

No. 08-8483

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IN THE  
**Supreme Court of the United States**

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MUMIA ABU-JAMAL,

Petitioner,

v.

JEFFREY A. BEARD, SECRETARY  
PENNSYLVANIA DIRECTOR OF CORRECTIONS, ET AL.,  
Institutional Division,

Respondent.

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE NAACP LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.  
IN SUPPORT OF PETITIONER

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society, formed to assist African Americans in securing their rights through the prosecution of lawsuits. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF has represented defendants in numerous jury selection cases before this Court including, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana* 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in, *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Cockrell*, 537 U.S.322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992). In addition to its jury discrimination work in this Court, LDF submitted an *amicus* brief and presented oral argument in the court below in the instant matter.

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<sup>1</sup> Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, made any monetary contribution to its preparation or submission.

Because of its long-standing commitment to the elimination of racial discrimination in the criminal justice system and its experience litigating claims of discrimination in the jury selection process, LDF has an interest in Mr. Abu-Jamal's petition, which presents important issues regarding the application of *Batson* and its progeny, and believes its perspective would be helpful to this Court in evaluating the claim presented in this case.

### SUMMARY OF ARGUMENT

Since 1986, this Court has consistently recognized and reinforced the principle that courts must promptly examine and eradicate all founded allegations of discrimination in the exercise of peremptory challenges in order to ensure a fair trial for the accused, to protect prospective jurors from discrimination, and to protect the integrity of the criminal justice system. Specifically, in *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, this Court has declared that a petitioner claiming discrimination in the exercise of peremptory challenges should only be subject to a modest initial burden of proof, and that courts evaluating such a claim should consider "all relevant circumstances" suggestive of discrimination. *Id.* at 96-97. By rigorously enforcing these two core dictates, this Court seeks to ensure that no relevant evidence of discrimination is ignored and that public confidence in the integrity of the criminal justice system is assured. *See id.* at 86-87; 103.

*Amicus* respectfully requests that this Court grant review of the decision below affirming the denial of Mumia Abu-Jamal's *Batson* claim. The Court of

Appeals declared that Mr. Abu-Jamal failed to establish a *prima facie* case of discrimination under *Batson* because he did not offer evidence “comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire.” *Abu-Jamal v. Horn*, 520 F.3d 272, 290 (3d Cir. 2008). In reaching this conclusion, the panel majority rendered irrelevant substantial evidence strongly indicative of discriminatory jury selection presented by Mr. Abu-Jamal.

Consequently, the lower court ruling – which conflicts with decisions of the Courts of Appeals of the Second, Ninth and Eleventh circuits – undermines *Batson* by elevating the burden of proof to be met by litigants advancing *Batson* claims, and ignores numerous indicators of discrimination, thereby insulating credible allegations of racial discrimination in jury selection from constitutional scrutiny.

This Court should grant review and reaffirm *Batson*’s authority as a powerful tool for the eradication of racial discrimination in jury selection.

**I. Experience Teaches, and this Court has Held, that a Light Initial Burden of Proof is Necessary to Assure that Jury Selection is not Infected by Racial Discrimination in the Exercise of Peremptory Challenges.**

This Court’s rulings appropriately recognize that American juries operate to “safeguard[] a person accused of crime against the arbitrary exercise of power by [a] prosecutor or judge.” *Batson*, 476 U.S. at

86 (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)). Racial discrimination in jury selection diminishes the jury's power to perform this critical function by subjecting a criminal defendant to trial before a biased tribunal and "undermin[ing] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 86-87 (citations omitted); *see also Miller-El*, 545 U.S. at 238 ("When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial,' . . . 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication.") (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)). Discriminatory jury selection also unfairly exposes qualified citizens of color to public exclusion and a "brand" of inferiority. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (explaining that exclusion from jury service "is practically a brand upon [the potential juror], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."). For each of these reasons, a prosecutor's exercise of race-based peremptory challenges is pernicious, shameful and repugnant to the very underpinnings of the Constitution in general and the Equal Protection Clause in particular. *See Batson*, 476 U.S. at 102 (Marshall, J., concurring).

In order to ensure that the criminal justice system is not corrupted by such discrimination, this Court in *Batson* declared that the use of peremptory challenges to exclude prospective jurors from an

individual case because of race is unconstitutional. Specifically, *Batson* lowered the “crippling,” *Batson*, 476 U.S. at 92, and “unworkable,” *Miller-El*, 545 U.S. at 239, threshold burden of proof that had been imposed by this Court’s earlier decision in *Swain*, *supra*.<sup>2</sup> See also *Georgia v. McCollum*, 505 U.S. 42, 47 (1992) (noting that *Batson* “discarded *Swain*’s evidentiary formulation.”). This Court was compelled to act because petitioners claiming discrimination under *Swain* were overwhelmingly unable to meet its extremely high initial burden and, as a result, the “misuse of the peremptory challenge to exclude black jurors” became “common and flagrant.” *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

In response, *Batson* declared “inadequa[te]” “any burden of proof for racially discriminatory use of peremptories that requires that ‘justice . . . sit supinely by’ and be flouted in case after case before a remedy is available.” *Id.* at 102 (Marshall, J. concurring) (quoting *Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting)). It rejected the *Swain* formulation and directed courts confronted with claims of discrimination in the exercise of peremptory challenges to “undertake ‘a sensitive inquiry into such circumstantial and direct

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<sup>2</sup>Under *Swain*, a petitioner alleging the discriminatory exercise of peremptory challenges had to demonstrate that “the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries.” *Swain*, 380 U.S. at 223.

evidence of intent as may be available,” *Id.* at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 266 (1977)) and established the now familiar three-part test:

[f]irst, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties’ submissions, the...court must determine whether the defendant has shown purposeful discrimination.

*Miller-El*, 537 U.S. at 328-29 (citations omitted).

In recognition of the fact that *Swain’s* insurmountable first step burden had the effect of insulating unlawful discrimination from constitutional scrutiny, the *Batson* court declared that a petitioner seeking to establish a *prima facie* case of discrimination need only

show that he is a member of a cognizable racial group, [ ] and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race. [T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” [T]he defendant must

show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

*Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (internal citations omitted)).

This Court also made clear that there was no specific formula for establishing a *prima facie* case:

[i]n deciding whether the defendant has made the requisite showing, *the trial court should consider all relevant circumstances. For example*, a ‘pattern’ of strikes against black jurors included in the particular venire *might* give rise to an inference of discrimination. Similarly, the prosecutor’s questions and statements during *voir dire* examination and in exercising his challenges *may* support or refute an inference of discriminatory purpose. *These examples are merely illustrative.*

*Batson*, at 96-97 (emphasis added).

To make absolutely certain that evidence of discrimination was no longer ignored, the *Batson* Court repeatedly directed judges evaluating claims of intentional discrimination in the exercise of peremptory challenges to consider all “circumstantial and direct evidence of intent as may be available,” *Id.* at 93 (quoting *Arlington Heights*, 429 U.S. at 266), and explained that “any ... relevant circumstances [can] raise an inference that the prosecutor used that

practice to exclude the veniremen from the petit jury on account of their race.” *Batson*, 476 U.S. at 96. *See also Johnson*, 545 U.S. at 172 (“The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.”); *Abu-Jamal*, 520 F.3d at 314 n.44 (Ambro, J., dissenting) (“were we to summarize *Batson* in layperson’s terms, a defendant needs to raise, based on whatever evidence exists, a reasonable possibility that the prosecutor intended to exclude from the jury but one person because of race.”).

Thus, in order to ensure that unlawful discrimination in the exercise of peremptory challenges is exposed and eliminated, “all of the circumstances that bear upon the issue of racial animosity must be consulted.” *Snyder v. Louisiana*, 552 U.S. \_\_\_, 128 S.Ct. 1203, 1208 (2008).

**II. The Decision Below Inexplicably Departs from This Court’s Teachings and Conflicts with Rulings of Other Courts of Appeal Respecting the Elements of a *Prima Facie* Case under *Batson*.**

This Court has repeatedly addressed this subject and provided detailed guidance to lower courts about how *Batson* claims should be analyzed and decided. *See, e.g., Snyder, supra; Johnson, supra; Miller-El v. Dretke, supra; Miller-El v. Cockrell, supra*. It is ironic, then, that in the ruling below, the panel majority’s opinion retreats from this Court’s directive to undertake a broad review of all circumstances when assessing claims of discrimination in the exercise of peremptory challenges and instead improperly heightens the evidentiary burden on defendants

raising such claims. This departure from controlling precedent warrants plenary review by this Court, in order to assure that *Batson* remains an effective vehicle for uncovering and eradicating racial discrimination in the exercise of peremptory challenges.

In affirming the District Court’s conclusion that Mr. Abu-Jamal failed to establish a *prima facie* case of discrimination under *Batson*, the panel majority failed to conduct the constitutionally required broad review of all relevant evidence of discrimination. Instead, the Court concluded that Mr. Abu-Jamal’s purported failure to proffer “evidence from which to determine the racial composition or total number of the entire venire – facts that would permit the computation of the exclusion rate<sup>3</sup> and would provide important contextual markers to evaluate the strike rate”<sup>4</sup> was, in and of itself, fatal to his effort to set forth a *prima facie* case of discrimination under *Batson*. *Abu-Jamal*, 520 F.3d at 291-292. The panel majority conceded that “[t]here may be instances where a *prima facie* case can be made without evidence of the strike rate and exclusion rate,” but offered no insight into how a petitioner might do so

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<sup>3</sup>The Third Circuit explained that the “exclusion rate” is “calculated by comparing the percentage of exercised challenges used against black potential jurors with the percentage of black potential jurors known to be in the venire.” *Abu-Jamal*, 520 F.3d at 290.

<sup>4</sup>The “strike rate is computed by comparing the number of peremptory strikes the prosecutor used to remove black potential jurors with the prosecutor’s total number of peremptory strikes exercised.” *Abu-Jamal*, 520 F.3d at 290.

and summarily declared that Mr. Abu-Jamal did not meet this heightened and ambiguous standard. *Id.* at 292. Indeed, the majority acknowledged only in passing the non-statistical evidence of discriminatory intent that was presented by Mr. Abu-Jamal. *Id.* at 291 n.17.<sup>5</sup> By focusing solely on the exclusion rate and by giving Mr. Abu-Jamal’s abundant evidence of discriminatory intent only “cursory consideration,” the Court “misapplie[d] *Batson*, ... [by] fail[ing] to ‘consider all relevant circumstances’ of [the] case” and elevating *Batson*’s Step One burden. *Abu-Jamal*, 520 F.3d at 319 (Ambro, J., dissenting).

The Third Circuit’s declaration that exclusion rate evidence is a necessary component of *Batson*’s *prima facie* case requirement reveals a fatal

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<sup>5</sup>Mr. Abu-Jamal relied on the following evidence in support of his claim of discrimination in the exercise of peremptory challenges: the fact that he is an African American man charged with killing a white police officer; the fact that Mr. Abu-Jamal was a prominent African American community activist; the trial prosecutor’s pattern of peremptory strikes against prospective jurors of color; the trial prosecutor’s statement of discriminatory intent; and evidence of a culture of discrimination, including that the Philadelphia District Attorney’s Office trained its young prosecutors on how to exclude prospective jurors of color, testimony by Mr. Abu-Jamal’s trial lawyer and other Philadelphia defense attorneys indicating that the Philadelphia District Attorney’s Office routinely used its peremptory strikes to exclude African American prospective jurors, a study documenting significant exclusion of prospective jurors of color in Philadelphia capital trials, and the fact that at the time of his trial, state law authorized the use of race-based peremptory challenges. See Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 24-30, *Abu-Jamal v. Horn*, No. 08-8483 (Dec. 19, 2008) (filed on behalf of Petitioner, Mumia Abu-Jamal).

misunderstanding of the history and purpose of the *Batson* Step One burden. *Batson* recognized that *Swain's* flawed and singular focus on systemic statistical evidence impeded the identification and eradication of discrimination in the exercise of peremptory challenges and contributed to public mistrust in the administration of justice. It therefore required courts to conduct a complete assessment of evidence of discrimination in the exercise of peremptory challenges and acknowledged that a single strike, accompanied by such evidence, can sustain the *prima facie* case threshold. *Batson*, 476 U.S. at 99 n.22.

The decision below directly contradicts *Batson* and threatens to dramatically *reduce* the pool of cases eligible for judicial review from those that raise an inference of discrimination based on any and all relevant circumstances to those that do so based on “exclusion rate” evidence. By leaving those cases that present credible and compelling non-statistical evidence of discrimination beyond the reach of the courts, the Third Circuit leaves serious questions about the fairness of the criminal justice system unanswered. In so doing, that court “invites cynicism respecting the jury’s neutrality,” and undermines public confidence in adjudication.” *Miller-El*, 545 U.S. at 238 (quoting *Powers*, 499 U.S. at 412).

This elevation of statistical analysis above any other evidence of discrimination not only conflicts with *Batson's* goals, it also contradicts its express terms. *Batson* clearly indicates that a pattern of strikes and the prosecutor’s questions and statements may establish a *prima facie* case of discrimination. *Batson*,

476 U.S. at 96-97. The ruling below that “exclusion rate” evidence is an indispensable component of a *prima facie* case fails to give effect to this guidance. Additionally, *Batson* expressly suggested that a finding of intentional discrimination would be proper even if based on the exclusion of a single prospective juror. *Batson*, 476 U.S. at 99 n.22. It is entirely unclear how one discriminatory peremptory challenge could be exposed and corrected under the logic of the panel majority in this case.

It is for these reasons that several other Courts of Appeals have rejected the suggestion that statistical evidence such as “exclusion rate” is a necessary component of a *Batson prima facie* case. See *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998); *Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir. 1995); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (per curiam).

This Court should grant review to resolve this conflict among the Circuits and to insure the integrity of its consistent jurisprudence applying the bedrock ruling in *Batson*.

## CONCLUSION

Amicus respectfully urges this Court to affirm *Batson*’s dictate that petitioners seeking to prove racial discrimination in the exercise of peremptory challenges must face a modest threshold burden of proof, and that courts considering such challenges must consider “all relevant evidence” of discrimination.

Respectfully submitted,

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