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Larry D. Thompson

*University of Georgia School of Law, lthomps@uga.edu*

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The Opinion Pages | OP-ED CONTRIBUTOR

# How America Tolerates Racism in Jury Selection

By LARRY D. THOMPSON OCT. 30, 2015

On Monday, the Supreme Court will hear oral arguments in *Foster v. Chatman*, a case that challenges the all-too-common practice by which prosecutors deliberately exclude African-Americans from criminal juries.

The Supreme Court tried to outlaw this practice in 1986 through its landmark ruling in *Batson v. Kentucky*. But prosecutors routinely ignore that decision, excluding black jurors because of marital status, manner of dress, last names and other allegedly “race neutral” reasons.

This is problematic because interracial juries make fewer factual errors, deliberate longer and consider a wider variety of perspectives than all-white juries, according to several studies.

It’s time for the court to meaningfully enforce the ban on racial discrimination in jury selection.

In 2010, the Equal Justice Initiative, a nonprofit law firm, studied eight Southern states — Alabama, Arkansas, Florida, Georgia, Louisiana,

Mississippi, South Carolina and Tennessee — and found the problem to be rampant.

For example, from 2005 to 2009, prosecutors in Houston County, Ala., struck 80 percent of qualified black jurors from death penalty cases. Consequently, in a county that's 27 percent black, half of death penalty juries were all-white. The other half had one black citizen each.

Another study of death penalty trials in North Carolina shows that from 1990 to 2010, prosecutors excluded black jurors over twice as often as nonblack jurors.

An analysis of over 300 felony jury trials in Caddo Parish, La., from 2003 to 2012 found that of 8,318 qualified jurors, nearly half of black jurors were struck, compared with only 15 percent of nonblack jurors.

Clearly, Monday's case will have national implications.

About 30 years ago, a black man, Timothy Foster, went on trial for his life in Georgia. He was accused of killing an elderly white woman. During the jury selection process, the prosecutors struck all four potential black jurors. Then, they argued before the all-white jury for a death sentence to “deter other people out there in the projects.” They probably would have made a different argument if the jury had included at least one of the black citizens called to serve.

The jurors complied and sentenced Mr. Foster to death.

In at least six different ways, the prosecutors singled out eligible black jurors: Notes from the jury selection list show they marked their names with a “B” and highlighted them in green on four separate copies; circled the word “black” on their juror questionnaires; noted several as “B #1,” “B #2”; ranked potential black jurors against one another “in case it comes down to having to pick one of the black jurors”; and wrote “Definite NOs” on the list of priority

strikes, which had all four possible black jurors.

Although the prosecution has never admitted that race played a role in selecting a jury for Mr. Foster's trial, some of its "race-neutral" reasons for strikes were inaccurate and inconsistent.

For example, prosecutors struck a black juror for being a social worker — but she was a teacher's aide. Meanwhile, prosecutors accepted every white teacher and teacher's aide in the jury pool.

When the prosecutors asked a white juror and a black juror whether the defendant's age, which was close to that of their children, would be a factor in the sentence, the black juror said "none whatsoever" but was struck based on his son's age. The white juror answered "probably so" and was accepted.

Along with other former prosecutors, I joined a *friend-of-the-court* brief in support of Mr. Foster. We recognize, and refuse to condone, the blatant unconstitutionality of the prosecutorial misconduct in this case. Moreover, my own experience suggests that discrimination in jury selection is indeed a national problem, despite over a century of attempted legislative and judicial remedies.

In 1995, at a workshop hosted by North Carolina's district attorneys, the attendees were given a handout titled "Batson Justifications: Articulating Juror Negatives." It listed acceptable reasons for striking potential jurors, like body language, attitude and other factors, that the prosecution could present in the face of a Batson challenge. These vague explanations are virtually impossible for future courts to interpret as race-based, although they often are.

Mr. Foster's case offers a rare instance of extraordinary and well-documented misconduct. The prosecution's notes show purposeful racial discrimination in jury strikes. A judicial system that allows for obviously discriminatory jury selection is intolerable. If the court cannot establish discrimination in this case, then the lofty language of Batson rings hollow.

*Larry D. Thompson was the deputy United States attorney general from 2001 to 2003.*

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