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Timothy Foster got justice, but prosecutors still have wide leeway to exclude black jurors.

By Kami Chavis

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The Supreme Court Building in Washington, DC. (AP Photo / Jacquelyn Martin)

In 1986, an all-white jury in Georgia convicted Timothy Foster, an African-American man, for the rape and murder of an elderly white woman and sentenced him to death. On Monday, in *Foster v. Chatman*, the Supreme Court held 7-1 that Foster’s prosecutors illegally excluded jurors on the basis of race when they used their peremptory challenges to remove all of the potential black jurors. The ruling sparked some optimism for new options in challenging racial bias in death sentences. But while the Court has certainly corrected an injustice for Foster, many criminal-justice practitioners know that the decision will have virtually no impact on discriminatory jury selection in the United States.

Lawyers are allowed a number of opportunities to strike jurors without "cause," but the Constitution prohibits attorneys from using race or gender as the basis for these peremptory strikes. Decades after Foster's trial, his lawyers discovered that during jury selection, the prosecutors in his case made notations about the race of several potential jurors, by writing the letter "b" alongside their names and placing these jurors in a category labeled "definite no's." The prosecutors also highlighted certain jurors' names in green, which indicated a black juror, according to a legend the prosecutors used. Ultimately, the prosecutors used their peremptory strikes to exclude every potential black juror. Chief Justice John Roberts, writing for the majority, concluded that, "The focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."

The Court's ruling in *Foster v. Chatman* represents a victory for the defendant. Although his conviction was not vacated, the case will be remanded to the Georgia State Court, where Timothy Foster can now argue for a new trial that is (hopefully) not infused with the blatant racial discrimination that occurred during his first trial. But in short, this case represents a victory for only those defendants whose prosecuting attorneys use clumsy codes and highlighters—the ones whose discrimination is easily detected and preserved in the files. This is primarily because the *Foster* case, like other jury-selection cases, did not address the severe infirmities of the seminal 1986 case, *Batson v. Kentucky*, that set forth the current scheme for raising challenges to constitutionally impermissible uses of peremptory strikes.

To see the limits of the *Foster* holding, it is necessary to understand a few basic facts about jury selection and the challenges a defendant faces in proving a successful claim under *Batson*. In jury trials, lawyers for the prosecution and the defense are allowed to challenge jurors for cause. The "cause" for removal is likely familiar to anyone who's been considered for a jury: reasons such as a prospective jurors' relationship with one of the parties or lawyers, or the jurors' statements that they are unable to follow established law when hearing a case. But lawyers for the prosecution and defense may also use peremptory challenges to strike jurors. These peremptory strikes, as the name indicates, normally require no explanation.

Perhaps one side wants to exclude jurors with certain political beliefs because they believe these jurors may not be helpful to their side. One way to discern these political beliefs may be based on the reading material a potential juror brings to court, or maybe the lawyer discerns something about the juror because the juror is not reading at all while waiting for questions. The lawyers could use peremptory strikes for these people without articulating any reason, and they have wide latitude to do so. Peremptory challenges, however, may not be used in a constitutionally impermissible manner—which means that jurors cannot be excluded based on race or gender.

In *Batson*, the Court announced a burden-shifting process to determine whether racial discrimination has occurred. For example, if a defendant believes that the prosecution has used its peremptory strikes in a discriminatory manner, they may make a "*Batson*" motion

asserting that the prosecutor removed jurors based on race. Next, the prosecutor may put forth “race neutral” reasons for such strikes. After hearing these reasons, the trial judge is tasked with deciding whether the defense lawyers demonstrated that the prosecutors intended to discriminate, despite the assertion of their race neutral reasons for striking the jurors.

Despite *Batson’s* laudable pronouncement against racial discrimination and the process it set forth to ferret out discrimination, the limitations of the *Batson* scheme are obvious. At best, this scheme tolerates implicit bias in jury selection, because it is so easy to develop race-neutral reasons; at worst, the *Batson* scheme encourages prosecutors to develop race-neutral reasons as a pretext to shroud discriminatory intent. In his dissent in *Batson*, Justice Thurgood Marshall warned, “If such easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds,” this could ultimately render any constitutional protections the Court sought to provide as “illusory.” In the years following *Batson*, lower courts have critiqued the opinion on this very point.

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The potential systemic nature of racial discrimination in jury selection is even nore disturbing than an individual prosecutor’s exploitation of the weakness of the *Batson* scheme. Individual prosecutors need not possess the creativity to develop their own race-neutral reasons. Litigation in this area, such as in North Carolina, has uncovered myriad examples of *training* materials from local prosecutor offices nationwide that conveniently list justifications prosecutors could use to circumvent the strictures of *Batson.* Equally disturbing are the instances where prosecutors historically were directed to exclude racial minorities from juries. For example, in a 2005 Supreme Court case, in which the court held that jurors were impermissibly excluded on the basis of race, the record includes testimony and documents demonstrating that Dallas County prosecutors were clearly discouraged from allowing minorities to serve on juries.

Unfortunately, like other progeny of *Batson,* the *Foster* opinion is of little import to those defendants who are without the smoking-gun documents that finally became available to Timothy Foster’s defense team. Even though the prosecutors in the *Foster* case listed race-neutral reasons for their strikes, one of the prosecutors actually jotted a note that said, “If it comes down to having to pick one of the black jurors, [this one] might be okay.” Perhaps the most salient lesson the *Foster* ruling offers for future prosecutors wishing to exclude jurors based on race is to simply keep a mental note of the juror’s race rather than a tangible document that could be discoverable by the defense.

Indeed, if it has not been clear until now, prosecutors familiar with *Foster v. Chatman* will be reluctant to write or otherwise articulate the role that race plays in their jury-selection decisions. This does not mean that impermissible racial discrimination is not happening, it

simply means that the defendant cannot prove it.

Numerous studies indicate that black jurors are struck more often than white jurors. For example, a study of 300 felony jury trials in Caddo parish between 2003 and 2012 shows that prosecutors used peremptory strikes against 46 percent of black jurors, while they used peremptory strikes against 15 percent of other jurors. Researchers at Michigan State University examined 173 death penalty proceedings in North Carolina and documented that prosecutors struck 52.6 percent of the eligible black jurors, and only 25.7 percent of all other eligible jurors. Amnesty International has documented similar phenomena nationwide. Similarly, Ron Wright, Dr. Gregory Parks, and I (all professors at the Wake Forest University School of Law) have conducted a study of all non-capital felony trials in North Carolina from 2011 and 2012. After reviewing data on 22,000 potential jurors, our preliminary findings indicate that prosecutors strike non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck 16 percent of non-white potential jurors, while they struck only 8 percent of white potential jurors.

A 2010 report from the Equal Justice Initiative studied jury selection in eight Southern states and found that racial discrimination in jury selection persisted after *Batson.* This same study highlighted that there was evidence that prosecutors' offices explicitly trained prosecutors to exclude racial minorities, and that prosecutors who discriminated faced no consequences.

There are several solutions that could reduce racial discrimination in jury selection. Some experts, including Supreme Court Justice Stephen Breyer, have advocated eliminating peremptory strikes. Allowing only strikes for cause might be an effective remedy for racial discrimination, but like any effective remedy, there are likely to be side effects. There are some very good, and constitutionally acceptable, reasons to allow peremptory strikes in order to empanel a jury with characteristics that might be favorable to either side in a criminal case, and disallowing peremptory strikes might disadvantage defendants and the prosecution alike.

But there must be greater oversight and accountability of prosecutors, who are the most powerful players in the criminal-justice system, given the unchecked power they wield to charge and prosecute individuals. Instead of training prosecutors to circumvent *Batson*, there should be greater emphasis on training prosecutors to avoid racial bias at each stage of the criminal-justice system. Just as we encourage police officers not to fall victim to the blue wall of silence and to blow the whistle on wrongdoers within their ranks, prosecutors should be called on to do the same.

In addition to addressing overt discrimination, we must recognize the role that implicit bias plays in the criminal-justice system and accept that prosecutors are not immune from it. Just as there have been calls for police officers to be screened for bias before hiring, and to receive diversity training, prosecutor should be subject to the same scrutiny during the hiring process and should undergo training.

Furthermore, transparency about the rate at which prosecutors use their peremptory strikes should be tracked and made publicly available. It is doubtful that many prosecutors' offices keep such records, and without this knowledge, it is difficult to for supervisors to intervene. It is human nature that people behave better when they know others are watching and that they will be held accountable. The clerk of the court could cheaply and easily record and post this information for public scrutiny.

Finally, and perhaps most importantly, when a court determines that a prosecutor has engaged in constitutionally impermissible strikes of jurors, that prosecutor should face swift and sure discipline from the state bar and their office, just as other lawyers do when they commit ethical violations. Our justice system is, in part, premised upon the theory that punishing an individual wrongdoer will prevent not only that individual from committing future wrongs, but will deter others from committing similar wrongs. Surely, this principle must hold for prosecutors who engage in purposeful racial discrimination, and thus should not enjoy immunity for such abuses.

As Justice Roberts noted in *Foster*, "Two peremptory strikes on the basis of race are two more than the Constitution allows." Timothy Foster deserves a new trial, but eradicating the pernicious practice of racial discrimination in jury selection will require bolder reforms and innovative solutions to address not only the overt discrimination demonstrated in his trial, but also the implicit discrimination that has an equally detrimental impact upon the constitutional rights of excluded jurors and defendants alike.