IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. JOHNNY LEE GATES, Defendant.	Case No. SU-75-CR-38335

BRIEF OF AMICI LARRY D. THOMPSON, LEAH WARD SEARS, ROBERT BARR, JEFFREY H. BRICKMAN, FRANCYS JOHNSON, AND FRANK C. WINN IN SUPPORT OF DEFENDANT'S AMENDED EXTRAORDINARY MOTION FOR NEW TRIAL

Every black prospective juror in Defendant Johnny Lee Gates's case was labeled with an "N" to identify their race and assigned the lowest juror ranking in the prosecutors' jury selection notes. Subsequently every qualified black juror was struck by the prosecution so that Mr. Gates, a black man, was tried by an all-white jury. This egregious conduct was not limited to Mr. Gates's case, but formed part of a pattern of racial discrimination infecting jury selection in every death penalty case with a black defendant in Muscogee County from 1975 to 1979.

This conduct not only violates the United States and Georgia Constitutions, but also visits tremendous harm upon the judicial system, defendants, prospective jurors, and the community. As former prosecutors, a former Chief Justice of the Supreme Court of Georgia, and a former President of the Georgia State Conference of the NAACP, Amici are committed to advancing a fair and impartial justice system. The conduct presented in Mr. Gates's case is anathema to that goal. It must be fully examined on the merits and not swept away as the State desires. The State engaged in systemic racial discrimination, hid the evidence for four decades, and now that this Court has forced that evidence into the open, the State seeks to avoid its examination. The Court should not allow the State to do so.

I. IDENTIFICATION OF AMICI

- Larry D. Thompson served as Deputy United States Attorney General from 2001 to 2003 and as the United States Attorney for the Northern District of Georgia from 1982 to 1986.
- Leah Ward Sears served as the Chief Justice of the Georgia Supreme Court from 2005 to 2009, as the Presiding Justice from 2001 to 2005, and as a Justice from 1992 to 2001. She is currently a partner at the Atlanta office of Smith, Gambrell & Russell, LLP.
- Robert Barr represented Georgia's 7th Congressional District in the United States House of Representatives from 1995 to 2003 and served as the United States Attorney for the Northern District of Georgia from 1986 to 1990.
- Jeffrey H. Brickman served as the District Attorney for DeKalb County in 2004, as an Assistant United States Attorney in the Northern District of Georgia from 1997 to 2004, and as an Assistant District Attorney in DeKalb County from 1989 to 1997.
- Francys Johnson is a civil rights attorney, pastor, and educator who served as president of the Georgia State Conference of the NAACP from 2013 to 2017.
- Frank C. Winn served as the District Attorney for the Douglas Judicial Circuit from 1983 to 1990 and as an Assistant District Attorney in the Tallapoosa Judicial Circuit from 1978 to 1982.

II. THE EVIDENCE OF SYSTEMATIC RACIAL DISCRIMINATION IN JURY SELECTION IS OVERWHELMING

Prosecutors Douglas Pullen and William Smith engaged in a pattern of systematic racial discrimination in striking prospective black jurors in death penalty cases in Muscogee County from 1975 to 1979. Amici will not recite here all of the damning evidence presented in Mr.

Gates's briefing on this Motion,[1] but note the following points. First, absent this Court's February 8, 2018 Order, the State would have continued to conceal the systemic evidence of discriminatory intent across multiple death penalty cases contained within the prosecutors' jury selection notes. Indeed, the State opposed Mr. Gates's Open Records Act request for those notes and opposed the discovery of those notes in this litigation. Second, those notes are strikingly similar in character to the notes examined in *Foster v. Chatman* that the Supreme Court of the United States found "plainly demonstrate a concerted effort to keep black prospective jurors off the jury." 136 S. Ct. 1737, 1755 (2016).[2] It is worth noting that Mr. Pullen was also a prosecutor in the case examined in *Foster*.[3] Third, every prospective black juror was struck in Mr. Gates's case; Mr. Pullen struck 27 of 27 prospective black jurors in the five capital cases with black defendants he tried in the late 1970s; and combined, he and Mr. Smith struck 41 of 44 black prospective jurors across seven death penalty cases with black defendants. Gates's

[1] *See* Mr. Gates's Supplement to Motion for New Trial Regarding the Prosecutors' Jury Selection Notes ("Gates's Supplement on Prosecutors' Jury Notes"), filed March 19, 2018 at 4-6 (prosecutors' jury selection notes from death penalty trials with black defendants in Muscogee County from 1975 to 1979 identify the race of black prospective jurors as "N" or "B," mark their names with dots in the margin next to their names, describe black prospective jurors as "slow," "old + ignorant," "cocky," "hostile," "con artist," and "fat," and routinely rank black prospective jurors as "1" on a scale of 1 to 5 without any further explanation).

[2] In *Foster* the prosecutors marked the black prospective jurors as "B," highlighted their names on jury lists, and circled their race on questionnaires. 136 S. Ct. at 1744; *see also id*. at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a "color-blind manner. . . . The sheer number of references to race in that file is arresting."). Likewise, the prosecutors' notes the Court ordered released here display an overwhelming emphasis on the race of black jurors. *See supra*, n.1.

[3] *See Foster*, 136 S. Ct. at 1743; *see also* Affidavit of Katherine Chamblee, attached as Exhibit 1 to Mr. Gates's Second Supplement to Amend Extraordinary Motion for New Trial ("Gates's Second Supplement"), filed February 21, 2018 ¶ 4 (Pullen questioned 39 of 41 prospective jurors during *voir dire* in *Foster*); *Foster v. Chatman*, No. 14-8349, Joint Appendix, Vol. 1, 2015 WL 4550238, at *81(U.S. 2015) (testimony by the Floyd County District Attorney that he and Pullen worked together to conduct voir dire and determine which jurors to strike).

Supplement on Prosecutors' Jury Notes at 6-7. As a result, six of those seven cases were tried with all-white juries and in the seventh, having used 10 peremptory strikes to strike prospective black jurors, the State did not have enough strikes to keep the remaining prospective black jurors off the jury. *Id.* at 7, 8. This conduct is unquestionably unconstitutional.

The U.S. Constitution prohibits the purposeful exclusion of prospective jurors based on race. *Ford v. Georgia*, 498 U.S. 411, 419 (1991); *see Georgia v. McCollum*, 505 U.S. 42, 44 (1992) ("For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."); *Swain v. Alabama*, 380 U.S. 202, 208 (1965) (denying black individuals the opportunity to participate as jurors on the basis of their race violates Equal Protection Clause). And although "there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate," *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (citation and internal punctuation omitted), the presumption in any particular case is that a prosecutor is using the State's challenges to obtain a fair and impartial jury. *Swain*, 380 U.S. at 222. At the time of Mr. Gates's trial, a defendant could overcome that presumption and show prospective jurors were excluded based on their race by demonstrating a pattern of racial discrimination in other cases as well as his own. *Id.* at 223-24. The goal of this showing was to enable the court to infer the prosecutor's intent. *Horton v. Zant*, 941 F.2d 1449, 1455 (11th Cir. 1991); *see also Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983) (defendant must marshal enough proof to "show [the prosecutor's] intent to discriminate invidiously").

The prosecutors' jury selection notes obtained by Mr. Gates demonstrate the intent of the prosecutors in his case to exclude all black jurors based upon their race. While alone sufficient to demonstrate the intent to discriminate, the evidence becomes unquestionable when coupled

with evidence of the pattern of these prosecutors striking black jurors in death penalty cases with a black defendant. Dr. Michael Lacey's analysis demonstrates that the probability of striking 100% of the prospective black jurors in Mr. Gates's case using race-neutral criteria is 0.00278, less than one-third of one percent. Affidavit of Dr. Michael Lacey ¶ 4, attached as Exhibit 3 to Gates's Second Supplement. The probability of striking 41 of the 44 black prospective jurors across the seven cases examined for race-neutral reasons drops to an astonishingly low 0.00000000000000000000000000004. *Id.* ¶ 5. Courts have found discriminatory intent on less compelling evidence than that presented here. In *Miller-El v. Dretke*, where prosecutors used peremptory strikes to exclude 91% of the black prospective jurors, the Court found prosecutors discriminated based upon race. 545 U.S. 231, 266 (2005); *see also id.* at 241 ("Happenstance is unlikely to produce this disparity."). In *Horton v. Zant*, an expert examining strikes across numerous cases found that the probability of the strikes resulting from a race neutral method was less than 1 in 100,000, or 0.00001, and the Court found the evidence "sufficiently strong to overcome the presumption of propriety in which *Swain* clothes peremptory challenges." 941 F.2d at 1459 (citation and internal punctuation omitted). The evidence of the prosecutors' discriminatory intent here, as evidenced by their jury selection notes, is far more compelling than in *Miller-El* or *Horton*.

III. THE RACIAL DISCRIMINATION EVIDENCED HERE CAUSES SERIOUS HARM TO THE JUDICIAL SYSTEM, PROSECUTORS, DEFENDANTS, PROSPECTIVE JURORS, AND THE COMMUNITY

A prosecutor's duty is to "do justice." *Horton*, 941 F.2d at 1455. When a prosecutor fails to uphold that duty by striking prospective jurors on the basis of their race, the duty and the public trust are betrayed and the harm is far reaching. Such unconstitutional action "is at war

with our basic concepts of a democratic society and a representative government." *Swain*, 380 U.S. at 204.

Defendants are harmed when racial discrimination in jury selection compromises their right to trial by an impartial jury. *Miller-El*, 545 U.S. at 237 (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). The discrimination also causes harm to the individual jurors wrongfully excluded and the community. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *Batson*, 476 U.S. at 87. Importantly, race discrimination within the courtroom raises serious questions about the fairness of proceedings conducted therein and mars the integrity of the judicial system. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Miller-El*, 545 U.S. at 238 (citing *Powers v. Ohio*, 499 U.S. 400, 412 (1991)); *see also Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermines public confidence in the fairness of our system of justice.").

Unfortunately, racial discrimination in jury selection continues to persist and continues to have profound societal consequences. *See Miller-El*, 545 U.S. at 268-69 (Breyer, J., concurring) (citing eight studies and reports suggesting the discriminatory use of peremptory strikes remains a problem); Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, 3-4 (Aug. 2010) ("uncover[ing] shocking evidence of racial discrimination in jury selection in [states, including Georgia]," that have "seriously undermined the credibility and reliability of the criminal justice system"). Therefore, it is critically important that when such discrimination is brought into the light of day, it is remedied, so that the judicial system, defendants, prospective jurors, and law-abiding prosecutors are protected from the far-reaching harm it creates.

IV. CONDUCT OF THIS NATURE SHOULD NOT ESCAPE JUDICIAL REVIEW ON THE MERITS

The State here seeks to avoid an examination of the prosecutors' discriminatory conduct. The State argues that Mr. Gates is procedurally defaulted from challenging that conduct because the evidence of the prosecutors' discriminatory intent was available as public records in existence at the time of his trial and further accuse Mr. Gates of gamesmanship. State's Response in Opposition to Gate's Second Supplement, filed March 7, 2018 at 12-13. However, Mr. Gates did not have access to, nor would he have had access to, the prosecutors' jury selection notes had this Court not ordered the State to produce those records.[4] Mr. Gates did not receive those records until March 2, 2018. Gates's Supplement on Prosecutors' Jury Notes at 3. Shortly thereafter, he filed a brief outlining the discriminatory intent evidenced in those notes. Mr. Gates had no realistic possibility to present the Court with this evidence any sooner than he did. The Court should thus reject "the State's invitation to blind [itself] to the[] existence"[5] of this evidence and make a finding based upon the merits of Mr. Gates's claim. The seriousness of the alleged conduct and its effect on the judicial system require as much.

Unfortunately, the State's strategy here is well worn. Thankfully other defendants have overcome it and other courts have rejected it to allow an examination of whether prosecutors engaged in improper racial discrimination in jury selection. The State has repeatedly sought to shield evidence of discriminatory intent by denying defendants access to the jury selection notes of prosecutors. While Timothy Tyrone Foster eventually gained access to the jury notes on

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[4] *See* Gates's Motion to Compel Discovery, filed November 28, 2017 at 4 (discussing Mr. Gates's request to obtain jury notes and State's denial thereof).

[5] *Foster*, 136 S. Ct. at 1748 (rejecting the State's invitation to ignore the prosecutors' notes in that case).

which the Supreme Court based its 2016 holding in *Foster v. Chatman*, 136 S. Ct. 1737, his efforts 30 years earlier to gain access to those notes were rebuffed by the state. *See Foster v. Georgia*, 258 Ga. 736, 739 (1988) (upholding refusal to produce jury selection notes). Similarly, in *Chua v. Johnson*, the State refused to disclose a memo in the prosecutor's file about the prospective jurors in the defendant's case. 336 Ga. App. 298, 300 (2016). The Court of Appeals remanded the case to the trial court to hold an evidentiary hearing. *Id.* at 306-07. On remand, the district attorney disclosed the material to the defendant, conceded the race discrimination evidenced therein, and consented to the defendant's extraordinary motion for a new trial. *See* Jill Helton, *Chua Granted New Trial Freed with Plea Agreement*, Tribune & Georgian, https://www.tribune-georgian.com/news/chua-granted-new-trial-freed-plea-agreement (Sept. 19, 2017) (last accessed April 9, 2018).

Beyond preventing access to evidence of discrimination, the State has a history of arguing the examination of such evidence is procedurally barred. In *Amadeo v. Zant*, the critical document was a memo drafted by the district attorney that directed the Jury Commissioners of Putnam County to underrepresent black people and women on the master jury lists from which grand and petit juries were drawn. 486 U.S. 214, 217-18 (1988). This document was discovered by another litigant in unrelated litigation. *Id.* at 217. The State argued that the defendant's claim was procedurally barred and that the memo was not hidden from the defendant because it "was readily discoverable in the public records of Putnam County." Brief for Respondent, State of Georgia, 1988 WL 1031863, at *24-25 (Jan. 29, 1988). The Supreme Court rejected these arguments and held the defendant was not procedurally barred from presenting this evidence. 486 U.S. at 228-29. Likewise, in *Ford v. Georgia*, 498 U.S. 411 (1991), the State argued that the defendant's claim of discrimination in jury selection was procedurally barred. Brief for

Respondent, State of Georgia, 1990 WL 515098, at *8 (July 31, 1990). The Supreme Court also rejected that claim. 498 U.S. at 425. Similarly, in *Williams v. Georgia*, 262 Ga. 732 (1993), the State argued that the defendant's discrimination in jury selection claim was procedurally barred. Brief of the State by the District Attorney, 1992 WL 12035583, at *6 (July 14, 1992). There too, the Court rejected the State's claim, and remanded the case for a new trial. 262 Ga. at 734.

Here, as it must, the State has already conceded that it was against the law at the time of Mr. Gates's trial to discriminate on the basis of race in making peremptory strikes. Status Conference Transcript, dated November 7, 2017 at 33. To prove that discrimination, Mr. Gates must satisfy the heavy burden of showing that the prosecutors in his case engaged in a pattern of purposeful and deliberate race discrimination in striking jurors. *Swain*, 380 U.S. at 223-24. But for this Court's Order providing him access to the prosecutors' jury selection notes, he may not have been able to meet that burden. The intent to discriminate evident in those notes is plain and the Court should engage in a review of the merits of that evidence.

The prosecutors in Mr. Gates's case violated the Constitution by striking jurors based upon their race. The plain evidence of this was in the State's possession and the State fought to prevent its disclosure. Now that the evidence has been made public, the State should not be able to avoid its full examination. The Supreme Court's analysis in *Banks v. Dretke*, 540 U.S. 668 (2004), although addressing a *Brady* claim, is instructive. There, through discovery and an evidentiary hearing, the defendant was able to obtain long-suppressed evidence. *Id.* at 669-70. The prosecutors argued that the defendant's discovery was too late and was presented in the wrong forum. *Id.* at 675. The Court rejected this argument, noting that when prosecutors conceal significant evidence, it is "incumbent on the State to set the record straight." *Id.* at 676. The Court stated that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not

tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696. Nor is it tenable here where Mr. Gates is entitled to a trial free from unconstitutional racial discrimination. Therefore, Amici urge the Court to engage in a substantive examination of the evidence before it and to set the record straight.

Respectfully submitted this 9th day of April, 2018.

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