No. 14-8349

In The
Supreme Court of the United States

TIMOTHY TYRONE FOSTER,

Petitioner,

v.

BRUCE CHATMAN, WARDEN,

Respondent.

On Writ Of Certiorari To The Superior Court Of Butts County, Georgia

REPLY BRIEF OF PETITIONER

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ARGUMENT

The State argues for the first time in the history of this case that the prosecution's race-coded lists and notes singling out the black prospective jurors were made in response to "a jury array challenge and a preordained *Batson* challenge to any and all peremptory challenges to black prospective jurors." State's Br. at 18. This, according to the State, required the prosecution "to maintain detailed information on the individual black prospective jurors." State's Br. at 23. The State did not provide this explanation in the habeas court below,[1] in the Georgia Supreme Court when opposing review of the habeas court's ruling,[2] or even in opposing certiorari in this Court.[3]

When Foster introduced the prosecution's lists and notes in the habeas court, the State filed terse two-page affidavits in which each prosecutor asserted that he did not highlight the black prospective jurors in green on the venire lists or instruct anyone else to

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[1] *See* H.R. 1340-64 (making no suggestion that the notes were made in response to the *Batson* motion).

[2] *See* Response in Opposition to Application for Certificate of Probable Cause to Appeal at 5-15, *Foster v. Humphrey*, No. S14E0771 (Ga. July 1, 2014) (making no suggestion that the notes were made in response to the *Batson* motion).

[3] *See* Brief in Opposition [to Certiorari] on Behalf of Respondent at 4-25, *Foster v. Chatman*, No. 14-8349 (U.S. Mar. 9, 2015) (making no suggestion that the notes were made in response to the *Batson* motion).

do so. J.A. 168-71.[4] Neither affidavit mentions the theory now advanced by the State.[5]

The lists and notes focusing on the race of individual prospective jurors in Foster's venire would have had no bearing on Foster's challenge to the jury array. The challenge was denied at a pretrial hearing after the court clerk produced a certificate showing that black citizens were not underrepresented in the master jury pool of 7,500 from which the 179 prospective jurors summoned for the case were drawn.[6] The prosecutors were aware that the composition of the

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[4] Beyond that, District Attorney Stephen Lanier stated only, "I reaffirm my testimony made during the motion for new trial hearing as to how I used my peremptory jury strikes and the basis and reasons for those strikes." J.A. 169. Assistant District Attorney Douglas Pullen added only, "I did not rely on the highlighted jury venire list in making my decision on how to use my peremptory jury strikes." J.A. 171.

[5] The State could have included statements in the affidavits by the prosecutors as well as any materials from their files that existed to support its new explanation. Thus, there is nothing to the State's argument that Foster did not establish that the lists and notes he introduced "were a complete copy of the district attorney's file or a complete copy of all the notes relevant to jury selection." State's Br. at 9, n.8. Because Foster presented ample evidence of discrimination, he was not required to show that the evidence he presented was everything that existed.

[6] *See* T.R. 271-72 (trial court's order); P.T. 2-26 (Apr. 15, 1987) (transcript of hearing); P.T. State's Ex. 2 (Apr. 15, 1987) (certificate from the clerk).

master jury pool, not the venire drawn for a particular trial, is what matters for such a challenge.[7]

As for *Batson*, the State's newfound theory is sharply contradicted by the content of the lists and notes. The black prospective jurors were ranked against each other in case "it comes down to having to pick one of the black jurors." J.A. 345. The five black jurors were prioritized for peremptory strikes. J.A. 301. Race is emphasized from the venire lists to the notes to the strike lists, showing an overriding focus on the race of the black prospective jurors.[8]

Other notes undermine the prosecutors' credibility. All of the prosecutors' strike lists show that they intended to strike Marilyn Garrett, J.A. 287-90, 299-300, 301, 348-49, and were not telling the truth when they said they nearly accepted her as a juror, T.R. 438-39. A note on the Church of Christ states, "doesn't

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[7] *See* P.T. 21-24 (Apr. 15, 1987) (argument by Lanier relying on *Frazier v. United States*, 335 U.S. 497, 507-08 (1948), and *White v. State*, 196 S.E.2d 849, 853 (Ga. 1973)). In addition, the relevant documents – strike lists, juror questionnaires, descriptions of individual jurors, and venire lists highlighted and circulated to help "pick a good jury," H.T. 220 – were obviously prepared for jury selection.

[8] The State suggests that the prosecutors "could not know with certainty what they had to show in the second and third steps of the *Batson* inquiry." State's Br. at 22. But the required showing was stated clearly in *Batson*: upon a finding of a prima facie case, the prosecution must come forward with race-neutral reasons for its strikes. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). As Lanier told the trial court, "All I have to do is have a race neutral reason. . . ." J.A. 48.

take a stand on Death Penalty," J.A. 302, yet the prosecution claimed that the church "definitely takes a stand against the death penalty" as a reason for striking Eddie Hood, J.A. 46.

There is no question that the prosecutors used the lists and notes, which came from the prosecution's file and were certified as such. J.A. 247. District Attorney Stephen Lanier testified that just two other people were involved in jury selection: Douglas Pullen, an assistant district attorney, and Clayton Lundy, Lanier's chief investigator, who "was involved in all aspects of it." J.A. 81-82. Lanier, Pullen, and Lundy worked closely together[9] and relied heavily on their notes,[10] which they refused to disclose, J.A. 78-79. Lanier testified that during the weekend between the completion of voir dire and the striking of the jury, the prosecution team selected "who we would strike on Monday morning." J.A. 82. Their selections are set out on strike lists, which they followed precisely when striking the jury, as the State concedes.[11] The source

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[9] *See* J.A. 99 (Pullen and Lanier agreeing that they had "extensive discussions on the selection of this particular jury"); J.A. 101 (Lanier stating that he adopted his views about the Church of Christ from Pullen); J.A. 343-47 (Lundy stating in his draft affidavit that he conducted background checks on the black prospective jurors and shared his findings with Lanier and Pullen).

[10] *See* J.A. 55 (Lanier referring to what "Doug Pullen put down in his notes"); T.R. 438 (the prosecutors stating that they had, in their jury notes, listed Garrett as "questionable").

[11] State's Br. at 28. The State notes a single exception, alternate William Jeffrey Howell, who was marked "N," J.A.

(Continued on following page)

of the lists and notes, their timing, and their purpose is hardly "unknown" or based on "conjecture," as the State asserts. *See* State's Br. at 27-28.[12]

The reasons proffered for the strikes of Garrett and Hood also reinforce the discriminatory meaning of the lists and notes and undermine the prosecutors' credibility. The State does not even address many

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300, 301, 349, but was not struck, J.A. 33. State's Br. at 28. The reason is that the jury was selected before reaching prospective juror Bobbie Grindstaff, whom the prosecution had designated for a strike. J.A. 31. Thus, the prosecutors used only nine of their ten strikes in selecting the jury, and Grindstaff was moved to the alternate pool. J.A. 31-32. But the prosecutors, who had already designated two other prospective alternates for strikes, had only two strikes for alternates. They used the strikes against Grindstaff and another prospective alternate designated for a strike and accepted Howell. J.A. 33-34.

[12] *See Miller-El v. Dretke*, 545 U.S. 231, 264, 266 (2005) (relying on notations on juror cards and a manual on jury selection despite a dissent arguing that the use of them could not be known because "Miller-El never asked" the prosecutors about the manual and the prosecutors "were never questioned about their use of [the jury cards]," *id.* at 306-07 (Thomas, J., dissenting)). In other contexts, courts have reasoned that documents that were in an individual's possession can be probative of that individual's actions and intent, particularly when the documents are closely related to the actions at issue in the case. *See, e.g.*, *United States v. Walters*, 351 F.3d 159, 168 (5th Cir. 2003) (reasoning that portions of a book that were "pertinent to making a bomb similar to the one that exploded at the base were relevant to show [the defendant's] knowledge and ability to make such a device"); *People v. Mertz*, 842 N.E.2d 618, 654 (Ill. 2005) (concluding that books owned by the defendant were "sufficiently related to defendant's act of arson to support admission").

reasons that are unsupported by the record. For example:

- One of the principal reasons given for the strike of Garrett was "her age being so close" to Foster. J.A. 56. Garrett was thirty-four and Foster was nineteen. J.Q. #86 at 1; T.R. 588.

- The prosecutors said they struck Garrett because she was a social worker, J.A. 95, 102-03, but she was not a social worker, J.Q. #86 at 2; T.T. 953-54.

- Lanier asserted that he struck Hood because he "avoided eye contact" and "[a]s a personal preference, eye contact is highly valued as a jury selection technique." T.R. 424. But this "personal preference" was taken verbatim from a reported case.[13] *Batson* provides no protection against discrimination if a prosecutor can justify a strike simply by reading a reason from a case or list.

- Another reason given for the strike of Hood was that the defense lawyers did not ask him about his involvement in social or fraternal organizations. J.A. 47. But Hood had answered on his questionnaire that he was not a member of any social or fraternal organizations, J.Q. #9 at 4, and the defense lawyers did

[13] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) (same statement).

> not ask *any* prospective jurors about their involvement in such organizations.

The State also declines to acknowledge that many of the reasons provided by the prosecutors are inconsistent with each other. It does not distinguish between the reasons the prosecutors gave at the *Batson* hearing and the additional reasons they piled on later, such as the false representation that Garrett was a social worker, J.A. 95, 102-03, and the assertion that they struck Garrett because her cousin had a drug arrest, even though they acknowledged on the record that they did not know about the arrest when they struck her, P.T. 8-9 (May 1, 1987).[14] And the State does not address the fact that the prosecutors did not ask *any* questions in voir dire about *any* of the reasons they later gave for striking Garrett and Hood.

Taken together, the lists and notes from the prosecution's files and the suspicious and shifting explanations – changing from the *Batson* hearing to the motion for new trial, and again to the new explanation for the notes provided for the first time in this Court – make clear that the prosecution was engaged

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[14] Although this separately paginated transcript states the date as April 20, 1987, which was the first day of the trial, it also states that it reflects a "hearing held at the bench after the trial of the case and sentencing phase." The sentencing phase concluded on May 1, 1987. T.T. 2547.

in race discrimination when it struck all of the black prospective jurors.[15]

I. The Prosecution's Notes Are Not Consistent With Preparation for Defending Against a *Batson* Objection.

If the point of the prosecution's notes was to prepare to defend against a *Batson* objection, there would have been no reason to rank the black prospective jurors against each other to identify which "[m]ight be the [b]est one to put on [the] jury," J.A. 294, in case "it comes down to having to pick one of the black jurors," J.A. 345, or "if we had to pick a black juror," J.A. 345. The State argues that these statements are ambiguous, State's Br. at 26-27, but "having to pick" and "if we had to pick" clearly mean doing something against one's preference; the language reveals an intention to avoid accepting a black prospective juror unless forced to do so. The two statements about having to pick a black juror were deleted from investigator Clayton Lundy's affidavit

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[15] The prosecutors struck all four black prospective jurors and made it clear that they would have struck another, Shirley Powell, if she had not been excused for cause on the morning of jury selection. *See* T.R. 439 ("The State was not, under any circumstances, going to take [Powell]."); *see also* J.A. 301 (Powell on the list of "Definite NOs"). Although Foster centers his claim on the strikes of Garrett and Hood, "[i]t goes without saying that [a step three analysis under *Batson*] includes the facts and circumstances that were adduced in support of the prima facie case." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

before the prosecutors filed it in the trial court. T.R. 555-57.

The State also asserts that the statements in Lundy's draft support the prosecutors' claim that they *wanted* a black juror. State's Br. at 12, 26-27. The prosecutors said nothing about wanting black jurors at the original *Batson* hearing. At that hearing, they insisted that "[r]ace is not a factor," but that other considerations such as gender, age, and religious affiliation were. J.A. 41. Later, at the hearing on the motion for a new trial, the prosecutors claimed that they "actively look[ed] for black jurors" and even discussed "taking several black jurors to avoid . . . the white-lynch-mob argument the defense lawyers will make to jurors during the sentencing phase of the trial." J.A. 100. The prosecutors never explained how such a "lynch mob" argument might have been made. Their purported fear of the argument did not keep them from striking all the black prospective jurors, and no such argument was made by the defense.

In further explaining their newly announced desire to have black jurors, the prosecutors pointed out that their primary witness at the guilt phase was Lisa Stubbs, Foster's girlfriend, who was black. J.A. 100; State's Br. at 26.[16] But they had previously told

[16] Even if this were true, it would only further suggest discrimination. The point of *Batson* is to prohibit strikes based on the assumption that jurors will view a defendant, witness, or victim more sympathetically if they are of the same race. *See*

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the trial court, immediately after jury selection, that their choices about the jury had nothing to do with the guilt phase; they were confident of obtaining a conviction and were "looking at this case primarily for the death penalty." J.A. 57. It makes little sense that prosecutors who were confident of a conviction really wanted black jurors because of their black witness at the guilt phase. It is far more likely – and consistent with all the evidence – that the prosecutors did *not* want black jurors for fear that they would be sympathetic to the black defendant at the penalty phase.

The sheer quantity of references to the race of the black prospective jurors in the prosecution's file also belies the suggestion that the notes are "facially neutral" and that *Batson* preparation explains them all. State's Br. at 1. The "B" next to the name of each black panelist, the green highlighting, the circling of the word "BLACK" on the juror questionnaires, the labeling of black panelists as "B#1," "B#2," and "B#3," and the note identifying the Church of Christ as a "Black church" all demonstrate that race was the dominant factor in the prosecution's jury selection process. It is thus apparent that the materials from the prosecution file were not about preparing for a *Batson* hearing, but about preventing all of the black prospective jurors from serving on the jury.

J.E.B. v. Alabama, 511 U.S. 127, 153-54 (1994) (Kennedy, J., concurring).

II. The Lists and Notes Show That the Prosecution Misrepresented Its Willingness to Accept Marilyn Garrett.

The State argues that "[Marilyn] Garrett's demeanor in court during voir dire revealed qualities no prosecutor wants in a juror," State's Br. at 45, and "no prosecutor would risk placing an individual on a jury who was misleading during voir dire," State's Br. at 46. But only a few pages later, the State defends the prosecutors' representations that they nearly accepted Garrett. State's Br. at 49-51. The prosecutors could not possibly have viewed Garrett as *both* a juror they almost accepted *and* a juror who was completely unacceptable.

The prosecutors' strike lists show that they did not intend to accept Garrett as a juror. The State quibbles over the meaning of the lists and which prosecutor may have prepared a particular list, State's Br. at 49-51, but Garrett was designated to be struck on *all of the strike lists*, which the prosecutors followed precisely in striking the jury, J.A. 287-90, 299-300, 301, 348-49. The meaning of the lists and the objectives of the prosecutors are clear.

Although they asked Garrett only seven yes/no questions which required seven words to answer, T.T. 952-53, the prosecutors gave at least eight reasons for striking her at the *Batson* hearing, all of which were unrelated to the questions they had asked, J.A. 55-57. They reiterated those reasons and added two more at the motion for new trial hearing. J.A. 95, 102-03, 105.

Yet in a brief, they claimed that Garrett was acceptable and almost selected as a juror. According to the brief, "the state had, in his [sic] jury notes, listed [Garrett] as questionable," T.R. 438, and only decided to strike her after it gained "an additional strike" when Shirley Powell was excused for cause on the morning of jury selection, T.R. 439. This implied that Garrett would have been a juror if not for Powell's excusal. The prosecutors claimed they then chose between Garrett and another juror, "the only two questionable jurors the State had left on the list," and decided to strike Garrett. T.R. 439.[17]

But the State was not actually willing to accept Garrett. Lanier, Pullen, and Lundy prepared lists of the prospective jurors they planned to strike the weekend before the jury was struck. J.A. 82. Two lists contained the names of all of the prospective jurors with "N" for "No" before and after each of the jurors to be struck. J.A. 287-90, 299-300, 348-49.[18] Another list was divided into "Definite NOs," "Questionables," and "Alternates." J.A. 301. This was the only list that contained "Questionables."[19] The same prospective

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[17] This assertion was made only in the brief; it was not mentioned at the *Batson* hearing or the motion for new trial hearing. The trial court relied upon the prosecutors' purported willingness to accept Garrett in upholding the strike. J.A. 142-43.

[18] The list at J.A. 348-49 is a copy of the list at J.A. 299-300 noting the substitution of two jurors.

[19] The State argues that Lundy's draft affidavit supports the prosecutors' claim that Garrett was questionable because it

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jurors – including all five black prospective jurors who remained in the venire over the weekend – were marked for strikes on all of the lists. J.A. 287-90, 299-300, 301, 348-49. Garrett was not listed as "Questionable." J.A. 301. Like the other black prospective jurors, she was listed under "Definite NOs." J.A. 301. The prosecutors struck every person marked to be struck on the lists except Powell, who was excused for cause, and an alternate.[20]

The prosecutors' other actions with regard to Garrett further reveal their true intentions and lack of credibility. At the motion for new trial hearing, they claimed they struck her because she was a social worker, J.A. 95, 102-03, and they "wanted to stay away from any social worker" in accordance with the "universal[ ]" attitude that prosecutors have toward social workers. J.A. 102-03. But Garrett was not a social worker.[21] They also added that they struck Garrett because her cousin, Angela Garrett, had been charged with a drug offense. J.A. 105; T.R. 425. But they had not given that reason at the *Batson* hearing,

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states, "Garrett might be okay." State's Br. at 51 (citing J.A. 345). However, the full statement from which that quote was taken is this: "If it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay." J.A. 345.

[20] The prosecutors had three alternates marked for exclusion but only two strikes. *See supra* n.11.

[21] As stated on her questionnaire and in voir dire, Garrett was a teacher's aide. *See* J.Q. #86 at 2 ("Teacher's Aide – help teacher as needed with 20 children"); T.T. 953-54 (stating that she worked thirty hours a week as a teacher's aide).

and Lanier told the trial court after the death verdict was returned:

> It has come to our attention *since the trial of this case* that Angela Garrett whom the Metro Drug Task Force has just arrested for cocaine, who is a teacher at a school and has been subsequently dismissed from school because of the drug problem.

P.T. 9 (May 1, 1987) (emphasis added).

Thus, the contradictory positions, the lack of any serious questioning on voir dire, and the prosecutors' explanations for their strike of Garrett "do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny." *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

III. The False and Indefensible Reasons Given by the Prosecutors for Their Strikes Show Their Intent to Discriminate and Lack of Credibility.

The totality of the circumstances shows that the prosecutors struck the black prospective jurors because they were black and then gave reasons that were false, contradictory, or unsupported by the record. They cared so little about the reasons that they did not question the prospective jurors about them during voir dire.

Several of the reasons given for the strikes simply were not true. As previously discussed, the prosecutors said that they struck Marilyn Garrett because she was a social worker, J.A. 95, 102-03, which she was not, and because her cousin was arrested on drug charges, J.A. 105, even though they were unaware of the charges when they struck the jury, P.T. 8-9 (May 1, 1987). The Georgia Supreme Court upheld the strike based on those two reasons. J.A. 151. Another reason the prosecution gave for striking Garrett was "her age being so close" to Foster's. J.A. 56. Garrett was thirty-four, J.Q. #86 at 1; Foster was nineteen, T.R. 588. The State does not defend this reason in its brief.

In explaining his strike of Eddie Hood, Lanier expressed his "personal preference" that "eye contact is highly valued as a jury selection technique" and Hood "avoided eye contact with the prosecutor." T.R. 424. However, this "personal preference" was taken verbatim from a reported case.[22] The State does not address this in its brief, but it is a significant issue. If *Batson* requires no more than that a party give "race neutral" reasons upheld in other cases, it would render the Equal Protection Clause "a vain and

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[22] *See United States v. Cartlidge*, 808 F.2d 1064, 1071 (5th Cir. 1987) ("[S]he avoided eye contact with the prosecutor. As a personal preference, eye contact is highly valued as a jury selection technique."). Lanier gave the reason verbatim, without using quotation marks or citing *Cartlidge*, in his post-trial brief, T.R. 424, and later cited *Cartlidge* in his argument at the motion for a new trial hearing, J.A. 117.

illusory requirement," which *Batson* was intended to prevent. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)).[23]

Another reason given for the strike of Hood was that the defense did not ask him any questions about his membership in social or fraternal organizations. J.A. 47. But Hood answered in his questionnaire that he did not belong to any social or fraternal organizations, J.Q. #9 at 4, and the defense did not question *any* prospective jurors about their membership in such organizations. The State defends the prosecutors' alleged concern about defense questioning without mentioning social or fraternal organizations. State's Br. at 41-42. But the reason stated at the time of jury selection is what matters – not a sanitized version advanced later.[24]

The prosecution also changed its explanation for striking Hood. At the *Batson* hearing, Lanier stated that "[t]he only thing that [he] was concerned about" with regard to Hood was that he had "an eighteen year old son which is about the same year old as the

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[23] The practice of reading from a list of previously upheld reasons is not uncommon. *See* Brief of Joseph diGenova et al. as Amici Curiae at 7-8, *Foster v. Chatman*, No. 14-8349 (U.S. July 31, 2015).

[24] *See Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

defendant," J.A. 44; yet he stated at the hearing on the motion for new trial, "the bottom line on Eddie Hood is the Church of Christ affiliation." J.A. 110-11. The State does not address Lanier's shifting rationale.

The prosecutors' purported concern about the Church of Christ – that it was against the death penalty, J.A. 46 – was also inconsistent with its notes, which stated explicitly that the church did not take a position on the death penalty. J.A. 302. A few questions in voir dire would have established whether Hood had any knowledge of the church's position on the death penalty and, if so, whether he followed it. But no such questions were asked.[25]

The pretextual character of the prosecution's reasons is reinforced by Lanier's closing argument that the all-white jury should impose a death sentence to "deter other people out there in the projects."

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[25] The prosecutors also claimed that three white members of the Church of Christ – Vonda Waters, Gertrude Green, and Thelma Terry – were excused for cause "due to feeling against the death penalty." T.R. 435. This was not true. *See* Pet. Br. at 44-45. The State concedes that Waters was excused because she was pregnant. State's Br. at 39. It claims that Green's answers were unclear, State's Br. at 39, but Green said she could vote for death, but not life, T.T. 729. As for Terry, she expressed her belief that she did not "have the right to decide whether a person should live or die" in her questionnaire, J.Q. #35 at 5, but she was not questioned about it during voir dire because she answered, "Yes, sir," to one of the judge's first questions, "And you have made up your mind already as to the guilt of the accused?" T.T. 558.

T.T. 2505. The State attempts to neutralize the argument by stating that "[t]he housing project area was where White lived and the crime occurred." State's Br. at 3 n.1. But the victim, who was white, did not live in the projects; she lived near them.[26] Foster was among the black people who occupied thirty-two of the thirty-four units in the projects. T.R. 551. The close proximity of the victim's neighborhood to the nearly all-black impoverished projects was made clear to the jury in the prosecution's opening statement, T.T. 1592, and in testimony, T.T. 1628, 1783, and it provides the context for Lanier's racially divisive argument.[27]

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[26] *See* T.T. 1628 (White's next door neighbor testifying that the projects were "right near" where they lived); T.T. 1783 (police officer testifying that it is "about three blocks" from White's home to the projects). White lived on Highland Circle, T.T. 1604; the projects were on Church, Stonewall, and Waddell Streets, T.R. 551.

[27] Even without such proximity, as this Court observed the year before Foster's trial, there is "a unique opportunity for racial prejudice to operate" in the sentencing phase of a capital case involving a black defendant and a white victim. *Turner v. Murray*, 476 U.S. 28, 35 (1986). The Court noted, "Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty." *Id*. Lanier's closing argument increased the risk that such prejudice would play a role in the jury's decision.

IV. This Court Has Rejected the State's Position That Juror Comparisons Are Probative Only if the Jurors Are Identical.

The State argues that Foster's juror comparisons are not probative because there were not any white prospective jurors to whom *all* the proffered reasons also applied. State's Br. 33, 36-42, 46-49. But a petitioner invoking the protection of *Batson* is not required to identify prospective jurors with identical characteristics to make meaningful comparisons. As this Court has explained:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005). This is particularly true when the prosecution proffers eight to twelve reasons for striking a prospective juror, such that there will never be another juror to whom all the same reasons apply. If the State's view were correct, then prosecutors would have every incentive to proffer as many reasons as possible, whether genuine or not, because doing so would defeat almost any comparative juror analysis.

White prospective jurors Martha Duncan, Arlene Blackmon, and Don Huffman were not identical in all

respects to Garrett and Hood.[28] But that does not diminish the importance of the comparisons, especially since the prosecutors did not ask Garrett or Hood *any* questions in voir dire about *any* of the reasons they later claimed for striking them, which they "probably would have done if the [reasons] had actually mattered."[29]

The prosecutors said they struck Garrett because she worked with low-income children at Head Start, J.A. 56, where she was a teacher's aide, J.Q. #86 at 2. The State argues that the same concern did not apply to Duncan, a white teacher's aide who worked at a nearby school, T.R. 430, because there was no indication that she worked with low-income children. State's Br. at 46. But the prosecutors did not ask Garrett or Duncan about the children with whom they worked, T.T. 952-53, 961-63, which would have been the obvious course of action if they were actually

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[28] Duncan, Blackmon, and Huffman all shared multiple characteristics with Garrett or Hood. *See* Pet. Br. at 48-49.

[29] *See Miller-El v. Dretke*, 545 U.S. at 246 ("[T]he prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered."); *United States v. Odeneal*, 517 F.3d 406, 421 (6th Cir. 2008) ("The failure of the prosecution to inquire regarding a reason purported to be a basis for a juror's dismissal serves as evidence of discrimination.").

concerned about the jury including teacher's aides who worked with low-income children.[30]

Similarly, the prosecutors stated that *any* affiliation with Northwest Georgia Regional Hospital was a basis for striking black prospective jurors, J.A. 51, but they accepted Arlene Blackmon, a white juror who had worked at the hospital, J.Q. #83 at 2; J.A. 29. One reason asserted for the strike of Hood was that his wife worked at the hospital, J.A. 45, where she was a supervisor in food services, J.Q. #9 at 2. Lanier said: "Northwest Regional deals a lot with mentally disturbed, mentally ill people, and *I did not want anybody* from Northwest Georgia Regional. My experience in the past where insanity cases are involved [is] that they intend [sic] to be more sympathetic and are for the underdog." J.A. 45 (emphasis added). The prosecutors did not ask Hood any questions about what his wife did at the hospital, whether she had any interaction with the patients or mental health staff, or whether she discussed her work with him. T.T. 274-78.

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[30] The prosecutors also accused Garrett of being untruthful in answering "[n]o" when the trial judge asked her, "Are you familiar with [the] neighborhood where [the victim] lived, North Rome?" J.A. 55-56; T.T. 950-51. However, Martha Duncan also said "[n]o" when she was asked, "Are you familiar with the neighborhood in which [the victim] lives?" T.T. 959. The prosecutors did not strike Duncan for being untruthful. Instead, they accepted her *because* she lived and worked near the victim's neighborhood. T.R. 430. They did not ask Garrett or Duncan any follow-up questions about their knowledge of the neighborhood. T.T. 952-53, 961-63.

With regard to Mary Turner, another black prospective juror struck by the prosecution, Lanier said: "[S]he worked at Northwest Regional [Hospital]. Again, I did not want jurors who worked at Northwest Georgia Regional *regardless of their capacity*." J.A. 51 (emphasis added).[31] As with Hood, the prosecutors did not ask Turner any questions about her work at the hospital. T.T. 595-98.

However, the prosecutors questioned Blackmon about her work at the hospital – what she did there and whether she had any training in psychiatry, psychology, or mental health. T.T. 939. The prosecution's purported concerns about the hospital are simply not credible given their lack of any voir dire of Hood and Turner on the subject and their acceptance of Blackmon.

V. The Evidence Establishes Discrimination Under Any Standard of Review.

The evidence in this case entitles Foster to *Batson* relief under any standard of review. The prosecutors focused on the race of the black prospective jurors in their notes, struck all four black prospective jurors, gave reasons for the strikes that were false, incredible, and contradictory, and argued to the

[31] At the time of Foster's trial, Turner no longer worked at the hospital; she worked for the Community TB Control Unit. J.Q. #38 at 2.

all-white jury that it should impose a death sentence to deter people in the projects.

Although a typical *Batson* claim involves clear error review, this Court has recognized that the circumstances of a particular case may render the deference accorded under that framework inappropriate.[32] Here, the trial court held that the prosecutors did not violate *Batson*, but at that time, the prosecutors had successfully withheld their lists and notes, which provide critical evidence of discrimination. The same defect vitiated the Georgia Supreme Court's decision to reject Foster's *Batson* claim on direct appeal. The state habeas court admitted the lists and notes, but did not consider the totality of the circumstances by evaluating the notes along with the other evidence of discrimination. Instead, it relied primarily on the decisions of the trial court and the Georgia Supreme Court, J.A. 193, 196, and the assertions of good faith by Lanier, Pullen, and Lundy, J.A. 193-94.[33] Therefore, its ruling is not entitled to deference. This Court should consider the claim without deference to the state habeas court and hold that Foster has established purposeful discrimination.

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[32] *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (explaining that "exceptional circumstances" may render deference inappropriate).

[33] *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986) ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

If this Court determines that clear error is the appropriate standard, there are not "two permissible views" of the evidence in this case. *Hernandez v. New York*, 500 U.S. 352, 369 (1991). The only explanation that provides a realistic account of all the evidence – from the lists and notes to the shifting and implausible reasons to the closing argument – is racial discrimination.

CONCLUSION

For the foregoing reasons and the reasons advanced in Foster's principal brief, Foster respectfully requests that this Court reverse the decision of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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