No. 02-9001

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MUMIA ABU-JAMAL,
APPELLANT IN No. 02-9001
v.
MARTIN HORN, PENNSYLVANIA DIRECTOR OF CORRECTIONS, *et. al.*
APPELLEE IN No. 02-9001

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT SEEKING REVERSAL, IN PART, OF THE DISTRICT COURT'S ORDER

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* files the following statement of disclosure: The NAACP Legal Defense & Educational Fund, Inc., is a nonprofit 501(c)(3) corporation and is not a publicly held company that issues stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

NEWSPAPER ARTICLES

OTHER AUTHORITIES

Interest of *Amicus*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist African Americans in securing their rights by the prosecution of lawsuits. 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. We represented the defendants in, *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, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005), *Johnson v. California*, 125 S.Ct. 2410 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992). In addition to our jury discrimination work in the United States Supreme Court, LDF was counsel of record in *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005). Given its expertise, LDF believes its perspective would be helpful to this Court in resolving the issues presented in this case.

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[1] All parties have consented to the filing of this brief. Counsel for Appellant, Mumia Abu-Jamal, Robert R. Bryan, and Counsel for Appellee, the Commonwealth of Pennsylvania, Hugh Burns, have provided undersigned counsel with letters attesting to their consent.

ARGUMENT

Abu-Jamal v. Horn asks this Court to determine whether *Batson v. Kentucky*, 476 U.S. 79 (1986), requires a court confronted with evidence raising a genuine suspicion of intentional discrimination in the exercise of peremptory challenges to inquire into the motivations behind the challenged strike(s) or whether, instead, such an examination can only be triggered by actual proof of discrimination. Because the *Batson* three-part test was developed to ameliorate the logistical and practical difficulties of proving discriminatory intent, *Batson* clearly requires the former. In order for *Batson*'s promise to be realized, courts facing real indications of discriminatory intent must make a genuine inquiry into the motivations behind challenged strike(s) in order to expose and eliminate discrimination in jury selection.

Because Mr. Abu-Jamal's case presents an abundance of evidence of discriminatory intent, the District Court erred in deferring to the Pennsylvania courts' findings that Mr. Abu-Jamal failed to set forth a *prima facie* case of discrimination under *Batson*. This Court should reverse.

A. The Promise of *Batson*: Real Inquiry into Real Suspicion of Discrimination.

The United States Supreme Court has long condemned racial discrimination in jury selection. Indeed, "[f]or over a century, [the Supreme Court] has been

unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct." *Powers v. Ohio*, 499 U.S. 400, 405 (1991). The Supreme Court has explained that intentional discrimination harms the defendant on trial, the excluded juror, and the community-at-large. The defendant is harmed because s/he is "denie[d] . . . the protection that a trial by jury is intended to secure" – the "right[s] under the Fourteenth Amendment to 'protection of life, and liberty against race or color prejudice.'" *Batson*, 476 U.S. at 86-87 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879)). The excluded juror suffers because exclusion 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. The entire community is negatively impacted by discriminatory jury selection because "[w]hen 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,' . . . [it] 'invites cynicism respecting the jury's neutrality' and undermines public confidence in adjudication." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2324 (2005) (quoting *Powers*, 499 U.S. at 412; citing *Georgia v. McCollum*, 505 U.S. 42, 49

(1992)).

In working to eradicate discrimination in jury selection, the Supreme Court has focused on the discriminatory use of peremptory challenges. Although the peremptory challenge has long been recognized as a "means of assuring the selection of a qualified and unbiased jury," *Batson*, 476 U.S. at 91 (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965)), the Court has acknowledged that it also "constitute[s] a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id*. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). The Court has therefore "sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, and the constitutional prohibition on exclusion of persons from jury service on account of race." *Batson*, 476 U.S. at 91 (citing *Swain*, 380 U.S. at 214-20, 222-24).

To strike the appropriate balance between these often competing interests, the Court has struggled with determining when a prosecutor accused of exercising peremptory challenges in a racially discriminatory manner should be required to articulate the reasons underlying the use of such challenges and, more specifically, how much evidence of discrimination a petitioner must present in order to trigger such an inquiry. The resolution of this question is critical: if a petitioner claiming discrimination is required to satisfy an extremely high evidentiary burden, the

integrity of the peremptory challenge will be preserved but unlawful discrimination will go undetected. If, on the other hand, petitioners need only satisfy an extremely low evidentiary burden, purposeful discrimination will be exposed but the peremptory challenge will be gutted. The Supreme Court's decisions in *Swain*, and *Batson* (and its progeny) exemplify its struggle to strike the right balance. These cases also explain how and why the Court has concluded that petitioners must not face insurmountable barriers to the resolution of real claims of discrimination and that courts confronted with legitimate indicia of discrimination must inquire into the motives underlying challenged peremptory strikes to determine whether discrimination is at work.

In *Swain*, the Supreme Court tried for the first time "to reconcile the command of racial neutrality in jury selection with the utility, and the tradition, of peremptory challenges." *Powers*, 499 U.S. at 405. Although it "declined to permit an equal protection claim premised on a pattern of jury strikes in a particular case, [the Court] acknowledged that proof of systematic exclusion of black persons through the use of peremptories over a period of time might establish an equal protection violation." *Id*. Specifically, the Court held that a petitioner challenging the allegedly discriminatory exercise of a prosecutor's peremptory challenges must 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. Practically speaking, the *Swain* decision meant that peremptory challenges were shielded from all review unless and until a petitioner claiming discrimination was able to carry the very substantial burden of "investigat[ing], over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges." *Batson*, 476 U.S. at 92 n.17 (citing *U.S. v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971)). Thus, the *Swain* court erected an extremely high threshold for challenging potentially discriminatory peremptory strikes.

In the years that followed, it became clear that *Swain*'s burden of proof was "crippling," *Batson*, 476 U.S. at 92, "unworkable," *Miller-El*, 125 S.Ct. at 2324, and, ultimately, an impediment to the discovery and elimination of racial discrimination in jury selection. Indeed, "[i]n the two decades following *Swain* 'almost no other defendants . . . [were able to meet *Swain*'s] standard of proof.'" *U.S. v. Clemons*, 843 F.2d 741, 745 (3d Cir. 1988) (quoting *McCray v. Abrams*, 750 F.2d 1113, 1120 (2d

Cir. 1984)).[2] As a result, after *Swain*, the discriminatory "[m]isuse of the peremptory challenge to exclude black jurors [became] common and flagrant," *Batson*, 476 U.S. at 103 (Marshall, J., concurring), and "prosecutors' peremptory challenges [were] largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93.[3] Thus, although *Swain* technically created a mechanism for remedying purposeful discrimination in the exercise of peremptory challenges, its extremely high threshold burden rendered its promise illusory. Criminal defendants, excluded jurors and the community-at-large therefore continued to suffer from the deleterious effects of racial discrimination in the exercise of peremptory challenges.

Given its patent ineffectiveness, in 1986 the Supreme Court re-evaluated *Swain*. Relying on the Court's historical commitment to eradicating racial discrimination in jury selection, the evolution of its equal protection jurisprudence,[4]

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[2] *See also* Congressional Research Service, Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases Decided by the Supreme Court of the United States, Sixth Amendment–Rights of Accused in Criminal Prosecutions* at 1417 (Johnny H. Killian & George A. Costello eds., 1992), *also available as* S. Doc. No. 103-6, 103rd Cong. (1st Sess. 1992), *available at* http://www.gpoaccess.gov/constitution/pdf/con017.pdf, ("Swain . . . posited so difficult a standard of proof that defendants could seldom succeed"); James O. Pearson, Jr., *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3d 14, 2b (1979) ("In all of the cases involving [the *Swain* Standard] thus far. . .no defendant has yet been successful in proving to the court's satisfaction an invidious discrimination by the use of the peremptory challenge against blacks over a period of time.").

[3] *See also Batson*, 476 U.S. at 101 (White, J., concurring) (in the two decades that followed *Swain*, "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remain[ed] widespread.").

[4] *See*, *e.g.*, *Batson*, 476 U.S. at 93 (The *Swain* test is "inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.").

and the continuing abuse of the peremptory challenge system post-*Swain*,[5] in *Batson* the Supreme Court "tailored a new test under which defendants can more effectively protect themselves against the discriminatory use of peremptory challenges." *U.S. v. Clemmons*, 892 F.2d 1153, 1155 (3d Cir. 1989).

Because the *Batson* court "recognized the difficulty defendants will often have in showing intentional discrimination," *Wilson v. Beard*, 426 F.3d 653, 666 (3d Cir. 2005), it "repudiat[ed] . . . the evidentiary burden that it had previously placed on defendants in making an equal protection claim." *Holloway v. Horn*, 355 F.3d 707, 720 (3d Cir. 2004). Instead, the Court held that "the defendant may establish a prima facie case 'in other ways than by evidence of long-continued unexplained absence' of members of his race 'from many panels.'" *Batson*, 476 U.S. at 95 (quoting *Cassell v. Texas*, 339 U.S. 282, 290 (1950)). The Court declared that "[w]hen circumstances suggest the need, the trial court must undertake a 'factual inquiry' [into allegations of discrimination] that 'takes into account all possible explanatory factors' in the particular case." *Id.* (quoting *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)). Specifically, the *Batson* court held that a petitioner seeking to prove intentional discrimination in the exercise of peremptory challenges must

[5] *See*, *e.g.*, *Batson*, 476 U.S. at 99 ("The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors.").

> [first] make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. Third, "if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination."

Wilson, 426 F.3d at 666 (quoting *Johnson v. California*, 125 S.Ct. 2410, 2416 (2005)). With this decision, therefore, the Court sought to create an accessible means of addressing discrimination in jury selection.

In order to ensure that the *Batson* test did not suffer from the infirmities of *Swain*, the Court explicitly stated that petitioners claiming discrimination should not be saddled with a heavy evidentiary burden. Specifically, the Court declared that a such a petitioner 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. Second, the 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." Finally, the 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. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

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

A court presented with such *prima facie* evidence of discrimination is required to take action: it must obtain a race-neutral reason for the State's challenged strikes and decide whether the defendant has proven purposeful discrimination. *Batson*, 476 U.S. at 97-98. By directing that courts respond to indicia of discrimination by conducting a targeted inquiry and making (and explaining the basis for) reviewable findings on the issue, *Batson* promised that courts would "enforce[] the mandate of equal protection and further[] the ends of justice" to fill the vacuum that was created by *Swain*. *Batson*, 476 U.S. at 99.

In the years since *Batson*, the Supreme Court has maintained its commitment to keeping the *prima facie* case burden low in order to expose and eliminate the discriminatory use of peremptory challenges. Thus, in *Johnson v. California*, 125 S.Ct. 2410 (2005), the Supreme Court reaffirmed the principle that the *prima facie* case burden is not and cannot be unduly heavy and that courts confronted by a *prima facie* case of discrimination must inquire into the motives behind the challenged strikes to ensure that discrimination is not at work.

In *Johnson*, the Supreme Court reversed the California Supreme Court's holding that *Batson*'s *prima facie* case required a petitioner to "show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." *Id*. at 2413. Specifically, the Court held that

> [w]e did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Id. at 2417. The Court emphasized that the *prima facie* case burden must be kept low in order to honor *Batson*'s goal of protecting defendants, excluded jurors, and the community-at-large from the harm of discrimination in jury selection:

> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.

Johnson, 125 S.Ct. at 2418.

Thus, the promise of *Batson* is that courts confronted with real evidence of discrimination in the use of peremptory challenges will take prompt action to protect the interests of defendants, excluded jurors and the greater community by inquiring into the motives underlying challenged strikes and, where appropriate, remedy acts of unlawful discrimination.[6]

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[6] In light of *Batson*'s history and purpose, this Court has similarly rejected interpretations of the *prima facie* case requirement which are unduly burdensome. *See*, *e.g., Bronshtein v. Horn*, 404 F.3d 700, 723 (3d Cir. 2005) (holding that the Pennsylvania Supreme Court's requirement that a petitioner seeking to establish a *prima facie* case of discrimination create a record of "the race of the jurors who served and the race of the jurors acceptable to the [prosecution] who were stricken by the defense" was contrary to *Batson*) (internal quotations and citations omitted); *Holloway v. Horn*, 355 F.3d at 728(same); *Clemons*, 843 F.2d at 746 (rejecting the State's argument that there should

B. Mr. Abu-Jamal Has Set Forth a *Prima Facie* Case of Discrimination in Jury Selection.

When viewing the facts of Mr. Abu-Jamal's case through the lens of *Batson*'s true history and purpose, it becomes abundantly clear that he has set forth a *prima facie* case of discrimination. As detailed below and in the *Brief of Appellee and Cross-Appellant, Mumia Abu-Jamal*, an appropriately context-sensitive, holistic examination of the facts and circumstances surrounding Mr. Abu-Jamal's *voir dire* proceedings makes clear that there is more than "sufficient" evidence "to permit the trial judge to draw an inference that discrimination has occurred." *Johnson*, 125 S.Ct. at 2417.

1. The Racial Overtones in Mr. Abu-Jamal's Case.

This was unquestionably a racially charged case. Mr. Abu-Jamal is African American and the victim was white. *See, e.g., Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995) ("[t]he nature of the crime and its racial configuration – [a black defendant and white victim] – contribute significantly to [the] prima facie case."). Additionally, Mr. Abu-Jamal was a prominent African-American community

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be "some magic number or percentage to trigger a *Batson* inquiry" because such a test "would short-circuit the fact-specific determination expressly reserved for trial judges" and "*Batson* does not require that the government adhere to a specific mathematical formula in the exercise of peremptory challenges")(internal citations omitted).

activist. *See* NT 7/26/95 at 39, 41, 46-47.[7] Furthermore, in the months between the incident and the trial, the local media continually emphasized the racial aspects of the case.[8] Specifically, newspapers highlighted the following facts:

- **Mr. Abu-Jamal Was an African-American Community Activist and a Member of and/or Advocate for African-American Organizations.** *See* Stephen Braun, *Accused Killer a Man of Many Sides*, PHILADELPHIA DAILY NEWS, December 9, 1981, at 4 (Mr. Abu-Jamal was the immediate past president of the Philadelphia Chapter of the Association of Black Journalists; he was "close to members of the MOVE organization" and occasionally served as their spokesman; he had been the communications secretary for the Philadelphia chapter of the Black Panthers; in December 1970, he was suspended from Benjamin Franklin High School for distributing literature "calling for 'black revolutionary student power.'");[9] Terry E. Johnson and Michael A. Hobbs, *The Suspect: One Who Raised His Voice*, PHILADELPHIA INQUIRER, December 10, 1981, at A1 (Mr. Abu-Jamal was "a gadfly among journalists and easily recognizable because of his . . . revolutionary politics;" he was associated with "militant groups;" he "was involved in numerous black political organizations and was an active supporter of MOVE, a radical back-to-nature movement;" he had been a member of the Black Panther Party); Jim Davis, *Witnesses Give Conflicting Accounts of Actual Shooting*, PHILADELPHIA TRIBUNE, December 11, 1981, at 1 ("Jamal, in news media accounts dwelling on his teen-aged years, has been portrayed as a Black militant, stressing his ties to the former Black Panther Party."); Christopher Hepp, *The Accused[']s]*

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[7] *See*, *e.g.*, *Ham v. South Carolina*, 409 U.S. 524 (1973) (noting that the defendant's identity as a prominent African-American civil rights activist is a critical factor for determining whether race is a constitutionally significant issue in a case).

[8] Numerous venirepersons acknowledged exposure to the press coverage of Mr. Abu-Jamal's case. *See, e.g.,* NT 6/7/82 at 171; NT 6/8/82 at 2.15, 2.42, 2.67, 2.80, 2.94, 2.116, 2.135, 2.156; NT 6/9/82 at 3.55, 3.72, 3.89, 3.97, 3.131, 3.144, 3.195, 3.197; NT 6/10/82 4.61, 4.109, 4.199; NT 6/11/82 at 28, 39, 55, 80; NT 6/16/82 at 301, 317, 345, 471, 485.

[9] *See also* Robert J. Terry, Michael A. Hobbs, *Policeman Shot to Death: Radio Newsman Charged*, PHILADELPHIA INQUIRER, December 10, 1981, at A1; Joyce Gemperlein, *Higher Bail Sought for Abu-Jamal*, PHILADELPHIA INQUIRER, January 10, 1982, at B1; Joyce Gemperlein, *Abu-Jamal's Bail Appeal Slated to be Heard Today*, PHILADELPHIA INQUIRER, January 22, 1982, at B5.

Friends Can't Fathom 'Brilliant' Newsman as Murder Suspect, PHILADELPHIA DAILY NEWS, December 10, 1981, at 1 (Mr. Abu-Jamal "showed deep compassion and understanding of the city's minority community;" he was "communications secretary for the Philadelphia chapter of the Black Panthers;" while at Benjamin Franklin High School, he "helped lead an unsuccessful student effort to change the school's name to Malcolm X High School.")

- **As a Reporter, Mr. Abu-Jamal Worked for African-American Media Outlets And/or Focused on African-American Issues**. *See* Braun, *supra* (Mr. Abu-Jamal "often reported on housing, prisons and other stories involving poor people and minorities;" he "worked as a stringer for radio station WDAS;" when working for WUHY, he "covered black affairs;" he later worked as a consultant to WUHY to prepare "a special report on MOVE for the stations' afternoon talk show, 'Fresh Air;'" his "radio career began at . . . WRTI-FM, where, through 1973, he did a commentary show on black affairs.");[10] Hepp, *supra* (while working with WUHY, Mr. Abu-Jamal, "often reported on housing, prisons and other stories involving poor people and minorities;" he "distinguished himself reporting on the North Philadelphia reaction to the pope's arrival in 1979 and in continuing coverage of the MOVE organization;" he worked for WDAS).

- **Mr. Abu-Jamal Wore His Hair in Dreadlocks**. *See* Braun, *supra* ("Jamal, like many Rastafarians, grew his hair in long, spiky dreadlocks");[11] Johnson and Hobbs, *supra* ("Once, when asked about his hair style, Jamal said: 'I wear it as a conscious African. I wear it to show oneness with the first man, an African, who wore his hair this way.'"); Hepp, *supra* ("Jamal surprised other reporters by showing up with his hair braided in the familiar dreadlock style of MOVE members."); Marc Kaufman, *Abu-Jamal Selection of Jurors Halted*, PHILADELPHIA INQUIRER, June 10, 1982, at B4 ("Several prospective jurors left the courtroom Tuesday saying they were too upset and afraid to serve after being questioned by Abu-Jamal, who wears his hair in the dreadlocks style of the MOVE sect.").

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[10] *See also* Terry and Hobbs, *supra*.

[11] *See also* Terry and Hobbs, *supra*.

- **Mr. Abu-Jamal Demonstrated Interest in and/or Involvement with the Rastafarian Religious-Cultural Movement.** *See* Braun, *supra*; Hepp, *supra.*

- **Mr. Abu-Jamal was Born Wesley Cook but Changed his Name.** *See* Johnson and Hobbs, *supra* ("Jamal, whose name at birth was Wesley Cook, adopted the African name after leaving the Black Panther Party in 1970.").

- **Prior to his Arrest, Mr. Abu-Jamal Made Public Statements Regarding the Rights and Experiences of African Americans**. *See* Johnson and Hobbs, *supra* (Mr. Abu-Jamal was dismissed from Benjamin Franklin High School "for circulating pamplets [sic] calling for 'black revolutionary student power'"; "During the 1979-1980 MOVE trial for the murder of police officer James Ramp, Jamal complained that police harassed him when he entered the heavily guarded courtroom because his dreadlocks gave him the appearance of a MOVE member. 'You know how they treat you,' he said angrily to another reporter at the time"; "In a 1970 interview, Jamal said: 'Black people are facing the reality that the Black Panther Party has been facing: Political power grows out of the barrel of a gun."); Hepp, *supra* (Mr. Abu-Jamal had been criticized for working "to bring more black programming to WRTI.").

- **African-American Organizations Established and/or Supported a Defense Fund for Mr. Abu-Jamal**. *See* Terry and Hobbs, *supra* (the Association of Black Journalists established a defense fund for Mr. Abu-Jamal); Robert J. Terry and Terry E. Johnson, *Chamber Gives Slain Officer's Wife $1,000*, PHILADELPHIA INQUIRER, December 11, 1981, at B1 ("Defense fund committee organizers said that among the groups participating are the Association of Black Journalists, the National Black Independent Political Party, the National Lawyers Guild, the Black Teachers Caucus of the Philadelphia Federation of Teachers and the Committees United Against Police Abuse."); Gemperlein, *supra* (January 10, 1982); Norris P. West, *Jamal Says His Defense is Hindered*, PHILADELPHIA TRIBUNE, April 23, 1982, at 1 ("A benefit concert, featuring Temple University instructor and poet Sonia Sanchez, Black Sheep and a member of the Last Poets raised funds for Jamal's defense. Black Sheep, a Philadelphia oriented reggae group, asserted the defense committee's goals by singing their recently composed song, 'Justice for brother Jamal.'").

- **Members of the Philadelphia-Based, African-American Organization, MOVE, Attended the Court Proceedings and Supported Mr. Abu-Jamal's Defense**. *See* Joyce Gemperlein, *Abu-Jamal is Denied Information on Witnesses*, PHILADELPHIA INQUIRER, March 19, 1982, at B3; Joyce Gemperlein and Robert J. Rosenthal, *Abu-Jamal Shot Officer in Back, Witness Says*, PHILADELPHIA INQUIRER, January 9, 1982, at A1 ("Abu-Jamal's supporters, many of them members of MOVE, a self-styled back-to-nature group, have said that he was not guilty of the shooting and that he was beaten by police after the shooting. . . . After the hearing, MOVE supporters in the audience shouted: 'On the move!' – their now-familiar slogan at court hearings involving their members, as Abu-Jamal was led from the courtroom."); Frederic N. Tulsky, *Officers Say Abu-Jamal Hit a Pole*, PHILADELPHIA INQUIRER, June 4, 1982, at D24.

Because there exists a constitutionally significant risk of race prejudice in the trial of an African-American defendant who, like Mr. Abu-Jamal, is prominently involved in race-work and "[r]acial issues . . . [are] inextricably bound up with the conduct of the trial," the courts reviewing Mr. Abu-Jamal's *Batson* claim had an obligation to be sensitive to the potential for discrimination in the prosecutor's exercise of peremptory challenges. *Turner v. Murray*, 476 U.S. 28, 32 n.3 (1986) (citing *Risaino v. Ross*, 424 U.S. 589, 596-97 (1976)). Given this fact as well as the goals of *Batson*, the lower courts should, therefore, have erred (if at all) on the side of inquiring into the motivations behind the prosecutor's suspicious peremptory challenges in order to assure Mr. Abu-Jamal, the members of the venire, and the community-at-large that Mr. Abu-Jamal's trial was fair and that African-American prospective jurors were not excluded because of their race. *See McCollum*, 505 U.S.

at 49 (citing Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 195-96 (1989)) ("The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.").

2. The Conduct of the Trial Prosecutor.

The conduct of Joseph McGill, Mr. Abu-Jamal's trial prosecutor strongly suggested discriminatory intent. Not only did Mr. McGill use a disproportionate number of his peremptory challenges to exclude African-American potential jurors,[12] he also made statements suggesting discriminatory intent.[13] "If anything more is needed for an undeniable explanation of what was going on, history supplies it." *Miller-El*, 125 S.Ct. at 2340. The record reveals that Mr. McGill had a personal history of systematically striking black jurors. As detailed in Mr. Abu-Jamal's

[12] *See Brief of Appellee and Cross-Appellant, Mumia Abu-Jamal*, at 18-22 (noting that "the prosecutor struck **71%** (10/14) of the blacks he had an opportunity to strike, but struck just **20%** (5/25) of the whites he had an opportunity to strike – *i.e.*, he struck blacks at **3.6 times** the rate than he struck whites. The odds of being struck if you were black were **2.5-to-1** (10/4), but the odds of being struck if you were white were just **0/25-to-1** (5/20) – *i.e.*, a black person's odds of being struck were **10 times** higher than someone who is white.").

[13] *See* NT 6/12/82 at 2.35 (the prosecutor indicated that he accepted an African-American juror because he believed that juror was "fair-minded" because she hated Mr. Abu-Jamal).

Habeas Petition, a survey of homicide cases tried by Mr. McGill between September of 1981 and October of 1983 reveal that he excluded prospective African-American venirepersons *approximately three times as often* as he excluded non-black prospective jurors. Specifically, Mr. McGill was 2.93 times more likely to peremptorily challenge African-American venirepersons than non-blacks and the odds that Mr. McGill would peremptorily challenge an African-American potential juror were 8.47 times greater than for non-black jurors. *See Habeas Petition* at ¶¶ 465-66. Each of these factors strongly suggests discriminatory intent. *See Batson*, 476 U.S. at 97 (a pattern of strikes and statements/questions by the trial prosecutor "may support . . . an inference of discriminatory purpose."); *Miller-El*, 125 S.Ct. at 2325 ("[h]appenstance is unlikely to produce" a significant disparity in the use of peremptory challenges against African-American potential jurors).

3. The Historical Conduct of the Philadelphia County District Attorney's Office.

There is also substantial evidence that the Philadelphia County District Attorney's Office systematically excluded African-American prospective jurors through the use of peremptory challenges. A comprehensive statistical study of Philadelphia County death penalty cases tried between 1981 and 1997 reveals that, "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51%

of black jurors and 26% of nonblack jurors." *Miller-El*, 125 S.Ct. at 2341 (Breyer, J., concurring) (citing David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 52-53, 73, n.197 (2001)). The study found that the racial disparities were more pronounced prior to *Batson* (when this jury was selected) than after. *Id*.

Additionally, a videotaped *voir dire* training by the Philadelphia County District Attorney's Office explicitly advocates the exclusion of African-American prospective jurors. *See, e.g., Wilson*, 426 F.3d at 656-658 ("[i]n the [training] tape, [the prosecutor] makes a number of highly inflammatory comments implying that he regularly seeks to keep qualified African-Americans from serving on juries.").[14]

Finally, trial counsel's contemporaneous accounts of his experiences with the Philadelphia District Attorney's Office corroborate these findings. *See, e.g.,* NT 3/18/82 at 12 (in requesting the opportunity to *voir dire* the potential jurors on the race issues in the case, trial counsel indicated that "[i]t has been the custom and the

[14]Although the videotaped training occurred some years after Mr. Abu-Jamal's trial, this Court has concluded that the prosecutor at issue, Jack McMahon, utilized the techniques described in the tape for years beforehand. *See Wilson*, 426 F.3d at 669 ("McMahon had worked in the District Attorney's office for six years prior to Wilson's [1983] trial. It simply defies logic to suggest that all of the techniques which he so forcefully advocates in the tape suddenly came to him during the two years between Wilson's trial and the training session at which the tape was made."). Additionally, the fact that Mr. McMahon states that other Philadelphia prosecutors routinely use their peremptory challenges to exclude all African-American potential jurors demonstrates that this was a widespread practice within the Philadelphia County District Attorney's Office. *See Supplemental Appendix of Appellee and Cross-Appellant, Mumia Abu-Jamal* at 237 (DATV Transcript at 56). Finally, this evidence, in combination with the trial counsel's experience (detailed *infra*) and the contemporaneous findings of Pennsylvania courts, *see*, *e.g., Commonwealth v. Henderson*, 497 Pa. 23, 27 (1981), strongly suggests that the use of peremptory challenges to exclude African-American potential jurors was common practice in the Philadelphia County District Attorney's Office.

tradition of the District Attorney's Office to strike each and every black juror that comes up peremptorily. It has been my experience since I have been practicing law, as well as the experience of the defense Bar, the majority of the defense Bar, that that occurs."); *id*. ("I just finished a jury trial . . . where the first thirteen black jurors were peremptorily challenged by the district attorney.").[15]

This evidence of a pattern or practice of discriminatory exercise of peremptory challenges by the Philadelphia County District Attorney's Office also supports the inference of discrimination. *See Miller-El*, 125 S.Ct. at 2340 (finding a *Batson* violation by relying, in part, on evidence that "[t]he prosecutors took their cues from a 20-year old manual" advocating the exclusion of African-American – and other minority – potential jurors).

CONCLUSION

When the racially charged atmosphere of the trial, the conduct of the trial prosecutor and the pattern and practice of the Philadelphia County District Attorney's Office are "viewed cumulatively[,] its direction is too powerful to conclude anything but [that there exists an inference of] discrimination." *Miller-El*, 125 S.Ct. at 2339. As this Court has stated:

to allow the absence of a *prima facie* case to be case dispositive when

[15] *See also* NT 7/28/95 at 208.

> the record raises serious questions about the prosecutor's motivations would defeat one of *Batson*'s principal purposes – to provide assurance to the defendant and the community that criminal judgments are not tainted by invidious discrimination. Where the record as a whole as ultimately developed permits a reasonable argument that the judgment is so tainted, the issue of taint must be resolved; it cannot be avoided by a finding that the defendant failed to present a *prima facie* case.

Johnson v. Love, 40 F.3d 658, 665 (3d Cir. 1994). This is exactly such a case. This Court should find that the District Court erred in deferring to the state courts' conclusion that Mr. Abu-Jamal did not present a *prima* facie case of discrimination in the exercise of peremptory challenges and erred in failing to inquire into the true motivations underlying these strikes.

For the foregoing reasons, *amicus* respectfully suggests that this Court reverse the district court's decision that Mr. Abu-Jamal has not set forth a *prima facie* case of discrimination under *Batson*.

Dated: July 27, 2006

Respectfully submitted,
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CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Christina A. Swarns, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 5673 words, excluding the parts of the brief exempted by Fed. R.App.P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in 14 point, Times New Roman font.

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I hereby certify that the electronic and hard copies of foregoing Brief in the instant matter contain identical text.

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I hereby certify that a virus check of the electronic .PDF version of the foregoing Brief was performed using Symantic AntiVirus, and the .PDF file was found to be virus free.

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