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**	[redacted]	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.)

[redacted]

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.)

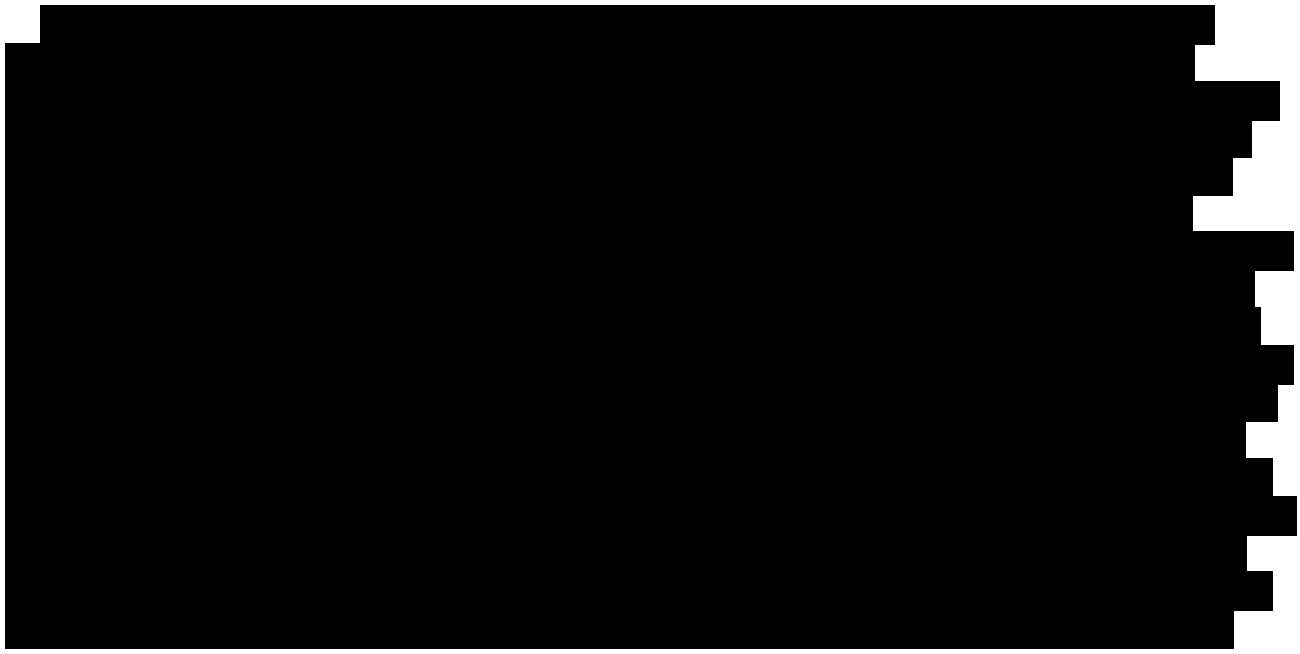
The Supreme Court stated further, "We agree with that approach. Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed 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. [redacted]

[redacted]

[redacted]



[redacted]

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.

[redacted]