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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

CARTER G. PHILLIPS
JENNIFER M. RUBIN
LESLEY C. FOXHALL
ALEXANDRA R. GELBER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ELISABETH SEMEL*
CHARLES D. WEISSELBERG
DEATH PENALTY CLINIC
University of California School of Law (Boalt Hall)
Berkeley, California 94720
(202) 642-0458

Counsel for Amici Curiae

* Counsel of Record

May 28, 2002

QUESTION PRESENTED

Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claim under *Batson* v. *Kentucky*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

IN THE

Supreme Court of the United States

No. 01-7662

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

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

BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former judges and former prosecutors, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal

[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, a student 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.

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 scrutinized to assure just and reliable outcomes in criminal cases, to safeguard the democratic right of all citizens to be considered for jury service, and to promote public trust in the criminal justice system.

This case is of vital interest to members of the bench and to law enforcement officials. Judges act as the ultimate guardians of the judicial process. "The 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). For their part, prosecutors have a "special role" to ensure that justice is 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). The prosecution function suffers when the criminal justice system operates in a discriminatory manner, such as when peremptory challenges are used to exclude citizens from juries based upon race.

INTRODUCTION AND SUMMARY OF ARGUMENT

When race-based exclusion of jurors goes unremedied, excluded jurors and all participants in the trial process are harmed. Even the perception that racial bias is tolerated weakens public confidence that our courts can guarantee equal justice. To remedy both the use of race-based peremptory challenges and the belief that such discrimination is occurring, it is imperative that judges adhere scrupulously to *Batson*'s three-step inquiry.

In making the ultimate determination whether peremptory challenges were exercised in a racially discriminatory manner, which is *Batson*'s third step, courts must consider *all* of the available evidence that supports an inference of purposeful discrimination, including the evidence presented at

step one to establish a *prima facie* case of discrimination. Where, as before the defendant has demonstrated a strong *prima facie* case of racial discrimination, it is particularly harmful for the judge to accept the prosecution's proffered race-neutral justifications without considering such critical information as evidence of a pattern of discrimination (by the attorney or his or her office), as well as disparate application of the race-neutral justifications to persons of different races and false reasons proffered (and rejected) during the second step of *Batson*. Requiring that courts consider such evidence not only will be consistent both with the treatment of credibility and pretext assessments by courts in other contexts and with common sense, but also will assure the public that the courts take seriously their roles as gatekeepers against racial discrimination in the courthouse. *See, infra*, Part II.

Applying the settled *Batson* standard to the facts of this case, the conclusion is inescapable that the prosecution exercised its peremptory challenges at petitioner's capital trial in violation of the Fourteenth Amendment. *See, infra*, Part III.

ARGUMENT

I. ERADICATING RACE-BASED PEREMPTORY CHALLENGES REMAINS A JUDICIAL IMPERATIVE.

According to a recent American Bar Association survey, the public's continued support for our justice system stems from its trust in the role of the jury.[2] Indeed, this understanding of the significance of the jury as an institution

---

[2] American Bar Ass'n, *Perceptions of the U.S. Justice System* 6-7 (1999) ("*Perceptions of the U.S. Justice System*"), *available at* http://www.abanet.org/media/perception/perceptions.pdf. Seventy-eight percent of respondents believe that the jury system is the fairest way to determine guilt or innocence, and 69 percent believe that juries are the most important aspect of our justice system. *Id.*

motivated, in part, this Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), which held that the Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from exercising peremptory challenges to exclude potential jurors on the basis of race. *Batson* recognized that the jury occupies a "central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)); *see also Powers*, 499 U.S. at 411 ("The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors."). By compromising the representative quality of the jury, racially discriminatory selection procedures deny the defendant this fundamental protection against injustice. *See Batson*, U.S. at 86 n.8. Beyond the injury to the defendant, the harm from discriminatory jury selection touches the excluded jurors and the entire community. *Id.* at 87; *see also Powers*, 499 U.S. at 406-07. Indeed, the exercise of race-based peremptory challenges "undermine[s] public confidence in the fairness of our system of justice," which threatens the integrity and legitimacy of the system itself.[3] *Batson*, 476 U.S. at 87.

Jury service maintains the "democratic element of the law" and "ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407; s*ee also Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) (Jury service "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience

---

[3] *Amici* recognize, however, that the peremptory challenge system is a traditional and necessary aspect of American jury trials. *See Swain v. Alabama*, 380 U.S. 202, 212-18 (1965). Peremptory strikes ensure a fair trial, not just for the accused, but also for the prosecution. *See id.* at 220. *Amici* do not advocate eliminating peremptory challenges because they believe that the process can be administered in accordance with the Equal Protection limitations this Court established in *Batson*. To that end, vigorous enforcement of *Batson* is required.

fostering … a respect for law."); *J.E.B. v. Alabama*, 511 U.S. 127, 145 (1994) (noting the equal opportunity to participate in the fair administration of justice is "fundamental to our democratic system"). When this Court first condemned the intentional exclusion of African Americans from juries, it observed that jury service is a fundamental aspect of citizenship because it permits ordinary citizens to "participate in the administration of the law." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). In *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922), this Court stated:

> The jury system postulates a conscious duty of participation in the machinery of justice …. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.

Apart from voting, for most citizens, jury service represents "their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. As Justice O'Connor recently observed, "[t]he time jurors spend in jury service is perhaps our best opportunity to instill in them a sense of trust in the fairness … of the justice system." Justice Sandra Day O'Connor, Address at the National Conference on Public Trust and Confidence in the Justice System (May 15, 1999), *available at* http://www.ncsc.dni.us/ptc/trans/oconnor.htm.

A jury selection process that tolerates racial discrimination contravenes the democratic underpinnings of our criminal justice system and fosters disrespect and cynicism for the law as an institution. *Powers*, 499 U.S. at 411 (race-based peremptory challenges "'cast[] doubt on the integrity of the judicial process'" and "place[] the fairness of the criminal proceeding in doubt"); *id.* at 413; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). Indeed:

> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, *casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the case*.... The composition of the trier of fact itself is called into question, and *the irregularity may pervade all the proceedings that follow*.

Powers, 499 U.S. at 412-13 (emphases added). As a result, there is a substantial risk that the verdict will not be accepted or understood as fair by the defendant, by some of the jurors, or by the community. *Id.* at 413.

In addition, the practice of race-based peremptory challenges reinforces negative stereotypes that defy the Equal Protection Clause and further undermines the public's confidence in the fairness of the justice system. In *Strauder*, this Court acknowledged that deliberate exclusion of African Americans from jury service "is practically a brand upon them, 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." *Strauder*, 100 U.S. at 308. More than a century after the decision in *Strauder*, an African American summoned for jury service in Brooklyn, New York wrote to the district attorney complaining about the prevalence of race discrimination in jury selection:

> "If we Blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why are we subject to fines of $250.00 if we don't appear and told it's our civic duty if we ask to be excused? Why bother to call us down to these courts and then overlook us like a bunch of naïve and better yet ignorant children?"

Letter to Elizabeth Holtzman, District Attorney (Nov. 21, 1984), *reprinted in Amicus Curiae* Brief for Elizabeth Holtzman, District Attorney, Kings County, New York, at App., *Batson v. Kentucky*, 476 U.S. 79 (1986).[4] For those who experience the treatment described in this letter and who observe "[t]he overt wrong" of race-based jury exclusion, the criminal justice system and the rule of law inspire neither confidence nor respect. *Powers*, 499 U.S. at 412-13.

In a 1999 survey conducted by the National Center for State Courts, a majority of African Americans and Hispanics surveyed agreed with the statement: "Most juries are not representative of the community."[5] According to a former prosecutor and Dallas County's first African American felony court judge, "blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility." Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, Dallas Morning News, Mar. 9, 1986, at A1; Ed Timms & Steve McGonigle, *A Pattern of Exclusion*, Dallas Morning News, Dec. 21, 1986, at A1.[6]

Such distrust of the justice system is evident in the statements of Billie Jean Fields and Carol Boggess, who were among the African American citizens of Dallas County summoned as prospective jurors for petitioner's trial and challenged peremptorily by the prosecution. Upon learning of

---

[4] Quoted in Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is It, Anyway?*, 92 Colum. L. Rev. 725, 745 (1992).

[5] National Ctr. for State Courts, *How the Public Views the State Courts* 7, 29 (1999), *available at* http://www.ncsc.dni.us/ptc/results/results.pdf. *See also Perceptions of the U.S. Justice System*, at 12, 65 (47% of respondents strongly disagreed or disagreed with the statement that courts treat all ethnic and racial groups the same).

[6] Appendices 10-11 & 12-13, respectively, to Petition for Writ of Certiorari ("Pet. App.").

his own race-based exclusion from petitioner's jury,[7] Mr. Fields commented, "'White Protestant Americans are the only ones [who] have a right to serve in this country and to even live in this country…. It's not right for the justice system to be biased like this, but it's no surprise.'"[8] Ms. Boggess stated, "'It really upsets me that they think like that, that they think that they can't trust me, not even knowing who I am.'" She is angry, she says, that the prosecutors "'would discriminate against me ... and not look at me as a person, as an individual but as a color.'"[9]

As this Court recognized in *Batson*, "[i]n view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if [the courts] ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99. The goal of *Batson* is to achieve the norm of zero tolerance for the discriminatory exercise of peremptory challenges.

II. A COURT MUST LOOK AT ALL RELEVANT EVIDENCE—INCLUDING THE DEFENDANT'S *PRIMA FACIE* CASE—IN DETERMINING WHETHER INTENTIONAL DISCRIMINATION OCCURRED.

While the *Batson* test, like other, similar tests addressing pretext in the context of allegations of racial discrimination, is a three-part test, *amici*'s concern in this case is with the

---

[7] *See* Exhibit 1 to Petition for a Recommendation of a Reprieve of Execution and Commutation of Death Sentence (*In re Thomas Miller-El)*, filed with the Texas Board of Pardons and Paroles on February 6, 2002. Exhibit 1, the videotape of these interviews, is available at http://www.deathpenaltyinfo.org/AudioVideo.html (last visited May 16, 2002).

[8] *Id.*

[9] *Id*.

application of the third step. Under the first step of the *Batson* test, the opponent of a peremptory strike must establish a *prima facie* case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. It is clear that Miller-El produced sufficient evidence to establish a *prima facie* showing of discrimination required by *Batson*'s first step. Once a *prima facie* case has been made, step two requires the prosecution to come forward with race-neutral explanations for its peremptory challenges. *Id.* at 97. For purposes of this brief, *amici* assume that the lower courts were correct to conclude that the prosecution had produced race-neutral explanations for its peremptory challenges. *Id*. However, the courts below failed to consider all of the relevant evidence in evaluating step three: namely, whether Miller-El had established intentional discrimination. *See id*. at 98. Thus, *amici* focus here on the test to be applied by the courts under step three.

The courts' treatment of evidence during the third step of *Batson* is particularly crucial, for "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). 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. 765, 768 (1995) (per curiam). Thus, courts 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 Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). "In deciding [at step three] whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances," *id.* at 96-97, which

means evidence produced by both sides, including evidence of historic, systemic discrimination—as well as the evidence available from the *voir dire* itself.

Evidence of an historic pattern and practice of discrimination is critically important under step three. While *Batson* sought to ensure that race-based peremptory challenges could be made even without evidence of historic, systemic race-based exclusion, *see id.* at 92-93,[10] it did not suggest that such evidence is unimportant. To the contrary, where, as here, the defendant offers substantial, undisputed evidence of a pattern and practice of striking African Americans on the part of the very prosecutors who tried him, the proffered race-neutral justifications for striking ten out of eleven eligible African American jurors become highly suspect. Ignoring strong evidence of pretext is inconsistent with the effort to ensure that prospective jurors are not subject to discrimination in the courthouse and to protect both jurors and the justice system from the harm caused by that discrimination.

No other area of credibility or pretext assessment ignores past practice (by the alleged discriminator, the attorney, or his or her office), training manuals, or other evidence tending to show that a justification given lacks credibility. In the employment discrimination context, past practice is treated as

---

[10] Prior to *Batson*, which was intended to *strengthen* the right to nondiscriminatory jury selection, many courts had held that the only means of showing discriminatory intent was "proof of repeated striking of blacks over a number of cases." *Batson*, 476 U.S. at 92. *See also* American Bar Ass'n, *ABA Standards Relating to Juror Use and Management, Commentary to Standard 9 "Generally"* (1983 ed.) (noting, pre-*Batson*, that "[a]lthough 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).

significant evidence of discrimination.[11] *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977) ("The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

This accords well with common sense: if a person consistently acts in a discriminatory manner, purposeful discrimination may be inferred and proffered race-neutral explanations may be rejected as pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) ("Other evidence that may be relevant to any showing of pretext includes facts as to ... petitioner's general policy and practice with respect to minority employment."). As such, a reasonable person would find relevant the facts that the Dallas County prosecutor's office regularly engaged in discriminatory use of peremptory challenges and had a training manual instructing attorneys to engage in racial discrimination in selecting juries, and that the prosecutors in petitioner's case had been found to have engaged in racial discrimination in selecting juries in similar cases.[12] *See*

---

[11] As this Court has acknowledged, cases interpreting Title VII of the Civil Rights Act of 1964 are highly relevant in explaining the evidentiary rules that govern allegations of race-based jury selection in the post-*Swain* era. *See, e.g., Purkett*, 514 U.S. at 768-69; *Hernandez*, 500 U.S. at 359-60; *Batson*, 476 U.S. at 94 n.18, 98 n.21. Like the *Batson* inquiry, the test for employment discrimination using indirect evidence is a three-step burden-shifting test, where the ultimate burden of persuasion remains at all times on the party challenging an action as discriminatory. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

[12] In this regard, one court of appeals upheld a *Batson* credibility assessment based in part on "a prior pattern or practice of jury selection made by a particular prosecutor" where the judge found that the prosecutor had a practice of *not* engaging in racial discrimination. *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991).

Swain v. Alabama, 380 U.S. 202, 223-24 (1965); *infra*, Part III.

But, as this Court held in *Batson*, other evidence should also be considered in applying step three of *Batson*, just as such evidence is used in other contexts to establish pretext or to assess credibility. Thus, discrimination under *Batson* may be shown where a prosecutor, who after repeatedly striking African American jurors and retaining white jurors, points—as the reason for his decisions—to a characteristic that the excluded black jurors and the seated white jurors have in common. *See, e.g.*, *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998). In the employment context, such differential treatment can similarly be used by a factfinder to conclude that the employer is lying about its reason for terminating a given employee. *See, e.g., Krieger v. Gold Bond Bldg. Prods.*, 863 F.2d 1091, 1098 (2d Cir. 1988). Similarly, if an attorney offers several reasons, some demonstrably false but others sufficient if true to establish the second step of *Batson*, for striking a juror, the court should consider the fact that the attorney offered false reasons when deciding if the legitimate reasons are credible. This is consistent with the lower courts' practices in evaluating pretext in the employment discrimination context.[13] Thus, factfinders should consider the fact that an attorney has offered false reasons in deciding whether to reject as noncredible the other, legitimate reasons offered for striking a juror. *Riley v. Taylor*, 277 F.3d 261, 283 (3d Cir. 2001) (en banc); *United States v. Chinchilla*, 874 F.2d 695, 699 (9th Cir. 1989).

In contrast to the Fifth Circuit, the Second, Third, Sixth, and Seventh Circuits have adhered to this Court's clear

---

[13] *See Fuentes v. Perskie*, 32 F.3d 759, 764 n.7 (3d Cir. 1994); *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir. 1995); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1298 (D.C. Cir. 1998) (en banc).

precedent regarding *Batson*'s third step, affirming that a court should "assess the totality of the circumstances surrounding the strike in the analysis of whether the defendants have met their ultimate burden of proving discrimination" under *Batson*—including the evidence that comprised the *prima facie* case. *United States v. Hill*, 146 F.3d 337, 342 (6th Cir. 1998); *see also Riley*, 277 F.3d at 283-84; *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *Coulter*, 155 F.3d at 921-22. In *Riley*, the Third Circuit properly insisted that "the significance of evidence of systematic exclusion of blacks in jury selection" must be weighed at step three. 277 F.3d at 284. Most particularly, courts must not do what the courts below in this case did, which is to consider "each piece of evidence ... in isolation." *Id.* at 283-84.

Where, as here, substantial, compelling evidence thoroughly undermines the credibility of the prosecutors who proffered race-neutral reasons for striking ten out of eleven eligible African American jurors, the only reasonable conclusion is that racial exclusion, and not the proffered race-neutral reasons, was the motivation for the prosecutor's peremptory challenges. In short, the third prong of *Batson* is not just the letter of the law, but the last clear chance to protect the interests of all participants in the judicial system.

Consistency and accuracy are not the only reasons why it is important for courts to consider all of the relevant evidence—including history of discrimination—in deciding whether a *Batson* violation has occurred. Considering all of the evidence that a reasonable person could use to assess the credibility of an attorney's claim that his or her use of a peremptory strike was race-neutral, does no more than respect common sense. When a court explicitly considers all of the relevant evidence that applies to credibility, the court gives legitimacy to the proceedings and makes clear to all interested parties that the court has acted as a gatekeeper to prevent discrimination in the judicial system. Conversely, when a court accepts uncritically an attorney's race-neutral

justifications, without considering compelling evidence of pretext, the court not only ignores the import of the third prong of *Batson*, but also creates the appearance that the court is complicit in the *Batson* violation.

In *Edmonson*, this Court emphasized that "[b]y enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'" 500 U.S. at 624 (alterations in original) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). As such, where a *prima facie* case of race discrimination is established under *Batson*, a court must take special care in evaluating the proffered race-neutral justifications for challenged peremptory strikes in order to avoid "participat[ing] in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *J.E.B.*, 511 U.S. at 140.

III. A REVIEW OF THE TOTALITY OF THE EVIDENCE UNDER A PROPER *BATSON* ANALYSIS REQUIRES THAT PETITIONER'S CONVICTION BE REVERSED.

None of the state and lower federal courts questioned whether petitioner had established a *prima facie* claim of a *Batson* violation. Similarly, all of the courts who heard this case were satisfied that the prosecution had offered race-neutral explanations for its peremptory challenges. However, each court in its turn improperly truncated the third step of the *Batson* analysis, refusing to consider *all* of the relevant evidence and performing no analysis of the totality of the circumstances presented by petitioner. Yet, as shown above, it violates the settled rule of *Batson* for a court to consider evidence to determine if a threshold showing has been met, but then to refuse to consider that same evidence when evaluating the overall merit of the claim. *See, supra*, Part II.

That, however, is exactly the error committed by each of the courts that reviewed petitioner's claim.

In its Findings of Fact and Conclusions of Law issued following the *Batson* hearing on remand, the trial court failed to consider the evidence submitted by the petitioner showing a pattern of race-based peremptory challenges. Indeed, none of the historical evidence presented by the petitioner is referred to in the trial court's findings of fact. Limiting its focus to evaluating the *voir dire* of the jurors and the prosecutors' explanations for their strikes, the court found that "the evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges." *Ex Parte Miller-El*, No. 8668 N.L., slip op. at 4, 6 (Crim. Dist. Ct. of Dallas County Jan. 13, 1988) (Findings of Fact and Conclusions of Law Upon Remand). The court ignored its duty to evaluate the totality of the circumstances under step three of the *Batson* inquiry, effectively denying petitioner meaningful judicial review and perpetuating the very harm that *Batson* is supposed to correct.

This constitutional error was repeated by the Texas Court of Criminal Appeals ("CCA"), which also ignored the third step of the *Batson* analysis. Again, the court did not even mention the evidence—undisputed by the State—of the systemic, historical use of peremptory challenges against African Americans by the Dallas County District Attorney's Office. Pet. App. 2, at 1-2 (*Miller-El v. State*, No. 69,677 (Tex. Crim. App. Sept. 16, 1992) (en banc) (per curiam) (unpublished)). The CCA also evaluated the race-neutral reasons for the peremptory strikes only with respect to the transcript of the *voir dire* of the challenged jurors, rather than considering the totality of the circumstances.

In his review of petitioner's federal habeas petition, the magistrate judge noted that petitioner had presented copious and multifaceted evidence in support of his claim. Pet. App. 5, at 20 (*Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. Jan. 31, 2000) (unpublished)). Nonetheless, the

magistrate judge again considered only the historical evidence in deciding that petitioner had established a *prima facie* case, stating first that historical evidence is of limited value, and is only useful to "help[] him establish a *prima facie* case for discrimination." *Id.* He declined to evaluate the "appalling" and "disturbing" evidence of persistent racism in the State's selection of jurors in reaching his final determination. *Id.* Adopting the findings of the magistrate judge, the district court placed its seal of approval on the crabbed *Batson* analysis conducted by the state courts. According to the district court, the CCA properly analyzed the historical evidence of discriminatory uses of peremptory challenges when it determined that while petitioner had raised an "inference of purposeful discrimination" "further discussion of the evidence in support of the prima facie case was unnecessary." Pet. App. 6, at 4 (*Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000) (unpublished)).

Lastly, in denying the petitioner's request for a Certificate of Appealability, the United States Court of Appeals for the Fifth Circuit sanctioned the lower courts' refusal to consider the evidence of systemic exclusion of African American jurors by Dallas County prosecutors beyond the first step of the *Batson* inquiry. Pet. App. 1, at 7-12 (*Miller-El v. Johnson*, 261 F.3d 445, 450-51 (5th Cir. 2001)). The Fifth Circuit also unreasonably and erroneously relied on the trial court's misapplication of *Batson* by leaving undisturbed the State courts' truncated third stage of the *Batson* inquiry.

Given the weight and power of petitioner's evidence, the denial of petitioner's *Batson* claim is astonishing. *Amici* believe that a proper review of the totality of the evidence relied on by petitioner can lead to only one reasonable conclusion: that the prosecutors improperly used peremptory challenges in a racist manner.

The actions of the prosecutors in petitioner's trial strongly suggest that their use of peremptory challenges was improper. Ten of the eleven eligible African American jurors were

peremptorily struck by the prosecution in petitioner's case. Pet. App. 5, at 6. Although the Fifth Circuit has suggested that there may be no discrimination so long as there are one or two minorities who are approved to sit on the jury, *United States v. Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), surely the acceptance of one minority juror cannot correct the improper exclusion of ten (especially since this form of quota would allow attorneys to shield themselves against any discrimination claim). As this case shows, the acceptance of one minority juror does not, standing alone, reflect an absence of discriminatory intent. To the contrary, it may signal that the particular juror has pro-prosecution characteristics that mitigate his race, such as being extremely pro-death penalty. Indeed, the one minority who did sit on the jury for petitioner's trial indicated during *voir dire* that execution was too humane a form of punishment, suggesting instead that defendants be coated with honey and eaten by ants. Pet. App. 5, at 6 n.4.

The prosecutors also "shuffled" the jury pool so that more African Americans were located near the back of the pool, thereby increasing the likelihood that they would be dismissed before they were ever questioned. After petitioner's attorneys had the jury pool shuffled so that there were a number of black jurors at the front of the pool, the prosecutors suddenly complained that the shuffling had been performed improperly.

Finally, prosecutors conducting the *voir dire* at petitioner's trial frequently questioned black and white jurors differently, in an attempt to find grounds to strike black jurors for cause. For example, white jurors were told what the minimum sentence would be for a lesser included offense, and then were asked if they could enforce such a sentence. Black jurors, on the other hand, were asked open-ended questions about what they thought the minimum sentence would be. If the juror suggested a minimum sentence that was higher than what the law provided, the prosecutor would then argue that

the response suggested that the juror would not be able to apply the minimum sentence, and should, therefore, be excluded from the jury. Pet. App. 5, at 13. In other instances, prosecutors would express grave concern if a black juror had anything that might conflict with jury duty, such as an inability to take time off from work, while disregarding similar problems raised by white jurors.

The State offered three general reasons for its peremptory strikes. First, the State claimed that some of the stricken jurors expressed hesitance or ambivalence about applying the death penalty and also about whether they could convict petitioner for a lesser included offense. Pet. App. 5, at 14. Second, in a related reason, the State professed purported concern that the religious beliefs of some of the excluded jurors would interfere with their service. Third, some of the jurors were excluded from the jury because they had relatives who had been charged with or convicted of committing a crime. However, the transcript of the *voir dire* strips the State's race-neutral explanations of all credibility. First, the prosecution's concern that a potential juror might be too hard on crime is simply not plausible on its face. In addition, whites and blacks were questioned differently with respect to minimum sentences in a manner suggesting that the prosecution was attempting to solicit information to strike the black jurors for cause. *See Coulter*, 155 F.3d at 921 ("A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate African American prospective jurors and not others who also have that characteristic."). Beyond that, the prosecution never struck a white juror for any of the reasons that it used against black jurors. No white juror was struck for having a relative who had been arrested or convicted of a crime—though at least one white juror did. Nor were any white jurors struck for their religious background—even though at least one white juror was, like a stricken black juror, Roman Catholic. White jurors who expressed a belief in

rehabilitation, and so favored life sentences over the death penalty, were left unquestioned by the prosecution—in sharp contrast to black jurors.

Although the evidence culled from petitioner's trial is compelling in its own right, when viewed in light of the historical evidence of discrimination by the Dallas County District Attorney's Office, it becomes overwhelming. Not only did petitioner present an astonishing volume of evidence suggesting that the Dallas County District Attorney's Office at the time of his trial systemically sought to strike African American jurors as a matter of course, but the State in turn left the majority of the evidence undisputed. This evidence included two internal memoranda, distributed among district attorneys in training materials, advising that minorities should not be permitted to sit on juries. One memorandum written in 1963 advised attorneys not to accept "'Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or well educated.'" Pet. App. 11, at 10. Six years later, another memorandum counseled that minority jurors were undesirable because they were more inclined to sympathize with the accused. Pet. App. 8, at 3.

A statistical analysis conducted by the *Dallas Morning News* at the time of petitioner's trial illustrated the actual impact of the district attorneys' training. The numbers speak for themselves: although 18 percent of the population of Dallas County was black, only four percent of jurors were. Prosecutors used peremptory challenges against 86 percent of otherwise eligible black jurors, meaning that any given eligible minority juror had a one-in-ten chance of being chosen for a jury, as opposed to white candidates, who had a one-in-two chance of being selected. Pet. App. 11, at 1. Focusing exclusively on capital cases, the *Dallas Morning News* found that in the 15 then-most recent capital cases, over ninety percent of qualified black jurors were peremptorily struck by the prosecution, leaving them with a one-in-twelve chance of being chosen to sit on a jury, as compared to a one-

in-three chance for whites. In those 15 trials, with 180 jurors, only five were black. Pet. App. 13, at 1.

Indeed, one of the prosecutors in petitioner's trial conducted *voir dire* in a number of the trials cited in the *Dallas Morning News* study. In another case tried by this same prosecutor, the defendant successfully challenged the use of peremptory challenges to strike minority jurors. The court in that case found that the race-neutral explanations offered by the prosecutor for the strikes were not credible. *Chambers v. State*, 784 S.W.2d 29, 32 (Tex. Crim. App. 1988) (en banc). Another prosecutor involved in petitioner's trial was also found in a subsequent case (against petitioner's wife) to have used peremptory challenges to strike black jurors, and to have failed to offer plausible race-neutral explanations. *(Dorothy) Miller-El v. State*, 790 S.W.2d 351, 356-57 (Tex. App. 1990). These prosecutors both improperly struck jurors based on their race and failed to provide adequate explanations for their actions immediately before, and immediately following, petitioner's trial. Ignoring such compelling evidence at step three renders *Batson*'s promise hollow.

So blatant was the method of excluding minorities from juries by the Dallas district attorney's office that state trial court judges readily testified to their first hand observations of the practice in their courtrooms. Pet. App. 5, at 7 n.6. One judge went so far as to exclude a prosecutor from his courtroom for egregious discrimination in his method of selecting jurors. *Id.* (noting that five current or former judges, two prosecutors, and two defense attorneys testified to the district attorney office's practice of excluding African Americans from jury service).

The courts below had before them this evidence of the history of racial discrimination by the Dallas County District Attorney's Office, but they confined its use to determine whether a threshold showing of a *Batson* claim had been met. No court considered the historical evidence together with the

evidence from petitioner's actual trial. By separating their analysis of the historical evidence from their evaluation of the use of peremptory challenges at petitioner's trial, the courts below erroneously insulated the prosecutors' proffered race-neutral justifications. These race-neutral explanations, however, could not counter the weight of the entirety of the evidence presented. The evidence from the *voir dire* alone raises implications of racial discrimination, but when viewed through the lens of the historic evidence of discrimination by the Dallas County District Attorney's Office, there becomes only one reasonable conclusion: that black jurors were impermissibly stricken as jurors from petitioner's trial. The courts below would have reached this conclusion if they had correctly applied the settled rule of *Batson* and considered all of the facts before them.

The prosecutors in this case engaged in conduct long-prohibited by the Equal Protection Clause, and each of the courts below failed to remedy the wrong done to the petitioner and to the constitutional principles of *Batson*. While a prosecutor's duty is to seek justice for those who are harmed and punishment for those who transgress the law, this purpose is not served by seeking a conviction at any cost. The goals of the criminal justice system are not met when a guilty man is convicted by constitutionally improper means. *Strickler*, 527 U.S. at 281. A conviction must be won fairly and in accord with constitutional guarantees in order for it to command public confidence. This is especially so in a death penalty case where the imposition of sentence is irreversible. Any reasonable suspicion that race played any part in the final judgment is simply intolerable. *Riley*, 277 F.3d at 287 ("We cannot avoid noting that *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.").

The rule established by this Court in *Batson* has no meaning if not properly applied. Failure to correct

unconstitutional actions by attorneys at trial compounds the harm to the justice system. First, it makes the courts complicit in the discriminatory actions of the trial attorneys. Second, it erodes the public's belief that courts will not shirk their duties to enforce the Constitution. As the guardians of judicial process and the enforcer of the constitutional principles that prohibit discrimination in the selection of jurors, *Powers*, 499 U.S. at 416, courts have the ultimate duty to ensure that the zero tolerance mandate of *Batson* is fulfilled. Thus far in this case, the courts have not fulfilled their role.

The constitutional violations that occurred at Thomas Miller-El's trial are precisely those *Batson* was designed to avert, and if committed, redress. This Court in *Batson* acted to lift the heavy burden established in *Swain* that a defendant must show a history of discrimination in the prosecutor's use of peremptory challenges, continuing unabated before and through the defendant's trial, in order to establish an equal protection violation. *Batson*, 476 U.S. at 92-93. In this case, however, petitioner actually has powerful evidence of the kind required by *Swain*; he has presented evidence of a systemic and historical practice of the discriminatory use of peremptory challenges by the prosecutor that continued up to and after his trial. Although the petitioner has satisfied the "crippling" burden of *Swain*, the State and lower courts nonetheless have found that his claim founders under what was intended to be the more protective standard of *Batson*. This perverse result is the product of the courts below deliberately restricting the use of the historical evidence to the first stage of the *Batson* inquiry and refusing to consider this "appalling" and "disturbing" evidence when deciding whether, under the totality of the circumstances, there has been discrimination. This reading of *Batson* cannot stand.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the lower courts and grant petitioner a new trial.

Respectfully submitted,

CARTER G. PHILLIPS
JENNIFER M. RUBIN
LESLEY C. FOXHALL
ALEXANDRA R. GELBER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

ELISABETH SEMEL*
CHARLES D. WEISSELBERG
DEATH PENALTY CLINIC
University of California School of Law (Boalt Hall)
Berkeley, California 94720
(202) 642-0458

Counsel for Amici Curiae

May 28, 2002

* Counsel of Record

APPENDIX

AMICI CURIAE

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. He served as an Independent Counsel from 1990 until 1995. He is currently employed at the law firm Schnader Harrison Segal & Lewis LLP in New York, New York.

W.J. Michael Cody served as Attorney General of Tennessee from 1984 until 1988 and Chairman of the Southern Conference of Attorneys General from 1987 until 1988. He also served as U.S. Attorney for the Western District of Tennessee from 1977 until 1981. He was a member of the Judicial Council of the Tennessee from 1984 until 1988, and a member of the Attorney General's Advisory Committee of U.S. Attorneys from 1979 until 1980. He is currently a member of the Constitution Project's Death Penalty Initiative and a partner at the law firm Burch, Porter & Johnson in Memphis, Tennessee.

The Honorable John Gibbons is the former Chief Judge of the United States Court of Appeals for the Third Circuit. He served on that court from 1970 until 1990. He is currently a partner in the law firm Gibbons, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey.

The Honorable Eric H. Holder, Jr. served as Deputy Attorney General of the United States from 1997 until 2001, and as U.S. Attorney for the District of Columbia from 1993 until 1997. He also served as Associate Judge of the Superior Court of the District of Columbia from 1988 until 1993. He is currently a partner at Covington & Burling in Washington, D.C.

Robert S. Litt served as Assistant U.S. Attorney for the Southern District of New York. He also served five years as Principal Associate Deputy Attorney General and Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice. Prior to that, he clerked for the Honorable Potter Stewart on the U.S. Supreme Court. He is currently a partner at Arnold & Porter in Washington, D.C.

Charles M. Oberly III served as Attorney General of Delaware from 1983 until 1995. He is currently a partner in the law firm Oberly & Jennings, P.A. in Wilmington, Delaware.

Professor James Orenstein formerly served as Assistant United States Attorney for the Eastern District of New York and as Deputy Chief of the Eastern District's Organized Crime and Racketeering Section. From 1996 until 1998 he was a Special Attorney to the U.S. Attorney. From 1999 until 2001, he served as Associate Deputy Attorney General of the United States. He is currently an adjunct professor at New York University School of Law and Fordham law School and a partner in the law firm Baker & Hostetler LLP in New York, New York.

Professor 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. She is currently a professor at Georgetown Law Center in Washington, D.C.

Professor Michael Scheininger formerly served as Assistant United States Attorney for the District of Columbia. He is currently an adjunct professor at Georgetown Law Center and a partner in the law firm McKenna & Cuneo in Washington, D.C.

The Honorable William Sessions served as Director of the Federal Bureau of Investigation from 1987 until 1993, as Chief Judge of the U.S. District Court for the Western District

of Texas from 1980 until 1987, and as a judge of the U.S. District Court for the Western District of Texas from 1974 until 1980. He also served as U.S. Attorney for the Western District of Texas from 1971 until 1974. He currently serves as a member of the Constitution Project's Death Penalty Initiative and is a partner at the law firm Holland & Knight LLP in Washington, D.C.

Professor Paul Shechtman served as Chief of the Criminal Division of the Office of the U.S. Attorney for the Southern District of New York from 1993 until 1995. He served as the State Director of Criminal Justice and Commissioner of the State Division of Criminal Justice Services from 1995 until 1997. He is currently an adjunct professor at Columbia School of Law and a partner in the law firm Stillman Friedman & Shaw P.C. in New York, New York.

Jeff Stone served in the office of the U.S. Attorney for Chicago for five years. He also served as counsel to the Illinois Judicial Inquiry Board. He has served as an adjunct professor at Northwestern University School of Law and is a partner at McDermott Will & Emery in Chicago, Illinois.

Beth A. Wilkinson formerly served as an Assistant United States Attorney for the Eastern District of New York from 1991 until 1995, Counsel to the Deputy Attorney General in 1995, and as a Special Attorney to the U.S. Attorney General for *United States v. McVeigh* from 1996 until 1998. She is currently the Co-Chairman of the Constitution Project's Death Penalty Initiative and a partner in the law firm Latham & Watkins in Washington, D.C.