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

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STATEMENT OF ASSIGNMENT AND CONCERNING ORAL ARGUMENT

This matter is on remand from the Supreme Court of the United States on the direct appeal of Appellant's conviction of capital murder, for which a sentence of death was imposed below. The rules provide that death penalty appeals be retained by the Supreme Court and orally argued *en banc*. Miss. R. App. P. 16(b)(1), 39(a). Appellant requests adherence to those procedures in this case.

STATEMENT OF THE ISSUE

> Whether the prosecutor violated the Equal Protection Clause of the Fourteenth Amendment when he struck five African-American jurors after utilizing disparate questioning and citing pretextual reasons.

STATEMENT OF THE CASE

Appellant, Curtis Flowers, has been tried six times – five of them capitally – in connection with a notorious 1996 quadruple homicide in the Montgomery County town of Winona. There were no surviving eyewitnesses, and there has never been real physical or forensic evidence connecting Flowers to the crime. Moreover, the motive and methods ascribed to Flowers by the prosecution are objectively improbable, and the witnesses relied upon to make up the circumstantial case for guilt have by turns been contradictory, unbelievable, or non-probative.[1] In short, the quality and probative value of the evidence against Flowers has always been suspect,

[1] The specific deficiencies in the prosecution's case against Flowers are detailed at pp. 8-49 of Appellant's Brief to this Court in Flowers' most recent direct appeal. Since Flowers' conviction, new evidence has further impeached the prosecution's guilt phase case. For example, a few months after trial, information surfaced indicating that Patricia Sullivan, a key prosecution witness by any measure, had been under a multi-count federal tax fraud indictment at the time she testified; she was later convicted. More recently, Sullivan's brother Odell Hallmon – the only witness to claim Flowers had confessed – committed a triple murder, and Montgomery County District Attorney Doug Evans quickly permitted him to avoid a death sentence by pleading guilty.

and the temptation to compensate for that weakness through improper means has been correspondingly high.

From the beginning, lead prosecutor Doug Evans' relentless exclusion of African Americans from the juries has been a point of contention. In two previous trials of this case, he was found to have discriminated in the exercise of his peremptory challenge, once by the trial judge, and once by this Court. Over the dissent of three members of this Court, a majority 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 challenged that determination in the Supreme Court of the United States and, after calling for the record, that Court granted certiorari, vacated this Court's judgment, and remanded the case "for further consideration in light *of Foster v. Chatman*, 578 U. S. ___ (2016)." *Flowers v. Mississippi*, 579 U.S. ___, 136 S.Ct. 2157 (2016) (Mem.).

I. The first five trials of this case.

The prosecution gained the upper hand during Flowers' first three trials by conscious resort to a set of tactics this Court would subsequently condemn as reversible misconduct. The first such tactic – employed at the first and second trials – was to ostensibly go forward against Flowers for only one of the four homicides while introducing (or simply referring to) extensive facts about the other homicides to inflame the jurors. This strategy offered the prosecutor the benefit of holding the other charges in reserve in case a jury proved unwilling to convict, suggesting that he doubted the strength of his case. This Court found such gamesmanship "egregious," *Flowers v. State*, 773 So.2d 309, 321 (2000) (*Flowers I*), and "improperly prejudic[ial]," *Flowers v. State*, 842 So.2d 531, 538 (2003) (*Flowers II*), and reversed both judgments.

Additionally, although not reached or decided by this Court in either case, in both trials

Evans used peremptory strikes against literally every African-American venireperson tendered for a seat on the juries. Between them, the first two trials saw the prosecutor peremptorily remove all ten African-Americans who survived qualification and came up for seats on the jury. In the first trial this tactic resulted in an all-white jury. *See* Clerk's Papers 1656. In the second trial the judge disallowed one of the prosecutor's strikes after finding it had been racially motivated; the resulting jury was made up of eleven whites desired by Evans plus the lone African-American he had been judicially prevented from removing. *See* Clerk's Papers 1662.

At the third trial Evans once again did his best to ensure that the African-American defendant would be tried by an all-white jury. This time, however, that effort was more conspicuous than it had been before, with the prosecutor using all fifteen of his peremptory challenges against African-Americans, which yielded a jury of eleven whites plus one African-American who was seated after the prosecution ran out of strikes. While this tactic produced the desired result at trial – another conviction and death sentence – the victory was again short-lived. On direct appeal this Court declared that the jury selection record presented "as strong a *prima facie* case of racial discrimination as [it] ha[d] ever seen in the context of a *Batson* [*v. Kentucky*, 476 U.S. 79 (1986),] challenge," *Flowers v. State*, 947 So.2d 910, 935 (2007) (*Flowers III*), and went on to hold that the record "evince[d] an effort by the State to exclude African-Americans from jury service," *id.* at 937. Before reversing the convictions and death sentence against Flowers for the third time, this Court warned that the magnitude of Evans' misconduct had left it "inclined to consider" "abolishing the peremptory challenge system as a means to ensure the integrity of our criminal trials." *Id.* at 939.

In contrast to the earlier proceedings, and for reasons not disclosed on the record, Evans elected to proceed non-capitally in the fourth trial. This choice eliminated the step of death-

qualifying prospective jurors, and with it the opportunity to remove a disproportionate number of African-Americans for "cause." Although all eleven of the peremptory strikes Evans exercised were again aimed at African-Americans, the resulting jury – seven whites and five African-Americans – was far more reflective of the community than prior juries had been. *See* Clerk's Papers 1667-68. After hearing the evidence, that more representative jury was unable to reach consensus on the question of Flowers' guilt, and a mistrial was declared. While the available record concerning the fifth trial does not reflect the number of African-Americans struck by the prosecution, it also ended in a mistrial when the jury was unable to reach a unanimous verdict at the guilt-or-innocence phase. *See* Clerk's Papers 1891.

All told, through the four trials for which data remain available, Evans' jury selection tactics support the following observations:

- He used thirty-six (36) peremptory strikes against African-American venirepersons;
- He struck *every* qualified African-American at each of the first three trials, all of which were capital; and
- He directed every one of the eleven (11) strikes exercised at the fourth trial against African-Americans.

II. The sixth trial and appeal.

Having already endured five trials, three appellate reversals, and two hung juries, Flowers moved the trial court to bar a sixth trial on the ground that it would violate the Double Jeopardy Clause of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, and an analogous provision of the Mississippi Constitution. *See* Clerk's Papers 1889-1905. When that motion was denied, the prosecution again proceeded capitally. As discussed in detail below, the prosecutor aggressively questioned African-Americans, which had the effect of generating both challenges for cause and bases for the exercise of peremptory challenges that could be

characterized as facially race-neutral. Consistent with his approach in the prior trials, Evans struck five of the six African-Americans tendered for consideration, and through those strikes transformed a venire that began as 42% African-American into a petit jury containing eleven whites. The trial court denied Flowers *Batson* motion, and Flowers was once again convicted and sentenced to death.

Flowers appealed, contending, *inter alia*, that viewed in the light of the prosecutor's history of racial discrimination in previous trials of the case, the strength of the *prima facie* case, disparate questioning of black and white jurors, side by side comparisons of struck black jurors with seated white jurors, and mischaracterizations of the record combined to compel the conclusion that he had again discriminated in the exercise of his peremptory challenges.

This Court split 6-3 over Flowers' *Batson* claim. As detailed more fully *infra*, although Evans had distinguished himself as an especially willful and recalcitrant *Batson* violator, the majority omitted that well-documented history from its assessment of the credibility of his facially neutral reasons. In place of a totality-of-the-circumstances approach, the majority instead confined itself to evaluating each piece of evidence of pretext in isolation, affording the prosecutor the benefit of the doubt where the evidence was ambiguous. Three justices dissented, criticizing the majority for ignoring the compelling facts of the prosecutor's history of race discrimination in the same case. *Flowers VI*, 158 So.3d at 1089 (King, J., dissenting). Characterizing the majority's "acceptance of the prosecution's account as "robotic," the dissenters engaged in a detailed comparative analysis – informed by history and other probative circumstances – and concluded that Evans had once again discriminated on the basis of race, *id.* at 1100.

III. Certiorari.

Flowers' petition for certiorari raised two questions, the second of which is at issue here:

"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?" Prior to the filing of that petition, the Supreme Court of the United States had granted certiorari in another *Batson* case, *Foster v. Chatman*, 136 S.Ct. 1737 (2016). After both Flowers' petition and the State's Brief in Opposition had been filed, the Supreme Court called for the record, then held the case (along with several others) pending the outcome of *Foster*. The merits decision in *Foster*, authored by Chief Justice Roberts and joined by five other Justices, reiterated the Court's insistence that, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster,* 136 S.Ct. at 1748 (citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)).[2] Applying that principle, the Court found that the Georgia Supreme Court erred in rejecting Foster's *Batson* challenge, and entered judgment reversing his conviction.

Less than a month later, the Supreme Court granted Flowers' petition, vacated the judgment, and remanded the case to this Court "for further consideration in light of *Foster v. Chatman*, 578 U. S. ___ (2016)." *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016) (Mem.).[3] This Court granted Flowers' motion for a briefing order on remand on September 15,

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[2] *Snyder* itself was a pointed reiteration of this principle. Snyder had been to the United States Supreme Court twice. His first petition for certiorari had been granted, the judgment vacated, and the case "remanded to the Supreme Court of Louisiana for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005)." *Snyder v. Lousiana*, 545 U.S. 1137 (2005). When the Louisiana Supreme Court refused to modify it its prior judgment, *State v. Snyder*, 942 So.2d 484 (La. 2006), the Supreme Court of the United States granted certiorari again, and after full merits briefing and argument, reversed.

[3] The Supreme Court did not grant, vacate, and remand all of the *Batson* cases submitted to it during the pendency of *Foster*. *See, e.g., Cox v. State*, 183 So.3d 36 (Miss. 2015), *reh'g denied,* (2015), *cert. denied*, 136 S.Ct. 2010 (2016); *United States v. Brown*, 809 F.3d 371 (7th Cir. 2016), *cert. denied sub. nom Brown v. United States*, 136 S.Ct. 2034 (2016). Despite this

2016.

ARGUMENT

I. Relevant legal principles

The Equal Protection Clause of the Fourteenth Amendment limits the State's privilege to strike individual jurors through peremptory challenges, compelling prosecutors to abjure racial discrimination in the exercise of the challenge. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Each juror must be evaluated on his or her own merits, rather than upon stereotypes, and if even a single juror is struck based upon race, the Fourteenth Amendment is violated. *Id.* at 95.

In lodging a *Batson* claim, the party objecting to the peremptory strike must first make a prima facie showing that race motivated the exercise of the peremptory strike. *Batson*, 476 U.S. at 96. "Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id*. at 97. Finally, the trial court must determine whether the race neutral explanation is a pretext for racial discrimination. *Id.*

In assessing whether to credit a prosecutor's facially neutral reasons, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*)). Drawing on broader equal protection principles, *Foster* added that, "[a]s we have said in a related context, '[d]etermining whether 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 (1977)).

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selectivity, Justice Alito (joined only by Justice Thomas) dissented from the Supreme Court's decision to grant certiorari, vacate the judgment, and remand this case.

Among the factors the Supreme Court has found to "bear upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El II*, 545 U.S. at 240; "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," *id.* at 241; "contrasting *voir dire* questions posed respectively to black and nonblack panel members," *id.* at 255; and mischaracterization of the evidence, *id*. at 244.

Most pertinently here, a history of racial discrimination by the prosecuting office is probative. *Miller-El II*, 545 U.S. at 263. As the three dissenters in *Flowers VI* pointed out,

> In *Miller-El*, the Supreme Court considered the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time [the defendant's] jury was selected." If the history of discrimination by a district attorney's office is a permissible consideration under *Batson*, surely the history of the *same prosecutor in the retrial of the same case* is a legitimate consideration.

Flowers VI, 158 So.3d at 1089 (King, J., dissenting) (internal citations omitted).

Moreover, the whole object of the multi-factor inquiry is to evaluate the prosecutor's credibility, *i.e.*, to determine whether his proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991); *see also Snyder*, 552 U.S. at 477 (citing *Batson*, 476 U.S. at 98, n. 21). A documented history of dishonesty is probative of willingness of deceive; indeed, reams of impeachment law rest upon the firmly established proposition that propensity to lie matters. It follows that consideration of the history of the same prosecutor in prior trials of the same case is mandated both by *Miller-El*'s specific directive that a history of racial discrimination by the prosecuting office is probative, and by *Batson*'s broader insistence that the trial judge must evaluate the credibility of the prosecutor.

II. *Foster* and the Supreme Court's order in this case require greater scrutiny of the prosecution's conduct than was applied by the majority in *Flowers VI*, and that greater scrutiny compels the conclusion that the prosecutor violated the Equal Protection Clause.

As in *Foster*, 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. Consequently, only the third step of *Batson* -- determination of whether facially neutral reasons are pretextual – is at issue. "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). Thus, upon remand this Court must 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.

A. The majority's failure to consider and evaluate the impact of the prosecutor's record of discrimination and dishonesty was clearly erroneous.

The "history of discrimination" held to be relevant to the determination of pretext in *Miller-El* was far less probative than is the history in this case. In *Miller-El*, the discrimination was engaged in by other members of the prosecuting attorney's office, and predated the Supreme Court's decision in *Batson v. Kentucky*. Not only was there no evidence that Miller-El's prosecutor himself had engaged in such discrimination, there was no evidence that he – or any member of the office – had either done so after the Supreme Court forbade it, or had previously lied about doing so. Here, however, Doug Evans *himself* had been judicially determined to have discriminated on the basis of race – *twice*. Moreover, both instances occurred after the Supreme Court declared discrimination in the exercise of the peremptory challenge unconstitutional, both occurred in prior

prosecutions of the same case against the same defendant, and in both instances, the prosecutor had *denied* discriminatory action.

When *Flowers VI* was decided by this Court, Evans' personal propensity to discriminate and his willingness to falsely deny his discriminatory intent were beyond argument; he had been adjudicated to be both an egregious violator of *Batson*'s command, and a repeat offender.[4] Despite the indisputable, judicially-determined fact of prior discrimination, and despite the clarity of the Supreme Court's instructions in *Batson* and *Miller-El*, the analysis set forth by the *Flowers VI* majority took no account of Evans' prior record. At no point in its *Batson* discussion did the majority mention the historical facts surrounding the claim of racial discrimination in the third trial or its own emphatic characterization of those facts as constituting "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.[5] Likewise, at no point in its evaluation of the evidence of discrimination did the majority assign any weight to Evans' history of racial discrimination, consider the way in which that history should influence interpretation of the other evidence of discrimination, or in any other

[4]As noted *supra*, in *Flowers III*, the State exercised all fifteen of its peremptory challenges against African-Americans, twelve against potential jurors, and three against potential alternates, *Flowers III*, 947 So.2d at 916. This Court found two clear *Batson* violations, and three more highly suspicious strikes where, in each case, the State offered multiple explanations, some of which were contradicted by the record, while others could not be rebutted. *Flowers III*, 947 So.2d at 936 ("While there was sufficient evidence to uphold the individual strikes of Golden, Reed, and Alexander Robinson under a 'clearly erroneous' or 'against the overwhelming weight of the evidence' standard, these strikes are also suspect, as an undertone of disparate treatment exists in the State's voir dire of these individuals.").

[5] The majority opinion contains only two brief references to the outcome of *Flowers III*. The first appears in the section entitled "Factual Background and Procedural History," and precedes discussion of any claims. *Flowers VI*, 947 So.2d at 1023 ("Finding that the State had engaged in racial discrimination during jury selection, the Court once again reversed and remanded the case for a new trial."). The second occurs in the majority's discussion of the claim that the venire was biased, which appears after the disposition of Flowers' *Batson* claim.

way consider the probative value of that history. Even the majority's recitation of the factors for determining pretext was silent concerning prior history.[6]

Under the "exceptional circumstances" of this case, failure to consider and give weight to Evans' prior history of discrimination and dishonesty was "clearly erroneous." *Foster*, 136 S.Ct. at 1747 (citing *Snyder*, 552 U.S. at 477). There can be no doubt that this is the error that prompted the Supreme Court to return Flowers' case to this Court. The only *Batson* question presented by his petition focused exactly – and exclusively – on this failure: "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?" Flowers argued in his petition that these omissions could not be dismissed as an inadvertent failure by the *Flowers VI* majority to articulate consideration of this factor, both because Flowers' briefing of the *Batson* issue had identified "the very proximate history of discrimination" as the first indicium of discrimination to be considered, and because the three dissenters specifically protested that the majority's failure to take account of history in this case was contrary to *Batson*'s direction that "all relevant circumstances" must be considered, *Flowers VI*, 158 So.3d at 1089 (King, J., dissenting) (internal citations omitted).

Flowers' petition also argued in some detail that (and how) the failure to consider the prosecutor's history of prevarication was outcome determinative. The Supreme Court called for

[6] According to the majority, five indicia of pretext should be considered when analyzing the race-neutral reasons for a peremptory strike: (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) whether 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. *Flowers VI*, 158 So.3d at 1046. Although this list overlaps with most of the criteria recognized as probative in *Miller-El*, it omits both the strength of the *prima facie* case and the prior history of discrimination – both of which are exceptionally weighty under the unusual facts of this case.

the record, likely to ascertain that the *Flowers VI* majority had not in fact considered Evans' history,[7] and/or to independently assess the significance of that omission.[8] Thus, the Supreme Court's remand for reconsideration requires this Court to reevaluate the evidence of pretext in light of the prosecutor's history of discrimination and dishonesty. The model for doing so can be found in the dissenting opinions.

B. Consideration of all the evidence of racially discriminatory intent, including the prosecutor's prior history of discrimination and dishonesty, compels the conclusion that his peremptory challenges in Flowers' sixth trial were influenced by race.

In the ordinary case, it is reasonable to presume that a prosecutor will obey clear constitutional commands, and that when a prosecutor makes a statement to a court concerning such obedience, he is telling the truth. Even when not under oath, as an officer of the court, a lawyer has an ethical obligation to tell the truth. As a representative of the State, a prosecutor has an additional duty: to seek justice. Consequently, to give most prosecutors the benefit of the doubt when the evidence of racial motivation is subject to more than one interpretation is not clearly erroneous; it is sensible. However, when a prosecutor has been found to have violated the Constitution and to have lied about it (or at least, to have been grossly self-deluded), presumptions of constitutional conduct and candor are unwarranted. Instead, what is warranted is a careful

[7] The State's Brief in Opposition (BIO) disingenuously cited a paragraph from the majority opinion that briefly recited the *Flowers III* characterization of Evans's prior discrimination, claiming that it was part of the majority's discussion of Flowers' *Batson* claim. It was not. As Flowers pointed out in his Reply to the BIO, that paragraph instead appears in the majority's discussion of the claim that the venire was biased. *Flowers VI*, 158 So. 3d at 1059.

[8] The State's BIO cited facially race neutral reasons proffered by Evans for each of his five strikes against African-American jurors. It did not, however, at any point address the impact Evans' prior history of discrimination has in evaluating the credibility of his stated reasons. Consequently, the Supreme Court may have perceived an obligation to call for the record to conduct its own investigation into that question.

consideration of whether that prosecutor has once again – perhaps with greater efforts at concealment – disregarded his constitutional and ethical obligations.

This does not mean that once a prosecutor has violated *Batson*, every subsequent *Batson* claim must be decided against him. As the dissenters in *Flowers VI* carefully noted, "On its own, [Evans' prior history of discrimination] is not dispositive of a finding of racial discrimination." *Flowers VI*, 158 So.3d at 1089 (King, J., dissenting). Evans could have – and *should* have – learned the constitutional mandate of racial neutrality from this Court's rebuke in *Flowers III*, even though he clearly had not learned it from the trial court's finding of discrimination in *Flowers II*. Another prosecutor might have. This one did not.

When considered in light of Evans' history, the jury selection record reveals that the opinion in *Flowers III* neither rehabilitated nor deterred him. Instead, this Court's *Flowers III* opinion taught him the limited lesson he wanted to learn: how to avoid the most obvious markers of racial motivation. In Flowers' sixth trial, Evans began by accepting the first African-American juror who survived for-cause challenges, and then, thinking he was safe to do as he pleased, struck the remaining five. He also took another precaution: this time, before he struck a black juror, he asked enough questions and gave enough reasons for each juror he struck to avoid making it *blatantly* obvious that his reasons were pretextual.

Close examination, however, shows greater cunning, but the same purposeful discrimination on the basis of race. *See Foster*, 136 S.Ct. at 1749 ("On their face, Lanier's justifications for the strike seem reasonable enough[, but o]ur independent examination of the record [] reveals that much of the reasoning provided by Lanier has no grounding in fact.") Evans' questioning of African-American jurors was grossly disparate; his responses to similar *voir dire* answers varied with the juror's race; at several points he mischaracterized the responses of African-

American jurors; and he even resorted to out-of-court investigation of an African-American juror in a desperate effort to generate a reason to strike her. *See Flowers VI*, 158 So.3d at 1095 (King, J., dissenting). When considered *alongside Evans' history of discrimination* – as mandated by *Miller-El* and as faithfully undertaken by the dissenters – the *Flowers VI* majority's interpretation of these other indicia of discrimination becomes untenable.

1. The strength of the *prima facie* case.

The majority did not address the strength of the *prima facie* case at all. In contrast, after noting the necessity of considering the history of discrimination, the three dissenting justices made the following detailed observations about the significance of the strength of the *prima facie* case:

> Like the history of today's case, a review of the statistics relating to the prosecutor's use of peremptory strikes is not, standing alone, dispositive of the *Batson* inquiry. These numbers, however, reveal a clear pattern of disparate treatment between white and African-American venire members. In today's case, a special venire of 600 citizens was drawn. The original venire consisted of forty-two percent African-Americans. After the jury qualification and initial for-cause challenges, the venire consisted of twenty-eight percent African-Americans. Ultimately, one African-American served as a juror and one African-American served as an alternate juror. Despite the initial venire consisting of forty-two percent African-Americans, the jury that convicted and sentenced Flowers consisted of eight percent African-Americans.

Flowers VI, 158 So.3d at 1090 (King, J., dissenting).

2. Disparate questioning.

The disagreement between the majority and dissent over whether the prosecutor's history of discrimination was relevant also affected the scrutiny each afforded the evidence of disparate questioning, which, in turn, almost certainly contributed to the Supreme Court's decision to remand. The majority disparaged the probative value of disparate questioning evidence, insisting three times that disparate questioning "alone" cannot establish racial motivation. *Flowers VI*, 158

So.3d at 1047; 1049; 1057. This statement is likely an erroneous characterization of the law; a case with no questioning of any white jurors and extensive questioning of all black jurors might, without more, establish purposeful discrimination. But more importantly, the premise was erroneous; the disparate questioning did not stand "alone," but at the very least was accompanied by a strong *prima facie* case and a very unusual history of prior discrimination.

Moreover, the majority's view of the evidence of disparate questioning was unduly deferential toward the state's contentions:

> 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.

Flowers VI, 158 So.3d at 1048. Although these generalizations are largely accurate – *more* African-American jurors knew the parties, *most* of the follow-up questions pertained to relevant matters, *more* questions were asked of jurors who had personal relationships about the case, or qualms about the death penalty – this trusting reliance on reassuring generalizations was not appropriate given the prosecutor's history. On the contrary, in light of that history, it is incumbent upon a reviewing court to probe whether those generalizations provided a *full* explanation for the disparities.

When the dissent approached the matter of disparate questioning, it did so with appropriately greater skepticism:

> An analysis of the number and type of questions asked by the prosecutor further reveals a pattern of disparate treatment. During individual *voir dire*, the prosecutor asked white jurors an average of approximately three questions. African-American jurors, however, were asked approximately ten questions each by the prosecutor.
>
> Further, in what appears to be mere lip service to the *voir dire* process, when questioning most white jurors during individual *voir dire*, the prosecutor essentially repeated questions that the trial court had just asked. The trial court asked each juror standard death-penalty-qualification questions. The prosecutor would then—in substance—ask the same questions and then hand the juror off to be questioned by the defense. The prosecutor asked only nine percent of white jurors something beyond these duplicated questions.
>
> In a stark contrast, the prosecution asked sixty-three percent of African-Americans questions outside of the standard death-penalty-qualification questions. As an example, fifty-five percent of African-American jurors who had some kind of connection to the Flowers family (through work, the community, or family) were asked questions by the prosecutor about this connection. Although five white jurors had similar connections to the Flowers family (through work and the community), the prosecutor failed to ask any questions about these connections.
>
> As noted in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), statistical analysis can raise a question as to whether race influenced the jury selection process. The numbers described above are too disparate to be explained away or categorized as mere happenstance.

Flowers VI, 158 So.3d at 1089-90 (King, J., dissenting).

In addition, when an apparently acceptable African-American juror was in the box, the State asked leading questions, plainly trolling for an excuse for a strike.[9] Careful parsing of

[9] For example, when African-American prospective juror Diane Copper stated she previously worked at Shoe World at the same time Cora Flowers was employed there, Tr. 772, Evans attempted to lead her into saying the relationship was a close one:

> EVANS: How long did you work with Cora?
>
> COPPER: I can't remember the exact – probably about a year or something like that.
>
> EVANS: Okay. Were y'all pretty close?
>
> COPPER: It was more like a working relationship, you know.

questioning is important, for absent vigilance – vigilance which was necessary given the questioner's prior history of discrimination – disparate questioning can obstruct comparative juror analysis. Had the majority assumed a vigilant stance, it would have concluded that "the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." *Miller-El v. Cockrell*, 537 U.S 322, 344 (2003) (*Miller-El I*). Instead, because it treated Evans like any other prosecutor, the majority accepted the State's explanation for disparate questioning at face value.

3. Comparisons of struck black jurors and seated white jurors.

A comparison of the majority's and dissent's approaches to individual struck African-American jurors reveals the further impact of their divided views on the significance of history. The majority and dissent agree that the strike of one of the African-American jurors was supported by race neutral reasons, but their analyses of each of the other four African-American jurors diverge. For each of those four jurors, the majority recited the reasons the prosecutor gave for each strike, found *some* record support for at least one of the reasons he proffered, then concluded that the strike was not pretextual. In contrast, the dissent did not stop with the stated reason, but went on – as is required by Evans' history, and the Supreme Court's remand -- to consider proffered evidence of prevarication.

EVANS: Did you ever visit with each other?

COPPER: No, sir.

Tr. 973. Later, Evans again tried to lead Copper into admitting her relationships with defense witnesses "would be something that would be entering into your mind if you were on the jury, wouldn't it?" Tr. 1407. In contrast, the State accepted without any inquiry similar assurances of relationships being purely "working" when white jurors Pamela Chesteen and Bobby Lester volunteered them during the trial court's *voir dire*. Tr. 986; 799.

a. Carolyn Wright

A side by side reading of their respective opinions facilitates the most complete appreciation of the difference between the approaches used by the majority and dissent. This is especially true in connection with the strike of Carolyn Wright, where the two approaches are most dramatically different. The majority's conclusion is unequivocal: "Flowers's claim that the State provided 'no convincing reasons' for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture." *Flowers VI*, 158 So.3d at 1050. Problems with each of these reasons, however, were pointed out by the dissent. Regarding the "working relationship" with Flowers' father, the dissent noted:

> Although the State cited Wright's working relationship with Archie Flowers as a basis for its strike, the State made no effort during *voir dire* to question Wright about the working relationship beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in different departments and during different shifts. Further, Wright stated during group *voir dire* that she was unaware of whether Archie Flowers still worked at Wal-Mart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of questioning related to this basis is suspect.

Flowers VI, 158 So.3d at 1092 (King, J., dissenting).

Regarding the second cited reason, Wright's acquaintance with potential witnesses, the dissent cited to dispositive facts about comparable white jurors: accepted white juror Chesteen "knew thirty-one people involved in Flowers's case;" accepted white juror Waller "knew eighteen people involved in the case;" and accepted white juror Lester "knew twenty-seven people involved

in the case." *Flowers VI*, 158 So.3d at 1091 (King, J., dissenting).[10]

Finally, with respect to the prosecution's stated reason that Wright had both been sued and had her wages garnished by Tardy's furniture store (whose owner was one of the four homicide victims), the dissent found that reason equally suspect, both because Wright had stated that the litigation was "paid off" and would not affect her as a juror, and because "[t]here is nothing in the record supporting the contention that Wright's wages were garnished." *Flowers VI*, 158 So.3d at 1091 (King, J., dissenting). The majority acknowledged that the record did not support the contention that Wright's wages had been garnished, but dismissed it as irrelevant because "that does not change the fact that being sued by Tardy Furniture was a race-neutral reason for striking Wright." *Flowers VI*, 158 So. 3d at 1050.

In the dissent's view, however, Evans' mischaracterization was significant:

> [T]he State did mischaracterize its basis for the peremptory strike. Further, unlike [another factual misstatement by Evans regarding juror Wright which alleged her acquaintance with one of Flowers' relatives], the statement that Wright had her wages garnished seems to go directly to reasoning for the State's strike—that Wright would have some sort of ill will toward Tardy's as a result of her wages being garnished. It is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages. As such, the State's unsupported characterization of the lawsuit is problematic.

[10] At an earlier point, the majority had acknowledged the existence of accepted white jurors who also knew many of the witnesses, but rationalized that "the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext." *Flowers VI,* 158 So.3d at 1049. True, but later the majority opinion lists the number of acquaintances as a "convincing reason" for her strike, which it is not, given the similarly situated white jurors. Moreover, the Court should have counted the comparison to those similar white jurors as evidence of pretext, even if not dispositive of the question.

Flowers VI, 158 So.3d at 1091 (King, J., dissenting). *Cf. Foster*, 136 S.Ct. at 1750 (disagreeing with the State's characterization of the prosecutor's false statements as merely "'misspeaking'" on the ground that "this was not some off-the-cuff remark"). [11]

The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 478) (internal quotation marks omitted). Examination of this prosecutor's cited reasons in light of his history makes it plain that race was the true reason behind his strike of Carolyn Wright. His racially conscious treatment of three other jurors further cements that conclusion.

b. Tashia Cunningham, Dianne Copper, and Edith Burnside

The two opinions' treatment of the other three disputed[12] strikes is also discordant. The majority is correct that for each of these jurors Evans cited at least one reason with record support that did not apply to a white juror he had accepted. Given the backdrop of this Court's opinion in *Flowers III*, only the most foolish prosecutor would not have had such a reason at hand – if he had a mind to discriminate. And given that backdrop, the dissent was correct that a facile inquiry was insufficient.

Although the move from *Swain* to *Batson* left a defendant free to

[11] The majority also "note[d]" that "on her juror questionnaire, Wright wrote that she had previously served as a juror in a criminal case involving the "Tardy Furniture trial." Evans, however, had not mentioned this fact in his stated reasons for striking Wright, and it therefore cannot legitimate the strike. *See Miller-El II*, 545 U.S. at 252 ("But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

[12] Flowers did not challenge the strike of prospective juror Flancie Jones. As the dissent noted, "the State's bases for striking Jones appear to be race neutral." *Flowers VI,* 158 So.3d at 1094 (King, J., dissenting).

> challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

Flowers VI, 158 So.3d at 1088 (King, J., dissenting) (quoting *Miller-El II*, 545 U.S. at 239-40 (citing *Batson*, 476 U.S. at 96-97)); s*ee also id.* at 247 n.7 ("A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.").

After examining the State's proffered reasons for striking Cunningham, Copper, and Burnside, the dissent concluded that for all three, the presence of a facially neutral reason was combined with the citation of a highly suspect reason. First, with respect to prospective juror Dianne Copper, the dissent noted that one of the prosecutor's stated bases for challenging Copper, her acquaintance with several witnesses, is suspect for the same reason it was suspect with respect to Wright: the presence of white unchallenged jurors who shared that characteristic. The dissent went on to agree with the majority that "the other bases the State provided appear to be race neutral—namely, Copper's relationship with Flowers's family and the possibility that it could cause her to 'lean toward' Flowers." *Flowers VI*, 158 So.3d at 1094 (King, J., dissenting). Unlike the majority, however, the dissent noted that, nonetheless, "the unchallenged jurors with [the shared characteristic of acquaintance with several witnesses] must still be considered." *Id.*

Second, with respect to prospective juror Tashia Cunningham, the dissent concluded that the race-neutral basis of her death penalty attitudes "does not erase the prosecutor's highly suspect

investigation of Cunningham's working relationship with Flowers's sister." *Id.* at 1097 (citing *Batson*, 476 U.S. at 96-97; *Miller–El II*, 545 U.S. at 239-40). No evidence in the record provided a basis for such an in-depth investigation, nor was there any evidence in the record that similar investigations were performed for other jurors. *Id*. "With this suspect record, the prosecution's unusual investigation of Cunningham must be seen for what it is worth—a questionable search for a race neutral basis." *Id*.

Finally, with respect to prospective juror Edith Burnside, the dissent noted a legitimate reason for her strike, but again did not end its inquiry there. Instead, as discussed below, it noted that Evans' treatment of Burnside resembled his treatment of Wright in one important respect: he mischaracterized her responses. "Similar to the State's characterization of Wright's litigation with Tardy's discussed above, the State's representation that Burnside's wages were garnished and that Burnside 'denied' this is unsupported by the record in today's case. This incorrect description of the litigation between Burnside and Tardy's is suspect." *Id*. at 1098.

4. Mischaracterizations of the record.

Mischaracterizations of the record must be evaluated in part for the obvious reason that they may impeach a purportedly race neutral reason, or a proffered distinction between a struck African American juror and a seated white juror. Importantly, however, they also have independent significance because – particularly, if repeated – they provide strong evidence of a willingness to offer explanations that are "not true." *Foster*, 136 S.Ct. at 1753.

The dissent pointed out two mischaracterizations regarding prospective juror Wright, the first that the State had claimed that Wright knew Flowers' sister, Sherita Baskin, though, in fact, Wright never indicated that she knew Baskin, and the second that her wages had been garnished as a result of litigation with Tardy Furniture. The dissent also noted that a third reason proffered

for striking Wright -- that she worked with Flowers' father -- though not literally false, was nonetheless misleading given the evidence in the record suggesting no significant or ongoing relationship.[13] And as the dissent also pointed out, the most significant mischaracterization with respect to Wright was repeated with respect to Burnside. Examined together, it is highly unlikely that all of four of these mischaracterizations were inadvertent. *Cf. Foster*, 136 S.Ct. at 1751 ("In sum, in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation."). Examined in the light of Evans' history – as required by the remand that brings this case before this Court again – the only sensible interpretation of these mischaracterizations is that they were intended to conceal his discriminatory intent.

5. The totality of the circumstances.

An exhaustive catalogue of each piece of evidence of discriminatory intent in this case – as Flowers attempted in his opening brief for *Flowers VI* – is a lengthy undertaking.[14] Plowing

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[13] As the dissent went on to note, the suspiciousness of this exaggeration of the record is compounded by the State's failure to strike Pamela Chesteen, who worked at a local bank in Winona and stated that she knew Archie Flowers, Sr., Lola Flowers, and Flowers' sisters from her work at the bank. Any "concern relating to the influence such relationships would have on a juror are the same—a concern that the coworker or employee would be influenced toward a family member of another coworker or a customer." *Id*. at 1092; *see also Snyder*, 552 U.S. at 484 ("If the prosecution had been sincerely concerned that Mr. Brooks would favor a lesser verdict than first-degree murder in order to shorten the trial, it is hard to see why the prosecution would not have had at least as much concern regarding Mr. Laws.").

[14] In addition to the extensive record evidence of discrimination addressed by the three dissenting justices, Flowers' brief discussed the probative value of several other irregularities that pointed toward racial motivation: the timing and treatment of the only African American juror Evans did accept, Appellant's Brief at 110-11; the return to a capital proceeding after a noncapital trial produced both a racially mixed jury and a mistrial due to the jurors inability to reach a consensus on guilt, Appellant's Brief at 108-09, Appellant's Reply Brief at 29-30; additional ways in which the questioning of African-American jurors differed from that of white jurors, Appellant's Brief at 112 n.77&78; additional details evidencing Evans' lack of interest concerning white jurors' contacts with defense witnesses and family members in contrast to his focus on those contacts when African-American jurors were in the box, Appellant's Brief at 113-15; as well as disparate treatment of jurors who were less than truthful, Appellant's Brief at 115 n.82. The *Foster* opinion, commenting on an analogous disparity in the treatment of less than forthcoming

through that catalogue is an exhausting one. Nonetheless, because of the "exceptional circumstances" of this case, careful sifting through all of that evidence is what was required. The *Flowers VI* dissent undertook that task, and did a careful, thorough job of comparing the record in this case with the contentions of the prosecutor. After "[c]onsidering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity," the dissenters, like the Supreme Court majority in *Foster*, were convinced that the prosecutor's exercise of the peremptory challenge was "motivated in substantial part by discriminatory intent." *Foster*, 136 S.Ct. at 1754 (quoting *Snyder*, 552 U.S. at 478).

Here, it was the majority's failure to consider the extraordinary history of Doug Evans' adjudicated discrimination and dishonesty in this case that led it astray. Fortunately, such a history *is* extraordinary, if not unparalleled,[15] and *Batson* reversals are therefore relatively uncommon. Moreover – as one would hope – a judicial finding of racial discrimination appears to almost always deter a prosecutor from repeating unconstitutional behavior; most cases that rely upon a "history of discrimination" are capturing prior discrimination by the prosecutor's *office*, which is

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jurors that coincided with race, observed: "We have no quarrel with the State's general assertion that it 'could not trust someone who gave materially untruthful answers on *voir dire* ... [b]ut even this otherwise legitimate reason is difficult to credit in light of the State's acceptance of white juror Duncan[,] who gave practically the same [untruthful] answer." *Foster*, 136 S.Ct. at 1751.

[15] As reflected in Flowers' Petition for Post-Conviction Relief and attached proof (filed March 17, 2016), Evans' history of producing stark racial disparities with his peremptory strikes runs even deeper than is apparent from the current record on appeal. While the disparities are most pronounced in the *Flowers* cases, they also appear in statistically significant form in other cases included in the study. *See* Petition at 90 (explaining that Evans struck African-Americans at more than twenty (20) times the rate of whites in the *Flowers* trials, and eight (8) times the rate of whites in other trials); Petitioner's Exhibit 34 (detailing racial disparities in Evans' history or peremptory strikes). Furthermore, evidence of the type that proved so compelling in *Foster* itself – *e.g.*, the prosecutor's jury selection notes – has thus far been withheld from Flowers' post-conviction counsel. Should this case proceed to post-conviction review, however, that evidence would have to be revealed by the State and considered alongside the historical record and the other evidence demonstrating race discrimination in this case.

obviously much less probative of propensity to discriminate, and not at all probative of an individual's willingness to lie to a court.[16] Undersigned counsel were able to find only one other prosecutor accused of a *Batson* violation who had himself been twice previously adjudicated a discriminator *and* was retrying a case in which he had been found to so discriminate. *See Currie v. McDowell*, 825 F.3d 603 (9th Cir. 2016) (finding *Batson* violation and reversing the conviction.)

"[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." *Miller-El II*, 545 U.S. at 238 (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991), and citing *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 628 (1991); *Batson*, 476 U.S. at 87)). Here, the specter of cynicism has two faces. Not only did the prosecutor's discrimination in jury selection threaten public confidence in jury neutrality, his avoidance of the rule of law by thinly veiled pretext threatens public confidence in the ability of the courts to enforce the law.

This Court should reverse to uphold the Equal Protection Clause rights of Curtis Flowers and the African-American jurors wrongly struck by the prosecutor, *see Flowers VI*, 158 So.3d at 1100 (King, J., dissenting) -- but also to make plain to prosecutors who are caught disobeying the command of the Equal Protection Clause, or who contemplate such disobedience, that the Constitution cannot be flaunted without consequences.

[16] In many such cases, reviewing courts have deemed the history of discrimination too remote to carry much weight. *See. e.g., Stevens v. Epps*, 618 F.3d 489 (5th Cir. 2010) (noting both that only two cases found racial discrimination, and that both were over a decade prior to the trial of the instant case); *Lane v. State*, 169 So.3d 1076, 1120-21 (Ala. Crim. App. 2014) (vacated on other grounds in *Lane v. Alabama*, 136 S.Ct. 91 (2015)) (affirming conviction and determining 18 year old history of the office too remote to be probative).

CONCLUSION

For the foregoing reasons, Appellant Curtis Giovanni 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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December 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed by means of the electronic case filing system the foregoing Supplemental 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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