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, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND AND THE LEAGUE OF WOMEN VOTERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[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. Its purpose includes rendering legal aid without cost to African-Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.

The 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 in 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 *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Georgia v. McCollum*, 505 U.S. 42 (1992).

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in one thousand communities and

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

in every state, with more than 120,000 members and supporters nationwide.

Founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States, the League has always worked to promote the values and processes of representative government. Working for open, accountable, and responsive government at every level; assuring citizen participation; and protecting individual liberties established by the Constitution — all reflect the deeply held convictions of the League of Women Voters.

The League of Women Voters believes that democratic government depends upon the informed and active participation of its citizens. Racial discrimination to block citizen participation in government offends the core values of the League and the American system of representative government. We believe that no person should suffer the effects of legal or administrative discrimination. The League participated as *amicus curiae* in *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994), the case that prohibited the exercise of peremptory challenges based on the gender of the juror.

The question before this Court – whether the lower courts erred in failing to find a violation of *Batson* when presented with overwhelming evidence that prosecutors had used race-based peremptory challenges systematically to exclude African-Americans from the jury which convicted and sentenced the African-American petitioner to death – presents an important issue concerning the administration of criminal justice. *Amici* believe their experience with the issue of racial discrimination in jury selection has yielded lessons that could be useful to the Court in resolving this appeal.

SUMMARY OF THE ARGUMENT

Justice and the perception of justice in the criminal justice system are essential to the maintenance of order in a democratic society. Functionally and symbolically, juries stand as a safeguard against the State's misuse of its powers to confine or execute its citizens. Racial discrimination in the selection of juries injures not only the defendant and the African-American citizenry who are excluded from service, but the entire community. Cynicism and disrespect for the law are the predictable results when courts condone blatant discrimination in the courtroom.

The facts of this case present an egregious example of just the type of government manipulation of the jury that denies justice and breeds disrespect for the law. The Dallas County District Attorney's office routinely and deliberately excluded African-Americans from jury service through peremptory strikes at the time this case was tried and in preceding years. The prosecutors followed this practice in choosing the jury in this capital case. State courts found that the same prosecutors who systematically struck African-Americans from the jury in this case had discriminated in the same way in other trials both before and after petitioner's trial. Yet instead of putting the prosecutors' strikes in context and weighing their assertions of racial neutrality against evidence that bespeaks discrimination, the courts below refused to consider such evidence.

The record here makes clear that this Court's determination to end invidious racial discrimination in the selection of juries remains unfulfilled in some jurisdictions. To assure that there is an adequate and certain check on the biased use of peremptory challenges to exclude African-Americans

from juries, the Court needs to restate what would seem a self-evident proposition: — that in determining whether invidious racial discrimination has occurred, judges must consider all of the facts and circumstances that might shed light on the issue.

ARGUMENT

I.

The Practice of Excluding African-Americans from Juries Undermines Justice and the Appearance of Justice

. The Crucial Role of Juries in a Democratic Society

This case is of great significance because juries are both a real and symbolic bulwark against the State's misuse of its powers to confine or execute its citizens. "The petit jury has occupied 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." *Batson*, 476 U.S. at 86. It is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), "a prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), that "fence[s] round and interpose[s] barriers on every side against the approaches of arbitrary power," *id.* at 84-85.

The jury also serves as the defendant's primary protection against the invidious influence of race in the decision whether he lives or dies. "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' *Strauder v. West*

Virginia, 100 U.S. 303, 309 (1880). Specifically, a capital sentencing jury representative of a criminal defendant's community assures a '"diffused impartiality,"' *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)), in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death,' *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)." *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (footnotes omitted); see also *Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. . . .The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.").

The risk of error in capital cases is not theoretical. Racial prejudice can influence jurors' determinations not only on the ultimate question of life and death, but on the issue of guilt itself. "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U.S. at 69 (O'Connor, J., dissenting). "[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' *Rose v. Mitchell*, 443 U.S. 545, 556 (1979), and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

. **Race-Based Exclusions Harm Jurors as Well as Defendants**

As this Court has made abundantly clear, the harm from discriminatory exclusions of African-American jurors is not to the defendant alone. When particular segments of the community are excluded from serving on juries, they are excluded from participating in an institution that stands at the heart of our democracy. To be told that you are unfit because of your race to judge your fellow citizens is to be told unequivocally that you are a second-class citizen. Your voice is not considered to be a voice of common sense to be interposed between the government and the accused. Your intelligence, your ability to be fair, your life experiences, your understanding of your society, and your integrity are all denigrated. "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970).

"'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.'" *Powers v. Ohio*, 499 U.S. at 406 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922)). For people who are excluded from jury participation, there is no such security, but doubt and mistrust that the system is functioning in a fair and impartial manner.

The fact that prosecutors have long used peremptory challenges to purge juries of African-Americans is not news in the African-American community. When an African-American is struck from a jury, he or she is aware that the strike may be racially motivated. "[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself," *Edmonson v. Leesville Concrete Co.*, 500 U.S. at 628, the place where

even-handed justice is supposed to reign. When the exclusion comes not just in a governmental forum, but at the instance of the government's representative himself, the injury is further compounded.

Such exclusions have led to the belief that what occurs in the courthouse is not justice, but "white man's justice."[2] Indeed, African-American citizens interviewed by the Dallas Morning News at the time of Petitioner's trial spoke of the injury such discrimination causes. "Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind." *Id*. One such potential juror said she felt "intimidated" after she and five other African-American jurors were eliminated by the State, resulting in an all-white jury. *Id*. A former prosecutor and Dallas county's first African-American judge said, "[A]s honest, law-abiding citizens who believe in God and the American way and pay our taxes to send our children to school, we're still told we're not anything of value." *Id*.

. **Racial Discrimination in Jury Selection Discredits the Entire Judicial System**

Society has a paramount interest in maintaining confidence in its criminal justice system. A democratic society depends on the shared belief of its members that the system is fair and impartial, that verdicts are objective and

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[2] *See*, *e.g.*, Steve McGonigle, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds* DALLAS MORNING NEWS, March 9, 1986 at A1, Cert. App. 11, at 8 ("Many families of defendants leave the courtroom believing they have witnessed 'white man's justice,' said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.") [Citations to items in the Appendices to Petition for Writ of Certiorari appear in the form, "Cert. App. [number of appendix], at [page number.]"

reliable, and that punishments meted out are punishments deserved. "Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 155 (Scalia, J., dissenting).

It is not only African-Americans who equate racial discrimination in the courtroom with a denial of justice. This Court has repeatedly observed that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality." *Rose v. Mitchell*, 443 U.S. at 556.

Indeed, one of the strongest and most enduring symbols of injustice in this country is the trial of an African-American defendant by an all-white jury. "To Kill a Mockingbird,"[3] although a work of fiction,[4] seared into the American consciousness the grim reality of inequity in

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[3] HARPER LEE, TO KILL A MOCKINGBIRD 233 (1960); *see also* Tim Dare, *Lawyers, Ethics, and To Kill a Mockingbird,* 25 PHILOSOPHY AND LITERATURE 131 (2001) ("These courts were governed not by presumptions of equality and innocence, but by prejudice and bigotry. Atticus's plea to the jury had been ignored and Tom had been convicted and killed as a result."). More recent works of fiction that have included the theme of the biased all-white jury include STEPHEN KING, THE GREEN MILE (1997).

[4] Although fiction, the book in fact was influenced by historical events. *See* Carroll Van West, *Perpetuating the Myth of America: Scottsboro and its Interpreters*, SOUTH ATLANTIC QUARTERLY, 36-48 (Winter 1981) (indicating To Kill A Mockingbird was strongly influenced by the Scottsboro case and the Emmett Till murder); *see also* Patrick Chura, *Prolepsis and Anachronism: Emmett Till and the Historicity of* To Kill A Mockingbird, SOUTHERN LITERARY JOURNAL, 1-26 (Spring 2000).

racially exclusionary tribunals. Although that story took place in 1930s America, the all-white jury is, unfortunately, not a relic of an unenlightened past,[5] nor is it perceived to be. Rubin "Hurricane" Carter's conviction by an all-white jury was the subject of both a popular song (*Hurricane*, co-written and performed by Bob Dylan),[6] and a recent movie (THE HURRICANE (Paramount Pictures 1999)).

There continues to be widespread public suspicion about the fairness and accuracy of verdicts in criminal cases where all-or nearly all-white juries are impaneled in communities with significant minority populations.[7] As Justice Thomas noted

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[5] For example, a recent study by the Chicago Tribune found that 22% of all African-Americans sentenced to death in Illinois between 1977 and the time of the survey in November, 1999 were condemned by all-white juries. Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, Sec. 1, p. 16.

[6]
Here comes the story of the Hurricane,
The man the authorities came to blame
For somethin' that he never done.
Put in a prison cell, but one time he could-a been
The champion of the world.

* * *

And though they could not produce the gun,
The D.A. said he was the one who did the deed
And the all-white jury agreed.

* * *

To see him obviously framed
Couldn't help but make me feel ashamed to live in a land
Where justice is a game.

(*Hurricane*, by Bob Dylan and Jacques Levy Copyright © 1975 Ram's Horn Music).

[7] The insidious history of white juries sitting in judgment of black defendants represents only part of the basis for the pervasive distrust of unrepresentative juries. On the other side of the coin are cases in which white juries have acquitted white defendants accused of crime against

African-Americans, like the famous murders of Emmett Till and Medgar Evers, and many others whose names never became known beyond their own small towns. When Byron De La Beckwith was re-indicted and, in 1994, finally convicted of murdering Medgar Evers, news reports and editorials concerning the conviction highlighted the fact that the verdict was returned by a mixed jury, a sign of social progress. *See, e.g., Belated Justice in Mississippi*, THE BALTIMORE SUN, Feb. 8, 1994, at 14A ("De La Beckwith was tried twice by all-white juries during the 1960s, with both cases ending in hung juries. This time, eight of the 12 jurors were black– a direct result of the civil rights movement Mr. Evers gave his life for– and their decision carried a measure of credibility that all previous proceedings lacked."); *After 30 Years, Conviction in Medgar Evers' Murder Case* (ABC NEWS, Feb. 5, 1994) ("A racially mixed jury did today what two all-white juries refused to do more than a generation ago: they convicted a white man, a segregationist . . . Byron De La Beckwith, of the crime."); Bill Berlow, *Beckwith's Old Story Sheds Light On Today's Racial Mistrust*, THE TALLAHASSEE DEMOCRAT, Jan. 26, 2001, at A1; Christina Cheaklos, *Mississippi's 30-Year Murder Mystery*, THE ATLANTA JOURNAL AND CONSTITUTION, Feb. 5, 1994, at A1 ("Today, the jury deciding Beckwith's fate is made up of eight blacks and four whites, testament to the change since two all-white juries failed to reach verdicts in 1964."). Despite the progress signaled by the Evers case, juries that *excluded* African-Americans were, at the same time, prominent in the news. The Rodney King case is a prime example. The jury which presided over the trial of the officers was composed of ten whites, one Asian-American, and one Latina. *See* Richard A. Serrano & Carlos V. Lozano, *Jury Picked for King Trial; No Blacks Chosen*, L.A. TIMES, Mar. 3, 1992, at A1, A19. On April 29, 1992, the jury acquitted police officers charged with beating King of all charges. The outcome shocked people throughout the nation, who had viewed a videotape of the beating on television. Riots erupted all over Los Angeles in large measure because the public perceived the jury, devoid of African Americans, as lacking legitimacy. *See* Robert Reinhold, *After the Riots: After Police Beating Verdict, Another Trial for the Jurors*, N.Y. TIMES, May 9, 1992, at A1; see *also* Tanya E. Coke, *Lady Justice May Be Blind, But Is She A Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (May, 1994) ("Conventional wisdom has it that Los Angeles burned in the spring of 1992 because of a damning videotape and a verdict of not guilty. The more precise source of public rage, however, was that the jury which acquitted four white police officers of beating black motorist Rodney King included no African Americans."). The King verdict cemented in the minds of many the idea that even at the end of the Twentieth Century, jury exclusion and racially-biased verdicts were a reality.

recently, "the public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society, and that it may influence some juries. Common experience and common sense confirm this understanding." *Georgia v. McCollum*, 505 U.S. at 61 (Thomas, J., dissenting).[8]

For all these reasons, state conduct that unlawfully manipulates a jury in a capital case so that minority juror participation is either token or non-existent raises profoundly important issues.

II.

The Lower Courts' Refusal to Recognize Discrimination in This Case Flouts This Court's Mandate to End Race Discrimination in Jury Selection

This case presents not only strong proof that intentional discrimination marred the selection of petitioner's jury but also a disturbing scenario of the lower courts' ignoring both this evidence and controlling law in concluding that no Equal Protection violation occurred.

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[8] In the five years after this Court's decision in *McCollum,* (from June 1, 1992 to June 1, 1997) a computer search found virtually the same number of references to "all-white" jury (192) in the New York Times, the Chicago Tribune and the Los Angeles Times as Justice Thomas did at the time of *Batson.* In the succeeding five years (June 1, 1997 to April 8, 2002) that number was reduced, but remained substantial (114).

A. From *Strauder* to *Batson*: The Struggle to End Governmental Exclusion of African-Americans from Jury Service

Since the adoption of the post-Civil War amendments promising equal protection of the laws to the newly-freed slaves, race-based exclusion from juries has been used to eviscerate that promise. It has undermined both justice and the perception of justice. As old, more direct methods of racial discrimination were held unlawful, new, more subtle ones took their place. Explicit laws forbidding African-Americans to sit on juries, *see*, *e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, were replaced with a variety of discretionary systems that enabled officials to exclude African-Americans simply by refusing to select them for venires. After the Court repeatedly made clear that exclusion from venires by any means -- whether by statute or practice -- would not be tolerated, *see, e.g.*, *Avery v. Georgia*, 345 U.S. 559 (1953); *Whitus v. Georgia*, 385 U.S. 545 (1967), officials determined to prevent African-Americans from actually serving on juries turned to the peremptory challenge. *Batson v. Kentucky*, 476 U.S. 79 (1986).

At each step along this path, officials have continually asserted that the absence of African-Americans from juries was not the result of purposeful discrimination, but was based on lawful reasons: there were no qualified African-Americans, *Neal v. Delaware*, 103 U.S. 370 (1880); none who qualified were known to State officials charged with composing venire lists, *Norris v. Alabama* 294 U.S. 587 (1935); their views and beliefs made them less impartial, and thus legitimately subject to peremptory strikes, *Swain v. Alabama*, 380 U.S. 202 (1965).

With regard to exclusion from jury lists and venires, this Court rejected such views and held repeatedly that assertions that African-Americans were universally unfit for

jury service — or nearly so — were nothing more than expressions of racial prejudice. *See*, *e.g.*, *Norris v. Alabama*, 294 U.S. 587. Even in the face of sworn testimony from state trial judges, jury commissioners and other officials found "credible" by state court judges, the Court made clear that it would not turn a blind eye to the truth of racial prejudice and discrimination that permeated American life and the American court system. "[A] finding of no discrimination was simply too incredible to be accepted by this Court." *Hernandez v. New York,* 500 U.S. 352, 369 (1991).

In the course of these "unceasing efforts to eradicate racial discrimination," *Batson*, 476 U.S. at 85, however, the Court stumbled. When it held in *Swain* that only proof of systematic and complete exclusion of African-Americans from juries over an extended period of time would suffice to prove intent to discriminate in the use of peremptory challenges, it erected what proved to be an insurmountable burden of proof. For the next twenty years, racial discrimination remained a notorious feature of jury selection in many American courtrooms.[9] The fact that African-Americans were virtually openly excluded from participation in a system of justice purporting to promise equality and fairness bred cynicism and distrust.

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[9] This is demonstrated by successful *Swain* challenges in the late 1980's and the 1990's. *See*, *e.g.*, *Horton v. Zant*, 941 F.2d 1449, 1455-60 (11th Cir. 1991)(*Swain* test satisfied where evidence showed prosecution struck 90% of African American jurors in capital cases in addition to other evidence showing prosecutor took steps to lessen minority participation in jury system); *Miller v. Lockhart*, 65 F.3d 676, 680-82 (8th Cir. 1995)(*Swain* test satisfied where prosecutor used ten strikes against African American jurors in instant case and other evidence showed African Americans excluded peremptorily in large numbers in five year period preceding Miller's trial); *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988)(testimony of six practicing attorneys showed black jurors routinely struck by prosecutors in jurisdiction; *Swain* standard satisfied).

When this Court decided *Batson*, its manifest intent was to bring to an end – once and for all – these practices and to restore integrity to the system. Those harmed by discriminatory peremptory striking could now prove their cause without need to conduct an exhaustive investigation into numerous other cases. The pervasive exclusion of African-Americans from juries — known to all but not "provable" in the courts — was to cease.

But cases like petitioner's show why it has not ended and will not end without this Court's decisive intervention. "Those of a mind to discriminate"[10] found the Achilles heel in *Batson,* the mask behind which continued discrimination could hide — the "facially neutral" explanation for a peremptory strike. In too many cases, African American jurors continued to be excluded in large numbers, and some trial and appellate courts not only credited nearly any reason given by the prosecution as a purportedly race-neutral justification but also held that it trumped all other proof suggesting racial discrimination.[11] It is clear to us that the trial bench and reviewing courts need a clear admonition from this Court that a facially neutral explanation for a strike may be a necessary but is not a sufficient defense in the face of strong evidence of purposeful racial discrimination.[12]

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[10] *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. at 562).

[11] See *infra* pp. 23 - 25.

[12] This case is distinguishable from *Purkett v. Elem*, 514 U.S. 765 (1995)(per curiam), wherein the Court addressed the prosecutor's burden of production at stage two of the three-step *Batson* inquiry, as well as the issue of the deference a federal habeas court must extend to state court fact-finding on the credibility of such offerings. This case does not concern those questions but rather presents only the question of the scope of evidence the court must consider at stage three after the prosecution has met its stage two burden of production.

B. The Evidence of Purposeful Discrimination in this Case is Overwhelming

In our view, it is hard to imagine a case with stronger proof that a prosecutor intended to discriminate, absent an explicit confession from the prosecutor. Without rehashing in detail all of the evidence produced below, which will be presented in petitioner's brief, it is important to summarize the evidence:

1. The office of the prosecutor made it an explicit policy to exclude African-Americans from juries, evidenced in its training manual, memos used in training, and the testimony of former prosecutors.[13]

2. The office had a history of vastly disproportionate exclusion of African-Americans from both felony and capital juries. Uncontroverted evidence showed that in a study of 100 randomly selected felony trials between 1983 and 1984 (shortly before petitioner's trial), 405 of 467 (87%) of African-Americans qualified to serve were excluded *by*

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[13] Although written in the late 1960s, the memo which was incorporated into the manual is known to have remained in the manual at least as late as the early 1980s. *Ex parte Haliburton*, 755 S.W. 2d 131, 133 n. 4 (Tex. Crim. App. 1988). The manual stated: "Who you select, and what you qualify the panel on will depend on the type of crime, the age, *the color* and sex of the Defendant . . ." Cert. App. 8, at 301 (emphasis added). "You are not looking for any member of a minority group which may subject him to oppression." *Id.* at 303. An earlier version used more straightforward and offensive language, calling for the exclusion of "Jews, Negroes, Dagos, Mexicans, or a member of any minority race." Cert. App. 11, at 100. That the policy was still in effect at the time of petitioner's trial was shown by the contemporaneous testimony of judges and lawyers who said it was widely known in the local legal community that the Dallas County district attorneys used peremptory strikes to exclude African-Americans.

prosecutors using peremptories. African-Americans were excluded from juries at almost five times the rate of whites. Eighty percent of African-American felony defendants were tried by all-white juries. Although African-Americans comprised 18% of the county, they were less than 4% of jurors. 72% of juries had no African-Americans. A qualified African-American had only a one in ten chance of serving on a jury, while a white had a one in two chance.[14]

In a study of capital trials in Dallas County from 1980 - 1986, the evidence, again uncontroverted, showed that of 180 jurors in 15 trials, only 5 (3%) were African-American. Of the remaining 57 African-Americans qualified to serve, 56 (98%) were excluded *by prosecutors using peremptory challenges*. Four of the five African-Americans sentenced to death were sentenced by all-white juries. Qualified African-Americans had a one in twelve chance of being selected for a jury, while whites had a one in three chance.[15]

3. The prosecutors used 10 of 14 peremptory challenges to exclude 91% of qualified African-Americans from petitioner's jury. Cert. App. 5, at 6.

4. The specific prosecutors who exercised the challenges at issue in petitioner's case were found to have intentionally discriminated in other trials preceding and following this case. *Chambers v. State*, 784 S.W.2d 29 (Tex.

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[14] See Steve McGonigle, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds* DALLAS MORNING NEWS, March 9, 1986 at A1, Cert. App. 11, at 1.

[15] See Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1, Cert. App. 13, at 36.

Crim. App. 1989); *(Dorothy Jean) Miller-el v. State*, 790 S.W.2d 351 (Tex. App. - Dallas 1990, pet. ref'd).[16]

5. The prosecutors acted to exclude African-Americans from petitioner's jury before they knew anything about them. Before a word of voir dire was uttered in this case, before juror questionnaires were even completed, the prosecutors attempted to reduce the number of African-Americans on the panel by "shuffling" the panels. When the permitted number of shuffles failed to achieve their goal, they requested an additional one, citing violation of a rule the trial judge had never seen cited, let alone enforced, in twenty-five years in the county. *See* V.D. Vol. IV 1792-93.

6. The prosecutors coded the jury cards in petitioner's case by race. *See* Supplemental Briefing on Batson/Swain Claim Based on Previously Unavailable Evidence (filed December 8, 1977), *Miller-El v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex.), Exhibit 1, at 1-56.

7. The prosecutors questioned African-American jurors differently than white jurors in petitioner's case. *See Petitioner's Brief.*

8. The reasons that the prosecutors proffered for striking African-American jurors from petitioner's jury applied to white jurors who were not struck.[17]

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[16] The prosecutor in charge of jury selection had joined the District Attorney's office in 1973. He testified in *Chambers* that he had "never" stricken a potential juror solely on the basis of race. *Chambers v. State*, 784 S.W.2d at 31. The state court refused to credit this testimony.

C. The Lower Courts' Patently Inadequate Review

There is simply no way to accept as "reasonable" -- as did the lower courts -- the trial court's holding that there was no discrimination in this case. In early 1986, it was widely known that Dallas County prosecuting attorneys used peremptory challenges to keep African-Americans off juries, but the courts apparently believed that *Swain* immunized their actions. Once *Batson* lifted that immunity, it was plain the courts could now provide relief to petitioner. But relief was not granted because the courts failed to apply the clearly established law requiring consideration of the compelling pattern and practice evidence in the record as bearing on the question whether petitioner had shown that the strikes constituted racially-biased conduct.

1. The State Court Decisions

The decision in *Batson* "requir[es] trial courts to be sensitive to the racially discriminatory use of peremptory challenges." *Batson*, 476 U.S. at 99. But sensitivity requires an open mind and an unflinching eye. Regrettably, in our view the trial court here displayed neither.

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[17] Only these last two categories of evidence were contested by the State. *See* Petitioner's Brief for a detailed analysis of the voir dire.

It is difficult to tell whether the trial judge simply misunderstood *Batson*, or was so unreceptive to a claim of racial discrimination that he refused to consider compelling facts in support of the claim.[18] Whatever the reason, the trial judge went so far as to hold, at the conclusion of the *Batson* remand hearing, that petitioner had failed to make out a *prima facie* case, even after the Texas Court of Criminal Appeals had explicitly held as a matter of law that one had been proven.[19] *Miller-El v. State*, 748 S.W.2d 459, 460 (1992).

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[18] At the conclusion of the original *Swain* hearing, after being presented with the training manual, the testimony of former prosecutors, the statistical evidence of exclusion, and testimony from judges and defense lawyers in support of the claim, the trial judge stated there was "*no evidence* presented to me that *indicated* any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (Def. Exh. 1 at 146) (emphasis added).

[19] The last section of the trial judge's opinion ("Findings of Fact and Conclusions of Law on Disputed Issues") is divided into two sections: "A. Prima Facie Case" and "B. Reasonableness of the State's Explanations." Under the "Prima Facie Case" section, the trial judge held: "The evidence did not even raise an inference of racial motivation in the use of the State's peremptory challenges." Reply to Respondent's Brief In Opposition, App. 1, at 4. In an introduction to the "Reasonableness of the State's Explanations" section, the trial judge wrote, "Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her [sic?] peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue." *Id.*, at 6. It also appears that the trial judge collapsed the first and second steps in *Batson*, allowing the prosecutor's "race neutral" explanations to negate a finding of a *prima facie* case. The trial judge cited a 1987 opinion from the Supreme Court of Missouri which seemed to endorse such a procedure, directing trial judges "to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use

At the *Batson* hearing, petitioner asked the trial judge to admit all of the evidence adduced at the pre-trial *Swain* hearing for consideration of the *Batson* claim. The State objected, arguing that all of the evidence of systematic exclusion should be excluded because it was now irrelevant: under *Batson*, the only evidence that was admissible was evidence about the individual trial in which the claim was raised. *See Respondent's Opposition to Writ of Certiorari* App. A, at 8-10. Neither office policy nor a pattern of behavior in prior or subsequent cases could be considered. Essentially, what this Court had intended as a relaxing of the *Swain* standard was turned on its head: although *Batson* held that difficult-to-obtain proof of complete and systematic discrimination was no longer required to prove discrimination in an individual case, the State contended that *Batson barred* the petitioner from using evidence of systematic discrimination as proof of discrimination in an individual case involving the same actors.

The state trial judge admitted the evidence "in an abundance of caution" but made clear that he was not required to give it any weight whatsoever in his decision *See Respondent's Opposition to Writ of Certiorari* App. A, at 11. His written decision recites the evidence he considered — the "raw numbers" of strikes used (which he believed were counterbalanced by the fact that one African-American was allowed to sit); the "entire voir dire process" and "the explanations for the [strikes] . . . offered at trial and at the retrospective *Batson* hearing." Reply to Respondent's Brief In

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of peremptory challenges." *Id.* at 5 (*citing State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987) (*en banc*)).

Opposition, App. 1, at 5. The pattern and practice evidence is omitted from the list, and not mentioned anywhere else. Thus, all the information about who the actors were, what they had been doing, and the impact of those actions vanished. Viewing the case in total isolation, the trial judge concluded that no discrimination had occurred.

On appeal, the Court of Criminal Appeals looked at the record to determine whether the prosecutor had, as the trial court found, proffered facially race-neutral explanations for the strikes of African-Americans. Since it found that he had, and there was support in the record for those explanations, the Court of Criminal Appeals went no further. The reality of what everyone knew had occurred in Dallas County in the 1980s simply dropped out of the case. The Court of Criminal Appeals did not even acknowledge that the trial judge had completely ignored its own finding that petitioner had proven a *prima facie* case of discrimination. *Miller-el v. State*, No. 69-677 (Tex. Crim. App. Sept. 16, 1992).

2. The Federal Court Decisions

The federal district court and the Fifth Circuit both relied on the Findings and Recommendation of the United States Magistrate Judge. *Miller-el v. Johnson*, No. 3:96-CV-1992-H (N.D. Tex. June 5, 2000); *Miller-el v. Johnson,* 261 F.3d 445 (5th Cir. 2001). In that report, the Magistrate Judge began by noting that it would be "an understatement" to characterize the evidence supporting the *Batson* claim as "copious and multifaceted." Cert. App. 5, at 12. Elsewhere, he concluded that "Petitioner has adduced a considerable amount of evidence showing that the Dallas County District

Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. *There is no other explanation* for the appalling statistics brought to light by the *Dallas Morning News* in March 1986." Cert. App. 5, at 20 (emphasis supplied). Nonetheless, because of his mistaken view of a proper *Batson* analysis, he recommended that relief be denied in this case.

The Magistrate Judge held that 1) evidence that the prosecutors were found to have discriminated in other cases is not relevant to whether they might be offering pretextual reasons for strikes in this case, but "is only relevant to determining whether petitioner has established a *prima facie* case under *Batson*;"[20] 2) evidence that the prosecutor systematically questioned African-American jurors differently than white jurors is irrelevant unless the specific line of questioning led to the exclusion of African-Americans;[21] and 3) in a disparate treatment analysis, if review of the voir dire of each struck African-American juror revealed some difference, no matter how minor, from comparable white jurors who were seated, the court need not

[20] The fact that the specific prosecutors whose intentions were being assessed had been found by other courts to have intentionally discriminated was not relevant, in his view, in determining whether their reasons for striking 10 African-Americans in petitioner's case were sincere or pretextual. Cert. App. 5, at 13.

[21] The Magistrate Judge did not dispute that *all* African-American jurors (and anti-death penalty white jurors) were questioned so as to make them vulnerable to exclusion on the issue of minimum punishment. The fact that the prosecutor was able to exclude 10 African-Americans without resort to the minimum punishment issue does not negate this fact. Although it may not be dispositive of the issue, the evidence certainly casts light on the prosecutors' determination to exclude African-Americans by whatever means necessary.

look further to see whether the overall pattern of excluding *many* African-Americans who varied in only minor ways from white jurors supported a finding of discrimination.[22]

Under the Magistrate Judge's analysis, evidence one normally considers to be determinative in discerning the intent of an actor — evidence of an explicit policy governing the actions at issue, prior and subsequent behavior in similar circumstances by the specific actors involved, behavior in the case at hand that reveals the presence of intent — is "irrelevant" to an evaluation of intent. Evidence of a pattern and practice of discrimination is confined to consideration of whether a *prima facie* case has been proven. The Magistrate Judge replaced the "crippling burden of proof" denounced by this Court in *Batson,* 476 U.S. at 92, with another one that purports to come from *Batson* itself.

D. *Batson* Requires Consideration of All Relevant Evidence of Discrimination

Although *Batson* set out a three-part procedure for analyzing claims of discriminatory use of peremptory challenges, it is clear that the Court did not intend those "steps" to be isolated and unrelated inquiries, with evidence

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[22] The Magistrate Judge deferred to the "credibility determination[s]" of the state trial judge on the disparate treatment issue. Cert. App. 5, at 16. But as we have seen, the trial judge did not consider, when making those determinations, that the District Attorney's office had a policy of discrimination nor that there were "appalling" statistics proving widespread discrimination by the office. He made the determinations in the context of his own disinclination to believe that discrimination had occurred. Moreover, the Magistrate Judge simply ignored the fact that the prosecutor often gave multiple explanations for a strike, some of which were demonstrably pretextual, *i.e.*, they depended not on "demeanor" issues like "hesitancy" but on simple facts (*e.g.*, whether a juror was Catholic) which applied equally to African-American jurors who were struck and white jurors who were not.

confined to one step or another. Nor did it envision the piecemeal examination of individual voir dires, each in isolation from the other, as a sufficient evaluation of the presence of discrimination.

The Court recognized that the exercise of peremptory challenges provides the opportunity to carry out the "conscious and unconscious prejudice [that] persists in our society," *Georgia v. McCollum*, 505 U.S. at 61 (Thomas, J., dissenting). "[T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. at 562).

Although the Court's discussion in *Batson* of the kind of evidence that would be relevant to proof of discrimination came in the portion of the opinion discussing proof of a *prima facie* case, it in no way hinted, implied, insinuated, or suggested -- let alone stated -- that such proof of discrimination should not be considered when deciding the ultimate question of whether discrimination occurred.

The Court has long observed that proof of purposeful discrimination can come from many sources. "In deciding if the defendant has carried his burden of persuasion, a court must undertake a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis*, 462 U.S.[229] at 242 [(1976)]." *Batson*,

476 U.S. at 93. A defendant may rely on "any . . . relevant circumstances" and "a combination of factors" in establishing a claim of jury discrimination. Courts should consider "all relevant circumstances" in deciding whether the defendant has made the requisite showing. *Batson*, 476 U.S. at 96-97.[23]

It is clear this settled rule was not applied in this case; if it had been, the only reasonable conclusion would be that Petitioner met his burden of showing that racial bias motivated the striking of the excluded African American jurors.

III.

The Importance of Fulfilling *Batson's* Promise

Our final point is that the Court has more work to do to ensure the realization of *Batson's* promise. As the Court recognized six years after *Batson* was decided, "[d]espite the clarity of . . . [our] commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist." *Powers v. Ohio*, 499 U.S. at 402. Commentators have attributed the persistence of such claims to the "toothlessness" of *Batson*.[24]

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[23]Indeed, in a different context, the Court recently confirmed the application of this approach in age discrimination cases. *See Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000).

[24] *See*, *e.g.*, Leonard Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenges of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501 (1999) ("Only the most overtly discriminatory or impolitic lawyer can be caught in Batson's toothless bite and, even then, the wound will be only superficial."); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1104 (1994) (arguing that the *Batson* line of cases "was misguided from the outset because it failed to appreciate the 'interest litigants have in continuing to discriminate by race and gender if they can get away with

But *amici* believe that the fault lies not with the decision itself, but with the misapprehension by the lower courts of its commands.

Despite *Batson*'s goal of eradicating racial discrimination in jury selection, some lower courts have accepted questionable "race-neutral" reasons for the exclusion of African-American prospective jurors;[25] they have atomized their analyses in a juror- by-juror discussion, refusing to look at the voir dire as a whole, thus allowing "race-neutral" reasons to justify patterns of striking virtually *all* black veniremembers;[26] and, in cases like petitioner's, they have

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it[]'"); *See, e.g.,* 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, 81 (2001) (noting Supreme Court decisions prohibiting race or gender-based peremptory strikes have had "at best [] only a marginal impact on the peremptory strike strategies of each side" in Philadelphia, possibly because counsel for both sides "have little expectation that the courts will sustain a claim of discrimination even if it is based on solid evidence"); *see id.* (presenting statistical data reporting the prosecutorial strike rates pre- and post-*Batson* against black and non-black venire members, and concluding that a sharp *upswing* in the use of peremptory strikes against black venire members post- *Batson* may reflect the perception that the decision would have little actual clout).

[25] For a compilation of examples, *see* Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 489-90, 493-49 (1998) and Cavise, *supra*, n. 24, at 531-35, 53.

[26] *See* Charles J. Ogletree, *Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance and Innovation*, in TOWARD A USABLE PAST 339, 349 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) at 352 ("State trial courts frequently accept prosecutorial explanations that, although somewhat plausible, have a disparate effect on minorities and therefore may become convenient excuses for rationalizing challenges against minorities.").

refused to consider extensive evidence bearing on the issue of the prosecutor's intent.[27]

But other courts have found in *Batson* ample tools to hold prosecutors accountable for their race-based exclusions. For example, the Seventh Circuit had no trouble recognizing that *Batson* required the consideration of all evidence in a case. *Coulter v. Gilmore*, 155 F.3d 912, 921 (7th Cir. 1998) ("The *Batson* decision makes it clear that, one way or another, a trial court must consider all relevant circumstances before it issues a final ruling on a defendant's motion.").[28] The Third Circuit has recognized that a history of discrimination by the prosecutor's office is probative. *Riley v. Taylor*, 277 F.3d at 283-84. Other courts have found disparate treatment despite a lack of total identity in juror responses.[29] Still others have refused to credit reasons as "race-neutral" because of the pattern of strikes in a particular case.[30]

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[27] *See e.g.*, *Riley v. Taylor*, 277 F.3d 261, 283-84 (3rd Cir. 2001)(*en banc*).

[28] *See also*, *e.g.*, *State v. Givens,* 776 So. 2d 443, 449 (La. 2001) (holding that a defendant "may offer any facts relevant to the question of the prosecutor's discriminatory intent . . .[which] include, but are not limited to, a pattern of strikes . . . against members of a suspect class, . . . the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class").

[29] *See, e.g., Burnett v. State*, 27 S.W.3d 454 (Ark. App. 2000); *People v. Morales*, 719 N.E.2d 261 (Ill. App. 1999).

[30] *Robinson v. State*, 773 So.2d 943, 949 (Miss. App., June 27, 2000) ("[B]ased on our review of this record, we find the reasons offered by the State to be so contrived, so strained, and so improbable, that we are persuaded that they unquestionably fall within the range of those 'implausible or fantastic justifications' mentioned in *Purkett v. Elem* that ought to 'be found to be pretexts for purposeful discrimination.' *Purkett v. Elem*, 514 U.S. 765, 768 (1995)."). In *Robinson,* the state used 7 of 10 peremptory challenges to exclude prospective African-American jurors. Reasons proffered by the prosecution were 1) perceived hostility to the

Given the overwhelming *and* unrebutted evidence in this record of purposeful exclusion of African American jurors in Dallas over a significant period of time, as well as the Court's unbroken line of cases dating back more than 100 years prior to the trial in this case that clearly condemns such behavior, we can only conclude that the judges who made the findings in this case — both the state trial judge and the Magistrate Judge — could not bring themselves to apply the law that plainly required that this evidence be considered at *Batson's* stage three. They acted as if the history of jury discrimination documented in scores of opinions from this Court, did not exist, as if behavior was not evidence of intent, as if no action had any relationship to any other -- as if they had walked into what was plainly a forest and saw only leaves. Like others throughout the sordid history of race-based exclusions of African-American citizens from jury service, they were apparently incapable of looking behind the mask of racial neutrality worn by those of a mind to discriminate. Their blindness invites cynicism and anger from those who saw — and see — the reality of Dallas County in the 1980s: the defendants who watched African-Americans being struck, one after another, from their juries; the African-American citizens who arrived for jury duty only to be sent

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prosecution; 2) possible irresponsibility evidenced by the fact that the questionnaires showed the jurors had children but were not married, although the prosecutor did not know whether the jurors were divorced or had children out of wedlock; 3) juror lived in a high crime area; 4) sleeping during voir dire; 5) not providing answers on the questionnaire that created uncertainty about ties to the community; 6) serving on a jury that acquitted. The Court found that although some of the proffered reasons for striking some of the jurors had been found to be race-neutral by prior case law, "there is no requirement that every challenge be clearly objectionable in order to conclude that the State was impermissibly making a calculated effort to exclude as many African-Americans as could reasonably be done from the jury." *Robinson*, 773 So.2d at 950. Viewing the totality of the circumstances, the Court concluded that *Batson* was violated. *Id.*

home humiliated and intimidated; the reporters who watched and gathered evidence of the system at work; and all the readers of the articles that so graphically portrayed the nefarious behavior of the prosecutors.

The decisions below are thus seriously flawed. They failed to heed this Court's declaration in *Batson* that "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85. Vigorous and faithful application of the Court's teaching is the least that can be expected of state and federal judges who take the oath of office and swear to uphold the Constitution of the United States. The Court must make clear in this case that it shares that expectation.

CONCLUSION

"Notwithstanding history, precedent, and the significant benefits of the peremptory challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded." *Powers v. Ohio*, 499 U.S. at 430 (Rehnquist, C.J., dissenting). Petitioner's was just such a jury.

Despite clear and emphatic statements condemning race discrimination in the selection of juries in this Court's decisions since 1879, prosecutors in Dallas County in 1986 openly followed a policy of excluding African-Americans through the use of peremptory challenges.

As our nation's history aptly demonstrates, discrimination in jury selection will continue unless this Court reaffirms in clear and emphatic language that review of a *Batson* claim is not a shell game, but the exercise of steadfast and resolute judicial commitment to ending race-based exclusions of African-American citizens from participation in the American judicial process.

Petitioner's conviction and sentence of death should be reversed.

Respectfully submitted,

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