

No. 08-8483
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2008

MUMIA ABU-JAMAL,

Petitioner,

v.

JEFFREY A. BEARD, Secretary, Pennsylvania Department
of Corrections, *et. al.*,

Respondents.

**BREF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT**

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CAPITAL CASE: QUESTIONS PRESENTED

Race was crucial in trial of Petitioner. The decedent was a white police officer, as were key prosecution witnesses; the defense asserted police racism and brutality. The accused was a prominent black journalist who had been associated with the Black Panther Party in his younger years; the prosecutor used those Black Panther ties to attack his character.

The Philadelphia District Attorney's Office had a culture of racial discrimination, as demonstrated by its racially disparate use of peremptory strikes in numerous cases, office training materials and programs that expressly promoted racially discriminatory jury selection, and the observations of experienced lawyers who dealt with that office in many cases. Here the trial prosecutor made statements about a black juror indicating his racial bias in selecting this jury. Further, he used 10 of his 15 peremptory strikes against black potential jurors.

The Pennsylvania Supreme Court decided Petitioner's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986) on the merits on direct appeal and again on post-conviction appeal, holding that there was no prima facie case. However, on federal habeas review, a sharply divided Third Circuit panel denied relief after creating a "forfeiture" rule for Petitioner's habeas case that does not exist in other circuits and is inconsistent with this Court's decisions.

The questions presented are:

1. Is a federal habeas court free to create and apply its own forfeiture rule to a *Batson* claim, and to deem the claim forfeited as a matter of federal law, even though the state courts addressed the claim on the merits and did not invoke an adequate and independent state court procedural default?
2. May a court decline to find a prima facie case under *Batson* when the Petitioner's evidence for the prima facie case includes *every item* that this Court's cases recognize as demonstrating a prima facie case?

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ARGUMENT¹

I. THE *BATSON* CLAIM IS NOT PROCEDURALLY BARRED

The Commonwealth argues that the *Batson* claim is procedurally barred because the Pennsylvania Supreme Court supposedly denied it on “waiver” grounds. Brief in Opposition at 8-12. That is incorrect and contrary to what occurred below.

The Commonwealth did not assert procedural bar against the *Batson* claim in the Third Circuit. To the contrary, it explicitly admitted that the Pennsylvania Supreme Court had addressed the *Batson* claim on the merits; the Commonwealth expressly *disavowed* procedural bar; and it asked the Third Circuit to deny the claim, instead, on the basis of the *federal* forfeiture rule which that court adopted. *See, e.g.*, Commonwealth’s Third Step Brief at 24 (“the state courts addressed [the *Batson* claim] on the merits”); *id.* (“As a matter of constitutional law, [the lack of a contemporaneous objection] bar—or at least fundamentally undermines—his *Batson* claim on federal habeas review, even though the state courts and the District Court reviewed it on the merits.”); *id.* at 55 (Pennsylvania Supreme Court gave “Abu-Jamal the benefit of *Batson* despite his failure to object”); Commonwealth’s Sur-Reply Brief at 5-6 (admitting that *Batson* “claim is defaulted” and asking the Circuit to apply a federal forfeiture rule).

Moreover, the Commonwealth’s new-found procedural bar argument is frivolous. The Third Circuit correctly determined that there is no procedural bar, for two independent reasons.

First, it properly found that the Pennsylvania Supreme Court addressed the *Batson* claim *on the merits*, both on direct appeal and on post-conviction appeal. *See* Petition at 5-6, 8-9. While the Commonwealth *now* claims that the direct appeal merits ruling was an “alternative” holding, Brief in Opposition at 9-10, the Commonwealth’s current assertion is belied by its con-

1. All emphasis herein is supplied unless otherwise indicated. Parallel citations usually are omitted. Respondents are referred to as “the Commonwealth.” The Petition for Writ of Certiorari is cited as “Petition.” As in the Petition, prior opinions, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989), *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998), and *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), are cited as *Abu-Jamal-1*, *Abu-Jamal-2*, and *Abu-Jamal-4*,

trary admissions in the Third Circuit and by the Pennsylvania Supreme Court's opinion which noted that the claim *would be* "waived" in a non-capital case, but addressed it on the merits because the "relaxed waiver" rule applied to this capital case. *See* Petition at 5-6. This is not an "alternative" ruling on the merits; it is an explanation of why waiver was *not applied* in this death penalty case.

Lest there be any doubt about whether the Pennsylvania Supreme Court's direct appeal ruling was on the merits, it was resolved by that court in *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003), in which it described some of the history of the relaxed waiver rule and then abrogated it. The court explained that at the time of Mr. Abu-Jamal's direct appeal, application of the relaxed waiver rule in capital appeals was a "common" and "settled" practice that was "employed to reach a wide variety of claims" that would have been "waived" in a non-capital case. *Id.*, 827 A.2d at 400. The court cited its merits review of the *Batson* claim in *Abu-Jamal-1* as an example of this "common," "settled" practice of affording merits review: "the relaxed waiver doctrine has obliged this Court to review a *Batson* claim raised for the first time on direct appeal. *See Commonwealth v. Abu-Jamal*, 521 Pa. 188, 555 A.2d 846, 849-50 (1989)." *Freeman*, 827 A.2d at 395-96.

Even if it is erroneously assumed that the Pennsylvania Supreme Court on direct appeal applied a waiver rule and addressed the *Batson* claim only in the "alternative," any possible procedural bar was lifted when the Pennsylvania Supreme Court addressed the *Batson* claim on the merits in the post-conviction appeal, *see Abu-Jamal-2* at 112-13, without even mentioning the possibility that it might be barred. "State procedural bars are not immortal . . . , they may expire because of later actions by state courts. If the last state court to be presented with a particular

respectively.

federal claim reaches the merits, as here, it removes any bar to federal-court review that might otherwise have been available.” *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). Since *Abu-Jamal-2* addressed the merits of the claim and did not apply any bar, there is no bar to federal merits review. *Id.*²

Second, the Third Circuit also correctly found there is no procedural bar even if it is erroneously assumed that the Pennsylvania Supreme Court denied the *Batson* claim on “waiver” grounds, because a “waiver” ruling is not an adequate state ground. *See* Petition at 9 n.7. The Commonwealth, again making arguments it did not make below, asks this Court to second-guess the Third Circuit’s adequate state ground analysis. Brief in Opposition at 10-12. This Court, however, has “repeatedly recognized [that] the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit” and, thus, in the best position to make such rulings. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (declining to address procedural bar issue).³

This Court should be particularly averse to second-guessing the Third Circuit here, because its no-adequate-state-ground holding is expressly based upon four unanimous Third Circuit opinions: *Holland v. Horn*, 519 F.3d 107 (3d Cir. 2008), *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008), *Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), and *Bronshtein v. Horn*, 404 F.3d 700 (3d

2. The Commonwealth, citing *Ylst*, says *Abu-Jamal-2* “preserved” *Abu-Jamal-1*’s supposed default ruling. Brief in Opposition at 9-10. Under *Ylst*, a “later *unexplained* order” preserves a default ruling. 501 U.S. at 803. But *Abu-Jamal-2* was *not* “unexplained,” it was on the merits. Thus, erroneously assuming *Abu-Jamal-1* was a bar ruling, *Abu-Jamal-2* did not “preserve” that bar, but lifted it.

3. *Accord id.* at 547 (O’Connor, J., dissenting) (“As the Court points out, the Court of Appeals is better suited to evaluating matters of state procedure [relevant to procedural bar issues] than are we.”); *Selvage v. Collins*, 494 U.S. 108, 110 (1990) (per curiam) (remanding to Court of Appeals for determination of procedural bar issue because Court of Appeals “is more familiar with [state] law than we are”); *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980) (rejecting state’s procedural bar argument by “[d]eferring to the Court of Appeals interpretation of Texas law”).

Cir. 2005)—joined by nine Third Circuit Judges—then Judge, now Justice Alito, and Judges Ambro, Barry, Chagares, Cowen, Greenberg, Sloviter, Smith and Stapleton. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 153-54 (1979) (declining to find procedural bar where “three Second Circuit Judges, whose experience with New York practice is entitled to respect, concluded that” there was no adequate and independent state ground).

II. THE THIRD CIRCUIT’S APPLICATION OF A FEDERAL FORFEITURE RULE HAS NO BEARING ON THE REASONABLENESS *VEL NON* OF THE STATE COURT DECISION, WHICH DID NOT APPLY SUCH A RULE

The Commonwealth claims the state court’s denial of the *Batson* claim *must be* a “reasonable application” of *Batson* under 28 U.S.C. § 2254(d)(1), because it *would have been* reasonable for the state court to apply the federal forfeiture rule that was applied by the Third Circuit. Brief in Opposition at 12-18. The Commonwealth errs. Under § 2254(d), federal habeas courts address the *actual rationale of the state court* at least when, as here, the state court gives one. *See Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003); *Williams v. Taylor*, 529 U.S. 362, 391-98, 413-16 (2000). In *Wiggins*, the Court explained that arguments raised by the state in the federal habeas courts, but not adopted in the state court’s opinion, have “no bearing on whether the [state court] decision reflected an objectively unreasonable application of” Supreme Court law. 539 U.S. at 529-30. Here, the Third Circuit’s federal forfeiture rule *was not applied by the state court* and, thus, it has “no bearing” on the reasonableness *vel non* of the state court decision.

III. SECTION 2254(E)(2) HAS NO BEARING ON THIS CASE

The Commonwealth says “federal habeas relief is barred by [28 U.S.C.] § 2254(e)(2).” Brief in Opposition at 33; *see generally id.* at 33-36. That is incorrect. Section 2254(e)(2) is not a bar to habeas *relief*; at most it may preclude a petitioner from obtaining a federal *evidentiary hearing* if he or she “failed to develop the factual basis” of the claim in state court. Here, there is no barrier to a hearing.

The Third Circuit dissenter, Judge Ambro, would have remanded for an evidentiary hearing:

Having determined that Abu-Jamal met his prima facie burden at step one, I would remand for the District Court to complete an analysis of the remaining steps of the *Batson* claim, starting at step two, where the burden shifts to the Commonwealth to “come forward with a neutral explanation for challenging black jurors.” *Batson*, 476 U.S. at 97. If the Commonwealth does so, the Court should proceed to step three and assess whether the reason(s) given are valid or pretextual in determining, on the basis of the evidence presented, whether purposeful discrimination did occur. *See id.* at 98.

Abu-Jamal-4 at 319 (Ambro, J., dissenting).

In short, Judge Ambro would have held that the *existing record* establishes a prima facie case, and the purpose of the evidentiary hearing contemplated by him would have been to allow the *Commonwealth* to defend against that prima facie case. The Commonwealth’s section 2254(e)(2) argument thus posits that *Mr. Abu-Jamal* “failed to develop” a record of the *prosecutor*’s reasons for striking African Americans. The Commonwealth’s assertion is absurd.

Because the state courts held that Mr. Abu-Jamal did not establish a prima facie case, the *Batson* claim in state court never progressed to *Batson*’s step two, the step at which the prosecutor must give reasons for his strikes. Thus, it is the state court’s denial of the *Batson* claim at step one, not a “failure” by Mr. Abu-Jamal, that makes a federal evidentiary hearing necessary.

The Commonwealth’s own Brief in Opposition highlights the absurdity of its claim that Mr. Abu-Jamal “failed to develop” the Commonwealth’s step two case. The state says: “In state court, there being no finding of a prima facie case, . . . the Commonwealth had no obligation to volunteer reasons for its strikes, let alone at a [state court] hearing.” Brief in Opposition at 35-36. The Commonwealth further explains that it would not have given reasons for the strikes absent a prima facie case finding because to do so would have mooted the question of whether a prima facie case exists and thus, “increased the risk that a federal court would overturn the

judgment” even absent a prima facie case finding. *Id.* at 36. The Commonwealth thus makes it perfectly clear that it would not have allowed the prosecutor to give reasons for his strikes in state court unless the state court had found a prima facie case, which it did not. Mr. Abu-Jamal is not at fault for the Commonwealth’s failure to present the prosecutor’s reasons.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari, the Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., In Support of Petitioner, and presented herein, this Court should grant certiorari and review the Third Circuit’s 2-1 ruling.

Respectfully submitted,



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AFFIDAVIT OF MAILING PURSUANT TO RULE 29.2

I, Robert R. Bryan, declare under penalty of perjury that I am a member in good standing of the Bar of the United States Supreme Court. My business address is Law Offices of Robert R. Bryan, 2088 Union Street, Suite 4, San Francisco, California 94123. On this date, I deposited in a United States mail box, first class postage pre-paid and properly addressed to the Clerk of this Court, the Reply Brief In Support of Petition for Writ of Certiorari in the above-entitled cause. To the best of my knowledge, the mailing took place on March 27, 2009, within the permitted time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 27th day of March, 2009, at San Francisco, California.



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