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Racism in the Courts: Six Tries, Multiple Errors, and He's Still Not Out!

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After spending more than ten years in jail without a formal sentence, Curtis Flowers now can point to another unenviable distinction – he's the first person in U.S. history subjected to six murder trials for the same crime.

Two of the five previous trials of this Mississippi man charged with the 1996 murder of four people in a rural town ended in jury deadlocks. State courts voided Flowers' three convictions, each time citing outrageous misconduct by prosecutors.

One instance of prosecutorial error in the tortured Flowers trial saga involved biased jury selection procedure so egregious that Mississippi's Supreme Court tagged it the worst case of "racial discrimination we have ever seen…" – an extraordinary declaration considering that state's history of over-the-top racism.

The fact that prosecutors flogged Flowers with racially bigoted jury selection practices exposes once again an oily injustice that has befouled court proceedings in the Gulf States and beyond for nearly two centuries.

The U.S. Supreme Court finally barred prosecutors from blatantly biased jury selection practices in its 1986 Batson ruling. However, "illegal racial discrimination in jury selection remains widespread" according to a recent report by the Equal Justice Initiative that examined practices in eight southern states.

Many blacks sit on death rows in those eight states stretching from Florida to Arkansas, convicted by all-white juries despite many of those capital convictions occurring in counties with majority black populations.

"Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives," the EJI report stated. The Montgomery, Ala. Based EJI provides legal representation to indigent defendants and prisoners who have been denied fair treatment in the legal system.

The all-white jury in that Flowers trial criticized by Mississippi's Supreme Court deliberated just a few hours, following six days of testimony, before issuing a guilty verdict and death sentence.

The prosecutor during that Flower's trial used all 15 of his peremptory challenges to exclude African-Americans.

That prosecutor, for example, rejected two black women for not strongly supporting the death penalty while he accepted two white women whose death penalty postures were "nearly indistinguishable" from the excluded blacks the
Mississippi high court determined in that 2007 ruling.

In that ruling the Mississippi Supreme Court warned prosecutors in that Deep South state that their persistence in "racially profiling jurors" would force that court to abolish the current jury selection system.

The EJI report, that included quotes from the Mississippi Supreme Court's 2007 Flowers case ruling, credited supreme courts in the studied states with overturning convictions tainted by discriminatory jury selection practices.

However, the report also criticized lower court judges in those states for blithely accepting specious explanations from prosecutors defending their exclusions as race-neutral lacking discriminatory intent.

A Louisiana judge allowed a prosecutor to exclude a black because that prosecutor felt the potential juror looked like a drug dealer while a South Carolina judge backed a prosecutor who proclaimed a potential black juror "shucked and jived" as he walked.

Arkansas judges permit exclusions by prosecutions based solely on information "known only to prosecutors which cannot be verified" independently the EJI report stated while a Georgia judge allowed prosecutors to bar an African-American because he had a son from an interracial marriage.

Perhaps more startling than judges' accepting thinly veiled bigotry from prosecutors is this alarming finding contained in EJI's report: Tennessee courts – state and federal – have never upheld a claim of racial discrimination during jury selection despite more than 100 criminal defendants, including death row inmates, having raised Batson claims.

This astonishing spectacle of Tennessee judges rejecting every Batson appeal reflects either an "indifference or unwillingness to address the issue" said EJI Executive Director Bryan A. Stevenson, in a recent interview.

Stevenson said jury selection bigotry by prosecutors persists due to failures of judges to sternly crack-down on this form of misconduct that violates both court rulings and professional conduct rules applicable to lawyers.

"This is illegal and unprofessional conduct that goes on but is seen as an issue meriting little attention and correction," Stevenson said citing the confounding element of most judges being ex-prosecutors. "If judges see their prosecutor colleagues doing this for decades, it's hard for them to render discipline."

While reports from EJI and other organizations on this issue rightly reference that 1986 US Supreme Court Batson ruling, Stevenson said that for blacks the issue of jury box fairness dates back to the post-Civil War Reconstruction Era.

"During Reconstruction blacks felt that jury service was important for their keeping land and their freedoms. The violent, racist overthrowing of Reconstruction included denying access to the judicial system," Stevenson said pointing to provisions in the federal 1875 Civil Rights Act barred excluding blacks from juries because of their race.

An 1879 assessment on the racist onslaught against Reconstruction delivered by Richard T. Greener, the first black graduate of Harvard, decried discrimination in the "jury box" as a critical component of wider deprivations rampant during that emerging apartheid era.

"District Attorneys appointed [by] known rebels…will not do their duty, hence, the Negro dares not look for justice in the courts," said Greener, the dean of Howard University's law school when he presented a research paper before the American Social Science Association.

The EJI report discussed how some district attorney's offices "explicitly train prosecutors" to exclude racial minorities.

The reported specifically cited an infamous videotaped training session instructing Philadelphia, Pa prosecutors on how to evade Batson requirements to achieve the exclusion of potential blacks.

The maker of that tape, Jack McMahon, now a prominent death penalty appellate attorney in Philadelphia, said that training tape reflected officially sanctioned procedure in Philly's DA's Office countering DA claims that McMahon's broke office policy with his instructions.

Recommendations in the EJI report for lessening discriminatory use of peremptory challenges during jury selection included penalizing prosecutors, better training and “thorough enforcement” of anti-discrimination laws.

Criticisms of discriminatory jury selection practices are not limited to the old Confederate South.

Earlier this year, criticisms about biased practices emerged in the bribery trial of Hartford, Conn Mayor Eddie Perez when the defense accused the prosecutor of trying to exclude persons of color, like striking a Hispanic bail bondsman by claiming that man was too closely associated with criminal defendants.

Curiously even some white defendants challenge their convictions by raising claims of discrimination in jury selection. Last month a white man on Alabama’s death row for killing a white raised the fact of his trial prosecutor excluding 11 blacks by contending those potential jurors didn’t appear to have the professional or social “sophistication” to comprehend technical DNA evidence in that trial.

In another jury discrimination twist, defense lawyers in police abuse cases involving white officers frequently seek to exclude African-Americans from juries.

The latest example involves no African-Americans sitting on the California jury currently hearing the case against the white Bay area transit officer charged with the fatal shooting of unarmed Oscar Grant on New Year’s Day 2009.

Blatant discrimination in jury selection corrodes the foundation of America’s sacrosanct right to a fair trial.

“What’s been appalling,” EJI’s Stevenson said. “Is that this has lasted so long.”

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