NO. M1988-0026-SC-DPE-PD

IN THE SUPREME COURT

STATE OF TENNESSEE

STATE OF TENNESSEE,
Appellee,

vs.

ABU-ALI ABDUR'RAHMAN,
Appellant.

Conditionally Filed

BRIEF OF *AMICUS CURIAE*
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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Filed April 2, 2002 (jsr)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

COMES NOW, counsel George H. Kendall and Miriam Gohara, on behalf of the NAACP Legal Defense Fund, Inc. (LDF), and moves this Court, pursuant to Tenn. R. App. P. 31(a), for permission to file a brief of *amicus curiae*. As grounds therefore, *amicus curiae* states as follows:

At issue in this capital case is whether the trial court erred in allowing a prosecutor to strike a prospective juror based on reasons which were a clear pretext for racial discrimination.

This issue is one of considerable constitutional significance under both the Tennessee and the federal Constitution, and it raises significant concerns for the integrity of Tennessee's criminal justice system.

Amicus curiae, LDF, has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and in the administration of the death penalty in particular. We represented the defendants in, *inter alia, Furman v. Georgia,* 408 U.S. 238 (1972), *Jurek v. Texas,* 428 U.S. 262 (1976), and *McCleskey v. Kemp,* 481 U.S. 279 (1987), as well as filing numerous *amicus* briefs in other cases. We raised jury discrimination claims in appeals from criminal convictions, *see, e.g., Swain v. Alabama,* 380 U.S. 202 (1965), *Alexander v. Louisiana,* 405 U.S. 625 (1972); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission,* 396 U.S. 320 (1970), *Turner v. Fouche,* 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky,* 476 U.S. 79 (1986), and *United States v. Armstrong,* 517 U.S. 456 (1996).

The question before this court presents an issue at the crux of fairness in the administration of criminal trials and the death penalty: Whether the Court should remedy its earlier determination (now shown to be erroneous) that no *Batson* error marred this trial, where there is clear evidence that the prosecution engaged in purposeful discrimination in excluding qualified African-American citizens from this jury while seating similarly situated white citizens. *Amicus* believes its half-century experience with the issue of racial discrimination in the criminal justice system, including particular interest in discrimination in jury selection and the administration of the death penalty, has yielded lessons that could be useful to the Court in resolving this appeal.

WHEREFORE, *Amicus Curiae* respectfully move this Court to accept the brief conditionally filed in this case.

_____

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I. STATEMENT OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans to secure their rights by the prosecution of lawsuits. Its purpose includes rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in the Supreme Court of the United States, in the lower federal courts, and in state courts.

LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and in the administration of the death penalty in particular. We represented the defendants in, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *Jurek v. Texas*, 428 U.S. 262 (1976), and *McCleskey v. Kemp*, 481 U.S. 279 (1987), as well as filing numerous amicus briefs in other cases. We raised jury discrimination claims in appeals from criminal convictions, *see, e.g.*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *United States v. Armstrong*, 517 U.S. 456 (1996).

The question before this Court presents an issue at the crux of fairness in the administration of criminal trials and the death penalty: Whether the Court should remedy its

earlier determination (now shown to be erroneous) that no *Batson* error marred this trial now that there is clear evidence showing that the prosecution engaged in purposeful discrimination in excusing qualified African-American citizens from this jury. LDF believes its half-century experience with the issue of racial discrimination in the criminal justice system, including particular interest in discrimination in jury selection and the administration of the death penalty, has yielded lessons that could be useful to the Court in resolving this appeal.

II. BACKGROUND

A. Racial Discrimination in Jury Selection– History and Remedial Efforts

Mr. Abdur'Rahman presents a critical issue for this court's review: whether his execution should go forward despite compelling evidence of the prosecution's racial discrimination in the selection of his jury. His case is the latest in a long line of capital cases tainted by this kind of discrimination.

For much of the history of our country, administration of the death penalty has been entangled with racial politics and discrimination. Criminal justice policy has always been inextricably linked with race in this country. Criminal laws evolved from the Slave Codes, continued with the Black Codes, and were eventually replaced by Jim Crow laws. *See* Steven B. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in the Infliction of the Death Penalty, 35 Santa Clara L. Rev. 433, 439 (1995)("The death penalty is a direct descendant of lynching and other forms of racial violence and racial oppression in America."); David M. Oshinsky, Worse Than Slavery: Parchman Farm and the Ordeal of Jim

Crow Justice (1996). The Supreme Court finally acknowledged that race is a fundamental arbitrary factor in the administration of the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972).

In 1976, when the states petitioned the Supreme Court to revisit *Furman* and again permit the imposition of capital punishment, state attorneys promised the Court that the new death penalty statutes were designed to limit if not end the influence of discrimination in the capital sentencing system. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *see also Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. at 262. Nevertheless, much of the empirical evidence that has been collected and analyzed since the reinstatement of the death penalty confirms just the opposite – race continues to play an unacceptably significant role in who is charged, tried, and convicted capitally. *See McCleskey*, 481 U.S. at 279; *see also* General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5 (Feb. 1990) (analyzing twenty-eight states' capital punishment data and finding "a remarkably consistent" pattern of racial disparities in capital sentencing nationwide); *see also* United States Department of Justice, The Federal Death Penalty System: A Statistical Survey (Sept. 12, 2000); *see also United States v. Bass*, 266 F.3d 532, 536-37 (6th Cir. 2001) (discussing racial disparities in the application of the federal death penalty).

Nevertheless, courts and legislatures have continued to legally mandate or *de facto* tolerate racial discrimination in jury selection. Such race conscious jury selection, particularly the exclusion of qualified African-American jurors, has played a crucial role in the continued

unjust administration of the death penalty in this country, particularly with regard to minority defendants. Since adoption of the modern capital punishment statutes, prosecution peremptory striking practices in some jurisdictions have been so extreme that courts have granted relief pursuant to the extraordinarily demanding test of *Swain v. Alabama*, 380 U.S. 202 (1965).[1] Indeed, the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986) abandoned the *Swain* test in large part because it concluded that the formidable *Swain* standard of proof was insulating discriminatory conduct from judicial remedy.[2]

Discriminatory peremptory striking practices by prosecutors are particularly egregious in capital cases. Courts have long viewed the purposeful removal of qualified minority jurors as a "grave constitutional trespass," *Vasquez v. Hillary*, 474 U.S. 255, 262 (1986), as such exclusion allows state officials to alter the jury's structural integrity. This tampering is particularly significant because in our criminal justice system, the jury, acting as peers of the defendant, stands between the defendant and the government and acts as "the great bulwark

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[1] *See e.g.*, *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991)(capital conviction struck down on grounds that peremptory striking practice of Georgia district attorney in capital cases was extreme and satisfied *Swain* test); *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995)(same as applied to practices of Arkansas district attorney); *Jones v. Davis*, 835 F.2d 835 (11th Cir. 1988)(holding that the striking pattern of Alabama district attorney was sufficiently extreme to establish a *Swain* violation); *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991)(same); *Banks v. Cockrell*, No. 01-40058 (5th Cir. appeal pending) (considering a record showing that prosecution strikes removed over 90% of qualified African American jurors over six-year period and that such strikes resulted in an all-white jury assembled in this mixed-race case).

[2] Indeed, *Swain's* author, Justice White, wrote in his concurring opinion in *Batson*. "It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." *See* 476 U.S. at 101.

of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873); *see also Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (2000); *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968). Where government conduct diminishes the structural integrity of the jury, it denies the defendant a fairly-constituted tribunal.

The Supreme Court's efforts to limit the influence of the prosecution's discriminatory behavior has evolved from *Batson*. In *Turner v. Murray*, 476 U.S. 28 (1986), the Court minted a new constitutional rule that requires *voir dire* on racial matters in capital proceedings. This decision confirms the Court's view that some potential jurors continue to harbor strong racial prejudice, and the defendant must have an opportunity to identify such disqualifying biases. *See id.* at 35 (noting that "a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether [the] crime involved aggravating factors" and "[f]ear of blacks, which could easily be stirred up by the violent facts of [the] crime, might incline a juror to favor the death penalty").

Thus, Mr. Abdur'Rahman, an African-American defendant sentenced to death by an overwhelmingly white jury who presents a meritorious claim of racially discriminatory jury selection, could not present a more compelling issue to justify this Court's recalling its mandate. We urge the Court to reexamine his *Batson* claim because, as a result of newly available evidence, he can now demonstrate that purposeful discrimination by the prosecution marred the jury selection process.

B. Racial Discrimination in the Selection of Mr. Abdur'Rahman's Jury

The trial and conviction of Abu-Ali Abdur'Rahman were tainted by the prosecution's unabashed exclusion of African-American veniremembers on the basis of their race. The prosecution's profiles of veniremembers included notations on the race of each potential juror as well as a four-point scale upon which the prosecution ranked potential jurors according to their likelihood to favor the prosecution. The prosecution assigned a rank of 4 to the most pro-prosecution veniremembers. Despite the fact that at least one African-American venireman, Robert Thomas, outranked several white veniremembers, and was assigned the same rank as several white veniremembers, the prosecution excluded Mr. Thomas from the jury and seated several of the white potential jurors whom he outranked. Moreover, the prosecution's articulated "race-neutral" reason for excluding Mr. Thomas, that he appeared to be uneducated, revealed a prejudice which had no basis in fact.

The prosecution claimed that it excluded Robert Thomas because he "appeared uneducated and lacking the communicative skills of other jurors." *See State v. Jones*, 789 S.W.2d 545, 552 (Tenn. 1990). The prosecution never questioned Mr. Thomas about his education, but rather relied on a deeply racist stereotype that African Americans are inarticulate and ignorant. Mr. Thomas, in fact, had completed two years of college. Nevertheless, he did not survive the prosecution's scrutiny. That Mr. Thomas's alleged lack of education was a pretext for racial discrimination became even more apparent from the prosecution's choosing to seat on the jury white veniremember Swarner, whom the district

attorney's contemporaneous notes describe as "dumb," "not real smart," and a "rough old boy." No contemporaneous prosecution notes refer to Mr. Thomas's alleged lack of education, though several such notes were made about other veniremembers.

The facts in this case clearly support the conclusion that the prosecution's exclusion of all but one African-American veniremember from Mr. Abdur'Rahman's jury violates *Batson* and its progeny. *See State v. Ellison*, 841 S.W.2d 824, 827 (Tenn. 1992). It is incumbent upon this Court to reconsider the facts of this case and apply *Batson* analysis with an eye toward recognizing and halting racially discriminatory jury selection. Only the courts have the power to end this invidious practice.

III. ARGUMENT

A. *Batson* Framework

In *Batson v. Kentucky*, the Supreme Court established the framework by which a criminal defendant may establish a claim of racial discrimination in the use of peremptory strikes. 476 U.S. at 97-98. First, a defendant must make a *prima facie* showing of purposeful discrimination in the use of peremptory strikes. *Id.* at 97. Next, the burden shifts to the prosecution to come forward with a race-neutral explanation for the strikes in question. *Id.* at 97-98. Finally, the court must decide whether the prosecution's explanation is a pretext and the defendant has indeed established purposeful discrimination in the use of peremptory strikes. *Id.* at 98.

1. *Batson*, Step I:

In order to establish a *prima facie* case under *Batson*, a defendant must show that he is a member of a cognizable racial group, and that the prosecution has exercised peremptory challenges to strike from the venire members of the defendant's race. *Batson*, 476 U.S. at 96; *cf. Powers v. Ohio*, 499 U.S. 400 (1991) (holding that white defendants may challenge the discriminatory use of peremptory strikes against venire members who do not share the defendant's race); *see also United States v. Peete*, 919 F.2d 1168, 1178 (6th Cir. 1990). In making a *prima facie* case, the defendant is entitled to rely on the fact that peremptory challenges are a jury selection practice that "permits those to discriminate who are of a mind to discriminate." *Batson, 476 US at* 96 (quotation marks omitted). Finally, in the first stage of *Batson*, the defendant must show that the facts and circumstances raise an inference that the prosecution used peremptory strikes to exclude venire members from the jury on account of their race. *Id.* The Supreme Court noted that the aforementioned "*combination of factors* in the empaneling of the petit jury . . . raises the necessary inference of purposeful discrimination." *Id.* (emphasis added). Moreover, the Court instructed trial courts considering the *prima facie* case to consider "all relevant circumstances" impacting the use of peremptory strikes. The Court also offered as illustrative, though not exhaustive, examples of such circumstances, including: a pattern of strikes against black jurors; and the prosecution's questions and statements during *voir dire* in exercising peremptory challenges. *Id.* at 97.

In this case, the prosecution used three of its five peremptory strikes to exclude African-American prospective jurors. Consequently, Mr. Abdur'Rahman's jury included only one African American, constituting 8.3% of the jury in a county in which the African-American population at that time was 23.3%.[3] These facts alone establish a *prima facie* case of discrimination pursuant to *Batson*. *See, e.g., United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988) (identifying statistical disparities between the percentage of African Americans in the venire pool and the percentage of African Americans on the jury as evidence sufficient to establish a *prima facie Batson* case).

2. *Batson*, Step II:

At the second stage of *Batson*, the burden shifts to the prosecution to offer a racially-neutral reason for its striking members of a particular racial group. *Batson* at 97; *see also Ellison*, 841 S.W.2d at 827. In rebutting the *prima facie* case, the prosecution may not rely on the "assumption– or [an] intuitive judgment– that the [excluded venire members] would be partial to the defendant because of their shared race." *Batson* at 97. Neither may the prosecution rebut a *prima facie* case by simply denying a discriminatory motive or "affirming [its] good faith in making individual selections." *Id.* at 98. Rather, the prosecution must articulate a race-neutral reason *related to the particular case being tried*. *Id.* (emphasis added); *see also Ellison*, 841 S.W.2d at 827.

[3] This statistic is based on the 1990 United States Census which reported that the population of Davidson County, where Mr. Abdur'Rahman was tried, was 510,784. 119,273 county residents were counted as black.

However, the Court in *Batson* was careful to point out that the prosecution's explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97. In later cases, the Supreme Court elaborated on this point. *See, e.g, Purkett v. Elem*, 514 U.S. 765 (1995); *see also Hernandez v. New York*, 500 U.S. 352 (1991). In *Purkett*, the Court explained that in Step II of *Batson*, a prosecutor's facially valid reason for striking a prospective juror need not be "persuasive or even plausible." 514 U.S. at 768. Rather, a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 769. Essentially, *Purkett* announced the principle that any reason that on its face does not violate equal protection is acceptable at the second stage of *Batson*. This principle significantly lowered the bar for parties seeking to rebut a *prima facie* case. Any reason not facially race-based is acceptable at this stage of the inquiry.

In this case, the prosecution's proffered "race-neutral" reason was its perception that veniremember Robert Thomas was uneducated. According the *Purkett* standard, this reason is sufficient to advance the analysis to the third stage of *Batson*.

3. *Batson*, Step III:

The third step of *Batson* requires courts to decide whether the defendant has indeed established that the prosecution purposely used its peremptory strikes in a racially discriminatory manner. *Batson*, 476 U.S. at 98. At this stage, the court is to consider all the evidence before it, including the *prima facie* case and the prosecution's proffered race-neutral reason, as well as any additional relevant circumstances, and determine whether the

prosecution's reasons are valid or whether they are merely pretext for racial discrimination. *See Purkett*, 514 U.S. at 768 ("It is not until the *third* step that the persuasiveness of the justification becomes relevant . . . At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.") (emphasis in original).

At this stage, the reviewing courts' consideration of the record evidence as a whole is critical, and required by *Batson*. *See Batson*, 476 U.S. at 96-97. The record in Mr. Abdur'Rahman's case was not fully available to him until after the conclusion of his direct appeal.[4] However, analysis of the prosecution's handwritten notes revealed the racial animus afoot during the selection of Mr. Abdur'Rahman's jury.

B. Evidence of Disparate Treatment of Similarly Situated Jurors of Different Races Satisfies *Batson*, Step III.

In particular, the disparate treatment of similarly situated white and African-American prospective jurors is a strong indication that the prosecution's proffered race-neutral reasons for excluding Robert Thomas from the jury were a pretext for racial discrimination. As noted earlier, when called to explain its exclusion of Mr. Thomas, the prosecution stated that Mr. Thomas appeared to be uneducated. No contemporaneous notes indicate that the prosecutor

[4] Tennessee law protected the prosecution's handwritten notes, the basis of Mr. Abdur'Rahman's *Batson* claim, until after the conclusion of his direct appeal. *See Capital Case Resource Center v. Woodall*, 1992 Tenn.App.Lexis 94 (holding that under Tennessee Public Records Act, district attorney files are exempt from disclosure until after a conviction is upheld on direct appeal and certiorari denied); *see also* Tenn.R.Crim.P. 16 (a)(2).

trying the case thought that Thomas was uneducated, though several notes about other veniremembers described their educational or intellectual limitations.[5] Equally significant is the fact that Mr. Thomas was in fact more educated than several people who were allowed to serve on the jury.

Such disparate treatment of similarly situated prospective jurors of different races requires a finding that the prosecution's "race-neutral" reasons were instead a pretext for impermissible racism in the selection of the jury. *See Jones v. Ryan*, 987 F.2d 960, 973 (3rd Cir. 1993) (finding evidence of pretext where the prosecutor's proffered reasons for excluding black veniremen was not applied to similarly situated white prospective jurors); *see also Brown v. Kinney Shoe, Corp.*, 237 F.3d 556, 563 (5th Cir. 2001) (holding that the peremptory strike of a black juror evinced purposeful discrimination because the defendant claimed he was worried about the juror's prior litigation experience but the defendant did not challenge two white jurors who had also been parties to litigation); *see also McClain v. Prunty*, 217 F.3d 1209, 1219 (9th Cir. 2000) ("A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge . . . Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a

[5] The prosecution's notes during jury selection included the following descriptions of several white veniremembers: "She has a hard time expressing herself"; "not very smart"; "this may all be over her head"; "not very smart" again; "maybe a little slow." *See* Petitioner's Exhibit 1. No such remark was written next to Mr. Thomas's name.

prosecutor's reasons for exercising peremptory challenges are raised."); *see also United States v. Sowa*, 34 F.3d 447, 452 (7th Cir. 1994); *see also Davidson v. Harris*, 30 F.3d 963, 965 (8th Cir. 1994) ("A party can establish an otherwise neutral explanation is pretextual by showing that the characteristics of a stricken black panel member are shared by white panel members who were not stricken."); *see also Devose v. Norris*, 53 F.3d 201, 204 (8th Cir. 1995).[6]

The record in this case clearly demonstrates that the prosecution has excluded at least one African-American veniremember on grounds that were neither objectively reasonable nor equally applied to similarly situated whites. The facts before the Court require a finding that the prosecution violated *Batson* by announcing a pretextual basis for excluding African Americans from the jury. *See Ellison*, 841 S.W.2d at 827 (holding that the exercise of even

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[6] A host of state courts have also recognized this principle. *See People v. Morales*, 719 N.E.2d 261 (Ill. App. 1 Dist. 1999) (finding evidence of pretext where the prosecution struck an African-American juror because she was a salesperson who worked on commission and might not be attentive at trial if she was missing work, but never challenged a white juror in his last semester of college who had expressed concern about the length of the trial); *see also Burnett v. State*, 27 S.W.3d 454 (Ark. App. 2000) (holding, in a case depending heavily on testimony from undercover police, that although the prosecutor's reason was race-neutral, it was clearly pretextual where white jurors with explicitly-stated biases against police officers were not struck and an African-American juror was struck despite his statement that he could be fair and believed that undercover officers are sometimes necessary to apprehend criminals); *see also McElemore v. State*, 2000 WL 336914 (Ala. Crim. App. March 31, 2000)(holding that the prosecutor's reason for striking an African-American juror was because she worked in retail but said she had never seen any shoplifting was pretextual where the African-American juror stated unequivocally that she had witnessed retail thefts; and noting that although the prosecutor struck based on an error, his reason was still pretextual given the fact that he did not strike a white prospective juror who worked in retail and claimed she had never had experience with shoplifters); *see also Buck v. Commonwealth*, 415 S.E.2d 229 (Va. App. 1992); *State v. Grate*, 423 S.E.2d 119 (S.C. 1992); *Cavous v. Brown*, 385 S.E.2d 206 (S.C. App. 1989); *State v. Williams*, 746 S.W.2d 148 (Mo. App. 1988); *Ex Parte Bird*, 594 So.2d 676 (Ala. 1991); *Richmond v. State*, 590 So.2d 384 (Ala. Crim. App. 1991); *Chivers v. State*, 796 S.W.2d 539 (Tex. Ct. App. 1990); *State v. Butler*, 731 S.W.2d 265 (Mo. App. 1987).

one peremptory challenge in a purposefully discriminatory manner violates equal protection and recognizing that the prosecution's bare statement that it had no intent to discriminate will not satisfy *Batson*).

B. Courts' Refusal to Enforce *Batson* Has Undermined Public Confidence in the Criminal Justice System.

Moreover, courts' failure to recognize incidents of invidious discrimination, including that demonstrated in this case, undermines public confidence in the criminal justice system. Discrimination in jury selection "harms the defendant, prospective and actual jurors, and the community as a whole . . . Discrimination in the jury selection process undermines the justice system, and thereby, the whole of our society." *Ramseur v. Beyer*, 983 F.2d 1215, 1224-25 (3rd Cir. 1992); *see also See Johnson v. Love*, 40 F.3d 658 at 664 (3rd Cir. 1994) (recognizing that confidence in the criminal process will be jeopardized if the public perceives discrimination in jury selection); *see also Batson*, 476 U.S. at 86 ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by the prosecutor or judge . . . Those on the venire must be 'indifferently chosen' to secure the defendant's right under the Fourteenth Amendment . . . .") (citation omitted). One scholar aptly has noted that the under-representation of racial minorities and the role of stereotyping in jury selection "seriously undermine the fairness of

our criminal and civil trials." *See*, Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 Wis. L. Rev. 501 at 501 (1999). As a result, "[i]n the eyes of many, the under-representation of minorities on juries in a criminal system where the defendant population shows a surplus of minorities, remains a tool to perpetuate the subjugation of minorities and the historical dominance of whites . . . ." *Id.*

Despite the wide recognition that racial discrimination in the make-up of juries injures defendants, prospective jurors, and the public perception of the fairness of criminal trials, many courts continue to allow peremptory challenges excluding African-American jurors to go virtually unchecked.[7] Even more troubling, courts are willing to accept purportedly race-neutral reasons for the exclusion of African-American prospective jurors even when such

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[7] *See* David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (studying the persistence of race discrimination in the use of peremptory strikes in all reported Pennsylvania judicial decisions that adjudicated *Batson* claims and claims under *Georgia v. McCollum*, 505 U.S. 42 (1992), and stating that those decisions support a compelling argument that "the existing pattern of enforcement by the Pennsylvania courts of United States Supreme Court decisions prohibiting the use of race and gender by both sides is likely to deter only the grossest forms of discrimination in the use of peremptories"); *see id.* (presenting statistical data reporting the prosecutorial strike rates pre- and post-*Batson* against black and non-black venire members, and concluding that a sharp upswing in the use of peremptory strikes against black venire members post-*Batson* may reflect the perception that the decision would have little actual clout); *see* Baldus, *supra*, at 35 (citing Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1104 (1994) (arguing that the *Batson* line of cases "was misguided from the outset because it failed to appreciate the 'interest litigants have in continuing to discriminate by race and gender if they can get away with it[]'"); *see also* Cavise, *supra*, at 501 ("Only the most overtly discriminatory or impolitic lawyer can be caught in Batson's toothless bite and, even then, the wound will be only superficial."); *see also* Bright, *supra*, at 447-48.

reasons justify patterns of striking all black veniremembers and repeatedly produce all-white juries.[8] This Court now has before it an opportunity, in a case presenting the clearest evidence of racially discriminatory jury selection, to restore the integrity of and bolster confidence in this state's criminal justice system.

IV. CONCLUSION

"Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds." *Ramseur*, 983 F.2d at 1224. And yet, today, in courtrooms across the country, some government lawyers continue to engage in racial discrimination in jury selection, and, unfortunately, courts accept their implausible, sometimes even absurd, "race-neutral" reasons for excluding African-American prospective jurors. *See Clemmons*, 892 F.2d at 1162 (Higginbotham, J., concurring) ("[B]ecause the

[8] *See United States v. Clemmons*, 892 F.2d 1153, 1159 (3rd Cir. 1989) (Higginbotham, J., concurring) ("I have been . . . disturbed . . . by a series of . . . cases where the Batson issue has been raised and where superficial or almost frivolous excuses for peremptory challenges with racial overtones have been proffered and accepted. I fear that Batson is fast coming to offer a theoretical right without an effective remedy."); *see also* Charles J. Ogletree, *Supreme Court Jury Discrimination Cases and State Court Compliance, Resistance and Innovation*, in *Toward a Usable Past* 339, 349 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) at 352 ("State trial courts frequently accept prosecutorial explanations that, although somewhat plausible, have a disparate effect on minorities and therefore may become convenient excuses for rationalizing challenges against minorities."); *see also* Baldus, *supra*, at 81(discussing the reluctance of Pennsylvania appellate courts to reverse trial courts' factual findings that a *Batson* respondent's proffered explanation is legitimate); *see id.* at 123 (finding in Philadelphia capital trials from 1981 to 1997, that Supreme Court decisions prohibiting race or gender-based peremptory strikes have had "at best [] only a marginal impact on the peremptory strike strategies of each side," possibly because counsel for both sides "have little expectation that the courts will sustain a claim of discrimination even if it is based on solid evidence" and noting that in the twenty-four capital cases in the study in which jury discrimination claims appear to have been raised, *appellate relief was not granted in a single case*).

prosecutor's prejudice may be subtle, unconscious, and shared by the judge, the prosecutor may be able to articulate non-racial explanations that the judge would find reasonable.").

In this case, the courts have once again allowed the unconstitutional exclusion of African-American jurors in a capital trial to proceed unchecked.[9] As has become common practice, Mr. Abdur'Rahman's prosecutors have been allowed to present an implausible if not a patently incredible reason for the exclusion of an African American from the jury which convicted him and sentenced him to death.[10] The prosecutors' own notes demonstrate their race consciousness in selecting Mr. Abdur'Rahman's jury. Moreover, their reliance on racist

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[9] Compare the way courts treat *Batson* challenges with the way they have treated the requirement that jury venires reflect a "fair cross section of the community." *See, e.g., Taylor v. Louisiana*, 419 U.S. 522 (1975); *see also Batson*, 476 U.S. at 88 ("While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury."). Courts have enforced, and even sought to expand, the principles announced in *Taylor*. *See* Robert William Rodriguez, Comment: Batson v. Kentucky: Equal Protection, The Fair Cross-Section Requirement, And The Discriminatory Use of Peremptory Challenges, 37 Emory L.J. 755 (1988) (discussing the history of the "fair cross section" requirement and state courts' pre-*Batson* application of that principle to the use of peremptory strikes as a way of circumventing *Swain*'s stringent standards of proof). In large part because of courts' willingness to enforce *Taylor*, today, venire lists generally reflect the make-up of the communities from which they are comprised.

In contrast, when facing *Batson* claims, courts have shied away from second-guessing prosecutors' reasons for peremptory strikes, even when such reasons are patently implausible. Only when trial courts and reviewing courts challenge dubious reasons offered for race-based strikes will *Batson* have any practical effect. This Court now has a chance to penalize the use of race-based peremptory strikes in this case and to set a standard for courts reviewing *Batson* claims in the future.

[10] As *amicus* LDF has highlighted the prosecution's disparate treatment of one juror in the Abdur'Rahman case, Robert Thomas. As discussed, racial discrimination against even a single prospective juror is sufficient to establish a *Batson* violation. *See Ellison*, 841 S.W.2d at 827. Mr. Abdur'Rahman's motion before this Court presents compelling evidence of the disparate treatment accorded at least one other African-American veniremember, Sharon Baker. *See* Appellant's Motion to Recall Mandate, at 12-13.

stereotypes unsupported by facts in excluding at least one black veniremember while seating similarly situated white jurors is clearly sufficient to warrant a finding that the "race neutral" reasons proffered were actually pretexts for racial discrimination in the exercise of peremptory strikes.

To allow Mr. Abdur'Rahman's execution to go forward despite the racist exclusion of African Americans from his jury will contravene bedrock constitutional principles and significantly undermine the integrity of and public confidence in Tennessee's administration of criminal justice. This Court has the power and the duty to recognize and penalize racist jury selection and insure that a citizen of Tennessee is not put to death while the State tramples his constitutional rights.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by first-class mail, postage paid, on this 1st day of April, 2002 upon:

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