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IN THE SUPREME COURT OF THE UNITED STATES

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 TIMOTHY TYRONE FOSTER, :
 Petitioner : No. 14-8349
 v. :
 BRUCE CHATMAN, WARDEN. :

- - - - - x
 Washington, D.C.
 Monday, November 2, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

STEPHEN B. BRIGHT, ESQ., Atlanta, Ga.; on behalf of Petitioner. Appointed by this Court.

BETH A. BURTON, ESQ., Deputy Attorney General, Atlanta, Ga.; on behalf of Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-8349, Foster v. Chatman.

Mr. Bright.

ORAL ARGUMENT OF MR. STEPHEN B. BRIGHT

ON BEHALF OF THE PETITIONER

MR. BRIGHT: Mr. Chief Justice, and may it please the Court:

The prosecutors in this case came to court on the morning of jury selection determined to strike all the black prospective jurors.

CHIEF JUSTICE ROBERTS: Mr. Bright, maybe you could address first the -- the question we raised on Friday with respect to which court certiorari should be directed to.

MR. BRIGHT: Yes, Your Honor.

We filed this petition originally certiorari to the Supreme Court of Georgia. And of course this Court in Sears v. Upton had issued certiorari -- this is in 2010 -- to the Supreme Court of Georgia in a similar situation.

It appears to us, from looking at this over the weekend, that R.J. Reynolds Tobacco Company v. Durham County, which the Court has decided in eight --

1 in 1986, the Court said that, unless there was positive
2 assurance that the decision was not a ruling on the
3 merits, then the writ went to the State supreme court.

4 And the Georgia court, while it has rules
5 and statutes and its own opinions that are not totally
6 in harmony with one another, the rule, nonetheless, is
7 that a certificate of probable cause, which is what was
8 denied in this case, is to be granted if there is
9 arguable merit to the case.

10 CHIEF JUSTICE ROBERTS: Do you think that
11 affects the scope of our review? In other words, are we
12 addressing just whether there's arguable merit to the
13 claim or are we addressing the claim on its own merits?

14 MR. BRIGHT: Well, I -- I think what this
15 Court has done in -- in all these cases is apply *Yist v.*
16 *Nunnemaker* to look through to the last reasoned
17 decision, and that would be the decision of the habeas
18 corpus court. In Georgia, typically the habeas court
19 rules, an application is made for certificate of
20 probable cause to the Georgia Supreme Court, and that is
21 often denied summarily. It is denied summarily as it
22 was in this case. It was denied.

23 JUSTICE SCALIA: I really don't understand
24 that. You -- you say we would be reversing the Georgia
25 Supreme Court, not the -- not the habeas court, right?

1 And -- and all that the Georgia Supreme Court held is
2 that there -- there -- is that there was no arguable
3 basis for -- for its accepting review.

4 So if we reverse that decision, we -- we
5 tell the Georgia Supreme Court, you're wrong; there is
6 an arguable basis for your accepting review. So we
7 ought to remand to that court, requiring them to accept
8 review, it would seem to me.

9 How can we reverse them on -- on an issue
10 they -- they never considered?

11 MR. BRIGHT: Well, that's what happened in
12 R.J. Reynolds. I mean, there you had almost an
13 identical situation where you had an intermediate
14 appellate court that had ruled, and then you had the
15 North Carolina Supreme Court denied review. And the
16 question was, do you issue the writ to the intermediate
17 appellate court or to the North Carolina Supreme Court?
18 And -- and this Court decided, and Justice Blackman,
19 writing for the court, said, "We want to give
20 practitioners" -- "We want to end the confusion about
21 this."

22 And so it goes to the State supreme court.

23 There is no difference in our situation here
24 and the situation that R.J. Reynolds --

25 JUSTICE KAGAN: But -- but you're saying in

1 that case or in other cases? And if so, which other
2 cases that, in that situation, we, nonetheless,
3 addressed the reasoning of the intermediate court? Is
4 that what you're saying?

5 MR. BRIGHT: You -- you did in *Sears v.*
6 *Upton*, a case out of Georgia, 561 U.S. 945 in 2010.
7 That was certiorari to the Supreme Court of Georgia, but
8 it came up on exactly the same posture of our -- our
9 case.

10 JUSTICE KENNEDY: Is there an argument that
11 the petition for certiorari could go to the trial court?

12 I mean, our statute says that it goes to the
13 highest court in which review could have -- could have
14 been had, I think is the -- the statutory phrase, in
15 which sounds like the Georgia Supreme Court.

16 On the other hand, as Justice Scalia said,
17 they haven't really directed their attention to the
18 issues before us.

19 I -- I -- I'm not sure to me that it's an
20 option to -- to go to the superior -- to the Georgia
21 trial court.

22 MR. BRIGHT: Well, let --

23 JUSTICE KENNEDY: Or -- or is that
24 incorrect?

25 MR. BRIGHT: Well, what this Court has said,

1 both in the R.J. Reynolds case and then that was
2 followed in Grady v. North Carolina last year -- 2015
3 case, this year, in which, once again, there was an
4 intermediate court decision denied by the -- the North
5 Carolina Supreme Court.

6 I mean, I can remember all the way back to
7 1960. There was Thompson v. Louisville, where
8 certiorari was to the police court in Louisville,
9 Kentucky, because no court in Kentucky could take the
10 case because the fine was less than \$20.

11 But I think these cases, much more recent,
12 decided by the Court 1986 and this year --

13 JUSTICE GINSBURG: You're putting together
14 two rules that you say we've established. One is
15 Justice Blackman said, to end the confusion, the
16 petition should be addressed to the Supreme Court.

17 And then you said, we have cases. Look
18 through cases. If --

19 MR. BRIGHT: Right.

20 JUSTICE GINSBURG: -- the Supreme Court has
21 said just "denied," nothing more than "denied," we look
22 back to the last reasoned decision.

23 Those are both decisions of this Court, and
24 that's what you're relying on.

25 MR. BRIGHT: Well, and -- and they're not

1 mutually exclusive. This Court can look back through to
2 the last reasoned decision in making its decision in
3 this case, and I believe that's what it should do. But
4 at the same time, the Court's opinions appear to us, on
5 the quick research we did over the weekend on this, that
6 R.J. Reynolds and -- and the subsequent case say that
7 certiorari would issue to the Georgia Supreme Court.

8 And -- and we listed it that way, and then
9 when the case was docketed here, it was listed that the
10 lower court was the superior court of Butts County.

11 JUSTICE ALITO: What if the State supreme
12 court wrote a short opinion and said, We're not going to
13 determine whether there was, in fact -- the only issue
14 we're going to determine is whether there's any arguable
15 merit to this? And then you say that the whole issue of
16 whether it was a correct application in Batson is -- is
17 the issue that we have to decide?

18 MR. BRIGHT: I -- I -- I think in
19 R.J. Reynolds, I think that's this Court's law, yes.

20 JUSTICE ALITO: Could I ask you another -- a
21 question about another preliminary issue before you get
22 to the -- the -- the underlying question in the case?

23 The Superior Court said, on page 175 of the
24 Joint Appendix, that the issue of the Batson violation
25 was not reviewable based on the doctrine of

1 res judicata.

2 And then it later said, and this is 192 of
3 the Joint Appendix, that it will review the Batson claim
4 as to whether Petitioner has shown any change in the
5 facts sufficient to overcome the res judicata bar.

6 Now, if you put those two together, you
7 could argue that the superior court decided only a
8 question of State law, namely, whether the situation
9 here was such that there could be review of the Batson
10 claim.

11 What is your response to that?

12 MR. BRIGHT: Well, the State doesn't argue
13 that. And I think the reason for that is because the
14 Court said, we're moving -- the Court is going to
15 address step three of Batson. And it said, Foster's
16 Batson claim is without merit.

17 JUSTICE KENNEDY: Well, but is it question
18 of Federal or State law as to whether or not the
19 Petitioner has shown a change in facts sufficient to
20 overcome the res judicata bar? The one -- the page 192
21 language that Justice Alito quoted, is that -- is that a
22 State law question or --

23 MR. BRIGHT: That's a State law question.

24 And here --

25 JUSTICE KENNEDY: Well --

1 MR. BRIGHT: -- the Court decided it, but
2 I -- I point out, Justice --

3 JUSTICE KENNEDY: Well, if it's a State law
4 question and they resolved it against you, what do you
5 have to -- then what do you have to argue?

6 MR. BRIGHT: No, no, no.

7 JUSTICE KENNEDY: I think you have to say
8 it's a Federal question.

9 MR. BRIGHT: No. In order to decide it,
10 the -- this is exactly like *Ake v. Oklahoma*, where the
11 court, the Oklahoma court had to decide the Federal
12 question in order to decide whether it had jurisdiction
13 over the issue.

14 And this Court held in *Ake* that, where the
15 court has to decide the Federal issue -- and it did in
16 this case. It clearly decided the Federal issue and
17 felt that the -- found that the *Batson* claim had no
18 merit. So it is decided, the Federal issue, and there's
19 no contest about that in the --

20 JUSTICE SCALIA: Explain to me why deciding
21 the Federal issue was essential to its deciding the
22 State *res judicata* issue.

23 MR. BRIGHT: Because it -- it -- it framed
24 the question as being that it would look at the
25 *Ake v.* -- excuse me -- they would look at the *Batson v.*

1 Kentucky claim and that, if there was merit to that
2 claim, then the court would grant the writ on it. On
3 the other hand, if it found that there was not merit on
4 it, then --

5 JUSTICE SCALIA: There -- you think it was
6 saying whether there's res judicata or not depends on
7 whether the new claim has any merit?

8 MR. BRIGHT: I think -- I think it's
9 exactly --

10 JUSTICE SCALIA: That's a very strange
11 application of res judicata, it seems to me.

12 MR. BRIGHT: Well --

13 JUSTICE SCALIA: I thought it was whether
14 there -- there were changed facts sufficient enough.

15 MR. BRIGHT: Well, the Georgia law is that
16 you can bring an issue that's been litigated already
17 before direct appeal.

18 JUSTICE SCALIA: Right. Right.

19 MR. BRIGHT: In habeas, if there are --

20 JUSTICE SCALIA: Even -- even -- right.
21 Even if it would, you know, produce a different result,
22 right?

23 MR. BRIGHT: Right. If the -- if the facts
24 are such that it would produce a different result,
25 right.

1 JUSTICE SOTOMAYOR: Mr. Bright, did the
2 court, in your judgment, do de novo review? Didn't it
3 say that it did -- basically, it was going to do step
4 three of the Batson charge -- challenge?

5 MR. BRIGHT: Yes, that's exactly what the
6 court said, yes.

7 JUSTICE SOTOMAYOR: So that's a ruling on
8 the merits.

9 MR. BRIGHT: I think -- I think the court
10 said the Batson claim is without merit. That seems like
11 a ruling on the merits to me.

12 (Laughter.)

13 JUSTICE SOTOMAYOR: Well, it -- I think it
14 said after -- after redoing --

15 MR. BRIGHT: After considering these other
16 facts. And we think there was some legal errors made
17 there. But yes, after considering these facts, the
18 court said that the claim was without merit.

19 JUSTICE GINSBURG: The court said that it
20 would reach step three again on the basis of the new
21 evidence presented, and so they did it all over. And I
22 guess that's -- we must take that as what happened.
23 They did not apply a res judicata bar.

24 MR. BRIGHT: No. I mean, in Ake this Court
25 said, when the resolution of the State procedural law

1 question depends upon a Federal constitutional ruling,
2 the State law prong is not independent of the Federal
3 claim. And this Court has jurisdiction. That's on page
4 75 of 47 United States.

5 JUSTICE ALITO: Well, I don't want to
6 belabor the point too much, but you -- are you arguing
7 that Georgia res judicata law is this: If someone comes
8 up with any new fact, the -- the -- the thinnest new
9 fact, that is sufficient to wipe out the res judicata
10 bar and allow the court to get to the merits of the
11 claim? Is that your argument? That's your
12 understanding of Georgia res judicata law?

13 MR. BRIGHT: That's not my understanding.
14 My understanding is the evidence has to be sufficient
15 enough that the court does what it did in this case and
16 rule on the merits of the issue. And that's what
17 happened here. This was not a matter of just adding one
18 more leaf to the basket.

19 JUSTICE KENNEDY: And we really want you to
20 get to the merits, but why is that -- in conjunction
21 with --

22 MR. BRIGHT: We will.

23 JUSTICE KENNEDY: -- with Justice Scalia's
24 question, why is that an issue of Federal law?

25 MR. BRIGHT: Because the court decided the

1 Batson issue to decide the underlying State law issue.
2 And I think Ake is pretty clear on this, and I commend
3 it to the Court's attention. We didn't -- it wasn't --
4 since the State had raised this, either in their
5 opposition to cert or in their brief, it's not briefed
6 before this Court, but I think that's the deciding case
7 on this.

8 CHIEF JUSTICE ROBERTS: Thanks, counsel. I
9 think we have your argument on the point. Thank you.

10 MR. BRIGHT: Okay. Thank you very much.

11 If I could just say what happened here was
12 that the prosecutors had identified the
13 African-Americans by race, they had rated them against
14 each other in case it came down to having to select a
15 black juror.

16 JUSTICE GINSBURG: The prosecutors said the
17 reason for concentrating on the black jurors was that
18 you had informed them you would present a Batson
19 challenge, and therefore, it was necessary for them to
20 see if there was a race-neutral ground for disqualifying
21 that case.

22 MR. BRIGHT: Right. Two answers to that,
23 Justice Ginsburg.

24 I mean, what the lawyers did here was these
25 lawyers have practiced here for a long time in Rome,

1 Georgia. They said the prosecutor always strikes all
2 the blacks from the jury. That's been the historic
3 practice. We think they're going to strike all the
4 blacks on the jury in our case. But last year the
5 Supreme Court of the United States decided Batson v.
6 Kentucky, and we asked the Court not to let that happen
7 in this case.

8 Now, of course, if the prosecutor is willing
9 to avoid a Batson challenge, they could have not
10 discriminated. That would have been the first thing to
11 do.

12 But -- but secondly, with regard to the
13 information that's collected here, it doesn't seem like
14 it's information just to exercise strikes when they say,
15 if it comes down to having to take an African-American,
16 Ms. Hardge, or in another place, Ms. Garrett, might be
17 okay. And the district attorney himself said Marilyn
18 Garrett has the most potential of the black prospective
19 jurors.

20 In other words, the blacks were taken out of
21 the picture here. They were taken and -- and dealt with
22 separately. And over the weekend, the jury -- the
23 questioning ended on a Friday. And the judge said, all
24 right. Over the weekend, you've got your chance to
25 decide who you're going to strike. And they knew

1 exactly who they were going to strike because the --
2 the -- the jurors are listed in order. The State goes
3 first, and if it accepts a juror, then the State
4 accepts, and that juror is on. There's no going back.
5 There's no backstriking or there's no striking people
6 here and there.

7 They developed three strike lists. And one
8 of those strike lists was a list headed "Definite NOs."
9 These are the people absolutely are not going to be on
10 this jury. There are only six jurors listed on the list
11 of "Definite NOs," and the first five are
12 African-Americans. The sixth is a juror who made clear
13 during the voir dire process that she could not impose
14 the death penalty under any circumstances. The State
15 moved to strike her for cause. The judge probably erred
16 in not granting that strike. But even she ranked behind
17 the black jurors in terms of the priorities that the
18 prosecution had for -- for striking.

19 CHIEF JUSTICE ROBERTS: Counsel, at this --

20 JUSTICE SOTOMAYOR: Mr. Bright --

21 CHIEF JUSTICE ROBERTS: -- at the time,
22 Mr. Lanier said they weren't striking the -- the jurors
23 because of race. They were striking them because they
24 were women. And I guess three -- three out of the
25 four --

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: -- African-Americans
3 were -- who were struck were -- were women. How does
4 that -- and then that explanation is just kind of fallen
5 out of the case.

6 How -- how does that affect the analysis?

7 MR. BRIGHT: Well, he -- he did accept
8 women, though, as -- as well. If -- bear with me a --
9 just a moment.

10 JUSTICE GINSBURG: The Court had not yet
11 held that Batson applies to --

12 MR. BRIGHT: The Court had not held in JEB
13 that Batson applied to women, but the Court did say in
14 JEB that, of course, it could be used as a pretext,
15 women, for striking on the basis of race.

16 In this case, the prosecutor struck three
17 white jurors, and then he struck the three black jurors,
18 women, the three black women and the three white women.
19 The final --

20 JUSTICE SOTOMAYOR: Mr. -- Mr. Bright,
21 Mr. Lanier --

22 MR. BRIGHT: Yes.

23 JUSTICE SOTOMAYOR: -- answered yes when he
24 asked -- when during the -- during the trial when he was
25 asked whether he had done -- I don't know if it -- oh,

1 no, it was on the motion for a new trial hearing --
2 whether he had done the same extensive background check
3 on all the jurors, white and black.

4 Did you find any evidence of that extensive
5 black background search?

6 MR. BRIGHT: No. The only -- what that's
7 talking about -- and -- and the investigator said this
8 in his deposition, was the color -- race-coded colored
9 list, those first four lists you have in the Joint
10 Appendix in which the blacks are marked with a "B" and
11 are highlighted in green with a marker up at the corner
12 saying green designates black.

13 JUSTICE SOTOMAYOR: So -- so your -- your
14 understanding of that statement was that all -- he had
15 only done an extensive search on the blacks on the list?

16 MR. BRIGHT: Well, it's clear, Mr. Lundy had
17 prepared a -- a list, notes in which he talked about
18 just the black jurors in -- in the case. And I think
19 the State concedes in its brief that the focus was on
20 the black jurors.

21 JUSTICE SOTOMAYOR: During the trial, did
22 defense counsel, when he made his initial Batson
23 challenge -- not in the papers, but at trial -- did he
24 again say that this was part and parcel of the
25 prosecutor's pattern?

1 MR. BRIGHT: He didn't say that, but I point
2 this interesting thing out. When they discussed the
3 Batson motion before trial, there was never a suggestion
4 that there wouldn't be a Batson hearing. Everybody knew
5 what was going to happen, that all the blacks would be
6 struck, and then they'd have a hearing after that
7 happened. But the defense had basically put their
8 motion in writing and relied upon that throughout the
9 jury selection.

10 JUSTICE SOTOMAYOR: I was just surprised
11 that we didn't hear about this preparation for a Batson
12 hearing until --

13 MR. BRIGHT: Well --

14 JUSTICE SOTOMAYOR: -- the habeas.

15 MR. BRIGHT: The -- the defense lawyers at
16 trial did move for the prosecution's notes. And the
17 prosecution opposed that. They're very strict in not --
18 not giving up their notes. Then when the prosecutor
19 testified on the motion for a new trial, he did
20 something I've never seen a lawyer do before. He cut a
21 bargain, sort of, with the judge and the lawyer saying,
22 I will testify, but only if I don't have to show them my
23 notes.

24 I mean, basic rules of evidence are you
25 testify and rely upon notes; the other side can see the

1 notes. But here, these notes were guarded until 2006,
2 when we obtained them through a Freedom of Information
3 or what they call Open Records Act in Georgia.

4 JUSTICE GINSBURG: The prosecutors said that
5 you -- they said, we never -- we never wrote or
6 authorized or relied on those notes. And you didn't
7 call the prosecutors to test the veracity of that
8 assertion.

9 MR. BRIGHT: No, but all the prosecutor
10 talked about were the color-highlighted notes. Each
11 prosecutor filed an affidavit which are in the -- in the
12 Joint Appendix at 168. And all they said was, we didn't
13 highlight it in green, and we didn't tell anybody else
14 to highlight it in green. And then Mr. Lanier says --
15 and I don't have anything else to say beyond what I said
16 at the Batson hearing and the motion for a new trial.
17 Mr. Pullen said -- the only other thing he said is, I
18 didn't use those green-highlighted lists in choosing the
19 jury; but, of course, that's just the first few pages.

20 What's damning about this is not so much
21 that, but the "Definite NOs" list, the misrepresentation
22 to the trial court that Ms. Garrett -- that they wanted
23 Ms. Garrett. That's what they told the trial court.
24 And the trial court relied upon that in denying the
25 Batson motion, that this showed their openness to

1 having -- Ms. Garrett was on the "Definite NO" list.
2 She was on each of the strike lists. Ms. Garrett was
3 never in the running to be on this jury.

4 But they represented to the court that
5 because another African-American, Shirley Powell, was
6 excused for cause -- there were five African-Americans
7 in the venire at the start when they got ready to
8 instruct the jury. But one said, turns out I know
9 somebody in the family. She was excused for cause. And
10 the prosecutors said -- made it -- implied clearly that
11 had it not been for that, that extra strike, that
12 Ms. Garrett would have sat.

13 At the same time -- and they're still
14 arguing this both ways, that they both wanted her and
15 didn't want her -- they give eleven reasons for why
16 Ms. Garrett would not be a good juror. That she's
17 impudent and she doesn't respect the court. If you
18 believe all the things they said about her, they would
19 never want her as a juror.

20 But those things, I would submit, are not
21 really valid in terms of -- in terms of the reasons,
22 because the reasons they gave here, many were
23 demonstrably false and not supported by the evidence,
24 including reasons they gave about Ms. Garrett. They
25 were inconsistent, some were completely incredible, and

1 they applied to white jurors -- some of these reasons
2 applied to white jurors who had the same characteristics
3 as the African-Americans who were struck.

4 And then lastly, and what's so important
5 under Miller-El, they didn't question the jurors about
6 the reasons for striking them. They gave reasons for
7 striking, and one question would have cleared up some of
8 these. And Miller-El says that the failure to engage in
9 any meaningful voir dire about whatever your reason is,
10 is evidence suggesting that the explanation is a sham
11 and a pretext.

12 JUSTICE SOTOMAYOR: Mr. Bright --

13 MR. BRIGHT: And --

14 JUSTICE SOTOMAYOR: -- I have found some
15 circuit courts who have a rule on appeal or on habeas
16 which is if they can find one legitimate reason for
17 striking a juror --

18 MR. BRIGHT: Yes.

19 JUSTICE SOTOMAYOR: -- that's enough to
20 defeat a Batson challenge. Do you believe that's an
21 appropriate rule? Are you suggesting a different
22 approach to the question?

23 MR. BRIGHT: Well, it can't -- I -- I would
24 suggest it -- it can't possibly be. Because this Court
25 said in Justice Alito's opinion in Snyder v. Louisiana

1 that where the peremptory strike was shown to have been
2 motivated in substantial part by race, that it could not
3 be sustained. And -- excuse me -- I -- I would suggest
4 to you, it shouldn't even really say substantial.
5 Because if this Court, as it said so many times, is
6 engaged in unceasing efforts to end race discrimination
7 in the criminal courts, then a strike that -- strikes
8 motivated by race cannot be tolerable.

9 And, of course, as -- as pointed out here in
10 the -- in the amici, this is a serious problem, not just
11 in this case, but in other cases where people come to
12 court with their canned reasons and just read them off.
13 That happened in this case, where one of the reasons
14 that was given was just taken verbatim out of a -- two
15 of the reasons given were taken verbatim out of a
16 reported case. So you don't have the reason for the
17 lawyer in this case. He said my personal preference.
18 It wasn't his personal preference. It was the personal
19 preference of some U.S. attorney in Mississippi who gave
20 that reason, and then it was upheld on appeal by -- by
21 the Fifth Circuit.

22 But I -- we would suggest that the standard
23 is at least what Snyder says, because when you have
24 both -- you can always have, as Miller-El recognized --

25 JUSTICE KENNEDY: Well, in -- in response to

1 Justice Sotomayor's question --

2 MR. BRIGHT: Right.

3 JUSTICE KENNEDY: -- if the prosecutor
4 argues a laundry list of reasons for striking the black
5 juror and some of those are reasonable and some are
6 implausible, how should the Court approach the Batson
7 analysis?

8 MR. BRIGHT: I think the Court looks at
9 which reasons are pretextual. I think the fact that
10 there is a laundry list suggests in and of itself that
11 the Court should scrutinize the reasons very carefully,
12 should be suspect of the reasons. Because otherwise,
13 what the Court is going to do is just simply encourage
14 prosecutors or any party in a case, since Batson applies
15 to everyone -- is going to encourage a party to just
16 give as many reasons as possible and hope that one will
17 be acceptable. And in this case --

18 JUSTICE ALITO: Don't you think this is --
19 this is a case-by-case thing? Suppose there's one
20 reason that's a killer reason? Like this -- this
21 individual has numerous prior felony convictions, all
22 right? And then the prosecutor says in addition, and
23 this -- this person didn't -- he looked down at the
24 floor in answering the questions and didn't seem to
25 pause and didn't seem to understand some of the

1 questions.

2 So under a circumstance like that, couldn't
3 the Court say, well, the one -- there's one reason here
4 that would -- that is clearly a justification for a
5 peremptory strike? We don't have to determine whether
6 there's evidence that the person was looking down at the
7 floor.

8 MR. BRIGHT: Well, of course, Batson says,
9 and the subsequent cases say, you look at all relevant
10 circumstances. It may be if all the circumstances that
11 are there, the ones you said, then you would come to the
12 conclusion that of those two reasons that there was a
13 valid reason.

14 But I would suggest that where you have
15 indicia like we have here, I mean, we have an arsenal of
16 smoking guns in this case.

17 JUSTICE SCALIA: A lot of those smoking guns
18 were in the original decisions by -- by the Georgia
19 courts. It seems to me what -- what you would have to
20 establish to reverse the Georgia courts is that the new
21 smoking gun, assuming that all the rest were not enough
22 to demonstrate a Batson violation -- the new smoking
23 guns would tip the scale. Isn't -- isn't that the
24 issue --

25 MR. BRIGHT: Well, when the --

1 JUSTICE SCALIA: -- that the Georgia courts
2 decided?

3 MR. BRIGHT: When the -- when the new
4 smoking gun tells you that the prosecutor misrepresented
5 facts and gave reasons that were absolutely false,
6 demonstrably false reasons, and those are not clear
7 before, but you have that now, I mean, Batson turns on
8 the feasibility of the reasons. It turns on the
9 credibility of the prosecutor.

10 JUSTICE SCALIA: Yes, but all -- all I'm
11 saying -- and you seem to be agreeing -- is that it is
12 not the overall Batson judgment that's before us but
13 rather the judgment that the -- that the new evidence
14 did not suffice to create a Batson violation where none
15 existed before.

16 MR. BRIGHT: No. Our position is that when
17 you look at the new evidence with all the evidence at
18 trial, that all relevant circumstances considered
19 together, considering that a lot of these reasons we now
20 know from the notes, we now know from the notes that
21 there were misrepresentations with regard to these
22 reasons.

23 I mean, the Georgia Supreme Court -- just as
24 an example, Justice Scalia -- upheld the strike on
25 Ms. Garrett on two bases: That she was a social worker

1 and that her cousin had been arrested for drugs. She
2 was not a social worker, and secondly, the prosecutor
3 didn't find out until after trial about her cousin's
4 arrest, so it couldn't have possibly been a reason for
5 the strike.

6 JUSTICE GINSBURG: Are you saying in answer
7 to Justice Scalia that when you had the notes, those
8 notes cast doubt on some of the prosecutor's
9 justifications in the first round?

10 MR. BRIGHT: They -- they do that, and --
11 and they show misrepresentations to the court, and they
12 show an overarching goal of separating out the
13 African-American citizens, treating them differently and
14 then putting them on this list of "Definite NOs."

15 JUSTICE KAGAN: And Mr. Bright, just to make
16 sure I understand, all the notes in the prosecutor's
17 files were new; is that right?

18 MR. BRIGHT: New. New to this case, yes.

19 JUSTICE KAGAN: Yes. Okay.

20 MR. BRIGHT: And there were three people:
21 It just involved the two prosecutors and the
22 investigator who put those together.

23 I'd like to reserve the balance of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Burton.

1 ORAL ARGUMENT OF BETH A. BURTON
2 ON BEHALF OF THE RESPONDENT

3 MS. BURTON: Mr. Chief Justice, and may it
4 please the Court:

5 I believe there are two important factors in
6 this case when reviewing the entirety of the evidence.
7 One is Petitioner bears the burden of establishing
8 clear --

9 CHIEF JUSTICE ROBERTS: I -- I'll ask you as
10 well to address the certiorari question first.

11 MS. BURTON: And -- and respectfully, I
12 disagree with Petitioner's counsel on this issue. I
13 believe *Norfolk & Western Railway v. Hiles*, which is
14 this Court's opinion, indicates that -- or states that
15 if there is an issue raised in the lower court and it is
16 raised in the State's highest court, in this case, the
17 Georgia Supreme Court, but the Georgia Supreme Court
18 denies discretionary review, then it is before this
19 Court on certiorari from the lower court. So --

20 JUSTICE SOTOMAYOR: Well, the problem is I
21 don't think this is discretionary review. The Eleventh
22 Circuit found it's not under Georgia law. Read its
23 opinion. It seems pretty grounded in the stated law of
24 Georgia.

25 MS. BURTON: Yes, Your Honor, and that is --

1 that's a pretty hot-button issue I know right now in the
2 State Federal courts in Georgia. But our position in
3 that -- in that -- those cases and in -- I think there
4 was a case before this Court on rehearing on that same
5 issue -- is that Georgia statute -- the Georgia statute
6 specifically says that is a discretionary appeal. The
7 1975 Habeas Corpus Act made it a discretionary appeal, I
8 think, because the Georgia Supreme Court was just
9 getting inundated with appeal after appeal.

10 JUSTICE KAGAN: And has the Georgia Supreme
11 Court ever -- ever said anything one way or the other as
12 to whether it's discretionary or not?

13 MS. BURTON: In two of their cases, Reed v.
14 Hopper, which is 219 S.E.2d 409, and Smith v. Nichols,
15 which is 270 S.E.2d 550, 1999. They both state those as
16 discretionary. But they have not -- they have not
17 answered a -- a certified question on that issue.

18 JUSTICE SOTOMAYOR: Could you give me the --
19 the Reed v. -- what?

20 MS. BURTON: Yes, Your Honor. 219 S.E.2d
21 409. That's a 1975 case.

22 JUSTICE SCALIA: Are certified questions
23 available in Georgia? Could -- could we certify a
24 question to the Georgia Supreme Court?

25 MS. BURTON: I -- I believe you can, Your

1 Honor.

2 JUSTICE BREYER: You did -- we -- I -- I --
3 we looked at -- I looked at the statute. The statute
4 says in a habeas case, State habeas, that the Georgia
5 Supreme Court must review it. It says it must review it
6 unless it's without merit. I forget the exact words. I
7 was looking for them.

8 MS. BURTON: Well, the -- in State habeas --

9 JUSTICE BREYER: Do they state that?

10 MS. BURTON: Well, in the State habeas, I
11 think it's 9-14-52 --

12 JUSTICE BREYER: Yes.

13 MS. BURTON: -- the statute takes State
14 habeas cases out of other appellate review and makes
15 that just discretionary. The Georgia Supreme Court --

16 JUSTICE BREYER: Well, wait, wait, wait.
17 Then I've been looking at the wrong place.

18 You heard your brother here say -- he quoted
19 some words. I don't remember the exact words, but they
20 were exactly what I'd read, and it was from a statute in
21 Georgia.

22 MS. BURTON: Well, it's --

23 JUSTICE BREYER: And the Georgia statute
24 said -- I just can't find it in my book here. Sorry.
25 The Georgia statute said they shall review the case

1 unless it's without -- it's totally without merit.

2 Something like that.

3 I -- does that ring a bell?

4 MS. BURTON: Well, there is --

5 JUSTICE BREYER: Does it ring a bell, what
6 I'm saying?

7 MS. BURTON: It -- it does ring a bell.

8 JUSTICE BREYER: Or what are the exact
9 words?

10 MS. BURTON: I -- I -- I do not know the
11 exact words. But I believe the --

12 CHIEF JUSTICE ROBERTS: The exact words are
13 that a certificate of probable cause will be issued when
14 there is arguable merit.

15 JUSTICE BREYER: Yes. That's it.

16 MS. BURTON: But I believe that's Rule 36 of
17 the Georgia Supreme Court.

18 JUSTICE BREYER: Right. Right -- that
19 doesn't --

20 CHIEF JUSTICE ROBERTS: I think it's
21 9-14-52. Or if there had been compliance with that,
22 right? Okay.

23 JUSTICE BREYER: Okay. Does that govern
24 this case?

25 MS. BURTON: I -- I believe the statute

1 would trump it.

2 JUSTICE BREYER: Does the word that he --
3 that the Chief Justice just read from Georgia law govern
4 this case? The answer is yes or no.

5 MS. BURTON: I -- no, I believe it's
6 discretionary.

7 JUSTICE BREYER: They do not govern this
8 case.

9 MS. BURTON: I believe the State --

10 JUSTICE BREYER: Okay. What, in your
11 opinion, is the Georgia statute that says that those
12 words you just held do not govern this case?

13 MS. BURTON: I believe it's -- and -- and
14 correct. I -- I'm certainly open to correction.
15 19-14-52 states that State habeas is taken out of other
16 appeals, which are normally directly appeals, or
17 prisoner appeals, and they are discretionary.

18 JUSTICE BREYER: Okay. Thank you.

19 JUSTICE SCALIA: Well, I -- I suppose
20 that -- that -- that a court could have a discretionary
21 view but could provide by rule that, in the exercise of
22 our discretion, we will grant any of these unless it's
23 patently wrong.

24 Could -- couldn't -- and -- is -- maybe
25 that's what's happened here. And if -- if you use your

1 discretion to enact a rule which says you will take
2 cases of a certain court, does -- does the taking of
3 those cases still remain discretionary?

4 That's a nice question, isn't it?

5 (Laughter.)

6 MS. BURTON: I think the -- I think the
7 taking of the case does remain discretionary. If they
8 find it has arguable merit, it is discretionary. And --
9 and the two cases I cited specifically reference --

10 JUSTICE SOTOMAYOR: Well, why would we --

11 JUSTICE SCALIA: You've -- you've just
12 decided that you will uniformly exercise your discretion
13 in a certain way.

14 MS. BURTON: Correct.

15 JUSTICE SCALIA: Yes.

16 JUSTICE KAGAN: But -- but I -- maybe I'm
17 misunderstanding what you're saying. You're saying
18 there is no such uniform determination that they will
19 exercise their discretion in a certain way, that they
20 are insisting upon their discretion being discretionary.
21 Is that correct?

22 (Laughter.)

23 MS. BURTON: That is -- that is my
24 understanding. Because these -- this -- this law
25 applies to not just, obviously, death-only cases but the

1 multitude of non-death-only cases.

2 JUSTICE SOTOMAYOR: I'm sorry. I'm so
3 confused I can't even --

4 (Laughter.)

5 JUSTICE SOTOMAYOR: The State habeas process
6 is different than the regular appeal process.

7 MS. BURTON: That's correct.

8 JUSTICE SOTOMAYOR: On the regular appeal
9 process, they look at each case -- each case with
10 discretion.

11 MS. BURTON: On a direct appeal process,
12 it -- it -- and certainly a capital case, it is
13 mandatory review.

14 JUSTICE SOTOMAYOR: Okay. In State habeas
15 they have a rule, an internal rule that says, we'll take
16 every habeas case unless it's -- has no arguable merit,
17 right?

18 MS. BURTON: I -- if I may rephrase: I
19 think the rule says that they will take a case if it has
20 arguable merit. Generally they would not take --

21 JUSTICE SOTOMAYOR: In the positive.

22 MS. BURTON: Right, right.

23 JUSTICE SOTOMAYOR: So what would lend us to
24 believe that they didn't look at the merits and say
25 there was no arguable merit? That they just said, we're

1 too busy. We don't care if there is arguable merit.

2 Do you believe they did that?

3 MS. BURTON: I would never -- I would never
4 say they were too busy to take the case.

5 JUSTICE SOTOMAYOR: I'm sorry. What?

6 MS. BURTON: But -- I said I would never say
7 they were too -- that that would be the reason.

8 But I think they would say, we've looked at
9 this case -- because they do have the records before
10 them -- and we don't see arguable merit to take this up.

11 JUSTICE SOTOMAYOR: So that is a decision on
12 the merits. There is no arguable merits.

13 MS. BURTON: I think it is a fine -- there
14 is no arguable merit to the application that there has
15 been error below.

16 JUSTICE SOTOMAYOR: Okay.

17 MS. BURTON: If that makes it any clearer.

18 JUSTICE SOTOMAYOR: Now it's clear.

19 JUSTICE KENNEDY: And in your view, cert
20 should have been granted to the Georgia Supreme Court?

21 MS. BURTON: I believe in my -- I believe it
22 should have been granted to the State habeas court
23 because of that discretionary review and because I
24 believe that this Court has said, in Michigan v. Long,
25 that if it's --

1 JUSTICE KENNEDY: All right.

2 MS. BURTON: -- if it's unclear, it comes
3 from the State habeas court.

4 JUSTICE KAGAN: Can I just ask one more
5 quick question about this.

6 MS. BURTON: Sure.

7 JUSTICE KAGAN: You -- you made reference --
8 this is an issue that's being litigated in the Georgia
9 courts, is that right, in the Eleventh Circuit?

10 MS. BURTON: That is correct.

11 JUSTICE KAGAN: This precise issue?

12 MS. BURTON: This -- this issue.

13 JUSTICE KAGAN: Thank you.

14 MS. BURTON: To --

15 JUSTICE SCALIA: What -- what issue is that?

16 MS. BURTON: The --

17 (Laughter.)

18 JUSTICE SCALIA: Is it -- is it the issue of
19 which court the certiorari should be directed to?

20 MS. BURTON: Well, I -- I -- it's -- it's --

21 JUSTICE SCALIA: The issue of what? What is
22 the issue that is being litigated?

23 JUSTICE KAGAN: Well, I'll -- I'll -- am I
24 right that the issue that is being litigated is whether
25 the Supreme Court review, in cases like this, is

1 discretionary or not discretionary?

2 MS. BURTON: That is correct.

3 JUSTICE SCALIA: All right.

4 MS. BURTON: And in those cases, obviously,
5 it's coming up from Federal court. So we're dealing
6 more with Elst and Richter -- Harrison -- Harrington v.
7 Richter in -- in a -- in a sort of a different scope of
8 things in that regard.

9 JUSTICE GINSBURG: And this question is in
10 both the Georgia Supreme Court and in the Eleventh
11 Circuit?

12 MS. BURTON: It is -- it is currently in the
13 Eleventh Circuit. I don't believe we have a case
14 pending now in the Georgia Supreme Court on that
15 particular issue. But I -- I do believe it's up --
16 there is an issue up here in a case, Jones v. Chatman,
17 where it is they've asked for rehearing on the issue --

18 JUSTICE KENNEDY: Do you think this would be
19 an appropriate case for us to exercise our discretion to
20 certify the question to the Supreme Court?

21 MS. BURTON: We would certainly like an
22 answer from the Georgia Supreme Court on that issue. I
23 think -- I think the Eleventh Circuit would like that
24 as -- as well. I think it would clear up both State and
25 Federal law for -- for a number of things.

1 JUSTICE GINSBURG: There's a statute that
2 permits the -- the Georgia Supreme Court to accept
3 certified questions. Do you know anything about the
4 history of requests for certification?

5 Some states have such a process, but the
6 State supreme court rejects the question.

7 MS. BURTON: I do not, Your Honor. And I --
8 I apologize for that.

9 JUSTICE SCALIA: What -- what if we hold in
10 this case that it is not discretionary review, and then,
11 in these cases that are pending, the Georgia Supreme
12 Court says it is discretionary review? Who wins?

13 (Laughter.)

14 JUSTICE SCALIA: Is it ultimately a question
15 for us or for the Georgia Supreme Court?

16 MS. BURTON: I think it's ultimately a
17 question for the Georgia Supreme Court as to what --
18 what their law is, what the State law is.

19 JUSTICE SOTOMAYOR: Why?

20 JUSTICE KAGAN: Me too.

21 Can I -- can I go to the merits? Is that --
22 is that all right?

23 MS. BURTON: Sure.

24 JUSTICE KAGAN: Okay. Unless other
25 people --

1 Okay.

2 Look. You have a lot of new information
3 here from these files that suggests that what the
4 prosecutors were doing was looking at the
5 African-American prospective jurors as a group, that
6 they had basically said, we don't want any of these
7 people. Here is the one we want if we really have to
8 take one. But that there -- the -- all the evidence
9 suggests a kind of singling out, which is the very
10 antithesis of the Batson rule.

11 So, you know, I mean -- well, isn't this
12 as -- I'm just going to ask you: Isn't this as clear a
13 Batson violation as a court is ever going to see?

14 MS. BURTON: I don't think it is. And I
15 think, because these notes that we have, they don't
16 undermine any of the findings that were given by the
17 prosecutor in his strikes, particularly of Mr. --
18 Mr. Hood and Ms. Garrett.

19 They certainly can be interpreted in two
20 ways. In -- in our response brief to this Court -- we
21 don't know when we say, you know, this is why these
22 highlights are there. There is a reasonable
23 explanation, just as Mr. Foster is given speculation in
24 his arguments. We don't know.

25 But when they're --

1 JUSTICE BREYER: What is the reasonable
2 explanation?

3 MS. BURTON: The reasonable explanation in
4 this case is, four months prior to trial, as was
5 previously argued, Batson had just come out. Batson is
6 new. Four months prior to trial, defense counsel files
7 a motion and says, the strike of any black juror, we're
8 filing a Batson challenge. Two weeks prior to trial, he
9 says -- he files a motion and says, I'm -- there's
10 racial disparity in 179 jurors. And that's the --
11 that's the list that's challenged, the 179. There is
12 racial disparity of black prospective jurors on that
13 list.

14 The day of trial, he re-files that. So I
15 would be more surprised, quite frankly, if there wasn't
16 some sort of highlighting, or if --

17 JUSTICE BREYER: In other words, the
18 argument you're making here --

19 MS. BURTON: Exactly.

20 JUSTICE BREYER: -- is that -- is that the
21 reason he highlighted all the black jurors in green and
22 thus said black -- what about the black jurors and did
23 all these different things was because he was preparing
24 a defense in case of a Batson challenge.

25 MS. BURTON: Correct.

1 JUSTICE BREYER: All right. Now, if that's
2 correct, why this is -- is this the first -- is it --
3 was this argument made before your main brief in this
4 case?

5 MS. BURTON: And it was not --

6 JUSTICE BREYER? It's been several years.
7 Yes or no?

8 MS. BURTON: And it was not. And that's --
9 and --

10 JUSTICE BREYER: It was not.

11 So if that had been his real reason, well,
12 isn't it a little surprising that he never thought of
13 it --

14 (Laughter.)

15 JUSTICE BREYER: -- or didn't tell anybody
16 until you raise this argument in your main brief?

17 MS. BURTON: And -- and I -- I would -- I
18 would say that's on State habeas counsel. We relied on
19 our res judicata bar throughout State habeas; and then
20 after that, basically defended the factual findings of
21 the State habeas.

22 JUSTICE BREYER: All right. It seems to me
23 you have two arguments.

24 One is this argument that he never thought
25 of, apparently, or at least never thought to tell you

1 until quite recently. And the other, after years, and
2 so it's hard to believe that's his real reason.

3 And then there's the second argument that he
4 had about 40 different reasons. And at least some of
5 them could be valid. Okay.

6 Now, if my grandson tells me, I don't want
7 to watch -- I don't want to do my homework tonight at
8 7:00 because I'm just so tired. And besides, I promised
9 my friend I'd play basketball. And besides that,
10 there's a great program on television. And besides
11 that, you know, I really -- my stomach is upset, but I
12 want to eat spaghetti. And so he's now given me five
13 different reasons.

14 What do I think of those reasons?

15 MS. BURTON: Well, in this case -- and
16 again, I think this is --

17 JUSTICE BREYER: One may be valid.

18 MS. BURTON: Correct, and the other ones
19 also may be --

20 JUSTICE BREYER: Which one?

21 MS. BURTON: Well, they all may be valid,
22 but they all may not be as strong as -- as the -- as the
23 first one. But in this case, I think the important
24 part --

25 JUSTICE BREYER: Well, wait. The point is

1 he gave 40 different reasons. And the very fact that he
2 gives 40 different reasons -- and many of them are
3 self-contradictory, obviously not applicable, totally
4 different from -- you know, that's why I used my
5 grandchild's analogy. All right?

6 And so I would say my answer to my
7 grandchild is, look, you're not too tired to do your
8 homework. And I think any reasonable person looking at
9 this would say, no, his reason was a purpose to
10 discriminate on the basis of race.

11 Now, tell me why I'm wrong.

12 MS. BURTON: I think because you have to
13 look at the time period this was done. This was done
14 not -- you know, a year after Batson came out. And even
15 throughout the transcript, people -- defense counsel and
16 the prosecutor says, we're -- we don't really know where
17 Batson is going.

18 So in this case, the prosecutor, dealing
19 with Batson for the first time, the first time in
20 history anybody has had to put strikes on the record.

21 JUSTICE KENNEDY: But he's simply wrong. He
22 puts down, if it comes -- if it comes down to having to
23 pick one of the black jurors -- was it Ms. Garrett? --
24 might be okay.

25 MS. BURTON: And that's -- that's Mr. Lundy.

1 That's the investigator.

2 JUSTICE KENNEDY: So it -- it -- it -- well,
3 but that seems to me to undercut the argument, well,
4 they're just feeling their way and so forth. They've --
5 they've made a mistake -- they've made a mistake of --
6 in Batson. Sure it was new; but they're wrong.

7 MS. BURTON: Well, first let me say, I think
8 that's why there was a laundry list because he was just
9 espousing every reason he had. But with regard to
10 Mr. Lundy's, notes, and that was the investigator who
11 said if we have to choose a black juror, she may be the
12 best one.

13 JUSTICE GINSBURG: Who was responsible for
14 the definite no list?

15 MS. BURTON: The definite no list, nobody --
16 the only person that was asked about that was Mr. Lundy,
17 who was deposed and said he could not identify who wrote
18 that list. So we don't --

19 JUSTICE GINSBURG: There are only three
20 possible choices.

21 MS. BURTON: We -- right. We know it came
22 from the D.A.'s office.

23 JUSTICE GINSBURG: And it -- and it
24 exists -- the paper exists. It says "Definite NO."

25 MS. BURTON: Correct. And I don't think

1 that is -- I don't think that was a ranking of jurors,
2 because when you look, they did score jurors throughout.

3 JUSTICE GINSBURG: But there were five
4 African-American jurors --

5 MS. BURTON: Correct.

6 JUSTICE GINSBURG: -- on the definite --
7 well, one of them was Garrett -- this -- as was pointed
8 out. They said, if we have to have one, let it be
9 Garrett. But Garrett then shows up on the definite no
10 list.

11 MS. BURTON: Correct. And --

12 JUSTICE SOTOMAYOR: Were we told that the
13 only three people who did the investigation on Batson
14 were the two prosecutors on the case and Mr. Lundy? So
15 if Mr. Lundy says I didn't make that list, it has to be
16 one of the two prosecutors.

17 MS. BURTON: It has to be one of the two
18 prosecutors, and one was not there on the day it was
19 struck -- the jury was struck; only Mr. Lanier was. But
20 if that's not Mr. Lanier's thought process of this
21 definite -- this definite no list -- and I don't see
22 that that gets you to clear error in the striking of
23 Mr. Hood or Ms. Garrett.

24 JUSTICE GINSBURG: What do you do with
25 other -- I mean, it just -- it seems an out-and-out

1 false statement. The reason that's given -- one of the
2 reasons for Garrett's being struck is that her cousin
3 was arrested. But then the prosecutor doesn't know that
4 at the time of the voir dire. He doesn't know until
5 after the voir dire that the cousin was arrested. So
6 how could it possibly be a reason at the time of the
7 voir dire?

8 MS. BURTON: And I don't think the record
9 bears that out. These notes -- the highlighted notes
10 that Petitioner wants to say, these were used during
11 voir dire, these were using during the strikes, in those
12 notes -- and this is at Joint Appendix page 256 --
13 Angela is written out beside Ms. Garrett's name. In
14 Mr. Lundy's notes where he said he wrote down things he
15 knew prior to the strikes, prior to voir dire of what he
16 knew about individual jurors, he wrote down as to
17 Marilyn Garrett, Angela Garrett is a cousin. So -- and
18 then, Mr. Lanier testified --

19 JUSTICE SOTOMAYOR: Didn't the habeas
20 court --

21 JUSTICE ALITO: Did Mr. Lanier testify --

22 CHIEF JUSTICE ROBERTS: Justice.

23 JUSTICE SOTOMAYOR: -- provide an excuse and
24 say -- I'm sorry.

25 CHIEF JUSTICE ROBERTS: No, you.

1 JUSTICE SOTOMAYOR: Didn't the habeas court
2 accept that he didn't know at the time of trial, but he
3 just knew that Lundy didn't want her?

4 MS. BURTON: The -- what the -- the habeas
5 court actually credited the fact that Mr. Lundy had
6 advised trial counsel that Angela Garrett should be
7 struck.

8 JUSTICE SOTOMAYOR: But that was his
9 explanation for why the prosecutor didn't know about the
10 prior arrest, correct?

11 MS. BURTON: No, I think the -- I think the
12 State habeas court credited that as one of the facts of
13 the strike.

14 JUSTICE SOTOMAYOR: That Mr. Lundy didn't
15 want her.

16 MS. BURTON: Excuse me, I --

17 JUSTICE SOTOMAYOR: That Mr. Lundy didn't
18 want her. He never credited or never said that he knew
19 this -- that he knew about the arrest.

20 MS. BURTON: Mr. -- actually, Mr. Lanier
21 testified twice, though, that he was aware at the time
22 of jury selection that he knew about --

23 JUSTICE SOTOMAYOR: Mr. Lundy did, but the
24 prosecutor didn't.

25 MS. BURTON: Well, no. In the motion for a

1 new trial that Mr. Lanier -- the prosecutor testified
2 and said, I knew during voir dire; Mr. Lundy told me
3 that. That's at Joint Appendix 105 and 112, that he
4 knew --

5 JUSTICE ALITO: Well, didn't he also
6 testify -- this is on 14 of the reply brief -- it has
7 come to our attention since the trial of this case that
8 Angela Garrett was arrested?

9 MS. BURTON: It says on -- on that page of
10 the -- on that part of the transcript, which I -- I
11 cannot explain to you in -- in contrast to in the notes,
12 it is noted that she is the cousin prior to the jury
13 selection, unless that means -- and I've read it several
14 times -- since that time she's been dismissed from her
15 job. Again, it's unclear as --

16 JUSTICE ALITO: What about the -- what about
17 the giving a reason for dismissing her that she was
18 close in age to the defendant?

19 MS. BURTON: When -- and the --

20 JUSTICE ALITO: She was in her 30s. He was
21 18 or 19.

22 MS. BURTON: And when he initially
23 strikes -- when Mr. Lanier initially explains his
24 strikes, he does state her age, so he is not trying to
25 say she's 23. He states her age as 34. And throughout,

1 the overall theme was, we don't want younger jurors.
2 We're looking for older jurors closer to the age of the
3 victim, age 79.

4 So I think -- you know, maybe -- I know it's
5 not -- not the most articulate framing of it, but I
6 think it's more of a generational, she was younger. And
7 that, the age, I don't think was a make-or-break factor.
8 Working at Head Start with underprivileged children, a
9 make-or-break factor; a similarly situated white juror
10 also struck for that same purpose.

11 JUSTICE KAGAN: But -- but Ms. Burton, I
12 mean, wouldn't you agree, in a lot of these Batson
13 cases, you'll have purported justifications, which they
14 could support a valid peremptory strike, right? But
15 that the question for a court is, well, but did they
16 support this valid peremptory strike? In other words,
17 what was the prosecutor thinking? Batson is a rule
18 about purposeful discrimination, about intent.

19 And so it doesn't really matter that there
20 might have been a bunch of valid reasons out there, if
21 the -- if it was clear that the prosecutor was thinking
22 about race.

23 You agree with that, right?

24 MS. BURTON: I think if his intent was to
25 strike based on race.

1 JUSTICE KAGAN: Yes, if his intent was to
2 strike based on race, it doesn't matter that he could
3 have had a different intent that would have supported a
4 good peremptory strike. And so the question of whether,
5 you know, someone or other might have been properly
6 struck by -- by a prosecutor isn't really the question.
7 The question is on the total amount of evidence before
8 us, including all these prosecutors' notes, what was
9 going on with respect to each of these peremptory
10 strikes.

11 And then you have to deal with not just, oh,
12 it could have been this or it could have been that, but
13 you have to deal with all this information that what it
14 really was, was they wanted to get the black people off
15 the jury.

16 MS. BURTON: And -- and I don't think these
17 notes show that. What the notes show, again, with
18 Ms. Hood -- Mr. Hood and Ms. Garrett, they're
19 contemporaneous notes taken at the time of trial as to
20 each of these jurors, are the reasons they struck them.
21 I mean, there's no derogatory comments within those
22 notes.

23 JUSTICE SCALIA: Where -- where there are,
24 you know, other reasons that are plausible but could be
25 phony, surely it's the -- it's the judge that hears the

1 testimony who's best able to judge whether asserted
2 reasons are phony reasons or not; isn't that right?

3 MS. BURTON: Yes, Your Honor. And -- and I
4 don't believe that --

5 JUSTICE SCALIA: It's sort of hard for us to
6 do it on a cold record.

7 JUSTICE KAGAN: Well, but that's --

8 JUSTICE SCALIA: I mean, it's harder. It's
9 harder, not impossible, but harder.

10 JUSTICE KAGAN: And Justice Scalia raises,
11 of -- of course, a good point in the mine run of cases,
12 but not in a case where all the evidence of intentional
13 discrimination was not before the judge at the time.

14 MS. BURTON: And -- and again, I don't think
15 there's -- I don't think there's clear error here on
16 these notes of racial discrimination. Their strikes are
17 sound as to Mr. Hood. You would not want Mr. Hood on
18 the jury regardless of his race, based on his reasons.
19 The what -- reason that he gives a laundry list, like I
20 said, may well have been because we're in 1987, and
21 you're just putting out everything you can because
22 you're not exactly sure what you're supposed to do.

23 Well --

24 JUSTICE GINSBURG: Why weren't the notes
25 turned over earlier?

1 MS. BURTON: The -- the notes were not
2 turned over earlier, although it was brought up in the
3 motion for a new trial in November, right after the
4 trial in 1987. And the prosecutor, Mr. Lanier, says, I
5 will -- said, I will give my notes to the court to look
6 at en banc if defense counsel will do the same.

7 Defense counsel chose not to do so. That
8 issue was raised on appeal to the Georgia Supreme Court,
9 direct appeal. The Georgia court -- Georgia court found
10 it was work product; it didn't have to be turned over.

11 When we got to State habeas proceedings,
12 they found an open records request under Georgia law.
13 And they were immediately turned over. I -- I don't
14 think there was any argument about it at that point.

15 JUSTICE SOTOMAYOR: What did they do with
16 the failure to ask Ms. Garrett any questions about the
17 issues that troubled the -- troubled, for example, her
18 cousin's arrest. There's an assumption that she has a
19 relationship with this cousin. I have cousins who I
20 know have been arrested, but I have no idea where
21 they're in jail. I hardly -- I don't know them. So --
22 but he didn't ask any questions. Doesn't that show
23 pretext? I don't -- I'm not going to inquire because
24 she might get off the hook on that.

25 MS. BURTON: Well, I think a number of

1 times -- and I know this Court's precedent on not asking
2 questions is particularly in voir dire as to people.
3 But as to a number of issues, I think when you're in
4 voir dire and you're asking questions, you don't
5 necessarily care what the answer is because with regard
6 to Mr. Hood, if he had said, yes, I have a son that's
7 been arrested, it's not going to bother me a bit that
8 you prosecuted my son.

9 JUSTICE SOTOMAYOR: Well, stealing hubcaps,
10 in my mind, is decidedly different than murdering people
11 or attacking them the way this case was -- this case was
12 about. I -- I can imagine a -- why can't you imagine a
13 father saying, it was stealing hubcaps --

14 MS. BURTON: And he --

15 JUSTICE SOTOMAYOR: -- he should have been
16 punished?

17 MS. BURTON: And he may well have, but it's
18 a risk I don't -- the prosecutor --

19 JUSTICE SOTOMAYOR: That's what the record
20 supports.

21 MS. BURTON: Well, it's a risk the
22 prosecutor didn't have to take. I -- if you have
23 somebody -- and, as I said, Mr. Hood could very well
24 have said that, very well have meant that, never have
25 been lying. But in my mind, I'm thinking, he's going to

1 get back there and he's going to think, oh, I don't know
2 about --

3 JUSTICE BREYER: I -- I want to ask you a
4 different question before your time is up. And I'd like
5 you to respond to the question that Justice Alito
6 initially asked.

7 MS. BURTON: Okay.

8 JUSTICE BREYER: And that is, is there an
9 independent State ground here? Now, you're familiar
10 with the record.

11 MS. BURTON: Yes.

12 JUSTICE BREYER: And I read on page 192 of
13 the -- of your record the decision. And the first
14 paragraph supports your -- the view that you would like
15 to hold, I think, that this is based upon res judicata,
16 which is a State matter.

17 And then there is the paragraph that was
18 read to you on page 195 and 196 where the judge says,
19 "The reason that I reach that conclusion is because the
20 notes and records submitted by Petitioner failed to
21 demonstrate purposeful discrimination on the basis that
22 the race was the basis." Okay? That sounds like Batson
23 to me.

24 And then he goes on to say, "And in addition
25 there is no good reason given, now or then."

1 And then he concludes, "Accordingly, the
2 court finds the renewed Batson claim is without merit."

3 So if I read just that paragraph, I would
4 think the reason that the judge found in your favor is
5 he decided the Batson claim in your favor. He didn't
6 have to. He could have gone on some other ground, but
7 that's the ground he did go on.

8 But at worst, why isn't it ambiguous? And
9 if it is ambiguous, then why don't we take, you know --
10 I think it's what's in the -- Long, you know, all those
11 cases. If it's ambiguous, then aren't we required to
12 assume that the judge went on the Federal ground? Okay?

13 Now, that's both Alito's question. It's
14 what I think is the hardest point for you to overcome.
15 And I want to hear your response.

16 MS. BURTON: I actually agree that it's
17 unclear. I think --

18 JUSTICE BREYER: Well, that's the end of it,
19 isn't it?

20 MS. BURTON: It is -- it is the end of it.
21 I think it's unclear.

22 The other -- one other issue --

23 JUSTICE ALITO: What do you think is Georgia
24 res judicata law?

25 MS. BURTON: I think res judicata in -- in

1 Georgia, if you have new facts or new evidence --

2 JUSTICE ALITO: The res judicata goes out
3 the window.

4 MS. BURTON: Then you -- then the court gets
5 to look at the issue and go beyond. And I think in this
6 case --

7 JUSTICE SOTOMAYOR: I'm sorry. I didn't
8 hear that. Then this Court?

9 MS. BURTON: In -- in -- in this case, once
10 you have new facts or new evidence, if the Court in this
11 case finds that they can review the evidence anew and a
12 new review is had, then I think you are beyond that bar.

13 JUSTICE SCALIA: I -- I don't understand
14 what you've just said. Say it again.

15 MS. BURTON: Okay.

16 (Laughter.)

17 MS. BURTON: If you have -- if the issue has
18 been decided on direct appeal and you cannot go back to
19 it -- a superior court obviously can't overturn the
20 State's highest court. But when you have new evidence,
21 such as in this case, and it is strong evidence, that
22 the court feels like it has to go -- it has to look at
23 that evidence -- and in this case it did -- then I think
24 you are beyond the res judicata bar.

25 JUSTICE KAGAN: Yes, I mean, I think that

1 that's exactly how the decision is framed, right?
2 Because the decision talks about claims that are not
3 reviewable due to res judicata. It lists many, many,
4 many claims, and then it lists a whole bunch of claims
5 that are procedurally defaulted. And then this is in a
6 separate section, the Batson issue, and it's in a
7 section that's with -- with all the other claims that
8 there are merits determinations being made about.

9 And the court is very clear, first sentence,
10 last sentence. First sentence: "The court finds the
11 prosecution did not violate Batson versus Kentucky."

12 Last sentence: "On the merits the person,
13 the" -- "the" -- "the Petitioner loses."

14 So --

15 MS. BURTON: As much as I would like it --

16 JUSTICE KAGAN: -- it is --

17 MS. BURTON: As much as I would like it to
18 be an adequate and independent State law ground, I'm not
19 sure I clearly have that here --

20 JUSTICE ALITO: What do you make of the
21 statement on 175, "As a preliminary matter, this court
22 notes that, as cited by the Respondent, the following
23 claims are not reviewable based on the doctrine of
24 res judicata"? And the first one it lists is the Batson
25 claim. Does that suggest maybe the court had two

1 reasons for what it did? It's barred by res judicata,
2 and it would fail even if it were not.

3 JUSTICE KAGAN: No. But that --

4 JUSTICE ALITO: Well, I'd like the -- I'd
5 like counsel's answer --

6 (Laughter.)

7 JUSTICE KAGAN: I'm sorry.

8 MS. BURTON: Yes, I think it -- if -- if
9 anything, it is an alternate ruling.

10 JUSTICE GINSBURG: But doesn't Georgia have
11 the rule -- Georgia, the supreme court has said, Georgia
12 law allows claims to be revisited on habeas when new
13 facts have developed since the time of the direct appeal
14 because a claim that is based on facts that did not
15 actually exist at the time of the direct appeal, which
16 is this case, is essentially a different claim. That's
17 what the Georgia Supreme Court said.

18 MS. BURTON: Yes.

19 JUSTICE GINSBURG: New facts is essentially
20 a different claim.

21 MS. BURTON: Yes, Your Honor.

22 JUSTICE GINSBURG: You may be right or wrong
23 as a matter of conclusion law, but that's the law of
24 Georgia.

25 MS. BURTON: That is the law.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MS. BURTON. Thank you.

3 Mr. Bright, you have two minutes remaining.

4 REBUTTAL ARGUMENT OF STEPHEN B. BRIGHT

5 ON BEHALF OF THE PETITIONER

6 MR. BRIGHT: Thank you. Very quickly, let
7 me first say that with regard to what Justice Alito
8 quoted that it's just come to our attention since the
9 trial of the case that Ms. Garrett cousin was arrested.
10 That was on May the 1st. That was after the death
11 verdict had been returned in this case.

12 Secondly, if you look at the Joint Appendix
13 on page 56 and 57 where they give the reasons for
14 striking Ms. Garrett, there is no mention of her cousin
15 whatsoever in there. That's the time when she should
16 have been mentioned, after the strikes were made. And
17 yet there is no mention of that at all.

18 So I don't think there's any way -- and then
19 six months later, there is a motion for new trial, and
20 now the prosecution is adding new reasons that it didn't
21 give at the Batson hearing.

22 It's saying she was a social worker. She
23 wasn't a social worker. It's saying her cousin was
24 arrested. They didn't know that at the time they struck
25 the jury. They said she's low income, taking another

1 thing out of United States v. Cartlidge. But you can't
2 add reasons on into perpetuity. The reasons are the
3 reasons articulated in -- in Miller-El, and the
4 prosecutor has got to stand or fall on the reasons.

5 With regard to the questions, I -- I just
6 want to make one quick point on that because there's not
7 much time. But with regard to Ms. Garrett and Martha
8 Duncan, who were both teachers aides, who were at
9 schools that were literally right in the same
10 neighborhood -- Ms. Duncan had kindergarten students;
11 Ms. Garrett was Head Start -- no questions: What kind
12 of children do you have, Ms. Duncan?

13 I mean, Ms. Duncan, if you look at the --
14 they also said familiarity with the neighborhood.
15 Ms. Garrett lived, like, 18 or 20 miles away.
16 Ms. Duncan lived 200 -- her -- her school was 250 yards
17 away, and she lived a half-mile from the school.

18 Both of them answered that they weren't
19 familiar with the area where the victim lived. Now then
20 some more questions after those answers would have
21 provided a difference. But instead, Ms. Garrett is
22 treated as a liar, and Ms. Duncan is accepted and
23 actually serves as a juror in this case.

24 And there are other examples, with Mr. Hood
25 particularly, with regard to the child. If you had

1 asked: What about your child who was arrested? He was
2 put on probation -- he was -- \$180 of -- can I have just
3 a second? -- \$180 restitution, and he went off to the --
4 this is in the record -- went off to the Navy, served
5 his country honorably, got an honorable discharge, and
6 came back. That --

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.

9 (Whereupon, at 11:05 a.m., the case in the
10 above-entitled matter was submitted.)

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