FOSTER V. CHATMAN: CLARIFYING THE *BATSON* TEST FOR DISCRIMINATORY PEREMPTORY STRIKES

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INTRODUCTION

Peremptory challenges have existed since the early days of the common law.[1] Many believe that peremptory challenges help prosecutors ensure fair and impartial juries.[2] Prosecutors often, however, use peremptory strikes for discriminatory purposes. The Supreme Court introduced a test in *Batson v. Kentucky*[3] to evaluate whether peremptory strikes used on potential jurors were based on racial discrimination. Implementing the ambiguous *Batson* test has proven extremely difficult. Social scientists have found that prosecutors still commonly use race as a factor in selecting juries, and black jurors remain underrepresented relative to their proportion of the population in many jurisdictions,[4] which suggests the *Batson* test has failed to effectuate its purpose.

The question presented in *Foster v. Chatman*[5] is whether the state habeas court erred when it held that the prosecution's use of peremptory strikes was not a violation of the *Batson* test. According

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1. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 639 (1991) (O'Connor, J., dissenting) (describing the common law heritage of peremptory challenges).

2. Swain v. Alabama, 380 U.S. 202, 218–19 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

3. 476 U.S. 79 (1986).

4. *See, e.g.*, Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012) (finding *Batson* is under-enforced in North Carolina); David C. Baldus, et. al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001) (finding both prosecutors and defense attorneys commonly use racially-motivated peremptory strikes in Philadelphia capital murder cases).

5. NO. 14-8349 (U.S. Nov. 2, 2015).

to the habeas court, new evidence uncovered by Foster failed to show that the trial court committed clear error when the trial court accepted the race-neutral reasons the prosecution offered for striking *all* potential black jurors from Foster's trial jury. Cases like Foster's are far from unique. While the Court has found *Batson* violations in several instances, state trial and appellate courts rarely rule in favor of a *Batson* challenge.[6]

This Commentary argues the Court in *Foster v. Chatman* should rule that prosecutorial strikes constitute race discrimination prohibited by *Batson*. The prosecutorial notes presented by Foster show strong evidence of discrimination against black potential jurors, circumstances closely similar to those in *Miller-El v. Dretke*,[7] in which the Court accepted a *Batson* challenge. Ruling in favor of the State would prevent *Batson* relief in the very situation the test was designed to remedy. Additionally, such a ruling would prevent the Court from refining the *Batson* test in order to halt courts from automatically accepting any race-neutral explanation presented by prosecutors.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 1986, Petitioner Timothy Foster broke into the home of 79-year-old Queen Madge White.[8] He broke her jaw with a fireplace log and sexually molested her with a salad dressing bottle.[9] Finally, Foster strangled White to death and took several items from White's home before he left.[10] The next morning, White's sister found the body, which was covered in a blanket to her neck and coated with talcum powder.[11] A month later, Foster was arrested.[12] While searching Foster's home, police recovered several of White's possessions.[13] During an interrogation following his arrest, Foster confessed to White's murder.[14]

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6. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* at 13–27 (Aug. 2010), http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.

7. Miller-El v. Dretke, 545 U.S. 231 (2005).

8. Brief of Respondent at 3, Foster v. Chatman, No. 14-8349 (U.S. Sept. 8, 2015) [hereinafter Brief of Respondent].

9. *Id*.

10. *Id*.

11. Foster v. State, 374 S.E.2d, 188, 190 (Ga. 1988).

12. *Id*. at 736 n.1.

13. *Id*. at 736.

14. *Id*.

Four months prior to the start of jury selection for Foster's trial, the defense sought to prevent the prosecution from using peremptory challenges to exclude black prospective jurors and to require the prosecution to provide an explanation for any decision to strike a black prospective juror.[15] The pool of jurors for Foster's trial consisted of ninety-five prospective jurors, ten of whom were black.[16] Each prospective juror filled out a questionnaire and underwent individual voir dire,[17] and after that process, forty-two prospective jurors remained.[18] The prosecution used four of its ten peremptory strikes to remove the four qualified black prospective jurors. The result was an all-white jury.[19] The prosecution had highlighted all of the black prospective jurors in green, and identified the black jurors with a "B."[20] Furthermore, the qualified black prospective jurors were listed first in the prosecution's "Definite NO" column—meaning that they were at the very top of the list to be excluded.[21] Nevertheless, the prosecution claimed that race was not a factor in striking the black prospective jurors, and provided a list of eight to twelve race-neutral reasons for each strike.[22]

The jury convicted Foster of malice murder and burglary and sentenced him to death.[23] Foster issued an appeal to the Georgia Supreme Court, which affirmed his conviction, finding that the strikes were "sufficiently neutral and legitimate."[24] Foster filed a petition for writ of habeas corpus with the Superior Court of Butts County, Georgia in 1989, claiming that he had an intellectual disability that rendered him ineligible for the death penalty under Georgia law.[25] In 1999, the Superior Court of Floyd County, Georgia held a trial to assess Foster's intellectual state.[26] The jury determined that Foster did not meet the standard for exclusion, and the habeas case resumed in Butts County.[27] In 2006, Foster's counsel obtained the prosecution's

15. Brief of Respondent, *supra* note 8, at 4–5.
16. Brief of Petitioner at 4–5, Foster v. Chatman, No. 14-8349 (U.S. July 24, 2015) [hereinafter Brief of Petitioner].
17. *Id*. at 5.
18. *Id*.
19. Brief of Petitioner, *supra* note 16, at 2.
20. *Id*. at 3.
21. *Id*.
22. *Id*. at 2–3.
23. *Id*. at 736.
24. Brief of Petitioner, *supra* note 15, at 12–13 (citation omitted).
25. *Id*. at 13.
26. *Id*.
27. *Id*.

jury selection notes from Foster's 1987 trial.[28] It was then that Foster discovered that the prospective black jurors had been earmarked by race.[29] However, the Superior Court of Butts County, which acted as Foster's habeas court, denied relief in 2013. The habeas court found that Foster's *Batson* claim lacked merit because he failed to show discrimination.[30] Foster issued an application for a certificate of probable cause to appeal with the Georgia Supreme Court, which was denied on November 3, 2014.[31] The United States Supreme Court granted certiorari on May 26, 2015[32] to review Foster's racial discrimination claim under the *Batson* test.[33]

II. LEGAL BACKGROUND

In *Batson v. Kentucky*, the Supreme Court held that, while prosecutors are entitled to peremptory challenges, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[34] In his opinion, Justice Powell illustrated that the Court has long protected defendants from prosecutors purposefully removing members of the defendant's race from the jury pool.[35] According to the court, "[p]urposeful racial discrimination in the selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[36] While prosecutors are generally allowed to use peremptory strikes for any reason, the Court in *Batson* recognized that the Equal Protection Clause places "some limits on the State's exercise of peremptory challenges."[37]

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28. *Id*. at 14.
29. *See id*. at 14–19 (describing the notes Foster received from the prosecution).
30. Brief of Respondent, *supra* note 8, at 10.
31. *Id*.
32. Brief of Petitioner, *supra* note 16, at 1.
33. *Id.* at i.
34. *Id*. at 80.
35. *Id*. at 84–85. *See also* Strauder v. Virginia, 100 U.S. 303, 304 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that excluding black jurors violated a black defendant's rights); Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986) (stating that denying blacks participation on juries was a violation of the Equal Protection Clause).
36. *Batson*, 476 U.S. at 86.
37. *Id*. at 91.

In *Batson* and its progeny, the Supreme Court has laid out a three-step process to establish that prosecutors unlawfully discriminated in issuing their peremptory strikes.[38] First, the defendant must make out a prima facie case of racial discrimination involving peremptory strikes.[39] Second, the prosecution will present a race-neutral explanation for its actions.[40] Third, the trial court will consider the evidence presented and decide whether it finds evidence proving intentional racial discrimination.[41]

In the first step of a *Batson* challenge, the defendant needs to demonstrate membership in a certain racial group and establish that the prosecutor used peremptory strikes to remove prospective jurors belonging to that racial group.[42] Additionally, the defendant must present facts from which the court could infer the prosecutor discriminated to exclude prospective jurors on account of their race.[43]

The second step of a *Batson* analysis begins once the defendant shows racial discrimination.[44] It is then up to the prosecution to come forward with a neutral explanation for striking members of the defendant's race.[45] As peremptory strikes can be made for any reason that is not racially discriminatory,[46] the prosecution's reasoning "does not demand an explanation that is persuasive or even plausible"[47] as long as there is no racially discriminatory intent.[48] However, "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis . . . . [P]retextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have shown up as false."[49]

Finally, if the prosecutor fails to present a racially neutral explanation for striking the prospective jurors, the trial court has the duty of determining if the racial discrimination was intentional.[50] The

38. *See, e.g.*, Purkett v. Elem, 514 U.S. 765, 767 (1995) (explaining the *Batson* three-part test).
39. *Id*.
40. *Id*.
41. *Id*.
42. Batson v. Kentucky, 476 U.S. 79, 96 (1986).
43. *Id*.
44. *Id*. at 97.
45. *Id*.
46. *Id*. at 79–80.
47. Purkett v. Elem, 514 U.S. 765, 768 (1995).
48. *Id*. (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion)).
49. Miller-El v. Dretke, 545 U.S. 231, 252 (2005).
50. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

trial court's "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."[51] The trial court's ruling is generally sustained on appeal unless it is clearly erroneous.[52]

III. HOLDING

The Supreme Court of Georgia determined that Foster's renewed *Batson v. Kentucky* claim was without merit.[53] The court therefore denied Foster's Application for Certificate of Probable Cause to appeal the denial of habeas corpus.[54]

Although Foster made several legal claims in his habeas corpus petition to the Superior Court of Butts County, only the *Batson* claim will be reviewed on this appeal.[55] The habeas court applied the three-step *Batson* analysis to Foster's claim.[56] As Foster's case reached the third and final step of *Batson* analysis, the court determined whether or not the prosecution's race-neutral reasons for striking black potential jurors "were a pretext for purposeful discrimination."[57]

After examining the record, the habeas court found that "all jurors in this case, regardless of race, were thoroughly investigated and considered before the State exercised its peremptory challenges."[58] The court leaned heavily on the testimony of the prosecutors,[59] and fully accepted the prosecution's explanation that the notes made about the prospective jurors were not intended to discriminate based on race.[60] The court also distinguished Foster's case from those he cited.[61]

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51. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

52. Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (citing Hernandez v. New York, 500 U.S. 352, 369 (1991) (plurality opinion)).

53. Order Denying Application for Certificate of Probable Cause to Appeal at 1, Foster v. Humphrey, No. S14E0771 (Ga. Nov. 3, 2014).

54. *Id*.

55. Order Denying Petitioner's Request for Habeas Relief at 14, Foster v. Humphrey, No. 1989-V-2275 (Ga. Super. Dec. 4, 2014).

56. *Id*. at 15.

57. *Id*.

58. *Id*. at 17.

59. *Id*. at 16–17.

60. *See id*. (accepting the investigator's explanation that his notes were meant to compile information about each juror in order to "help pick a fair jury").

61. *Id*. at 16 (describing that the court viewed the facts of Foster's case differently than those facts in *Miller-El v. Dretke* and *Adkinds v. Warden, Holman CF* because the race of *all* potential jurors was marked).

The Superior Court of Butts County determined that Foster failed to present evidence proving that the prosecutor purposefully discriminated in exercising its peremptory strikes.[62] Additionally, the court found that the State "offered evidence sufficient to rebut [Foster's] claim."[63] In making its decision, the court emphasized that both the trial court and the Georgia Supreme Court denied Foster's initial *Batson* claims.[64] Agreeing with the initial 1988 review of the Georgia Supreme Court, which stated that "the prosecutor's explanations were related to the case to be tried, and were clear and reasonably specific,"[65] the habeas court denied Foster's assertion of a *Batson* claim. In its denial of Foster's Application for Certificate of Probable Cause to appeal the denial of habeas corpus, the Georgia Supreme Court endorsed the reasoning of the habeas court.[66]

IV. ARGUMENTS

A. Foster's Arguments

Foster argues that the prosecution intentionally struck black prospective jurors to achieve an all-white jury.[67] According to Foster, "[t]he evidence of racial motive by the prosecution in this racially charged capital case is extensive and undeniable."[68] Thus, Foster argues that the State's actions are enough to meet the standard set by step three of the *Batson v. Kentucky* analysis.[69]

First, Foster argues that the prosecution displayed discriminatory intent in its evaluation of the jurors, as evidenced by a "sharp focus on the race of the prospective jurors."[70] Foster pointed to several pieces of evidence from which to infer racial motivation. For example, the names of the black prospective jurors were highlighted, their names were designated with a "B," and their race was circled on the jury questionnaires.[71] Furthermore, the prosecution *only* compiled a list of

62. *Id*. at 17.
63. *Id*.
64. *Id*.
65. *Id*.
66. *See* Order Denying Application for Certificate of Probable Cause to Appeal at 1, Foster v. Humphrey, No. S14E0771 (Ga. Nov. 3, 2014).
67. *See* Brief of Petitioner, *supra* note 16, at 26.
68. *Id*. at 21.
69. *See id*.
70. *Id*. at 26.
71. *Id*. at 26–27 (citing Joint Appendix at 253–76, Foster v. Chatman, No. 14-8349 (U.S. July 24, 2015)).

notes on black prospective jurors.[72] Foster presents the fact that not a single black juror was chosen to serve on the jury as the most glaring evidence of intentional racial discrimination.[73]

Second, Foster contends that the evidence discredits the reasons for striking the black prospective jurors proffered by the prosecution. According to Foster, the prosecution "exaggerated facts to make the black panelists seem problematic, gave reasons that also applied to white prospective jurors, and contradicted themselves and their own notes."[74] For example, one of the myriad reasons given for striking thirty-four-year-old Marilyn Garrett was her young age, but a white twenty-one-year-old, however, was allowed to serve on the jury.[75] Furthermore, Garrett's employment as an aide at a Head Start program was another reason presented to explain her strike.[76] According to the prosecution, Garrett was likely sympathetic to disadvantaged children, which was relevant as Foster had grown up poor.[77] Two white jurors, however, were selected because they were teachers, like the murder victim, and were thus viewed as likely to display sympathy towards the victim.[78] The prosecutors tried to justify this discrepancy by claiming that Garrett's position as a Head Start aide made her a social worker, not a teacher.[79]

Similarly, Foster argues that black prospective juror Eddie Hood was treated in a manner inconsistent with the treatment of white prospective jurors. For example, the prosecution phrased questions differently when questioning Hood than it did while questioning whites.[80] While Hood's membership in the Church of Christ was used to strike him, white Church of Christ members were not struck on the basis of their religion.[81] Foster also notes that the prosecution had "problems with the demeanor of all four [black] prospective jurors."[82]

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72. *Id*. at 27.
73. *See id*.
74. *Id*. at 28–29.
75. *Id*. at 32 (citations omitted).
76. *Id*. (citing Joint Appendix at 56, Foster v. Chatman, No. 14-8349 (U.S. July 24, 2015)).
77. *See id*. (citation omitted).
78. *Id*. at 33–34 (citation omitted).
79. *See id*.
80. *See id*. at 41 (citation omitted) (explaining that the prosecutors encouraged white prospective jurors to demonstrate their ability to be fair and impartial, but that the prosecutors gave no such encouragement to Hood).
81. *Id*. at 44–45 (citation omitted).
82. *Id*. at 37 (citing Joint Appendix at 51–53, 55, Foster v. Chatman, No. 14-8349 (U.S. July 24, 2015)).

Finally, Foster asserts that the Court should not give deference to the decision of the Georgia habeas court, as the habeas court relied on the rulings of the trial court and the Georgia Supreme Court.[83] Foster argues that the state habeas court should not have deferred to the holdings of the trial court and the Georgia Supreme Court because those courts did not have the new evidence of purposeful racial discrimination: the prosecution's notes.[84] Thus, Foster contends that the court "failed to give meaningful consideration to 'all relevant circumstances' as *Batson* requires."[85]

B. The State of Georgia's Arguments

The State of Georgia argues that the habeas court did not commit clear error when it rejected Foster's *Batson* claim.[86] According to the State, Foster failed to provide the habeas court with facts sufficient to overturn the findings of the Georgia Supreme Court and failed to prove discriminatory intent.[87] The State argues that the new documents presented by Foster are simply work product aiming to adequately document peremptory strikes in a manner that would beat Foster's inevitable *Batson* claim. Thus, the State contends that the new evidence still fails to meet the third step of a valid *Batson* claim.[88]

The State contends that the state habeas court committed no clear error in finding that Foster's new evidence failed to show that prosecutors used discriminatory intent in using their peremptory strikes.[89] In fact, the State argues that *none* of the new evidence shows any intent to discriminate.[90] It views the new evidence as flawed for two reasons. First, Foster's interpretation of the prosecution's notes was speculative, as the two prosecutors who handled Foster's jury trial were never called to the stand and interrogated.[91] In sworn affidavits before the state habeas court, Foster's trial prosecutors testified that their strikes were race-neutral.[92] For example, the State justifies the investigations the prosecution made into the backgrounds of each

83. *See id*. at 50–52.
84. *See id*. at 50.
85. *Id*. at 51 (quoting Miller-El v. Dretke, 545 U.S. 231, 240 (2005)).
86. *See* Brief of Respondent, *supra* note 8, at 16.
87. *Id*.
88. *See id*. at 18–19.
89. *See id*. at 19.
90. *See id*. at 20.
91. *Id*.
92. *Id*. at 23 (citing Joint Appendix at 168–71, Foster v. Chatman, No. 14-8349 (U.S. July 24, 2015)).

potential juror, explaining that "[it] sought to obtain all the information possible on all prospective jurors."[93] Additionally, a black investigator defended making notes on prospective jurors who he knew personally, and the prosecutor even argued that the State actually aimed to select a black juror.[94] Second, the State contends that, since Foster had filed several motions designed to prohibit discriminatory strikes prior to voir dire, the prosecution had ample non-discriminatory reasons for marking and highlighting the race of the black jurors.[95] The prosecution claims that it kept detailed information on each black prospective juror to defend against an inevitable *Batson* inquiry.[96]

The State also argues that portions of the new evidence actually corroborate the State's stated reasons for using its peremptory strikes against the black potential jurors.[97] Notes taken by the prosecution during voir dire mirror the reasons given during testimony for striking both Eddie Hood and Marilyn Garrett.[98] According to the State, the fact that these were "contemporaneous observations"[99] supports the legitimacy of the prosecution's presented reasoning behind striking them from the jury.

The State contends that the state habeas court committed no clear error in relying on the trial court's conclusion that the prosecutors' strikes were not pretextual because it accepted the prosecution's race-neutral reasons for exercising their peremptory strikes.[100] Thus, the State argues the habeas court's approval of the trial court's *Batson* analysis was proper.[101] Furthermore, the State argues that differences in the treatment of similarly situated white prospective jurors do not amount to an indication of a pretext.[102] The State maintains that, while black and white prospective jurors might share some similar characteristics, jurors are selected based on the sum of *all* of their characteristics,[103] so Foster's new evidence proves very little.[104] Thus,

93. *See id.* at 24.
94. *Id*. at 26 (citing Joint Appendix, *supra* note 74, at 99–100).
95. *See id*. at 20–21.
96. *See id*. at 22–23.
97. *See id*. at 29.
98. *Id*. at 29–32 (citing Joint Appendix, *supra* note 74, at 303–10).
99. *Id.* at 30.
100. *See id*. at 32.
101. *See id*. ("This was not error, let alone clear error.").
102. *See id*. at 33.
103. *See id*.
104. *Id*. at 57.

the State asks the Court to give deference to the factual finding of the habeas court, as it found no purposeful racial discrimination based upon the evidence presented by Foster.[105]

V. ANALYSIS

Foster v. Chatman hinges on whether or not the state habeas court erred when it found that the prosecution did not purposefully discriminate in issuing its peremptory strikes. Here, the Court should—and likely will—hold that the habeas court should have found that the prosecution purposefully and strategically used its peremptory strikes on the potential black jurors to produce an all-white jury.

Although the Supreme Court has rejected *Batson* challenges recently,[106] it should rule in Foster's favor here. The use of strikes against black prospective jurors in Foster's case has much in common with other successful *Batson* challenges, and in some ways is more egregious here. For example, the Supreme Court dealt with a case that mirrors Foster's closely in *Miller-El v. Dretke*.[107] In *Miller-El*, ninety-one percent of the eligible black jurors were struck by the prosecution, a fact which the Court considered to be a "disparity unlikely to have been produced by happenstance."[108] In Foster's case, *all* of the black jurors were struck.[109] Furthermore, the prosecution in *Miller-El* struck a black juror for giving a response similar to one given by a white juror chosen to serve on the jury.[110] In response, *Miller-El* stated that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination."[111] This suggests that the Court would view the discrepancies between the treatment of Marilyn Garrett, Eddie Hood, and white potential jurors

105. *See id*. at 57–58.

106. *See* Felkner v. Jackson, 562 U.S. 594, 598 (2011) (holding that the Ninth Circuit should not have struck the California Court of Appeal's reasonable upholding of a prosecutor's race-neutral explanations); Rice v. Collins, 546 U.S. 333, 341–42 (2006) (finding that the trial court correctly found that the prosecutor's strike based on one juror's demeanor did not constitute a *Batson* violation).

107. 545 U.S. 231 (2005).

108. *Id.* at 232.

109. Brief of Petitioner, *supra* note 16, at 5–6.

110. *Miller-El*, 545 U.S. at 232–33. ("Here, a black potential juror was excused for expressing apprehension about using the death penalty over life imprisonment. However, several white potential jurors who voiced similar opinions were chosen for service.").

111. *Id.* at 232.

by the prosecution in *Foster* as evidence of discrimination. Likewise, several courts have determined that "laundry lists" of race-neutral explanations for peremptory strikes are themselves evidence of discriminatory intent.[112] Here, the prosecution came up with a list of eight to twelve reasons[113] for striking each qualified black potential juror. Thus, the Court has yet another reason to rule in Foster's favor. Given the parallels between Foster's case and *Miller-El*, it is very unlikely that the Supreme Court will rule differently, especially since commentators believe that *Miller-El* did not succificently clarify the *Batson* test.

Foster provides an opportunity to fix issues with the *Batson* test. Since its inception, many have been critical of *Batson*'s effectiveness in preventing peremptory strikes.[114] Justice Thurgood Marshall was cynical about *Batson*'s potential effectiveness,[115] and Justice Breyer has expressed similar skepticism.[116] As Justice Marshall predicted, *Batson* has not become an effective weapon against discriminatory peremptory strikes. Typically, courts give extreme deference to the race-neutral explanations prosecutors give for exercising their strikes. It is rare for a trial court to grant a defendant's *Batson* claim,[117] and appellate courts are inconsistent in their handling of *Batson* claims.[118] In Southern jurisdictions, *Batson* claims almost always fail.[119] Notably, the Tennessee Supreme Court has *never* granted a *Batson* claim.[120] Widespread denial of *Batson* claims is not unique to the South. In a

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112. *See, e.g.*, Sheets v. State, 535 S.E.2d 312, 315 (Ga. Ct. App. 2000) (concluding that a "'laundry list' of reasons" was evidence of using a pretextual excuse to hide discriminatory purpose behind peremptory strike).

113. Brief of Petitioner, *supra* note 16, at 22 (citing Joint Appendix, *supra* note 74, at 41–57).

114. *See* Mimi Samuel, *Focus on* Batson*: Let the Cameras Roll*, 74 BROOK. L. REV. 95, 104 (2008); *see also* Baldus, et al., *supra* note 4, at 10 ("The United States Supreme Court decisions banning these practices appear to have had only a marginal impact."); Grosso & O'Brien, *supra* note 4, at 1533 ("Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place.").

115. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

116. Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring) ("The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge . . . . *Batson* embodies defects intrinsic to the task.").

117. *See, e.g.*, Samuel, *supra* note 114, at 95–96.

118. Equal Justice Initiative, *supra* note 6, at 19.

119. *Id.*

120. *Id.* at 20.

study of twenty-four capital cases asserting claims in Pennsylvania, not a single claim for *Batson* relief was granted by state appellate courts.[121] One commentator theorizes that frustration with this state of affairs motivated the Supreme Court to grant certiorari from the Georgia Supreme Court's summary denial of appeal.[122]

As blacks still remain underrepresented on Southern juries[123] and instances of improper peremptory strikes occur frequently,[124] it would not make sense for the Court to make it harder for defendants to successfully assert claims of racial discrimination in the jury selection process. The use of discriminatory peremptory strikes erodes trust in the judicial system and deprives both jurors and defendants of their constitutional rights. As Justice Blackmun wrote in *J.E.B. v. Alabama ex rel. T.B.*,[125] "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."[126]

The Court should raise the threshold prosecutors must meet to comply with *Batson*. Currently, the "race-neutral" bar is easily met by coming up with some pretextual excuse. While Justice Breyer and some scholars have promulgated the idea of getting rid of peremptory strikes entirely,[127] this is unlikely to happen, as peremptory strikes are still widely considered to be a valuable prosecutorial tool. Instead, the Supreme Court should issue a more refined, concrete way of handling a *Batson* analysis in its *Foster* opinion.

CONCLUSION

In *Foster v. Chatman*, the Court should rule that the prosecution acted with discriminatory intent when it used peremptory strikes

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121. Baldus, et al., *supra* note 4, at 123 (2001).

122. Rory Little, *As the 2015 Term opens: The Court's unusual Eighth Amendment focus*, SCOTUSBLOG, (Sep. 21, 2015), http://www.scotusblog.com/2015/09/as-the-2015-term-opens-the-courts-unusual-eighth-amendment-focus.

123. Equal Justice Initiative, *supra* note 6, at 42.

124. Grosso & O'Brien, *supra* note 4, at 1536 (2012) ("Anecdotal evidence suggests that race weighs heavily in decisions to exercise peremptory strikes—a conclusion bolstered by systematic research.").

125. 511 U.S. 127 (1994).

126. *Id*. at 140.

127. *See* Miller-El v. Dretke, 545 U.S. 231, 272 (2005) (Breyer, J., concurring) (arguing that the random jury selection system in the United Kingdom might be preferable to one with peremptory strikes); *see generally* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV 809 (1997).

against all of the qualified black potential jurors. As the facts of Foster's case closely mirror that of prior instances where the Court found discrimination, the Court will likely rule in favor of Foster. The Court's ruling should clarify the ambiguity that has surrounded *Batson* since its inception, finally ending the strong deference trial and appellate courts give to race-neutral reasons offered by prosecutors for their use of peremptory strikes.