shot. (R. 315.)[3] Like many jurors, Ms. Culver responded to those questions by not raising her hand. At one point, the prosecutor emphatically stated his insistence that everyone on the venire respond by letting him know whether they understood reasonable doubt, stating, "Come on people. I'm looking at you. If you don't, I need to know. It's very important." (R. 311.) Again, by not raising her hand, like many of the other jurors, Ms. Culver responded that she, in fact, understood. (Id.) Moreover, when the prosecutor asked the venire if anyone had seen someone get shot on television, he noted that *everybody* responded that they had. (R. 316.) ("Everybody seen that during their lifetime?. . .Everybody? Anybody who has not?"). These examples show that, contrary to the District Attorney's assertion and the Alabama Supreme Court's finding, Ms. Culver *did* respond to questions during voir dire which provided information about herself to the District Attorney.

By failing to consider that the prosecutor used a lack of information about Ms.

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[3] Ms. Culver also responded in the negative by not raising her hand to the following questions: Would you consider that someone was only 21-years-old before imposing the death penalty? (R. 307-08); Do you think the burden of proof in a death penalty case should be 100 percent? (R. 310); Have you ever testified in a criminal case? (R. 314); Did any of the defense attorneys ever represent you? (R. 317); Would you spare someone's life for sympathy because of your religion? (R. 319); Does anyone think you should automatically give up your wallet during a robbery? (R. 322); Does anyone believe the district attorney's office selectively prosecutes based on race, color, or creed? (Id.)

Culver as a reason for this strike, yet failed to engage in additional voir dire of Ms. Culver, the courts below flatly contradicted long-standing precedent from this Court that the failure of a prosecutor to engage in additional voir dire where there are gaps in information about a juror should be considered evidence that the reason given for a strike is a sham. Miller-El v. Dretke, 545 U.S. 231, 246 (2005) (finding that explanation for removal of African American juror "reeks of afterthought" where prosecutor failed to ask followup questions about topic of alleged concern). Here, the gist of the State's assertion about Ms. Culver is that there was a dearth of knowledge about her, yet the prosecutor did nothing to address this purported deficiency. See Johnson v. California, 545 U.S. 162, 172 (2005) (Batson framework designed to produce actual answers to suspicions of discrimination, not produce mere speculation). The Alabama Supreme Court erroneously accepted this reason at face value. Floyd v. State, 2015 WL 3448098, at *9.

B. The Lower Court's Failure to Consider the Fact That the Prosecutor Made Notations About Race Conflicts With United States Supreme Court Precedent.

The Alabama Supreme Court also failed to consider the fact that the prosecutor's background "list" compiled by law enforcement agencies contained the race of every veniremember, thus a "B" for black was beside Ms. Culver's name. At the Batson hearing, the prosecutor explained that he also used a strike list in which he "put a 'B' outside the names of those who are black," as part of an "initial gut

reaction rating system" he has followed for more than thirty years. (R.R. 58.) This is strong evidence of discriminatory intent that reviewing courts are required to consider. See Miller-El v. Cockrell, 537 U.S. 322, 347 (2003) ("The supposition that race was a factor could be reinforced by the fact that the prosecutor marked the race of each prospective juror on their juror cards.").

C. The Lower Court's Failure to Find Disparate Treatment of White Jurors Conflicts With Miller-El v. Dretke.

The Alabama Supreme Court additionally excused the prosecutor's disparate treatment of Ance Barr, a white juror who responded to voir dire questions in an identical manner as Ms. Culver. Like Ms. Culver, Mr. Barr answered no (by remaining silent) to all of the group voir dire questions except the one about whether he had seen someone get shot on television, to which he answered yes. (R. 316) (prosecutor noting for record that everyone answered yes to that question). However, the court below found that because Mr. Barr was not left off the State's strike list the State knew that he had never served on a jury and that he had never been convicted of a crime, information that the State asserted it did not have about Ms. Culver because she was left off its list. The Alabama Supreme Court held that, "[u]nder the facts of this case, these known facts about [Mr. Barr] negate the evidence of any disparate treatment of [Ms. Culver] and [Mr. Barr.]" Ex Parte Floyd, 2015 WL 3448098, at *8.

In so doing, the court below overlooked the fact that the prosecutor's reliance on knowing less about Ms. Culver than Mr. Barr was created by the prosecutor himself when he failed to conduct individual voir or ask any followup questions to Ms. Culver, despite his clear knowledge that she was not on his "list," in violation of this Court's precedent. Miller-El v. Dretke, 545 U.S. at 246 (explanation for removal of African-American juror "reeks of afterthought" where prosecutor failed to ask followup questions). Moreover, during voir dire, the trial judge elicited from everyone on the venire, including Ms. Culver, whether they had been convicted of a crime (R. 204-05), and neither Ms. Culver nor Mr. Barr answered this question in the affirmative. This type of disparate treatment provides strong evidence of discrimination, and the lower court's failure to consider it conflicts with United States Supreme Court precedent and this Court's precedent. Miller-El, 545 U.S. at 241("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . "); Snyder v. Louisiana, 552 U.S. 472, 483 (2008) (reversing and finding "implausibility" of prosecutor's explanation for strikes reinforced by acceptance of white jurors with similarities to African Americans removed).

D. Additional Strikes of African American Jurors Demonstrate Racial Bias in Jury Selection.

Lillie Curry

The prosecutor gave two reasons for striking 59-year-old African-American veniremember Lillie Curry: that she had religious convictions against sitting in judgment of another and that she knew the defense attorneys and a witness. (R.R. 71-72.) The first reason is explicitly contradicted by the record. The trial court specifically asked, "Do any of you have a religious conviction or moral conviction which would prohibit you from sitting in judgment on your fellow man or woman?" No one raised a hand and the court noted, "I see no hands." (R. 209.) Nevertheless, the trial court found "religious convictions" as a valid race-neutral reason for this strike.

As to the second, Ms. Curry indicated she knew attorneys on both sides and a witness for the State, Dr. Alfredo Paredes, the State's forensic pathologist. (R. 250-51, 267.) Ms. Curry affirmed that her knowledge of this individual would not affect her ability to follow the law. (R. 268.) The prosecutor failed to ask any follow-up questions to Ms. Curry. Therefore, there is no evidence in the record that Ms. Curry's acquaintance with any of these individuals would affect her ability to be impartial. To the contrary, the record indicates Ms. Curry had been married to a law enforcement officer and believed law enforcement officers to be more truthful than

other witnesses (R. 250), suggesting she would be a strong witness for the State. Further, the fact that she knew people involved in the case is unpersuasive in light of the fact that five of the seated jurors knew individuals involved in the case, including Kelly Colbert, a white male who served as the jury foreman, and Glenn Brackin, a white male alternate, both of whom knew the State's attorneys.[4]

Joe Butler

The prosecutor stated that he struck Joe Butler, a 37-year-old African American man, as part of an effort to remove jurors with criminal convictions, because Mr. Butler had been convicted for harassment twice and had numerous traffic tickets. (R.R. 65.) However, as defense counsel pointed out, one of the harassment cases occurred in 2007, and Mr. Floyd's trial was in 2005, so there is no way for a conviction that had not occurred to be a legitimate reason for a strike. (R. 77.)

Furthermore, Mr. Butler's purported convictions should have been considered along with multiple responses he provided that showed a respect for law enforcement:

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[4] During the Batson hearing, the prosecutor also pointed out that he wrote a "minus" and "no" beside Ms. Curry's name during his initial juror evaluation, and offered this fact as an additional race-neutral reason for this strike. (R.R. 72. ("I didn't just write a plus or minus. I wrote a "no" out beside Ms. Curry's name.")). But, as he had previously explained, this "gut-reaction" rating system relied upon "B" labels beside the names of African-American prospective jurors and demeanor-based evaluations, and thus cannot fairly be used to support a finding of non-discrimination. Johnson v. California, 545 U.S. 162, 172 (2005) (Batson framework designed to produce actual answers to suspicions of discrimination, not produce mere speculation).

his belief that law enforcement officers had a better memory (R. 351), and the fact that he had friends on the local police department (R. 347). Instead, the trial court found the prosecution's stated reasons – two harassment convictions and twelve traffic tickets[5] – to be sufficiently race-neutral (C.R. 2 31; C.R. 17), and the appeals courts' agreed. Ex parte Floyd, 2015 WL 3448098, at *9.

Martha Culver

Another one of African Americans struck was 50-year-old Martha Culver, whom the State said it struck because she expressed reservations about the death penalty. (R.R. 68-69.) However, Martha Culver was clear that she could put aside those reservations and base her decisions on the law and the evidence (R. 332), which the trial court acknowledged at the remand hearing. (R. 69 ("[S]he indicated later she could follow the law.")). In addition, her removal was inconsistent with the State's retention of Caroline Dove, a white female venire member who served on the jury, who had serious doubts about her ability to render a death sentence for Mr. Floyd because he was only 21-years old at the time of the crime, and she had sons that age.

[5]The trial court contradicted himself regarding traffic tickets. At the Batson hearing, the court stated that he did not believe traffic tickets were a valid reason for strikes: "Everybody has traffic tickets." He added, "I did not write traffic tickets down on any of those African Americans that were struck by the State." (R. 86.) However, his order states that traffic tickets were one of the State's reasons for striking Mr. Butler that he considered to be race-neutral. (C.R. 2 31.)

(R. 457-58.) When asked about her ability to follow the law, Ms. Dove again expressed doubts, responding both that she "could not" recommend a death sentence, then that she "possibly" could.[6] (R. 458-59.)

The disparity between how the prosecutor treated Ms. Culver, who is African-American, and Ms. Dove, who is white, suggests that the strike of Ms. Culver was based on race.

II. SIMILARITIES BETWEEN THE EVIDENCE OF DISCRIMINATION IN THIS CASE AND IN FOSTER v. CHATMAN WARRANT THIS COURT'S INTERVENTION.

This Court has granted certiorari in Foster v. Chatman, 136 S. Ct 290 (2015) (mem) to address Timothy Foster's claims that the prosecutor in his case illegally removed all African Americans from his jury and that the Georgia courts failed to consider all relevant circumstances tending to show racial discrimination when they denied his Batson claim. Many of the same kinds of evidence of racial discrimination that were presented by Mr. Foster are present in Mr. Floyd's case.

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[6]Instead of properly examining the disparity between the State's treatment of Martha Culver and Caroline Dove, the trial court offered its own reasons as to why the prosecutor would keep her, stating in its order, "the Court was familiar with Ms. Dove who comes from an old Dothan family with extensive ties to the community. Mr. Valeska knew the family." (C.R.2 35.) This sort of conjecture by judges has been condemned in the Batson context. Miller-El, 545 U.S. at 252 (Trial judge or appeals court cannot "imagine" a reason if stated reason for strike does not hold up). Also, Ms. Culver's right to serve on a jury should not be violated simply because she does not come from a family familiar to the judge or District Attorney.

Both District Attorneys' offices have a demonstrated history of discriminating against potential black jury members in criminal cases. In Mr. Foster's case, the Floyd County, Georgia, District Attorney's Office "over a long period of time excluded members of the black race from being allowed to serve on juries with a black defendant and a white victim." (Brief of Petitioner in Foster v. Chatman, No. 14-8349, 2015 WL 4550211, * 4 (July 24, 2015). The prosecutor's office in this case also has a documented history of discrimination during jury selection.[7] See Miller-El, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). Instead of properly considering that history, the Alabama Supreme Court pointed out its determination that prosecutor Gary

[7]Alabama courts have reversed seven criminal convictions wrongfully obtained by this office after finding that the prosecutor intentionally removed prospective jurors in a discriminatory fashion. See Grimes v. State, 93-cv-215 (M.D. Ala. June 12, 1996) (Houston County prosecutor illegally discriminated against prospective jurors); McCray v. State, 738 So. 2d 911 (Ala. Crim. App. 1998) (Houston County prosecutor admitted race was motivating and deciding factor for striking prospective black juror); Ashley v. State, 651 So. 2d 1096 (Ala. Crim. App. 1994) (Houston County prosecutor illegally discriminated against prospective jurors); Andrews v. State, 624 So. 2d 1095 (Ala. Crim. App. 1993) (same); Bush v. State, 615 So. 2d 137, 140 (Ala. Crim. App. 1992)(prosecutor made unsubstantiated allegations that African-American prospective jurors's family members were criminals); Williams v. State, 620 So. 2d 82 (Ala. Crim. App. 1992) (Houston County prosecutor illegally exercised peremeptory strikes in a discriminatory fashion); Roger v. State, 593 So. 2d 141 (Ala. Crim. App. 1991) (prosecutor encouraged African Americans to indicate they did not wish to serve). All of these reversals occurred during the trial prosecutors' tenures.

Maxwell struck this jury and there was no claim that *he* had been involved in the prior cases reversed because of Batson violations. Ex parte Floyd, 2015 WL 3448098 *4, n.5. However, the record is clear that District Attorney Doug Valeska, who has been found to have repeatedly struck jurors based on race, was closely involved in jury selection in this case; he asked the questions in voir dire (R. 300-08), and intervened to stop Maxwell from removing a juror (R.R. 95).

Similarities between Mr. Foster's claims and Mr. Floyd's claims include the fact that prosecutors in both cases demonstrated race-consciousness prior to and during jury selection by marking the race of each black prospective juror, which this Court has found provides evidence of discriminatory intent. Miller El, 545 U.S. at 264. In Mr. Foster's case, "the prosecution's file includes four different copies of the venire list of prospective jurors with the names of the black prospective jurors marked with a "B" and highlighted in green." See Brief of Petitioner, Foster v. Chatman, 2015 WL 4550211, at *16. In this case, black jurors were also identified with the letter "B," followed by a plus symbol, a minus symbol, or the word "okay." (R.R. 22-23.)

Additionally, prosecutors in both cases proffered reasons for the strikes of African Americans that were belied by the record. As discussed above, the prosecution's reliance on "nonresponsiveness" in its strike of Inez Culver is contradicted by the record, and the prosecution's assertions that struck juror Joe

Butler had two convictions for harassment is also contradicted by the record, which makes clear one of these conviction occurred *after* Mr. Floyd's trial. A similar rationale was given in Mr. Foster's case when the prosecutor asserted he struck an African-American woman in part because of her cousin's drug arrest. However, the prosecution was not aware of that arrest until after the jury selection. Finally, prosecutors in both cases proffered religious reasons that were unsupported by the record as justifications for striking African American prospective jurors. (See Martha Culver supra; Foster, 2015 WL 4550211, at *23-24 (describing State's strike of Eddie Hood because of affiliation with Church of Christ even though Mr. Hood stated neither he, nor church was opposed to death penalty).

At a minimum, Mr. Floyd's case should be held pending the resolution of Foster v. Chatman.

Conclusion

For these reasons, Mr. Floyd prays that this Court grant a writ of certiorari to review whether the lower court's decision that the prosecutor did not engage in racial discrimination during jury selection conflicts with this Court's precedent and the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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APPENDIX A

APPENDIX B