IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

Nos. 01-9014 and 02-9001

MUMIA ABU-JAMAL,

Appellee in No. 01-9014,
Appellant in No. 02-9001,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; and CONNER BLAINE, Superintendent of the State Correctional Institution at Greene,

Appellants in No. 01-9014,
Appellees in No. 02-9001.

PETITION FOR REHEARING AND REHEARING EN BANC OF APPELLEE AND CROSS-APPELLANT, MUMIA ABU-JAMAL

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Dated: June 27, 2008

STATEMENT OF COUNSEL PURSUANT TO FRAP 35(b)(1) AND LAR 35.1[1]

I express a belief, based on a reasoned and studied professional judgment, that the panel's majority ruling is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court. Further, I express a belief, based upon a reasoned and studied professional judgment, that this case involves questions of exceptional importance which should be addressed by the full Court. Specifically:

I. The panel majority created a new federal law forfeiture rule for habeas cases, 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.

A. The panel majority's creation of a new federal law and forfeiture rule for *Batson* claims brought in federal habeas proceedings by state prisoners is in conflict with Supreme Court and Third Circuit decisions:

(1) It is at variance with Supreme Court and Third Circuit decisions in *Batson* cases which hold that contemporaneous objection rules for *Batson* claims

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1. All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

are a matter of *state law* procedure, not federal law. *E.g.*, *Id.*; *Ford v. Georgia*, 498 U.S. 411 (1991); *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005); *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004); *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (en banc).

(**2**) It conflicts with Supreme Court and Third Circuit decisions on jury selection claims brought under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), which also hold that the question of whether a contemporaneous objection is required is a matter of *state law* procedure, not federal law. *E.g.*, *Uttecht v. Brown*, 127 S.Ct. 2218 (2007); *Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001).

(**3**) It conflicts with a huge body of Supreme Court and Third Circuit 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 independent and adequate state ground doctrine to those *state law* rules. *E.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002); *Gray v. Netherland*, 518 U.S. 152 (1996); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Campbell v. Burris*, 515 F.3d 172 (3d Cir. 2008); *Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007); *Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007); *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005); *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004); *Smith v. Freeman*, 892 F.2d 331 (3d Cir. 1989).

B. The panel majority's creation of a new federal law forfeiture rule for *Batson* claims brought in federal habeas proceedings by state prisoners presents questions of exceptional importance because, *inter alia*: (**1**) it disrupts established precedent regarding how federal habeas courts should treat perceived procedural failures by state prisoners in state court; (**2**) it invites future panels to create further *ad hoc* exceptions to settled procedural default law whenever two Judges believe there are "prudential reasons" to do so; (**3**) it leaves "timely objection" undefined, creating monumental practical problems for district judges and future panels; and (**4**) it requires the creation of an unprecedented body of *federal law* procedural rules governing presentation of claims in *state* court.

II. The panel majority held that Mumia Abu-Jamal had not shown a *prima facie* case under *Batson*. In so holding, the panel majority addressed just one piece of the evidence—the prosecutor's use of 10 of his 15 strikes against black people.

A. The panel majority's *prima facie* case analysis conflicts with Supreme Court and Third Circuit decisions because: (**1**) it contravenes the command of *Batson* and its progeny that "all relevant circumstances" be considered; (**2**) it fails to take into account important evidence, including, *inter alia*, that this was a racially charged case with a black defendant, a white police officer decedent and allegations of police misconduct and racism; the prosecutor made statements in court that suggested racial bias; and the prosecutor's office was marked by a culture of discrimination; (**3**) it places on defendants a record-making burden that this Circuit previously has rejected

as too onerous; and (**4**) it raises the bar for a *prima facie* case above the level commanded by *Batson* and its progeny. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79; *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004); *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995); *Johnson v. Love*, 40 F.3d 658 (3d Cir. 1994).

B. The panel majority's *prima facie* case analysis presents questions of exceptional importance because it vitiates *Batson*'s *prima facie* case standard, and creates a new, onerous record-keeping requirement for *Batson* claims.

Date: June 27, 2008

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State Trial, Appellate, and Post-Conviction Proceedings

Mumia Abu-Jamal was convicted of first-degree murder in 1982 in the Court of Common Pleas, First Judicial District, Philadelphia (Sabo, J., presiding), and sentenced to death the following year. The trial occurred four years before *Batson v. Kentucky*, 476 U.S. 79 (1986) was decided. At the time of trial, claims of 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*, 476 U.S. at 92-93).

Batson was decided while Mr. Abu-Jamal's case was on direct appeal, and direct appeal counsel raised a *Batson* claim. *See Commonwealth v. Abu-Jamal*, 555 A.2d 846, 848-50 (Pa. 1989) ("*Abu-Jamal-1*"). The Commonwealth argued that the *Batson* claim was "waived" because trial counsel (operating under the "crippling burden of proof" imposed by *Swain*) had not made a contemporaneous objection to the prosecutor's peremptory strikes.

The Pennsylvania Supreme Court at that time applied a "relaxed waiver rule" in *capital* cases 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. It therefore 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 ("PCRA"). Again the *Batson* claim was addressed on the merits by the Pennsylvania Supreme Court, and again it held that Mr. Abu-Jamal had not established a *prima facie* case. *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 113-14 (Pa. 1998) ("*Abu-Jamal-2*").

United States District Court

Mr. Abu-Jamal sought federal habeas relief, raising the *Batson* claim and other claims of constitutional error. The District Court (Yohn, J.), held that the penalty phase jury instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), and vacated the death sentence, but denied relief as to the guilt phase. *Abu-Jamal v. Horn*, 2001 WL 1609690 (E.D. Pa.) ("*Abu-Jamal-3*").

As to the *Batson* claim, Judge Yohn 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, it is not procedurally barred. On the merits, Judge Yohn 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-*107. Judge Yohn granted a certificate of appealability on the *Batson* claim.

United States Court of Appeals for the Third Circuit

This Court's panel affirmed. *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008) ("*Abu-Jamal-4*"). It unanimously affirmed 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.). However, the panel was decisively divided on the *Batson* claim—Chief Judge Scirica and Judge Cowen denied relief, while Judge Ambro found a *prima facie* case and would have remanded for further proceedings in the district court.[2]

The panel *unanimously* affirmed Judge Yohn's finding that the *Batson* claim is *not procedurally defaulted*, despite the lack of a contemporaneous objection. Majority at 284-87; Dissent at 305, 311. Under the "independent and adequate state ground doctrine,"

> 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, 109 . . . (1989) (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 . . . (1985); *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.").

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

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2. Because this application is concerned solely with the *Batson* issue, the opinion of Chief Judge Scirica and Judge Cowen is referenced herein as "Majority," while the opinion of Judge Ambro is designated as "Dissent."

Since the Pennsylvania Supreme Court *decided the merits* of the *Batson* claim both on direct appeal (*Abu-Jamal-1*) and on PCRA 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. Majority at 286-87 (quoting *Smith v. Freeman*); *accord* 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)); *id.* at 311.[3]

While unanimously agreeing that lack of contemporaneous objection is not a procedural default, the panel split decisively as to the proper disposition of the claim. The majority created and imposed a new *federal law* forfeiture rule against the *Batson* claim, despite the fact that the state courts had addressed it 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.

Majority at 284.

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3. The panel found that, under controlling precedent including *Holland v. Horn*, 519 F.3d 107 (3d Cir. 2008), *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008), *Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), and *Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005), 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 state court did not regularly apply waiver rules in capital cases. Majority at 287 n.15; Dissent at 311.

It was also held by the majority that "even assuming Abu-Jamal's failure to object is not fatal to his claim, Abu-Jamal has failed to meet his burden in proving a *prima facie* case." Majority at 284.[4]

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 holding are inconsistent with Supreme Court and Third Circuit decisions. *See* Dissent (described below).

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," as this Circuit did in *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004). Dissent at 319 (citing *Batson* and *Hardcastle*). Judge Ambro concluded:

> 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 height unattainable . . . In so holding, we do a disservice to *Batson*. I respectfully dissent.

Dissent at 319-20.

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4. *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. *See* Majority at 289; Dissent at 319.

REHEARING AND *EN BANC* REVIEW ARE APPROPRIATE ON THE *BATSON* CLAIM

I. THE PANEL MAJORITY'S CREATION OF A NEW FEDERAL FORFEITURE RULE FOR *BATSON* CLAIMS RAISED IN STATE COURT

Rehearing and en banc review are appropriate because the panel majority's creation of a new *federal* forfeiture rule for *Batson* claims raised in state court, deeming such claims forfeited absent a contemporaneous objection even when the state courts do not find the claim procedurally barred, conflicts with decisions of the Supreme Court and this Circuit, and presents a question of exceptional importance.

A. Conflict with Supreme Court and Third Circuit Precedent

***Batson* cases** As Judge Ambro found, the panel majority's "newly created contemporaneous objection rule for habeas petitions," Dissent at 305, conflicts with Supreme Court and Third Circuit *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.
>
> . . . .
>
> 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 demon-

strates 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.

Dissent at 305-06 (footnote omitted).

Judge Ambro explained that the majority's new federal law forfeiture rule also conflicts with the Supreme 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.

Dissent at 306-08.

Judge Ambro explained that the majority's new rule also conflicts with Third Circuit decisions on *Batson* claims brought by state prisoners, which have 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.[5]

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.

Dissent at 308-10 (footnotes omitted).[6]

After surveying this Circuit's *Batson* cases, Judge Ambro concluded:

Our caselaw repeats to become a simple refrain: *If a contemporaneous objection were required as a prerequisite to a federal Batson claim, we could not have reached the issue on the merits.* Why we pick this case to depart from that reasoning I do not know.

Dissent at 310 (emphasis in original; footnote omitted).[7]

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

6. *See also Gattis v. Snyder*, 278 F.3d 222, 231-35 (3d Cir. 2002) (where state prisoner first raised *J.E.B. v. Alabama*, 511 U.S. 127 (1994), claim (the equivalent of *Batson* for sex-discrimination), in state post-conviction, this Circuit addressed the claim on the merits because the state courts did).

7. Judge Ambro explained why the only Third Circuit case cited by the 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:

> 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

***Witherspoon/Witt* cases** The panel majority's creation of a new federal law forfeiture rule for *Batson* claims also conflicts with Supreme Court and Third Circuit decisions on habeas claims that striking a juror for cause because of his or her attitude toward capital punishment violates *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). *See Uttecht v. Brown*, 127 S.Ct. 2218 (2007); *Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001).

These *Witherspoon/Witt* cases are highly instructive because the Supreme Court and this Circuit and have stated that state court contemporaneous-objection rules *have the same rationale* under *Witherspoon/Witt* and *Batson*. *E.g.*, *Synder v. Louisiana*, 128 S.Ct. 1203, 1208 (2008) (quoting *Witt* as rationale for contemporaneous objection under *Batson*); *Miller-El v. Cockrell*, 537 U.S. at 339 (same); *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (same); *United States v. DeJesus*, 347 F.3d 500, 507 (3d Cir. 2003) (same). Indeed, the panel majority recognized this. *See* Majority at 284 n.11 (discussing *Uttecht*).

In *Uttecht* the defendant *failed to object* during jury selection to the strike he later challenged; indeed, his counsel affirmatively stated: "We have no objection." *Uttecht*, 127 S.Ct. at 2227. Under the panel majority's approach, the failure to object would have forfeited his claim as a matter of federal law, without regard to whether

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> 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.

Dissent at 310 n.39.

the state court treated failure to object as a waiver. The Supreme Court, however, *rejected the panel majority's 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.

Similarly, in *Szuchon*, 273 F.3d at 324-31, this Circuit granted habeas relief on a *Witherspoon/Witt* claim that was not preserved at trial, and which the Pennsylvania Supreme Court had deemed waived because of the lack of objection. Under the panel majority's approach herein, the lack of an objection would have forfeited the claim as a matter of federal law. But that is *not* what this Circuit held. Instead, citing the Supreme Court's *Batson* ruling in *Ford*, this Circuit held that contemporaneous objection rules are "*state procedural grounds*" which are "independent of the *Witherspoon* claims" and which must be evaluated under the *independent and adequate state ground doctrine*. *Szuchon*, 273 F.3d at 325.

Other cases The panel majority's approach is at odds with a enormous body of Supreme Court and Third Circuit precedent regarding forfeiture rules in federal habeas proceedings. In countless cases, the Supreme Court and this Circuit 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 independent and adequate state ground doctrine to those *state law* rules.[8]

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). As this Circuit has put it, federal habeas courts do not bar a claim if the state court did not do so, "even if the procedural [bar] rule is theoretically applicable to [the] facts." *Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (quoting *Smith*, 892 F.2d at 337, and citing *Harris*).

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 panel majority's] refusing to consider the merits of" the *Batson* claim. *Harris v. Reed*, 489 U.S. at 265 n.12. The majority's ruling here conflicts with this entire body of Supreme Court and Third Circuit precedent.

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8. Among legions of cases, *see Lee v. Kemna*, 534 U.S. 362 (2002) (petitioner's claim *addressed on merits* because it is *not* barred by an independent and adequate state ground); *Harris v. Reed*, 489 U.S. 255 (1989) (same); *Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007) (same); *Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007) (same); *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2005) (same); and *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) (petitioner's claim *not* addressed on merits because it *is* barred by independent and adequate state ground); *Coleman v. Thompson*, 501 U.S. 722 (1991) (same); *Campbell v. Burris*, 515 F.3d 172 (3d Cir. 2008) (same).

B. Question of Exceptional Importance

The panel majority's creation of a new federal law forfeiture rule raises a question of exceptional importance. The majority's approach disrupts established precedent regarding how federal habeas courts should treat perceived procedural failures by state prisoners in state court. The majority's approach invites future panels to create further *ad hoc* exceptions to settled procedural default law whenever two Judges believe there are "prudential reasons" (Majority at 284) to do so.

The majority's approach also creates monumental practical problems. While the majority requires a "timely objection," they "do not define what in their opinion is a 'timely' objection for the purposes of preserving a *Batson* claim." Dissent at 305 n.32.[9] "Thus, not only is the Court 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." Dissent at 310 n.38.

As Judge Ambro explained in dissenting, the practical problem created by the majority's approach—determining what type of objection is sufficient—is not a theoretical one. It is present *in this case*, in another case cited by the majority, *Hardcastle v. Horn*, 368 F.3d 246 (3d Cir. 2004), and in another case in which this Circuit granted *Batson* relief, *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005). Regarding this case:

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9. The majority variously requires the objection be "contemporaneous," "timely," "during the jury selection process," or at "trial." Majority at 279, 280, 282, 283 n.9.

> [I]t is at least arguable that Abu-Jamal presented an objection before trial . . . On March 18, 1982, before jury selection . . . . Abu-Jamal filed a pre-trial motion seeking to distribute questionnaires to the potential members of his jury venire pool in an effort to ensure that he was tried by "a fair and impartial jury.". . . At the motion hearing . . . Abu-Jamal's counsel [stated]:
>
> > *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, . . . that that occurs. . . .*
>
> My colleagues mention [this] in a footnote and discount it on the basis that "Abu-Jamal's motion to distribute a questionnaire to all prospective jurors is different from lodging a timely objection during the jury selection process." Maj. Op. 284 n.10. However, this colloquy served to put the trial court on notice that the prosecutor might use peremptory challenges in a discriminatory fashion. Defense counsel 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. *See Swain*, 380 U.S. at 223-24, 85 S.Ct. 824. 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 . . .

Dissent at 307 n.35.

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." Dissent at 310. Is this a "timely objection" under the panel majority's approach? Judge Ambro stated:

> In their discussion of the motion for a mistrial in *Hardcastle*, my colleagues appear to intimate that such a motion could suffice as a timely

> objection under their newly created contemporaneous objection rule. Maj. Op. 280 n.3. Given their belief that the Court in *Batson* "envisioned an objection raised during the jury selection process," Maj. Op. 280-81 (internal quotation marks omitted), I fail to see how they could construe Hardcastle's motion—made after voir dire was completed and the jury was empanelled, but prior to trial—as satisfying their objection requirement. Thus, not only is our Court 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.

Dissent at 310 n.38.

Similarly, in *Brinson*, 398 F.3d at 227 n.2, "voir dire took place before *Batson* was handed down, and Brinson's attorney did not object when the prosecutor made the peremptory challenges." Under the majority's approach, the federal court would have to decide if a post-jury selection objection was "timely" as a matter of federal law. Under the proper approach applied in *Brinson*, which looks to *state law* rules, "timeliness" was a non-issue because the "state courts did not hold . . . that Brinson procedurally defaulted his *Batson* claim by failing to raise an objection at the time when the challenges were exercised." *Id.*

Under current law, default issues are governed by *state law* procedural rules and the adequate and independent state ground doctrine. The panel majority's approach requires the 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. This is a truly revolutionary approach, and this Circuit should not adopt it without at least allowing *en banc* consideration.

II. THE PANEL MAJORITY'S RULING THAT MR. ABU-JAMAL HAS NOT ESTABLISHED A *PRIMA FACIE* CASE UNDER *BATSON*

Rehearing and en banc review are also appropriate because the panel majority's holding that Mr. Abu-Jamal has not shown a *prima facie* case conflicts with Supreme Court and Third Circuit decisions, and presents a question of exceptional importance.

A. The *Prima facie* Case

The *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). Judge Ambro warned: "Bear in mind that 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." 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. When circumstances raise "suspicions and inferences that discrimination may have infected the jury selection process," a *prima facie* case is established. *Johnson*, 545 U.S. at 172. In other words, Mr. Abu-Jamal need show only that there is "*some reason to believe* that discrimination *might* be at work." *Johnson v. Love*, 40 F.3d 658, 663 (3d Cir. 1994) (quoting *United States v. Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989)).

As Judge Ambro found, there is a *prima facie* case here. *See* Dissent at 315-19.

1. One "relevant circumstance" is whether there is "a 'pattern' of strikes against black jurors included in the particular venire." *Batson*, 476 U.S. at 97. Here, as Judge Ambro found, there is such a pattern:

> We know that the 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.

Dissent at 316 (footnote omitted).

2. Another "relevant circumstance" is that Mr. Abu-Jamal is black and he challenges the prosecutor's 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); *Jones v. Ryan*, 987 F.2d 960, 972 (3d Cir. 1993).

3. Another "relevant circumstance" is that Mr. Abu-Jamal is black and the decedent was white. This Circuit has found that 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 defen-

dant and less sympathetic to the victims than would a white juror," *Johnson*, 40 F.3d at 666.[10]

As Judge Ambro noted, this Circuit's *Simmons* decision highlights the importance of the black defendant/white victim dynamic. Dissent at 319 n.53. In *Simmons*, little was known about jury selection: the transcripts were missing; it was not known how many people were in the venire, "how many African Americans were in the venire, how many were struck by the prosecution, or how many were seated as jurors"; it was not known "how many peremptory challenges [the prosecutor] used to strike African Americans." *Simmons*, 44 F.3d at 1163, 1167. What *was* known was that Simmons was black; the victim was white; the "prosecution struck at least one potential African American juror"; and the prosecution accepted at least one African American. *Id.* at 1167-68. From this limited information, this Circuit found "a *prima facie* case of a *Batson* violation. The combination of Simmons' race, the prosecution's exclusion of at least one potential African American juror, and the circumstances surrounding the crime [*i.e.*, a black defendant and a white victim in a violent crime] are sufficient to meet Simmons' *prima facie* burden." *Id.* at 1168.

Here, as Judge Ambro recognized, the racial dynamic went even *beyond* an ordinary black/white scenario that already contributes heavily to the prima face case, because of Mr. Abu-Jamal's connections to the Black Panther Party and the MOVE

10. *See also Jones*, 987 F.2d at 971-72 (black defendant/white victim supports *prima facie* case); *Commonwealth v. Jackson*, 562 A.2d 338, 345 (Pa.Super. 1989) ("potential for misuse of peremptory challenges is greatest when a defendant is accused of attacking an individual of a different race").

organization, which were prominent in the original trial proceedings, and which the prosecutor portrayed as a blot on Mr. Abu-Jamal's character. *See* Dissent at 319.[11]

4. Another "relevant circumstance" is that the decedent was a police officer, as were key prosecution witnesses, and the defense raised issues of police racism, brutality and misconduct.[12]

As Judge Ambro recognized, Dissent at 319, this supports the *prima facie* case, since a prosecutor may strike black people based on a stereotype that they are more hostile to the police than are whites. *See Holloway*, 355 F.3d at 723 (support for *prima facie* case where, "while Holloway, the victim, and key prosecution witness Shirley Baker were *all black*, the [police] officer who took Holloway's custodial

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11. The prosecutor raised the Black Panther/MOVE connection as early as a pre-trial bail hearing, when he asked Mr. Abu-Jamal's character witnesses (two state legislators and a civil rights leader) if they knew 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 writing about MOVE and the Black Panthers; if they had heard him criticize police mistreatment of MOVE and the Black Panthers. *E.g.*, NT 1/11/82 at 49-52, 59-60, 66. At the guilt phase, when Mr. Abu-Jamal again presented character witnesses, the prosecutor again tried to question them about Mr. Abu-Jamal's Black Panther Party connections; over the prosecutor's outraged protests, the court did not allow the questioning. *E.g.*, NT 6/30/82 at 36-37, 49; NT 7/1/82 at 22, 24-25, 27-30. At the penalty phase, the prosecutor questioned Mr. Abu-Jamal about his connection to the Black Panthers, *see, e.g.*, NT 7/3/82 at 21-26, and emphasized that connection in closing argument, *see id.* at 68.

12. *See, e.g.*, NT 1/8/82 at 94-98; NT 1/11/82 at 77-78; NT 3/18/82 at 50-54; NT 4/29/82 at 43-46; NT 5/13/82 at 25-26, 33-35, 44-47; NT 6/1/82 at 65, 79, 93, 115-19, 137-38; NT 6/2/82 at 2.4-6, 2.44, 2.130-31; NT 6/3/82 at 3, 5-6, 12-17, 29-32; NT 6/4/82 at 4.43-92; NT 6/19/82 at 8-19; NT 7/31/95 at 83-84, 87-89.

statement, Detective Gilbert, was *white*" and "Holloway's credibility versus that of Detective Gilbert, a white police officer, was a crucial issue for the jury").[13]

That this particular stereotype existed *in this prosecutor's office* is evidenced by a videotaped "training session on jury selection," given by that office in 1987, which "repeatedly advises [the trainees] to use peremptory strikes . . . in apparent violation of *Batson*." *Wilson*, 426 F.3d at 655-56. In particular, this training tape advises prosecutors to strike "blacks from the low-income areas" because they have "a *resentment for law enforcement*." *Id.* at 657 (quoting training tape); *see also* Dissent at 308-10 n.37 (quoting training tape); part 6, *infra* (describing training tape).

5. Further "relevant circumstances" are in the "prosecutor's questions and statements" about jury selection. *Batson*, 476 U.S. at 97.

After jury selection, a black juror, Jennie Dawley, broke sequestration. Judge Sabo said he was surprised Ms. Dawley was selected in the first place, since she seemed to him 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 Ms. Dawley: "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 elaborated that he picked

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13. *See also 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).

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.

The prosecutor's statements support the *prima facie* case because they 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 Jackson*, 562 A.2d at 346 ("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").

6. Further support for a *prima facie* case comes from evidence of what the Supreme Court has called a "culture of discrimination," *Miller-El v. Cockrell*, 537 U.S. at 347, in the prosecutor's office. The Supreme Court and this Circuit have explained that "culture of discrimination" evidence includes evidence of discrimination in other cases prosecuted by the office, evidence that the office has disproportionately used its peremptory strikes against blacks in other cases, defense lawyers' observations about discrimination by the office, and office training materials. *E.g.*, *id.*, 537 U.S. at 334-35; *Riley*, 277 F.3d at 280-84.[14]

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14. *See also 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").

There is significant evidence, from several sources, of a "culture of discrimination" in this prosecutor's office at the time of trial.

At the time of 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 systematically exclusionary that they violated *Swain.*[15] 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 practiced the discrimination that *Swain* and Pennsylvania law encouraged. Before jury selection, counsel stated:

> 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.

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15. *See Commonwealth v. Henderson*, 438 A.2d 951, 953 (Pa. 1981) (pre-*Batson* Pennsylvania law allowed prosecutor to strike blacks "because he believed that black jurors would tend to be more favorable than white jurors to the black defendant"; race was deemed a "proper consideration" for peremptory challenges); *Commonwealth v. Brown*, 417 A.2d 181, 186 (Pa. 1980) (same).

NT 3/18/82 at 12.

For direct appeal, trial counsel provided an affidavit stating that he observed such discrimination by the prosecutor *in this case*:

> 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).

At the PCRA hearing, the prosecutor questioned trial counsel about these statements, and counsel emphatically reaffirmed 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 trial prosecutor in this case *followed that racially discriminatory practice*:

> [PCRA Prosecutor]: . . . [A]re you saying that Mr. McGill was exercising peremptory strikes in a racially motivated fashion?
> [Trial Counsel]: Sure.
> [PCRA 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.

Trial counsel's observations about pre-*Batson* discrimination in Philadelphia are not idiosyncratic. In *Brown*, 417 A.2d at 186, 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 discrimi-

natory fashion." *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 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 because the cases pre-dated *Batson* and, thus, discrimination was allowed.[16] Since *Batson*, Philadelphia prosecutors have been found to have engaged in intentional discrimination during jury selection.[17]

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16. 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 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). These opinions undoubtedly are a small fraction of the *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.

17. *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); *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 study of peremptory strikes in Philadelphia found that, "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors," with the racial disparities higher before *Batson* (when this jury was selected) than after. *Miller-El v. Dretke*, 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)). This and similar studies were cited favorably by a Committee appointed by the Pennsylvania Supreme Court and charged with investigating racial and gender bias in state justice system. *See* Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System 201 (2003) ("Bias Report").[18] The Committee found "strong indications that Pennsylvania's capital justice system does not operate in an evenhanded 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." Bias Report at 201, 205-09, 218-21, 223 n.5.

Further evidence of the "culture of discrimination" in the prosecutor's office comes from a "training session on jury selection" given by that office, and videotaped, shortly after *Batson* was decided ("Training Tape"). *Wilson*, 426 F.3d at 656;

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.); *Commonwealth v. Spence*, Sept. Term 1986, Nos. 3391-95 (PCRA trial court opinion) (Berry, J.).

18. *www.courts.state.pa.us/Index/Supreme/biasreport.htm.*

see Dissent at 308 n.37 (describing Training Tape). The Training Tape's teachings "*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.

The Training Tape "repeatedly advises [the] audience to use peremptory challenges . . . in apparent violation of *Batson.*" *Wilson*, 426 F.3d at 655.[19] The trainer, Jack McMahon, who joined the office in 1978, *Id.*, at 656, 659, explained that he learned his racially discriminatory techniques through discussions with *prosecutors in the office's homicide unit*—that is how "the wisdom of the ages gets passed down." Training Tape at 72. He also 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. . . . [S]ome people say, well, the best jury is an all white jury." *Id.*, at 56, 58.

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."

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19. *See also Brinson*, 398 F.3d at 229 ("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*").

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 Office"). The fact that racial discrimination was openly promoted—on on videotape, as part of a training exercise—shows that discriminatory use of peremptory strikes was an *openly accepted practice* in the office. Thus, this prosecutor's office was a place where a prosecutor who was "of a mind to discriminate," *Batson*, 476 U.S. at 96-97, could do so and was encouraged to do so.[20]

B. Conflict with Supreme Court and Third Circuit Precedent

Judge Ambro found that the panel majority's analysis of the *prima facie* case is in conflict with Supreme Court and Third Circuit decisions. As stated above, the evidence for a *prima facie* case includes that: (1) the prosecutor used 10 of 15 strikes against black people; (2) Mr. Abu-Jamal is black and the decedent was white; (3) the prosecutor used Mr. Abu-Jamal's connections to the Black Panthers and MOVE to attack his character; (4) the decedent and key prosecution witnesses were police officers, and the defense claimed police misconduct and racism; (5) the prosecutor's statements about a juror suggested his belief that only black people who "hated" Mr. Abu-Jamal could be "fair minded"; and (6) the prosecutor's office was marked by a culture of discrimination, as evidenced by observations of counsel, the office's ra-

20. Judge Ambro found that Training Tape's significance is not diminished by the fact that it was made "five years after his trial," since 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 Mr. Abu-Jamal's trial. Dissent at 310 n.37. Nor is the Training Tape's significance diminished by the fact that 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.

cially disparate use of strikes in many cases, and office training materials that promote racially discriminatory jury selection.

1. Remarkably, the panel majority addressed just *one piece* of this evidence—the prosecutor's use of 10 of his 15 strikes against black people—with *all of the other factors* mentioned only in a conclusory footnote. Judge Ambro found that the majority's dismissive treatment of all these "critical factors" conflicts with *Batson*:

> [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.

Dissent at 319 (quoting *Batson*, 476 U.S. at 96).

The majority's cursory treatment of the evidence also conflicts with this Circuit's decision in *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995):

> In *Simmons*, we had no record of the total venire, yet we nevertheless found that the defendant had established a *prima facie* case based on "[t]he combination of Simmons' race, the prosecution's exclusion of at least one potential African American juror, and the circumstances surrounding the crime," which involved "the murder and robbery of an elderly [C]aucasian physician by a young African American man." [Simmons v. Beyer], 44 F.3d at 1168.

Dissent at 319 n.53 (quoting *Simmons*).

Justice Ambro pointed out that "[a]t the very least, [the 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." Dissent at 319.

More generally, the majority's myopic focus on the "numbers" (of strikes, acceptances, etc.) conflicts with Supreme Court and Third Circuit decisions about the purpose and nature of the *Batson* inquiry:

> *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, 106 S.Ct. 1712 (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. *Holloway v. Horn,* 355 F.3d 707, 720 (3d Cir. 2004) ("Consistent with [*Batson*] principle[s], courts have recognized that a prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated as consistent with the guarantee of equal protection under the law."(citing *Harrison v. Ryan,* 909 F.2d 84, 88 (3d Cir. 1990))). In fact, in *United States v. Clemons,* 843 F.2d 741, 747 (3d Cir. 1988), we explained that "[s]triking a single black juror could constitute a *prima facie* case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks." *Accord Snyder,* 128 S.Ct. at 1208; *Simmons v. Beyer,* 44 F.3d 1160, 1167 (3d Cir. 1995); *United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir. 1994); *United States v. Battle,* 836 F.2d 1084, 1086 (8th Cir. 1987)
>
> 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 (quoting *United States v. Montgomery,* 819 F.2d 847, 851 (8th Cir. 1987)).

Dissent at 314-15.

2. As Judge Ambro found, the majority's approach conflicts with Third Circuit precedent even within the narrow inquiry to which the majority erroneously confined itself—the existence *vel non* of a "pattern" of strikes.

The majority recognized that the prosecutor used 10 of his 15 strikes against black people, "resulting in a strike rate of 66.67%." 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 of the entire venire – facts which that would permit the computation of the exclusion rate and would provide important contextual markers to evaluate the strike rate." Majority at 287, 292.

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 this Circuit's decisions. 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* bur-

den despite the lack of contextual markers my colleagues now seek here. *Id.* at 729; *see also Simmons*, 44 F.3d at 1168.[21]

> 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 to require a trial court to proceed to step two of the *Batson* procedure." *Id.*

Dissent at 316-18 (footnotes omitted).

The panel majority recognized that this Circuit, in *Holloway* and *Brinson*, found a *prima facie* case *without* evidence "of the venire's racial composition," which it requires in this case. Majority at 292. The majority said those "cases 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." Majority at 292-93. Judge Ambro, rightly, was not impressed with the majority's distinction. *See* Dissent at 317-18.[22]

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21. In *Holloway*, this 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.

22. Here, the (Philadelphia) prosecutor used 10 of 15 strikes against blacks; in *Holloway*, the (Philadelphia) prosecutor used 10 of 12 strikes against blacks; in

If the *only thing* we knew about jury selection was that the prosecutor used 10 of 15 strikes against black people, the majority's concerns about "strike rate" versus "exclusion rate" *might* have some weight. *Cf. Brinson*, 398 F.3d at 235 (13 of 14 strikes against blacks is a "stark pattern" that establishes a *prima facie* case even without *any* "other factors suggestive of possible racial discrimination"). But there is much *more* here than the strike rate, as set forth above and as Judge Ambro found. The majority's exclusive focus on the strike rate conflicts with Supreme Court and Third Circuit decisions.

C. Question of Exceptional Importance

"It is . . . important to remember that a primary justification for the *Batson* burden-shifting framework is the recognition that *direct evidence* of the prosecutor's discriminatory intent will often be hard to produce." *Wilson*, 426 F.3d at 670 n.18. The "scope of the first of [*Batson*'s] three steps," the *prima facie* case, is particularly important because it is the mechanism that allows courts to inquire into and root out racial discrimination. *Johnson v. California*, 545 U.S. at 168. The panel majority's narrow approach to the *prima facie* case, and its "raising the low bar for a *prima facie* case . . . to a[n inappropiate] height . . . do a disservice to *Batson*" and present exceptionally important questions that deserve en banc review.

Brinson, the (Philadelphia) prosecutor used 13 of 14 strikes against blacks. While the strike rates were somewhat higher in *Holloway* and *Brinson*, that does not make Mr. Abu-Jamal's "pattern" evidence meaningless, as the majority held.

D. Important Points of Fact the Panel Majority Overlooked

The panel majority's ruling hinged on its belief that the "record does not reveal the total number of venirepersons or the racial composition of the venire." Majority at 287. Without proof of the "racial composition of the venire," the majority believed it was "unable to determine whether there is a disparity between the percentage of peremptory strikes exercised to remove black venirepersons and the percentage of black jurors in the venire." Majority at 292.

The majority's misguided emphasis on this issue justifies en banc review for the reasons stated above. In addition, the majority overlooked relevant facts, which at least makes panel rehearing appropriate. FRAP 40(a)(2).

First, the Commonwealth agreed in its panel brief that it is appropriate to compare the prosecutor's strike rate "with the black percentage of the city population, which in 1980 was 37.8%," because the "black percentage" of the venire likely approximates this number. Third Step Brief for Appellants Martin Horn, et al., at 34 (citing census data). Making the comparison invited by the Commonwealth, one would expect race-neutral application of the prosecutor's 15 strikes to result in striking 5 or 6 blacks (since 37.8% of 15 is 5.7). This prosecutor struck 10 blacks. 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).

Second, the record actually *does* show the information the majority demanded—the "total number of venirepersons" and "the racial composition of the venire." The voir dire transcripts show 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*.

The panel majority found *3 black people were selected*, and the *prosecutor struck 10 black people*. Majority at 287. The majority said the defense struck "at least one black" person. Majority at 287. The record actually 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 *one* 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 *one* black person was struck by the defense. *See id.* at 22 (quoting Commonwealth's direct appeal brief). Judge Sabo *found* that the defense struck *one* black person. *See id.* at 24-25 (quoting Judge Sabo's findings).

Since the majority found that 3 black people were selected and the prosecutor struck 10 black people, and the record shows that 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 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. Again, this strongly supports the *prima facie* case.

CONCLUSION

As Judge Ambro stated, a *prima facie* case should be found and this case should be remanded so that the district court can complete the three step *Batson* analysis. The panel majority has backed away from this Circuit's historical commitment to equal justice for all, and has done a "disservice to *Batson*." Dissent at 320. Rehearing and en banc review are appropriate.

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CERTIFICATION THAT E-BRIEF AND HARD COPY ARE IDENTICAL, AND OF VIRUS CHECK

I, Robert R. Bryan, Esq., pursuant to Third Circuit Rule 31.1(c), hereby certify that the text of the e-brief and hard copies filed this date are identical, and that that a virus check was performed this date of the E-Brief in this matter utilizing McAfee Virus Scan software and no viruses were detected.

Date: June 27, 2008

ROBERT R. BRYAN

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing **Petition for Rehearing and Rehearing En Banc of Appellee and Cross-Appellant, Mumia Abu-Jamal** to be served by United States Mail, first class postage prepaid, upon the following:

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

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