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## FORD v. GEORGIA 111 S. Ct. 850 (1991)

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FORD v. GEORGIA

111 S. Ct. 850 (1991)  
United States Supreme Court

FACTS

James A. Ford was convicted of kidnapping, rape and murder. At trial, Ford filed a pretrial motion alleging that the county prosecutor had "over a long period of time" excluded black persons from juries. The issue was acute because Ford, a black man, had been charged with raping and killing a white woman. The prosecution opposed the motion, citing *Swain v. Alabama*, 380 U.S. 202 (1965), in which the U.S. Supreme Court recognized that the deliberate exclusion of members of the defendant's race from a jury would constitute a denial of equal protection under the fourteenth amendment, but held that the defendant would have to prove a pattern of racial discrimination in prior cases.

The trial judge denied Ford's motion based upon his personal observation and evaluation of the prosecutor's past conduct. During jury selection, the prosecution exercised nine of its ten peremptory challenges to strike black prospective jurors, leaving one black person on the jury. After his conviction and death sentence Ford moved for a new trial claiming that his right to an impartial jury had been violated. The Supreme Court of Georgia affirmed the trial court's decision.

The U.S. Supreme Court granted certiorari and the case was vacated and remanded for further consideration. 479 U.S. 1075 (1987). The basis for the remand was *Batson v. Kentucky*, 476 U.S. 79 (1986), which was decided while Ford's petition for certiorari was pending. *Batson* held that a black criminal defendant could make a prima facie case of an equal protection violation with evidence that the prosecutor had used peremptory challenges in defendant's case to strike members of the defendant's race from the jury. *Batson*, 476 U.S. at 95.

On remand the Supreme Court of Georgia held that defendant's equal protection claim was procedurally barred because a *Batson* claim was never raised at trial. In addition, because Georgia case law held that a *Batson* claim must be raised during the period between selection of the jurors and the administration of their oaths, Ford's motion was deemed untimely. The decision was again appealed and the United States Supreme Court granted certiorari.

HOLDING

The Supreme Court held that Ford had raised a *Batson*-type claim and that the rule of procedure that the Georgia Supreme Court relied upon was not an adequate and independent ground that would bar review of defendant's claim.

ANALYSIS / APPLICATION IN VIRGINIA

*Batson* lowered the level of proof required to establish a prima facie case of discrimination. Whereas *Swain* had required proof of a

pattern of prior discrimination, *Batson* only required a showing of discrimination based upon matters in the defendant's case. The discrimination precipitating the *Batson* decision was the prosecution's use of peremptory challenges to strike black jurors. The Court found that Ford had made a *Batson*-type claim in substance, even if not in form.

Ford's pretrial motion did not mention the equal protection clause, and the subsequent motion for a new trial cited the sixth amendment, not the fourteenth. The state courts were deemed to have conceded that a *Swain* issue had been raised, and the Supreme Court concluded that, since *Swain* and *Batson* were essentially the same other than their respective proof requirements, Ford had in effect raised a *Batson* claim.

With regard to the procedural bar asserted by the state court, the Supreme Court acknowledged that because of the differing methods of jury selection among the states, the states could determine their own procedural rules regarding the assertion of a *Batson* claim. "In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the exercise of the local power to set procedure." *Ford v. Georgia*, 111 S. Ct. 850, 857 (1991). However, only a "firmly established and regularly followed state practice" may be imposed by a state to prevent subsequent review of a federal constitutional claim by federal court. *James v. Kentucky*, 466 U.S. 341, 348-51 (1984). The case support cited by the Georgia court on remand was decided after Ford's trial. The Supreme Court would not allow retroactive application of the procedural rule because Ford had no notice of such procedure.

Since the rule was not firmly established at the time in question, the Supreme Court reversed and remanded the matter to the Georgia Supreme Court. If the Georgia court turns down Ford on the merits, as it did with the *Swain* claim, then the *Batson* claim is not defaulted and is preserved for federal review.

This case provides little new law, but it does demonstrate that not every state decision based upon procedural default will be honored by the Supreme Court. The *Ford* decision should provide encouragement to defense counsel in that it shows the potential benefit of preserving issues. Ford benefited from a change in the law, but only because he was deemed to have raised the matter, albeit awkwardly, at the trial level. Thus, it is advisable to make timely objection to colorable issues even if not accepted under the current law. See Rules of Virginia Supreme Court 5:17, 5:22, 5:25 and 5:27.

Summary and analysis by:  
Christopher J. Lonsbury