No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

MUMIA ABU-JAMAL,

Petitioner,

v.

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, *et. al*.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Race was crucial in the Philadelphia capital trial of Petitioner who was sentenced to death. The decedent was a white police officer, as were key prosecution witnesses; the defense asserted police racism and brutality. Petitioner was a prominent black journalist who had been associated with the Black Panther Party in his younger years; the prosecutor used those Black Panther ties to attack his character.

The Philadelphia District Attorney's Office had a culture of racial discrimination, as demonstrated by its racially disparate use of peremptory strikes in numerous cases, office training materials and programs that expressly promoted racially discriminatory jury selection, and the observations of experienced lawyers who dealt with that office in many cases. Here the trial prosecutor made statements about a black juror indicating his racial bias in selecting this jury. Further, he used 10 of his 15 peremptory strikes against black potential jurors.

The Pennsylvania Supreme Court decided Petitioner's *Batson v. Kentucky*, 476 U.S. 79 (1986), claim on the merits on direct appeal and again on post-conviction appeal, holding that there was no prima facie case. However, on federal habeas review, a sharply divided Third Circuit panel denied relief after creating a "forfeiture" rule for Petitioner's habeas case that does not exist in other Circuits and is inconsistent with this Court's decisions.

The questions presented are:

1. Is a federal habeas court free to create and apply its own forfeiture rule to a *Batson* claim, and to deem the claim forfeited as a matter of federal law, even though the state courts addressed the claim on the merits and did not invoke an adequate and independent state court procedural default?

2. May a court decline to find a prima facie case under *Batson* when the Petitioner's evidence for the prima facie case includes *every item* that this Court's cases recognize as demonstrating a prima facie case?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mumia Abu-Jamal, respectfully asks that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.*

OPINIONS BELOW

The Third Circuit's opinion, *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008) ("*Abu-Jamal-4*"), is appended as Exhibit A. The Third Circuit's July 22, 2008 order denying Mr. Abu-Jamal's application for rehearing is appended as Exhibit B. The District Court's Opinion, *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa.) ("*Abu-Jamal-3*"), is appended as Exhibit C. Because this is a habeas corpus proceeding by a state prisoner, we also attach the opinions of the Pennsylvania Supreme Court on direct appeal, *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989) ("*Abu-Jamal-1*"), Exhibit D, and post-conviction appeal, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) ("*Abu-Jamal-2*"), Exhibit E.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit denied rehearing on July 22, 2008. Exhibit B. This Court granted an extension of time until December 19, 2008, for filing this petition. Exhibit F. The petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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*. All emphasis herein is supplied unless otherwise indicated. Parallel citations usually are omitted. Transcripts in Pennsylvania are referred to as "Notes of Testimony" and cited as "NT" followed by the date and page number. Respondents are referred to as "the Commonwealth."

28 U.S.C. § 2254(d) provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. State Court: Mr. Abu-Jamal was convicted and sentenced to death after a jury trial in Philadelphia, Pennsylvania. Mr. Abu-Jamal is African-American. The decedent was a white police officer. The Commonwealth claimed Mr. Abu-Jamal shot the officer when he saw the officer struggling with Mr. Abu-Jamal's brother, after the officer stopped the brother for an alleged traffic violation. Mr. Abu-Jamal himself was shot in the chest by the officer's weapon. *See Abu-Jamal-4* at 274-75.

Race played a prominent role throughout the proceedings.

Mr. Abu-Jamal, who wore his hair in dreadlocks, was a member of and had served as president of the Association of Black Journalists; he had been active in, and reported on, civil rights organizations; he had been associated with and written favorably about the Black Panther Party and the MOVE organization; he was an advocate for minority communities in Philadelphia. *E.g.*, NT 1/5/82 at 16; NT 1/8/82 at 106-07; NT 1/11/82 at 49-53, 63-67; NT 7/26/95 at 39, 41, 46-48.

At a pre-trial bail hearing the prosecutor asked Mr. Abu-Jamal's character witnesses (two state legislators and a civil rights leader) if they knew that Mr. Abu-Jamal was a "member" of the Black Panther Party and "alleged . . . to be the founder of a Philadelphia chapter of the Black Panthers"; if they were familiar with his writings about the Black Panthers and the MOVE orga-

nization; and if they had heard him criticize police mistreatment of the Black Panthers and MOVE. *E.g.*, NT 1/11/82 at 49-52, 59-60, 66.

At the guilt/innocence phase of trial, when Mr. Abu-Jamal again presented character witnesses, the prosecutor once more tried to question them about his Black Panther Party connections; over the prosecutor's outraged protests, the court halted the questioning. *E.g.*, NT 6/30/82 at 36-37, 49; NT 7/1/82 at 22, 24-25, 27-30. At capital sentencing, the prosecutor questioned Mr. Abu-Jamal about his connections to the Black Panther Party, and emphasized that connection in his closing argument. *E.g.*, NT 7/3/82 at 21-26, 68.

The prosecutor knew before jury selection began on June 7, 1982, that Mr. Abu-Jamal's defense at trial would include claims of police racism and brutality. *See*, *e.g.*, NT 1/8/82 at 94-98 (defense cross-examination of arresting officer asserts that officer beat Mr. Abu-Jamal and "called him a black son-of-a-bitch"); NT 1/11/82 at 77-78 (police officer cross-examined about beating Mr. Abu-Jamal); NT 3/18/82 at 50-54 (defense requests discovery regarding police beating Mr. Abu-Jamal); NT 4/29/82 at 43-46 (both counsel recognize that police misconduct is part of defense); NT 5/13/82 at 25-26, 33-35, 44-47 (defense requests investigation and discovery regarding police officers who beat and shot Mr. Jamal); NT 6/1/82 at 65, 79, 93, 115-19, 137-38 (police officers cross-examined about mistreatment of Mr. Abu-Jamal); NT 6/2/82 at 2.4-6, 2.44, 2.130-31 (same); NT 6/3/82 at 3.5-6, 3.12-17, 3.29-32; (same); NT 6/4/82 at 4.43-92 (defense argues that inculpatory statements attributed to Mr. Abu-Jamal were concocted by police or beaten out of Mr. Abu-Jamal).

Mr. Abu-Jamal's jury selection and trial were in 1982, before *Batson v. Kentucky*, 476 U.S. 79 (1986), was decided. At that time, federal constitutional claims of prosecutorial racial discrimination in jury selection were governed by *Swain v. Alabama*, 380 U.S. 202 (1965), which imposed on defendants "a 'crippling burden of proof' that left prosecutors' use of peremptories 'largely immune from constitutional scrutiny.'" *Miller-El v. Dretke*, 545 U.S. 231, 239

(2005) (quoting *Batson*). The Pennsylvania Supreme Court had adopted *Swain*'s "crippling burden" and rejected arguments for a modified standard under state law. *E.g.*, *Commonwealth v. Henderson*, 438 A.2d 951, 953-56 (Pa. 1981); *Commonwealth v. Brown*, 417 A.2d 181, 186 (Pa. 1980).

Before jury selection began, defense counsel told the court of his concern that the prosecutor would use his peremptory strikes in a racially discriminatory way. At a pre-trial motion hearing, defense counsel told the court:

> It has been the custom and the 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. . . . They always do, they always do. I just finished a jury trial . . . where the first thirteen black jurors were peremptorily challenged by the district attorney.

NT 3/18/82 at 12. Defense counsel believed he was powerless to stop this under existing law, but asked the court to at least distribute questionnaires to potential jurors in an effort to ensure that Mr. Abu-Jamal was tried by "a fair and impartial jury." NT 3/18/82 at 11-13. The court denied the request.

During jury selection, the prosecutor used fifteen peremptory strikes, ten of them against African-Americans. *Abu-Jamal-4* at 287. At the close of jury selection, the jury was composed of nine whites and three blacks. *Id.*

After jury selection was completed, but before trial began, one of the three black jurors broke sequestration to care for her sick cat. The trial judge said he was surprised she was selected in the first place, since she seemed to be a "mental case" who was "pretty close to" being "mentally incompetent." NT 6/18/82 at 2.39-40, 45-46. The prosecutor explained why he selected her: "I thought she was good. She *hates him, she hates Jamal, can't stand him. . . . Can't stand him.*" *Id.* at 2.40. The prosecutor said he picked this black juror who "hated" Mr. Abu-Jamal because "I wanted to get as much black representation as I could that I felt was in some

way *fair-minded*." *Id.* at 2.46. She was dismissed, leaving a jury of ten whites and two blacks. *Abu-Jamal-4* at 287.

Batson was decided while Mr. Abu-Jamal's case was pending on direct appeal, and appellate counsel raised a *Batson* claim. *See Abu-Jamal-1* at 848-50. Appellate counsel relied on the trial record, described above, and also provided to the Pennsylvania Supreme Court an affidavit from trial counsel relating counsel's observations about jury selection. Trial counsel stated, *inter alia*:

> It was apparent during voir dire that the prosecutor exercised both peremptory and cause challenges against otherwise qualified black venirepersons. It was clear to me that the prosecutor was pursuing a traditional course (for prosecutors) of excluding as many blacks from service on this jury as he could exclude, and was pursuing this course solely by reason of the race of these venirepersons which was the same as that of appellant. . . . [T]he exclusions were also sought because the victim was white.

Affidavit of Anthony Jackson, Aug. 22, 1986 (paragraph numbers omitted).

The Commonwealth argued that the *Batson* claim was "waived" because trial counsel (operating under the "crippling burden of proof" then imposed by *Swain* and Pennsylvania law) had not made a contemporaneous objection to the prosecutor's peremptory strikes. *See Abu-Jamal-1* at 849. The Pennsylvania Supreme Court noted that lack of contemporaneous objection would be a "waiver" in a non-capital case. *Abu-Jamal-1* at 849.

In *capital* cases such as Mr. Abu-Jamal's, however, the Pennsylvania Supreme Court explained that it applied a "relaxed waiver" rule under which it would "address the merits of arguments raised for the first time in the direct appeal to this Court." *Abu-Jamal-1* at 849. The Pennsylvania Supreme Court applied its capital case "relaxed waiver" rule and addressed the *Batson* claim on the merits, stating:

> Applying the "standards" set out in *Batson*, 476 U.S. at 95-98, for assessing whether a prima facie case exists, vacuous though they may be, we do not hesitate to conclude that no such case is made out here.

Abu-Jamal-1 at 849.†

Mr. Abu-Jamal raised the *Batson* claim again in state post-conviction proceedings under Pennsylvania's Post-Conviction Relief Act ("PCRA"). In the post-conviction proceedings, Mr. Abu-Jamal submitted additional information relevant to the *Batson* claim.

Trial counsel reaffirmed his prior observations about prosecutorial racial discrimination. Trial counsel testified that, in his experience at the time of this trial, it was the practice of "most [Philadelphia] D.A.'s, most homicides, [to] *get rid of as many blacks as they possibly can*," NT 7/28/95 at 208, and that the prosecutor in this case *followed that racially discriminatory practice*:

> [Post-conviction prosecutor]: [A]re you saying that [the trial prosecutor] was exercising peremptory strikes in a racially motivated fashion?
> [Trial counsel]: Sure.
> [Post-conviction prosecutor]: You are saying that?
> [Trial counsel]: Yes, sir. . . . [I]t was true. You may call it ridiculous but it was true, wasn't it? . . . Yes, it was true. . . It was true.

NT 7/28/95 at 208-09.

Mr. Abu-Jamal also provided to the Pennsylvania Supreme Court the results of an extensive study of the use of peremptory strikes by this prosecutor's office. Justice Breyer's concurring opinion in *Miller-El v. Dretke*, describes this study, which found that, "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of non-black jurors," with the racial disparities higher before *Batson* (when this jury was selected) than after. 545 U.S. at 268 (Breyer, J., concurring) (citing Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U.Pa.J.Const.L. 3 (2001)).‡

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†. *Batson* claims are analyzed in three steps, with the prima facie case being the first. *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003). Here, only the prima facie case is at issue.

‡. This study has been cited favorably by a Committee appointed by the Pennsylvania Supreme Court to investigate racial and gender bias in Pennsylvania's justice system. *See* Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System 201 (2003), *www.courts.state.pa.us/Index/Supreme/biasreport.htm*. The Committee

Mr. Abu-Jamal also provided to the Pennsylvania Supreme Court a videotape of an official training session on jury selection ("Training Tape"), produced by this prosecutor's office shortly after *Batson* was decided.[§] The Pennsylvania Supreme Court itself would later describe the Training Tape's lessons about jury selection as teachings that "*flout constitutional principles in a highly flagrant manner.*" *Commonwealth v. Basemore*, 744 A.2d 717, 731 n.12 (Pa. 2000).

> [V]arious racial and gender stereotypes are described and offered as reasons to discriminate in the selection of jurors; techniques for accomplishing such discrimination are described in detail, including the maintenance of a running tally of the race of the venire panel and the invention of pretextual reasons for exercising peremptory challenges; and a willingness to deceive trial courts to manipulate jury panels to these ends is also expressed.

Id. at 729.

In particular, the Training Tape "repeatedly advises [the] audience to use peremptory challenges . . . in apparent violation of *Batson.*" *Wilson v. Beard*, 426 F.3d 653, 655 (3d Cir. 2005).[**] The senior prosecutor providing this training, who joined the office in 1978, *id.* at 656, 659, explained that he learned his racially discriminatory techniques from *prosecutors in the office's homicide unit*—that is how "the wisdom of the ages gets passed down." Training Tape Tr. at 72. He portrayed himself as rather restrained in his racially discriminatory use of strikes, compared to others in the office, explaining that he favors keeping a few blacks while other prosecutors in the office "strike them because they're black, and that's kind of like a rule, Well, they're black, I've got to get rid of them." Training Tape Tr. at 56, 58.

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found "strong indications that Pennsylvania's capital justice system does not operate in an even-handed manner" when it comes to race; and found particularly "*alarming results*" in Philadelphia capital cases, with Philadelphia prosecutors "striking African Americans from the jury twice as often as non-African Americans." *Id.* at 201, 205-09, 218-21, 223 n.5.

§. The Training Tape was first made public in 1997, when District Attorney Lynne Abraham released it during her election campaign against Jack McMahon, the trainer.

**. *See also Brinson v. Vaughn*, 398 F.3d 225, 229 (3d Cir. 2005) ("tape depicted a training session in which McMahon advocated the use of peremptory challenges against African Americans"); *Cook v. Philadelphia*, 179 Fed.Appx. 855, 856 (3d Cir. 2006) (per curiam) ("training video depicting Jack McMahon repeatedly advising his audience to use peremptory strikes against Black jurors, in violation of *Batson*").

On post-conviction appeal, the Pennsylvania Supreme Court again addressed the *Batson* claim on the merits, and again held that Mr. Abu-Jamal had not established a prima facie case. *Abu-Jamal-2* at 113-14.

B. District Court: Mr. Abu-Jamal sought federal habeas relief, raising the *Batson* claim and other claims of constitutional error. The District Court held that the jury instructions at capital sentencing violated *Mills v. Maryland*, 486 U.S. 367 (1988), and vacated the death sentence, but denied relief as to the guilt phase. *See Abu-Jamal-3*.

As to the *Batson* claim, the District Court found it was "fairly presented" to the state courts and "was adjudicated on the merits by the state courts." *Abu-Jamal-3* at *104. Thus, the *Batson* claim is *not procedurally barred*. On the merits, the District Court denied relief, holding that the Pennsylvania Supreme Court's failure to find a prima facie case was not "unreasonable" under 28 U.S.C. § 2254(d). *Abu-Jamal-3* at *104-07. The District Court granted a certificate of appealability on the *Batson* claim.

C. Third Circuit: A divided Third Circuit panel affirmed the denial of relief on the *Batson* claim, while unanimously affirming the grant of sentencing relief under *Mills*. *See Abu-Jamal-4* at 303 (opinion of Scirica, C.J., & Cowen, J.); *id.* at 305 n.31 (opinion of Ambro, J.). On *Batson*, Chief Judge Scirica and Judge Cowen held that relief should be denied, while Judge Ambro would have remanded for further proceedings in the District Court.[††]

The panel *unanimously* affirmed the District Court's finding that the *Batson* claim is *not procedurally defaulted*, despite the lack of a contemporaneous objection, because the Pennsylvania Supreme Court addressed the claim on the merits. *Abu-Jamal-4 Majority* at 284-87; *Abu-Jamal-4 Dissent* at 305, 311.

Under the "independent and adequate state ground doctrine,"

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††. Because this petition is concerned solely with the *Batson* issue, we refer to the opinion of Chief Judge Scirica and Judge Cowen as "*Abu-Jamal-4 Majority*," and to Judge Ambro's opinion as "*Abu-Jamal-4 Dissent*."

> "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) . . .; *see also Smith v. Freeman*, 892 F.2d 331, 337 (3d Cir. 1989) ("[W]e are not bound to enforce a state procedural rule when the state itself has not done so, even if the procedural rule is theoretically applicable to our facts.").

Abu-Jamal-4 Majority at 286-87; *accord Abu-Jamal-4 Dissent* at 305, 311.

Because the Pennsylvania Supreme Court *decided the merits* of the *Batson* claim both on direct appeal, *Abu-Jamal-1*, and on post-conviction appeal, *Abu-Jamal-2*, there is *no procedural bar* against federal merits review of the *Batson* claim, even though a contemporaneous objection "rule is theoretically applicable to" that claim. *Abu-Jamal-4 Majority* at 286-87 (quoting *Smith v. Freeman*); *accord Abu-Jamal-4 Dissent* at 305 ("As my colleagues concede, Abu-Jamal's failure to lodge a [contemporaneous] objection . . . would not result in a state procedural bar because the Pennsylvania Courts . . . considered Abu-Jamal's *Batson* claim on its merits." (footnote omitted)).‡‡

However, the panel majority then created and imposed a new *federal law* forfeiture rule against the *Batson* claim, despite the fact that the state courts had addressed the claim on the merits:

> [T]here are . . . prudential reasons for requiring a timely objection at trial to preserve a *Batson*-type claim for appellate review. Although none of our prior cases have directly confronted or ruled on this issue, we believe a timely objection is required to preserve this issue on appeal. Accordingly, Abu-Jamal has forfeited his *Batson* claim by failing to make a timely objection.

Abu-Jamal-4 Majority at 284.

The majority also held that, "even assuming Abu-Jamal's failure to object is not fatal to his

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‡‡. The panel also unanimously found that the *Batson* claim is not procedurally defaulted even if it is erroneously assumed that the Pennsylvania Supreme Court denied it on procedural grounds, because any purported default occurred during the "relaxed waiver" era, when the Pennsylvania Supreme Court did not regularly apply waiver rules in capital cases; thus, a "waiver" ruling would not be an adequate state ground. *Abu-Jamal-4 Majority* at 287 n.15; *Abu-Jamal-4 Dissent* at 311.

claim, Abu-Jamal has failed to meet his burden in proving a prima facie case." *Abu-Jamal-4 Majority* at 284.

Judge Ambro dissented from both the majority's creation of a new federal law forfeiture rule and the majority's failure to find a prima facie case, explaining that both aspects of the majority's ruling are inconsistent with the decisions of this Court and prior Third Circuit decisions. Judge Ambro "would hold that Abu-Jamal met his prima facie burden" and "would remand for the District Court to complete an analysis of the remaining steps of the *Batson* claim." *Abu-Jamal-4 Dissent* at 319. Judge Ambro explained:

> As *Batson* reminds us, "[t]he core guarantee of equal protection . . . would be meaningless were we to approve the exclusion of jurors on the basis of . . . race." *Id.* at 97-98. I fear today that we weaken the effect of *Batson* by imposing a contemporaneous objection requirement where none was previously present in our Court's jurisprudence and by raising the low bar for a prima facie case of discrimination in jury selection to a[n inappropriate] height . . . . In so holding, we do a disservice to *Batson*.

Abu-Jamal-4 Dissent at 319-20.

Mr. Abu-Jamal sought panel rehearing and rehearing *en banc*, which were denied, with Judge Ambro dissenting. Exhibit B.

SUMMARY OF REASONS FOR GRANTING THE WRIT

I. The Third Circuit majority created a new federal law forfeiture rule for habeas cases brought by state prisoners, holding that when a state prisoner has presented a *Batson v. Kentucky*, 476 U.S. 79 (1986), claim to the state courts, and the *state courts have ruled on the merits of that claim*, a federal habeas court should nevertheless deem the claim forfeited as a matter of federal law if the federal court believes there was not an appropriate objection at the time of jury selection.

The Third Circuit majority's ruling conflicts with Supreme Court and Circuit Court habeas decisions on *Batson* claims brought by state prisoners, which hold that contemporaneous objection rules for *Batson* claims are a matter of *state law* procedure, not federal law. It also

conflicts with Supreme Court and Circuit Court habeas decisions on similar jury selection-related claims, which also hold that contemporaneous objection requirements are *state procedural law*, not federal law. It also conflicts with an enormous body of Supreme Court and Circuit Court decisions regarding forfeiture rules in federal habeas proceedings, which hold that federal habeas courts do *not* create their own *federal* law forfeiture rules for perceived procedural shortcomings in the *state* courts; instead, federal habeas courts look to *state law* procedural rules and apply the adequate and independent state ground doctrine to those *state law* rules.

The Third Circuit majority's ruling also presents a question of exceptional importance that this Court should address. It disrupts established precedent regarding how federal habeas courts should treat perceived procedural failures by state prisoners in state court; it invites future federal habeas courts to create further *ad hoc* exceptions to settled procedural default law; it leaves "timely objection" undefined, creating monumental practical problems for future rulings; and it requires the creation of an unprecedented and unworkable system of *federal law* procedural rules governing presentation of claims in *state* court.

II. The Third Circuit majority also held that Mr. Abu-Jamal had not shown a prima facie case under *Batson*. Its ruling failed to come to terms with the powerful evidence for a prima facie case that is present here.

The Third Circuit majority's ruling conflicts with Supreme Court and Circuit Court decisions. It contravenes the command of *Batson* and its progeny that "all relevant circumstances" be considered. It fails to take into account vitally important evidence, including that this was a racially charged case with a black defendant who was associated with the Black Panther Party and other advocacy groups; that the decedent was a white police officer; that the defense alleged police brutality and racism; that the prosecutor made statements in court that suggested racial bias; and that the prosecutor's office was marked by a culture of discrimination. It places on defendants a record-making burden that is too onerous to preserve the vital rights *Batson* was in-

tended to protect. It raises the bar for a prima facie case above the level commanded by *Batson* and its progeny.

The Third Circuit majority's ruling also presents questions of exceptional importance that this Court should address because it vitiates *Batson*'s prima facie case standard; creates a new, onerous record-keeping requirement for *Batson* claims; and undermines the federal courts' ability to root out and remedy racial discrimination in our criminal justice system.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT MAJORITY'S CREATION OF A NEW FEDERAL FORFEITURE RULE FOR *BATSON* CLAIMS RAISED BY STATE PRISONERS IN FEDERAL HABEAS PROCEEDINGS CONFLICTS WITH THIS COURT'S DECISIONS AND WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD ADDRESS

As set forth above, the Third Circuit majority created a new *federal* forfeiture rule for *Batson* claims raised by state prisoners in federal habeas proceedings, deeming the claims forfeited absent a contemporaneous objection even when the *state courts did not find the claim procedurally barred* and *addressed the claim on the merits*. This ruling conflicts with decisions of this Court and other Courts of Appeal, and presents a question of exceptional importance that this Court should address.

A. Conflicts with Supreme Court and Circuit Precedent

1. *Batson* claims: In creating this federal forfeiture rule for *Batson* claims brought by state prisoners, the Third Circuit majority relied upon similar *Batson*-claim rulings by the Courts of Appeal for the Second, Fourth, Fifth and Tenth Circuits – *McCrory v. Henderson*, 82 F.3d 1243 (2d Cir. 1996); *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) (en banc); *Thomas v. Moore*, 866 F.2d 803 (5th Cir. 1989); *Wilkerson v. Collins*, 950 F.2d 1054 (5th Cir. 1992); *Sledd v. McKune*, 71 F.3d 797 (10th Cir. 1995). *See Abu-Jamal-4 Majority* at 283. These rulings conflict with the decisions of this Court and with other Circuit Court decisions.

Conflicts with Supreme Court decisions: Judge Ambro explained in dissent that the ma-

jority's "newly created contemporaneous objection rule for habeas petitions," *Abu-Jamal-4 Dissent* at 305, conflicts with this Court's *Batson* decisions, starting with *Batson* itself:

> As my colleagues concede, Abu-Jamal's failure to lodge an objection to the exclusion of black potential jurors contemporaneous to that event would not result in a state procedural bar . . . . But in this case our Court imposes a *federal* contemporaneous objection requirement – as a prerequisite for a *Batson* claim – *in addition to* any potential *state* procedural bar. I do not agree with such a requirement, and I do not believe that Abu-Jamal forfeited his right to present a *Batson* claim by failing to lodge an objection before trial.
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> . . . .
>
> That a contemporaneous objection is helpful in the context of *Batson* does not mean . . . that it is constitutionally called for. The Supreme Court has never announced a rule requiring a contemporaneous objection as a matter of federal constitutional law, and I see no reason for us to do so now. The Court, in leaving the implementation of the *Batson* decision to the trial courts, stated that "[w]e decline . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99. My colleagues believe this demonstrates that the Supreme Court "envisioned an objection raised during the jury selection process" prior to trial. *See* Maj. Op. 280-81 . . . What they overlook is that, even if the Supreme Court "envisioned" an objection, *it authorized the states to craft rules for it as a matter of state procedural law*. Thus, I read this sentence from *Batson* as emphasizing that *the Court trusts the state courts to fashion their own protocol* and will *not* "formulate particular procedures to be followed," including the *procedures governing the timeliness of an objection*. *See Batson*, 476 U.S. at 99.
>
> [N]owhere in the Supreme Court's grant of discretion to trial courts is the pronouncement that, where a contemporaneous objection is not made and the state courts nonetheless consider the *Batson* claim on the merits, a federal court will subsequently be barred from reviewing the merits of a petitioner's claim . . . Our Court today makes that pronouncement.

Abu-Jamal-4 Dissent at 305-06 (footnote omitted).

Judge Ambro explained that the majority's new federal law forfeiture rule for *Batson* claims also conflicts with this Court's decision in *Ford v. Georgia*, 498 U.S. 411 (1991):

> Since *Batson*, the Supreme Court still has not indicated that a contemporaneous objection is a prerequisite to a federal *Batson* claim. To the contrary, in *Ford*, . . . the Court reaffirmed "[t]he appropriateness in general of looking to *local rules* for the law governing the timeliness of a constitutional claim." *Id.* at 423. It continued:

> In *Batson* itself, for example, we imposed no new procedural rules and declined either "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," or to decide when an objection must be made to be timely. Instead, we recognized that *local practices* would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases, and we left it to the trial courts, with their wide "variety of jury selection practices," to implement *Batson* in the first instance.
>
> *Id.* (citations omitted). The Court was explicit in stating that the issue of "when an objection must be made to be timely" is a matter of "*local practice* [ ]" rather than federal law. Moreover, it never indicated that, as a matter of federal law, a "general rule" of timeliness existed. Thus, the presence or absence of a contemporaneous objection is purely an issue of *state procedural law*. If a state court rejects a defendant's *Batson* claim as a matter of state law because it was not made within the time-frame specified by the state's procedural rules, and the federal court determines that the state rule functions as an independent and adequate basis for decision, then the federal court will be procedurally barred from hearing the claim. . . . However, where the state does not require such an objection—or as here, where the Commonwealth's relaxed waiver rule is not capable of serving as an independent and adequate state law procedural bar—the federal court should proceed to the merits of the *Batson* claim.

Abu-Jamal-4 Dissent at 306-08.

Conflicts with prior Third Circuit decisions: Judge Ambro explained that the majority's federal forfeiture rule also conflicts with prior Third Circuit decisions on *Batson* claims brought by state prisoners, which consistently treated the existence *vel non* of a contemporaneous objection as a *state law procedural issue*:

> Our Court has previously reached the merits of *Batson* claims on habeas review in cases where the petitioner did not make a timely objection during jury selection – signaling that our Circuit does not have a federal contemporaneous objection rule – and I see no reason why we should not afford Abu-Jamal the courtesy of our precedents. *See*, *e.g.*, *Wilson v. Beard*, 426 F.3d 653, 659 (3d Cir. 2005); *Hardcastle v. Horn*, 368 F.3d 246, 251 (3d Cir. 2004); *Riley v. Taylor*, 277 F.3d 261, 273 (3d Cir. 2001) (en banc).
>
> In *Wilson*, the defendant never made a *Batson* objection pre-trial, during trial, or even in his first [PCRA] proceeding. After the release of a videotape detailing the Philadelphia District Attorney's suggestions on how to keep blacks off juries, Wilson filed a second post-conviction petition raising a *Batson* claim, *Wilson*, 426 F.3d at 658, and we reviewed it on the merits [and granted relief], *id.* at 666-70. If a contemporaneous objection were required as a prerequisite to the

federal claim, we could not have proceeded to the merits of Wilson's claim.[§§]

> Next, in *Hardcastle*[,] . . . Hardcastle's attorney did not object to the prosecutor's use of peremptory challenges during jury selection, but did subsequently move for a mistrial after voir dire – a motion that was denied. On habeas review, we entertained the merits of Hardcastle's *Batson* claim without considering whether *Batson* required a contemporaneous objection to be made during jury selection.[***]
>
> Finally, in *Riley*[,] counsel made no *Batson* objection at the time of jury selection. 277 F.3d at 271-72, 274. When Riley raised a *Batson* claim in his habeas petition, the District Court held that it was procedurally defaulted because it was never presented to the trial court. *Id.* at 274. When our Court considered the issue *en banc*, we held that the claim was not procedurally barred because the last state court to consider the claim did so on the merits. *Id.* at 274-75.

Abu-Jamal-4 Dissent at 308-10 (footnotes omitted).

After surveying *Batson* cases from this Court and the Third Circuit, Judge Ambro explained that the "caselaw repeats to become a simple refrain"—"contemporaneous objection" is a *state law procedural issue* and is not necessarily "required as a prerequisite to a federal *Batson* claim." *Abu-Jamal-4 Dissent* at 310. Judge Ambro concluded: "Why we pick this case to depart from that reasoning I do not know." *Id.*[†††]

Conflicts with other Circuit Court decisions: Application of a federal forfeiture rule to a

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§§. In *Wilson*, the state courts deemed the *Batson* claim waived; the Third Circuit found that the state court waiver ruling was not an adequate state ground. *Id.* at 664-65.

***. In *Hardcastle*, as in *Abu-Jamal*, the Pennsylvania Supreme court addressed the merits of the *Batson* claim on direct appeal and again on PCRA appeal. *See Hardcastle*, 368 F.3d at 250.

†††. Judge Ambro explained why the only Third Circuit case cited by the *Abu-Jamal-4 Majority* as imposing a contemporaneous objection requirement for a *Batson* claim, *Government of Virgin Islands v. Forte*, 806 F.2d 73 (3d Cir. 1986), is inapposite – it was a *federal* direct appeal under the federal rules of procedure:

> My colleagues cite one case [*Forte*] in which we held on direct appeal that a petitioner had waived his *Batson* claim by failing to make a contemporaneous objection. . . . But *Forte* involved the direct appeal of a federal criminal conviction, and thus our waiver analysis was based on the operation of a Federal Rule of Criminal Procedure. As such, *Forte* has no bearing on our analysis of whether Abu-Jamal was required to make a contemporaneous *Batson* objection in the state-court trial to preserve federal habeas consideration of his claim.

Abu-Jamal-4 Dissent at 310 n.39. For the same reason, the *non-habeas* cases from other Circuits cited by the Third Circuit majority, *see Abu-Jamal-4 Majority* at 283 n.9, are also inapposite.

Batson claim raised by a state prisoner also conflicts with decisions of the Courts of Appeal for the First, Second, Fifth, Seventh and Eleventh Circuits. Indeed, two of the Circuits the Third Circuit relied upon in creating a federal forfeiture rule for *Batson* claims, the Second and Fifth, have in other decisions *expressly repudiated* such a rule for *Batson* claims.

Second Circuit: In *DeBerry v. Portuondo*, 403 F.3d 57 (2d Cir. 2005), the habeas petitioner raised a *Batson* claim where counsel had failed to object to the prosecutor's peremptory strike at the time of trial. *See id.* at 64. The state appellate court had addressed the *Batson* claim on the merits, despite the lack of a contemporaneous objection. *Id.* at 65-66. On federal habeas review, the state argued that the *Batson* claim was forfeited because of the lack of contemporaneous objection; in support of its argument, the state cited a Second Circuit case holding that a *federal* prisoner's *Batson* claim was forfeited on direct appeal because of his failure to adequately object at trial. *Id.* at 66.

The Second Circuit expressly rejected the state's request that it apply *federal* forfeiture rules to habeas cases brought by *state* prisoners:

> [The state] seeks to import a *federal* procedural rule into our Section 2254 review of a state court decision. However, on Section 2254 review, we rely on *state, not federal*, procedural rules. Thus, a *waiver on which the state court did not explicitly rely will not bar our review of the merits* of a claim.

DeBerry, 403 F.3d at 66. The Second Circuit therefore addressed the *Batson* claim on the merits.

In *Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001), the Second Circuit similarly rejected application of federal forfeiture rules to *Batson* claims brought by state prisoners. The *Galarza* district court had held "that Galarza's counsel had waived Galarza's *Batson* challenges by failing to pursue them during voir dire." *Id.* at 635. The Second Circuit reversed – it held that the *Batson* claim was not forfeited in federal habeas review because it was not barred in state court by an "adequate and independent state ground." *Id.* at 637-38.

One Second Circuit Judge dissented in *Galarza*, and would have held that the petitioner "forfeited his [*Batson*] claim" by "failing to object at trial to the deficiencies in the trial court's

findings." *Id.* at 641 (Walker, J., dissenting). The majority adamantly rejected the dissent's application of a federal forfeiture rule to a claim the state courts had not barred on adequate and independent state grounds. The majority explained that the "dissent's waiver analysis . . . *turns our habeas law on its head*" because federal habeas courts do not create their own forfeiture rules but, instead, apply the "adequate and independent state grounds doctrine" as a matter of "comity and federalism." *Id.* at 637. The majority explained that federal habeas courts have "repeatedly stated that in order for federal habeas review to be procedurally barred, a *state court must actually have relied on a procedural bar* as an independent basis for its disposition of the case," and stated that the "dissent would invoke a procedural bar where the state court chose not to do so," thus violating the comity-based rules on which federal habeas forfeiture law depends. *Id.* at 637-38. Applying the adequate and independent state ground doctrine, the majority "decline[d] to invoke a procedural bar which the state courts chose not to invoke," addressed the merits of the *Batson* claim, and remanded for a hearing. *Id.* at 638.‡‡‡

Fifth Circuit: In *Rosales v. Dretke*, 444 F.3d 703 (5th Cir. 2006), the Fifth Circuit similarly held that the adequate and independent state ground doctrine – *not* federal forfeiture rules – governs "waiver" issues for *Batson* claims raised by state prisoners in federal habeas proceedings. In *Rosales*, the state court held that, "because Rosales failed to preserve the [claim of *Batson*] error, he was barred from advancing this claim and denied relief." 444 F.3d at 706. The Fifth Circuit applied the adequate and independent state ground doctrine to the state court's waiver ruling:

> The Texas Court of Criminal Appeals is entitled to exercise whatever leniency or grace it wishes in establishing its procedural rules. Our task is to determine

‡‡‡. Other Second Circuit decisions similarly apply the adequate and independent state ground doctrine, rather than federal forfeiture rules, to *Batson* claims raised by state prisoners. *E.g.*, *Richardson v. Greene*, 497 F.3d 212, 217-20 (2d Cir. 2007); *Messiah v. Duncan*, 435 F.3d 186, 194-96 (2d Cir. 2006); *Green v. Travis*, 414 F.3d 288, 294-96 (2d Cir. 2005); *Rodriguez v. Schriver*, 392 F.3d 505, 506-12 (2d Cir. 2004); *Epps v. Commissioner*, 13 F.3d 615, 617-19 (2d Cir. 1994).

> whether procedural rules applied by the state court to bar merits review of a habeas claim have been strictly and regularly applied [as required for an adequate state ground]. If the state procedural rule has not been strictly and regularly applied, *we must review the merits of the petitioner's constitutional claims*.

444 F.3d at 710. The Fifth Circuit concluded that the state court waiver ruling was *not* an adequate state ground, and remanded for a hearing on the merits of the *Batson* claim. *Id.*[§§§]

First, Seventh and Eleventh Circuits: Decisions from the Courts of Appeal for the First, Seventh and Eleventh Circuits take the same approach – when a state prisoner brings a *Batson* claim in federal habeas proceedings, questions of waiver are controlled by *state law procedural rules*, in conjunction with the adequate and independent state ground doctrine, not by *federal* forfeiture rules. *E.g.*, *Brewer v. Marshall*, 119 F.3d 993, 1001 (1st Cir. 1997) ("*Batson* itself declined to decide when an objection must be made in order to be timely and left that matter to be resolved by local law. *Batson*, 476 U.S. at 99-100 & n. 24"); *id.* at 999-1003 (reviewing state court's ruling for adequacy and independence); *Rosa v. Peters*, 36 F.3d 625, 632- 35 (7th Cir. 1994) (holding that state court's ruling on *Batson* claim was not adequate state ground, and remanding for hearing on merits of *Batson* claim); *Fortenberry v. Haley*, 297 F.3d 1213, 1220-21 (11th Cir. 2002) (no bar to federal merits review of *Batson* claim not raised at trial or on direct appeal, where state post-conviction court addressed it on merits).

2. *Witherspoon/Witt* claims: The Third Circuit majority's application of a federal law forfeiture rule also conflicts with habeas decisions of this Court and the Circuit Courts on state prisoners' claims that striking a juror for cause because of his/her attitude toward capital punishment violated *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). These cases are instructive because this Court has noted that contemporaneous objection rules have a similar rationale under *Witherspoon/Witt* and *Batson*. *E.g.*, *Snyder v. Lou-*

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§§§. Other Fifth Circuit decisions similarly apply the adequate and independent state ground doctrine, rather than federal forfeiture rules, to *Batson* claims raised by state prisoners. *E.g.*, *Johnson v. Puckett*, 176 F.3d 809, 823-24 (5th Cir. 1999); *Reed v. Scott*, 70 F.3d 844, 846-47 (5th Cir. 1995); *Williams v. Cain*, 31 Fed.Appx. 835 (5th Cir. 2002).

isiana, 128 S.Ct. 1203, 1208 (2008); *Miller-El v. Cockrell*, 537 U.S. at 339; *Hernandez v. New York*, 500 U.S. 352, 365 (1991).

For *Witherspoon*/*Witt* claims, this Court has twice expressly held that issues of waiver in state prisoner habeas cases are governed solely by *state law* under the adequate and independent state ground doctrine.

In *Witt*, there was no objection during jury selection – the defendant raised the claim for the first time on direct appeal, where the state supreme court addressed it on the merits. *See* 469 U.S. at 415-16. Under the Third Circuit majority's approach, the lack of contemporaneous objection would have been fatal to the claim as a matter of federal forfeiture law, despite the fact that the state court addressed the claim on the merits. This Court, however, expressly rejected that approach. After noting the absence of a contemporaneous objection, this Court stated:

> [W]e do not mean to suggest that [the defendant] "waived" his *Witherspoon* claim . . . by failing to contemporaneously object. There is no doubt that in spite of [the defendant's] failure to object, the Florida courts reached the merits of his *Witherspoon* claim. . . . Under circumstances *where the state courts do not rely on independent state grounds for disposing of a claim and instead reach the merits of a federal question, the federal question is properly before us*.

Witt, 469 U.S. at 431 n.11.

In *Uttecht v. Brown*, 127 S.Ct. 2218 (2007), this Court again addressed a *Witherspoon/Witt* claim in federal habeas proceedings by a state prisoner, and again rejected the approach taken by the Third Circuit majority here. In *Uttecht*, the defendant failed to object during jury selection to the strike he later challenged; indeed, counsel affirmatively stated "We have no objection." 127 S.Ct. at 2227. Under the Third Circuit majority's approach, this would have forfeited the claim as a matter of federal law, without regard to whether the state court treated failure to object as a waiver. This Court, however, rejected that approach and addressed the merits of the claim because the state courts had addressed it on the merits: "[I]n order to preserve a *Witherspoon* claim for federal habeas review there is *no independent federal requirement* that a

defendant in state court object to the prosecution's challenge; *state procedural rules govern*." *Uttecht*, 127 S.Ct. at 2229.

For *Witherspoon/Witt* claims raised by state prisoners, the Third Circuit takes the same approach as this Court. In *Szuchon v. Lehman*, 273 F.3d 299, 324-31 (3d Cir. 2001), the Third Circuit granted habeas relief on a *Witherspoon/Witt* claim that was not raised at trial, and which the Pennsylvania Supreme Court had deemed waived because of the lack of objection. Under the Third Circuit majority's approach here, the lack of an objection would have forfeited the claim as a matter of federal law. But that is *not* what the Third Circuit held in *Szuchon*. Instead, the Third Circuit, citing this Court's *Batson* ruling in *Ford v. Georgia*, held that contemporaneous objection rules are "*state procedural grounds*" which must be evaluated under the *independent and adequate state ground doctrine*. 273 F.3d at 325.

To the best of counsel's knowledge, *every* Circuit takes the same approach to "waiver" of *Witherspoon/Witt* claims brought by state prisoners as taken by this Court in *Witt* and *Uttecht* and by the Third Circuit in *Szuchon* – "waiver" is governed by *state law procedural rules* and the adequate and independent state ground doctrine, *not* by the federal courts' own forfeiture rules. This includes the Circuits that *have* applied a federal forfeiture rule to *Batson* claims. *E.g.*, *Whitley v. Bair*, 802 F.2d 1487, 1498 n.23 (4th Cir. 1986) (applying adequate and independent state ground doctrine to state court's ruling that petitioner waived *Witherspoon/Witt* claim by failing to object); *Russell v. Lynaugh*, 892 F.2d 1205, 1207-11 (5th Cir. 1989) (same); *Cardenas v. Dretke*, 405 F.3d 244, 249-50 (5th Cir. 2005) (same); *Neill v. Gibson*, 263 F.3d 1184, 1193 (10th Cir. 2001) (same).[****]

3. All other claims: The Third Circuit majority's new approach is at odds with an enormous body of Supreme Court and Circuit Court precedent regarding forfeiture rules in fed-

****. The Second Circuit does not have any habeas cases presenting *Witherspoon/Witt* claims, presumably because of a lack of state court capital cases in the Second Circuit's jurisdiction.

eral habeas proceedings. In countless cases, and for all types of claims, this Court and all the Courts of Appeal have held that federal habeas courts do *not* create their own federal law forfeiture rules for perceived procedural shortcomings in the *state* courts. Instead, federal habeas courts look to *state law* procedural rules, and apply the adequate and independent state ground doctrine to those *state law* rules.[††††]

In particular, when, as here, "the state court under state law chooses not to rely on a procedural bar . . ., then *there is no basis for a federal habeas court's refusing to consider the merits* of the federal claim." *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989) (citing *Ulster County Ct. v. Allen*, 442 U.S. 140, 147-54 (1979)); *accord Victor v. Nebraska*, 511 U.S. 1, 19 (1994) ("Because the last state court in which review could be had considered Victor's constitutional claim on the merits, it is properly presented for our review despite Victor's failure to object to the instruction at trial or raise the issue on direct appeal." (citing *Ylst*, *infra*)); *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." (citing *Harris*)); *Witt*, 469 U.S. at 431 n.11 ("Under circumstances where the state courts do not rely on independent state grounds for disposing of a claim and instead reach the merits of a federal question, the federal question is properly before us." (citing *Ulster County*

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††††. Among legions of cases, *see*, *e.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002) (habeas petitioner's claim *addressed on merits* because it is *not* barred by an adequate and independent state ground); *Harris v. Reed*, 489 U.S. 255 (1989) (same); *Phoenix v. Matesanz*, 189 F.3d 20, 24-27 (1st Cir. 1999) (same); *Bell v. Miller*, 500 F.3d 149, 154 (2d Cir. 2007) (same); *Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007) (same); *Johnson v. Muncy*, 830 F.2d 508 (4th Cir. 1987) (same); *Reed v. Scott*, 70 F.3d 844, 847 (5th Cir. 1995) (same); *Rogers v. Howes*, 144 F.3d 990, 994 (6th Cir. 1998) (same); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997) (same); *Pearson v. Norris*, 52 F.3d 740, 742 (8th Cir. 1995) (same); *Fields v. Calderon*, 125 F.3d 757, 760-61 (9th Cir. 1997) (same); *Walker v. Attorney General*,167 F.3d 1339, 1344-45 (10th Cir. 1999) (same); *Spencer v. Kemp*, 781 F.2d 1458, 1462-72 (11th Cir. 1986) (en banc) (same), and *see*, *e.g.*, *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) (habeas petitioner's claim *not* addressed on merits because it *is* barred by an adequate and independent state ground); *Coleman v. Thompson*, 501 U.S. 722 (1991) (same).

Ct.)); *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988) (same, citing *Witt*); *Wainwright v. Greenfield*, 474 U.S. 284, 289 n.3 (1986) (same, citing *Ulster County Ct.*); *Castaneda v. Partida*, 430 U.S. 482, 485 n.4 (1977) (same).

In this case, the Pennsylvania Supreme Court "cho[se] not to rely on a procedural bar" and, accordingly, "there [wa]s no basis for [the Third Circuit majority's] refusing to consider the merits of" the *Batson* claim. *Harris*, 489 U.S. at 265 n.12. The Third Circuit majority's ruling conflicts with this entire body of settled Supreme Court and Circuit law.

B. Question of Exceptional Importance

The Third Circuit majority's application of a federal law forfeiture rule – deeming the *Batson* claim forfeited even when it was decided on the merits in state court – raises a question of exceptional importance that should be addressed by this Court.

As set forth above, the Third Circuit's approach disrupts established precedent regarding how federal habeas courts should treat perceived procedural failures by state prisoners in state court. It also invites future habeas courts to create further *ad hoc* exceptions to settled procedural default law whenever they believe there are "prudential reasons," *Abu-Jamal-4 Majority* at 284, to do so. This disruption of settled law should be addressed by this Court.

The Third Circuit's new approach also creates monumental practical problems. While the Third Circuit majority required a "timely objection" as a matter of federal law, they did "not define what in their opinion is a 'timely' objection for the purposes of preserving a *Batson* claim." *Abu-Jamal-4 Dissent* at 305 n.32. At different places in its opinion, the majority variously required that the objection be "contemporaneous," "timely," "during the jury selection process," or at "trial." *Abu-Jamal-4 Majority* at 279, 280, 282, 283 n.9. "Thus, not only is [the Third Circuit] now imposing an additional limitation on a criminal defendant's ability to raise a *Batson* claim, it is declining to set out the parameters of that new rule." *Abu-Jamal-4 Dissent* at 310 n.38.

As Judge Ambro explained, the practical problem created by the Third Circuit majority's approach – determining what type of objection is sufficient as a matter of federal law—is not a theoretical one. It is present *in this case* because "it is at least arguable that Abu-Jamal *presented an objection* before trial." *Abu-Jamal-4 Dissent* at 307 n.35.

As stated above, defense counsel told the judge before trial that it was the "custom and tradition" of this prosecutor's office to strike African Americans because of their race, and complained that such racial discrimination could deny Mr. Abu-Jamal "a fair and impartial jury." *See* Statement of the Case § A. Judge Ambro noted that counsel thereby "put the trial court on notice that the prosecutor might use peremptory challenges in a discriminatory fashion" and "framed the issue in a manner consistent with the then-prevailing *Swain* standard, which required a defendant to demonstrate that a prosecutor repeatedly struck blacks over a number of cases to make out a claim for an equal protection violation in the prosecutorial use of peremptory strikes." *Abu-Jamal-4 Dissent* at 307 n.35.

Judge Ambro concluded

> If my colleagues are driven to create a contemporaneous objection rule because it "alert[s] the [trial] judge to errors that might be corrected in the first instance and give[s] the judge the opportunity to develop a complete record of the jury selection process for appellate review," Maj. Op. 282, it is reasonable that they should inquire whether the above colloquy could have served to put the trial judge on adequate notice. They do not do so . . .

Abu-Jamal-4 Dissent at 307 n.35.

Under current law, procedural default issues in federal habeas proceedings brought by state prisoners are governed by *state law* procedural rules and the adequate and independent state ground doctrine. The Third Circuit majority's new approach requires federal habeas courts to generate a whole new body of *federal law* procedural rules—in effect, a *federal evidentiary code*—for state prisoners in state courts. The Third Circuit majority's approach is truly revolutionary. This Court should review this case.

II. THE THIRD CIRCUIT MAJORITY'S RULING THAT MR. ABU-JAMAL HAS NOT ESTABLISHED A PRIMA FACIE CASE UNDER *BATSON* CONFLICTS WITH THIS COURT'S DECISIONS AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD ADDRESS

Certiorari review is also appropriate because the Third Circuit majority's holding that Mr. Abu-Jamal has not shown a prima facie case conflicts with Supreme Court and Circuit Court decisions, and presents a question of exceptional importance that this Court should address.

Mr. Abu-Jamal's prima facie case includes *every item* that this Court's decisions recognize as demonstrating a prima facie case. This Court's cases hold that only *some of these items* are necessary for a prima facie showing. The Third Circuit panel majority's refusal to find a prima facie case eviscerates *Batson*'s constitutional holding, and conflicts with applications of *Batson* in every other Circuit and with this Court's post-*Batson* cases.

A. The Prima Facie Case

The *Batson* prima facie case does not require proof of discrimination, just an "*inference* of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 169 (2005) (quoting *Batson*, 476 U.S. at 94). When there are "suspicions and inferences that discrimination may have infected the jury selection process," a prima facie case is established. *Johnson*, 545 U.S. at 172. As Judge Ambro cautioned, Mr. "Abu-Jamal does not need to prove that the prosecutor was actually acting to strike jurors on account of their race; to the contrary, he only needs to '*raise an inference*' that discrimination was afoot." *Abu-Jamal-4 Dissent* at 316 (emphasis in original).

The existence *vel non* of a prima facie case depends on "all relevant circumstances," taking into account "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. As Judge Ambro described, there is a prima facie case here. *See Abu-Jamal-4 Dissent* at 315-19.

1. One "relevant circumstance" supporting a prima facie case is evidence suggesting a "'pattern' of strikes against black jurors included in the particular venire." *Batson*, 476 U.S. at

97. Judge Ambro explained that there is such a pattern here:

> [T]he prosecutor exercised 15 peremptory strikes, 10 of which were used to remove black venirepersons. . . . That means that the "strike rate" for blacks was 66.67%. As the Supreme Court has noted, "[h]appenstance is unlikely to produce this disparity." *Miller-El*, 537 U.S. at 342 ("In this case [where 10 of 14 peremptory strikes were used against black venirepersons, resulting in a strike rate of 71.43% . . .] the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors."). It is my belief that the 66.67% strike rate, without reference to the total venire, can stand on its own for the purpose of raising an inference of discrimination. *See Batson*, 476 U.S. at 97.

Abu-Jamal-4 Dissent at 316 (footnote omitted).

Similarly, the parties agreed below that it is appropriate to compare the prosecutor's strike rate "with the black percentage of the city population, which [at around the time of jury selection] was 37.8%," because the "black percentage" of the venire likely approximated this number. Third Step Brief for Martin Horn, *et al*. (*i.e.*, the Commonwealth), at 34 (citing census data). Given this minority population, one would expect race-neutral application of the prosecutor's 15 peremptory strikes to result in striking 5 or 6 African-Americans (since 37.8% of 15 is 5.7). This prosecutor struck 10 African-Americans. His strike rate, which is "nearly twice the likely minority percentage of the venire[,] *strongly supports* a prima facie case." *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) (comparing strike rate to census data and finding prima facie case where prosecutor used 50% of strikes against minorities, who comprised 29% of the jurisdiction's population). The Third Circuit panel majority nevertheless failed to find a prima facie case.

2. Another "relevant circumstance" supporting a prima facie case is that Mr. Abu-Jamal is black and he challenges the prosecutor's peremptory strikes against black people. This "[r]acial identity between the defendant and the excused person[s]" makes this "one of the easier cases to establish . . . a prima facie case," *Powers v. Ohio*, 499 U.S. 400, 416 (1991), yet the Third Circuit panel majority still failed to find a prima facie case.

3. Another "relevant circumstance" supporting a prima facie case is that Mr. Abu-Jamal was accused of killing a white person. The Third Circuit previously has recognized that, especially in a crime of violence, this "racial configuration . . . *contribute[s] significantly* to [the] prima facie case," *Simmons v. Beyer*, 44 F.3d 1160, 1168 (3d Cir. 1995), because "a prosecutor still burdened with a stereotypical view of the world might well believe that a black juror would be more sympathetic to the defendant and less sympathetic to the victims than would a white juror," *Johnson v. Love*, 40 F.3d 658, 666 (3d Cir. 1994); *see Abu-Jamal-4 Dissent* at 318-19. This Court, too, understands that the risk of racial discrimination is particularly high in cases where a black person is accused of a crime of violence against a white person. *E.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (voir dire questions on race must be allowed in trial of interracial crime of violence, because risk of racial prejudice is particularly strong). However, the Third Circuit panel majority declined to find a prima facie case.

4. Here, the potential for racial discrimination went even beyond that generally present when a black man is accused of a crime of violence against a white person. Mr. Abu-Jamal's role as an African-American journalist, his connections to civil rights organizations, his association with the Black Panther Party and the MOVE organization, and even his appearance with dreadlocked hair, *see* Statement of the Case § A, heightened the danger that a prosecutor harboring racial stereotypes would apply those stereotypes during jury selection. *See*, *e.g.*, *Ham v. South Carolina*, 409 U.S. 524 (1973) (risk of racial discrimination is high when the defendant is a black civil rights activist who claims he was framed by police); *Abu-Jamal-4 Dissent* at 319. The Third Circuit panel majority, however, still failed to find a prima facie case.

5. Further "relevant circumstances" are that this black defendant was accused of killing a white *police officer*, that key prosecution witnesses were also police officers, and that the defense raised issues of police racism, brutality and misconduct. *See* Statement of the Case § A. As Judge Ambro recognized, this supports the prima facie case because a prosecutor may strike

black people based on a stereotype that they are more hostile to the police than are whites. *See Ham v. South Carolina*, *supra*; *Abu-Jamal-4 Dissent* at 319.

This particular racial stereotype existed *in this prosecutor's office*, as evidenced by the jury selection Training Tape produced by this office, *see* Statement of the Case § A, which expressly advised Philadelphia prosecutors to strike "blacks from the low-income areas" because they have "*a resentment for law enforcement*." *Wilson*, 426 F.3d at 657 (quoting Training Tape); *Abu-Jamal-4 Dissent* at 308-10 n.37 (quoting Training Tape); *see also Holloway v. Horn*, 355 F.3d 707, 723 (3d Cir. 2004) (support for prima facie case where black defendant claimed white police officer concocted inculpatory statements); *Cochran v. Herring*, 43 F.3d 1404, 1410 (11th Cir. 1995) (former prosecutors describe racial stereotype that African-Americans are "anti-police . . . and should not be left on juries"); *United States v. Bishop*, 959 F.2d 820, 825-26 (9th Cir. 1992) (prosecutor used "racial stereotypes" by assuming African-American prospective jurors were more likely to have negative feelings about police); *Tankleff v. Senkowski*, 135 F.3d 235, 249 n.3 (2d Cir. 1998) (noting possible use of such stereotypes by prosecutor). And the Third Circuit panel majority still would not find a prima facie case.

6. Further "relevant circumstances" are found in the "prosecutor's questions and statements" about jury selection. *Batson*, 476 U.S. at 97. As set forth in the Statement of the Case § A, the prosecutor told defense counsel and the trial judge that he selected a black juror because he believed she "*hated*" Mr. Abu-Jamal and he "wanted to get as much black representation as I could that I felt was in some way *fair-minded*." NT 6/18/82 at 2.46. The prosecutor's statements suggest that, in the prosecutor's mind, an African-American had to "*hate" Mr. Abu-Jamal* to be considered "*fair minded*," *i.e.*, the prosecutor presumed African-Americans would favor Mr. Abu-Jamal and chose African-Americans who overcame that presumption by showing hostility. *See Commonwealth v. Jackson*, 562 A.2d 338, 346 (Pa.Super. 1989) ("prosecutor may strive to eliminate nearly all black venirepersons, but may make an exception in favor

of . . . black venirepersons who are viewed as sympathetic to the Commonwealth"). The prosecutor never suggested that white jurors had to "hate" Mr. Abu-Jamal to be "fair minded"—race played a role in the prosecutor's selections and strikes. Still, the Third Circuit panel majority failed to find a prima facie case.

7. Further "relevant circumstances" supporting a prima facie case come from evidence of what this Court has called a "culture of discrimination," *Miller-El v. Cockrell*, 537 U.S. at 347, in this prosecutor's office. Evidence of a "culture of discrimination" is significant because "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, and a prosecutor practicing in such an office knows that discrimination is not discouraged and may even be encouraged.

"Culture of discrimination" evidence may include information about discrimination in other cases prosecuted by the office, evidence that the office has disproportionately used its peremptory strikes against blacks in other cases, observations of persons who have observed jury selection by the office, and office training materials. *Miller-El v. Cockrell*, 537 U.S. at 334-35.‡‡‡‡ There is significant evidence, from several sources, of a "culture of discrimination" in this prosecutor's office.

At the time of this trial, prosecutorial discrimination in jury selection was "widespread" and "common" because of the "crippling burden of proof" that *Swain* imposed on defendants who would challenge such discrimination. *Batson*, 476 U.S at 92; *id.* at 101 (White, J., concurring); *id.* at 103 (Marshall, J., concurring). Before *Batson*, Pennsylvania law *allowed prosecutors to intentionally discriminate* in jury selection, so long as their race-based strikes were not so

‡‡‡‡. *See also Riley*, 277 F.3d at 280-84 (statistical evidence of office's strikes in other cases); *United States v. Hughes*, 864 F.2d 78, 79-80 (8th Cir. 1988) (taking "judicial notice of the frequency of the charge of systematic exclusion of black jurors" in jurisdiction; "history of exclusion is a relevant factor in deciding whether the defendant has made out a prima facie case"); *Jones v. Davis*, 906 F.2d 552, 553 (11th Cir. 1990) (defendant established prima facie case under *Swain* through testimony of "several local defense attorneys" that prosecutor's office "had a pattern and practice of excluding blacks from jury service").

systematically exclusionary that they violated *Swain*. *See* Statement of the Case § A (discussing *Commonwealth v. Henderson* and *Commonwealth v. Brown*). Pennsylvania law at the time of this trial thus *"encouraged prosecutors to use peremptory challenges to arrange the racial balance of juries*." *Henderson*, 438 A.2d at 962 n.8 (Nix, J., dissenting).

Mr. Abu-Jamal's trial counsel, who had tried at least 20 homicide cases in Philadelphia before this trial and had briefly worked in the prosecutor's office, confirmed that Philadelphia prosecutors routinely practiced the discrimination that *Swain* and Pennsylvania law allowed. In his pre-trial motion, post-trial affidavit and post-conviction testimony, trial counsel consistently stated that he had seen, throughout years of practice, a pattern of racial discrimination in jury selection by this prosecutor's office, and saw such discrimination by this prosecutor in this case. *See* Statement of the Case § A.

Trial counsel's observations about pre-*Batson* discrimination in Philadelphia are not idiosyncratic. For example, in *Commonwealth v. Brown*, 417 A.2d 181 (Pa. 1980), defense counsel "observ[ed] that in the two years prior to the [1978] trial, he represented black defendants in five Philadelphia murder trials during which the prosecution used peremptory challenges in a discriminatory fashion." *Id.* at 186; *see also id.* at 188 (Nix, J., dissenting) ("this problem has repeated itself in this and other cases"). In *Diggs v. Vaughn*, 1991 WL 46319, *1 (E.D. Pa.), the federal court heard and credited "testimony by attorneys familiar with practices in the Philadelphia courts [pre-*Batson*], to the effect that assistant district attorneys routinely sought to exclude blacks from criminal juries." In other cases close in time to this trial, Pennsylvania courts found that Philadelphia prosecutors used all or most of their peremptory strikes against African-Americans, but held that there was no remedy under the law at the time.[§§§§] Since *Batson*,

§§§§. E.g., *Henderson*, 438 A.2d at 952 (Philadelphia prosecutor used peremptory strikes to eliminate all blacks); *Commonwealth v. McKendrick*, 514 A.2d 144, 150 (Pa.Super. 1986) (same); *Commonwealth v. Edney*, 464 A.2d 1386, 1390-91 (Pa.Super. 1983) (same); *Commonwealth v. Fowler*, 393 A.2d 844, 846 (Pa.Super. 1978) (same); *Commonwealth v. Jones*, 371

Philadelphia prosecutors repeatedly have been found to have engaged in intentional discrimination during jury selection.[*****]

Statistical studies of the use of peremptory strikes by Philadelphia prosecutors confirm the observations of Mr. Abu-Jamal's trial counsel and the findings of state and federal courts regarding the racially disparate use of those strikes by this prosecutor's office. As set forth in the Statement of the Case § A, between 1981 and 1997 Philadelphia prosecutors were almost twice as likely to strike black potential jurors, rather than white ones, with the racial disparity being even higher before *Batson*, when this case was tried. This, too, suggests a culture of discrimination in the office.

Finally, the jury selection Training Tape produced by this prosecutor' office expressly advises office prosecutors to racially discriminate during jury selection. *See* Statement of the Case § A. Judge Ambro recognized that the Training Tape is "significant because it gives a view of the culture of the Philadelphia District Attorney's Office in the 1980s." *Abu-Jamal-4 Dissent* at 310 n.47; *accord Lark v. Beard*, 2006 WL 1489977, *8 (E.D. Pa. May 23, 2006) (Training Tape is "evidence of a culture of discrimination in the Philadelphia District Attorney's

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A.2d 957, 958 (Pa.Super. 1977) (same); *Brown*, 417 A.2d at 186 (Philadelphia prosecutor used all 16 peremptory strikes against blacks); *Commonwealth v. Green*, 400 A.2d 182, 183 (Pa. Super. 1979) (Philadelphia prosecutor used 17 peremptory strikes against blacks); *Commonwealth v. Harrison*, 12 Phila. Co. Rptr. 499, 516, 1985 WL 384524 (Phila. C.P. June 5, 1985) (Philadelphia prosecutor used 6 of 8 peremptory strikes against blacks). This is a small sample of pre-*Batson* Philadelphia cases in which such discrimination occurred, since defendants "were not likely to have raised" such claims under pre-*Batson* law, no matter how egregious the discrimination. *Riley*, 277 F.3d at 284 n.8.

*****. *E.g.*, *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005); *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005); *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004); *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004); *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993); *Harrison v. Ryan*, 909 F.2d 84 (3d Cir. 1990); *Lark v. Beard*, 495 F.Supp.2d 488 (E.D. Pa. 2007); *Diggs v. Vaughn*, 1990 WL 117986 (E.D. Pa. Aug. 8, 1990), *subsequent history*, 1991 WL 46319 (E.D. Pa. March 27, 1991); *McKendrick v. Zimmerman*, 1990 WL 135712 (E.D. Pa. Sept. 12, 1990); *Commonwealth v. Dinwiddie*, 542 A.2d 102 (Pa.Super. 1988), *aff'd*, 601 A.2d 1216 (Pa. 1992); *Commonwealth v. Basemore*, March Term 1987, Nos. 1762- 65 (PCRA trial court opinion) (Savitt, J.); *Commonwealth v. Wilson*, July Term 1988, Nos. 3267, 3270-71 (PCRA trial court opinion) (Temin, J.).

Office"). The fact that racial discrimination was *openly promoted* – on videotape, as part of a training exercise – shows that discriminatory use of peremptory strikes was an *accepted practice* in the office. Thus, this prosecutor's office was a place where prosecutors who were "of a mind to discriminate," *Batson*, 476 U.S. at 96-97, could do so and were encouraged to do so.†††††

Even with all this, the Third Circuit panel majority refused to find a prima facie case.

B. Conflicts with Supreme Court and Circuit Precedent

Judge Ambro explained that the Third Circuit majority's treatment of the prima facie case conflicts with Supreme Court and prior Third Circuit decisions; it also conflicts with decisions of other Circuits.

As stated above, the evidence for a prima facie case includes, *inter alia*: the prosecutor used ten of his fifteen peremptory strikes against black people; Mr. Abu-Jamal is black and the decedent was white; the prosecutor used Mr. Abu-Jamal's connections to the Black Panthers to attack his character; the decedent and key prosecution witnesses were police officers, and the defense claimed police misconduct, violence and racism; the prosecutor's statements about a black juror suggested his belief that only black people who "hated" Mr. Abu-Jamal could be "fair minded"; and the prosecutor's office was marked by a culture of discrimination, as evidenced by observations of counsel, the office's racially disparate use of strikes in many cases, and office training materials that expressly promote racially discriminatory jury selection.

1. Remarkably, the Third Circuit majority addressed just *one piece* of this evi-

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†††††. Judge Ambro noted that the Training Tape's significance is not diminished by the fact that it was made "five years after his trial," because it is "difficult to believe that the culture in the Philadelphia D.A.'s Office was any better five years before the training video was made. Indeed, given that Abu-Jamal's trial preceded *Batson*, it is not far-fetched to argue that the culture of discrimination was even worse" at the time of this trial. *Abu-Jamal-4 Dissent* at 310 n.37. Nor is the Training Tape's significance diminished by the fact that the trainer, Mr. McMahon, did not personally prosecute Mr. Abu-Jamal. After all, it was a "*training session* in the D.A.'s Office," *id.*, which evidences a culture of discrimination for the reasons stated above; and Mr. McMahon stated that he learned his discriminatory techniques from other prosecutors in the office's homicide unit.

dence—the prosecutor's use of ten of his fifteen strikes against black people – with *all the other circumstances* mentioned only in passing in a conclusory footnote. *See Abu-Jamal-4 Majority* at 291 n.17. Judge Ambro criticized, as inconsistent with *Batson*, the majority's cursory, dismissive mentioning of all these "critical factors":

> [S]etting aside statistical calculations about the strike and exclusion rates, the other relevant factors in this case further demonstrate that Mr. Abu-Jamal has satisfied his prima facie burden. . . .
>
> My colleagues dispense with these considerations [other than the strike rate] in a footnote, stating merely that "Abu-Jamal has not demonstrated that these allegations make the Pennsylvania Supreme Court's decision objectively unreasonable." Maj. Op. 291 n.17. Their cursory consideration of these critical factors mirrors that of the Pennsylvania Courts. I believe this misapplies *Batson*, for it fails to "consider all relevant circumstances" of our case.

Abu-Jamal-4 Dissent at 319 (quoting *Batson*, 476 U.S. at 96).

Judge Ambro is right. Since *Batson*, this Court repeatedly has emphasized that a court reviewing a *Batson* claim "must undertake a *sensitive inquiry* into *such circumstantial and direct evidence of intent as may be available*," *Batson*, 476 U.S. at 93 (citations and internal quotation marks omitted), and must "consider *all relevant circumstances*," *id.* at 96; *accord Snyder*, 128 S.Ct. at 1208 ("all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Miller-El v. Dretke*, 545 U.S. at 240 (court must "consider all relevant circumstances"); *Johnson*, 545 U.S. at 168 (court must consider "the totality of the relevant facts"); *Miller-El v. Cockrell*, 537 U.S. at 341 (criticizing lower court because it "did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case"); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (Title VII case: "requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic'" (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978))). The Third Circuit majority violated the emphatic command of this Court's decisions.

The Courts of Appeal, including prior Third Circuit decisions, also have warned that the need to make a "sensitive inquiry" into "all relevant circumstances," *Batson* at 93, 96, precludes

the myopic approach taken by the Third Circuit majority here. Judge Ambro described prior Third Circuit rulings:

> *Batson* was "designed to ensure that a State does not use peremptory challenges to strike *any* black juror because of his race." 476 U.S. at 99 n.22 (emphasis added). Following suit, we have repeatedly said that a defendant can make out a prima facie case for jury-selection discrimination by showing that the prosecution struck a single juror because of race. [citing *Snyder*, 128 S.Ct. at 1208; *Holloway*, 355 F.3d at 720; *Simmons*, 44 F.3d at 1167; *Harrison*, 909 F.2d at 88; *United States v. Clemons*, 843 F.2d 741, 747 (3d Cir. 1988)]
>
> Yet the majority focuses on the absence of information about the racial composition and total number of the venire, claiming that this statistical information – from which one can compute the exclusion rate – is necessary to assess whether an inference of discrimination can be discerned in Abu-Jamal's case. Such a focus is contrary to the nondiscrimination principle underpinning *Batson*, and it conflicts with our Court's precedents, in which we have held that there is no "magic number or percentage [necessary] to trigger a *Batson* inquiry," and that "*Batson* does not require that the government adhere to a specific mathematical formula in the exercise of its peremptory challenges." *Clemons*, 843 F.2d at 746 . . .

Abu-Jamal-4 Dissent at 314-15. The other Circuits agree with Judge Ambro that sensitive consideration of *all factors*, not a "magic numbers" approach, is required by *Batson*. *E.g.*, *Tankleff v. Senkowski*, 135 F.3d 235, 249 (2d Cir. 1998); *United States v. Roan Eagle*, 867 F.2d 436, 441 n.8 (8th Cir. 1989); *Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir. 1995); *United States v. Horsley*, 864 F.2d 1543, 1546 (11th Cir. 1989) (per curiam). The Third Circuit majority is out of step.

If the *only thing* known about jury selection was that the prosecutor used ten of his fifteen peremptory strikes against black people, the Third Circuit's majority's narrow focus on the numbers would be understandable. But there is *much more* here, as set forth above and as Judge Ambro explained. "At the very least, [the Third Circuit majority] and the Pennsylvania Courts should have considered that *this was a racially charged case*, involving a black defendant and a white victim," that "Abu-Jamal was a member of the Black Panther Party and that he was charged with killing a police officer," that there is evidence of a "culture of [discrimination in]

the Philadelphia District Attorney's Office in the 1980s," and that "this is a capital case." *Abu-Jamal-4 Dissent* at 310 n.37, 319. By focusing myopically on the "numbers," without due regard for other relevant information, the Third Circuit majority ruled in a way that conflicts with this Court's decisions, and with the decisions of other Circuit Courts.

2. Judge Ambro also criticized the Third Circuit majority's approach because it conflicts with prior Third Circuit decisions even within the narrow inquiry to which the majority erroneously confined itself—the existence *vel non* of a "pattern" of strikes. It also conflicts with other Circuits' decisions.

This prosecutor used 10 of his 15 strikes against black people, "resulting in a strike rate of 66.67%." *Abu-Jamal-4 Majority* at 287, 291. The majority held that this did not show a "pattern" because the record does not establish "the racial composition or total number of the entire venire—facts that would permit the computation of the exclusion rate and would provide important contextual markers to evaluate the strike rate." *Abu-Jamal-4 Majority* at 292.‡‡‡‡‡

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‡‡‡‡‡. The majority's claim about the record actually is erroneous. In fact, the record *does* show the information the majority demanded—the "total number of venirepersons" and "the racial composition of the venire." The majority's claim to the contrary is inexplicable.

The jury selection transcript shows that 12 jurors were picked from 45 potential jurors who survived challenges for cause and hardship, *see* Mr. Abu-Jamal's Second Step Brief at 18 & n.3 (citing transcripts), *i.e.*, the *total number of venirepersons was 45*. It is also undisputed that *3 black people were selected* for the jury and the *prosecutor struck 10 black people*. *E.g.*, *Abu-Jamal-4 Majority* at 287.

The majority said the defense struck "at least one black" person, *Abu-Jamal-4 Majority* at 287, but the record shows the defense struck *exactly one* black person: the trial prosecutor, in an affidavit submitted by the Commonwealth on direct appeal, said he found 4 black people acceptable, but *1 black person was struck by the defense*, *see* Mr. Abu-Jamal's Fourth Step Brief at 21 (quoting prosecutor's affidavit); relying on the trial prosecutor's affidavit, the Commonwealth told the Pennsylvania Supreme Court that *1 black person was struck by the defense*, *see id.* at 22 (quoting Commonwealth's direct appeal brief); the trial judge *found* the *defense struck 1 black person*, *see id.* at 24-25 (quoting trial court findings).

Since 3 black people were selected, the prosecutor struck 10 black people, and the defense struck 1 black person, the *total number of blacks in the venire was 14*. Thus, the record shows that the "total number of venirepersons" was *45*, and "the racial composition of the venire" was *14 blacks* and *31 whites—i.e.*, the venire was 31% black. The prosecutor used 10 of

Judge Ambro explained that the majority's "attempt to downplay the strike rate by saying that it is essentially meaningless without reference to the racial makeup of the venire as a whole" is not consistent with prior Third Circuit decisions. *Abu-Jamal-4 Dissent* at 316.

> [The majority] claim it is impossible to understand such a high strike rate without "contextual markers" about the entire jury venire. Maj. Op. 292. While such "markers" would be helpful, the lack of a record containing that information should not serve as an absolute bar to Abu-Jamal's claim. Simply put, the failure to develop a record of the entire venire pool or all black members in that pool (against which to compare the prosecutor's use of peremptory strikes) does not defeat a prima facie *Batson* claim. . . . *Batson* does not place the burden on the petitioner to develop a full statistical accounting in order to clear the low prima facie hurdle of the *Batson* analysis. *See Holloway*, 355 F.3d at 728.
>
> In *Holloway*, we emphasized that "requiring the presentation of [a record detailing the race of the venire] simply to move past the first [*prima facie*] stage in the *Batson* analysis places an undue burden upon the defendant." *Id.* at 728. There we found that the strike rate—11 of 12 peremptory strikes against black persons – satisfied the *prima facie* burden despite the lack of contextual markers my colleagues now seek here. *Id.* at 729;[§§§§§] *see also Simmons*, 44 F.3d at 1168.
>
> We have relied on the strike rate alone despite the absence of other contextual markers in post-AEDPA cases. In *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), we ruled that it was an unreasonable application of law to find that the petitioner had not made out a *prima facie* case where the prosecutor had allegedly used 13 of his 14 peremptory challenges against black potential jurors. *Id.* at 235. We did not have information about the total venire or number of black persons in that venire, but we nevertheless held that "[t]he pattern of strikes alleged by the defense is alone sufficient to establish a prima facie case under the [present] circumstances." *Id.* This was so even though "other factors suggestive of possible racial discrimination on the part of the prosecution [we]re not present in the record of th[e] case." *Id.* We emphasized that "[s]uch a pattern, of course, does not necessarily establish racial discrimination, but particularly in the absence of any circumstance (such as a venire composed almost entirely of African Americans) that might provide an innocent explanation, such a pattern is more than sufficient

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15 strikes against blacks. His "strike rate" was 66.7%—more *than twice what one would expect* from race-neutral strikes in a venire that was 31% black. While the majority plainly erred on this matter, certiorari review is appropriate, for the reasons stated in the text, even if it is assumed that the majority's statement about the record is correct.

§§§§§. In *Holloway*, the Third Circuit expressly stated that "Holloway did not establish the number of blacks in the venire," and such evidence "is *by no means necessary* to establish a prima facie showing under *Batson*." *Id.*, 355 F.3d at 723 n.11.

to require a trial court to proceed to step two of the *Batson* procedure." *Id.* *Abu-Jamal-4 Dissent* at 316-18 (footnotes omitted).******

The Third Circuit majority's claim that the prosecutor's use of ten of his fifteen strikes against blacks is meaningless absent a detailed accounting of the venire also conflicts with the decisions of other Courts of Appeals, which have found a "pattern" without requiring such a detailed record.

In *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994), the Seventh Circuit remanded for a hearing on the habeas petitioner's *Batson* claim without requiring the information required by the Third Circuit majority here. Instead, the record was:

> During jury selection, twenty-three potential jurors were questioned. The prosecution exercised four peremptory challenges, three of which were used against Blacks. . . . The record does not show the racial composition of the rest of the twenty-three venire members or the twelve seated jurors.

Rosa, 36 F.3d at 632. The Third Circuit majority's ruling conflicts with this.

In *United States v. Alvarado*, 923 F.2d 253 (2d Cir. 1991), the Second Circuit similarly found a prima facie case and remanded for a *Batson* hearing without requiring the numerical information required by the Third Circuit majority here:

> [A]ppellant first contends that a prima facie case of discrimination was established. He points out that the prosecution used four of its seven challenges against minority members of the venire, with three out of six used to challenge minority

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******. The Third Circuit panel majority said *Holloway* and *Brinson* "can be distinguished on their facts" because "the prosecution had used a greater percentage of its strikes to remove black potential jurors from the venire than the percentage we find in the record here." *Abu-Jamal-4 Majority* at 292-93. Judge Ambro, rightly, was not impressed with the majority's distinction. *See Abu-Jamal-4 Dissent* at 317-18. In *Holloway* and *Brinson*, the petitioner relied primarily (*Holloway*) or solely (*Brinson*) on "pattern" evidence. *See Holloway*, 355 F.3d at 722 ("The most striking factor in this case is the [Philadelphia] prosecutor's pattern of strikes. . . . The pattern here was certainly strong enough to suggest an intention of keeping blacks off the jury"); *Brinson*, 398 F.3d at 235 (Philadelphia prosecutor's use of 13 of his 14 strikes against blacks is "stark pattern" that establishes prima facie case even in the *absence of any other suggestion of discrimination*). Mr. Abu-Jamal, relies on "pattern" evidence *plus* multiple other relevant circumstances; that his "pattern" is not as "stark" as that in *Holloway* or *Brinson* does not render it meaningless, as the majority held.

> members in selection of the twelve regular members of the jury. There is no indication that any of the prosecution's "questions and statements during *voir dire,*" Batson, 476 U.S. at 97, revealed evidence of discriminatory intent.
>
> Here, the prosecution's challenge rate against minorities was 50 percent (three of six) in the selection of the jury of 12, and 57 percent (four of seven) in the selection of the jury of 12 plus alternates. . . . *We are not informed of the minority percentage of the venire in this case*, but we may accept as a surrogate for that figure the minority percentage of the population of the Eastern District, from which the venire was drawn. That percentage is 29. . . .
>
> We think a challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under *Batson*.

Alvarado, 923 F.2d at 255-56.

The Third Circuit majority's ruling conflicts with *Alvarado*. In Mr. Abu-Jamal's case, *the parties agreed*, based upon census data, that the black population of Philadelphia at the time of this trial was approximately 37.8%. *See* § II.A.1, *supra*. This prosecutor used 67% of his peremptory strikes against black people. Thus, as in *Alvarado*, the prosecutor's "challenge rate [was] nearly twice the likely minority percentage of the venire," which "strongly supports a prima facie case under *Batson*."

C. Question of Exceptional Importance

Racial discrimination is never more troubling than when it occurs in our criminal justice system. This Court's decision in *Batson* was an important breakthrough in the fight against racial discrimination because it for the first time offered a realistic opportunity to root out and remedy such discrimination in jury selection. In recent years, this Court has recognized that the promise of *Batson* is fragile and must be protected by vigorous judicial review, and has granted certiorari when the lower courts have eroded *Batson*'s protections. *See Synder v. Louisiana* (2008); *Miller-El v. Dretke* (2005); *Johnson v. California* (2005); *Miller-El v. Cockrell* (2003).

The "scope of the first of three steps this Court enumerated in *Batson*"—the prima facie case—is particularly "important" because it is the threshold over which the defendant must pass in order to obtain any judicial review of his racial discrimination claim. *Johnson*, 545 U.S. at

168. The Third Circuit majority's narrow approach to the prima facie case, "rais[es] the low bar for a prima facie case of discrimination in jury selection to a height unattainable" in many cases, and thus "weaken[s] the effect of *Batson*" and "do[es] a disservice to *Batson.*" *Abu-Jamal-4 Dissent* at 319-20. It therefore presents exceptionally important questions that deserve this Court's review.

CONCLUSION

This Court should grant certiorari and review the decision of the Third Circuit.

Respectfully submitted,

_____

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December 19, 2008

AFFIDAVIT OF MAILING PURSUANT TO RULE 29.2

I, Robert R. Bryan, declare under penalty of perjury that I am a member in good standing of the Bar of the United States Supreme Court. My business address is Law Offices of Robert R. Bryan, 2088 Union Street, Suite 4, San Francisco, California 94123. On this date, I deposited in a United States mail box, first class postage pre-paid and properly addressed to the Clerk of this Court, a Petition for Writ of Certiorari and Appendix in the above-entitled cause. To the best of my knowledge, the mailing took place on December 19, 2008, within the permitted time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 19th day of December, 2008, at San Francisco, California.

_____

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