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FOR IMMEDIATE RELEASE - August 3, 2015

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Discrimination in Jury Selection Invalidates Georgia Death Penalty, Prosecutors Say

WASHINGTON, D.C. -- Eight prominent former trial prosecutors from some of the largest jurisdictions in the country are asking the U.S. Supreme Court to set aside the conviction of Timothy Foster, a Georgia death row inmate, because the prosecution in the case systematically excluded black prospective jurors from serving on the jury solely on the basis of their race.

"It should be self-evident that a prosecutor's fulfillment of his or her function depends not only on seeking a conviction but on upholding constitutional principles and maintaining the public's faith in the rule of law -- a charge in which there is no place for race discrimination. When prosecutors discriminate in the selection of jurors, they violate the Constitution and abdicate their responsibility to the public," the group of prosecutors wrote in a [friend-of-the-court brief](#) that was filed with the Supreme Court late Friday afternoon in support of Foster's appeal.

Foster, a poor, intellectually-limited black man, was sentenced to death in 1987 after being convicted of murdering an elderly white woman in Rome, Georgia. When Foster's trial counsel challenged the removal of all four of the black potential jurors from the jury pool, the prosecution provided a litany of "race-neutral" explanations for their dismissals. Nearly two decades later, under an open records request, Foster's lawyers finally obtained the prosecution's jury selection notes, which revealed a concerted effort to seat an all-white jury.

Just one year before Foster's initial trial, the Supreme Court found in a landmark case, *Batson v Kentucky*, that it is unconstitutional to dismiss a potential juror because of race.

The former state and federal prosecutors have a combined prosecution experience of more than 100 years, and have participated in the selection of thousands of juries. "The ban on race discrimination under *Batson* does not impair the pursuit of a conscientious prosecution, but only prevents abuse," they wrote.

In Foster's case, the prosecution put a "B" next to black prospective jurors' names, highlighted the

names of the potential black jurors on four different copies of the jury list, which were circulated in the prosecution's office, and circled the word "black" on multiple juror questionnaires. During jury selection, prosecutors rejected a 34-year-old black woman, alleging she was too near in age to the 19-year-old Foster, while accepting eight white prospective jurors who were age 35 or younger, including a white man who was just two years older than Foster and who ultimately served on the jury. They also struck a black prospective juror for the stated reason that his church opposed the death penalty, which the notes subsequently showed the prosecution knew to be false, even though the prospective juror repeatedly stated he could impose the death penalty.

"The prosecution's conduct in this case clearly violates *Batson's* rule," the former prosecutors argue, noting that if the Supreme Court "does not find purposeful discrimination on the facts of this case, then it will render *Batson* meaningless."

Former prosecutors signing the brief, which was organized by The Constitution Project, a nonpartisan legal watchdog group, include:

- Joseph diGenova, who served as United States Attorney for the District of Columbia from 1983 to 1988 and as an Assistant District Attorney in the District of Columbia from 1972 to 1975 and again from 1982 to 1983;
- Gil Garcetti was elected to two terms as the District Attorney for Los Angeles County, serving from 1992 to 2000, and having previously served as a trial prosecutor in the office for more than 20 years;
- Glenn F. Ivey, who was elected to two terms as the State's Attorney for Prince George's County, the second most populous county in Maryland, serving from 2003 to 2011;
- Robert M. A. Johnson, who was the elected County Attorney for Anoka County, Minnesota, from 1982 to 2010 and also served as president of the National District Attorneys Association from 2000 to 2001;
- Harry L. Shorstein, who was elected to four terms as the State's Attorney for Florida's Fourth Judicial Circuit, encompassing the City of Jacksonville and Clay, Duval and Nassau Counties, serving from 1991 to 2008;
- Larry D. Thompson, who was Deputy Attorney General of the United States from 2001 to 2003, and also served as the United States Attorney for the Northern District of Georgia from 1982 to 1986;
- Scott Turow, the acclaimed author who was an Assistant United States Attorney for the Northern District of Illinois from 1978 to 1986; and
- John Van De Kamp, who served as Attorney General of the State of California from 1983 to 1991 and previously served as the Los Angeles County District Attorney from 1975 to 1981.

The friend-of-the-court brief was prepared with pro bono assistance from Jenner & Block, and Foster is represented by attorneys from the Southern Center for Human Rights. Oral arguments and a ruling are expected during the court's next term, beginning in October and ending in June 2016. The case is *Foster v. Chatman*, U.S. Supreme Court, No. 14-8349.

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Created out of the belief that we must cast aside the labels that divide us in order to keep our democracy strong, The Constitution Project brings together policy experts and legal practitioners from across the political spectrum to foster consensus-based solutions to the most difficult constitutional challenges of our time through scholarship, advocacy, policy reform and public education initiatives. Established in 1997, TCP is based in Washington, D.C.



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