POINTS AND AUTHORITIES

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Week Of	Topic	Guest	30 min
June 13, 2015	*Foster v. Chatman*: U.S. Supreme Court issues a decision on *Batson* claims	Santa Clara County Deputy DA Jeff Rubin	Bias

This week's P&A discusses the United States Supreme Court decision in *Foster v. Chatman* (May 23, 2016) __ S.Ct. __ [2016 WL 2945233].

The defendant's 1987 trial, in which he was convicted and sentenced to death, was held four months after *Batson v. Kentucky* (1986) 476 U.S. 79 was decided. The prosecution used four of its nine peremptory challenges to strike all four black potential jurors. The Supreme Court concluded the prosecutors were motivated in part by race when they struck two of those potential jurors. "Two peremptory strikes on the basis of race are two more than the Constitution allows." (*Foster*, *supra*, at p.*18.)

At the conclusion of this P&A handout, we discuss the takeaways of the *Foster* decision, with guest Jeff Rubin offering his responses on two concerns that have been raised by this decision: a) Should prosecutors refrain from taking any notes on the race or ethnicity of jurors, and b) Can the defense demand to see prosecutors' jury selection notes.

I. General Background

a. The 79-year-old victim had been beaten, sexually assaulted, and strangled to death. Her home had been burglarized. The defendant Foster subsequently confessed to killing the victim, and the victim's possessions were recovered from Foster's home and his sister's home. (*Foster*, *supra*, at p.*4.)

b. The United States Supreme Court explained the jury selection process in this case: "In the first phase, each prospective juror completed a detailed questionnaire, which the prosecution and defense

reviewed. The trial court then conducted a juror-by-juror voir dire of approximately 90 prospective jurors. Throughout this process, both parties had the opportunity to question the prospective jurors and lodge challenges for cause. This first phase whittled the list down to 42 'qualified' prospective jurors. Five were black." (p.*4.)

c. In the second phase, known as the "striking of the jury," both parties had the opportunity to exercise peremptory strikes against the array of qualified jurors. Pursuant to Georgia law, the prosecution had ten such strikes; Foster twenty. In a procedure quite different from the California system, the process worked as follows: "The clerk of the court called the qualified prospective jurors one by one, and the State had the option to exercise one of its peremptory strikes. If the State declined to strike a particular prospective juror, Foster then had the opportunity to do so. If neither party exercised a peremptory strike, the prospective juror was selected for service. This second phase continued until 12 jurors had been accepted." (p.*4.)

d. On the morning when the second phase began, one of the five qualified black prospective jurors alerted the court that she had just learned that a close friend was related to Foster, and this juror was removed for cause. Four black prospective jurors were left. The prosecutors removed all four black prospective jurors. Foster's *Batson* challenge was denied. (p.*4.)

e. The jury convicted Foster. Following sentencing, Foster renewed his *Batson* claim in a motion for a new trial. After an evidentiary hearing, the motion was denied. The Georgia Supreme Court affirmed the conviction and the United States Supreme Court denied cert. Foster then sought a writ of habeas corpus in the superior court, again pressing his *Batson* claim. After considering the evidence, the state habeas court denied relief. The Georgia Supreme Court declined to issue the certificate of probable cause necessary under Georgia law for Foster to pursue an appeal, determining that Foster's claim had no arguable merit. The United States Supreme Court granted review, reversed the order of the Georgia Supreme Court and remanded for further proceedings. (pp.*3, 4.)

II. Information Obtained by the Defense for its *Batson* challenge

a. While the state habeas proceeding was pending, Foster filed a series of requests under the Georgia Open Records Act, seeking access to the prosecution's file from the 1987 trial. In response, the prosecution disclosed documents related to the jury selection at the trial. Over the prosecution's objections, the state habeas court admitted those documents into evidence. (p. *5.)

b. The United States Supreme Court described the documents obtained by Foster from the prosecution as follows:

(i) Four copies of the jury venire list: On each copy, the names of the black prospective jurors were highlighted in bright green. A legend in the upper right corner of the lists indicated that the green highlighting "represents Blacks." The letter "B" also appeared next to each black prospective juror's name. According to the testimony of Clayton Lundy, an investigator who assisted the prosecution

during jury selection, these highlighted venire lists were circulated in the district attorney's office during jury selection. That allowed "everybody in the office" -- approximately "10 to 12 people," including secretaries, investigators, and prosecutors -- to look at them, share information, and contribute thoughts on whether the prosecution should strike a particular juror. Lundy testified that the documents were returned to District Attorney Lanier before jury selection. (p.*5.) [Jeff Rubin points out in his P&A presentation that the case was tried in Floyd County, Georgia. Its largest city, Rome, had only 35,000 people as of the 2015 census, and the population was likely far smaller in 1987 when the case was tried. As Jeff explains, it was likely not unusual for people in the DA's Office to have personal knowledge about many of the jurors.]

(ii) A draft of an affidavit that had been prepared by Investigator Lundy "at [District Attorney] Lanier's request" for submission to the state trial court in response to Foster's motion for a new trial: The typed draft detailed Lundy's views on ten black prospective jurors. Under the name of one of those jurors, Lundy had written: "If it comes down to having to pick one of the black jurors, [this one] might be okay. This is solely my opinion. . . . Upon picking of the jury after listening to all of the jurors we had to pick, if we had to pick a black juror I recommend that [this juror] be one of the jurors." Lundy's text had been crossed out by hand; the version of the affidavit filed with the trial court did not contain the crossed-out language. Lundy testified that he "guessed" the redactions had been done by District Attorney Lanier. (p.*5.)

(ii) Three handwritten notes on three black prospective juror: The three jurors were identified as "B # 1," "B# 2," and "B# 3." Lundy testified that these were examples of the type of "notes that the team -- the State would take down during voir dire to help select the jury in Mr. Foster's case." (p.*6.)

(iv) A typed list of the qualified jurors remaining after voir dire: The list included "Ns" next to ten jurors' names, which Lundy told the state habeas court "signified the ten jurors that the State had strikes for during jury selection." Such an "N" appeared alongside the names of all five qualified black prospective jurors. The file also included a handwritten version of the same list, with the same markings. Lundy testified that he was unsure who had prepared or marked the two lists. (p.*6.)

(v) A handwritten document titled "definite NO's," listing six names: The first five names were those of the five qualified black prospective jurors. The prosecution conceded that either District Attorney Lanier or Assistant District Attorney Pullen compiled the list, which Lundy testified was "used for preparation in jury selection." (p.*6.)

(vi) A handwritten document titled "Church of Christ": A notation on the document read: "NO. No Black Church." (p.*6.)

(vii) The questionnaires that had been completed by several of the black prospective jurors: On each one, the juror's response indicating his or her race had been circled. (p.*6.)

c. District Attorney Lanier and Deputy District Attorney Pullman submitted affidavits stating that neither of them made the highlighted marks on the jury venire list. Neither prosecutor testified at the habeas proceeding. (p.*6.)

d. The United States Supreme Court had this to say about its review of the contents of the prosecution's file obtained by Foster under the Georgia Open Records Act: "The State concedes that the prosecutors themselves authored some documents (admitting that one of the two prosecutors must have written the list titled 'definite NO's), and Lundy's testimony strongly suggests that the prosecutors viewed others, (noting that the highlighted jury venire lists were returned to Lanier prior to jury selection). There are, however, genuine questions that remain about the provenance of other documents. Nothing in the record, for example, identifies the author of the notes that listed three black prospective jurors as 'B# 1,' 'B# 2,' and 'B# 3.' Such notes, then, are not necessarily attributable directly to the prosecutors themselves. The state habeas court was cognizant of those limitations, but nevertheless admitted the file into evidence, reserving 'a determination as to what weight the Court is going to put on any of them' in light of the objections urged by the State." (p.*9, internal record citations omitted.)

The Supreme Court stated further, "We agree with that approach. Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.' (citation omitted.) As we have said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.' (citation omitted.) At a minimum, we are comfortable that all documents in the file were authored by someone in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value." (p.*10.)

III. Foster's Challenge

The Supreme Court pointed out that Foster centered his claim on the strikes of two black prospective jurors. Jeff Rubin provided the following written summary of how the prosecutor's stated reasons for challenging these jurors were contradicted by the various prosecutorial notes obtained by the defense:[1]

"For example, the prosecutor in *Foster* told the trial court that one of the black jurors challenged was only struck when a peremptory challenge opened up due to an unexpected event resulting in the excusal of another juror for cause. The prosecutor explained that the juror was listed in his notes as "questionable" along with another white juror and then provided reasons why the "questionable" white juror was just a better fit in comparison. (*Id*. at p. *11.) However, the High Court found, based on the prosecution notes, that "the predicate for the State's account—that [the juror] was "listed" by the prosecution as "questionable," making that strike a last-minute race-neutral decision—was false." (*Id*. at p. *12.) Rather, the juror in question was one of ten listed jurors (the first five of whom listed were black) that the prosecutor intended to strike in advance who were definite "NO's." (*Ibid*.) "Only in the number six position did a white prospective juror appear, and she had informed the court during

[1] This summary is contained in Jeff Rubin's *Inquisitive Prosecutor's Guide* (IPG), June 10, 2016, "*Batson-Wheeler* Outline." Much thanks to Jeff for allowing us to include it.

voir dire that she could not "say positively" that she could impose the death penalty even if the evidence warranted it." (*Ibid*.) The court rejected the prosecution argument that this contradiction was explainable as the prosecutor misspeaking, noting that the statement regarding the questionability of the jurors were "not some off-the-cuff remark; it was an intricate story expounded by the prosecution in writing, laid out over three single-spaced pages in a brief filed with the trial court." (*Ibid*.) The court observed that several of prosecutor's reasons for why he chose to strike the black juror over the other questionable white juror were also contradicted by the record: although the prosecutor said he struck the black juror because "the defense did not ask her questions about" three different trial issues, the transcripts revealed that the defense asked her several questions on all three topics. (*Ibid*.) Moreover, other explanations given (such as the fact that the black juror was divorced, young, and arguably lied about not being familiar with the neighborhood because she went to high school near the neighborhood of the crime) while not explicitly contradicted by the record, are difficult to credit because the State accepted 3 of 4 white jurors who were divorced, accepted eight white jurors who were under 36 (the black juror was 34 years old), and a white juror who lived and worked near the neighborhood of the crime. (*Id*. at pp. *12,13.) The High Court highlighted that it was "not faced with a single isolated misrepresentation." (*Id.* at p. *13.)

Another reason the Supreme Court disbelieved the prosecutor's reasons were genuine was the fact the prosecutor's statement of the primary reasons for challenging the second black juror shifted over time. At the pre-trial *Batson* motion, the prosecutor initially provided eight reasons for challenging the juror but strongly indicated he was only concerned about was the fact the juror had an 18 years old son, which is about the same age as the defendant. But at the subsequent motion for a new trial, the prosecutor told that trial court his paramount concern was the second black juror's membership in the Church of Christ. The prosecutor claimed the "bottom line" was the juror's affiliation with the Church of Christ, a church which does not take a formal stand against the death penalty but whose members "are very, very reluctant to vote for the death penalty." (*Id*. at p.*14.)

The High Court recognized that the prosecutor may have simply misspoke in one of these two proceedings. However, the Court then noted that if that were the case, at least one of the two purportedly principal justifications for the strike would withstand closer scrutiny - and neither did. As to the claim of a concern about the age of the juror's son, the prosecutor did not accept the second black juror who stated the defendant's age would not be a factor in sentencing "whatsoever," but accepted white jurors with sons close in age to the defendant, including a juror who stated the defendant's age would "probably" be a factor in sentencing. (*Id*. at p. *14.) The prosecution sought to explain this away by noting that, unlike the white jurors, the son of the second black juror had been convicted of "basically the same thing that this defendant is charged with." (*Id*. at p. *15.) The High Court said equating the crime committed by the son of the second black juror (stealing hubcaps from a car in a mall parking lot five years earlier for which the son received a 12 month suspended sentence) with defendant's crime (a capital murder of a 79–year–old widow after a brutal sexual assault) was "nonsense" and so implausible that it actually supported the conclusion that the focus on the second juror's son was pretextual. (*Id*. at p. *15.) As to the claim the second black juror was struck because of his affiliation with the Church of Christ, the juror asserted no fewer than four times during voir dire that he could impose the death penalty and while the prosecution argued it challenged several white jurors on the same basis (i.e., for belonging to that same denomination), the record showed these

other jurors were actually challenged for cause for different reasons. In addition, the handwritten notes from the prosecution's file stated that the Church of Christ did not take a stand on the death penalty, leaving it to individual members but the notes then stated: "NO. NO Black Church." (*Id*. at p. *16.)

Many of the other justifications provided for challenging this second black juror "similarly come undone when subjected to scrutiny. The prosecution stated this juror "appeared to be confused and slow in responding to questions concerning his views on the death penalty" but the juror unequivocally voiced his willingness to impose the death penalty, the way the question was asked was confusing in general (according to the trial court) and a white juror who showed similar confusion served on the jury. (*Id*. at pp. *16-17.) The prosecution stated it struck the second black juror because his wife worked at a hospital that dealt a lot with mentally disturbed and mentally ill people but expressed no such concerns about white juror who had worked at the same hospital. (*Id*. at p. *17.) And the prosecution stated the second black juror was struck because the defense didn't ask the juror questions about the age of the defendant, his feelings about criminal responsibility involved in "insanity" or "publicity"; but such questions were asked by the defense. (*Ibid*.)

In sum, the difference in treatment of the black jurors and white jurors with similar characteristics, coupled with "the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file" left the Foster Court "with the firm conviction that the strikes . . . were 'motivated in substantial part by discriminatory intent.'" (*Id*. at p. *18.)" [Inquisitive Prosecutor's Guide, pp. 94-96.]

IV. The Supreme Court's Conclusion

a. The Supreme Court sternly rebuked the prosecution in this *Foster* case. It noted that throughout all stages of the litigation, the State had strenuously objected that race was not a factor in its jury selection strategy. "Indeed, at times the State has been downright indignant." (p.*17.) But the Supreme Court stated that the contents of the prosecution's file "plainly belied" the State's claim that it exercised its strikes in a color-blind manner. (p.*18.)

b. The Supreme Court said the "sheer number of references to race" in the prosecutor's file was "arresting." Nevertheless, the State contended that its focus on black jurors did not indicate an attempt to exclude them from jury. The State claimed, instead, that since *Batson* had just come down only months before Foster's trial, the State was unsure of what sort of showing might be required of them and wanted to be prepared. Therefore, in the State's words, the State wanted to be " 'thoughtful and non-discriminatory in [its] consideration of black prospective jurors [and] to develop and maintain detailed information on those prospective jurors in order to properly defend against any suggestion that decisions regarding [its] selections were pretextual.' " (p.*18.)

c. The Supreme Court said the State's argument " 'reeks of afterthought,' " noting that this argument had "never before been made in the nearly 30–year history of this litigation: not in the trial court, not in the state habeas court, and not even in the State's brief in opposition to Foster's petition for certiorari." (p.*18.)

d. The Supreme Court, summarizing the focus on race in the prosecution's file, said this focus demonstrated a concerted effort to keep blacks off the jury. The information contained in the prosecution's file undercut the prosecution's claim that it was actively seeking a black juror.

V. Takeaways

1. As a result of the *Foster* decision, should prosecutors refrain from taking notes on the race or ethnicity of jurors?

As Jeff explains, such a conclusion would be an erroneous take-away from *Foster*. The *Foster* court did *not* dispute that identifying jurors by race would be proper if done for the purpose of responding to a *Batson-Wheeler* motion, either at the time the challenge is made, or years later at a *Batson-Wheeler* remand hearing. As explained above, the Supreme Court in *Foster* rejected the State's belated argument that the prosecutors' notes were made for such a legitimate purpose. It did not find credible this claim, which had never before been asserted. The Supreme Court instead concluded that the notes reflected a concerted effort to keep blacks off the jury.

In *People v. Lenix* (2008) 44 Cal.4th 602, the California Supreme Court emphasized that "post-*Batson*, recording the race of each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a *Batson* challenge." (*Id*. at p. 617, fn. 2.)

Indeed, it is impossible to make a comparative juror analysis without a full record of the race, gender, ethnicity of each juror.

A suggestion from Jeff: As to the identification of the juror's race, gender or ethnicity, the prosecutor can make a notation in his or her file that such identifying factors were recorded solely for the purpose of responding to a *Batson-Wheeler* motion, or put that information on the record if necessary.

Additionally, the following comments are taken from Jeff's IPG:

Make notes of the reasons for choosing or not choosing each juror, including the juror's demeanor, attitude, and other intangibles - not just those who seem like they might be adverse to the prosecution. This is especially important when the judge allows limited or no voir dire and the notes will help the judge see beneath superficial similarities between jurors who were kept and those whom the prosecutor challenged. As mentioned in *Gonzalez v. Brown* (9th Cir. 2009) 585 F.3d 1202, "[i]t is obviously a desirable and correct practice for a prosecutor to have notes of reasons for a peremptory strike if a challenge is raised requiring a race-neutral explanation at step two of *Batson*." (*Brown* at p. 1209, fn. 5.) Keep such notes as they may save a prosecution down the road if a prosecutor needs to refresh his or her recollection if the prosecutor at a post-conviction proceeding. (See *Shirley v. Yates* (9th Cir. 2015) 807 F.3d 1090, 1105, fn. 16.) [IPG, p. 15.]

2. Does the *Foster* decision signal that the defense can demand to see the prosecution's jury selection notes?

Jeff advises that this concern is probably overblown. In California, the government is entitled to assert the work-product privilege to prevent the disclosure of these types of notes from public records request. Whether such an objection to the request was made in *Foster* and/or whether a court ruled that the privilege was overcome by the need for the notes is not discussed in the *Foster* opinion. But, in California, if the defense makes a public record request for such notes, the privilege should be asserted. California Government Code Section 6254, subdivision (k) exempts from release records the disclosure of which is prohibited by provisions of the Evidence Code relating to privilege.

Also, an argument should be raised that if it such records somehow constitute "discovery," the request is barred by Penal Code section 1054. However, hopefully, in most cases, the information in the notes will be beneficial to the prosecution – in other words – we would not want to assert the privilege and if we did assert the privilege, unless there was evidence supporting a claim of discriminatory prosecution, a court reviewing the documents in camera should not release the notes to the defense.

3. When a prosecutor mischaracterizes what the juror has said or proffers a reason for excusing a juror that is contradicted by the record or lacks support in the record, will these mistakes be used in assessing discriminatory intent?

As *Foster* demonstrates, reasons given by the prosecutor that are not borne out by the record or that are contradicted by the record can be viewed as evidence of pretext. On the other hand, just because a mistake has been made in recollecting what a juror said does not mean the attorney is being pretextual or acting with discriminatory purpose. See the Inquisitive Prosecutor Guide discussion at pages 91-100, for a fuller discussion of this issue, and citations to cases therein.

- Jeff Rubin's IPG is available on the CDAA website. Or you can contact Jeff at jrubin@da.sccgov.org
- Prosecutors in the Alameda County District Attorney's Office can email Mary Pat for a link to the IPG.

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