IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-DP-01348-SCT

CURTIS GIOVANNI FLOWERS APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

Appeal from the Circuit Court of Montgomery County, Mississippi
Fifth Judicial District
No. 2003-0071-CR

SUPPLEMENTAL REPLY BRIEF OF APPELLANT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

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I. INTRODUCTION.

Lead prosecutor Doug Evans tried this same case six times, striking a remarkable number of African American jurors in the process of doing so. With respect to two of those trials, a Mississippi court – once the trial court and once this Court – determined that Evans had discriminated on the basis of race in the exercise of his peremptory challenges. Over the dissent of three members of this Court, and without addressing Evans' history, a majority of this Court declined to find that Evans had once again engaged in racial discrimination in the selection of Flowers' sixth jury. *Flowers v. State*, 158 So.3d 1009 (2014) (*Flowers VI*).

Flowers' petition for certiorari raised only one jury selection issue: "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?" The Supreme Court of the United States then decided *Foster v. Chatman*, 578 U.S. ___ (2016), reversing a Georgia court that had rejected a claim of racial discrimination in the exercise of a prosecutor's peremptory challenge. It then granted certiorari in this case, vacated this Court's judgment, and remanded the case for consideration in light of *Foster*. *Flowers v. Mississippi*, 579 U.S. ___, 136 S.Ct. 2157 (2016) (Mem.). Flowers' Supplemental Brief set forth an analysis of the evidence of discrimination *considered in light of Evans' history of discrimination*, as previously modeled by the dissenters in *Flowers VI.* In response, the State has filed a brief dedicated to *avoiding* rather than conducting such an analysis, as if ignoring the clear import of the Supreme Court's action might somehow obviate the need to comply with its mandate.

First the State argues that the decision to GVR this case in light of *Foster* was wrong, but it does not explain how the State's position on the wisdom of an order by the United States Supreme

Court can alter the duty of this Court to follow that order. Next the State argues that there is no reason to think that the GVR was focused on the relevance of the prosecutor's history of discrimination, but it offers no alternative explanation for the purpose of the order. It then argues that the prosecutor in this case *has* no history of discrimination in jury selection, despite the fact that he has twice been adjudicated to have discriminated in the exercise of his peremptory challenges – both times in trials of the same charges against the same defendant – on the basis of race. The State's penultimate argument is that Flowers failed to establish a *prima facie* case, though none of the three courts that have heard this case have bought that argument, and the State itself declined to make it in its Brief in Opposition to the Petition for Certiorari. Lastly, the State addresses each of the challenged strikes, but it does so without any reference at all to the prosecutor's history of discrimination – as though the dissent in this Court had never been written, and the Supreme Court had never issued an order vacating the decision and remanding this case for reconsideration in light of *Foster*.

II. THE PROPRIETY OF A GVR IS DETERMINED BY THE UNITED STATES SUPREME COURT.

The State's brief claims that the issue before this Court now is: "Does *Foster v. Chapman*, 578 U.S. ___ , 136 S.C.t 1737, 195 L.Ed.2d, 1 (2016), change or clarify the *Batson* analysis in any way that possibly changes this Court's decision to affirm the trial court decision to deny Appellant's challenges to five of the State's peremptory strikes?" State's Brief 1. It then spends half a dozen pages detailing the proceedings and facts in *Foster v. Chatman*, and another half a dozen arguing that the Supreme Court should not have remanded this case for reconsideration in light of *Foster*.

This statement of the issue and related argument is tantamount to contending that *Martin v.*

Hunter's Lessee, 14 U.S. 304 (1816), or at least *Cohens v. Virginia*, 19 U.S. 264 (1821), was wrongly decided. *Martin v. Hunter's Lessee* holds that in a case involving a federal issue, the Supreme Court of the United States has appellate jurisdiction regardless of whether the case arose in state or federal court, and that the holding of the Supreme Court is binding upon the state court. Cohens established that this appellate jurisdiction and the supremacy of the United States Supreme Court extends to criminal cases. Absent the overruling of these cases, it is not open to the State to argue that *Foster* does not "change or clarify the *Batson* analysis *in any way that possibly changes this Court's decision* ...." State's Brief 1 (emphasis added). When the United States Supreme Court remands a case for reconsideration in light of another case, that remand requires such reconsideration. So this Court must – and, there is no reason to doubt, will – reconsider the case in light of *Foster*.

That there were two dissents to the GVR is irrelevant at best. The State's brief quotes from those dissents, but given that there were six other members of the Court at the time of the GVR, the dissents reflect a perspective that was raised, but did not prevail. As in all courts, it is the view of the majority that provides precedent, unless that precedent is overturned by a higher court, or until overruled by the court itself.

III. THE TASK BEFORE THIS COURT IS TO RECONSIDER THE TOTALITY OF THE EVIDENCE, GIVING WEIGHT TO THE DISTRICT ATTORNEY'S HISTORY OF DISCRIMINATION.

The State's brief next asserts that Flowers argues that the United States Supreme Court "GVR'ed the case because the Majority failed to consider and give weight to [the District Attorney's] prior history of discrimination and dishonesty," and then complains that Flowers "provides no citation to support that assertion." State's Brief 17. While this is indeed Flowers'

interpretation of the GVR order, to object to the absence of a "citation to support that assertion" is silly. Since the GVR contains no explanation – as is typical of GVRs – it would be impossible to provide a supporting "citation." However, Flowers' Supplemental Brief provided ample support for that interpretation, including, most importantly, that the *only relevant question* in his petition for certiorari asked: "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?" *See* Supreme Court Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Flowers also cited language from *Foster* that supports that interpretation, language that the State claims means nothing. In contrast, the State has proffered no explanation at all for the GVR.[1] The problem with the State's stance is that it boils down to claiming: We don't know what the Supreme Court wanted you to do, except we're sure it's not what Flowers' petition for certiorari says you should have done, so you should do nothing at all.

IV. THE HISTORY OF DISCRIMINATION BY THE PROSECUTOR IS CLEAR.

Whether the State's argument that there is no relevant history of discrimination in this case is a mark of desperation or willful blindness, or reflects a lack of commitment to the constitutional

[1]The State makes only one affirmative argument against Flowers' straightforward interpretation of the GVR as responding to the question he posed in his petition. It asserts that the majority *did* consider Evans' history. However, as set forth in detail in both Flowers' opening Supplemental Brief and his Reply to the State's BIO, that contention is false. The majority did not consider that history *when adjudicating the Batson claim*; the only arguably relevant *references* to that history occur in the discussion of other claims, and there is no *consideration* of the relevance of that history at any point in the majority opinion. The dissent objects to failure to consider that history, an objection the majority nowhere addresses. Thus, the argument that there is nothing new to consider because it was already considered is specious.

norm of racial neutrality is unclear. What is clear is that this argument, like the argument that there is nothing to reconsider in light of *Foster*, disregards basic tenets of interpreting controlling precedent. Here, however, it is not the relationship between the United States Supreme Court and state courts that the State disregards, but the bedrock rule of *res judicata*. The State argues that this Court in *Flowers v. State*, 947 So.2d 910 (2007) (*Flowers III*), was wrong to hold the prosecutor had discriminated on the basis of race in the exercise of his peremptory challenges. This Court has issued a final judgment on that question and it is no longer subject to appeal. Flowers will not waste this Court's time by reciting the compelling reasons behind this Court's *Flowers III* determination because it is not and cannot not now be in contention. As was true with respect to the GVR, the fact that there was a dissent from *Flowers III* does not alter the controlling decision of the majority.

Moreover the State's assertion that there is no relevant history of discrimination entirely ignores the trial judge's determination that this prosecutor discriminated on the basis of race in the exercise of his peremptory challenges in *Flowers II*.

V. THE ESTABLISHMENT OF A *PRIMA FACIE* CASE IS NOT IN DOUBT.

The next five pages of the State's brief are devoted to another non-issue: the existence of a *prima facie* case. The State's brief correctly reports Flowers' assertion that neither step one, the sufficiency of evidence of a *prima facie* case of discrimination, nor step two, the facial neutrality of the district attorney's stated reasons, are at now issue. The State then, however, chastises Flowers for that assertion, objecting that it still disputes the existence of a *prima facie* case. But the explanation for Flowers' conclusion that the State was no longer disputing the *prima facie* case lies with the State's own most recent filing: The Brief in Opposition to Petition for Certiorari said

nothing at all about either the strength or the existence of a *prima facie* case.

More importantly, this issue was resolved against the State by the trial court. Then, although a majority of this Court rejected Flowers' *Batson* claim, it did not find fault with his *prima facie* showing; it did not reverse or even question the trial court's determination that Flowers had established a *prima facie* case. Indeed, it did not even mention the matter. This silence was particularly significant given that the dissent did address the *prima facie* case, and explained why it was a strong indicator of discriminatory purpose.

Nor is it surprising that the lower court found a *prima facie* case, a finding not disturbed on appeal and not disputed in the State's BIO. While the State is of course correct that the number of strikes alone does not always establish a *prima facie* case, here there was more, including: the pattern and timing of the strikes; the proportion of black jurors in the venire as compared to those seated; multiple examples of disparate questioning; several significant misrepresentations of the record – not to mention Doug Evans' history of discrimination in previous trials of the same case.

VI. THE STATE'S BRIEF FAILS TO ADDRESS THE ONLY ISSUE BEFORE THIS COURT ON REMAND.

The remainder of the State's brief, save the conclusion, could have been written before the GVR in this case. It provides alternative explanations for some of the indicia of discrimination cited in Flowers' opening Supplemental Brief. But it fails to take on the question that brings Flowers and the State back to this Court: the assessment of the totality of the circumstances relevant to discriminatory intent, *when considered in light of the remarkable, proximate, and personal history of discrimination by the prosecutor in this case*. It also fails to cite other cases where courts have dismissed such a history as unimportant, most likely because, to the best of Flowers' knowledge,

there are no such cases. It therefore provides virtually no help to this Court in undertaking the task compelled by the GVR.

VII. CONCLUSION.

In addition to providing no assistance to this Court in complying with the order of the Supreme Court of the United States, the State's Supplemental Brief evinces disrespect for that order and that Court. Ironically, it also evinces disrespect for this Court by dismissing the binding effect of the *Flowers III* holding on the question of whether Doug Evans discriminated in the past. At no point does the State's brief evaluate the totality of the evidence of racial motivation in light of the prosecutor's history of discrimination. The failure to do soprovides strong support for the inference that such an evaluation would compel the conclusion reached by the dissent in *Flowers VI*: The prosecutor's peremptory challenges were influenced by race.

For these additional, Flowers respectfully requests that this Court reverse his conviction and order retrial; or in the alternative, in recognition of the extraordinary burden that would be placed upon Flowers by a seventh trial, and relying upon due process protections, the prohibition against double jeopardy, and this Court's inherent supervisory power over the courts of this State, that this Court preclude retrial.

Respectfully submitted,

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March 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed by means of the electronic case filing system the foregoing Supplemental Reply Brief Appellant pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to all ECF participants in this cause is made, including upon counsel for the State, Jim Hood, Jason L. Davis and Brad A. Smith, Office of the Attorney General, P.O. Box 220, Jackson MS 39205, and by U.S. Mail, postage prepaid, on the following persons believed by me not to be ECF participants.

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