IN THE SUPREME COURT OF MISSISSIPPI

CURTIS GIOVANNI FLOWERS, *Appellant*

versus No. 2010–DP–01348–SCT

STATE OF MISSISSIPPI, *Appellee*

SUPPLEMENTAL BRIEF OF APPELLEE

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Special Assistant Attorney General

BRAD A. SMITH
Special Assistant Attorney General

Counsel for Appellee

The Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

page

Federal Cases

State Cases

State Statutes

State Rules

IN THE SUPREME COURT OF MISSISSIPPI

CURTIS GIOVANNI FLOWERS, *Appellant*

versus No. 2010–DP–01348–SCT

STATE OF MISSISSIPPI, *Appellee*

SUPPLEMENTAL BRIEF OF APPELLEE

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE ISSUE

Does *Foster v. Chatman*, 578 U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016) change or clarify the *Batson* analysis in a way that possibly changes this Court's decision to affirm the trial court in denying Appellant's challenges to five of the State's peremptory strikes?

STATEMENT OF THE CASE

The Court affirmed Appellant's four capital murder convictions and sentences of death on November 13, 2014.[1] That decision became final on April 2, 2015.[2] Three months later, Appellant petitioned the Supreme Court of the United States for a writ of *certiorari* to review the judgment of this Court.[3] He presented the following two questions for consideration:

> I. Whether compelling a defendant to stand trial six times on the same charges, where three judgments were reversed due to prosecutorial misconduct and two other trials ended with hung juries, violates the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment?
>
> II. Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?[4]

On May 23, 2016, the U.S. Supreme Court held the decision of a Georgia habeas court and the Georgia Supreme Court, that Timothy Tyrone Foster failed to show purposeful discrimination for two peremptory strikes, was clearly erroneous.[5] The Supreme Court's review of the state court record and evidence admitted during Foster's state habeas proceedings revealed: (1) disparate treatment of prospective African-American jurors, (2) shifting reasons for strikes, (3)

---

[1] *Flowers v. State*, 158 So.3d 1009 (Miss. 2014).

[2] Mandate, dated Apr. 2, 2015, *Curtis Giovanni Flowers v. State of Mississippi*, No. 2010-DP-01348-SCT.

[3] Petition for a Writ of Certiorari to the Mississippi Supreme Court, docketed Jun. 29, 2015, *Curtis Giovanni Flowers v. Mississippi*, No. 14-10486.

[4] Pet. for a Writ of Cert. to the Miss. Sup. Ct. at I, *Flowers v. Mississippi*, No. 14-10486.

[5] *Foster v. Chatman*, 578 U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016).

misrepresentations of the record, and (4) a "persistent focus on race" in the prosecution's case file.[6] The Supreme Court reversed the Georgia Supreme Court and remanded for further proceedings.[7]

The following month, the Supreme Court GVR'd three petitions. That is, the Court granted three petitions for a writ of *certiorari*, vacated the judgments below, and remanded to the lower courts for reconsideration in light *Foster v. Chatman*, 578 U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016). The Court GVR'd the petitions in *Jabari Williams v. Louisiana*, —— U.S. ——, 136 S.Ct. 2156 (Mem), 195 L.Ed.2d 819 (U.S. June 20, 2016), *Christopher Anthony Floyd v. Alabama*, —— U.S.——, 136 S.Ct. 2484 (Mem), 195 L.Ed.2d 820 (U.S. June 20, 2016), and *Curtis Giovanni Flowers v. Mississippi*, 578 U.S. ——, 136 S.Ct. 2157 (Mem), 195 L.Ed.2d 817 (U.S. June 20, 2016). Justice Alito, joined by Justice Thomas, dissented in each case.

BACKGROUND

A. *Foster v. Chatman*

1. *Trial and Direct Appeal Proceedings*

In 1986, Foster confessed to killing a 79-year-old widow. *Foster*, 136 S.Ct. at 1743. His trial began the following year. *Id*. Jury selection took place in two phases: the removal for cause phase and the peremptory strikes phase. *Id.* During the removal for cause phase, the parties reviewed jury questionnaires, individually questioned approximately 90 prospective jurors, and made challenges for cause. *Id.* Forty-two prospective jurors remained at the conclusion of this phase. *Id.* During the peremptory strikes phase, the parties were allowed to exercise peremptory strikes. *Id.* The State had 10 strikes and Foster had 20. *Id.*

---

[6] *Foster*, 136 S.Ct. at 1754 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008); citing *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)).

[7] *Id*. at 1755.

There were five prospective African-American jurors remaining when the peremptory strikes phase began. But one, Shirley Powell, was removed for cause. *Id.* The remaining four prospective African-American jurors were: Eddie Hood, Evelyn Hardge, Mary Turner, and Marilyn Garrett. *Id.* The State used nine out of ten strikes, and removed all four prospective African-American jurors. *Id.* Foster objected, claiming purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *Id.* The trial court overruled his objection and seated a jury with no black jurors. *Id.* Foster was then tried, convicted, and sentenced to death. *Id.* Foster filed a motion for new trial, which was based on his *Batson* claim. During the hearing on Foster's motion for new trial was held, the District Attorney (DA) who prosecuted the case testified and proffered reasons for the peremptory strikes against all four prospective African-American jurors. The trial court denied his motion. And, the Georgia Supreme Court affirmed.[8] *Id.*

2. *State Habeas Proceedings*

Foster raised his *Batson* claim in state habeas court, when seeking state habeas corpus relief. During state habeas proceedings, Foster obtained a portion of the DA' case file, which contained documents relating jury selection. *Id.* at 1743. Foster offered some of the documents as evidence supporting his *Batson* claim during state habeas proceedings. *Id.* The documents he obtained, included: (1) four copies of the jury venire list, (2) a typed draft affidavit that was prepared by an investigator with the DA's Office, (3) three handwritten notes on the prospective African-American jurors with references B#1 for Eddie Hood, B#2 for Louise Wilson, and B#3 for Corrie Hinds, (4) a list of the qualified jurors remaining after the first phase of jury selection with the letter, "N", next

[8] *Foster v. State*, 374 S.E.2d 188 (1988), *cert. denied*, *Foster v. Georgia*, 490 U.S. 1085, 109 S.Ct. 2110 (Mem), 104 L.Ed.2d 671 (1989)

to all 10 of the State's strikes, (5) A list of six names, titled "Definite NO's", (6) a handwritten document, titled "Church of Christ", (7) the returned jury questionnaires, all of which had the race response circled. *Id.* at 1743-44.

The state habeas court ultimately denied Foster's *Batson* claim, finding it was procedurally barred, and alternatively, failed to demonstrate purposeful discrimination. *Id.* at 1745. The Georgia Supreme Court agreed with the state habeas court and refused to issue Foster a Certificate of Probable Cause to appeal. *Id.* at 1742-43. So Foster petitioned the U.S. Supreme Court for a writ of *certiorari.* *Id*. at 1743.

3. *Certiorari Review*

The U.S. Supreme Court granted his petition, considered his *Batson* claim, and found the state courts' decision—that Foster failed to demonstrate purposeful discrimination—was clearly erroneous. *Id.* at 1754-55. The *Foster* Court reversed the Georgia Supreme Court and remanded the case for further proceedings. *Id.* at 1755. In reaching that decision, the *Foster* Court reviewed the state court record and the portion of the DA's case file that contained documents relating jury selection. *Id.* at 1743.

On *certiorari* review, the U.S. Supreme Court examined the state court record and the evidence that Foster presented during his state habeas proceedings. With respect to the "[f]our copies of the jury venire list[,]" the *Foster* Court made several observations. The names of the four prospective black jurors were highlighted in green on all four copies of the list. *Id.* at 1744. The highlighted names corresponded with a similarly highlighted phrase, "represents blacks", which appeared in the top right corner of all of four lists. *Id.* And "[t]he letter 'B' appeared next to each black juror's name." *Id.* Testimony indicated the lists was circulated in the DA's Office in order

to share and obtain information relevant to striking specific jurors. *Id.*

The *Foster* Court also reviewed a typed draft of an affidavit and related testimony from an investigator with the DA's Office. *Id.* The investigator testified to drafting the affidavit at the DA's request that the investigator that he provide his opinion on ten prospective African-American jurors. *Id.* But, the *Foster* Court discovered there were two drafts. The draft filed in the state habeas court, did not contain a hand-redacted notation, which appeared under one of the juror's names. *Id.* The redacted notation read as follows:

> "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion.... Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors."

Id. (citation omitted). When asked why the one affidavit did not contain the passage above, the investigator " 'guessed the redactions had been done by [the DA.]' " *Id.* (citation omitted).

There were other documents in the DA's case file that were troubling. For example, the case file contained three handwritten notes on the prospective African-American jurors Hood, Wilson, and Hinds. *Id.* Those notes referred to jurors Hood, Wilson, and Hinds as B#1, B#2, and B#3, and were used by the DA at trial. *Id.* There was a list of the jurors, who had not been excused during the removal for cause phase. The letter, "N", appeared beside the names of 10 jurors the State struck. *Id.* All five prospective African-American jurors had an "N" written next to their names. *Id.* There was a list of six names, titled " 'Definite NO's.' " *Id.* The names of all five prospective African-American jurors appeared on this list. *Id.* There was a document, titled "Church of Christ[,]" which contained a notation that appeared in the top right corner and read: "*NO*. No black Church." *Id.* (citation omitted). And the race response on every returned jury questionnaire in the DA's case file had been circled. *Id.*

The *Foster* Court then considered the State's peremptory challenges used against Marilyn Garrett and Eddie Hood in light of the evidence from the DA's case file. *Id.* at 1748. With respect to Garrett, the *Foster* Court found multiple misrepresentations. *Id.* at 1751. Several of the DA's reasons for striking Garrett were contradicted by the record. For example, the trial court accepted the DA's reason to strike Garrett was unexpected and came on the heels of Shirley Powell being excused. *Id.* at 1749. The evidence, however, tended to show the State's decision to strike Garrett was planned out. *Id.* The DA was able to give eleven reasons for striking Garrett. *Id.* The DA stated during a pre-trial hearing that he had " 'pretty well select the ten specific people [it] intend[ed] to strike' in advance." *Id.* (citation omitted). Garrett's name appeared on the list of " 'Definite NO's.' " *Id.* at 1749-50 (citation omitted). All of this was evidence that showed the DA's asserted reason for striking Garrett as a "last-minute race-neutral decision—was false." *Id.* at 1749.

According to the *Foster* Court, the DA's reasons for striking Garrett, though not directly contradicted by the record, were "difficult to credit" when compared with similar white jurors. *Id.* at 1750. Garrett was a divorcee; young; and inconsistent in his responses when asked whether she was familiar with the area where the murder occurred. *Id.* The record indicated the State did not to strike three prospective white jurors who were divorced. *Id.* And the State did not exercise strikes against eight prospective white jurors who were around the same age or younger than Garrett. *Id.* at 1751. Another reason the State gave was that the defense failed to ask Garrett about "her thoughts on 'insanity' or 'alcohol,' or 'much questions on publicity' " when the record clearly revealed that it had. *Id.* at 1750 (citation omitted).

With respect Garrett's inconsistent testimony and her familiarity with the neighborhood where the murder occurred, the Court said that It had "no quarrel with the State's general assertion

that it 'could not trust someone who gave materially untruthful answers on voir dire....' But even this otherwise legitimate reason is difficult to credit in light of the State's acceptance of (white) juror Duncan." *Id.* (citation omitted). Duncan's response was similar to Garrett's. *Id.* at 1751. Duncan lived nearby and worked less than 250 yards from the scene. *Id.* When asked, "Are you familiar with the neighborhood [,]..." Duncan's responded, "No." *Id.*

The *Foster* Court found misrepresentations in evaluating the strike of Hood. *Id.* The DA stated that Hood" 'was exactly what [the State] was looking for in terms of age, between forty and fifty, good employment and married.' " *Id.* (citation omitted). Yet, it struck Hood and proffered eight reasons for doing so. *Id.* The *Foster* Court also noted that the State's primary reasons for striking Hood "shifted over time, suggesting those reasons may be pretextual." *Id.* Prior to trial, the State's primary reason for striking Hood was his son's age. Hood's son and Foster were around the same age. *Id.* at 1751-52. During post-trial proceedings, the State's primary reason for striking Hood shifted from his son's age to Hood's Church of Christ affiliation. *Id.* at 1752.

The *Foster* Court also compared both of those reasons with other similarly white jurors. *Id.* The State accepted several white jurors who had sons approximately the same age as Foster. And the State did so, even though Hood definitively said his son's age would not have any impact in making his decision. *Id.* (citation omitted). The State also mis-characterized a crime that Hood's son had been convicted of committing. During jury selection, the State argued that Hood's son had been convicted of a crime similar to Foster's murder. *Id.* In reality, Hood's son had been convicted five years earlier for stealing the hubcaps off a car. He received a 12 month suspended sentence. *Id.* This mis-characterization was evidence of pretext. *Id.* (citing *Miller–El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)).

The *Foster* Court rejected the State's other primary reason for striking Hood—his religious affiliation. *Id.* at 1753. While the State did not have to accept a prospective juror's *voir dire* answers, the State's religious affiliation reason failed given Hood's definitive answer that he could impose death. *Id.* At one point in the proceedings, the State mis-informed the trial court that three jurors, who were white and Church of Christ members, had been stricken. *Id.* It was true that the stricken jurors were white and affiliated with the Church of Christ. *Id.* But none of them had been excused for their religious affiliation. *Id.* One was five months pregnant. *Id.* Another's view on the death penalty were unclear. *Id.* And one other had already formed an opinion on Foster's guilt. *Id.* The DA's case file contradicted the religious affiliation reason for striking Hood, specifically a document titled "Church of Christ." *Id.* There was a notation on that document that stated the church "'doesn't take a stand on [the] Death Penalty," and considered that matter to be one " 'for each individual member.' " *Id.* (citation omitted).

Additionally, the *Foster* Court found many of the State's other reasons for striking Hood were baseless. *Id.* at 1754. For example, the record contradicted the State reason that defense did not ask Hood about Foster's age, criminal responsibility and insanity, or publicity. *Id.* There was no basis in the record for the State's reason that Hood seemed confused and slow to respond to *voir dire* questions. *Id.* Instead, the record indicated that confusion among jurors was common. *Id.* at 1754. Another unsupported reason was that Hood's wife would probably be sympathetic to the underdog because she worked for a hospital that treated the mentally ill. The State struck Hood for this reason, but not against a white juror whose spouse was employed by the same hospital. *Id.*

The *Foster* Court found State was substantially motivated by race when it struck Garrett and Hood. A review of the state court record and evidence presented during Foster's state habeas

proceedings demonstrated: (1) disparate treatment; (2) shifting explanations for the reasons proffered by the prosecution; (3) misrepresentations of the record; (4) and a "persistent focus on race in the prosecution's file." *Id.* at 1754. The *Foster* Court held the state courts' decision—that Foster failed to show purposeful discrimination—was clearly erroneous. *Id.* at 1755. And because the decision was clearly erroneous, the *Foster* Court reversed the Order of the Georgia Supreme Court and remanded the case for further proceedings. *Id.*

ARGUMENT

A. *Foster v. Chatman* does not alter the *Batson* analysis one iota.

Appellant claims *Foster's* decision and the GVR Opinion entered in this case require the Court to apply greater scrutiny on remand, specifically in reviewing the prosecution's intent. (Supplemental Brief of Appellant on Remand from the Supreme Court of the United States at 9). He quotes a sentence from the *Foster* Opinion to support his contention that the Court should "identify the 'exceptional circumstances' that led the Supreme Court to depart from its ordinary deference to state court findings by vacating the judgment in this case, and then adopt an approach that complies with Supreme Court precedent and avoids a 'clearly erroneous' result." (Appellant's Supp. Br. at 9).[9] He believes the trial court's factual findings are not entitled to the considerable deference a reviewing court owes a trial court's factual findings.

"The ultimate issue in *Batson* [*v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)] is a pure question of fact—whether a party exercising a peremptory challenge engaged in

---

[9] To support his contention, Appellant quotes *Foster* where Court recites the well-established deferential standard of review that applies to state court factual findings. " 'That step turns on factual determinations, and in the absence of exceptional circumstances,' as the Supreme Court stated in *Foster*, 'we defer to state court factual findings unless we conclude that they are clearly erroneous.' *Foster*, 136 S.Ct. at 1747 (citing Snyder, 552 U.S. at 477)." (Appellant's Supp. Br. at 9).

intentional discrimination on the basis of race." *Flowers*, 136 S.Ct. at 2158 (Alito, J., dissenting) (citing *Batson*, 476 U.S. at 93-94). To determine whether purposeful discrimination was the motivating factor for a strike, the Court analyzes the facts under *Batson's* three-part process:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination."

Foster v. Chatman, 578 U.S. ——, 136 S.Ct. 1737, 1747, 195 L.Ed.2d 1 (2016) (internal citation omitted); *cf. Flowers v. State*, 158 So.3d 1009, 1046-47 (Miss. 2014), *reh'g denied* (Mar. 26, 2015), *cert. granted*, *judgment vacated*, 578 U.S. ——, 136 S.Ct. 2157, 195 L.Ed.2d 817 (2016).

"*Foster* d[oes] not change the *Batson* analysis one iota." *Id.* at 2158 (Alito, J., dissenting). *Foster* only addresses *Batson's* third step. *Foster*, 136 S.Ct. at 1747. "That step turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." *Id.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)). " 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). " '[W]hether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial ... evidence of intent as may be available.' " *Foster*, 136 S.Ct. at 1748 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). " '[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted.' " *Id.* (quoting *Snyder*, 552 U.S. at 478). "There is no mechanical formula for

the trial judge to use in making that decision, and in some cases the finding may be based on very intangible factors, such as the demeanor of the prospective juror in question and that of the attorney who exercised the strike." *Flowers*, 136 S.Ct. at 2158 (Alito, J., dissenting) (citing *Snyder*, 552 U.S. at 477).

First, *Foster* does not modify or, in any way, alter the clearly erroneous standard of review that applies to a trial court's factual findings. *Batson's* third step requires the trial court to determine whether the race-neutral reasons for a peremptory strike should be believed. *Hernandez*, 500 U.S. at 365. A finding on the issue of purposeful discrimination "largely will turn on evaluation of credibility." *Id.* (citing *Batson*, 476 U.S. at 98). "There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id.*; *see Snyder*, 552 U.S. at 477. In the absence of exceptional circumstances, a reviewing court defers to a trial court's factual findings unless they are clearly erroneous. *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 477); *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2199, 192 L.Ed.2d 323 (2015).

And second, *Foster* does not require the Court to find an exceptional circumstance. The determination in *Foster* did not turn on, or even involve, an exceptional circumstance. "In *Foster*, the Court's determination that the prosecution struck jurors based on race ... was based on numerous case-specific factors, including evidence that racial considerations permeated the jury selection process from start to finish and the prosecution's shifting and unreliable explanations for its strikes of black potential jurors in light of that evidence." *Flowers*, 136 S.Ct. at 2158 (Alito, J., dissenting). The *Foster* Court's determination, according to Justice Alito, was based on evidence of "case-specific factors" that was either contained in the state court record or presented during Foster's state

habeas proceedings. *Foster* certainly did not add the exceptional circumstances exception to the *Batson* analysis. That exception has been the part of the *Batson* analysis since 1991, when the Supreme Court held "in the absence of exceptional circumstances, [It] would defer to state-court factual findings, even when those findings relate to a constitutional issue." *Hernandez*, 500 U.S. at 366 (citations omitted).

In *Hernandez*, the Supreme Court was asked to adopt appellate review that was "independent" of a trial court's decision to deny a *Batson* challenge. *Id.* The Court was urged to " 'analyze the facts in order that the appropriate enforcement of the federal right may be assured,' [*Norris v. Alabama*, 294 U.S. 587, 590, 55 S.Ct. 579, 79 L.Ed. 1074 (1935)], "or to 'make independent inquiry and determination of the disputed facts,' *Pierre v. Louisiana*, 306 U.S. 354, 358, 59 S.Ct. 536, 539, 83 L.Ed. 757 (1939)." *Id.* at 368 (citations omitted). The Court declined the invitation "to conduct a more searching review of findings made in state court than we conduct with respect to federal district court findings[,]" found "the *Norris* line of cases reconcilable with this clear error standard of review[,]" and explained that in the *Norris* line of cases:

> the evidence was such that a "reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). For instance, in *Norris* itself, uncontradicted testimony showed that "no negro had served on any grand or petit jury in [Jackson County, Alabama,] within the memory of witnesses who had lived there all their lives." 294 U.S., at 591, 55 S.Ct., at 581; *see also Avery v. Georgia*, *supra*, 345 U.S., at 560-561, 73 S.Ct., at 892; *Patton v. Mississippi*, *supra*, 332 U.S., at 466, 68 S.Ct., at 186; *Smith v. Texas*, *supra*, 311 U.S., at 131, 61 S.Ct., at 165. In circumstances such as those, a finding of no discrimination was simply too incredible to be accepted by this Court.

Id. at 369 (brackets in the original).

Foster and the GVR Opinion do not add a requirement that the Court identify an exceptional circumstance. Finding an exceptional circumstance is tantamount to a determination that a trial

court's factual findings are "simply too incredible to be accepted by this Court." *Id.* *Foster* is an example of a case where the U.S. Supreme Court determined the state courts' decision was clearly erroneous. *Foster* and the GVR Opinion do not eliminate, or otherwise reduce, the considerable deference this Court and the U.S. Supreme Court give a lower court's factual findings in determining whether race-neutral reasons for a peremptory strike are valid or pre-textual.

Further, this Court's precedent is consistent with *Batson* and its progeny. With respect to *Batson's* third step, this Court has held: "the pivotal question is 'whether the opponent of the strike has met the burden of showing that proponent has engaged in a pattern of strikes based on race or gender, or in other words "the totality of the relevant facts gives rise to an inference of discriminatory purpose." ' " *Puckett v. State*, 788 So.2d 752, 757 (Miss. 2001) (quoting *Randall v. State*, 716 So.2d 584, 587 (Miss. 1998) (quoting *Batson*, 476 U.S. at 94)). "[C]onsidering all of the evidence, the trial court must determine if the State 'engaged in purposeful discrimination' or if the strike was made for a race-neutral reason." *Flowers*, 158 So.3d at 1046 (quoting *Thorson v. State*, 721 So.2d 590, 593 (Miss. 1998)). "This determination will likely turn on a trial judge's evaluation of a presenter's credibility and whether an explanation should be believed." *Id.* at 1047 (quoting *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); citing *Webster v. State*, 754 So.2d 1232, 1236 (Miss. 2000)). This Court recognizes five considerations to assist a trial court in determining whether a proffered race-neutral reason is pre-textual:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the challenged characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.

Id. (quoting *Manning v. State*, 765 So.2d 516, 519 (Miss. 2000) (quoting *Mack v. State*, 650 So.2d

1289, 1298 (Miss. 1994))).

The Court's analysis in this case is consistent with *Batson* and *Fosters'*. *Batson* requires a reviewing court to "delve into the facts and carefully review the trial judge's findings on the question of the prosecution's intent." *Id.* at 2159 (Alito, J., dissenting). That is exactly what this Court did. *Flowers*, 158 So.3d 1046-58. "*Foster* d[oes] not change the *Batson* analysis one iota." *Id.* at 2158 (Alito, J., dissenting). And *Foster* does not change the result in this case.

B. *Foster v. Chatman* is distinguishable from this case.

Appellant believes that *Foster* is analogous to this case. Yet, he offers no real discussion or insight as to how the facts in *Foster* apply, or are even relevant, to a determination in this case. The State disagrees. *Foster* is easily distinguishable from this case. The posture of this case is distinguishable from *Foster.* And, the evidence that was before the U.S. Supreme Court in *Foster* is not present in this case.

1. *Procedural posture*

The procedural posture of this appeal distinguishes it from *Foster v. Chatman*. *Foster* involves an appeal that came before the U.S. Supreme Court after direct review and state habeas review proceedings had ended. *Foster*, 136 S.Ct. at 1745. The decision in *Foster* turns on evidence that obtained through Georgia's Open Records Act and introduced during state habeas proceedings. *Foster*, 136 S.Ct. at 1743-44. This appeal is a direct appeal of Appellant's 2010 trial proceedings. *Flowers*, 158 So.3d 1009. Unlike the state courts in *Foster*, this Court's review is limited to the record before It. And the record in this case does not contain evidence similar to the evidence that supports the decision in *Foster.*

Mississippi's Uniform Post-Conviction and Collateral Relief Act (UPCCRA), Miss. Code

Ann. § 99-39-1, *et seq*., provides prisoners, like Appellant, with a procedure for obtaining collateral review of "objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal." Miss. Code Ann. § 99-39-3(2). Appellant, like Foster, will have the opportunity to present claims and evidence beyond the four corners of the record during his post-conviction review proceedings.

In any event, the procedural posture of this case distinguishes it from *Foster*. The U.S. Supreme Court's reviewed included the state court record and evidence that was presented during state habeas proceedings. The posture of this case constrains the scope of review to the record before the Court on direct appeal.

2. *Evidence of purposeful discrimination*

The evidence in this case distinguishes it from *Foster*. The evidence supporting the *Foster* decision is not present in this case. Foster obtained a portion of the DA's case file through Georgia's Open Records Act. He used documents in that file to support his *Batson* claim during his state habeas proceedings. The DA's case file is not part of the record in this case. That said, Mississippi law requires post-conviction petitioners be given access to information similar to the information that Foster obtained. M.R.A.P. 22(c)(4)(ii). Appellant will be given access to information during his post-conviction proceedings.[10] But more importantly, this Court has reviewed the record, considered the circumstances of this case, and found no *Batson* violation. So Appellant, in response, rehashes the arguments made in his Brief of Appellant and faults the Majority for rejecting them.

---

[10] In fact, Appellant has been given access to the DA's case file—with one exception. The State, pursuant to M.R.A.P. 22(c)(4)(ii), submitted documents relating to jury selection in the trial court. The State asked that it be permitted to withhold those documents from Appellant under the provisions of M.R.A.P. 22(c)(4)(ii). The trial court reviewed the documents, found no evidence of racial discrimination or any other information that would helpful to Appellant in his efforts to obtain post-conviction relief.

C. The Majority's decision is not clearly erroneous.

Appellant strenuously argues the U.S. Supreme Court GVR'd the case because the Majority failed "to consider and give weight to [the District Attorney's] prior history of discrimination and dishonesty...." (Appellant's Supp. Br. at 11). He provides no citation to support that assertion. The State disagrees with Appellant's contention that the Court simply did not consider *Flowers III* or the history of this case when reviewing Appellant's *Batson* claim, particularly in light of what the Court said. The Court discussed *Flower III's Batson* violation, as Appellant correctly points out, in denying his biased venire claim, *Flowers*, 158 So.3d at 1058-59. (Appellant's Supp. Br. at 10-11, 12 n. 7). In denying Appellant's biased venire claim, the Court wrote:

> First, [Appellant] asserts that bias is evident from the Court's holding in *Flowers III*. [Appellant]'s claim comes from the Court's statement in *Flowers III* that the case presented "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935 (¶ 66). The problems surrounding jury selection in *Flowers III* are not present in today's case. In that case, the State exercised all twelve of its peremptory strikes on African–Americans and its three peremptory strikes for alternate jurors on African–Americans. *Id*. at 917-18. The Court found that the following facts resulted in a *Batson* violation: the State exercised peremptory strikes against African–American veniremen who shared characteristics with tendered white jurors; the State's proffered race-neutral reasons for striking African–Americans were not supported by the record; and the State failed to voir dire other jurors as to a characteristic cited as a race-neutral basis. *Id*. at 935-39. However, the facts were particular to the third trial, and *Flowers III* does not stand for the proposition that the community as a whole—and any future venire—would be biased. The claim is without merit.

Flowers, 158 So.3d at 1059.

Appellant characterizes the passage above as one of two "brief references to the outcome of *Flowers III*[,]" but glosses over the fact that this Court expressly acknowledged the *Batson* violation in *Flowers III* along with the specific evidence supporting it (*e.g.*, disparate treatment, unsupported reasons for strikes, failure to voir dire on challenged characteristics). (Appellant's Supp. Br. at 10

n. 5). Facts like the those in *Flowers III*, which led the Court to determine the prosecution violated *Batson*, were not present in this case.

Appellant places a great deal of emphasis and effort in criticizing the Majority for not expressly stating that It took *Flowers III*'s *Batson* determination into consideration. Appellant has offered absolutely no evidence to support his position. And he fails to mention, or chooses to ignore, the fact that *Flowers III* was a five-four split decision, a plurality. *Flowers v. State*, 947 So.2d 910, 941-43 (Miss. 2007). Then-Chief Justice Smith, joined by three other Justices, dissented from the Plurality's determination that the State violated *Batson*. His Dissenting Opinion gave several reasons for affirming the trial court's judgment with respect to jurors Curry and Pittman—the two *Batson* violations found in *Flowers III.* 947 So.2d at 941-43 (Smith, C.J., dissenting).

Beginning with juror Curry, Chief Justice Smith found the State's proffered reasons for striking her were race-neutral. *Id.* at 942-43. Curry worked with Appellant's sister and her husband had been convicted of burglary. *Id.* Also, an investigator, who helped convict Curry's husband, was a potential witness in Appellant's third trial. *Id.* at 942. Chief Justice Smith found the trial court's judgment was reasonable, given the reasons proffered by the State. *Id.* at 943. The State's reasons strongly related to the facts of the case. *Id.* at 943. And he failed to find disparate impact on a minority class in striking Curry. He found the fact that the investigator, and possible State's witness, who helped prosecute Curry's husband distinguished her situation from other similar jurors. *Id.*

As for juror Pittman, Chief Justice Smith found Appellant was procedurally barred from arguing purposeful discrimination for failing to rebut the State's proffered reasons at trial. *Id.* He also disagreed with the Plurality's finding of purposeful discrimination given that the State was only allowed to articulate one of its reasons for striking Pittman. *Id*. "The State indicated that it had other

reasons for striking Pittman, but when the defense failed to rebut the State's first reason, the trial judge announced his finding." *Id.* The Dissenters found no *Batson* violation with respect to Curry or Pittman, and would have affirmed the trial court's judgment. *Id.*

D. The trial court did not err in denying Appellant's *Batson* claims.

Appellant claims the Majority's decision becomes untenable when considered alongside the District Attorney's history of discrimination. Appellant's claim is without merit and must fail for the following reasons:

1. *Strength of the prima facie case*

First, Appellant argues the Majority's decision is erroneous because, unlike the Dissent, it did not consider the strength of the *prima facie* case. (Appellant's Supp. Br. at 14). The record belies this argument. The record reflects that the reduction of African-Americans from the venire had nothing to do with the State.

But first, trial counsel made Appellant's *prima facie* case after the DA struck the third prospective African-American juror. (Tr. 1759.). Trial counsel stated that:

> **BY MS. STEINER**: Four [African-American jurors], and has stricken three of them. And that is a 75 percent strike rate of African-American jurors. The mere fact that one has been accepted does not preclude the finding of either a prima fascia case or ultimately of discrimination on the basis of race.

(Tr. 1759.). In *Strickland v. State*, 980 So. 2d 908, 917 (Miss. 2008) this Court found that "exercising seven peremptory strikes against African-Americans, standing alone, absent any other facts or circumstances ... fails to establish a *prima facie* showing that race was the criteria for the exercise of the peremptory challenge." If striking seven black jurors does not, by itself, establish a *prima facie* case, striking five prospective African-American jurors does not either.

While the parties were exercising for-cause challenges, trial counsel renewed an objection to the racial composition of the venire. (Tr. 1733-34.). Trial counsel noted that "venire that was 42 percent African-Americans and 55 percent white" had been "halved on points" to a venire that "was 72 percent Anglo-American, white, and 28 percent African-American." (Tr. 1733-34.). Trial counsel claimed there had been a statistically significant reduction of African-American jurors in the venire. (Tr. 1733-34.). And in support, trial counsel called attention to the fact that for-cause challenges to the venire had reduced the number of African-Americans to 15 individuals. (Tr. 1734.). Trial counsel re-urged the trial court to preclude the prosecution from exercising peremptory strikes "because of so much of this ... there is the history that has been found by the Mississippi Supreme Court of racial discrimination in jury selection with respect to this case by this prosecution. (Tr. 1734-35.). The trial court responded as follows:

> COURT: You have got to look into the purpose, the reason. And the reason why is because [Appellant] has a number of brothers and sisters. His parents are well-known. Mr. Archie Flowers is apparently one of the most well-thought of people in this community. You have had countless numbers of African-American individuals that have come in and said they could not sit in judgment because of their knowledge of [Appellant], and they could not be fair and impartial.
>
> ....
>
> [If there is a statistical abnormality now, it is because almost every African-American that has been excused for cause, other than those on the death question, were because they knew him.
>
> ....
>
> [There is probably about seven or eight people that were on the death question alone, there was some that said because of death and other reasons -- well, eight of 600 that were originally called is, is statistically not material. Even eight out of 154 that finally started voir dire on Monday is statistically insignificant.
>
> So you know, there is -- nothing the State has done has caused this statistical abnormality. It is almost chiefly because [Appellant's] family are such prominent people, and he has got so many relatives and so many

> friends and so many of his family members that have friends. But it is not anything that, you know, has shaken out that way.
>
> ....
>
> [You know full well from past experiences in this county because of the number of people that know [Appellant], they know his parents, they know his brother, they know his sisters, and he -- I mean he has got a large number of siblings. And all of those people -- you know, I mean he is so well-known here that, you know, you've got a number of African-Americans that say I know him. I can't be fair. I know these people. I can't sit in judgment of their son. And there is -- there is no way to avoid that if this case is tried in this county. Because this is the same type of things that, that occurred in previous trials where he had so many people that knew him.
>
> You know, I don't -- I hadn't kept a running count of anything in here but, you know, there is nothing about that has -- that has -- no discrimination that's occurred that has caused this, what you call, statistical abnormality now. It is strictly because of the prominence of his family.
>
> ....
>
> And as far as the motion to prohibit the State from using peremptory challenges, there is no basis for that. Absolutely none. If the State looks at potential jurors and feels that they have right reasons for using peremptory challenges, that is their right. That is -- each side gets to make peremptory challenges.
>
> But because Flowers III was reversed on Batson is certainly no grounds for saying that they should now be denied the right to use peremptory.

(Tr. 1736-39.).

The record belies Appellant's argument concerning the strength of his *prima facie.* As the trial court observed and stated on the record, almost all of the prospective African-American members of the venire were excused for one of two reasons. If the defendant fails to make out a *prima facie* case showing a discriminatory purpose, the inquiry ends. *See Prat v. State*, 986 So. 2d 940, 942-43 (Miss. 2008); *Scott v. State*, 981 So. 2d 964, 968 (Miss. 2008). Either they could not follow the law with respect to imposing a sentence of death, or they knew Appellant, members of his family, or both. The statistical data Appellant relies on cannot be attributed to the State, and is

simply not indicative of disparate treatment.

The State would also note that Appellant informs the Court that there "is no dispute here that a *prima facie* case of racial discrimination was established, and no dispute that the prosecutor offered race neutral reasons for his strikes[,] ... [and that] only the third step of *Batson* -- determination of whether facially neutral reasons are pretextual – is at issue." (Appellant's Supp. Br. at 9). This is false. The State took issue with Appellant's *prima facie* case of discrimination in its Brief of Appellee. (Brief of Appellee at 72-76, filed Nov. 25, 2013, *Flowers*, No. 2010-DP-01348-SCT).

There were three points which the State did not dispute in its Brief of Appellee. The State acknowledged that "[t]he trial court found that the use of five out of six peremptory challenges against African-American jurors was sufficient to raise a *prima facie* claim of discrimination under *Batson*." (Appellee's Br. at 73, *Flowers*, No. 2010-DP-01348-SCT). And it did not "dispute that the final jury consisted of eleven white jurors, one black juror, and a single black alternate[,] ... [or] that the State used its peremptory challenges to strike five black jurors from the regular panel." (Appellee's Br. at 74, *Flowers*, No. 2010-DP-01348-SCT).

But the State disagreed with "the trial court's determination that Appellant made a *prima facie* case for discrimination based on the simple number of strikes used against African Americans." (Appellee's Br. at 73, *Flowers*, No. 2010-DP-01348-SCT). It also disputed "Appellant's characterization of the *prima facie* case as strong." (Appellee's Br. at 73, *Flowers*, No. 2010-DP-01348-SCT). It argued that, "[leally, this characterization is incorrect; ... the number of strikes used against African-Americans, standing alone, was insufficient to support a *prima facie* finding of discrimination." (Appellee's Br. at 73, *Flowers*, No. 2010-DP-01348-SCT).

For the Court's convenience, it was—and is—the State's position that:

numbers are not quota requirements. They are a part of the "totality of the relevant facts" the trial court is to consider; numbers alone do not constitute, "as a matter of law," a *prima facie* case under *Batson*. *Batson*, 476 U.S. at 94. The principle that a *prima facie* case determination, under *Batson*, is not to be based on numbers alone but is to be made in light of the totality of the circumstances, is generally accepted across this country. *See U.S. v. Hill*, 643 F.3d 807, 839 (11th Cir. 2011); *U.S. v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994); *State v. Holland*, 2011 WL 6153193, *cert. denied*, 132 S.Ct. 2682 (2012) ("Bare statistics" insufficient); *U.S. v. Lewis*, 892 F.2d 735, 736 (8th Cir. 1989) (percentages insufficient), *Strickland v. State*, 980 So.2d 908 (Miss. 2008) (number of African-Americans struck insufficient to prove *prima facie* case); *People v. Gutierrez*, 932 N.E. 2d 139, 164 (Ill. 2010) (same); *Thompson v. U.S.*, 509 U.S. 931 (1993) (same); *U.S. v. Branch*, 989 F.2d 752, 755 (5th Cir. 1993) (same); *U.S. v. Davis*, 40 F.3d 1069 (10th Cir. 1994) (same); *U.S. v. Canoy*, 38 F.3d 893 (7th Cir. 1994) (same); *Williams v. Woodford*, 385 F.3d 567, 583-84 (9th Cir. 2004), *cert. denied*, 546 U.S. 934 (2005) (same); *Moran v. Clark*, 443 F.3d 646, 652 (8th Cir. 2006) (same); *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 562 (5th Cir. 2001) (same). *See also U.S. v. Clemons*, 843 F.2d 741, 746 (3rd Cir.) *cert. denied*, 488 U.S. 835 (1988) ("magic number" to trigger *Batson* inquiry "would short-circuit the fact specific determination expressly reserved for trial judges").

There is a reason why *Batson* does not base itself in mathematics. In *Powers v. Ohio*, 499 U.S. 400, 410 (1991), the U.S. Supreme Court stated that, "A person's race simply is unrelated to his fitness as a juror. We may not accept as a defense to racial discrimination the very stereotype the law condemns." Thus, a *Batson* argument based solely on percentages "ironically reinforces the very racial stereotypes" *Batson* was meant to prevent: namely, that if enough blacks serve on the jury, or if enough whites are struck from the jury, then there is no discrimination. *Carrera v. Ayers*, 670 F.3d 938, 950 (9th Cir. 2011). Indeed, this Court, in *Strickland v. State*, held that *Batson*,

> [Is not concerned with racial, gender, or ethnic balance on petit juries, and it does not hold that a party is entitled to a jury composed of or including members of a cognizable group. Rather, it is concerned exclusively with discriminatory intent on the part of the lawyer against whose use of his peremptory strikes the objection is interposed.
>
> ...
>
> Exercising seven peremptory strikes against African-Americans, standing alone, absent any other facts or circumstances related to (1) racial composition of the venire, empaneled jury, or community, or other non-exclusive factors such as (2) the prosecutor's conduct, (3) the habitual policies of these prosecutors, (4) the stated policies of the district attorney's office, or (5) the nature of the case itself, see fails

> to establish "a prima facie showing that race was the criteria for the exercise of the peremptory challenge."

Strickland, 980 So.2d at 916-17.

In *State v. Duncan*, 802 So. 2d 533, 550 (La. 2001) (*cert. denied, Duncan v. Louisiana*, 536 U.S. 907 (2002)), the court reasoned that,

> Such number games, stemming from the reference in *Batson* to a "pattern" of strikes, are inconsistent with the inherently fact-intense nature of determining whether the prima facie requirement has been satisfied. Indeed, such attempts to fashion absolute, per se rules are inconsistent with *Batson* in which the court instructed trial courts to consider "all relevant circumstances."

(Appellee's Br. at 75-76, *Flowers*, No. 2010-DP-01348-SCT) (footnote omitted).

The State did not concede the fact that Appellant failed set out a *prima facie* case of discrimination. And the State has, at no time, abandoned its position with respect to the *prima facie* case of discrimination. The trial court's finding that Petitioner had made a *prima facie* case for discrimination based on the simple number of strikes used against African-Americans. Numbers alone are insufficient to Assuming *argued* that Appellant had established a *prima facie* case, it is hardly one that can be characterized as strong. And any strength his *prima facie case* had, is only diminished by his claim's utter lack of evidentiary support and the explanation for the reduction in the number of African-American venire members in the record.

2. *Disparate questioning*

Next, Appellant argues the decision to deny his *Batson* claim is clearly erroneous because the Majority disparaged the probative value of disparate questioning in reaching the conclusion that disparate questioning on its own is insufficient to establish purposeful discrimination. (Appellant's Supp. Br. at 14-15). He complains the Majority deferred to the State's assertions. (Appellant's Supp. Br. at 15). And, he quotes the following portion of the Majority Opinion—save the last

sentence of the following paragraph—which reads:

> The State's assertion that elaboration and followup questions were needed with more of the African–American jurors is supported by the record. Most of the followup questions pertained to the potential juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial. The jurors who had heard little about the case, who said they would not be influenced by what they had heard, and who said they would not be influenced by relationships were asked the fewest questions. The jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty were asked more questions. *Those issues are appropriate for followup questions*.

Flowers, 158 So.3d at 1048 (emphasis added).

Appellant is mistaken. First, the State has already demonstrated the fact that Appellant's history of discrimination and *prima facie* case arguments are unsupported and without merit. With respect to disparate questioning, Disparate treatment is an identifier of possible pretext, but is not an automatic reason for finding a strike to be pre-textual. *Berry v. State*, 802 So. 2d 1033, 1038 (Miss. 2001); *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2009). If the State demonstrates the jurors do not share the same characteristics, disparate treatment is not shown. Where the State is able to articulate additional race-neutral reasons for striking the juror in question and strikes jurors based on that same reason there is also no disparate treatment demonstrated. *Manning*, 765 So. 2d at 519-20; *Woodward v. State*, 726 So. 2d 524, 531 (Miss. 1997). And as this Court noted, the trial court took an active role in *voir dire*, took copious notes, allowed Appellant ample opportunity to question and rehabilitate jurors as well as challenge them. *Flowers*, 158 So.3d at 1049.

According to Appellant, the Majority for inappropriately relied on "reassuring generalizations." (Appellant's Supp. Br. at 15). The Majority was required to go further and find the full explanation for the disparities. (Appellant's Supp. Br. at 15). The Majority did not defer to

the State. It confirmed the State's assertion by looking to the record. *Flowers*, 158 So.3d at 1048. The Majority then reported what It found in Its Opinion. *Id.*

Appellant claims the State engaged in disparate questioning of black and white jurors. He argues the State asked more questions of the black jurors than they did of the whites. But the white jurors Appellant identifies each stated that they would have no problem following the law and were able to impose either death or life. There was nothing for the State to question when the answers were satisfactorily clear. The State questioned jurors whose answers to the trial court were unclear or needed further elaboration. That the State failed to ask redundant questions, simply to meet a quota for "length of questioning", does not indicate pretext. Appellant points to two questions the State asked Diane Copper. (Appellant's Supp. Br. at 16-17, n. 9). First, the questions the State asked can hardly be characterized as leading questions. Second, the two questions were particularly relevant given that a possible juror worked with Appellant's mother. How long did you work with Appellant's mother? Were you close with Appellant's mother? Surely, Appellant can see Diane Copper's relationship with Appellant's mother would be a direct conflict with the State's interest in having an impartial jury hear the case. The State was "trolling" for a reason to strike Diane Copper.

3. *Disparate treatment & Misrepresentations*

Third Appellant argues the Majority's approach stops short providing a comparison of seated white jurors and similarly situated African American jurors who were struck. The State discussed these jurors in its Brief of Appellee. The State resubmits those arguments here:

Carolyn Wright

Carolyn Wright worked with Flowers's father at what the trial judge characterized as the

"smallest Wal-Mart in existence." In *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013), the Fifth Circuit held that a juror's familiarity with the defendant or his family is a race-neutral reason for a strike. Striking a juror who worked with the defendant or a member of his family is a race-neutral reason for a strike. See Manning v. State, 735 So. 2d 323, 340 (Miss. 1999) ("We have condoned a peremptory challenge against a juror who was acquainted with the defendant's family"). Wright also was sued by Tardy Furniture. In *Webster v. State*, 754 So. 2d 1232, 1236 (Miss. 2000) this Court held that the exercise of a peremptory strike was race-neutral, where the juror in question was struck because he had worked for a company sued by defense counsel. A juror's history of litigation with any of the parties or their attorneys is, therefore, a race-neutral reason for a strike.

In rebuttal, Appellant claimed the State engaged in disparate treatment by failing to ask white jurors if they had ever been sued by Tardy Furniture. However, both the State and the trial court pointed out Appellant's claim was incorrect. The State noted that it checked every prospective juror on the list to see if anyone had been sued by Tardy, or had any sort of "run-in" with the store. (Tr. 1772.). The trial court then reminded defense counsel that the entire venire panel had been asked if any of them had a charge account with Tardy; the entire venire also had been asked if any of them had ever been sued by Tardy. According to the trial court, that question, "was not just asked of African-American jurors, as you claimed." R. 1773. The trial court pointedly asked defense counsel whether any of the white jurors tendered had been sued by Tardy Furniture. Defense counsel responded, "no." R. 1765.

In additional rebuttal of the strike against Wright, Appellant claimed the State tendered white Juror Pamela Chasten, who also had acquaintances with witnesses and with the Flowers family. (Tr. 1765.). However, of critical distinction is the fact that Chasten did not work with anyone in

Flowers's family, as Wright did. The trial court asked defense counsel if any white jurors tendered worked with Flowers's father. Defense counsel responded, "no." (Tr. 1765.). The trial court, accordingly, found the State's reasons to be race-neutral and non-disparate:

> Wal-Mart here in Winona is not like some of these giant mega stores. It's a relatively small-smallest Wal-Mart, actually, that I know in existence. So she had worked with Mr. Flowers's father. She has been sued by Tardy Furniture. I find those to be race neutral reasons. You are correct in pointing out that some of the other State-the other jurors that have been tendered by the State-some of these, you know, white jurors know some of these people. But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral reasons, and I find that the Defense has failed to rebut the reasons offered by the State.
>
> ....
>
> If-if the only reason the State offered was that she knows some of these Defense witnesses, then there might be something there. But the fact is knowing these Defense witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

(Tr. 1773-75.).

Tashia Cunningham

During individual voir dire Tashia Cunningham stated that she was against the death penalty. However, she then equivocated on the issue:

> By the Court: Would you or would you not be able to consider the death penalty? I mean, what's your view on even considering the death penalty?
>
> A [by Cunningham]: I would not.
>
> By Court Reporter: I'm sorry. What?
>
> A: I would not.
>
> By the Court: Are-are you saying you would not consider it?
>
> A: No, sir.

Q: Even if the law allowed it and the facts justified it, you just could not even consider it?

A: No, sir.

[…]

Q: So-but again, just tell me again what your feelings are on the death penalty?

A: I don't believe in the death penalty.

Q: And would there be a possible-could you consider it?

A: I don't think so.

Q: You don't think so?

A: I don't think so.

Q: But there's-in our own mind, you might could-are you saying you could possibly?

A: I don't think so.

Q: See, I'm not asking you to make a-you know, you haven't heard anything. And all we want to know is whether you could consider that as a possibility-that as a sentencing possibility […]

A: I might. I might. I don't know. I might.

Q: So you might be able to consider that?

A: (Nodding head).

(Tr. 1293-95.).

After the conclusion of this voir dire by the court, the State asked the question again:

Q: Could you consider the death penalty yourself if the facts justified it and the law allowed it?
A: I don't think so.

(Tr. 1296.).

This Court has held that inconsistencies in a juror's statements are race-neutral

> reasons for a strike. *Hicks v. State*, 973 So. 2d 211, 220 (Miss. 2007). Moreover, a juror's views on the death penalty are a race neutral reason for a strike. *Pitchford v. State*, 45 So. 3d 216; Batiste v. State, 2013 WL 2097551 (Miss. 2013). Peremptory challenges may be used against venire persons who expressed reservations against the death penalty, but were not excluded for cause. *Jordan v. State*, 464 So.2d 475, 480-81 (Miss. 1985). This is a race neutral reason. *Underwood v. State*, 708 So.2d 18, 27-28 (Miss. 1998); *Mack v. State*, 650 So.2d 1289, 1300 (Miss. 1994); *Turner v. State*, 573 So.2d 657, 663 (Miss. 1990).

Tashia Cunningham also lied during voir dire. Cunningham repeatedly stated that while she worked with Flowers's sister (alone a sufficient reason to strike her) on an assembly line, the two did not work in close contact with another. According to Cunningham, "She works at the front of the line, and I work at the end of the line." (Tr. 987.).

However, Cunningham's quality control clerk, Crystal Carpenter, confirmed that Cunningham and Flowers's sister, in fact, worked "side by side," less than ten inches from each other nearly every day. R. 1328, 29. Ms. Carpenter confirmed there were records kept as to the particular locations of the employees. Lying during voir dire is a sufficiently race-neutral reason for a strike. *Murphy v. Dretke*, 416 F.3d 427, 433 (5th Cir. 2005). That Cunningham's lie served to downplay a relationship between herself and Flowers's sister further supports the State's race-neutral reason for the strike.

With respect to alleged disparate treatment of Ms. Cunningham, defense counsel claimed the State tendered white Juror 30, Whitfield, who also had mixed feelings about the death penalty. (Tr. 1778-79.). However, as the trial court found, while Cunningham's statements were "all over the map," Mr. Whitfield's situation was "greatly different […he] said from the beginning on his questionnaire that he generally favored the death penalty and could consider it." (Tr.1781-82.). Defense counsel also claimed that the State's decision to strike Cunningham based on the testimony of Cunningham's quality control representative (Crystal Carpenter) was pretext, because the State

didn't "verify" the woman's statements with documents-they simply took her word for it. (Tr. 1777.). The court dismissed such argument by defense counsel, noting that counsel had presented no legal authority to support the claim that the State was required to prove Ms. Carpenter's testimony-given under oath-was true. According to the court, "In my mind, the State had shown race-neutral reasons for that strike and the Defense has failed to rebut that race-neutral reason that was given." (Tr. 1782.).

Edith Burnside

With respect to Edith Burnside, she too was sued by Tardy Furniture. This was a sufficiently race-neutral reason to strike her from the jury. *See Webster v. State*, 754 So. 2d 1232, 1236 (Miss. 2000). Burnside also equivocated on whether she could impose the death penalty:

> By the Court: And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?
>
> A [by Burnside]: That I don't think I could do. I don't know if I could do that […] I don't-I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

(Tr. 1300-01.). The court continued to investigate the issue on voir dire:

> Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?
>
> A: If I was on there, yeah, I guess I'd have to.
>
> Q: So if the facts justified it and the law allowed it, you would consider it?
>
> A: Yes.

(Tr. 1301.).

During individual voir dire by the State, the district attorney asked Ms. Burnside about an earlier statement she made, in which she said she did not want to sit in judgment:

> Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did

you state that?

A: Well, because I-you know, I prefer not to judge anyone. But when they come back and say could I be fair. My thing is I prefer not to judge anyone. But now, I will be fair.

(Tr.1305.). The State followed up on this answer by asking the obvious question:

Q: So you've changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in this case; is that right?

A: It could, possibly, yes, sir.

(Tr. 1306.).

The State's reason for striking Ms. Burnside was race-neutral pursuant to the case law of this Court. A juror's views on the death penalty are a race neutral reason for a strike. *Pitchford v. State*, 45 So. 3d 216 (Miss. 2010). A juror's reluctance to serve is a race neutral reason for a peremptory challenge. *Hughes v. State*, 90 So. 3d 613, 626 (Miss. 2012).

In rebuttal Appellant again erroneously claimed (as he did with the strike on Carolyn Wright) that only African-Americans had been asked about being sued by Tardy Furniture. However, the record already belied that allegation. Defense counsel also argued Burnside stated she could be fair even though she had been sued. However, as the court noted, her promise to be fair was at war with her reluctance to serve, her reluctance to judge, and her belief that such reluctance might affect her

judgment:

> She first stood up when the district attorney asked her if she could judge, and she said she could not. I have seen no white person that was left on this panel that responded in a similar fashion. And I've got a note here that said she stated that she'd preferred not to judge. Again, I don't have any notes that would indicate that there was any white person that said that. She was sued by Tardy Furniture." "But I think the State has offered numerous race-neutral reasons for this strike, and there are not white jurors that were left on the panel that have the race-neutral reasons the State has offered for striking Ms. Burnside."

(Tr.1785-86.).

Flancie Jones

The State proffered three race-neutral reasons for striking Flancie Jones. First, she was late twice to court; her reasoning was that she didn't like to get up in the morning. This Court has held that lack of respect for the court proceedings is a race-neutral reason for a strike. *Lockett v. State*, 517 So. 2d 1346 (Miss. 1987) (citing *U.S. v. Matthews*, 803 F.2d 325 (7th Cir. 1986) (juror arrived late, indicating a lack of commitment to the importance of the proceedings). Second, Jones is related to Curtis Flowers. The relationship appeared to be through two different veins, both through marriage. Both the State and Appellant categorized that relationship differently; the trial court described the relationship as follows:

> She said that Angela Ward Jones was married to Mark Jones, and she said that was her nephew. She's not directly related to Mr. Flowers. She's related by marriage to Mr. Flowers's sister. Id. And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

(Tr. 1789-90.). A familial relationship to the Defendant is a race-neutral reason for a strike. *See Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013) (juror's familiarity with the defendant or his family is a race-neutral reason for a strike).

Third, Jones admitted to lying on her jury questionnaire. In that document she said she was

strongly against the death penalty. During voir dire by the court, however, Jones testified that she had "an open mind," and that she "could consider both" sentencing options. (Tr.1362.). The State investigated this discrepancy by asking why her answers differed:

> Q[by the State]: Okay. And I think on your questionnaire, you said you were strongly against the death penalty.
>
> A: I guess I'd say anything to get off.
>
> Q: Okay. Well, are you saying that you didn't tell the truth?
>
> A: No, that's not that. It's just that if I didn't have to be here, I wouldn't want to be here.
>
> Q: Well, I want to know when you put down you were strongly against the death penalty-
>
> A: I was trying not to be-I-really and truly, I don't want to be here. I'll say it like that.

(Tr. 1364.). This Court consistently holds that equivocation and lying are independent race-neutral reasons to strike a member of the venire. *Lockett v. State*, 517 So. 2d 1346 (citing *Rodgers v. State*, 725 S.W. 2d 477 (Tex. App. 1987)). Additionally, a juror's views on the death penalty are a race neutral reason for a strike. *Pitchford v. State*, 45 So. 3d 216;

Attempting to rebut the State's reasoning, Appellant argued that Flancie Jones was only related to Hazel Jones by marriage. Defense counsel argued the State's treatment of Jones was disparate because the State "didn't seem to have any problem with" Juror 111, who was related to someone in the District Attorney's Office. (Tr. 1788.). Of course, the State never tendered nor struck Juror 111; moreover, that Juror was not related to someone in Flowers's family. The trial court agreed that the reasons for striking Jones were, therefore, independently sufficient and not indicative of disparate treatment. (Tr. 1788-90.).

Defense counsel also argued the State engaged in disparate treatment by striking Jones for

lying on her questionnaire, but not striking Juror 51, Mr. Huggins, who initially stated that he had no knowledge of the Flowers case, but then later admitted to being in the 2007 voir dire panel. (Tr. 1791). The trial court rejected Appellant's argument, holding that Ms. Jones was the only juror, black or white, who admitted to lying to the court for the purpose of being struck from the venire:

> The court was somewhat dumbfounded-and this is the only juror of any race that made this statement. But she got up here from this witness stand and said, 'I lied on my questionnaire.' And I think that, in and of itself, if a race neutral reason. She said, 'I lied. You know, I don't want to be here. And so I lied.' And so, you know-I don't-she's totally been dishonest in something that she filed with this Court, and that is race neutral. There's not another person that has said, 'I lied on my questionnaire.'"

(Tr. 1789.).

Referring to Juror 51-whom the State did not strike-the court recognized that Huggins initially stated he had not been involved in the case, only to later volunteer that he had been in the venire panel in one of Flowers's previous trials. However, rightfully, the court recognized that Huggins never admitted to intentionally lying, as Jones did. Accordingly, it was just as likely that Huggins forgot, or misspoke, or failed to understand the question. Moreover, in yet another distinction, Juror 51's response had to do with his familiarity with the case-and not with whether he was for or against the death penalty. Rejecting claims of disparate treatment, the trial court noted,

> Well, I have made my ruling, but I'll reiterate that she [Jones] said up here from this stand, "I lied on that questionnaire." I never did hear Mr. Huggins say he lied, and you didn't ask him. You know, you didn't ask him when he was called back in, Did you lie when you said that? So I can't know his frame of mind of why he didn't originally point out he was in the original voir dire. But he clearly did not say that he lied. And again, the statement on the questionnaire [that she lied about was totally different] she said she could not under any circumstances consider the death penalty. And now she, in court, is saying that she can. That is vastly different. And also, again, these relationships she's got. I do not have any white juror that has been allowed to remain on that had those issues.

(Tr. 1792.).

Diane Copper

Finally, with respect to Diane Copper, she (like Cunningham and Wright) worked with Flowers's family members. She worked with Flowers's father at Wal Mart, and with Flowers's sister at Shoe World. R. 1794. This was a race-neutral reason to strike her from the jury. See *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013); *Manning v. State*, 735 So. 2d 323, 340 (Miss. 1999). Moreover, while Copper stated she could be fair, she also stated that she would lean towards voting in favor of Flowers's family. Copper stated that "it's possible" the fact that she knew many of Flowers's family members could affect her and make her "lean toward [Flowers]." (Tr. 1404-06.). The State asked Copper if those relationships would, "make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?" Copper answered, "Correct." (Tr. 1407.). Both Copper's preference for one side of the case, and her equivocation between fairness and bias, are sufficient, race-neutral reasons for a peremptory strike.

Finally, Copper agreed with defense counsel's statement, "I get the impression you're saying that you'd rather not be a juror." (Tr. 1409.). Reluctance to serve is a sufficiently race neutral reason to lodge a peremptory challenge. *Hughes v. State*, 90 So. 3d at 626.

Just as with Wright and Cunningham, defense counsel attempted to argue disparate treatment based on the fact that the State accepted "almost every white juror who had some sort of connection to this case." However, defense counsel conceded that none of the white jurors struck worked with a member of Flowers's family-as Copper did. The trial court, accordingly, rejected Appellant's claim of disparate treatment:

> Also, she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationship with those two individuals in Mr. Flowers's family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank. There's

no indication that Ms. Chesteen has ever worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the-S-6 with Ms. Copper and any white juror that was left on the panel."

(Tr. 1796-97.).

The trial court properly found a difference between being acquainted or friendly with the victims, the defendant, or their families-and working with the defendant's father and sister. As Appellant himself recognizes, nearly all the jurors had some sort of connection to the individuals involved in this case. The State could not strike everyone with a connection. It had to limit its strikes in some way; it started with the closest connections (relatives) and stopped at a point in which it felt bias or prejudice would no longer be an issue (employed with relatives). As the State accepted no juror, black or white, who worked with the victims, the defendant, or the parties' families, there was no disparate treatment, no pretext. Thus, the court's ruling was proper.

Defense counsel also argued the State engaged in disparate treatment of Ms. Copper by accepting Jurors 40 and 50, each of whom stated that they had formed an opinion about the case (which they did not disclose); and yet struck Copper without ever asking her if she could lay that aside. R. 1797. However, factually Appellant was once again incorrect. Ms. Copper noted that she could be fair-thus suggesting she could set aside her feelings. However, she then equivocated by stating that she would lean toward the Flowers' family-a statement Jurors 40 and 50 never made. The trial court found Appellant's argument to be erroneous:

The Court: Well, the Court-neither No. 40 or No. 50 stated that they were leaning towards the Flowers' family in this case. And she did. There-there wasn't anything for them to rehabilitate because they didn't say they were leaning towards the Flower family. And-

Ms. Steiner: They didn't say-

The Court: I'm making my ruling now, ma'am. I'm tired of you interrupting me constantly.

....

Ms. Steiner: Your Honor raised in your ruling the fact that the opinions expressed-the opinions of 40 and 50 were not opinions in favor of the Flowers family. Your Honor, neither of these jurors advised as to what that opinion was. It is equally likely if you have an opinion it could be for either side. These jurors did not express an opinion and-

The Court: You're absolutely correct. They did not, and she [Copper] did. That makes it different. That is the difference. She said, "I would tend to lean toward favoring the family." And that-that is different than somebody that expresses no statement to that.

(Tr. 1796-98.).

Again, the reasons offered by the State were race-neutral and have been consistently accepted and approved of by this Court. Further, there was no disparate treatment. None of the white jurors accepted by the State worked with a member of Flowers's family. None of the white jurors accepted by the State were related, by blood or marriage, to Flowers. None of the white jurors accepted by the State equivocated on the death penalty. None of the white jurors accepted by the State admitted to lying in order to get off the jury. None of the white jurors accepted by the State lied about their opinion on the death penalty; none lied about their work relationship with a member of Flowers's family. None of the white jurors accepted by the State admitted to lying to the court. None of the white jurors accepted by the State had ever been sued by the victim's company. None of the white jurors accepted by the State were against the death penalty.

CONCLUSION

For the reasons above, the State respectfully request the Court affirm Appellant's convictions and sentences. *Foster v. Chatman* does not change the result in this case.

Respectfully submitted

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JASON L. DAVIS
Special Assistant Attorney General
Miss. Bar No.

BRAD A. SMITH
Special Assistant Attorney General
Miss. Bar No. 104321
Counsel of Record

by: s/ *Brad A. Smith*

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Supplemental Brief of Appellee on Remand from the Supreme Court of the United States with the Clerk of the Court using the appellate e-filing system, which sent notification of such filing to the following:

Alison Steiner, Esq.

The Office of the State Public Defender
Capital Defense Counsel Division
239 N. Lamar St., Ste. 604
Jackson, MS 39201
This, the 8th day of February 8, 2017.

Further, I hereby certify that I mailed by United States Postal Service the Appellee's Brief to the following:

Hon. Joseph H. Loper, Jr.
Judge, Circuit Court of Montgomery County
P.O. Box 615
Ackerman, MS 39735

Doug Evans
District Attorney
P.O. Box1262
Grenada, MS 38902

Sheri Lynn Johnson
Keir M. Weyble
Cornell Law School
158-B Myron Taylor Hall
Ithaca, NY 14853

This the 8th day of February, 2017.

s/ *Brad A. Smith*

BRAD A. SMITH

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Phone: (601) 359-3680
Facsimile: (601) 359-3796
Email: bsmit@ago.state.ms.us