No. 01-7662

In The

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE,* THE HONORABLE ARLIN M. ADAMS AND JULIE R. O'SULLIVAN IN SUPPORT OF PETITIONER

CARTER G. PHILLIPS
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: 202-736-8270
Facsimile: 202-736-8711

ELISABETH SEMEL*
CHARLES D. WEISSELBERG
DEATH PENALTY CLINIC
University of California
School of Law (Boalt Hall)
Berkeley, CA 94720-7200
Telephone: 510-642-0458
Facsimile: 510-643-4625
**Counsel of Record*

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTION PRESENTED

Whether a court is required to ignore uncontested evidence of a pattern and practice of racial discrimination, and evidence of contemporaneous instances of discrimination, when assessing the genuineness of the alleged discriminator's proffered race-neutral reason for exercising a peremptory challenge?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a former judge and a former prosecutor[2] who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. Allegations of race discrimination by representatives of the government must be reviewed scrupulously to assure just and reliable outcomes for individuals facing the ultimate penalty, to safeguard the democratic right of all citizens to be fairly considered for jury service, and to promote public confidence in the criminal justice system.

Judges serve as the ultimate guardians of the judicial process. In general, "[t]he courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici curiae* with the assistance of Racheal Turner and Portia Glassman, students at the University of California School of Law (Boalt Hall). No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

[2] The Honorable Arlin M. Adams served as a judge of the United States Court of Appeals for the Third Circuit from 1969 to 1987, and as Director of the Federal Judicial Center from 1986 to 1987. Julie R. O'Sullivan served as an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office of the Southern District of New York from 1991 to 1994, and as a prosecutor in the Office of the Independent Counsel in 1994.

Prosecutors exercise their duties as officers of the court to enforce the criminal laws. This Court has repeatedly underscored "the special role" of the prosecutor to ensure that justice shall be done even at the expense of the legitimate adversarial interest in the outcome of a criminal case. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *Amici* believe that the prosecutorial function suffers when the criminal justice system operates in a discriminatory manner.

In his petition for a writ of *certiorari*, Thomas Miller-El calls upon the Court to enforce the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), by setting forth the appropriate analysis at the final, third step of the *Batson* inquiry in unmistakably clear terms. It is at this juncture that the lower courts must weigh all of the evidence to determine whether a defendant has met his or her burden of showing purposeful discrimination. The question presented is critically important to individuals who are excluded from jury service on account of their race and to defendants who are constitutionally entitled to an impartial jury selected in a manner untainted by racial discrimination. This case is of vital interest to members of the bench and to law enforcement officials, who must see that justice is served in criminal proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although Thomas Miller-El was tried in 1986, review is essential to this Court's stewardship of *Batson*'s important principles because *Batson* is applied by courts every day, including within the Fifth Circuit. A LEXIS search has uncovered 440 court decisions citing *Batson* during just the last calendar year.[3] In May 2000, a blue-ribbon

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[3] The LEXIS search was performed on December 31, 2001, using the search term "Batson w/3 Kentucky," and restricting cases to the previous year. The search was performed in the file "Federal and State Caselaw."

committee, including both supporters and opponents of the death penalty, convened to examine the administration of our capital punishment system and "recommend ways to ensure that fundamental fairness is guaranteed for all." *Mandatory Justice: Eighteen Reforms to the Death Penalty*, at ix (The Constitution Project, 2001). Last year, it issued its report, which included a recommendation designed to address "the potential for racial discrimination [that] hang[s] over our nation's capital punishment system." *Id.* at 23. In particular, the committee announced the need for "vigorously enforcing *Batson v. Kentucky*" "to ensure that racial minorities are part of every decision-making process within the criminal justice system." *Id.* at 24.

Amici Curiae adopt the facts and procedural history set forth in the petition for writ of *certiorari*. Petitioner presented undisputed evidence in the courts below that, prior to and at the time of Mr. Miller-El's trial, the Dallas County District Attorney's Office systematically discriminated against African-American potential jurors. And he presented evidence that prosecutors had actually engaged in these practices during his capital jury trial.

Amici note that the evidence presented of the pattern and practice of race-based jury selection methods employed by the Dallas County District Attorney's Office was found to be "appalling" and "disturbing" by the magistrate judge who reviewed this matter.[4] The undisputed evidence included, *inter alia*, written materials used for decades to train Dallas County prosecutors to exclude African-Americans and other minorities from juries,[5] two Dallas County Morning News studies revealing that, at the time of Petitioner's trial, in capital and non-capital

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[4] *See* App. 5 at 20, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. Jan. 31, 2000) (unpublished).

[5] App. 8 at 3; App. 10-13. *See also Ex parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988); *Batson*, 476 U.S. at 104 n.3 (Marshall, J., concurring).

cases, County prosecutors exercised peremptory challenges against no fewer than 86 percent of African-Americans,[6] testimony from members of the local bench and bar that these discriminatory methods were routinely employed at the time of Petitioner's capital trial,[7] and judicial findings that the prosecutors who obtained a death sentence against Petitioner had engaged in race-based jury selection practices.[8] Likewise, there was compelling evidence that these unconstitutional practices were used by prosecutors to exclude African-Americans from Petitioner's jury. For example, the prosecution struck 10 of 11, or 91 percent, of the qualified African-American jurors so that only one African-American was allowed to serve on Petitioner's jury. App. 5 at 6.

Batson places upon a court a duty, in making the ultimate determination whether peremptory challenges were exercised in a racially discriminatory manner, to consider all the evidence supporting the prima facie case – including any evidence that the prosecution has engaged in an historic pattern and practice of discrimination – together with the prosecution's offered justifications for its peremptory strikes. The Equal Protection Clause and this Court's jurisprudence require that the

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[6] App. 10 (article's first chart shows 405 of 467, or 86 percent, of qualified African-American venirepersons were struck peremptorily by state). According to a second study, in fifteen death penalty cases tried between 1980 and 1986, the District Attorney's Office struck an even higher percentage – 90.3% – of the eligible African-American jurors. App. 12-13 (56 of 62 qualified African-American venirepersons struck peremptorily by state).

[7] *See* App. 5 at 7 and n.6; *see also* Petition for Writ of Certiorari at 8-10; *Ex parte Haliburton*, 755 S.W.2d at 132-33 and n.4.

[8] *See Chambers v. State*, 784 S.W.2d 29, 32 (Tex. Crim. App. 1989); *Miller-El (Dorothy Jean) v. State*, 790 S.W.2d 351, 353 (Tex. App. 1990).

persuasiveness of the proffered race-neutral explanations be assessed in light of the totality of the evidence so that the trier of fact may determine whether the movant has established purposeful discrimination. Because the courts below failed to do so and because there appears to be confusion in the state and federal courts regarding the proper application of *Batson*, we offer our views in support of Mr. Miller-El's petition for writ of *certiorari*.

REASONS FOR GRANTING THE PETITION

I.

ELIMINATION OF RACE-BASED JURY SELECTION REMAINS A JUDICIAL IMPERATIVE

A. Eliminating race discrimination from the jury selection process is essential to the vitality of the American justice system.

The American jury system is universally revered as an important institution in our democratic form of government. The Sixth and Fourteenth Amendments' guarantees to a jury trial are first and foremost intended to protect individuals against arbitrary governmental action. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). The Court in *Batson* also recognized that race-based exclusion of jurors violates the equal protection rights of the excluded jurors as well as the community at large. *See id.* at 87. Further, jury service is a fundamental aspect of citizenship, allowing the individual to "participate in the administration of the law." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). Race-based exclusion from jury service does violence to the constitutional principle of equal access to government. *See Powers*, 499 U.S. at 400, 407 (1991). It denigrates fundamental democratic institutions, much as the exclusion of voters due to race undermines constitutional ideals, whether or not this exclusion affects the outcome of a particular election. Jury service and

voting have both been regarded as fundamental incidents of citizenship. *See Carter v. Jury Commisison of Greene County*, 396 U.S. 320, 330 (1970).[9]

In addition to the injury to the individual venireperson, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 79, 87. Exclusion based on race tends to reinforce racial stereotypes and biases, and judges who tolerate race-based jury selection may be viewed by the public as unworthy of trust. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). Courts in this nation today police the private sector and other branches of government for compliance with constitutional prohibitions against discrimination and with civil rights legislation.[10] Failure to abide by these same norms in the selection of jurors undermines the enforcement authority of the bench. *See Georgia v. McCullom*, 505 U.S. 41, 52 (1992) (quoting *Edmonson*, 500 U.S. at 624 (internal citations omitted)).

In a recent speech, Justice O'Connor observed:

> The jury system is not only central to our trial process, but it is also the primary link between the courts and the community. The

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[9] *See generally* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?*, 92 Colum. L. Rev. 725, 746 (1992).

[10] *See e.g.*, U.S. Const. Amend. XIV (state actors); Equal Credit Opportunity Act, 15 U.S.C. sections 1691-1691f (1988) (lenders); Civil Rights Act of 1964, Title II, 42 U.S.C. sections 2000a-2000a-6 (1988) (places of public accommodation); Civil Rights Act of 1964, Title VII, 42 U.S.C. sections 2000e-2000e-17 (1988) (employers); Fair Housing Act of 1968, 42 U.S.C. sections 3601-3631 (1988) (providing housing for sale or rent).

> impressions that jurors receive during their jury service have a significant impact on public perceptions of the justice system. . . . The time jurors spend in jury service is perhaps our best opportunity to instill in them a sense of trust in the fairness and competence of the justice system.[11]

In her remarks, Justice O'Connor described a 1999 survey conducted by the National Center for State Courts, which examined public attitudes toward the judicial system and found African-Americans and Hispanics were more likely to agree that "[m]ost juries are not representative of the community."[12] Justice O'Connor observed: "The *perception* that African-Americans are not accorded equality before the law is pervasive and it requires us to take action at every level of our legal system. . . . " Luncheon address, *supra*, n.11. Inadequate judicial enforcement of the prohibition on race-based jury selection will reinforce, rather than counteract, this skepticism of minority groups about the fairness of our legal system.

B. Race-based exclusion of citizens from jury service continues to threaten the integrity of the American criminal justice system.

In 1986, the year Thomas Miller-El was tried and sentenced to death, the Court lamented that "[t]he reality

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[11] The Hon. Sandra Day O'Connor, Luncheon Address at the National Conference on Public Trust and Confidence in the Justice System (May 15, 1999), *at* http://www.ncsc.dni.us/ptc/trans/oconnor.htm. Justice O'Connor also discussed a survey conducted by the American Bar Association (ABA), which "showed almost 70% of those surveyed consider the jury the most important component of the justice system." *Id.*

[12] National Center for State Courts, *How the Public Views the State Courts* 7, 29 (1999) *at* http://www.ncsc.dni.us/ptc/results/results.pdf.

of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors." *Batson v. Kentucky*, 476 U.S. at 99. Concurring in *Batson*, Justice White remarked: "It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." *Id.* at 101 (White, J., concurring). In his concurring opinion, Justice Marshall condemned the very jury selection training methods and practices of the Dallas County Office of the District Attorney that were employed in Petitioner's capital trial. *See id.* at 104 and n. 3 (Marshall, J., concurring); App. 10, 11.[13]

This Court long ago recognized that judicial intervention was required to bring an end to the intentional exclusion of minorities from juries and, for over a century, has issued " 'a course of decisions' " designed to further this objective. *Powers*, 499 U.S. at 415 (citing *Cassell v. Texas*, 399 U.S. 282, 290 (1950)).[14] Despite this line of authority, there is ample evidence that prosecutors in some localities continue to use peremptory challenges

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[13] The stereotype-driven jury selection methods of the Dallas County District Attorney's Office drew this Court's attention again when it prohibited intentional discrimination on the basis of gender in the exercise of peremptory challenges by state actors. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 138 n.10 ("A manual formerly used to instruct prosecutors in Dallas, Texas, provided the following advice: 'I don't like women jurors because I can't trust them.' ") (citing to Albert Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U.Chi.L.Rev. 153, 210 (1989).)

[14] *See, e.g., Batson v. Kentucky*, 476 U.S. at 85; *Edmonson*, 500 U.S. at 618; *Rose v. Mitchell*, 443 U.S. 545, 551 (1979).

to exclude minorities from jury service and that *Batson* violations are not being corrected effectively or efficiently by state and federal courts.[15] Indeed, looking at but one state within the Fifth Circuit, Louisiana, there is no shortage of recent cases in which the prosecution used its peremptory challenges to strike most, if not all, African-Americans from the jury. *See, e.g., State v. Jacobs,* No. 1999-0991, 2001 WL 507878 (La. May 15, 2001) (all four African-American jurors struck by prosecution); *State v. Taylor,* 781 So.2d 1205 (La. 2001) (three of four African-American jurors struck by prosecution); *State v. Myers,* 761 So.2d 498 (La. 2000) (six of seven African-American jurors struck by prosecution); *State v. Touissant,* 750 So.2d 980 (La. 1999) (all three African-American jurors struck by prosecution); *State v. Snyder,* 750 So.2d 832, 866 (La. 1999) (Johnson J., dissenting, "I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant.").

As discussed below, *amici* believe that the peremptory challenge system is a viable and important feature of jury trials. However, "[t]he State's interest in *every* trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner," *J.E.B.,* 511 U.S. at 137 n.8, and the need remains for this Court's vigilant enforcement of the Equal Protection Clause in the arena of jury selection.

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[15] *See* Paragraph II, *infra,* for a discussion of the circuit conflict regarding the third step of the *Batson* inquiry.

C. Vigorous adherence to the *Batson* framework is essential to preserving the peremptory challenge system.

The peremptory challenge system is a traditional aspect of American jury trials. *Edmonson*, 500 U.S. at 639 (O'Connor, J., dissenting) (citing *Swain v. Alabama*, 380 U.S. 202, 212-18 (1965) and *Holland v. Illinois*, 493 U.S. 474, 481 (1990)). In *Swain*, this Court discussed the history and importance of peremptory challenges, observing, "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain*, 380 U.S. at 219. Peremptory strikes ensure a fair trial, not just for the accused, but also for the prosecution. *See id.* at 220 (quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

Over time, this Court has increased the constitutional scrutiny to which it subjects the exercise of peremptory challenges. It has nonetheless affirmed the value of the peremptory strike system and declined invitations to eliminate the process altogether. *Batson*, 476 U.S. at 99 n. 22. "In *Holland* and *Batson*, we spoke of the significant role peremptory challenges play in our trial procedures, but we noted also that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality." *Powers*, 499 U.S. at 415. While the peremptory system serves legitimate interests and safeguards both parties' right to a fair trial, such challenges are not constitutionally required, and could be eliminated completely. *See Edmonson*, 500 U.S. at 620; *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *Batson*, 476 U.S. at 91 and 98; *Id.* at 108 (Marshall, J., concurring); *Swain*, 380 U.S. at 219; *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *United States v. Wood*, 299 U.S. 123, 145 (1936); *Stilson v. United States*, 250 U.S. 583, 586 (1919). *Amici* believe that preservation of the peremptory strike system

therefore requires vigorous enforcement of the Equal Protection limitations that this Court established in *Batson*.

II.

ALL RELEVANT EVIDENCE, INCLUDING SYSTEMIC EVIDENCE OF DISCRIMINATION IN JURY SELECTION, MUST BE CONSIDERED IN DETERMINING WHETHER INTENTIONAL DISCRIMINATION OCCURRED

This Court's Equal Protection jurisprudence has consistently emphasized the importance of evidence of systematic race discrimination. More than a century ago, the Court held that the Equal Protection Clause prevents States from systematically excluding people from juries in criminal cases solely because of their race or color. *See Strauder v. West Virginia*, 100 U.S. 303 (1880). The Equal Protection principle was extended to the peremptory challenge system in *Swain v. Alabama*, 380 U.S. 202 (1965), when the Court held that the defendant makes out a prima facie case of purposeful discrimination under the Fourteenth Amendment by showing that the State has engaged in a pattern of striking African-Americans systematically from petit juries. *See id.* at 223-24. The Court, however, "declined to permit an equal protection claim premised on a pattern of jury strikes in a particular case . . . . " *Powers v. Ohio*, 499 U.S. 400, 405 (1991). Thus, *Strauder* and *Swain* put courts and law enforcement officials on notice that the Constitution prohibits excluding individuals from jury service on the basis of their race alone. *See Batson*, 476 U.S. at 101 (White, J., concurring).

In *Batson v. Kentucky*, the Court established a three-step framework for evaluating allegations that peremptory challenges were used in a manner violating the Equal Protection Clause. *See id.*, 476 U.S. at 96-98; *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Hernandez v. New*

York, 500 U.S. 352, 358-59 (1991). Properly viewed, the first two steps of the *Batson* inquiry set out burdens of production of evidence for the opponent and proponent of the peremptory strike(s). All of the evidence is then weighed in the final analysis, at step three.

The prima facie case of purposeful discrimination, step one, is established "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. While proof of systematic exclusion from the venire necessarily raises an inference of purposeful discrimination, "evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial" may also be sufficient. *Id.* at 96. "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Id.* Thus, not all prima facie cases are the same – some necessarily will be stronger than others, depending on the particular evidence available to the proponent of the claim. The decision in *Batson* was based on the recognition that evidence of historic, systemic race-based exclusion required by *Swain* would not be available in most cases. *See id.* at 92-93.[16] *Batson* did not hold, however, that such evidence, when offered, should be ignored as part of the proper analysis at steps one and three.

Once the inference of discrimination has been raised, the burden of production shifts. The second step of the

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[16] *See also* ABA Standards Relating to Juror Use and Management, Commentary to Standard 9 "Generally" (1983 Ed.) (In a standard that pre-dated *Batson*, the ABA noted: "Although the Supreme Court did articulate a test in *Swain v. Alabama* to determine the existence of systematic exclusion of blacks from juries, only rarely has it been possible to obtain the required statistical evidence of a pattern of discrimination." (Citation omitted)).

Batson framework requires the prosecution to come forward with race-neutral explanations for its peremptory challenges. *See id.* at 97.

The third step of the inquiry imposes upon the trial court "the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98; *Hernandez v. New York,* 500 U.S. at 363. To do so, the judge must examine the force and quality of the evidence on both sides. The defendant retains the ultimate burden of persuasion, but "[i]t is not until the *third* step that the persuasiveness of the [prosecutor's] justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett v. Elem,* 514 U.S. at 768. A court must inquire into " 'such circumstantial and direct evidence of intent as may be available.' " *Batson,* 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977)). In *Hernandez v. New York,* this Court affirmed the importance of *Batson's* third step when it noted, "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." 500 U.S. at 365. Whether or not the race-neutral reasons are sufficient must depend on the strength of the prima facie case when compared to the race-neutral reasons and all other relevant evidence.

In a variety of cases in which allegations of racial discrimination are made – both criminal and civil – this Court has required the finder of fact to consider the record evidence as a whole, including the strength of the petitioner's prima facie case, in deciding whether a party engaged in discrimination. Beginning in *Batson,* this Court looked to its decisions in equal rights cases under Title VII of the Civil Rights Act of 1964 to explain the

evidentiary rules that govern allegations of race-based jury selection in the post-*Swain* era. *See, e.g., Batson,* 476 U.S. at 94 n.18, 96 n.19, 98 n.21; *Hernandez v. New York,* 500 U.S. at 359-60; *Purkett v. Elem,* 514 U.S. at 768-69. In the Title VII arena, the Court has stated that once the opponent of the challenge meets his burden of production, i.e., has "come forward with a response," the "presumption" created by the plaintiff's prima facie showing "simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 510-511 (1993). But this Court has never held that the evidence presented to raise the presumption ceases to be relevant in determining, at step three, whether the proponent has carried his burden of persuasion. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143 (2000) (noting that the fact finder, in deciding the ultimate question of discrimination, may consider the plaintiff's *prima facie* case " 'and inferences properly drawn therefrom' " (citation omitted)); *see also id.* at 147 ("The fact finder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." (quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. at 511).)

In *amici*'s view, the first and only review of the totality of the evidence in this case occurred in the federal district court, but under an application of this Court's precedents that was both unreasonable and clearly erroneous. The Fifth Circuit's summary affirmance, on a record that shows that the state court failed to conduct a proper step three analysis, conflicts with decisions of the Third, Sixth and Seventh Circuits, as we now explain.

First, nothing in the Findings of Fact and Conclusions of Law Upon Remand from the Court of Criminal Appeals ("Findings") suggests that the trial court discharged its constitutional responsibilities with respect to

step three of the analysis.[17] The trial court found that "the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges." Findings at 4 and 6. Further, the state court's itemized findings of fact do not contain a single reference to the pattern and practice evidence introduced by Petitioner at the trial or the remand hearing, and the court's conclusions are based solely on an assessment of the prospective jurors' responses during voir dire and the explanations proffered by the State. *Id.* at 6-7.

Next, the opinion of the Texas Court of Criminal Appeals ("CCA") provides no comfort that *Batson*'s rules were protected here. The CCA opinion makes no mention of the undisputed evidence that Dallas County prosecutors had systematically utilized peremptory strikes to exclude African-Americans from jury service. *See* App. 2 at 1-2, *Miller-El v. State*, No. 69,677 (Tex. Crim. App. Sept. 16, 1992) (unpublished). The appellate court's assessment of the race-neutral reasons offered by the prosecution was based solely on its examination of the voir dire transcript of the challenged jurors. *See id.*

In federal court, the magistrate judge found that the historic, race-based jury selection practices were "appalling" and "disturbing." App. 5 at 20, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. Jan. 31, 2000) (unpublished). Nonetheless, he ruled that, "assuming [they] constitute [ ] a pattern of systematic discrimination," the reversals in *Chambers v. State* and *Dorothy Jean Miller-El v. State* based upon *Batson* violations by two of

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[17] *Amici* have been advised that the Dallas County District Court's Findings of Fact and Conclusions of Law will be included as an exhibit to Petitioner's Reply to Brief in Opposition.

Petitioner's prosecutors, "[are] only relevant in determining whether petitioner has established a *prima facie* case under *Batson*." *Id.* at 12-13. Further, "[t]he historical evidence cited by petitioner [only] helps him establish a *prima face* case of discrimination." *Id.* at 20. The district court adopted the magistrate judge's findings and recommendations, concluding that the evidence of historic and systematic exclusion of African-Americans by Dallas County prosecutors had been properly evaluated by the Texas Court of Criminal Appeals in its determination that Petitioner had raised "an inference of purposeful discrimination," and "that further discussion of the evidence in support of the prima facie case was unnecessary." App. 6 at 4, *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000) (unpublished).

Finally, the United States Court of Appeals for the Fifth Circuit denied Petitioner's request for a Certificate of Appealability, essentially finding that *Batson* overruled *Swain* to the extent that systematic evidence of discrimination is only relevant to the prima facie case. App. 1 at 12-13, *Miller-El v. Johnson*, 261 F.3d 445, 450-51 (5th Cir. 2001). Although the court of appeals stated that it had engaged in an "independent review" of the state court findings and the evidence, it failed to disavow the refusal by all the other courts to consider the undisputed evidence of systematic exclusion of African American jurors at the third step of the *Batson* inquiry. *See* App. 1 at 12-13.

Amici believe that, in contrast to the Texas and lower federal courts, the Sixth Circuit set forth the correct step three obligations in *United States v. Hill*, 146 F.3d 337 (6th Cir. 1998):

> At this [third] step of the analysis, the [trial] court has the responsibility to assess the prosecutor's credibility under all of the pertinent circumstances, and then to weigh the asserted

> justification against the strength of the defendant's prima facie case under the totality of the circumstances. Thus, even though the issue of whether the defendants made out a prima facie case is moot for purpose of deciding whether they met their burden of production at step one, the district court may still assess the totality of the circumstances surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving purposeful discrimination.

Id. at 342. The prosecutor in *Hill* struck the only African-American prospective juror. In remanding the case to the trial court, the Sixth Circuit's instructions make clear that all relevant evidence must be considered at step three. *See id.* at 342-43.

Two circuits, the Third and Seventh, have recently applied this principle in habeas corpus cases. In contrast to the Fifth Circuit's ruling below, these Circuits affirm that a court must consider all of the evidence at step three. Just last month, the Third Circuit, sitting en banc, overturned the denial of habeas corpus relief because the record did not show that the state court had considered all of the evidence at *Batson*'s penultimate step. In *Riley v. Taylor*, ___ F.3d ___, 2001 WL 1661489, *12 (3d Cir. Dec. 28, 2001) (en banc), the prima facie showing included "evidence that in addition to the prosecutor's striking of the three prospective black jurors in his trial, the Kent County Prosecutor's office used its peremptory challenges to remove every prospective black juror in the three other first degree murder trials that occurred within a year of his trial."[18] Much as the evidence of systematic

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[18] Like petitioner, Riley was tried before the decision in *Batson*. His *Batson* claim was raised in his state petition for post-conviction relief and presented at an evidentiary hearing in the

race discrimination offered by Thomas Miller-El was undisputed, the State in *Riley* declined the opportunity to rebut evidence that it had engaged in a practice of excluding African-Americans from juries. *Id.* at *19, 13, 22-23, 36-37.

Notably, Riley did not contend that the State had failed to meet its burden of production at step two. *See id.* at *15. Rather, he argued, and the majority agreed, that the hearing judge and the Delaware Supreme Court had omitted the "requirement under the third step of the *Batson* inquiry – of an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances. . . . " *Id.* at *29.[19] The Third Circuit emphasized that "the Batson step three inquiry is not merely a formalistic one, but an integral element of the required analysis." *Id.* at *34.

The Third Circuit's observation in *Riley* applies with equal force to Petitioner:

> *Batson* was not a death penalty case. This is. If the State failed to accord Riley his constitutional right to a jury selected on a race-neutral basis, we must not shirk to so hold. As Riley's lawyer asked at oral argument, 'If not this case, what case? If the evidence in this case is insufficient to show that the prosecutors' race-neutral rationales were pretextual, what case, short of a prosecutorial mea culpa would do the job?'

Id. at *29 (citation omitted). To the same effect is *Coulter v. Gilmore*, 155 F.3d 912 (7th Cir. 1998), where the prosecution used all but one of its peremptory challenges to

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state superior court, but before a different judge than had presided over his trial. *Id.* at *4.

[19] The Third Circuit split six to five on the *Batson* claim, with Judge Becker adding a seventh vote, concurring in the judgment. *Id.* at *1.

remove African-American jurors. *See id.* at 918. This established a prima facie case. *See id.* at 919. However, at *Batson*'s third step, the state court looked "only in an isolated way at individual jurors and individual reasons, and even in that setting [it] overlooked remarkable similarities between the excluded African Americans and the non-excluded Caucasians." *Id.* at 920. The judge failed to examine the strikes in light of all of the evidence, including the evidence that had supported the prima facie case, which was error. *See id.* at 921-22.[20]

By confining the evidence of an historic pattern and practice of race discrimination to the first step of the *Batson* analysis, the courts in this case failed to adhere to this Court's precedents. In light of *Batson*'s burden-shifting mechanisms, this evidence was critical to the third step of the inquiry; that is, it was indispensable to the court's assessment of the prosecution's proffered race-neutral reasons and to whether Petitioner had met his burden of showing intentional discrimination. By disregarding the undisputed and "appalling" pattern and practice evidence, the courts received the prosecution's explanations shorn of all context and could not, consistent with the demands of the Equal Protection Clause, determine whether the petitioner had met his ultimate burden of persuasion. This decisional process essentially converts *Batson*'s three steps into two: if the prosecution's reasons appear facially race-neutral the inquiry ends, for

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[20] *See also Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000) (trial judge failed to engage in third step of *Batson* inquiry when "he granted counsel no time to identify the relevant facts and assess the circumstances necessary to decide whether the race neutral reasons given were credible and nonpretextual"); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (remanding to trial court for "an ultimate determination on the issue of discriminatory intent based on all the facts and circumstances").

a court can assess the genuineness of the offered reasons only by studying them in light of other evidence. And there is no point in weighing evidence to decide if a defendant has met the burden of persuasion if the court removes the affirmative evidence from one side of the scale.

This impoverished, stilted approach cannot stand. *Batson* was intended to furnish jurors with greater protection from exclusion from jury service based on group bias than had been available under *Swain*. *See Batson*, 476 U.S. at 92. The decision was never meant to exclude evidence of historic, systematic exclusion of African-Americans from the ultimate determination of whether intentional discrimination occurred in cases where such evidence is available. *Amici* believe that excluding a qualified individual from jury service due to the individual's race is contrary to this nation's democratic ideals and beliefs, and thus is harmful to the justice system as a whole. This Court's guidance is needed because, in addition to denying Petitioner equal protection of law under the federal Constitution, the Fifth Circuit's misapplication of *Batson* does injury to these fundamental interests, and conflicts with the application of *Batson* in other Circuits.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
ELISABETH SEMEL*
CHARLES WEISSELBERG
Counsel for Amici Curiae

**Counsel of Record*