

Supreme Court takes up racial discrimination in jury selection



As it considers the controversial case of a black teenager sentenced to death by an all-white jury, alleged racial prejudice at the heart of the US criminal justice system comes under scrutiny at the supreme court on Monday. USA TODAY

WASHINGTON — The original jury pool for Timothy Foster's 1987 murder trial in Rome, Ga., included 10 blacks among 95 potential jurors. During the selection process, prosecutors highlighted their names, circled the word "black" on their questionnaires and added handy notations such as "B#1" and "B#2."

After more than half the pool was excused for specific reasons, each side was allowed to make a set number of additional strikes — as long as it wasn't because of race or gender. On a sheet they labeled "definite NO's," prosecutors listed the five remaining black prospects on top, and they ranked them in case "it comes down to having to pick one of the black jurors."

Foster, who is black, was swiftly convicted of murdering an elderly white woman. At sentencing, the prosecutor urged the all-white jury to impose death in order to "deter other people out there in the projects" — where 90% of the residents were black.

In a case that would appear to have multiple smoking guns, Foster's conviction and death sentence will go on trial Monday at the Supreme Court — and so, too, the process by which judges consider claims of racial discrimination in jury selection.

The case is important on two levels. If the justices find that Foster's constitutional rights were violated and instruct that he be given a new trial, the ruling could impact the way prosecutors, defense attorneys and trial judges handle jury selection in the future. And because Foster received a death sentence, it could fuel concerns previously voiced by two justices that the death penalty itself may be unconstitutional — in this case because of racial bias.

In capital punishment cases, where jury selection can take almost as long as the trial itself, "the racial diversity of the jury is everything," says Stephen Bright, Foster's lawyer at the Southern Center for Human Rights.

Since the high court upheld a controversial form of lethal injection four months ago, eight executions have gone forward in five states — Texas, Missouri, Georgia, Virginia and Florida — and two more are scheduled this year. Dozens of others have been delayed, including all those previously scheduled in Arkansas, Ohio and Oklahoma — the state that won the case in June — because of continuing doubts about the method of execution.

Foster's case raises another concern about the death penalty: racial discrimination in its application and, in particular, in jury selection. Despite the Supreme Court's 1986 ruling in *Batson v. Kentucky* that said prosecutors cannot have jurors dismissed because of their race, civil rights groups contend the practice still exists today.

"I think the court is upset, and that's why they keep taking these cases, because it does persist," says Christina Swarns, director of litigation at the NAACP Legal Defense and Educational Fund. As a result, she says, "it undermines confidence in the outcomes that the jury actually produces."

A new study by the anti-death-penalty group Reprieve Australia showed that prosecutors in Caddo Parish, La., struck would-be jurors who were black three times as often as others. In 200 verdicts over a 10-year period ending in 2012, juries with fewer than three blacks did not acquit any defendants. When five or more blacks participated, the acquittal rate was 19%.

Another study in North Carolina in 2012 found blacks were twice as likely to be struck from juries by prosecutors. And in Houston County, Ala., from 2005-09, prosecutors removed 80% of blacks qualified for jury duty, producing juries with either one black or none at all.

Georgia officials accuse Foster's lawyers of acting on "unfounded speculation." Their Supreme Court brief argues that the prosecution's notes, which the defense gained through a public records request, are "perfectly consistent with conscientious, non-discriminatory prosecutors preparing to rebut a defense

challenge to the array of the jury and a pretrial *Batson* challenge to any black prospective juror that may be peremptorily struck."

Joshua Marquis, an Oregon prosecutor active with the National District Attorneys Association, says most prosecutors take the *Batson* process seriously and avoid jury strikes based on race, ethnicity and gender. Foster's case, he says, "is literally an artifact from a generation ago. The question is, does this reflect what's going on today in America's courtrooms? I really don't think that it does."

But E.G. "Gerry" Morris, president of the National Association of Criminal Defense Lawyers, says discrimination remains prevalent, particularly in the Deep South. "This case is certainly a blatant example of it," he says. "The fact that this occurred in a death penalty case just underscores the seriousness of it."

A brief submitted on Foster's behalf by a group of prominent former prosecutors says discrimination "goes both ways" — defense lawyers seek to strike white jurors disproportionately just as prosecutors go after black jurors.

Their recommendation? "This court should send a clear message that blatant race discrimination will not be tolerated in jury selection."

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