

**IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA**

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

**SUPPLEMENT TO MOTION FOR NEW TRIAL REGARDING
THE PROSECUTORS' JURY SELECTION NOTES**

The prosecutors at Johnny Gates's 1977 capital trial used peremptory strikes to exclude all four black prospective jurors. Gates, a black man, was then convicted of the rape and murder of a white woman by an all-white jury.

Newly discovered evidence establishes that the prosecutors' jury strikes in Gates's case were the product of systematic race discrimination. Last month, this Court ordered the State to disclose the prosecutors' jury selection notes from Gates's trial, as well as from other capital trials involving black defendants in Muscogee County in the late 1970s. The notes reveal that the prosecutors:

- (1) labeled the white prospective jurors as "W" and the black prospective jurors as "N";
- (2) singled out the black prospective jurors by marking dots in the margins next to their names;
- (3) identified one white prospective juror as a "top juror" because he "has to deal with 150 to 200 of these people that works for his construction co.";

- (4) described black prospective jurors as “slow,” “old + ignorant,” “cocky,” “con artist,” “hostile,” and “fat”;
- (5) tallied the race of the final jurors selected to serve, with twelve marks in the white column and no marks in the black column; and
- (6) ranked black prospective jurors as “1” on a scale of 1 to 5 without any further explanation.

These notes do not stand alone. There were two prosecutors at Gates’s trial: Douglas Pullen and William Smith. Pullen was involved in five capital trials involving black defendants between 1975 and 1979. The prosecution struck 27 of 27 black prospective jurors across the five cases. Smith was involved in four capital trials involving black defendants in that same period. In three of the four, the prosecutors struck all of the black prospective jurors. In the fourth, they used 10 strikes to exclude black prospective jurors; however, an all-white jury was impossible because the final pool of prospective jurors had more black citizens than the prosecution had strikes.

The newly discovered notes and the pattern of strikes across cases establish systematic race discrimination. Therefore, Gates is entitled to a new trial.

BACKGROUND

Gates has been incarcerated for the past 41 years based on his 1977 trial. He received the death penalty initially but was later resentenced to life in prison without parole.

In 2016, the United States Supreme Court held in Foster v. Chatman that Douglas Pullen, the same prosecutor from Gates's trial, engaged in race discrimination when he struck all four black prospective jurors in a capital case involving a black defendant in Rome, Georgia. 136 S. Ct. 1737 (2016). Pullen and his co-counsel claimed that they struck the black prospective jurors in Foster for race-neutral reasons. However, their notes showed that they had marked the black prospective jurors as "B," highlighted the names of the black prospective jurors on their jury lists, and circled the race of the black prospective jurors on their juror questionnaires. As the Supreme Court explained, "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." Foster, 136 S. Ct. at 1755. Foster was granted a new trial.

After the Supreme Court's decision in Foster, Gates raised a claim in his Extraordinary Motion for New Trial that the prosecution engaged in systematic race discrimination in jury selection in his case, as well as in other capital cases involving black defendants in Muscogee County in the 1970s. Gates requested that the State produce its jury selection notes from his trial and others. The State refused. However, this Court issued an order requiring production. Pursuant to that order, the State produced its jury selection notes from Gates's case and four others on March 2, 2018. The notes are attached to this pleading as Appendix A.

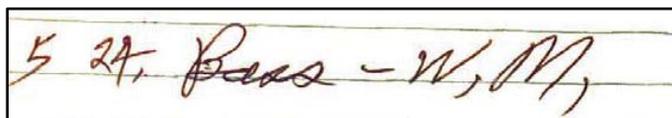
ARGUMENT

I. The Prosecutors' Jury Selection Notes Reflect Systematic Race Discrimination.

The newly discovered notes demonstrate the prosecutors' practice of race discrimination in jury selection in the late 1970s. The notes reflect the following:

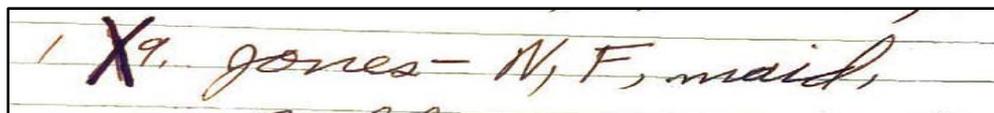
First, in Gates's case, the prosecutors labeled the prospective jurors by race.

The white prospective jurors are labeled as "W":

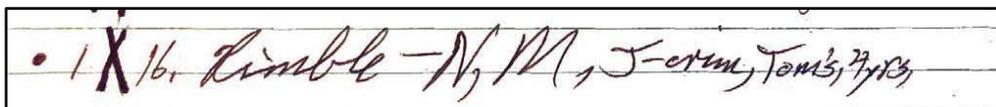


5 2A. Bass - W, M,

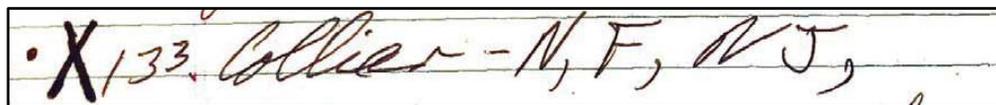
The black prospective jurors are labeled as "N":



1 X9. Jones - N, F, maid,



• 1 X16. Limble - N, M, J-crim, Tom's, 7, 13,



• X133. Collier - N, F, NJ,

This race label is the first note written about each prospective juror, immediately to the right of the jurors' names. In the other cases for which the State produced notes, the prosecutors similarly labeled black prospective jurors with either "N" or "B." These labels were used by multiple prosecutors, across multiple cases.

Second, the prosecutors singled out black prospective jurors by marking dots in the margins next to their names:

1 • 11) Annie S. Hargrove, BF N.S. - Teacher MS.D.
Spec Ed + Eng. Hastile

• COLLIER, Mattie P.

1 • 10. Buckner - N, F,

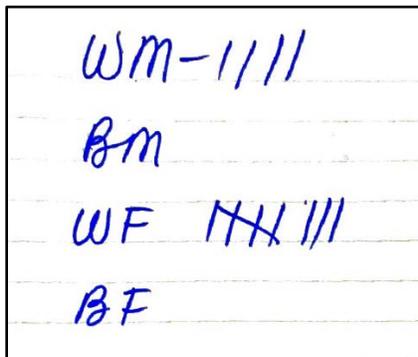
The prosecutors marked dots only for black prospective jurors. As with the “N” and “B” notations, this practice was used by multiple prosecutors and across multiple cases, including in Gates’s case.

Third, in the notes from a case involving a 16-year-old black defendant accused of killing a white victim, one prosecutor wrote that a white prospective juror would be a “top juror” because he “has to deal with 150 to 200 of these people that works for his construction co.”:

W/M good
Hatched
Born + raised with C.B. and will
a top juror. B.O. He has to deal with
150 to 200 of these people that works
for his construction Co. B.O.

Fourth, the prosecutors described black prospective jurors as “slow,” “old + ignorant,” “cocky,” “hostile,” “con artist,” and “fat.”

Fifth, in one case, the prosecutors tallied the race of the final jurors selected to serve, with twelve marks in the white column and no marks in the black column:



Handwritten notes on lined paper showing a tally of juror races:

WM	-	
BM		
WF	 	
BF		

Sixth, the prosecutors routinely ranked black prospective jurors as “1” on a scale of 1 to 5 without any further explanation. In Gates’s case, the prosecutors ranked all four black prospective jurors as “1.” In contrast, they ranked only one of the 43 white prospective jurors as “1,” and they provided a specific explanation for that ranking: the prospective juror was opposed to the death penalty.

Taken together, the notes demonstrate a purposeful and deliberate strategy to exclude black citizens and obtain all-white juries.

II. The Discriminatory Intent Reflected in the Notes Is Confirmed by the Prosecutors’ Strikes Across Cases.

The prosecutors’ strikes across cases confirm the discrimination. Records indicate that from 1975 to 1979, the State brought seven capital cases against black

defendants in Muscogee County and struck a total of 41 black prospective jurors.

In six of the seven cases, including in Gates’s case, the prosecutors removed every black prospective juror to secure all-white juries. In the seventh case, an all-white jury was impossible because the pool of prospective jurors had more black citizens than the prosecutors had strikes.

Pullen was involved in five of the seven cases. In those five cases, the prosecution struck 27 of the 27 black prospective jurors who were qualified to serve. The following chart reflects the strikes in the cases involving Pullen:

Case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Joseph Mulligan	42	8	4	4	0
Jerome Bowden	45	11	8	8	0
Johnny Lee Gates	47	12	4	4	0
Jimmy Lee Graves	46	11	4	4	0
William Spicer Lewis	42	10	7	7	0

Smith was involved in four of the seven cases. The following chart reflects the prosecution's strikes in the cases involving Smith:

Case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Johnny Lee Gates	47	12	4	4	0
William Brooks	46	11	4	4	0
William Spicer Lewis	42	10	7	7	0
William Henry Hance	37	11	13	10	2

Together, the prosecutors struck 41 black prospective jurors across the seven cases. The probability that they exercised those strikes without considering race is 0.00000000000000000000000000000004. See Affidavit of Dr. Michael Lacey (filed in this Court on February 21, 2018).

The Constitution prohibits systematic race discrimination in jury selection, as it did at the time of Gates's trial. Swain v. Alabama, 380 U.S. 202 (1965); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). The discrimination in this case is

undeniable in light of the newly discovered notes, the prosecutors' strikes across cases, and Pullen's history of "a concerted effort to keep black prospective jurors off the jury." Foster, 136 S. Ct. at 1755. Gates respectfully requests that this Court grant his Extraordinary Motion for New Trial pursuant to Swain, Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980), Georgia Code § 5-5-41, the Georgia Constitution, the United States Constitution, and corresponding case law.

Respectfully submitted,

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Filed by /s/ Patrick Mulvaney

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Date: March 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Supplement to Motion for New Trial Regarding the Prosecutors' Jury Selection Notes was served via email and by U.S. Mail, with adequate postage thereon, on opposing counsel at the below address on this 19th day of March, 2018.

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