No. 14-8349

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IN THE SUPREME COURT OF THE UNITED STATES

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TIMOTHY TYRONE FOSTER,

PETITIONER,

v.

BRUCE CHATMAN, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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# BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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SAMUEL S. OLENS
Attorney General

BETH A. BURTON
Deputy Assistant Attorney General

SABRINA D. GRAHAM
Senior Assistant Attorney General

RICHARD W. TANGUM
Assistant Attorney General
(*Counsel for Respondent*)

Please serve:
Richard W. Tangum
Assistant Attorney General
40 Capitol Square
Atlanta, Georgia 30334-1300
(404) 656-3397

## QUESTION PRESENTED

1. **SHOULD THIS COURT DENY CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF PETITIONER'S BATSON V. KENTUCKY CLAIM THAT IS IN ACCORDANCE WITH THIS COURT'S PRECEDENT?**

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## I. STATEMENT OF THE CASE

### A. TRIAL PROCEEDINGS

Petitioner Timothy Tyrone Foster was convicted by a jury in the Superior Court of Floyd County of one count of malice murder and one count of burglary on May 1, 1987. (T. 2444-2445).[1] The same day Petitioner was also sentenced to death for the malice murder of Queen Madge White. (T. 2551). In addition to the death sentence, the trial court sentenced Petitioner to twenty years for burglary. (T. 2553).

### B. MOTION FOR NEW TRIAL AND DIRECT APPEAL PROCEEDINGS

Petitioner filed his motion for new trial on May 28, 1987 and it was denied on February 3, 1988. Petitioner filed a notice of appeal to the Georgia Supreme Court on March 3, 1988. The Georgia Supreme Court affirmed Petitioner's convictions and sentences on November 22, 1988 and denied reconsideration on December 14, 1988. Foster v. State, 258 Ga. 736 (1988), *cert denied* Foster v.

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[1] References to Petitioner's Application for Certificate of Probable Cause to Appeal will be denominated as "Application, __." References to the Trial Transcript will be denominated "T. Page Number." References to the Record will be denominated as "R. Page Number." References to the Motion for New Trial Hearing will be denominated as "MNT Hearing, Page Number." References to the State Habeas Transcript will be denominated as "HT, Volume, Page Number." References to the State Habeas Court's Final Order will be denominated as "HO, Page Number."

Georgia, 490 U.S. 1085 (1989), *reh'g denied* Foster v. Georgia, 492 U.S. 928 (1989).

## C. INITIAL STATE HABEAS CORPUS PROCEEDING

On July 28, 1989, Petitioner filed a petition for writ of habeas corpus and subsequently filed a "First Amendment to Petition for Writ of Habeas Corpus" on April 2, 1990 wherein he alleged, *inter alia*, that he was intellectually disabled. On April 4, 1990, the state habeas court remanded Petitioner's case to the Superior Court of Floyd County for a jury trial on the issue of Petitioner's alleged intellectual disability under the procedure set forth by the Georgia Supreme Court in Fleming v. Zant, 259 Ga. 687 (1989). Petitioner's habeas corpus proceedings were held in abeyance pending the intellectual disability trial.

## D. REMAND TO TRIAL COURT ON INTELLECTUAL DISABILITY CLAIM

Following pretrial proceedings and an interlocutory appeal to the Georgia Supreme Court which resulted in the decision Zant v. Foster, 261 Ga. 450 (1991), Petitioner's intellectual disability claim proceeded to a civil jury trial from March 15, 1999 to March 18, 1999. Following the presentation of evidence by both the State and Petitioner, the jury returned a verdict finding that Petitioner was not intellectually disabled. Petitioner thereafter filed a motion for new trial and an amendment thereto, which were denied in an order filed July 9, 1999.

## E. DIRECT APPEAL REGARDING INTELLECTUALLY DISABILITY CLAIM

The Georgia Supreme Court affirmed the jury's finding that Petitioner was not intellectually disabled on January 18, 2000. Foster v. State, 272 Ga. 69 (2000), *cert denied* Foster v. Georgia, 531 U.S. 890 (2000), *reh'g denied*, Foster v. Georgia, 531 U.S. 1045 (2000).

## F. STATE HABEAS PROCEEDINGS

Petitioner filed his petition for writ of habeas corpus on January 4, 2002 and amended petitions on January 26, 2004 and July 10, 2006. An evidentiary hearing was held on October 30-31, 2006.

The state habeas corpus court denied Petitioner's state habeas petition in an order filed December 9, 2013. Petitioner filed his application for certificate of probable cause to appeal on February 10, 2014. Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on November 3, 2014.

## II. STATEMENT OF THE FACTS

On direct appeal, the Georgia Supreme Court found the evidence at trial established the following:

> Queen Madge White, a 79-year-old widow, lived by herself in Rome, Georgia. Early in the evening of August 27, 1986, a friend took White to choir practice, and brought her home at 8:30 p.m. White talked to her sister by telephone at 9:00 p.m. and everything was normal. However, when the sister stopped by early the next morning, she

> discovered that White's house had been broken into and ransacked. The sister called the police, who found White's body lying on the floor in her bedroom covered to her chin by a blanket. Her face was coated with talcum powder. Her jaw was broken. She had a severe gash on the top of her head. She had been sexually molested with a salad-dressing bottle, and strangled to death. A number of her possessions were missing from her home.
>
> The appellant, Timothy Tyrone Foster, was arrested for White's murder a month later when he threatened his live-in companion and she responded by turning him in. The victim's possessions were recovered from their home and from Foster's two sisters. Foster was interrogated and confessed

Foster v. State, 258 Ga. at 736 (Direct Appeal I).

## III. REASONS FOR NOT GRANTING THE WRIT

### A. CERTIORARI REVIEW SHOULD BE DENIED AS THE STATE COURTS' FINDINGS REGARDING PETITIONER'S BATSON V. KENTUCKY CLAIM WERE A FACT SPECIFIC APPLICATION IN ACCORDANCE WITH THIS COURT'S PRECEDENT.

During the voir dire portion of Petitioner's initial trial, forty two (42) jurors were qualified by the trial court to serve. (T. 1336-1344, 1354). Jury selection took place Monday April 27, 1987, following the completion of questioning the previous Friday. (R. 565). This allowed Petitioner's trial counsel and State prosecutors Stephen Lanier and Doug Pullen to spend the weekend assessing prospective jurors. (R. 565). Mr. Lanier and Mr. Pullen were assisted in their investigation by Clayton Lundy. (MNT Hearing, p. 16). Of the jurors qualified by the trial court to serve, four were black: Eddie Hood, Evelyn Hardge, Mary Turner and Marilyn Garrett. Mr. Lanier and Mr. Pullen utilized a portion of their

peremptory strikes to excuse all four. (T. 1337-1343). Trial counsel objected to the strikes, alleging the State violated this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits juror excusal on the basis of race. (T. 1354). The trial court conducted a Batson analysis and found that Petitioner had failed in his burden of demonstrating purposeful discrimination. (T. 1361, 1380). During the motion for new trial, the trial court reconsidered Petitioner's Batson claim and again found Petitioner had failed to show the strikes were racially motivated. (R. 567-573). On appeal, the Georgia Supreme Court held the trial court finding that Petitioner had failed to demonstrate purposeful discrimination was "entitled to "great deference," and...not clearly erroneous." Foster, 258 Ga. at 739 (Direct Appeal I). During state habeas proceedings, Petitioner tendered the State's file from trial including lists of prospective jurors and notes from voir dire. (HT Vol. 4, pp. 896-1000). Considering the entirety of the habeas record, the state habeas court rejected Petitioner's Batson claim. (HO, p. 17).

Petitioner presently alleges the prosecution engaged in racial discrimination during jury selection by striking the four black prospective jurors and that the state habeas court failed to undertake meaningful consideration of the entirety of the evidence. (Petitioner's brief, pp. 9-10). Contrary to Petitioner's claim, the state habeas court found that despite the newly tendered evidence, Petitioner failed to demonstrate the strikes were inherently discriminatory as the State had thoroughly

investigated all prospective jurors in advance of trial and had numerous credible race neutral reasons for striking Mr. Hood, Ms. Hardge, Ms. Turner, and Ms. Garrett. (HO, p. 17). This Court should not grant certiorari in this case as this is a fact-specific application of Batson and this Court does not sit to determine facts. Even if it did, Petitioner has failed to show the state courts erroneously decided the facts.

This Court detailed the steps of a Batson analysis in Snyder v. Louisiana:

> *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:
>
> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[;s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

552 U.S. 472, 476 (2008) (citing Miller-El v. Dretke, 545 U.S. 231, 277 (2005)).

Regarding the third step in the analysis, this Court held:

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," *Hernandez,* 500 U.S., at 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (plurality opinion). In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to

> the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,'" *ibid.* (quoting *Wainwright* v. *Witt,* 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]," 500 U.S., at 366, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (plurality opinion).

Snyder, 552 U.S. at 477 (citation omitted).

It is undisputed that Petitioner's claim reached the third step of the Batson analysis in the trial court. In state habeas proceedings the analysis again focused upon the third step, that of prosecutorial intent, in light of alleged "new" evidence tendered by Petitioner. Specifically, Petitioner references the State's notes and records from jury selection in which specific jurors had been highlighted and or identified by race and gender. (Petitioner's brief, p. 11; HO, p. 15; Application, pp. 2-3). In evaluating whether the prosecution's race-neutral reasons were a pretext for purposeful discrimination, the state habeas court properly recognized that "[a]t the final stage of a Batson inquiry [as here], the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (HO, p. 15). In rejecting Petitioner's Batson claim after considering the newly tendered evidence, the state habeas court found "the record is clear that all jurors in this case, regardless of race, were thoroughly investigated and considered before the State exercised its peremptory challenges." (HO, p. 17).

Petitioner alleges "the Georgia courts failed to give meaningful consideration to "all relevant circumstances" when reviewing [Petitioner]'s Batson claim in the state habeas proceedings." (Petitioner's brief, pp. 10-11). However, the record demonstrates that in accordance with this Court's decisions applying Batson in both Miller-El, 545 U.S. at 239 and Snyder, 552 U.S. at 478, "all of the circumstances that bear upon the issue of racial animosity were consulted," by the state habeas court prior to rejecting Petitioner's claim that the strikes were motivated by race:

> There were four copies of the traverse jury list from the Petitioner's trial, and each noted that "[Green Highlighting] Represents Blacks." The prosecution or its investigators made written notations of the race of each individual prospective juror on its "qualified" juror list.
>
> District Attorney Stephen Lanier and Assistant District Attorney Doug Pullen have both stated that they exercised their peremptory challenges for entirely race-neutral reasons, and that they did not rely upon the highlighted jury lists to make their decision on how to utilize strikes. Furthermore, both the trial court and the Georgia Supreme Court conducted lengthy examinations of the Petitioner's initial Batson claims and found no error. **This court cannot find that the highlighting of the names of black jurors and the notation of their race can serve to override this previous consideration, especially where the race of each juror was noted.** While Miller-El v. Dretke, 545 U.S. 231 (2005) and Adkins v. Warden, Holman CF, 710 F.3d 1241 (2013) are cited by the Petitioner in support of his claim of purposeful discrimination, as both cases included the fact that prosecutors also marked the race of each prospective juror on their juror cards. This court finds Miller-[El] and Adkins to be distinguishable from the circumstances of this case, as the prosecution here has rebutted the purported evidence of discriminatory intent. The court finds the record evidence shows that every

prospective juror, regardless of race, was thoroughly investigated and considered by the prosecution before the exercise of its peremptory challenges.

(HO, pp. 15-16) (emphasis added) (citations omitted).

Moreover, the state habeas court elaborated on additional evidence within the record countering Petitioner's claim of racial bias by the State in jury selection:

> At the Petitioner's Motion for New Trial, while under oath as a witness called by Petitioner, District Attorney Stephen Lanier explained that he [was] assisted in jury selection at trial by Assistant District Attorney Doug Pullen and Chief Investigator Clayton Lundy. Mr. Lanier testified that over the weekend between April 24 and April 27, 1987, he, Mr. Pullen, and Mr. Lundy decided on the ten people they felt would be unfavorable jurors. Concurrent with the Petitioner's Motion for New Trial, the State also filed an Affidavit of Mr. Lundy, who testified that "having worked with and knowing Mr. Pullen and Mr. Lanier, each of us knowing the seriousness and penalty of this crime, can honestly state that the strikes used by Mr. Pullen and Mr. Lanier were not racially biased." Mr. Lundy, himself African American, testified that prior to working as chief investigator in the instant case he had served approximately eight years as a police officer patrolling various neighborhoods in the Rome area. He explained that specifics on African American jurors within the notes and records of the prosecutor were likely information he knew from having lived in Rome all his life, and that he knew many people and could "just come off the top of my head with it."
>
> It is further clear that multiple staff members within the office of the district attorney including secretaries, investigators and other assistant district attorneys would take part in adding their personal knowledge to the lists of prospective jurors. Mr. Lundy testified that 10 to 12 different individuals would go through the list, make marks and notations and add "little stuff on [prospective jurors] that we know about each." The motivation for the passing lists and notes on individual jurors was to help pick a fair jury, especially given that this was a death penalty case.

(HO, pp. 16-17) (citations omitted). The extensive investigation of all prospective jurors by the State regardless of race is clearly reflected within the record.

Mr. Lundy testified that it was common practice in cases to investigate the backgrounds of all prospective jurors. (HT Vol. 2, p. 217). Mr. Lundy also testified that specifically in this case, everyone on the traverse jury list was investigated and none were singled out, regardless of any highlighting, Lundy stating "We did extensive background check[s] on everybody." (HT Vol. 2, pp. 218-219, 221). During the hearing on Petitioner's Motion for New Trial, Mr. Lanier corroborated Mr. Lundy's testimony:

> Mr. Wyatt: My question is: Did Clayton Lundy or anybody else do a background check on the white jurors prior to jury selection?
>
> Mr. Lanier: Yes.
>
> Mr. Wyatt: And was the background check as extensive as the background check on these black jurors?
>
> Mr. Lanier: Yes.

(MNT Hearing, p. 52). From the testimony, it is evident jurors were struck due to findings from the State's extensive investigation rather than race.

Furthermore, as found by the Georgia Supreme Court and the state habeas court, the State put forth "multiple race-neutral reasons for striking each juror." (HO, p. 17). Moreover, the Georgia Supreme Court found:

> The prosecutor's explanations were related to the case to be tried, and

> were clear and reasonably specific. The trial court did not err by finding them to be sufficiently neutral and legitimate. The court's determination that the prosecutor successfully rebutted the prima facie case is entitled to "great deference," Batson supra, 106 S. Ct. at 1724 (fn.21) and is not clearly erroneous in this case.

Foster, 258 Ga. at 739 (Direct Appeal I). The record provides ample support for the state courts' proper determination that Petitioner has failed in his burden to establish purposeful discrimination by the State in striking the four jurors.

**1. The State Court's Decision That The Prosecution's Strikes Were Not Discriminatory Is In Accord With This Court's Precedent.**

In making his claim that the state courts failed to "give meaningful consideration to 'all relevant circumstances,'" Petitioner relies in part upon the prosecution's notes taken during voir dire which included highlighted lists of prospective jurors. (Petitioner's brief, pp. 10-11, 13). However, as properly found by the state habeas court, the notes and records submitted by Petitioner failed to demonstrate purposeful discrimination on the sole basis that the race of prospective jurors were circled, highlighted or otherwise noted. (HO, p. 17). Petitioner has offered no evidence demonstrating that the intent of the State was to dismiss prospective jurors on account of their race.

Moreover, Petitioner's reference to an alleged notation by Mr. Lundy is taken out of context. Petitioner cites to Mr. Lundy's alleged statement that "[i]f it comes down to having to pick one of the black jurors, Ms. Garrett, might be okay" as evidence of purposeful discrimination by the State. However, Petitioner's fails

to note that Mr. Lundy qualified the alleged statement as "solely my opinion." (HT Vol. 4, p. 995). Though Mr. Lundy informed the State's investigation of prospective jurors, Mr. Lundy's alleged statements are not those of the State and contrary to Petitioner's claims, do not establish the State's intent. Furthermore, regarding his concerns of Ms Garrett as a potential juror, Mr. Lundy also stated "Be very careful in picking Ms. Garrett for a juror in this case due to the case we have on Angela Garrett who lost a teaching and coaching job due to a cocaine arrest." (HT Vol. 4, p. 995).

Additionally, Mr. Lanier and Mr. Pullen testified by affidavit in state habeas proceedings that it was common practice in the office to highlight in yellow those jurors who had prior case experience but neither made nor instructed others to make the green highlighted marks denoting black prospective jurors. (HT Vol. 47, pp. 14230, 14258-14259). As previously stated, both Mr. Lanier and Mr. Pullen reaffirmed that their reasoning for exercising the challenges was entirely race neutral and they did not rely on the highlighted jury lists in making their decisions on how to utilize strikes. (HT Vol. 47, pp. 14231, 14259).

As found by the state habeas court, Petitioner's continued reliance upon the presence of marked juror cards in Miller-El, 545 U.S. 231, as authority supportive of negating prosecutorial credibility is misplaced. In Miller-El, this Court found "the [juror] strikes correlate with no fact as well as they correlate with race, and

they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State." 545 U.S. at 266. In this case, it is clear that the trial court conducted a proper Batson analysis, found Petitioner has established a *prima facie* showing of discrimination and then conducted a proper review of whether the prosecutor's reasons were race neutral. Petitioner's alleged new "evidence" fails to undermine the credibility of the State in its race neutral explanations for the challenges. This is a fact-specific application of Batson and this Court does not sit to determine facts. Even if it did, Petitioner has failed to show the state courts erroneously decided the facts.

**2. The State's Race-Neutral Reasoning For Exercising Strikes**

Petitioner alleges the reasons given by the State in striking jurors Eddie Hood, Evelyn Hardge, Mary Turner and Marilyn Garrett are "simply not believable in light of the prosecution's notes and the other available evidence." (Petitioner's brief, p. 14). As previously stated, this Court found in Snyder, 552 U.S. at 477, that "determinations of credibility" are uniquely "within a trial judge's province," and that absent a showing of "exceptional circumstances," this Court defers to the trial court's credibility findings. Also as previously stated, this Court has found "that the best evidence of the intent of the attorney exercising a strike is often that attorney's demeanor." Thaler v. Haynes, 559 U.S. 43, 49 (2010) (citing Hernandez v. New York, 500 U.S. 352, 365 (1991)). It is clear that the trial court carefully

considered the State's reasons for striking the four jurors following Petitioner's Batson challenge in thorough questioning of the State both at trial and during the hearing on the motion for new trial and found the reasoning race neutral.

**a. Eddie Hood**

Citing this Court's decision in Miller-El , Petitioner alleges the State's reasoning for striking prospective juror Eddie Hood was a pretext for discrimination as the State failed to extensively question Mr. Hood during voir dire on the issues the State later claimed for striking him. (Petitioner's brief, pp. 17-18). Petitioner also alleges one of the reasons put forth by the State for excusing Mr. Hood is invalid as white jurors with the same circumstances were not struck. Contrary to Petitioner's claims, the record shows the State conducted an extensive investigation of all prospective jurors prior to voir dire, thus limiting the need for further questioning. Moreover, a review of facts clearly show Mr. Hood distinguishable from alleged similarly situated white jurors and that the trial court properly found the State's reasoning regarding its strike of Mr. Hood race neutral. Therefore the State's excusal of Mr. Hood did not violate Batson.

Following Petitioner's Batson challenge at trial, the State opined prospective juror Eddie Hood was what the State was seeking in a juror in terms of age, employment and marriage. (T. 1361). However, one of the main reasons the State struck Mr. Hood stemmed from Mr. Hood having a son approximately the same

age as the defendant who had been convicted and sentenced approximately four years prior to the trial for theft by taking. (T. 1361). As Mr. Lanier testified at trial and during hearing on the motion for new trial:

> [I]n the two hundred and some odd jury trials that I have tried and the now five death penalties that I have tried, we stay—I stay away from jurors with family members who are, you know, criminally connected in some way or another...

(MNT Hearing, p. 40).

> It is ironic that his son...Darrell Hood has been sentenced by my court, by the Court here, to theft by taking on April 4, 1982...That is Darrell Hood who resides at 13 Copeland Street, his same address. And [Eddie Hood] does say on his questionnaire that he has three boys ages 26, 22 and 18. There is a Darell Hood that we have a conviction on that resides at that address, 13 Copeland Street, who was sentenced on April 12, 1982, twelve months suspended sentence for theft by taking. Again, theft by taking is basically the same thing that this defendant is charged with.

(T. 1362). Federal courts have found the conviction of a relative a justified race neutral reason for excusal. United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987).

At trial, Mr. Lanier also stated Mr. Hood was challenged because: Mr. Hood's wife was employed at Northwest Regional Hospital (which serves mentally ill patients) and the State readily excused those employed there where insanity was raised as a defense; Mr. Hood himself asked to be excused from the jury; Mr. Hood appeared confused and was slow to respond to death penalty questions; Mr. Hood made no eye contact with the State and his answers were ambiguous, and; Mr.

Hood's church's stance on the death penalty. (T. 1362-1363). As Mr. Lanier explained:

> One of the things that concerned me, Your Honor, is religious preference of jurors. His religious preference is Church of Christ. There have been four other jurors that have been excused for cause by agreement that belong to the Church of Christ, Juror No. 35, 53 and 78.
>
> Evidently, the question was not asked of him whether or not his church took a stand against the death penalty. He did not respond to that. His church took a stand against alcohol. But it is my experience that the Church of Christ definitely takes a stand against the death penalty.

(T. 1363). Moreover, as stated *supra,* where a juror's demeanor is invoked by the prosecution as reasoning for the strike as in this case, the trial court's "firsthand observation [is] of even greater importance." Snyder, 552 U.S. at 477.

Petitioner also alleges the State's reasoning that they struck Mr. Hood because he had a son the same age as Petitioner is a pretext for racial discrimination as the State accepted "thirteen white prospective jurors with children between seventeen and twenty-three." (Petitioner's brief, p. 18). However, the record clearly shows this claim was raised by Petitioner during the motion for new trial and the trial court found Mr. Hood's circumstances clearly distinguishable from those of white jurors:

> While the defense asserts that the state used different standards for the white jurors, insofar as many of them had children near the age of the Defendant, the Court believes that the conviction is a distinction that makes the difference. (Venireman Martha Duncan, number 88, the

> state failed to strike despite her nephew's conviction of armed robbery. The defense argues that this shows shifting standards, however, the Court must disagree. A person's feelings for a son are ordinarily much stronger than for a nephew; one's interest in a person living under one's own roof is ordinarily much stronger than one's interest in someone living in another town.)

(R. 567-568). It is clear Mr. Hood was distinguishable from the white jurors who were accepted as his son who was the same age as the Petitioner also had a conviction.

The multiple race neutral reasons offered by the State prompted the trial court, the Georgia Supreme Court and the state habeas court to find the State's explanation for its dismissal of Mr. Hood race neutral and not inherently discriminatory. (T. 1366).

**b. Evelyn Hardge**

Petitioner alleges the State's notes show the State was as motivated to strike Evelyn Hardge due to her race as the other black jurors. (Petitioner's brief, p. 21). Contrary to Petitioner's claim, the record shows trial counsel has consistently conceded the State provided race neutral reasoning to strike Ms. Hardge. Specifically, Ms. Hardge's interaction with Petitioner's mother shortly before the trial started and her obvious confusion during voir dire. Therefore, the state courts properly found the strike was not racially motivated.

The State explained that its dismissal of Ms. Hardge was largely based upon her admission to the court that just prior to her voir dire questioning she had

spoken to Petitioner's mother outside the courtroom. (T. 1367). The State also asserted that Ms. Hardge appeared confused, was very easily swayed, irrational, bewildered, and incoherent as she had stated she would vote for life regardless of the evidence, then claimed she was against the death penalty but could vote for it. (T. 1368). At trial, Petitioner's trial counsel had no response to the State's race neutral justification for striking Ms. Hardge. (T. 1369). The trial court found "the State had ample reason to excuse her." (T. 1369). During the motion for new trial, trial counsel reiterated he had no response to the State's strike of Ms. Hardge. (R. 387).

Additionally, the following colloquy during the hearing on the motion for new trial clearly demonstrates the trial court had a vivid recollection of Ms. Hardge's voir dire testimony in determining that the State's strike was race neutral:

> Mr. Lanier: Your Honor, and for the record [Petitioner] conceded that striking Evelyn Hardge was not a factor—he conceded on the record that he was not contesting the striking of Mrs. Hardge. So, obviously,--
>
> The Court: Well the Court remembers in great detail Evelyn Hardge. I don't think either side would have wanted Evelyn Hardge.

(MNT Hearing, pp. 63-64). It is clear from the record that the trial court carefully considered the entirety of the evidence and found the State had ample race neutral reasons to excuse Ms. Hardge. Petitioner has failed to show otherwise.

**c. Mary Turner**

Petitioner claims the state courts failed to give meaningful consideration to alleged evidence that the prosecutor relied upon his investigator Mr. Lundy in striking prospective juror Mary Turner. (Petitioner's brief, p. 20). Petitioner alleges that as a result of the prosecutor's reliance upon Mr. Lundy, the "strike must be evaluated in the context of Lundy's view of the jury selection process." (Petitioner's brief, p. 20). Contrary to Petitioner's claim, such a narrow analysis would constitute an incorrect application of Batson. As found by this Court, a court applying Batson must decide whether neutral explanations offered by the prosecution are credible and whether the "defendant has established purposeful discrimination." Miller-El, 545 U.S. at 239. As the Petitioner has conceded, and this Court has found, the entirety of the "circumstances that bear upon the issue of racial animosity must be consulted." Snyder, 552 U.S. at 478. A review of the record supports the state courts' findings that the strike of Ms. Turner was not racially motivated.

Consistent with the race neutral reasoning for excusing Mr. Hood, the State explained that it had dismissed prospective juror Ms. Turner because her half brother had been charged on five to seven separate occasions with theft, burglary and drug possession, facts not acknowledged by Ms. Turner in answering her juror

questionnaire. (T. 1369-1371). As the trial court found in denying Petitioner's motion for new trial based upon this claim:

> The district attorney stated that the prospective juror had a step-brother, Mr. Otis Turner, who had a criminal history. In her affidavit submitted by the defense as Exhibit A to its "Argument" in support of the motion for a new trial, she states that Mr. Turner is her brother-in-law, and that she did not list the charges against him because she "did not interpret burglary convictions as crimes of violence." The state, in its "Brief in Response to Defendant's Batson Argument for a New Trial," attached an Exhibit B which shows that in May of 1986 Mr. Turner was indicted for aggravated assault (with a baseball bat) and burglary. In September of 1986, a nolle prosequi was entered on this indictment. In addition, the investigator knew that her husband also had a criminal history, and she did not mention him, either. In light of these facts, the investigator did not believe she could be a fair and impartial juror in this case. Under these circumstances, the Court finds credible the state's unease with this venireman.

(R. 571-572). Given Ms. Turner's failure to disclose family members with indictments for violent crimes, the record clearly demonstrates the State's explanation for Ms. Turner's excusal was both race neutral and credible.

The State also explained that: Ms. Turner was employed by Northwest Georgia Regional Hospital which the State disfavored in light of the probable insanity defense, and; Ms. Turner hesitated strongly when answering the death penalty question and appeared confused at times and had to have questions repeated. (T. 1370-1372). In addition to his concerns regarding Ms. Turner's

candor,[2] the State asserted that Ms. Turner failed to make any eye contact with State's counsel during questioning, but rather made constant eye contact with Petitioner. (T. 1371). Federal courts have found failure to maintain eye contact during questioning constitutes sufficient race neutral reasoning justifying excusal. U.S. v. Cartlidge, 808 F. 2d 1064, 1070-1071 (5th Cir. 1987). Moreover, as the Fifth Circuit Court of Appeals found a race neutral reason for a prospective juror's excusal in U.S. v. Forbes, 816 F. 2d 1006, 1009 (5th Cir. 1987), the State in the instant case noted that Ms. Turner appeared hostile to State questioning and became defensive. (T. 1371). Given the multiple race neutral reasons put forward by the State, the state courts properly concluded that Petitioner had failed to show inherent discrimination in her excusal.

**d. Marilyn Garrett**

Petitioner alleges racial discrimination was inherent in the excusal of prospective juror Marilyn Garrett. Specifically, Petitioner claims the State's primary reason in striking Ms. Garrett was unpersuasive as the State accepted a teacher's aide and three public school teachers who were white. (Petitioner's brief, p. 15). Contrary to Petitioner's claim, it is clear that Ms. Garrett's affiliation with the Head Start program was the basis for exercising the strike, not that she was a

[2] Ms. Turner also represented to the trial court that she was the half-sister of Mr. Lundy, a claim which Mr. Lundy denied in his affidavit testimony. (R. 556). The trial court found that as Mr. Lundy assisted prosecutors in the case, the "friction" resulting from the dispute would not have been conducive to the State. (R. 572).

teacher's aide. Petitioner has provided no evidence that white jurors who were not struck were affiliated with Head Start. Moreover, as the record shows, this was just one of several race neutral reasons the State presented which justified Ms. Garrett's excusal. Accordingly, Petitioner has failed to demonstrate the State's strike was discriminatory.

The State explained to the trial court that Ms. Garrett's excusal stemmed from multiple reasons, all of which negated an inference of purposeful discrimination. As previously stated, the main reason given by the State was that Ms. Garrett worked with the Head Start program which served youth from low income families and Petitioner's underprivileged childhood was a central issue in the defense strategy. (T. 1375; MNT Hearing, p. 30). As the trial court found:

> The state indicated that it was "bothered" by her association with Head Start because that program deals with "low-income, underprivileged" children (Trial Transcript at 1375). As the defense counsel informed the Court before voir dire, they were trying to find jurors who possessed some empathy, or could possess some empathy, for the "socially, culturally and educationally deprived life-style" of the Defendant (Trial Transcript at 85-89). Given this, the prosecutor's strike was sound.

(R. 573). The State elaborated on its aversion to prospective jurors involved in social work:

> Mr. Pullen: [H]ave you read literature by other prosecutors on how to select jurors?
>
> Mr. Lanier: I have.

Mr. Pullen: What is the attitude that they universally have toward social workers?

Mr. Lanier: Stay away from them. As I stated in my affidavit, social workers tend to relate to people and tend to sympathize with an underdog, and the defendant in this case, knowing the facts up front, what the defenses were and knowing the social-economic condition of the defendant, you know, I wanted to stay away from any social worker.

(MNT Hearing, p. 38). The record clearly shows that State's primary reason for excusing Ms. Garrett was race neutral and that the trial court found the reason credible. Petitioner faults the trial court's analysis, claiming Ms. Garrett's employment as a teacher's aide was similar to an accepted white juror employed as a teacher's aide and three white jurors who were public school teachers. (Petitioner 's brief, p. 15). However, the trial court clearly found Ms. Garrett distinguishable from allegedly similarly situated white jurors given her involvement in the Head Start Program. (R. 573). Petitioner has failed to show the white jurors accepted had a similar affiliation.

The State also put forth reasons surrounding Ms. Garrett's demeanor. As previously addressed, where the prospective juror's demeanor is used as reasoning for excusal, great deference is given to the observations of the trial court. Snyder, 552 U.S. at 477. Notably, and affirmed as race neutral by the Fifth Circuit in Cartlidge, *supra*, the State explained Ms. Garrett would not look at the trial court but instead stayed focused on the ground during voir dire. (T.1374). Consistent

with the Court's finding of race neutral reasoning in U.S. v. Matthews, 803 F.2d 325,331(1986), the State noted that Ms. Garrett "show[ed] a complete disrespect for the Court and its authority," when responding to questions put forth by the trial court. (T. 1374). As evidenced below, the trial court agreed that the "body language" of a prospective juror is an important factor when considering excusal:

> As the defense has related in its brief, Mr. Hood was said to have no eye contact, Mrs. Garrett looked at the ground, and Mrs. Turner kept eye contact with the Defendant. The defense states that the prosecution has failed to explain the correct way for a venireman to look, and speculate that all that is left is looking at the ceiling. This hyperbole fails to note the obvious: looking at the state's attorneys would be the "correct" way. The defense has insisted that "body language" is important in the selection of a jury (Trial Transcript at 107), and the Court must agree; further, it is just as important to the state as the defense, and the Court rules on that basis.

(R. 572).

Moreover, as with Mr. Hood, the State noted its concern regarding Ms. Garrett's connection to first cousin Angela Garrett who had been was arrested shortly prior to jury selection for cocaine possession and had subsequently lost her coaching and teaching job at a local school. (MNT Hearing, p. 41). The trial court took note of the concern in its summary of the race neutral reasons justifying the excusal. (R. 573). As shown, the State offered several race neutral reasons for the excusal of Ms. Garrett including her connection to Head Start and her demeanor during voir dire, all of which the trial court found credible. Accordingly, Petitioner has failed to demonstrate the State's strike of Ms. Garrett was racially motivated.

The record is clear that the trial court, the Georgia Supreme Court and the state habeas court all conducted a thorough and meaningful review of the evidence before ruling the State's strikes of prospective jurors Eddie Hood, Evelyn Hardge, Mary Turner and Marilyn Garrett were not racially motivated. As shown above, all three state courts properly applied Batson and found the State's racially neutral reasons for striking the four jurors to be credible. Moreover, after having reviewed Petitioner's evidence which was not available to the trial court, namely the notes and files of the State, the state habeas court properly found the evidence failed to undermine the trial court's and Georgia Supreme Court's determination that the juror strikes were not racially motivated.

Petitioner's *Batson* claim has been reviewed four separates times: by the trial court immediately following voir dire; by the trial court again during the motion for new trial, by the Georgia Supreme on direct appeal, and; by the state habeas court. On all four occasions, the state courts have reviewed the facts and found Petitioner failed in his burden to show purposeful discrimination in the jurors excusals. As previously stated, this court does not sit to determine facts. Even if it did, Petitioner has clearly failed to show the multiple state courts reviewing the claim erroneously decided the facts. Therefore, the fact-specific applications of Petitioner's Batson claim fail to present a claim worthy of this Court's certiorari jurisdiction.

## CONCLUSION

WHEREFORE, for all the above and forgoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for writ of certiorari seeking review of the judgment of the Georgia Supreme Court.

Respectfully submitted,


SAMUEL S. OLENS 551540
Attorney General

BETH A. BURTON 027500
Senior Assistant Attorney General

SABRINA D. GRAHAM 305755
Senior Assistant Attorney General

Richard W. Tangum/sdg 141337
RICHARD W. TANGUM
Assistant Attorney General

Please serve:

Richard W. Tangum
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3397
Facsimile: (404) 651-6459

## COMPLIANCE WITH PAGE LIMITATIONS

This brief complies with Rule 33.2 of this Court.

## CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record and also, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed, upon:

Stephen B. Bright
Patrick Mulvaney
Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, GA 30303

This 9th day of March, 2015.

Richard W. Tangum /SDG
RICHARD W. TANGUM
Assistant Attorney General