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U.S.

Exclusion of Blacks From Juries Raises Renewed Scrutiny

By **ADAM LIPTAK** AUG. 16, 2015

SHREVEPORT, La. — Here are some reasons prosecutors have offered for excluding blacks from juries: They were young or old, single or divorced, religious or not, failed to make eye contact, lived in a poor part of town, had served in the military, had a hyphenated last name, displayed bad posture, were sullen, disrespectful or talkative, had long hair, wore a beard.

The prosecutors had all used peremptory challenges, which generally allow lawyers to dismiss potential jurors without offering an explanation. But the Supreme Court makes an exception: If lawyers are accused of racial discrimination in picking jurors, they must offer a neutral justification.

"Stupid reasons are O.K.," said Shari S. Diamond, an expert on juries at Northwestern University School of Law. Ones offered in bad faith are not.

In Louisiana's Caddo Parish, where Shreveport is the parish seat, a study to be released Monday has found that prosecutors used peremptory challenges three times as often to strike black potential jurors as others during the last decade.

That is consistent with patterns researchers found earlier in Alabama, Louisiana and North Carolina, where prosecutors struck black jurors at

double or triple the rates of others.

In Georgia, prosecutors excluded every black prospective juror in a death penalty case against a black defendant, which the Supreme Court has agreed to review this fall.

"If you repeatedly see all-white juries convict African-Americans, what does that do to public confidence in the criminal justice system?" asked Elisabeth A. Semel, the director of the death penalty clinic at the law school at the University of California, Berkeley.

As police shootings of unarmed black men across the country have spurred distrust of law enforcement by many African-Americans, the new findings on jury selection bring fresh attention to a question that has long haunted the American justice system: Are criminal juries warped by racism and bias?

Some legal experts said they hoped the Supreme Court would use the Georgia case to tighten the standards for peremptory challenges, which have existed for centuries and were, until a 1986 decision, Batson v. Kentucky, considered completely discretionary. (Judges can also dismiss potential jurors for cause, but that requires a determination that they are unfit to serve.)

But many prosecutors and defense lawyers said peremptory strikes allow them to use instinct and strategy to shape unbiased and receptive juries. "I'm looking for people who will be open, at least, to my arguments," said Joshua Marquis, the district attorney in Astoria, Ore.

Jeff Adachi, San Francisco's elected public defender, said peremptory challenges promote fairness.

"You're going to remove people who are biased against your client," he said, "and the district attorney is going to remove jurors who are biased

against police officers or the government."

Reprieve Australia, a group that opposes the death penalty and conducted the Caddo Parish study, said the likelihood of an acquittal rose with the number of blacks on the jury.

No defendants were acquitted when two or fewer of the dozen jurors were black. When there were at least three black jurors, the acquittal rate was 12 percent. With five or more, the rate rose to 19 percent. Defendants in all three groups were overwhelmingly black.

Excluding black jurors at a disproportionate rate does more than hurt defendants' prospects and undermine public confidence, said Ursula Noye, a researcher who compiled the data for the report.

"Next to voting," she said, "participating in a jury is perhaps the most important civil right."

'It Dashes Your Hopes'

Prospective jurors arriving at the courthouse here walk past a towering monument to the Confederacy, featuring grim likenesses of four Confederate generals.

Carl Staples, a 63-year-old African-American, recalled how the monument made him feel when he reported for jury duty.

"It dashes your hopes," he said, taking a break at the gospel radio station where he works as an announcer. "It has its roots in the ideology of white supremacy." He said much the same thing during jury selection in a 2009 death penalty case, and that played a part in his dismissal for cause.

Caddo Parish is 48 percent black, and 83 percent of the defendants in the new study were black. But the typical 12-member criminal jury had fewer than four blacks on it, the report said.

Much of the gap had nothing to do with peremptory strikes. Of the 8,318 potential jurors in the study, which reviewed 332 trials from 2003 to 2012, only 35 percent were black.

Professor Diamond suggested reasons for this. Blacks may be less likely to be on jury lists that are drawn from voter registration records, less likely to appear when called, more likely to qualify for hardship exemptions and more likely to be disqualified for felony convictions.

Still, prosecutors here used peremptory strikes against 46 percent of the black potential jurors who remained, and against 15 percent of others. In 93 percent of trials, prosecutors struck a higher percentage of blacks than of others.

Dale Cox, the parish's acting district attorney, said jury selection was more art than science and could not be quantified. "Statistics can be misleading," he said. "There could be any number of variables that would explain those strikes that have nothing whatsoever to do with race."

The study's findings, though, were in keeping with data from around the country.

In a five-year period ending in 2010, according to a lawsuit, prosecutors in Houston and Henry Counties in Alabama used peremptory strikes to remove 82 percent of eligible black potential jurors from trials in which the death penalty was imposed.

There can be good reasons for that, said Kent S. Scheidegger, a lawyer with the Criminal Justice Legal Foundation, which generally supports prosecutors.

"Opposition to the death penalty is much more common among black people, polls regularly show," he said. Striking jurors for hesitation about capital punishment is legitimate, he continued, adding that it is largely

balanced ”by defense lawyers doing exactly the same thing the other way.”

In 2012, a state trial judge in North Carolina found that prosecutors in his state had created a “cheat sheet” of race-neutral reasons to offer when challenged. Among the choices were “air of defiance,” “arms folded” and monosyllabic responses.

The judge, Gregory A. Weeks of Cumberland County Superior Court in Fayetteville, endorsed a study by law professors at Michigan State University examining the trials of the state’s death row inmates in 2010. It found that prosecutors had struck 53 percent of black potential jurors and 26 percent of others.

“The probability of this disparity occurring in a race-neutral jury selection process is less than one in 10 trillion,” Judge Weeks wrote.

In Caddo Parish, the new study said, Mr. Cox struck black jurors at 2.7 times the rate of others over the course of 22 trials. (Mr. Cox recently expressed unusual enthusiasm for the death penalty.)

He denied any improper conduct, and noted that he had never had a conviction questioned by a court or reversed because of his jury selection practices.

He added that it was not always clear whether black jurors helped or hurt the prosecution.

“The defendant on trial may be African-American and the victim is African-American,” he said. “That is a scenario that is 90 percent of our cases here in Shreveport. So you can see right away I want African-Americans on the jury, by and large, because they are the voice of the victim.”

Of the 12 prosecutors who handled at least 20 trials, 10 were white. The highest dismissal rate was held by Brian H. Barber, a white former prosecutor who struck five times as many blacks as others. Now a judge, he

did not respond to requests for comment.

Circling the Word 'Black'

When the Supreme Court hears the death-penalty case from Georgia, Foster v. Chatman, No. 14-8349, it could reshape the ways juries are selected.

The case arose from the 1987 trial of Timothy T. Foster, an African-American facing the death penalty for killing a white woman, Queen Madge White. Prosecutors worked hard to exclude blacks from the jury.

In notes that did not surface until decades later, they marked the names of black prospective jurors with a B. They highlighted those names in green. They circled the word "black" where potential jurors had noted their race on questionnaires.

They ranked the black prospective jurors in case "it comes down to having to pick one of the black jurors," as the prosecution's investigator put it in a draft affidavit at the time.

There was no need for that, though. Prosecutors struck all four black potential jurors.

When challenged, Stephen Lanier, the lead prosecutor, offered lots of reasons for the strikes. All the prospects were said to be some combination of confused, incoherent, hostile, disrespectful and nervous. Three did not make enough eye contact. A 34-year-old black woman was too close in age to the defendant, who was 19. (The prosecution did not challenge eight prospective white jurors age 35 or under.)

"All I have to do is have a race-neutral reason," Mr. Lanier said, "and all of these reasons that I have given the court are racially neutral." The judge rejected the defense's objection.

After Mr. Foster was convicted, Mr. Lanier urged the all-white jury to

impose a death sentence to “deter other people out there in the projects.” The jury did so.

Mr. Foster, who has spent decades on death row, is seeking a new trial.

Troubling evidence of bias led the Supreme Court to adopt the race restriction in jury selection nearly three decades ago.

In a concurrence in the Batson decision, Justice Thurgood Marshall said it was a necessary step to combat “common and flagrant” race discrimination, citing statistics from Louisiana, Missouri, South Carolina and Texas. But he called for “banning peremptories entirely.”

More recently, Justice Stephen G. Breyer has expressed concerns about peremptory challenges, writing in a 2005 concurrence that they seemed “increasingly anomalous in our judicial system.”

He noted that England had eliminated peremptory challenges but “continues to administer fair trials based largely on random jury selection.”

But other lawyers and scholars have argued for more limited changes to the system.

Some say allowing fewer peremptory challenges — three, say, instead of the 12 each side gets in Louisiana — could combat the worst abuses.

Abbe Smith, a law professor at Georgetown, would go further.

“Simply put,” she wrote last year in The Georgetown Journal of Legal Ethics, “prosecutors have abused the privilege of exercising peremptory challenges and should lose it.”

Selection in Action

Shreveport, in the northwest corner of Louisiana, was once a booming

oil town. Its downtown is now dotted with empty storefronts, and among the few bright spots in its struggling economy are casinos and the occasional film or television production lured by tax breaks.

The courthouse is a grand affair, though, with marble walls and bronze fixtures. But the courtroom in which Frederick Dudley's jury was selected this month was charmless and modern, with a low ceiling and fluorescent lights.

Race may have played a role in the proceedings, but not always in predictable ways. Mr. Dudley, a 26-year-old black man with dreadlocks, had rejected his court-appointed lawyer's advice to plead guilty to armed robbery in exchange for a 10-year sentence. He asked Judge Katherine Dorroh, who is white, for a new lawyer. She told Mr. Dudley that he was free to hire a lawyer but that otherwise he was stuck with David McClatchey, a white public defender.

The lawyers questioned prospective jurors in groups of 14. "I happen to represent a young man who is African-American," Mr. McClatchey said. "If you were in deliberations and someone said something prejudiced, would you speak up?" Thirteen people, both black and white, said they would. "No," said a white woman. "Their opinion is theirs." Neither side challenged her, and she was seated.

The prosecutor, Treneisha Hill, who is black, asked many more questions. "Tell me one thing about you that would make you a good juror for this case and one thing that wouldn't," she said. The jurors responded to the second part of her query with common themes.

They were worried about crime. They did not want to miss work. A white woman said she might not be able to be fair because her husband had recently been robbed at gunpoint. "He was an African-American man," the juror said, glancing at Mr. Dudley. "I look at him and think, 'Were you the one who held a gun to my husband's head?'"

Mr. McClatchey used a peremptory strike to dismiss her. “It’s like cutting the mold off the cheese,” he later explained.

In the end, he used nine peremptory challenges, three of them to strike blacks. The prosecutors used four, only one to strike a black potential juror, a young man with dreadlocks, much like the defendant’s.

That did not surprise J. Antonio Florence, a defense lawyer here not involved in the case. “Young black men,” he said, “have absolutely no chance of getting on a jury.”

The final panel — 12 plus an alternate — included six black members, all women. Mr. McClatchey said those demographics could work against him, as the black jurors might identify with the prosecutor rather than with his client. “They’ve gotten smart,” he said of recent hiring practices by the district attorney’s office.

But the jury never sat. Mr. Dudley pleaded guilty the next day and was sentenced to 12 years in prison the next week. Mr. McClatchey said his client’s decision to plead was wise, as “he was obviously guilty.”

“Because of the nature of the case,” he added, “the jury selection was very basic.”

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