IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	**)**	
	)	
Appellee	**)**	
	)	**No. M1988-00026-SC-DPE-PD**
v.	**)**	
		Oral Argument Requested
	)	
ABU-ALI ABDUR'RAHMAN	**)**	
	)	
Appellant	**)**	

Filed March 22, 2002

MOTION TO RECALL MANDATE AND TO CONSIDER POST-JUDGMENT FACTS ESTABLISHING INTENTIONAL RACIAL DISCRIMINATION IN THE SELECTION OF THE PETIT JURY

Abu-Ali Abdur'Rahman respectfully moves this Court to recall its mandate in light of new proof of intentional discrimination against African-Americans in the jury selection process. In particular, the prosecution struck African-American juror Thomas based on the invidious racial stereotype that he appeared "uneducated"– an assertion which, in fact, is false. The prosecution's racial motivation is now apparent in light of prosecution notes which establish the racially discriminatory treatment Mr. Thomas received *vis-a-vis* similarly situated white jurors.

When this Court originally considered Mr. Abdur'Rahman's claims of intentional racial discrimination under Batson v. Kentucky, 476 U.S. 79 (1986), neither Mr. Abdur'Rahman nor this Court was aware of the prosecutor's handwritten notes, because under Tennessee law, such

notes were privileged until *after* the direct appeal had concluded.

Because this new information conclusively establishes intentional racial discrimination under Batson, this Court must recall its mandate and either grant relief or order further proceedings in accordance with Tenn.R.App.P. 42(d), Tenn.R.App.P. 14(a), and the right to due process under the Eighth and Fourteenth Amendments to the United States Constitution and Article I §8 of the Tennessee Constitution. See e.g., State v. Williams, 52 S.W.3d 109, 122 (Tenn.Cr.App. 2001). Recalling the mandate is required because the notes constitute new evidence establishing intentional racial discrimination, this evidence was not available before the mandate issued, and the *Batson* issue cannot (and could not) have been reconsidered through post-conviction process because the claim had been "previously determined" on direct appeal. See e.g., House v. State, 911 S.W.2d 705 (Tenn. 1995).

Mr. Abdur'Rahman is entitled to a remedy, and the only remedy available is for this Court to recall its mandate and to grant relief. Through no fault of his own, Mr. Abdur'Rahman has been denied a fair hearing on his *Batson* claims: facts were not disclosed by the prosecution at the time he required such facts to prove his claims. Considering Mr. Abdur'Rahman's interest in his life and the interest of the People and the state in not having an African-American executed based upon invidious racial discrimination, due process requires consideration of Mr. Abdur'Rahman's claim. Compare Workman v. State, 41 S.W.3d 100 (Tenn. 2001); Burford v. State, 845 S.W.2d 204 (Tenn. 1992); Sample v. State, 2001 Tenn.Crim.App.Lexis 33 (2001)

application for permission to appeal granted, ___ S.W.3d ___ (Tenn. July 9, 2001)(addressing whether due process requires consideration of claims based on withheld evidence from district attorney's file). Absent recalling of the mandate, Abu-Ali Abdur'Rahman will be denied due process of law under the Sixth, Eighth and Fourteenth Amendments and the Tennessee Constitution. The motion should be granted.

I. Abu-Ali Abdur'Rahman Was Denied Equal Protection Because African-American Jurors Were Struck Because Of Their Race

The prosecution engaged in racial discrimination when exercising peremptory strikes, and Abu-Ali Abdur'Rahman is therefore entitled to relief under Batson v. Kentucky, 476 U.S. 79 (1986).

A. The Prosecution Struck Three African-American Prospective Jurors, Leaving Only One African-American Juror

The population of Davidson County is 23.3% African-American.[1] Between 1978 and July 1987, in Davidson County, there were only seven (7) capital prosecutions in which a jury made a sentencing decision between life and death. All of those defendants were African-American. Abu-Ali Abdur'Rahman was the seventh such African-American to have his fate decided by a jury.[2]

In Mr. Abdur'Rahman's case, the prosecution used three (3) of its five (5) peremptory

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1 This figure comes from the 1990 United States Census. According to the census, the total population in Davidson County was 510784, with 119273 persons being "Black."

2 This information comes from the Tennessee Supreme Court's Rule 12 Database. Assuming the accuracy of the database, the seven defendants who faced a capital sentencing proceeding were all African-American: James Looney (Trial Date 5-15-78); Terry Lynn Howard (Trial Date 6–18-79); Raymond Jackson (Trial Date 11-5-79); Cecil Johnson (Trial Date 1-13-81); Douglas Bell (Trial Date 11-7-83); Charles Wright (Trial Date 3-25-85); Abu-Ali Abdur'Rahman (Trial Date 7-6-87).

strikes to remove African-American prospective jurors: jurors Robert Thomas, Sharon Baker, and William Green. With the prosecution having struck these three African-American jurors, Abu-Ali Abdur'Rahman was tried and sentenced to death by a jury containing a single member of his own race, juror Howard.[3] African-American representation on the jury was thus only 8.3% – a mere third of what one would expect if the jury had been selected in accordance with the numbers of African-Americans in the general population. There is clear evidence from the prosecution's own notes, however, that the prosecution's removal of minority jurors was racially motivated.

B. The Prosecution's Own "Rating" System For Jurors As Found In The District Attorney's Notes Establishes That The Prosecution Struck Jurors For Racial Reasons

The district attorney's notes reveal that the prosecution struck African-American jurors for racially biased reasons. The district attorney notes (which were not available on direct appeal) show that the prosecution rated each juror on a scale from 0-4, with 4 being a score as being the most favorable for the prosecution. See Exhibit 1 (excerpts of prosecution's *voir dire* notes). In addition, the prosecution clearly marked in its notes the race of each juror. See Exhibit 1, pp. 1-14.

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3 Another African-American was seated as an alternate, but was dismissed before deliberations.

African-American prospective juror Thomas was rated as a "2" by the prosecution. See Exhibit 1, p. 7. The prosecution used a peremptory strike to remove him. Yet the prosecution did not move to strike five (5) white jurors whom they rated as worse jurors, nor five (5) other white jurors whom the prosecution rated equal to Mr. Thomas. The racial motivation behind the prosecution's removal of Mr. Thomas is apparent from the following chart:[4]

[4] The prosecution's ratings of the various jurors are contained in Exhibit 1: Thomas, p. 7; Galloway, p. 10; Morgan, p. 11; Meyer, p. 2; Stone, p. 4; Kline, p. 8; Hamblen, p. 13; White, p. 5; Swarner, p. 12; Stoddard, p. 3; McAlister, p. 6.

Name	Race	Prosecution Rating	Struck By Prosecution/Juror?
Thomas	**African-American**	2	**Struck**
Galloway	White	2	Juror
Morgan	White	2	Juror
Meyer	White	2	Juror
Stone	White	2	Juror
Kline	White	2	Juror
Hamblen	White	1	Juror
White	White	1	Juror

Swarner	White	1	Juror
Stoddard	White	0.5	Juror
McAlister	White	0	Juror

Thus, even though the prosecution rated Mr. Thomas as being *more* acceptable than five white jurors and *equally* acceptable as five other white jurors, Mr. Thomas was removed from the jury, while those ten white jurors were not removed. The prosecution's own numbers tell the story. One clear explanation exists for this marked disparity – Mr. Thomas was removed because of his race. Though the prosecution proffered non-racial reasons for striking Mr. Thomas, as will be shown *infra*, pp. 7-13, those reasons were a pretext for racial discrimination – especially in light of the prosecution's own "rating" system.

C. Because Of Racial Discrimination In The Prosecution's Striking Of Prospective Jurors, Abu-Ali Is Entitled To Relief Under Tennessee Law And The United States Constitution

Abu-Ali Abdur'Rahman is entitled to relief under Batson v. Kentucky, 476 U.S. 79 (1986). As the Supreme Court has explained:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a *prima facie* case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770-1771 (1995).

Here, Abu-Ali Abdur'Rahman made a *prima facie* showing of racial discrimination. He established that he is African-American, and that the prosecution used 3 of 5 strikes to remove African Americans from the jury, leaving only 1 African-American juror to sit in judgment on his case. Where the prosecution uses more than half of its strikes to remove 60% of the African-American jurors – thus leaving only 1 to sit in judgment – the prosecution is required to establish race-neutral reasons for its strikes. See e.g., Purkett v. Elem, 514 U.S. at 766, 115 S.Ct. at 1770 (*Batson* inquiry required where prosecution struck two black men from the jury panel); Batson v. Kentucky, 476 U.S. 79, 97 (1986)(pattern of strikes establishes *prima facie* case of discrimination). Further the disparate treatment of white and African-American jurors (See *infra*, pp. 7-13) also shows intentional discrimination. Compare Slappy v. State, 503 So.2d 350, 352, 355 (Fla.App. 1987). Thus, the prosecution was required to come forth with race-neutral reasons for striking the jurors.

The prosecution's proffered "race-neutral" reasons were nothing more than pretexts for intentional discrimination. This becomes apparent when one considers the African-American

jurors' ability to serve *vis-a-vis* the white jurors who actually sat, and (as shown by the District Attorney notes) that white jurors were retained by the prosecution despite identified "shortcomings" which were then articulated by the prosecution as reasons why the African-American jurors had to be struck. Simply put:

> Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.

Turner v. Marshall, 121 F.3d 1248, 1252 (9th Cir. 1997), quoting Doss v. Frontenac, 14 F.3d 1313, 1316-1317 (8th Cir. 1994).

As will be shown, the prosecution violated this prohibition here, and Abu-Ali Abdur'Rahman is therefore entitled to relief under *Batson*. See Riley v. Taylor, 277 F.3d 261, 279-283 (3d Cir. 2001)(en banc)(finding *Batson* violation where prosecution struck blacks for reasons which were not used to strike whites who were left on jury); McClain v. Prunty, 217 F.3d 1209, 1220 (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."); Jordan v. Lefevre, 206 F.3d 196, 201 (2d Cir. 2000); Coulter v. Gilmore, 155 F.3d 912, 921 (7th Cir. 1998); Turner v. Marshall, 121 F.3d 1248, 1251-1252 (9th Cir. 1997); Davidson v. Harris, 30 F.3d 963 (8th Cir. 1994)("a party can establish that 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.")

1.

Prospective Juror Thomas Was Struck On The Basis Of Race

The Prosecution's Assertions At Trial: In the trial court, reasons for the prosecution's peremptory strikes were offered by Assistant District Attorney John Zimmerman. This court has previously found some of Zimmerman's actions in this case to be improper and bordering on deception. State v. Jones, 789 S.W.2d 545, 552 (Tenn. 1990). The United States District Court has found that Zimmerman violated *Brady* in this case. Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1089-1090 (M.D.Tenn. 1998).[5]He has violated *Brady* in another first-degree murder case. Garrett v. State, 2001 Tenn.Crim.App.Lexis 206 (2001). He has been held in contempt of court for failing to disclose evidence as required by the discovery rules. In Re Zimmerman, 1986 WL 8586 (Tenn.Cr.App. 1986). He has been sanctioned for unethical conduct by the Board of Professional Responsibility. Zimmerman v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn. 1989).

As to prospective juror Thomas, Zimmerman first asserted that the African-American

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Justice Birch has recognized that "the evidence of prosecutorial misconduct alleged by Abdur'Rahman is strong. . . ." State v. Abdur'Rahman, No. M1988-00026-SC-DPE-PD (Tenn. Jan. 15, 2002)(Birch, J., dissenting).

Thomas was struck because he "appeared uneducated." "Mr. Thomas had given us the appearance that he was an uneducated, not very communicative individual." Tr. 1239. This explanation alone indicates a stereotyping of Mr. Thomas as being ignorant because of the color of his skin. And for that reason, it is not simply morally repugnant, it is legally illegitimate. State v. Tomlin, 384 S.E.2d 707, 710 (S.C. 1989)(violation of *Batson* where prosecution struck African-American juror based on stereotype that she had a lack of education, and another African-American juror because of racial stereotyping: "the use of such racial stereotypes violates the mandates of *Batson*"). And, as will be shown *infra*, that excuse is *demonstrably false.*

The prosecution continued to try to justify the removal of Mr. Thomas by equating Mr. Thomas' alleged mental disabilities with those of a white prospective juror, Harding, who had described himself as "a slow learner" and a "slow intellectual individual." Tr. 1239. The prosecution contended that "General Bernard and I expressed concern over Mr. Thomas and Mr. Harding." Tr. 1240. "We wanted both of those individuals off the jury because of their significantly reduced ability to communicate, articulate and . . . reduction in intellect." Thomas was "less in the communicative type skills and the intellect skills." Tr. 1241. As a final reason, Zimmerman also claimed that Thomas was struck because he knew defense counsel Barrett. Tr. 1241.

This Court's Ruling On Direct Appeal: On direct appeal – without the benefit of the

District Attorney's handwritten notes (and without knowledge that Zimmerman withheld evidence in this case) – this Court upheld the exclusion of Mr. Thomas, crediting the prosecution's claims that he was struck because "appeared uneducated and lacking the communicative skills of the other jurors" and because he had known defense counsel. State v. Jones, 789 S.W.2d at 549. This Court believed that "[t]here was no indication of any discriminatory purpose in the strikes." Id. The District Attorney's notes, however, demonstrate otherwise.

The District Attorney Notes Establish That Juror Thomas Was, In Reality, Struck Because Of His Race: On direct appeal, neither Abu-Ali Abdur'Rahman nor the Tennessee Supreme Court had the District Attorney's handwritten notes, which establish that the prosecution's assertions were "pretexts for purposeful discrimination." Purkett v Elem, 514 U.S. at 768, 115 S.Ct. at 1771. The District Attorney's notes contain extensive new evidence establishing that the prosecution's assertions were pretextual:

(1) First, the District Attorney notes conclusively establish that Juror Thomas was rated *more highly* than 5 white jurors who sat in judgment, and equal to another 5 who served on the jury. See pp. 3-4, *supra*. This establishes that Mr. Thomas was struck because of his race.

(2) Second, in claiming that Mr. Thomas should be removed because he was

"uneducated," the prosecution never asked him any questions about his education, or supposed lack of education. Because the prosecution struck Mr. Thomas for "appearing uneducated" without ever questioning him about his education, it is clear that this alleged reason was a pretext for striking the African-American Thomas because of his race. See e.g., Ex Parte Bird, 594 So.2d 676, 683 (Ala. 1991)(prosecution's failure to question juror on issue used as an explanation for striking a juror suggests that the explanation is a sham and pretext).

(3) Third, *nowhere* in the District Attorney notes is there any indication that the prosecution ever thought that Mr. Thomas "looked uneducated." The fact that the prosecution never mentioned Mr. Thomas' "looking uneducated" in their notes indicates that this reason – the prosecution's initial reason for striking the African-American Mr. Thomas – was simply a lie. The falsity of the prosecution's explanation is also confirmed by the fact that there are no written notes that Mr. Thomas is "slow" or "uneducated," but there are numerous notations of other jurors as being intellectually limited.[6]

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The prosecution was clear to note prospective white jurors who were not smart. See e.g., Exhibit 1, p. 1 (Geneva Steele: "She has a hard time expressing herself"); p. 5 (George Harding: "not very smart"); p. 6 (Barbara McCrary: "This may all be over her head"); p. 9 (Dudley Sorrells: "not very smart"); p. 14 (Dudley Sorrells: maybe a little slow). Where the prosecution: (1) made specific notes about white jurors not being smart; (2) made no such notation for Mr. Thomas; and (3) did not strike white juror Swarner despite his apparent ignorance, it appears that the prosecution's professed reasons for striking Mr. Thomas were pretextual and racially motivated.

(4) Fourth, the truth is that **Mr. Thomas is anything but "uneducated." An African-American from Birmingham, Alabama, Mr. Thomas not only graduated high school, but he completed two years of college, after which he was ordained a minister of the gospel**. See Exhibit 2 (Affidavit of Robert Thomas). **The fact that the prosecution claims they struck Mr. Thomas because he "appeared uneducated" and was of "reduc[ed] intellect" is patently false**. He was struck because he is African-American.[7]

(5) Fifth, if by now the stereotyping of Mr. Thomas as being an uneducated black man wasn't clear enough, it should be of little surprise that while the prosecution struck the college-educated African-American Mr. Thomas, the prosecution was content to seat as a juror a white man (Swarner) whom the prosecution described as "dumb," "not real smart" and a "rough old boy." Exhibit 1, p. 12. The fact that the prosecution struck African-American Thomas for allegedly being "uneducated" while not striking the "dumb" and "not real smart" Swarner (whom the prosecution rated as a "1" compared to Mr. Thomas' "2") establishes the racism behind striking Mr. Thomas.

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[7] One must not lose sight of the fact that Mr. Thomas is from Birmingham, Alabama, where Public Safety Commissioner "Bull" Connor turned fire hoses and dogs on African-Americans in the streets; where Dr. Martin Luther King, Jr, was arrested and penned his famous "Letter from Birmingham Jail;" and where, in 1963, four African-American girls were killed by a bomb at the Sixteenth Street Baptist Church – not distant from the Sixth Avenue Baptist Church, Mr. Thomas' home church.

(6) Sixth (and finally), it is important to note that in the prosecution's view, Mr. Thomas was the equivalent of the white Mr. Harding who was "a slow learner" and a "slow intellectual individual." Tr. 1239-1240. The prosecution wanted both of those men off the jury for the same reasons. It is no stretch to say that in the eyes of the prosecution, therefore, a college-educated African-American was the equivalent of an intellectually challenged white man.

The District Attorney notes – not considered by this Court on direct appeal because they were unavailable – thus establish that Mr. Thomas was struck on the basis of race, and that the prosecution's assertions to the contrary were pretextual. The notes establish the *Batson* violation because they establish: (1) Mr. Thomas was *more* qualified than numerous white jurors who were not struck by the prosecution; (2) Mr. Thomas was struck for reasons which were not used to disqualify at least one other white juror (Swarner); and (3) The initial (and primary) justification relied upon by the prosecution for striking Mr. Thomas, viz., his appearance as being "uneducated," is simply false.

Mr. Abdur'Rahman is entitled to relief on his claim under *Batson*, because the prosecution struck Mr. Thomas because of his race while using pretextual reasons to try to justify his exclusion. See e.g., Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001)(en banc); Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997)(disparate exclusion of jurors for reasons not used to exclude whites violated *Batson*); Devose v. Norris, 53 F.3d 201 (8th Cir. 1995); Davidson v.

Harris, 30 F.3d 963 (8th Cir. 1994)(granting relief where reasons given for striking jurors not used to remove white jurors from the panel); Jones v. Ryan, 987 F.2d 960 (3d Cir. 1993). This invidious discrimination – which left only one member of Mr. Abdur'Rahman's race on the jury – must be remedied.[8]

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[8] The illegal removal of African-American jurors also led to the imposition of the death sentence, because it left the jury without members of Mr. Abdur'Rahman's race who could (based on that similarity) relate to Mr. Abdur'Rahman and give effect to available mitigating circumstances. According to the Tennessee Supreme Court's Rule 12 Database, since 1977, in *all* Davidson County death penalty cases involving African-American defendants where the defendant committed a single murder and faced the death penalty at sentencing, the racial composition of the jury has played a critical role in sentencing. In five of the six cases in this class, where there were 3 or more African-Americans on the jury, African-American defendants received life sentences – even for interracial killings. See State v. James Looney, Davidson County Criminal Court, Case No. C-903, 1978 capital sentencing proceeding (life sentenced imposed for interracial killing where 4 African-Americans on jury); State v. Raymond Jackson, Davidson County Criminal Court, Case No. C-3629, 1979 capital sentencing proceeding (life sentence imposed for interracial killing where 3 African-Americans on jury); State v. Terry Lynn Howard, Davidson County Criminal Court, Case No. C-3629, 1979 capital sentencing proceeding (life sentence imposed where 4 African-Americans on jury); State v. William T. Johnson, Davidson County Criminal Court, Case No. 87-W-640, 1988 capital sentencing proceeding in 1988 (even though defendant had prior conviction for murder, jury containing 3 African-Americans imposed life sentence); State v. Douglas Bell, Davidson County Criminal Court, Case No. D-1044, 1983 capital sentencing proceeding (life sentence imposed by jury which contained "members" of defendant's race). The single African-American in this class who received the death sentence was Abu-Ali Abdur'Rahman, where there was only one African-American on the jury. See also Sherri Lynn Johnson, Black Innocence And The White Jury, 83 Mich.L.Rev. 1611, 1698 (1985)(all-white or nearly all white juries pose difficulties for black defendants).

Prospective Juror Baker Was Struck On The Basis Of Race

The prosecution claimed that prospective juror Baker was struck because, *inter alia*, she was allegedly not communicative and gave "short cryptic answers," (Tr. 1237) and "avoided eye contact" with the prosecution. Tr. 1238. The District Attorney notes belie these assertions as valid reasons for striking Baker. The "non-communicative and short cryptic answers" reason belies the prosecution's true motives.

First, juror Baker was questioned after waiting all day, after which she was "pretty tired." Tr. 213. This explains such alleged "short answers." Second, she was asked numerous leading questions which asked for a "yes" or "no" response. How else would one respond except in short answers? See Tr. 213-220 (prosecution's questioning on *voir dire*). Third, when not asked leading questions asking for a yes-or-no answer, her responses were not "cryptic," e.g., "I've never really given the death penalty much thought, to be perfectly honest with you, but I can't think of anything offhand that would keep me from going along with it if we found a person guilty." Tr. 217. Fourth, the prosecution did not strike white jurors who, according to the prosecution's notes, were also non-communicative, including white juror Swarner (cited *supra*) and white juror Steele who had "a hard time expressing herself." See Exhibit 1, p. 1.

The prosecution's disparate treatment of African-American juror Baker *vis-a-vis* white jurors Swarner and Stoddard, as well as the prosecution's "short, cryptic answer" reason which is

unsupported by the record establishes that Ms. Baker was struck for racially motivated reasons. Because the reasons for striking juror Baker were pretextual, Abu-Ali Abdur'Rahman has established his entitlement to relief under *Batson*. He is therefore entitled to relief in this Court under the Tennessee and United States Constitutions.

C.

Abu-Ali Is Entitled To Relief Because The Prosecution Struck African-American Jurors Because Of Their Race

The proof thus establishes that African-American jurors were struck because of their skin color. And because of that, Abu-Ali Abdur'Rahman is entitled to relief. Having been shown to have discriminated against African-American jurors, the prosecution cannot try to hide behind any allegedly "racially neutral" reasons to justify their intentional discrimination. In fact, the courts of our sister states have made clear that when one reason for striking a juror is shown to be a pretext for racial discrimination, the other proffered reasons cannot save the prosecution from its violation of the Constitution.

The South Carolina Supreme Court has stated this principle cogently:

> Once a discriminatory reason has been uncovered – either inherent or pretextual – *this reason taints the entire jury selection procedure.*

Payton v. Kearse, 495 S.E.2d 205, 210 (S.C. 1998)(emphasis supplied). Other states have similarly recognized that any pretextual reason proffered by the prosecution vitiates the entire

jury selection in a case. As the Alabama courts have stated: "[A] race-neutral reason for a peremptory strike will not 'cancel out' a race-based reason." McCray v. State, 738 So.2d 911, 914 (Ala.Cr.App. 1998). So, too, the Texas courts have emphasized that "Even though the prosecutor may have given one racially neutral explanation, the racially motivated explanation vitiates the legitimacy of the entire jury selection procedure." Moore v. State, 811 S.W.2d 197, 200 (Tex.App. 1991). Truly, if the prosecution seeks to hide its racial discrimination by providing *any* pretextual reason for striking a prospective juror, *every* reason given by the prosecution must be viewed as having been motivated by trying to hide that same discrimination.

Moreover, *Batson* means nothing if the courts allow the prosecution to get away with racial discrimination once proffered reasons are shown to be false or pretextual, and used to disguise actual racial animus:

> To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection.

Payton v. Kearse, 495 S.E.2d at 210.

It is for this reason – to ensure that race plays *no* factor in convictions and sentences (especially in a capital case, as here) – the courts in numerous sister states (including Alabama, Arizona, Georgia, South Carolina, Texas, Wisconsin) have ordered relief where any proffered

reason for striking a minority juror has been shown to be a pretext for racial discrimination. Ex Parte Sockwell, 675 So.2d 38 (Ala. 1995); McCray v. State, 738 So.2d 911, 914 (Ala.Cr.App. 1998); State v. Lucas, 18 P.3d 160 (Ariz.App. 2001); Rector v. State, 444 S.E.2d 862 (Ga. App. 1994); Payton v. Kearse, 495 S.E.2d 205 (S.C. 1998); Moore v. State, 811 S.W.2d 197 (Tex.App. 1991); State v. King, 572 N.W.2d 530 (Wis.App. 1997); United States v. Greene, 36 M.J. 274 (Ct.Mil.App. 1993). Otherwise, invidious discrimination would not be remedied.

II.

Abu-Ali Is Entitled To Relief In This Proceeding Because, Through No Fault Of His Own, Abu-Ali Abdur'Rahman Has Been Denied A Full And Fair Hearing On His Claim In This Court, And He Is Therefore Entitled To A Full And Fair Hearing To Remedy This Fundamental Injustice

Abu-Ali Abdur'Rahman is entitled to relief on his *Batson* claim in this Court, because he was denied a fair consideration of his claim on direct appeal through no fault of his own and, under the circumstances, he is therefore entitled to have this Court recall its mandate and to hear his claims in light of the new evidence establishing the *Batson* violation.

A.

Abu-Ali Abdur'Rahman Was Denied A Fair Consideration Of His *Batson* Claim On Direct Appeal Through No Fault Of His Own: The Critical District Attorney Notes Were Not Available Until After His Appeal Had Been Decided And The Mandate Issued

Because he was sentenced to death by a jury which was tainted by racial discrimination, Abu-Ali is entitled to a remedy. He sought that remedy when he raised his *Batson* claim on direct appeal in this Court; however, when he did so, he had no access to the district attorney's files which conclusively establish that the prosecution's reasons for striking jurors were pretexts for racial discrimination. The reason Mr. Abdur'Rahman had no access to those files is clear – Tennessee law exempts from disclosure district attorney records while a case is pending or on direct appeal. Capital Case Resource Center v. Woodall, 1992 Tenn.App.Lexis 94 (under Tennessee Public Records Act, district attorney files exempt from disclosure until after

conviction upheld on direct appeal and certiorari denied); Tenn.R.Crim.P. 16 (a)(2).

Thus, at the time of the direct appeal, Abu-Ali Abdur'Rahman did not receive a full or fair adjudication of his *Batson* claim, because the critical district attorney notes were not available – either to him or this Court. And because he could not get the notes, it is clear that it was not Mr. Abdur'Rahman's fault that he was denied a fair consideration of his claims on direct appeal.

The district attorney files, then, could only be used to establish his right to relief after the direct appeal had concluded. However, post-conviction remedies were unavailable, because the *Batson* claim had already been heard on direct appeal, and therefore could not be considered in post-conviction. Under the Post-Conviction Procedures Act, he could not get relief on his *Batson* claim because his claim was "previously determined" on direct appeal within the meaning of the act: even when a petitioner has new facts in support of a claim, he cannot re-raise the claim when it has been "previously determined."See House v. State, 911 S.W.2d 705 (Tenn. 1995); Caldwell v. State, 1998 Tenn.Crim.App.Lexis 1159 (petitioner may not relitigate previously determined issue by presenting additional facts even if the facts were not previously available); Glenn v. State, 1998 Tenn.Crim.App.Lexis 170; Thompson v. State, 958 S.W.2d 156 (Tenn.Cr.App. 1997)(petitioner may not relitigate previously determined claim for relief by presenting new or additional evidence in support of claim); Cone v. State, 927 S.W.2d 579, 581-582 (Tenn.Cr.App. 1995)

The Tennessee Public Records' Act prohibition against getting the records while on direct appeal, coupled with the Tennessee Post-Conviction Procedures Act's prohibition against litigating claims which have been raised on direct appeal, have left Abu-Ali in a "no-man's land" on his *Batson* claim. He did not receive a full and fair hearing on his claim on direct appeal, because he did not have – and could not get – the prosecution's critical notes. But then, when he could get the notes, he could not re-raise the claim in post-conviction proceedings. This Catch-22 is fundamentally unfair, and Abu-Ali Abdur'Rahman is therefore entitled now to relief from this Court.

B.

Mr. Abdur'Rahman Is Entitled To Have The Mandate Recalled And To Have This Court Reverse Its Prior Judgment And/Or Order Further Proceedings

Under these unique circumstances, this Court must recall its mandate under Tenn.R.App.P. 42(d), to consider the post-judgment facts which were not previously available under Tenn.R.App. 14(a), and to grant relief. The Tennessee Court of Criminal Appeals has recently made clear that recalling the mandate is the proper remedy when new facts have arisen after the entry of the mandate, but were not considered by the appellate court. State v. Williams, 52 S.W.3d 109, 122 (Tenn.Cr.App. 2001).

In fact, this Court itself has emphasized that when new facts come to light after judgment but were not presented to the appellate court where the district attorney withheld evidence and

the facts thus were not presented because of the fault of the criminal defendant, this Court must properly consider those facts and either grant relief or remand for further proceedings. Especially in a capital case, this is an appropriate remedy. See State v. Branham, 855 S.W.2d 563, 571-572 (Tenn. 1993)(where district attorney failed to disclose *Brady* material to defense until after trial, Tennessee Supreme Court ordered remand for consideration of post-judgment facts). See also Pruett v. State, 501 S.W.2d 807, 809 (Tenn. 1973)(where facts not developed at trial due to no fault of criminal defendant, remanding for consideration of post-judgment facts); Union Export Company v. N.I.B. Intermarket, 786 S.W.2d 628 (Tenn. 1990)(Tennessee Supreme Court reconsiders original judgment on appeal where Tennessee Supreme Court "not aware" of facts highly relevant to judgment); Baker v. ProMark Productswest, Inc., 692 S.W.2d 844 (Tenn. 1985)

Because the new facts were not available before the mandate issued, they must properly be considered here under Tenn.R.App.P. 42(d) and 14(a). Especially where Mr. Abdur'Rahman could not have obtained the facts before issuance of the mandate and could not present his claims through any other remedy, this Court should recall the mandate, consider these new facts, and grant appropriate relief on the *Batson* claim.

C.

Due Process Requires The Relief Requested By Mr. Abdur'Rahman, Given His Right To Life And Society's Interest In Removing Racial Prejudice From The Justice System

Finally, because Mr. Abdur-Rahman could not have obtained his new facts before issuance of the mandate, and because recall of the mandate is the only available remedy given the "previous determination" bar of the Post-Conviction Procedures Act, due process demands that he be accorded the relief he requests.

Especially in capital cases, this Court has made clear that when new facts arise which were not reasonably available previously, the criminal defendant is entitled to a remedy as a matter of due process. Workman v. State, 41 S.W.3d 100 (Tenn. 2001). Due process prohibits the state from enacting procedures which prohibit a petitioner from obtaining necessary facts to prove his claims, or otherwise barring a party from presenting a claim when he lacked the facts to present his claim. This Court has made this principle clear in Burford v. State, 845 S.W.2d 204 (Tenn. 1992) and its progeny. A petitioner may not be deprived of a remedy through no fault of his own. See e.g., Williams v. State, 44 S.W.3d 464 (Tenn. 2001)(as a matter of due process, post-conviction petitioner cannot be barred from relief by statute of limitations if petitioner failed to comply with statute of limitations through no fault of his own). And indeed, there can be nothing more arbitrary than denying a death-sentenced inmate access to information which was necessary to present his claims on direct appeal, but then providing him no way to establish his entitlement to relief once he has obtained such critical information.

As this Court has held, due process requires a balancing of the interests at stake. Burford,

supra. Here, on the one hand, undoubtedly Mr. Abdur'Rahman's life is of exceptional value. **On the other hand, neither the state nor the People have *any* interest in executing an African-American whose trial was tainted by racial prejudice**. Racial discrimination is an affront to "the dignity of persons" and the "integrity of the courts." Powers v. Ohio, 499 U.S. 400, 402 (1990). The harm "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." Batson v. Kentucky, 476 U.S. at 87. Critically "[P]ublic confidence in criminal justice is undermined by a conviction [or imposition of the death sentence] in a trial where racial discrimination has occurred in jury selection." Georgia v. McCollum, 505 U.S. 42, 50 (1992). The due process equities mandate full consideration of Mr. Abdur'Rahman's claims, and the granting of relief.

Finally, this Court is currently considering a nearly identical issue in the case of Sample v. State, 2001 Tenn.Crim.App.Lexis 33 (2001) *application for permission to appeal granted*, ___ S.W.3d ___ (Tenn. July 9, 2001) in which this court is deciding whether a petitioner who obtains *Brady* documents from the District Attorney's file after the filing of a first-post-conviction petition has a due process right to present his new claim in a subsequent habeas corpus petition. In all fairness, this Court must answer that question in favor of the petitioner in Sample, for to rule otherwise would leave without a remedy a death-sentenced inmate who has had critical evidence withheld from him. This merely rewards the prosecution for withholding critical

information, and thereby encourages state actors not to play fairly.[9]

That is the same situation here. While the prosecution was making seemingly plausible statements about their striking of African-American jurors, their own notes belie their assertions. To allow the death sentence to stand where the prosecution was not forthright on the *Batson* issue would be to condone a miscarriage of justice – and to allow the execution of a man whose jury was tainted by racial prejudice.

CONCLUSION

Abu-Ali Abdur'Rahman was sentenced to death by a jury which was tainted by invidious

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9 The situation here is analogous, but slightly different. As in Sample, Abu-Ali Abdur'Rahman obtained documents establishing his entitlement to relief under the Tennessee Public Records Act. The petitioner in Sample, however, had never presented his claim to a state court, so he requires a forum to have his claim hearing. Here, on the other hand, Abu-Ali Abdur'Rahman did present his claim to the state courts – but he was not able to establish his entitlement to relief at that time, because he did not have the facts he needed, and unlike Sample, he has faced the "previous determination" bar of the Tennessee Post-Conviction Procedures Act.

Yet exactly like Mr. Sample, Abu-Ali Abdur'Rahman has been denied a full and fair hearing on his constitutional claim through no fault of his own – because the prosecution did not provide documents relevant and dispositive of his claim. Though there are factual differences between Sample and this case, they are not meaningful. In both cases, the petitioners are entitled to a remedy and a forum to have their claims heard. For Sample, who has never presented his claim to any court, the remedy is a successive post-conviction petition. For Abu-Ali Abdur'Rahman, because he has presented the claim (but could not do so fairly), the remedy is to reopen the direct appeal and/or recall the mandate on direct appeal and/or for this Court simply to use its inherent equitable powers to consider the claim in full on the merits. As in Burford and Workman, due process demands nothing less.

racial discrimination. Through no fault of Mr. Abdur'Rahman, the prosecution's intentional discrimination has become apparent only after the issuance of this Court's mandate. Due process under the Fourteenth Amendment requires consideration of the claim, given both Mr. Abdur'Rahman's fundamental right to life and society's overriding interest in removing all taint of racial prejudice from a criminal justice system entrusted with life and death decisions. This Court should recall the mandate, consider new facts which were unavailable at the time of direct appeal, and grant Mr. Abdur'Rahman relief.

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 prepaid, on this ___ day of March, 2002 upon:

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_____
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EXHIBIT 1

EXHIBIT 2