UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MUMIA ABU-JAMAL, a/k/a WESLEY COOK
v.
MARTIN HORN, PENNSYLVANIA DIRECTOR
OF CORRECTIONS; CONNER BLAINE,
SUPERINTENDENT, SCI GREENE; DISTRICT
ATTORNEY FOR PHILADELPHIA COUNTY;
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA,
Appellants No. 01-9014

MUMIA ABU-JAMAL, a/k/a WESLEY COOK
V.
MARTIN HORN, PENNSYLVANIA DIRECTOR
OF CORRECTIONS; CONNER BLAINE,
SUPERINTENDENT, SCI GREENE; DISTRICT
ATTORNEY FOR PHILADELPHIA COUNTY;
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA,
Mumia Abu-Jamal,
Appellant No. 02-9001
Transcript from the oral argument held

Thursday, May 17, 2007, at the United States

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District Court.

BEFORE:

THE HONORABLE ANTHONY J. SCIRICA
THE HONORABLE THOMAS L. AMBRO
THE HONORABLE ROBERT E. COWEN

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THE COURT: Good morning, everyone. This morning we're hearing the case, the appeal and cross-appeal of Abu-Jamal vs. Horn. We have allotted a considerable amount of time for argument. And Mr. Burns, are you ready to proceed?

MR. BURNS: Thank you. Good morning your Honors. May it please the Court, Hugh Burns for the Commonwealth. I'll reserve 15 minutes for rebuttal.

The heart of the matter, when it comes to the Mills issue, is of course Banks, the case by which the district court considered itself bound. Banks is problematic because it fails to afford the deference to the state court decision that's required by Section 2254. Banks ruled that the federal court could exercise independent judgment. An independent judgment standard is contrary to the deferential standard required by the statute, as explained by the United States Supreme Court in Woodford vs. Viscotti.

Banks also explained that the result in that case would be dictated by the result in Frey, of course a nondeference case. And when the case in which deference is required is --

THE COURT: But how do you deal with Albrecht then?

MR. BURNS: Your Honor, I'm aware of Albrecht. And I'm aware that the court in Albrecht reiterated the reasoning in Banks. But that was dicta.

In Albrecht the holding of the case was simply that the Mills issue was barred by Teague. And because of the later decisions of the United States Supreme Court, particularly Woodford vs. Viscotti, explaining that the independent judgment standard is contrary to the deference standard, it's our position that Banks is no longer sound law.

THE COURT: Let me ask you something. Albrecht was Teagued; this case is not Teagued. This case does not have a Teague problem.

MR. BURNS: That is correct.

THE COURT: How is the charge in this case -- the latest Albrecht went through a panel rehearing and the latest was filed just earlier this week. How does the charge of this case in any way differ from Albrecht?

MR. BURNS: Well, it's not our

position that the charge in this case differs from that in Albrecht. But rather it is also our position that the charge does not materially differ from the instructions in Zettlemoyer.

Now, our position is the --

THE COURT: The problem you run into there, and one can say that we're really parsing things way too, too much. But Zettlemoyer was significantly different, or the court perceived in Frey that Zettlemoyer was significantly different from it.

So your instructions here, the proximity of unanimously to the word "mitigating" is literally identical to Frey, with the exception that you've added three sentences here. And the three sentences don't help you.

Remember again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be a verdict of each and every one of you.

THE COURT: Those three sentences hurt you, I think. They don't even help you.

THE COURT: Yes.

MR. BURNS: Well, our position, your

Honor, is that the court must, in such a case, where deference is required, take a step back.

Our position is that when the court arrives at the point at which it is counting the number of words between certain phrases, and when the court is saying that this case is unsatisfactory under the Mills standard because the phrases are seven words apart, but in this other case the instruction passes muster because the words are, the phrases are 17 words apart --

THE COURT: That's a fair point. Let's go back to Mills and Boyde and see what the standard should be and how we should look at this.

And I think maybe you'll want to start off with whether this matter is properly before us and whether it was properly before the district court.

MR. BURNS: Well, those are arguments that we make in our, in our brief. We contend that the real basis for the claim here was that the petitioner was relying narrowly on the third page of the sentencing verdict form and was distinguishing his claim --

THE COURT: He certainly emphasized

that. But he did mention at least three times in his PCRA petition that the jury instructions were also involved here, and the PCRA court even mentioned it.

MR. BURNS: Well, the wording to which the PCRA court referred was actually phrasing to the effect that the instructions as a whole failed to correct the error that arose from the third page of the sentencing verdict form. So the claim --

THE COURT: Why isn't that sufficient to raise the issue properly?

MR. BURNS: Because the issue was narrow. It was specifically drafted by the petitioner, in fact he said he was doing it to avoid Zettlemoyer.

THE COURT: Of course, the district court disagreed and said that you had to look at them together, that they were intertwined.

MR. BURNS: When the district court said that it referred specifically to the part of the petitioner's argument in which he simply said in one sentence that the other instructions don't fail to correct the problem that arises from page three of the sentencing verdict form.

So in saying that, he was not attempting to claim that the entirety of the instructions were the cause of the problem under Mills. He was maintaining his position that it was page three of the sentencing verdict form.

THE COURT: Isn't what is being said is that whether it be verdict form or instructions, they go hand in hand?

MR. BURNS: Well, not according to the claim that was raised by petitioner.

THE COURT: But petitioner in his PCRA claim, for example on page 155 of his briefs, says that the instructions are to be looked at in tandem with, that's a quote, with the verdict form. So that's all the way back to the briefing before the PCRA court.

MR. BURNS: That's true, but in the sense of the instructions failing to adjust for or correct for the supposed error that was restricted to the third page of the form.

THE COURT: I'm not sure it makes a difference here because isn't the toughest hurdle you have with respect to Mills actually with respect to the verdict form itself?

The verdict form says that, we, the jury, unanimously, and we the jury have found unanimously, and then it goes down, says the mitigating circumstances is or are. And then at the end each of the jurors needs to sign.

If the courts or our court has said that its interpretation of Mills is that there can be confusion among jurors with regard to whether they must be unanimous in connection with finding a mitigating circumstance rather than just having one juror able to do so, doesn't this really, isn't this the paradigm of that type of ambiguity which leads to the confusion? Or the reasonable likelihood of confusion I should say.

MR. BURNS: Well, that's actually the problem of Banks. We cite cases in our brief, not only Zettlemoyer, but a variety of cases from a variety of federal circuits, which hold that the absence of a nonunanimity instruction does not infer the requirement of unanimity, that the proximity of a unanimity instruction does not infer the necessity of unanimity with respect to mitigating circumstances.

In other words, that the instructions

may be silent about whether or not the jury must be unanimous as to mitigation, the idea that that creates a possibility that the jurors might assume that there is a unanimity requirement for mitigation is not a basis for relief under Mills, according to these cases which were contemporary with the state court's decision in this case. And I referred to Zettlemoyer because that's just the most imposing example of that because it's a decision of this court.

THE COURT: The argument you're making, if you have a case, now two cases, maybe three if Banks still exists, that have almost literally identical instructions and almost literally identical verdict form, and they have said that there is a reasonable likelihood of confusion, your argument really seems that it has to be made to an en banc court, not to a panel.

We have to follow what Frey, what Albrecht says.

MR. BURNS: I actually have two responses to that. First that Banks is effectively overruled by the subsequent decision of the --

THE COURT: That's why I said "if

Banks still exists."

MR. BURNS: And Albrecht cannot be considered controlling because it's dicta as to whether or not Banks is still sound, because the holding in Albrecht was simply that the issue was barred by Teague.

THE COURT: And there appears to be conflict between Frey and Zettlemoyer.

MR. BURNS: Certainly.

THE COURT: So we've got to go back to Mills and Boyde and see where we are. But before we -- I want to ask you one other question on the waiver issue.

The Pennsylvania Supreme Court only addressed the verdict form. They did not address the jury instruction issue. But they did make a statement that matters that weren't raised on direct appeal were technically waived.

What were they referring to when he said that?

MR. BURNS: They were probably referring to the appellant's request to treat any waived issues as claims of ineffective assistance of counsel.

That would be important in this case because at the time of the direct appeal Mills wasn't decided until some weeks after the case had been submitted to the state Supreme Court. And under state law new issues can't be raised as a matter of right after the case has been submitted and argued.

So for that reason appellate counsel, in the direct appeal, couldn't have been ineffective for failing to raise Mills, even though Mills existed before the final decision was made. And of course trial counsel also couldn't have been ineffective because Mills didn't exist at the time of the trial in 1982.

And it was because the petitioner --

THE COURT: Where did the Pennsylvania Supreme Court say in effect there was a waiver?

MR. BURNS: The state Supreme Court didn't specifically say that there was a waiver of this claim.

What happened was the PCRA court explicitly ruled that the claim had been waived. And when the case arrived at the state Supreme Court for the appeal the appellant asked the state

Supreme Court to take any waived issues as claims of ineffective assistance.

And since he didn't dispute that the issue had been waived, as had been held by the PCRA court, that was one of the waived issues, and that's why it had to be presented --

THE COURT: But then they go on to address on the merits the Mills issue.

MR. BURNS: Yes. But the fact that a state court considers the merits of the underlying issue, as this court explained on a number of occasions, is not dispositive.

Of course, in any case of ineffective assistance of counsel the underlying --

THE COURT: I think the way, as I understand the way it has to read, the state court has to say that we have found a procedural default, and as an alternative we will go ahead and we will deal with the merits.

But the state court here never said that they found a procedural default. You're not even arguing that. You're saying that they found a waiver, but they never found that either.

MR. BURNS: Well, they had no occasion

to find a procedural default because the claim wasn't presented.

THE COURT: But the case you rely on, Sistrunk, only deals with procedural default, correct?

MR. BURNS: No. I think Sistrunk deals with the principle that addressing the merits of the issue underlying --

THE COURT: Does Sistrunk deal with waiver?

MR. BURNS: It may have dealt with waiver in addition to the principle of --

THE COURT: It did not. It did not.

THE COURT: Was it exhausted?

MR. BURNS: Was the Mills claim exhausted?

THE COURT: Was the jury instruction claim exhausted?

MR. BURNS: No, it wasn't, because all along the petitioner had been relying on the third page of the form and not the instructions. And when he reached the state Supreme Court he raised the claims, the claim of ineffective assistance.

THE COURT: Doesn't the claim of

ineffective assistance automatically by it's very nature raise the underlying question of the ineffectiveness?

MR. BURNS: Yes. But not in the sense that it's being raised directly.

THE COURT: Not directly, but nevertheless the state court has to resolve that underlying question.

MR. BURNS: It can. And that's the point. If it decides to resolve the ineffectiveness claim by addressing the merits of the underlying claim, it still hasn't reached the claim itself as if it had been raised directly.

Therefore, the federal court also cannot treat the claim as if it had been raised directly. It has to analyze the claim under the restrictions that go with a claim of ineffective assistance of counsel.

And that's why in this case, regardless of the merits, and we do rely on the argument that the deference standard requires a different outcome on the merits, a finding that the state court judgment was reasonable, but also the state court judgment should have been upheld

because counsel could not have been ineffective under the circumstances that pertain here.

THE COURT: I have one other matter. You say that the discretion of the Mills issue in Albrecht is a dicta. How could it be dicta when we reversed the district court based on its Mills decision?

MR. BURNS: Well, you reversed the district court because it reached the Mills issue.

THE COURT: And said they shouldn't have done it.

MR. BURNS: Yes.

THE COURT: But the district court decided the Mills issue full square.

MR. BURNS: True. And you reversed the district court for deciding the Mills issue. In other words, that was the error, reaching the Mills issue when it was barred by Teague.

THE COURT: But in the process we said it decided incorrectly based on Supreme Court law.

MR. BURNS: Yes, as far as Teague was concerned. That's of course why the discussion of the merits of Banks was dicta, because it wasn't necessary to the holding of the case.

THE COURT: But all that really does is just follow what Banks did, even if Banks, or if Banks still existed, and what Frey did with the pre-AEDPA case.

But on the merits you have, you're marching up, as Judge Becker used to say, up San Juan Hill --

MR. BURNS: Well, I'm aware of that, your Honor.

THE COURT: -- absent going en banc.

MR. BURNS: True. But I think there is real merit to the deference question. I think that Banks no longer stands because of Woodford and other decisions of the United States Supreme Court, and the fact that so many decisions, contemporary with the state Supreme Court's decisions, said that silence on the question of unanimity with respect to mitigation does not amount to a Mills error.

THE COURT: But deference as to what? Because we've said on a number of occasions that the Pennsylvania Supreme Court has either stated contrary to or unreasonably -- or actually stated contrary to the Supreme Court. What is the standard with respect to Mills?

MR. BURNS: Well, that's the point. You see, it cannot be other than reasonable for the state Supreme Court to rule consistently with Zettlemoyer and many other decisions of federal courts of appeals, and that's what it was doing.

And since that must have been a reasonable thing for the state Supreme Court to do, a reasonable application of Mills, because federal courts have said so, it cannot be otherwise than --

THE COURT: Frey was '97, right? And the PCRA Supreme Court was '98, right?

MR. BURNS: I'm sorry, I didn't --

THE COURT: The Supreme Court decision, the Pennsylvania Supreme Court on the PCRA appeal, wasn't that in '98?

MR. BURNS: The PCRA decision was in '98. But the --

THE COURT: So the court would have Frey before it. It doesn't just have Zettlemoyer which is '91.

MR. BURNS: Sure. But Zettlemoyer and Frey effectively cancel each other out. All of the other cases that preexisted that ruling, I think almost unanimously, contend that the absence of a

unanimity instruction, or a nonunanimity instruction in this context isn't enough to create a Mills error. And some of those cases, probably all of them, were addressing the issue directly.

Here the issue was one step removed. The question before the district court was simply whether it could have been a reasonable application of Mills for the state court to do what it did.

And if the state court was ruling consistently with the decisions of numerous federal courts of appeals when it ruled, that decision had to have been reasonable. Otherwise you would be saying that decisions of however many circuits there were, I didn't count them but probably a good half dozen of more, circuits of federal appellate courts, were not only wrong but unreasonable in deciding the way that they did it. And that seems like an unlikely result.

Turning to the claims raised in the cross-appeal, the first is a claim of prosecutorial misconduct in closing argument that applies Caldwell under the due process standard announced in Darden v. Wainwright which of course, requires denial of relief unless the entire trial is

infected with unfairness by the supposed Caldwell violation.

We have to digress momentarily to mention that the cross-appellant attempts to raise a new claim in his brief, he argues now for the first time that the argument of the prosecutor was not violative of Caldwell but rather was a violation because it denied certain specific constitutional rights.

Clearly this claim cannot be raised for the first time on appeal. The claim that was litigated in state court, the claim that was before the district court, and the claim on which a certificate of appealability was granted is the Caldwell claim. And in fact Caldwell is the sole case cited by the petitioner in the district court.

So the claim before the court now is a claim based on Caldwell. And that claim fails for several reasons.

First, the United States Supreme Court has never held that Caldwell applies to guilt-phase closing arguments, that Caldwell applies in the new trial context.

THE COURT: As a preliminary matter you don't deny that the statements made by the assistant prosecutor were inappropriate for the summation, do you?

MR. BURNS: I do deny that.

THE COURT: You do deny it.

MR. BURNS: Yes. I do not believe that they were inappropriate for the summation. The reason that they're not inappropriate is because the prosecutor was accurately describing the process.

THE COURT: The appellate process.

MR. BURNS: Yes.

THE COURT: But the purpose of summation is to argue to the jury the facts which were developed in evidence before the case in light of the charge which will be delivered by the judge.

And what does the appellate process got to do with evidence that was adduced at trial in the light of the instruction to be delivered by the judge?

MR. BURNS: Well, the prosecutor was at the time making argument to the jury that their

responsibility was immense and extremely important, and he said this repeatedly. And in fact, he concluded his argument on this point, by asking the jurors to stand up in court and stand beside their verdict and have the courage to announce their verdict in open court.

And in the process of doing that he talked about finality, about whether or not -- about the finality of a not guilty verdict, and the fact that a guilty verdict could be followed by appeal after appeal and that to this extent is not as final as an acquittal.

THE COURT: Well, that might be true, but what's that got to do with the issues before the jury to resolve or the law before the district court to deliver?

MR. BURNS: Well, it had to do with his argument to the jury that their responsibility was very, very great. And because he was, because that was the gravamen of his argument, because that was the point of the argument that he was making, that alone takes it out of the Caldwell region.

The prosecutor was not asking the jury to understand that the real responsibility for the

verdict was somewhere else.

The prosecutor was arguing to the jury that the responsibility for the verdict was theirs, and that it was a very great responsibility. So that alone takes the issue out of the Caldwell context.

But another thing that takes it out of the Caldwell context is Section 2254. As you know, Section 2254 requires relief where the ruling of the state court was contrary to or an unreasonable application of federal law clearly established by the Supreme Court of the United States. And that is untrue of Caldwell.

The closest that the United States Supreme Court ever came to applying Caldwell in the instant context, in the context of a guilt phase closing argument, was Darden itself.

In Darden v. Wainwright at footnote 15 the Supreme Court explained that Caldwell is relevant only to certain types of comment, those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.

So when asked to extend Caldwell to the closing argument context, the United States Supreme Court said no, Caldwell is only about the sentencing process.

THE COURT: Well, doesn't Caldwell also, isn't that also about denying in the trial the rights which are establish by the Bill of Rights?

MR. BURNS: Well, it's actually --

THE COURT: And part of the Bill of Rights is the right to have a fair trial. You have the Sixth Amendment right to a fair trial. And by advising the jury, inferentially maybe not directly, about something which they didn't hear any evidence on, that don't worry about your verdict because whatever you do here is going to be reviewed, corrected, whatever by the appellate process, isn't that denial of one of your rights secured by the Bill of Rights?

MR. BURNS: Well, it might arguably have been if the prosecutor had been telling the jury don't worry about the result, don't worry about your verdict, it's really someone else's responsibility.

But instead, the argument he was making was just the opposite. He was repeatedly telling the jury of the immensity and the gravity of their decision on the guilt phase and asked them again to have the courage to stand beside their verdict.

That's not something you tell jurors when you're really trying to get them to believe that someone else is responsible for the verdict.

So that goes against the Caldwell argument. It also goes against the argument that the United States Supreme Court has never extended, in fact refused to extend Caldwell to the guilt phase that really rules out this claim under Section 2054.

THE COURT: Mr. Burns, we would like to hear you on the Batson issue and we don't want you to run out of time on that.

MR. BURNS: All right, your Honor. Turning to the Batson issue, there was no timely objection. That defeats the claim as a matter of federal constitutional law.

Now, I am --

THE COURT: Where do you get that?

MR. BURNS: From a number of cases, McCrory vs. Henderson, among others.

THE COURT: I thought that the Ford v. Georgia Supreme Court case from '91 says you don't have to have a contemporaneous objection.

MR. BURNS: On the contrary. Ford v. Georgia assumes that you do have to have a contemporaneous objection.

THE COURT: How about in our court Riley v. Taylor?

MR. BURNS: Those are both cases that deal with state procedural default, and that's not what we're talking about here.

What we're talking about here is a rule of federal constitutional law that derives from Batson itself. And that in each of the instances in which federal courts of appeals have been confronted with this issue, not a question of state procedural default, and it's the rule that applies even if the state court reached the merits.

But in each of the instances in which a federal court of appeals has been confronted with the requirement of a timely objection under Batson,

this is the Second Circuit, the Fifth, Seventh and Eighth Circuits, they have held that a timely objection is necessary for Batson's burden-shifting procedure to work.

And they hold that the party who fails to raise a timely objection either forfeits the claim or is denied the burden-shifting effect of Batson.

THE COURT: Well, at the very least it's before us on plain error, at the very least.

MR. BURNS: Your Honor, I don't believe plain error is a ground for relief under the statute. In any event --

THE COURT: I mean the issue is before us. I'm not saying it's -- we're talking about a procedural matter. You said it's not before us, there was no objection.

So my response is can it be before us at the very least because of plain error? It's been alleged on appeal.

MR. BURNS: I'm not making a waiver argument, your Honor, I'm making a substance argument. I'm saying that Batson requires a timely objection, that these courts of appeals that have

considered this question have ruled that a timely objection is essential.

THE COURT: You said first of all, the Supreme Court case Ford vs. Georgia does not require a contemporaneous objection because?

MR. BURNS: It does require timely objection.

THE COURT: It does.

MR. BURNS: In that case the court ruled that the state court had imposed an additional procedural requirement, that the objection be made at a specific point in the process. And in that case the Supreme Court said that rule's too new; you can't rely on that.

But there was no question, and in fact the state conceded in that case that there had been a timely objection. The only problem with the objection as far as the state court was concerned, was that it wasn't consistent with new state procedures requiring the objection to be made.

THE COURT: And then our court, you said Riley v. Taylor deals with what?

MR. BURNS: A state procedural default.

THE COURT: How about Wilson v. Beard in 2005?

MR. BURNS: I believe that also dealt with a state procedural default. This circuit has not dealt with --

THE COURT: Your position, as I understand it, is that we've not ruled on this issue directly.

MR. BURNS: That's correct.

THE COURT: On the other hand, we have treated, we have considered the issue in more than one case where we have taken it up, even though an objection was not lodged at the time of the voir dire.

MR. BURNS: But those are cases in which no argument was raised under the principle that we're raising here. This is a rule that, as again, these circuit courts of appeals have said is intrinsic to the Batson decision. That is a matter of federal constitutional law and not a matter of state procedural default or a matter of waiver, but a matter of the substance of the Batson decision.

THE COURT: Are you saying that we did not -- either it was not raised by the defendants

in those cases where we moved on and decided the prima facie case issue?

MR. BURNS: Well, this is not something to be raised by a defendant obviously.

THE COURT: No. No. I understand that. Or the court made that decision, we did it.

MR. BURNS: This court has never been confronted with this particular issue because it's never before been raised in this circuit.

THE COURT: All right.

MR. BURNS: Of course that's why we're relying on decisions of other circuits in which it has been raised. But in each of the federal circuits in which it has been raised it has been accepted as a requirement of Batson that a timely objection is necessary.

THE COURT: This case predated Batson. So why don't we turn to the merits of the claim, regardless of -- leave for a moment --

THE COURT: Actually one question while we're on it. Even as to Swain which was the --

THE COURT: Predecessor.

THE COURT: That existed at that

time. There was a March 18, 1982 hearing before Judge Ribner --

MR. BURNS: Right.

THE COURT: -- in which the, what became later backup counsel, Mr. Jackson, wanted to do surveys and ask certain questions of jurors because he was concerned about the -- or he was claiming that Mr. McGill and others had used their peremptory challenges to exclude blacks from juries.

MR. BURNS: That's right.

THE COURT: He wanted to get in certain information and it was denied at that March 18 hearing.

MR. BURNS: Right. He didn't ask --

THE COURT: Isn't that the equivalent of bringing up the issue contemporaneously, not just contemporaneously, actually before the trial?

MR. BURNS: Well, it's not. And one of the reasons it would not be a timely objection is because it was brought up so long before the trial. It was brought up in March 1982.

THE COURT: Three months before the trial.

MR. BURNS: Right. And at that point, in the listing before Judge Ribner, Mr. Jackson said something to the effect that he believes prosecutors strike all black jurors.

And the judge asked if there was a factual basis for this and none was forthcoming.

But what this incident does do is it tells us that the defense was on the alert for any conduct on the part of the prosecution that may have indicated racial discrimination. And yet the entire voir dire took place.

And at the entire voir dire no objection was raised at any time to the effect that the prosecutor was discriminating on the basis of race, and no accusation was made against the prosecutor to the effect that he was conducting his voir dire with respect to the races of the jurors.

And that is a separate reason for considering the absence of timely objection. It goes to the failure to establish a prima facie case.

THE COURT: What did the state courts do with regard to the Batson claim?

MR. BURNS: The state court said that

it examined the record, it could find no indication from the facts and circumstances before it.

THE COURT: So it dealt with it on the merits.

MR. BURNS: Yes, it did.

THE COURT: And the district court dealt with it on the merits.

MR. BURNS: That's correct.

THE COURT: Why don't we deal with it on the merits?

MR. BURNS: As I said, the lack of any objection is important not only as a matter of federal constitutional law as a requirement of Batson, but it also is an indication that it was not apparent on its face that the prosecutor was using his peremptory challenges for the basis of racial discrimination.

Batson also requires us to look at what was said by the lawyers during the voir dire. In this case Abu-Jamal conceded in the PCRA proceeding as a matter of fact that the prosecutor's statements gave no hint, not even a hint, of any racially discriminatory motive. That is in his memorandum of law in support of the PCRA

petition at page 146.

Further, in this case the prosecutor said that he wanted black people on the jury. And it's important to remember the circumstances in which that statement was made.

This statement by the prosecutor that he wanted black people on the jury was made in a matter-of-fact discussion in chambers dealing with what to do about a juror who had violated sequestration.

And at this time, as I've said, the entire --

THE COURT: Was that Ms. Dowley?

MR. BURNS: I'm sorry?

THE COURT: Was that Ms. Dowley, the juror?

MR. BURNS: Yes. I --

THE COURT: I don't think that really helps you, what he said, because in the June 18 hearing you've got Mr. McGill saying, or the court saying, "I thought you ought to know about it. Believe me, I was not going to keep her," in the beginning as telling them that he was releasing her because she violated the sequestration.

"Mr. McGill: I thought she was good. She hates him. She hates Jamal. Can't stand him."

"Court: That's not the point that she hates Jamal.

"Mr. McGill: Can't stand him."

And it goes on. And that's not so helpful.

MR. BURNS: Both lawyers agreed, both lawyers agreed that she disliked the defendant. But it was during this discussion that the prosecutor mentioned that he wanted black people on the jury.

And you will note the response of Mr. Jackson. As we know from March, three months before, Mr. Jackson, who was on the alert for any racially discriminatory behavior by the prosecutor, responded to this statement that the prosecutor wanted black people on the jury with silence. He didn't say anything.

And this again speaks to the --

THE COURT: What Jackson did say at that hearing was that Ms. Dowley was very belligerent, I think those were his words.

MR. BURNS: He did, but he did not in

any way dispute or disagree with the prosecutor's statement that he wanted black people on the jury.

THE COURT: Is the record clear that the prosecutor accepted four black jurors?

MR. BURNS: That comes from an admission in Abu-Jamal's habeas position, by which he's bound.

THE COURT: All right. And what about the district court said that there was no record evidence either of the number of jurors in the venire or the racial composition of the numbers in the venire?

MR. BURNS: That's quite true. And --

THE COURT: Many circuits have said that this is an important factor.

MR. BURNS: Yes indeed.

THE COURT: And that you can't, you can't evaluate the strike rate unless you understand what the racial composition of the entire venire was and make a comparison.

As I understand it, the petitioner here has said that there is record evidence as to the, both the number of jurors in the venire and the racial composition.

Is this accurate or is this inaccurate?

MR. BURNS: This is inaccurate. And I know that the court will examine the record with as fine a tooth comb as it can find, and I invite the court to do that.

There is no record of the races of the vast majority of the people who were voir dired. Over 150 people were interviewed. There's no record of the races of any of them, except for the particular ten jurors who were, who happened to be black who were struck by the prosecution, out of the 20 he had available.

THE COURT: Just so I understand. Was there -- the jurors would come in in what, panels of about 40 or 50; is that right?

MR. BURNS: Yes, about 40, that's right.

THE COURT: And how many panels came before the court for questioning?

MR. BURNS: I believe there were --

THE COURT: It looked to me as if they got to the second --

MR. BURNS: Four.

THE COURT: -- they got to the second panel for questioning before the judge and the counsel.

MR. BURNS: I think there were four panels. And I base that on the fact that on four different occasions, June 7, June 10, June 11, June 15, the judge gives the panel introductory instructions about what's going to be going on.

And also the numbers. If you look at the numbers of jurors that were gone through on each day, they come to about 40, and eventually you get to the total of about 154 people.

THE COURT: I can't make the numbers work because it looks to me like they clearly got to at least a second panel, which would have been another 40 or 50 so --

MR. BURNS: Well, as I said, they got to three or four panels, they got to a total of four panels.

THE COURT: With what degree of questioning of the panels beyond the second panel?

MR. BURNS: I'm not sure I understand your question as to degree.

THE COURT: In other words, did the

court go through its questions and then both counsel go through their questions of the --

MR. BURNS: That's right. And as I said, a total of 154 people were voir dired, which means that there had to have been at least four panels.

THE COURT: I guess the only thing we do know is that there were, of Mr. McGill's perempts, he was entitled to 20, he exercised 15. Ten of those 15 were of blacks by stipulation; is that correct?

MR. BURNS: That's right.

THE COURT: How many of those were, how many blacks were struck by the defendant?

MR. BURNS: That's unknown.

THE COURT: In other words --

THE COURT: Are you sure it's unknown? I thought there were six.

THE COURT: The record does not state the race of any of the people who were struck by the defense, except for one juror who had been accepted by the prosecution and then struck by the defense.

In fact, that was the second person

selected to be on the jury by the prosecutor. That person was black, and the first person to be selected by the prosecutor to be on the jury was black.

THE COURT: So statistically we have the Commonwealth striking ten blacks, we don't know how many the defendant struck.

MR. BURNS: Well, we know how many but not what their race is.

THE COURT: I'm sorry, we don't know how many blacks of those -- that it struck --

THE COURT: I'm sorry. I thought we were dealing with the venire. I'm not sure how many perempts were used by the defense with regard to black jurors. Was it just one?

MR. BURNS: One that we know of. The defense used a total of 19 and one for an alternate. So the defense used all 20.

But what's important here is that the, by admission the prosecutor accepted selected for the jury at least four people who were black, who made the jury one-third black, and those are only the ones that we know about.

THE COURT: It's also that you used

two-thirds of your strikes to strike black jurors.

MR. BURNS: It was actually half the strikes, your Honor.

THE COURT: Half the strikes.

MR. BURNS: Well, ten out of 20 available.

THE COURT: Two-thirds of the actual ones available.

MR. BURNS: Two-thirds of the ones used, right.

THE COURT: Two-thirds of those exercised were against blacks.

MR. BURNS: Yes, that's correct.

Something else happened during voir dire that is significant, and this is in the notes of testimony of June 15, 1982, at page 59.

Defense counsel, Anthony Jackson, went on the radio to talk about the case. And when he did that he said that, "Well, there aren't that many black people on the jury yet. And there's a reason for that, and the reason," he said, was that black people are against capital punishment.

In other words, Mr. Jackson indicated that a large number of black people were excused

for cause under Witherspoon.

Again what's important is what he did not say. He did not say that if there are not many black people on the jury it's because the prosecutor is striking them because of their race. No. The reason he gave when he went on the radio in the middle of voir dire for there not being that many black people on the jury at that point, was because black people are opposed to capital punishment.

THE COURT: Was the petitioner's burden to establish both the number of the venire and the racial composition of the venire?

MR. BURNS: In this case we would say that it was.

THE COURT: All right.

MR. BURNS: It's not a case like Brinson in which 91 percent of the strikes were of black people and the prosecutor in that case essentially admitted that there was a pattern of strikes.

It's not like Holloway in which 12 of 13 strikes were of black people and the prosecutor mooted the prima facie case question by offering

explanations. As was said by the Tenth Circuit, United States --

THE COURT: What about Hardcastle?

MR. BURNS: I believe Hardcastle was a case --

THE COURT: That's 12 of 20.

MR. BURNS: Twelve of 20. Okay.

THE COURT: So that's --

THE COURT: But two out of three were against blacks.

MR. BURNS: Two out of the three used, yes, were against blacks.

THE COURT: That's 66 percent. That's quite statistically --

THE COURT: In Hardcastle I thought it was 12 out of 14.

MR. BURNS: I thought it was 12 out of 13, but I could be wrong about that. It could have been 12 out of 14.

THE COURT: I'll take a look.

MR. BURNS: The point though is that the --

THE COURT: You're right. It was 12 out of 14 and the jury was 11 to one, 11 whites,

one black.

MR. BURNS: Right. And the ratio here is unlike that in those cases. And of course in two of those cases the question of the prima facie case was in essence either conceded by the prosecution or mooted by the prosecution. That's not the case here.

But as I've said, it's also significant that no objection was made by the defense that's inconsistent with there being a prima facie case of discrimination in instances in which the defense, who we know was on the alert for any sign of discriminatory behavior, had an opportunity to talk about whether the prosecutor was acting in a racially discriminatory manner -- it didn't. It remained silent. Or actually in the case where Mr. Jackson went on the radio and said that well, what's really going on is that black people are being removed because of their opposition to capital punishment.

Certainly the number of strikes is a point in favor of the cross-appellant. But as stated by the Tenth Circuit in United States vs. Esparsen, by itself of the number of challenges

used against members of a particular race is not sufficient to establish or negate a prima facie case.

THE COURT: When you start, for a prima facie case, Batson has said that the test is not onerous, correct?

MR. BURNS: That's true.

THE COURT: And it has even said in footnote 22 that if you could show, "The standard we adopt under the federal constitution is designed to ensure that a state does not use peremptory challenges to strike any black juror because of his race."

So if you could show an inference as to one juror who happened to be black, would that not meet a prima facie test?

MR. BURNS: It would. And it is our position that on the facts of this case in this record, such an inference does not arise.

THE COURT: And you may prevail on that, but the problem is we never got to that second step where you examined or you looked at or gave the reasons as to why the ten jurors that were black that were peremptorily challenged, the

reasons of Mr. McGill.

MR. BURNS: Yes, and the reason for that is two-fold. First, that there was no timely objection, and secondly, at the time of the PCRA hearing, in which there were over six weeks of evidentiary proceedings in front of the PCRA court, no evidence was presented on that question.

And it was, as Judge Yohn found, the burden of the petitioner in that case to present evidence. And in fact he actually subpoenaed the trial prosecutor but decided not to call him. So the fact that the record is tabula rasa as to these questions --

THE COURT: You mean the petitioner decided not to call him.

MR. BURNS: That's right.

THE COURT: And is it clear at that stage that it was the burden of the petitioner to present that evidence?

MR. BURNS: Yes.

THE COURT: Why? Tell me why that's the case.

MR. BURNS: Well, as Judge Yohn stated in his opinion, it is not the burden of the

prosecution in a collateral review proceeding in any event, but in a case where there was no timely objection and a great deal of time has gone by, the precedent of this court has said that it is not the burden of the prosecution to move forward and offer reasons for its strikes when there's been no finding of a prima facie case.

In fact, if it had done so it would have been considered a concession, would have mooted the prima facie question. It would have made it impossible for us to argue now that no prima facie case had been made out.

So if there's any question about what the prosecutor's reasons were, it was the burden of the petitioner to call the prosecutor's witness. And he had subpoenaed him but decided not to call him.

The only evidence that was presented on the Batson question was the stipulation that two jurors whose race had previously been unknown were black.

THE COURT: Let's stay on that point for a minute. Usually that evidence comes up at the second stage; is that correct?

MR. BURNS: I think it would be a first-stage question, because it's been suggested that the number of strikes alone might be enough to establish a prima facie case.

We argue that that's not the case. Or that if it could be, it would have to be a case like Brinson in which there was a 91 percent level.

But in any event, it's still a first-stage question whether or not the prosecutor was on the face of the record striking people who were black because of their race. And there are a number of indications that that was not what was happening.

There are the opportunities of the defense to say so during the voir dire, which were not taken, not taken because there was nothing there to object to.

There's the affirmative statement of Mr. Jackson talking on the radio about the case saying that the absence of a large number of black people on the jury was because of their opposition to capital punishment.

It was the fact that the prosecutor

selected four people, again four that we know of, there could have been more -- the record is silent as to this -- but selected at least four black people to be on the jury, which would have made the jury one-third black.

It would be a strange thing for a prosecutor to do, who is trying to keep black people off the jury because of their race, to select four black people to be on the jury, especially when he had five unused strikes. And that's something that was entitled to weight.

And also the question before the district court, it must be recalled --

THE COURT: Is that what you look at to get a prima facie case only? Isn't that really the third step of -- it's a burden-shifting throughout.

One, you get the prima facie case; two, you give your reasons; three, you look at and size them up to see if there was an inference that there was discriminatory conduct.

MR. BURNS: No. Batson was very clear that all the facts and circumstances have to be considered in the first step in deciding whether or

not there was a prima facie case.

In fact, in Batson itself, in that case the prosecutor struck all of the black people on the venire. And the Supreme Court nevertheless sent the case back to the trial court for determination to be made as to whether or not there was in the first instance a prima facie case.

That's not something the court would have done if it were not something that was in the first instance to be decided by the trial court.

THE COURT: For a prima facie case the first thing you need is a cognizable racial group. You've got that here. And that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. That happened here.

The second sort of just sets up in effect a presumption the defendant is entitled to rely on the fact as to which there can be no dispute that peremptory challenges constitute a jury selection practice that permits those to discriminate or of mind to discriminate.

So you can take that for whatever you think. But it's the idea that the court is saying

they understand that this happens in real life.

Three, finally the defendant must show that these facts and any other relevant circumstance raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of race. And it can be, according to note 22, even one juror.

MR. BURNS: Right. There could be other facts and circumstances that tend to rebut a prima facie case, as was said in, for instance, by the Ninth Circuit, United States vs. Chinchilla willingness to accept minority jurors undermines a prima facie case.

THE COURT: What about looking or denying the look at what was going on elsewhere within the system at around this time?

MR. BURNS: Well, I suppose that's a reference to the --

THE COURT: The Baldus-Woodworth study, for example. In Riley v. Taylor in Kent County, Delaware they said that you could look within a year at the other three murder trials of Riley's that existed and see what happened in those cases.

Why can't you do that here?

MR. BURNS: Well, I think it could have been done if evidence had been presented at the more than six weeks of evidentiary hearings before the PCRA court.

In the district court a motion was made to Judge Yohn to include things like the Baldus study, like the McMahon tape, to include them in the record of the district court proceeding. And Judge Yohn denied that motion in a ruling that has not been appealed.

He denied it because these things had not been developed in state court. And as this court said in Holloway, matters that are not developed in the state court record are not to be considered. And so Judge Yohn ruled consistently with that.

The argument of the supposed culture of --

THE COURT: When you say the matter is not appealed, the Batson issue is before us on habeas, right?

MR. BURNS: Right. But now we're talking about things like the Baldus study, the

McMahon tape, or the claims that are raised in the briefs for the cross-appellant --

THE COURT: Was there an attempt to put in studies before Judge Yohn?

MR. BURNS: Yes. And Judge Yohn denied that, again in a ruling that was not appealed. And he denied it because these things had not been developed in the state court record.

And because of that they're not in the record now. And the same is true for the references to a supposed culture of discrimination that supposedly existed in 1982 in the district attorney's office under District Attorney Ed Rendell.

There is no testimony in the record to confirm this. And of course the fact that the petitioner had more than an ample opportunity to present such evidence, in fact if the assertions that are made in the briefs were true it should have been more than easy to present a large variety of witnesses to this supposed culture of discrimination, yet the witnesses were not produced.

So there's no basis in the record for

these claims. They might have been relevant had the evidentiary foundation been there. But it's not something that the petitioner gets to rely on simply by adverting to it with no basis in the record.

And also, it has to be remembered that the issue before Judge Yohn was not merely was the state court right or wrong in deciding whether or not there was a prima facie case.

The issue before Judge Yohn was merely whether it was a reasonable application of Batson for the state court to set aside in this case on this record --

THE COURT: But taking a step back, all you have to do at this first nononerous step is give the prima facie case. That just tells you right there, you don't have to say a whole lot, to show that you meet that test.

We never got beyond the prima facie case here to get to the other, the reasons for why the perempts were used, et cetera.

If it's a low test, and we have said in Riley vs. Taylor that you can look at what else is going on to show a pattern, why should that have

been denied?

MR. BURNS: Because there are so many things going on in the record which contradict the idea that it was apparent on its face.

THE COURT: But that's when you get to steps two and three, not at the prima facie test, but ultimately looking as to whether there's a Batson violation.

MR. BURNS: The defendant in this case didn't get over the first hurdle. The state court ruled reasonably that --

THE COURT: I know what the court ruled. The question is why the court ruled that way. Should it not have gotten to the second and third prongs of the Batson violation test? Not the prima facie test, the Batson violation test.

MR. BURNS: I'm not sure I'm following your Honor's question, because --

THE COURT: Well, the first test, is there a prima facie violation.

MR. BURNS: Right.

THE COURT: After that you look at the reasons given, and then third you look and you size them up to see if there was in fact intentional

discrimination against particular persons with respect to a jury.

MR. BURNS: But if Judge Yohn was correct in his decision that the state court was not unreasonable in ruling that step one had not been met, those additional steps would not be reached, and properly so. And that is what Judge Yohn concluded, that the record supports the state court's decision, or supports the reasonableness in an application of Batson, the state court's decision --

THE COURT: But wouldn't your footing have been stronger if you got to steps two and three?

I know you never like to concede. You always like to win on the first step. But wouldn't your footing be stronger?

If you look at the reasons that were given in Judge Yohn's opinion as to the reason for each of the ten jurors, it's not in the record, as I understand it --

MR. BURNS: Sure, but, but the evidence you're --

THE COURT: That might have, seemingly

would have given you a stronger footing for saying that there wasn't a Batson violation.

MR. BURNS: But on this record that's sort of placing the state in an unfair position because the issue wasn't raised until 1989, and no evidentiary proceedings took place until 1995, some 13 years after the trial, which brings us back to the first cases that we mentioned, because one of the bases for the timely objection rule, the timely objection standard for Batson is that it gives the fact-finding apparatus, the burden-shifting mechanism, a chance to work accurately.

That wouldn't be possible in a case where no timely objection was made and many years went by until the time was reached when it was even possible for the prosecution to start thinking about whether there were, what the reasons were for the strikes.

THE COURT: Good. Mr. Burns, thank very much.

MR. BURNS: Thank you, your Honor.

THE COURT: We'll have you back on rebuttal.

Ms. Ritter, are you going first here?

MS. RITTER: Yes. Good morning.
THE COURT: Good morning.
MS. RITTER: May it please the Court, my name is Judith Ritter, and along with lead counsel Robert Bryan I represent Mumia Abu-Jamal.
If the Court permits, I would like to take about 15 minutes to address the Mills issue and then turn it over to Mr. Bryan for the guilt phase issues.
THE COURT: I think you have ten minutes.
MS. RITTER: Well, we were unsure of the format with going back and forth. And since Mr. Burns --
THE COURT: You have an hour. You can divvy it up any way you like.
MS. RITTER: Okay. So I will take 15 minutes if that's all right. And Christina Swarns from the NAACP Legal Defense Fund who appears as amicus would like to present for 20 minutes after Mr. Bryan.
THE COURT: I think that's more than an hour. We will give you an hour here.
MS. RITTER: Okay. That's fine. I

apologize if my math is off. I think we were thinking it was 65 minutes. In any event --

THE COURT: Join the club.

MS. RITTER: Thank you. In any event, with regard to the Mills issue, you know, while, whether or not this court is bound by the Banks decision or by Albrecht, this case -- the same result is required in this case.

The instructions, the verdict form are the same, if not a bit worse than they were in Banks. This court in Albrecht said that the Mills merits was of unquestionable merit. And as I said, even if there's, you don't feel as though you're bound by that, the same result is required.

If I could turn my attention initially to the verdict form, because I think that there's really no question that that was absolutely presented as the claim in the state court.

THE COURT: What about the waiver issue? Was it fairly presented both to the PCRA court and also to the Supreme Court on PCRA?

MS. RITTER: The verdict form as opposed to page three?

THE COURT: No, the jury instructions.

MS. RITTER: The jury instructions. Yes, it was. It was presented. In fact, the argument was made within the state Supreme Court's, the brief made in the state Supreme Court, the reference was made to the instructions. At the outset let me just --

THE COURT: It was not entitled -- the emphasis was completely on the verdict form.

MS. RITTER: Was the verdict form. It was. It was on the verdict form, it was on the structure of the verdict form.

And I guess I should say at the outset that even if that is the extent of the claim that was presented, the verdict form itself here, all by itself, creates Mills error. And in fact this court in Banks said that that verdict form, which was essentially the same all by itself created Mills error.

THE COURT: What of Banks still exists however?

MS. RITTER: What if it does still exists?

THE COURT: What of Banks still exists, however, in light of what went on at the

Supreme Court?

MS. RITTER: Well, this court has said that Banks is instructive. So at a minimum the findings in Banks are instructive.

I think that there is -- given that the United States Supreme Court set aside Banks on retroactivity grounds, that this court could view it as precedent. But we know at the very least that this court has said in both Hackett and in Albrecht that Banks is instructive.

But if you want to look at this case just even in isolation from Banks, and I think just since there seems to be less of a question as to whether the verdict form was at issue, I would like to first address the verdict form.

The verdict form has three pages and there's, I know that there's been an argument raised that only page three has been, that there's only been a claim with regard to page three.

There's really nothing in the record to support that. The verdict form in its entirety was raised at every level in the state court and in the district court.

And if you look at the verdict form,

the verdict form page one, and this is in the appendix at page 128, the verdict form page one is broken down into two sections.

Before you get to those two sections there's a paragraph that talks about "We the jury, having determined the defendant is guilty do hereby further find." Then you have one and two.

Subsection one says, "We the jury unanimously sentence the defendant to," choice is death, choice is life imprisonment.

Subsection two, the heading for subsection two, that's only to be used if there's a death sentence, "We the jury have found unanimously."

Underneath that subsection, following the instructions in that top heading, the jury is then instructed to either indicate that they found aggravators and no mitigators or, as was the case here, that they found aggravating circumstances which outweigh any mitigating circumstances.

And most significantly, the jury is then asked to list by letter which aggravators and which mitigators were found, which then brings you to page two and page three.

Page two of course is just the list of aggravators with no additional instructions. Page three is a list of mitigators with no additional instructions. And next to each possible mitigator there's a small box. And the judge instructs the jury to put a check mark in the ones that they find.

Now, while there's no question that the law does not require there to be a very clear statement that the jury doesn't have to be unanimous before finding mitigators, that that -- that having that lack of a clear statement doesn't create Mills error.

I think it's fair to say though if you take a step away from this and you look at all of this, how could a juror possibly believe that they didn't have to be unanimous? What in the instructions or in this verdict form would even hint to them that they could consider a mitigating circumstance even if they weren't unanimous? There's nothing here that would even suggest that.

If a jury looked at page three and was under the impression, by some miracle, frankly, but was under the impression that they believed that

they could on their own consider one of these mitigators, how were they to fill out this form?

Were they to put into one of these boxes three of us believe that? Were they to put the names of the people?

They were just told to put a check mark. And the only way that that could be done would be if they had to be unanimous and put down what they as a group --

THE COURT: Of the mitigating circumstances listed on page three, obviously A is checked, no significant history of prior criminal convictions. But B through G at least, could any of them possibly have been found?

MS. RITTER: Yes. In the penalty phase four mitigators were presented and argued. And the other three aside from A are number -- B. There was a presented to the jury and asked them to find that the defendant was under the influence of extreme mental or emotional disturbance; D his age, 27 at the time. And then going down of course then to H, the character testimony.

There was considerable character testimony at the guilt phase. And the entire guilt

phase was incorporated into the penalty phase.

Without going into great detail, there was testimony that the defendant at trial was a reporter, that he was a guest lecturer at a university, that he was a community activist, that he was the president of the Alliance for Black Journalists, he was on the board of directors of African Community Learning Center.

So there was certainly significant amount of evidence of additional mitigators that we couldn't possibly say that not a juror or six or seven jurors might have found one or more of those additional mitigators that they were prevented from considering, unconstitutionally prevented from considering because the impression was given that they had to be unanimous.

And under Boyde of course we need to look at whether there's a reasonable likelihood that a juror would be confused about whether or not they could consider mitigation.

THE COURT: That's not necessarily 50 percent either.

MS. RITTER: Correct. That's correct. I would like to -- and we were talking at

one point during the Commonwealth's argument I know this court says well, do we need to go back to Zettlemoyer.

The only comment I want to make about Zettlemoyer at this point is that Zettlemoyer was very different. There was not a verdict form in Zettlemoyer anything like the verdict form in this case.

In fact, this circuit in Zettlemoyer commented that Zettlemoyer was okay because the verdict form did not require listing of mitigators, and that suggested therefore to that jury that the consideration of mitigation could be broad.

Whereas here we have the exact opposite. There are two places where this jury is asked to mention which mitigators they found. And there is no -- nothing here to suggest to them that they could list that or consider it unless they were unanimous.

And certainly there's a reasonable likelihood that the jurors got that impression.

Just briefly, since I have a couple more minutes, I do want to address the claim that the Mills was improperly exhausted in the state

court.

And I think that the Commonwealth's argument that it was only considered as an ineffective assistance of counsel claim is not a correct one.

I think that Judge Yohn correctly noticed that the Pennsylvania Supreme Court considered Mills on the merits, that -- in fact I think it's an interesting contrast because in the Pennsylvania Supreme Court decision the very next paragraph after its Mills discussion is a discussion of Simmons vs. South Carolina claim which they quite clearly state we're reaching the merits on this only because of an ineffective assistance of counsel claim.

In Albrecht the Pennsylvania Supreme Court decided Albrecht. One month after this they also considered it to be an ineffective assistance of counsel claim and said it quite clearly.

Here there was a footnote dropped about the fact at the beginning of the opinion that counsel, to be safe, had said if anything's waived then please consider it as ineffective assistance of counsel. And it's then pages and pages later

into the decision where they reach Mills with not even a mention of ineffective assistance of counsel.

And there's no question that it was both raised as a standing claim on the merits and decided that way.

THE COURT: Was it raised in the amended PCRA petition?

MS. RITTER: It was raised in the PCRA petition only on its merits claim, yes.

THE COURT: And was the jury charge mentioned in the amended PCRA petition?

MS. RITTER: The jury charge, I don't know for sure whether it was in the amended PCRA petition. I know that it was referenced in the brief to the Pennsylvania Supreme Court. I know that it was cited in the brief.

If there are no more questions then I will let Mr. Bryan move on to the guilt phase.

THE COURT: Thank you very much.

MR. BRYAN: Good morning, your Honors. That was the fastest 15 minutes I've seen in quite a while.

THE COURT: We'll give her time to

Ms. Swarns.

MR. BRYAN: Pardon me, your Honor?

THE COURT: We'll give her time to Ms. Swarns.

MR. BRYAN: I'm Robert Bryan, lead counsel for Mr. Abu-Jamal, your Honors.

I do have one question. An additional five minutes was granted, and is that rebuttal or just part of our --

THE COURT: No, you can have that afterwards as rebuttal.

MR. BRYAN: All right. Thank you, your Honor. Thank you.

If I may, I will address Batson first. And also if I may, with the court's permission, address the merits.

It seems like a lot of time has been spent this morning with Mr. Burns' argument talking about really what seems like maybe step two under Batson.

And I would like to address step one. According to my math and our briefs, the prosecution used ten of 14 strikes, which is 71 percent.

Now, I've also heard the figure ten of 15. But whether it's two-thirds or 71 percent, it's still that, in that range, a significantly high number.

THE COURT: The only number I had seen was ten of 15. What makes you think it was ten of 14?

MR. BRYAN: Well, we submitted a chart in our briefing and we came up with 14 African-Americans on the panel, but I could be wrong, and I do not think that one either way would make a difference.

THE COURT: I only saw ten of 15 in the briefing as well.

MR. BRYAN: And I would accept that because initially we talked about ten of 14 in the brief filed July 21. But then after that in our next brief we started talking about 15. So I would accept for purposes of argument 15.

THE COURT: So on step one, the prima facie case, what would you say to us that would indicate that we should find that Judge Yohn was wrong in finding that there was not a prima facie case made of a possible Batson argument?

MR. BRYAN: If I may go through, and I'll list various factors which have been recognized by this court and other courts.

The strike rate, and as said in Alvarado, that in and of itself may support an inference or a prima facie case.

THE COURT: You fault the strike rate but not just -- that's where there are 12 of 13 or 11 of -- there's a lot of cases out there that say that statistics alone do not make for a Batson case.

MR. BRYAN: Of course. Of course. But as Judge Ambro I believe pointed out at some point this morning, even one, as in Batson and Miller-El, et cetera, even one, depending on the circumstances --

THE COURT: Yes.

MR. BRYAN: And the circumstances of this case is you have an African-American defendant and a white decedent. You have an African-American defendant and a white police officer.

In this case you have a person who was a member, had been a member in his youth of the Black Panther Party. He was not a member but he

had been supportive of the MOVE organization, their right to be, live as they wish. Very controversial issues.

And it's interesting, in trying to get into the mind of the prosecutor, even at a bail hearing well in advance of trial, the prosecutor was getting into the Black Panther Party, this type of thing.

When character witnesses were presented at the guilt phase, at the end of the guilt phase, I believe July 1 and the day before, the prosecutor, even though Judge Sabo stopped him, was trying again to get into this area of questioning.

So to him the race of -- race seemed to be a big factor related to the Black Panther Party, MOVE, et cetera.

THE COURT: Well, the Commonwealth says it was relevant for that purpose, maybe not jury selection, but for prejudicial purposes, so forth, race could have been relevant for decision making.

MR. BRYAN: I would submit that, again, and there's more I would like to present to

look at the full picture which somebody had mentioned earlier about, we need to look at the bigger picture.

I thought it was something interesting that I ran across last evening that I had overlooked. And that is just again a point about the mind-set of the prosecution.

During the trial, in the guilt phase, a witness named Cynthia White, the key prosecution witness, was on the witness stand. The late Judge Calvin Wilson walked into the courtroom and he sat down near the family, relatives of my client.

The prosecutor, Mr. McGill then interrupted, and he said the black jurors might know him. Anthony Jackson, the defense attorney, retorted very quickly, "Just because they're black."

Again this in and of -- by itself may be meaningless, but in the overall context that here is a judge who dealt with all races, and yet the prosecutor was thinking race when the judge walked in and just sat in the spectator section of the courtroom.

It was earlier mentioned about Jenny

Dowley, I believe some reference was to her. She was removed because the jury was sequestered. She had been selected, African-American, and she asked permission of Judge Sabo, if she could take her pet, she had received word, her cat was dying. She wanted to take the cat to the veterinarian, and the judge said no. She did it anyway, obviously violating the order of the court.

So she was removed on the motion and with the agreement of the prosecutor, who said that -- we get into this business about, you know, she hates the defendant.

What's interesting is at another point in the proceedings, the sequestering of the jury --

THE COURT: Before you go on to the next one, defendant's counsel did not object to her removal.

MR. BRYAN: Which I think was, he said nothing. He remained mute.

THE COURT: He did not object.

MR. BRYAN: He did not object. Correct.

THE COURT: In other words, he didn't say that she's being removed because she's black.

MR. BRYAN: That is correct.

THE COURT: And he didn't say anything objecting to her being removed.

MR. BRYAN: He said nothing. And technically she did violate the rule. No question about that.

What's interesting is she tried to do it properly, and she was frantic over her kitty dying, and so she went anyway and took her cat to the veterinarian. I believe she was gone 90 minutes and returned. But she did violate the rule.

I'm not faulting Judge Sabo for dismissing her. But what I'm saying is the prosecution really rushed in to remove her because -- I don't want to say "because," but she happened to be, incidentally African-American. What's interesting is --

THE COURT: Are you sure the prosecution wanted to remove her? I thought the prosecution wanted her to stay.

THE COURT: Because they thought that --

MR. BRYAN: No. He said that

afterwards, he said, oh, yes, she's got to go. He joined in with the judge. But then he made the point --

THE COURT: In reading the transcript it looked like they all joined in. The defense, no one said anything. She violated a court order.

MR. BRYAN: What's interesting is this occurred out of the presence of my client, incidentally, which is an issue which hasn't been certified but it is one that is one of our big -- a very significant issue in the habeas petition.

THE COURT: But getting back to -- how do you get back to showing that there was a prima facie case that should have been found so that we get to step two?

MR. BRYAN: I am. And I wanted to get to this. The removal of this juror, there was a white juror during sequestration who asked permission to go take a civil service exam. That was granted. And the prosecutor was all for that, that was fine with him.

It was granted, and the court even adjourned for I believe it was an afternoon so this person could go take a civil service exam. In and

of itself it means nothing. But it's part of the whole picture where one person is treated one way with the concurrence of the prosecutor, whereas the other was treated differently. One was white --

THE COURT: On that instance we really don't know because it was all -- the judge and both counsel agreed that this particular juror --

MR. BRYAN: Yes.

THE COURT: -- Ms. Dowley, was, quote, very belligerent, close quote.

THE COURT: And the judge actually threw her off the jury, not the parties.

MR. BRYAN: Of course he did. Of course, your Honor. I agree, Judge Cowen.

THE COURT: Judge Yohn said that it was impossible to determine the number of the jurors and the venire or the racial composition of the jurors. Do you agree with that?

MR. BRYAN: I -- well, if you're talking about the number of strikes --

THE COURT: What is in the record?

MR. BRYAN: But if you're talking about the whole venire, you're talking about the panels.

THE COURT: I am.

MR. BRYAN: That is unknown. But Mr. Jackson, as I believe discussed earlier during Mr. Burns' argument, had asked in advance of trial to do a questionnaire, which was rejected. He was concerned about what, some of what we are concerned about today.

Had that been done I think one would assume that would have been built into it, it's normally in other places, other jurisdictions, and we would not be wondering what was the overall makeup.

I submit that that's -- it's not really important. What's important is what the prosecutor did with what he had. And you have roughly 20 to 25 percent strikes of whites, and two-thirds who were African-American.

That in, again, in and of itself there are more circumstances I have not gotten to, but yes, your Honor.

THE COURT: But many courts have said that it's important to compare the strike ratio with the percentage, with the racial composition of the entire venire, and we don't have that

information.

MR. BRYAN: No.

THE COURT: And was that the obligation of the petitioner to provide or was that the obligation of the Commonwealth to provide?

MR. BRYAN: I submit it's not required. It's interesting, it would be helpful to the court in grappling with this issue.

THE COURT: Well, a lot of courts have said you have to have it.

MR. BRYAN: But I don't know how we can get it. We're a day late and a dollar short on that issue unfortunately.

I would say this, that a vast majority, and this is in the record, we do know this much about the greater number, that a vast majority were struck for cause, were removed for cause, released, because of employment, because of feelings on capital punishment, various reasons. And that much we do know.

I think, and it was again alluded to earlier, again as looking at the overall picture, statements of defense counsel well in advance of trial, on March 18, '82, he talked about the

prosecution systematically in case after case removing people because of their color.

He did an affidavit while the case was on direct appeal in 1986 in which he said, "The prosecution struck," and I'm using his words, "otherwise qualified black venire persons," that the prosecution, again his words, "was pursuing a traditional course of excluding as many blacks as he could solely by reason of the race. This was the same as appellant," in other words this case. "Exclusions were also sought because the victim was white."

THE COURT: Who made that comment in '86?

MR. BRYAN: Anthony Jackson, the defense attorney. Now, that was in an affidavit which is in our supplement.

THE COURT: But that's what you -- he's the defense attorney.

MR. BRYAN: Yes.

THE COURT: Where is there something from, that would indicate from the other side that there was -- I mean obviously there was the attempt to bring out the McMahon transcript, but that came

out many years later.

MR. BRYAN: The only thing we have is we do have, I believe it's a 1987 affidavit from Mr. McGill in which he talked about, dealt with this. And I believe it's in the supplement right after or just before the one I just cited at page 259 of the defense attorney.

And he stayed away from dealing with any of this. He only talked about the number of strikes. He dealt with trying to resolve that issue.

You mentioned something about a tape, and that gets into the next area of the overall picture. And that's whether or not, and you used the words of, in the cases whether or not there was a culture of discrimination, which is what Mr. Jackson was getting to.

And in and of itself, of course he's an advocate for his client. But he tried to get the questionnaire, he wanted to find out who was coming, what was the composition of the general venire well in advance of trial.

As far as in this area of culture of discrimination we do know about the training tape.

And it's interesting what Mr. McMahon said --

THE COURT: But is that in the record?

MR. BRYAN: Yes, your Honor, and we have -- well, we have the transcript before this court in our appendix. But it's also been recognized by this court as existing.

THE COURT: Just so we're all on the same page, to get a prima facie case you need --

MR. BRYAN: -- not very much. I hope, I hope, I hope.

THE COURT: It's certainly not onerous, according to the Supreme Court.

MR. BRYAN: Yes.

THE COURT: You need a cognizable racial group and perempts used to exclude people from that racial group. That happened here.

MR. BRYAN: Yes.

THE COURT: The second, as we said, is not really a, it's sort of a statement of, I don't know, the fact that the Supreme Court deemed to exist that sometimes people to use perempts to further a point of view they have in order to exclude particular persons.

But it's the third one that we're focusing on. "The defendant must show these facts and any other relevant circumstance raised an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."

So we're trying to look at what the factors might be. In Judge Scirica's case in Clemmons he gave by way of example five in 1988. And then I guess Riley v. Taylor may have added another that you can look at what other cases have done in that particular jurisdiction that are right around that time.

But of the five the first is, well, members of the racial group are excluded. The nature of the crime is the second. The race of the defendant and the victim is the third. The fourth is a pattern of strikes against black jurors in this particular venire, and we don't really have all of the information that we need to make any kind of mathematical reduction with respect to that. And then lastly by way of example the prosecutor's questions and statements during the selection process.

Working backwards from five up, there was nothing that was stated by Mr. McGill during the questioning of the venire persons that would indicate any type of discrimination, was there?

MR. BRYAN: Not in and of itself, of course not, your Honor. Mr. McGill was a very good lawyer, or is a very good lawyer. And I would assume that he, as reflected by this record, had better sense than to do something like that.

THE COURT: But obviously -- so then in this case working up a pattern of strikes against black jurors in a particular venire, how are you going to show that other than the fact that you had ten of 15 against blacks?

MR. BRYAN: And only --

THE COURT: Ten of 15 perempts against blacks.

MR. BRYAN: Well, and we know that there, we know from which there were a total 39 strikes. And we know of 25 white people only five were struck. And if you do the math, which we did in the first brief, so that's 20 percent as compared let's say to two-thirds of African-Americans.

And if you do the math a little bit farther, which we did in our initial brief last July --

THE COURT: Did you start with 39 or did you start with 45?

MR. BRYAN: Right, we started, yes. That would be, it would be African-Americans were struck at a ten times higher rate. Now that was with our figure of 14. Let's change that to 15. So it's going to be lower, let's say eight or nine times higher. But still, that's a, seems like a significant, if you're just looking at that, difference.

THE COURT: But to be more simplistic, because we don't know necessarily what the numbers are for the, I will call it the numerator, but to be simplistic, ten of 15 perempts were used by the prosecution for the purpose of excluding blacks.

MR. BRYAN: Correct. Correct.

THE COURT: That's 66, or if you say it's ten of 14, it's 71.

You're saying that and what else? What else plus that leads you to believe there's a prima facie case?

MR. BRYAN: Well, I would like to go back to the training tape, because in that training tape, which has been judicially dealt with, so it's not just something out in never-never land. It's here. It exists.

The prosecutor who was doing this training session, when he talked about, "Strike them because they're black and that's kind of a rule," talking about his office. "Well, they're black, I've got to get rid of them." Again those are his words. "Best jury, all white jury."

And then he made a comment a little later, and this is in the appendix before this court --

THE COURT: You're reading from the McMahon transcript?

MR. BRYAN: Yes, and then he talked about it being "the wisdom of the ages."

THE COURT: But he also said that your goal is to win and you want blacks on juries, you're hoping for blacks from certain areas of the country. You're hoping for older black men from the South would be his preferred.

MR. BRYAN: Yes. Yes.

THE COURT: So how much does that really help you?

MR. BRYAN: I think it helps enormously when a prosecutor says you want to get rid of poor black people and there are predominantly, it appear to be that's what he was doing in this case. It seems that is of enormous significance.

Again, in and of itself if he only struck, if there was no indication of using strikes in any discriminatory manner regarding African-Americans, then what does that mean? It doesn't mean a lot.

But again, if you put it in the mix I submit, your Honor, that it does, it is of great consequence.

THE COURT: How do we know that maybe 50 percent or maybe 66 percent of the venire were black?

MR. BRYAN: We don't know that. We can look at the general population, just assume that --

THE COURT: No, you can't look at that. We've got to look at the venire.

MR. BRYAN: I know. I understand.
THE COURT: And what does this ten of 15 mean when you, you can't relate it to anything that would be of significance?
It's a number but it doesn't prove anything because you don't know what percentage of the potentials were black to strike in the first place.
MR. BRYAN: All we know is that he used ten of 15 to strike African-Americans and only five of 25 to strike white people. Now, I agree, we do not have a large number but, and I may be totally wrong --
THE COURT: Five of 25 or five of 20 you mean?
MR. BRYAN: I'm sorry, it was five of 25 struck, 20 percent is what we came up with.
THE COURT: But you only have 20 perempts.
MR. BRYAN: But he struck five of 25. And he struck ten --
THE COURT: For cause?
MR. BRYAN: No. These are peremptory strikes.

THE COURT: But you only get 20 perempts, right?

MR. BRYAN: Yes, but he used five of 20 --

THE COURT: No. No. He used 15 altogether.

MR. BRYAN: Exactly.

THE COURT: All right. Five were white and ten were of blacks.

MR. BRYAN: Yes. Yes.

THE COURT: But you can't relate -- what if the jury was one-third white and two-thirds black? His strikes then would correlate precisely with the venire.

Without knowing what the venire was you can't take any significance from the percentage of strikes of whites or blacks. As a matter of fact, if there were more blacks on the venire than whites you would have to say he's discriminating against whites, not blacks.

MR. BRYAN: I see your point, your Honor. I respectfully would disagree. And we -- if I may go to another area, still dealing with this, the bigger picture. And the Baldus study has

already been touched on.

THE COURT: When you look at the factors only isn't the argument -- shouldn't you be starting with that when you look at these factors one of the factors is, is the defendant a different race than the victim? And that's clearly the case here.

MR. BRYAN: Exactly. Yes, your Honor. Yes. And this case also was, the atmosphere swirling around the trial was, as evidenced here today 24, over 24 years later, there was a lot of interest then, as there is today. This was a very controversial case.

THE COURT: But isn't a factor that the victim and the defendant are of different races, it well may be that a prosecutor wants the same racial composition as the defendant.

Batson doesn't speak of that being a factor proving a prima facie case.

MR. BRYAN: That is correct, your Honor.

THE COURT: So the fact that the defendant and the victim were of different races does not help you get a prima facie case as far --

MR. BRYAN: I disagree, with all respect, with that. It does. In and of itself if you have an African-American defendant and a white decedent or vice-versa, that in and of itself is meaningless. You have to look at the bigger picture.

If I may address some things, some more things. The question was asked about comments. We did somewhat of a comparative analysis even though we're at step one. And all we're asking for is a finding of the unonerous burden, if that's a correct word, of a prima facie case. That's where we are now.

We're asking this case be remanded back to the U.S. district court.

THE COURT: When you had the opportunity, or not you, but when the petitioner had the opportunity to have Mr. McGill testify at a hearing, was that on prima facie case or was it on other, was it the next step?

MR. BRYAN: No. That would have had to be.

THE COURT: Of the Batson analysis.

MR. BRYAN: There was no finding of

prima facie case at that point. And the burden certainly was not on the defense, the petitioner.

THE COURT: What was the reasoning -- but what would the questioning of Mr. McGill have been on were he put on the stand at the, was it a PCRA hearing?

MR. BRYAN: Yes, talking about the 1995 PCRA hearing, an evidentiary hearing. The questioning -- I can't read the mind of the lawyers who were in the case then, but I would assume that the questioning would have been what we were dealing with today is, and that's racial composition and trying to nail some of that down.

Maybe they would have gotten into that, I would assume. What do you, Mr. McGill, Mr. Former Prosecutor in the case, what do you remember about this? How can you help us? What do you have in your files?

THE COURT: How do you respond to the point that you had the opportunity to try to put some of that evidence out there and you passed it by?

MR. BRYAN: What the attorneys did, and this is 1995, there have been a lot of

decisions since then, a lot of water over the dam since then. But what the attorneys did, and the focus was, and they reached a stipulation to identify two more strikes who were African-American by the prosecution which brought it up from the eight to ten.

And that seemed, it seemed to be that everybody felt that okay, that's what the courts need.

THE COURT: Right.

MR. BRYAN: Your question this morning obviously reflects that's not correct.

THE COURT: But the court at that time, the situation that existed was that no prima facie case had been found.

MR. BRYAN: Correct.

THE COURT: So there was no reason to go to the second stage.

MR. BRYAN: Correct.

THE COURT: Why would not the burden have been on the defendant, the petitioner at that point, to call Mr. McGill, to try to establish a prima facie case?

MR. BRYAN: I would say that we have

the affidavit of Mr. McGill, which I believe was 1987, in which he dealt with what apparently he remembered. That was eight years earlier.

And he gave some figures that he recalled. And I can only assume that that was it. I don't know. That's what we have before us today.

THE COURT: That's what you have. But he was subpoenaed, he was there, he could have been called.

The Commonwealth contends that it was not their duty or burden because no prima facie case had been found at that point, and that the failure to call him should rest on the defendant and not on them.

MR. BRYAN: The only question that could have been asked of him, general question, would have been is there any more beyond the four pages of your affidavit, four corners of your affidavit, that you remember about racial makeup?

THE COURT: Surely.

MR. BRYAN: I think that's it. So it may have been whistling in the wind at that point.

THE COURT: Now, the Commonwealth has said that we shouldn't even be getting to the

merits of this because other circuits, when confronted with the issue, have said that unless the Batson claim is raised or something similar to a Batson claim is raised at the time, at voir dire or during the trial, that the issue was over and you can't raise it later on.

MR. BRYAN: The cases seem to hold, and it seems very consistent, including with this court, that that is not required. I mean there was no Batson or Miller-El, et cetera, at that time, at the time of the 1982 trial.

There was Swain, which was --

THE COURT: Correct.

MR. BRYAN: -- a very different picture. If I may, we were talking earlier about comments of the prosecutor. And there is, and we did submit somewhat of a comparative analysis only for prima facie case, in our briefing. And this I think is interesting.

There were references to, as a reason for striking African-Americans, people who never served on a jury. And yet the prosecutor accepted white people who had never served on a jury.

They contended that unemployment was a

reason for striking, using some of those ten strikes, when the prosecutor accepted whites.

THE COURT: Doesn't that proceed to the second step as to what the reasons were?

MR. BRYAN: Normally you would think so. But again this court, I submit, should look at the overall picture and what reasons was the prosecutor giving. Was the prosecutor misleading, giving misleading reasons?

They were asking about people who had heard my client on the radio. They asked African-Americans, not white people. And in fact he was heard on NPR nationally, you know. He was heard on more than just African-American radio. But they did not ask those questions of white people.

They said that the reason an African-American person was struck was because of a hearing problem. In fact this person said, Wayne Williams, as long as I have my hearing aid up, it's fine. I can hear well. They accepted a white person who could not hear well.

Now, I mean I can go on and on, it's in our briefing. They said they excluded people

who were black because they were single, unmarried, or divorced, and yet they accepted white people who were single, unmarried, and divorced. And it goes on and on.

They falsely stated that Darlene Sampson listened -- they excluded her because she listened to the defendant on the radio. But her testimony was, Mr. McGill's question, this is June 16, 1982, at page 276 --

THE COURT: But she was also opposed to the death penalty.

MR. BRYAN: No, she said she had problems with it, but she was not excluded for cause.

THE COURT: But if you say that you have a problem with the death penalty that is pretty much an invitation for somebody to knock you off.

MR. BRYAN: But my point is that the reason given was, it reeks, I'll use the words of Miller-El reeks with afterthought.

"Mr. McGill: Did you ever hear the defendant on the radio?"

She said, her answer was, "No."

But he said the reason he struck her was because she listened to the defendant on the radio.

Again just, again the part of the overall picture of what was going on in the prosecutor's mind, what was he, what was motivating him.

And Judge Sabo at one point said, and we have presented this to the court, "Sure, I'm real biased." And we also have, and I'll use his words from the court stenographer, "Fry the nigger" comment. But he said, "I am real biased."

What concerns me about this issue is that we should not have a mountain to climb, Mount Everest, in order to establish a prima facie case. That's all we're asking for. We're not asking for step two. We're not there, hopefully, yet.

And I just submit -- I think I'm running out of time to get my other two issues.

THE COURT: What you say is you have a burden at each, in step one, but it's a low burden, certainly use the words of the Supreme Court, not an onerous burden, and you believe you've met it.

MR. BRYAN: Yes. I certainly submit

we have. I would like to point out, and my time's up, but I would like to say that Mr. Burns has made reference to Mr. Jackson being on the radio.

Now, unless I'm missing something I have not seen that anywhere in the record, if it means anything anyway. But -- okay. All right. Thank you, your Honors.

THE COURT: Thank you very much, Mr. Bryan. We'll --

MR. BRYAN: And I do submit, obviously, the other two issues on the briefing.

THE COURT: We understand that. The briefs are very comprehensive, and you'll have rebuttal time.

MR. BRYAN: Thank you, your Honor.

THE COURT: Ms. Swarns. Good morning.

MS. SWARNS: Good morning. May it please the Court, I'm Christina Swarns here on behalf of the NAACP Legal Defense Fund as amicus in support of Mr. Abu-Jamal.

As your Honors have already pointed out, the question before this court is not whether Mr. Abu-Jamal has actually proved intentional discrimination in the exercise of peremptory

challenges.

The question before us today is whether or not he has proven an inference of discrimination, whether, in the words of this court, there is a reason to believe that discrimination may be at work.

I think LDF believes that Mr. Abu-Jamal has clearly met that standard, that not-onerous standard set forth by the Supreme Court.

I want to pick up though on some of the questions that your Honors have posed to both counsel for the Commonwealth and counsel for Mr. Abu-Jamal, starting with the Commonwealth's argument that a contemporaneous objection is a substantive requirement for a Batson claim.

This of course is the first time that that argument has been presented in this case ever, in the Third Circuit. That argument was not presented at any point below.

But I think that, Judge Ambro, your point is correct, that Ford vs. Georgia does dispose, certainly strongly indicates that a contemporaneous objection is not required. And I

want to begin by talking about what happened in Ford vs. Georgia.

THE COURT: Also I think as does Riley and the other cases.

MS. SWARNS: Yes, absolutely. Riley and Wilson do the same.

In Ford vs. Georgia the petitioner raised what was essentially a Swain claim at the time of the trial proceedings.

Later Georgia law passed after the time of the objection said it had to be done at a different time during the voir dire process.

Notwithstanding the fact that that decision came after Mr. Ford's trial, the Georgia Supreme Court applied it to him, found that he did not raise a timely objection under this later law. And it went to the United States Supreme Court on the question of whether or not Mr. Ford's Batson claims should be reviewed.

The United States Supreme Court said, of course, as Judge Ambro you've indicated, that since the Georgia rule didn't exist at the time of Mr. Ford's trial it was inapplicable because it wasn't firmly established and regularly followed at

the time of Mr. Ford's default.

And so because of that the United States Supreme Court said well, he gets to go on and litigate his Batson claim.

If a contemporaneous objection was a substantive constitutional requirement established by Batson, the United States Supreme Court could have and should have at that point said notwithstanding the fact that this Georgia rule is inapplicable to Mr. Ford, Mr. Ford still can't litigate this Batson claim because he did not raise a Batson claim at the time of, you know, of his trial.

They could have absolutely applied and said listen, the Georgia rule is out, but this Batson specifically says you require a contemporaneous objection. There was no contemporaneous objection, and therefore, Mr. Ford, you're out of here on this issue.

They didn't do that. So I think Ford is instructive in that regard. In addition to the fact that what they did was deal with this as a state procedural issue the way this court has consistently dealt with the timeliness issue in

this matter.

I think it's also important to point out that the reasons animating the circuit decisions suggesting that you need a contemporaneous objection are inapplicable here in this instance.

One of the main reasons that the circuits have said you need a contemporaneous objection is they talk about the impact of delay, for example. They say it's unfair, you know, the prosecutor doesn't remember what happened so many years ago during the time of the voir dire proceedings.

Of course we, in this case, are still at step one. We have no idea whether or not we're in the position of saying we don't know what happened at the time of trial. We've never had the opportunity to hear from the trial prosecutor to have him so much as say I don't remember what happened. We haven't gotten to that place.

Not only have we not gotten to that place to know whether or not the trial prosecutor remembers, Mr. Abu-Jamal has also -- I should say this circuit has also dealt with, in numerous

instances, this concern about the impact of delay.

This circuit has a body of jurisprudence that says we know that, you know, when these Batson cases go forward and they come to us many years after voir dire it is difficult to reconstruct and figure out what happened oh so many years ago.

And so in numerous cases this circuit has said we're still going to apply the three-step process, but what we're going to do is we're going to let you, Commonwealth, if you get to the position of saying I don't remember what happened, to rely on circumstantial evidence.

We can still reconstruct, we can still go through the three-step process, but we can adapt to recognize the problems of the time delay. And so that's something this circuit has repeatedly recognized and has done to address sort of the concern that has been raised by the other circuits with respect to the impact of delay.

I think it's also critical to point out with respect to this issue of delay that it's certainly not the fault of Mr. Abu-Jamal that we have never heard from the trial prosecutor in this

case.

Mr. Abu-Jamal has been raising and litigating and claiming intentional discrimination in jury selection --

THE COURT: Although at one point they had a chance to bring the trial prosecutor there and --

MS. SWARNS: Yes, they did. Yes, during the PCRA hearing, you're right. And there was an indication in the record that Mr. Abu-Jamal did not call the trial prosecutor during the PCRA proceeding.

THE COURT: And he was there and he was supposed to come on the next day. I guess, was the whole idea there, to the extent one can reconstruct it, just to get a stipulation? Because there was a claim that, at one point the state, there were only eight of the 15 perempts were used for blacks.

MS. SWARNS: That's what the Pennsylvania Supreme Court said.

THE COURT: And then the, I think the claim of Mr. Abu-Jamal was it was 11, and they settled on ten.

MS. SWARNS: Correct. What Mr. Abu-Jamal was doing attempting to show, contrary to what the Pennsylvania Supreme Court had said on direct appeal, that all of the evidence in the record in this case has clearly established a prima facie case of discrimination.

It was absolutely not Mr. Abu-Jamal's burden to call the trial prosecutor to prove a prima facie case of discrimination, particularly --

THE WITNESS: Why not?

THE COURT: It is his burden Mr. Batson to prove discrimination.

MS. SWARNS: Yes, absolutely. Not to call the prosecutor to prove a prima facie case of discrimination.

THE COURT: No, but he was -- the PCRA hearing was the time when this stuff is supposed to be fleshed out.

MS. SWARNS: Yes. Let me just say --

THE COURT: And as I understand it, what the petitioner was faced with at that time was that no prima facie case had been found. Why should he not have called the prosecutor in order to establish a prima facie case?

MS. SWARNS: I have two, I think two answers to that question. The first I think is Miller-El is instructive on this point and I will read from them.

"First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question."

THE COURT: That gets you to the next step.

THE COURT: But at that point he had not made, or at least he had not been successful in making a prima facie case.

MS. SWARNS: Exactly. And so his burden was to argue and to continue to assert, which he has done all the way through the proceedings in this matter, that the entire record of evidence showed a prima facie case of discrimination.

And it is Mr. Abu-Jamal's position, it is the Legal Defense Fund's position, that all of the evidence that was before the state court

clearly shows that Mr. Abu-Jamal established there was unquestionably an inference of discrimination, unquestionably reason to believe that discrimination was at work.

And I think we have to be really -- it's really critical that we focus on the fact that what we're talking about is reason to believe discrimination was at work. Not actual proven discrimination occurred, but we're talking about smoke not fire.

THE COURT: Why did they subpoena him to attend the PCRA and not call him? Why didn't they call him then? They subpoenaed him, not the Commonwealth.

MS. SWARNS: I would have to speculate and I don't know the answer to, I don't know why --

THE COURT: We're doing a lot of speculation here. That's the question.

MS. SWARNS: -- why counsel subpoenaed him. I suppose the answer would be they subpoenaed him to have him available in the event that Judge Sabo rereviewed the record, said Mr. Abu-Jamal you're correct, you have established a prima facie case of discrimination. They wanted to make sure

he was available to the Commonwealth at the time of the proceedings so that the Commonwealth could present him to offer race-neutral reasons.

THE COURT: The petitioner wanted to make sure that the Commonwealth had him available?

MS. SWARNS: That's my....

THE WITNESS: That strains credibility a little bit.

MS. SWARNS: I think no matter what, why they subpoenaed him doesn't really matter. Ultimately, I think there are, Mr. Abu-Jamal has presented at least 13 reasons why there was a prima facie case of discrimination presented in this case, at least 13 different reasons why there was a prima facie case of discrimination.

The first is, and that's been discussed repeatedly, the evidence of the number of strikes. I just want to clear up a few of the issues that were discussed.

THE COURT: You mean ten of the 15.

MS. SWARNS: Well --

THE COURT: What is your response to the position you've heard from the Commonwealth that doesn't prove anything if you don't know what

percentage of those are in the venire? It might even be discriminating against whites.

MS. SWARNS: Well, I have several answers. I want to say that first the ten of 14, I want to clear up the ten of 14 and ten of 15 distinction.

The prosecutor struck ten of 14 available African-Americans. He used ten of 15 of his total number of strikes against blacks.

He used 15 total strikes, five against whites, ten against blacks. He had 20. So five were unused. So it is ten strikes against African-Americans, against the number -- the 15 that he used.

There were 14 African-Americans available to be stricken. He used ten of 14. He struck ten of 14 African-Americans. So I just want to clarify that ten of 14 versus ten of 15 distinction.

One refers to the number of strikes used relative to the number of African-Americans available.

THE COURT: As to the 14 number, the number of African-Americans available to be struck,

I thought that's where we didn't --

MS. SWARNS: Right.

THE COURT: -- know because we didn't really have, know the number of African-Americans who were on the venire panel --

MS. SWARNS: Right.

THE COURT: -- that -- panels that were brought in.

MS. SWARNS: Right. I'm just -- one step at a time.

THE COURT: Okay.

MS. SWARNS: And so the next point I was going to make is that the record, and I think it's throughout the briefs, establishes the evidence that we need. It is in the voir dire transcripts, it is in the affidavits on direct appeal, it is in the PCRA proceeding, stipulation, it is throughout the record, the evidence that's required.

And I would just, with respect to the question that's repeatedly been asked about what the numbers were on the venire, I just point out that this circuit in Holloway specifically said that while -- although the number of blacks in a

venire, and I will quote this circuit, "further supports the prima facie case showing. It is by no means necessary to establish a prima facie showing under Batson, given other evidence in the record."

And that's our position. Given the other evidence showing a suggestion of discrimination in the record, even if the entire record of the venire --

THE COURT: In Holloway you had, the strike ratio was 11 out of 12, which is pretty high.

MS. SWARNS: Yes. Yes, it is. Yes. But in this case it is not just the strike rate, it is the strike rate --

THE COURT: I know. But there was other evidence in Holloway too.

MS. SWARNS: Yes. And in this case there's also a substantial amount of evidence, there's the fact already pointed out by this court that Mr. Abu-Jamal was of course an African-American defendant charged with killing a white victim.

This court has credited that as a factor going to the prima facie case in both

Simmons vs. Beyer and Clemmons.

This is not only a case where it was just an African-American defendant. As counsel for Abu-Jamal has noted, this is an African-American defendant with affiliations to the Black Panther Party and the MOVE organization.

This was a decedent who was a police officer, an African-American man then was charged with the killing of a police officer. And in Holloway again this circuit said that that was a factor that's relevant to a prima facie case determination.

And I would add that the McMahon tape, which I will also talk about in detail shortly, indicated, Mr. McMahon in that training tape indicated that that was a reason to strike African-Americans. And in that training tape he also said that the lessons that he learned and the lessons that he was teaching that day on that tape were things that he had learned from other prosecutors in that office. It was information that he was, that was passed on to him, the wisdom of the ages through the Philadelphia District Attorney's Office. So it is our position that that

is relevant.

There is evidence discussed by counsel for Mr. Abu-Jamal about the trial prosecutor's questions and statements.

First of all, counsel for the Commonwealth says well, the trial prosecutor said he wanted to get as much black representation as he could. Of course under Batson that statement has no constitutional relevance, and I quote them. "A prosecutor cannot rebut a defendant's case by merely affirming -- by denying that he has discriminatory motive or affirming his good faith in making individual selections. If these general assertions are accepted as rebutting a defendant's prima facie case, the Equal Protection Clause would be but a vain and illusory requirement."

So we can set aside the statement made by the trial prosecutor that he was not discriminating, because it just doesn't have constitutional relevance.

So when we put that aside and we're left with the statement of the trial prosecutor that the reason he accepted a particular black juror was because she hated Mr. Abu-Jamal.

So the suggestion that this African-American, an African-American juror had to hate Mr. Abu-Jamal to be accepted goes to the prima facie case of discrimination.

This was a trial that occurred in 1981 -- 1982. I'm sorry. And we know that the Supreme Court in Batson itself noted, in the years before Batson, which of course is a 1986 decision, that the discriminatory use of peremptory challenges was, and I will quote them, "widespread and common."

So this was going on, this trial was going on at a time when the Supreme Court noted that the discriminatory use of peremptory challenges was both widespread and common.

THE COURT: At the 1995 PCRA hearing, was that type of evidence brought forward?

MS. SWARNS: During the evidentiary proceedings?

THE COURT: Yes.

MS. SWARNS: I think the only things that were presented during the evidentiary proceedings was the stipulation as to the two additional jurors.

But the question that this court has to decide is whether or not the Pennsylvania --

THE COURT: Wouldn't that have been the time to really get into that, that there was -- obviously you didn't know in '95 about the McMahon tape I don't believe at the time. Is that correct? It was done in '87 but you didn't know about it until '97. Is that right?

MS. SWARNS: That's correct. That was when the Philadelphia District Attorney's Office released it.

THE COURT: But there was a suspicion, at the very least, that something was going on at that time of '82, '83, et cetera. Why wasn't there an attempt to try to develop that in '95 at the PCRA evidentiary hearing?

MS. SWARNS: Well, counsel had on direct appeal, of course, already presented and argued that the record established, the record before the court established --

THE COURT: What about as to other juries that were picked for Philadelphia capital cases?

MS. SWARNS: You mean in terms of --

well, I mean that information, certainly the Supreme Court's decision in Batson, and -- which I was going to move on to, of course, the Pennsylvania Supreme Court decisions, indicating that prosecutors in and around this time, Philadelphia prosecutors routinely struck African-Americans. That's part --

THE COURT: I guess what I'm leading to, was there anything equivalent or any attempt to get something equivalent to what became, was later put out in the Baldus-Woodworth study in 2000?

MS. SWARNS: By counsel at the time of the PCRA proceedings, no, they did not do a Baldus-type evidentiary presentation. No, they did not.

However, notwithstanding that fact, again, like I said, we know that the Supreme Court and the Pennsylvania Supreme Court -- United States Supreme Court and the Pennsylvania Supreme Court have noted that this is a time when discrimination against African-Americans in jury selection was going on, unquestionably.

I just want to quickly run through, I know I'm running out of time.

And I want to also remember to

address, counsel discussed, counsel for the Commonwealth discussed the fact that Mr., the trial counsel, Mr. Jackson, had, before the start of jury selection, raised a concern about systematic exclusion of African-Americans from juries.

That was his experience. And that, of course, by the way, is another factor that we argue supports the prima facie case.

THE COURT: That was the theme of the March 18 hearing.

MS. SWARNS: Absolutely. Now, counsel for the Commonwealth argues well, the fact that he raised it before trial and then never reraised it again shows that there was actually no discrimination going on during the time of the voir dire proceedings.

Clearly that's not the case. At the time that this trial was going on under Pennsylvania law trial prosecutors were authorized to use peremptory challenges against African-Americans. Point one.

Point two, Swain, the United States Supreme Court decision in Swain said you can challenge, you know peremptory challenges against

African-Americans, but the only time you can state a case under Swain is when it's essentially total systematic exclusion across a number of cases. Here we had a situation where --

THE COURT: That's why I asked the question. Even after Batson, and was way beyond having been decided nine years later, '95, why wasn't there the attempt to show that there was a pattern across the board, systematic?

MS. SWARNS: Well, in this case we know that the trial prosecutor accepted jurors, there were seated jurors in this case. That would deny any option to make a constitutional claim under the law at that time.

THE COURT: Of Swain.

MS. SWARNS: Yes.

THE COURT: But you then had Batson.

MS. SWARNS: Yes, we then had Batson. And under Batson we didn't --

THE COURT: And all you wanted to try to show is, adding on, is that there is a systematic exclusion of blacks in capital cases in the Philadelphia area.

MS. SWARNS: Yes. This is both A --

it certainly wasn't the burden, it is not, it was not and it is not the burden, Mr. Abu-Jamal's burden under Batson to show total systemic exclusion. If it exists, is it something as a factor that he can and should consider and argue?

THE COURT: Swain's no longer the law but --

MS. SWARNS: Absolutely.

THE COURT: But wouldn't it have helped?

MS. SWARNS: Absolutely. I mean, you know, the more exclusion that could be demonstrated the better.

However, again, I haven't even been through the list that I, you know, the 13 points that I think Mr. Abu-Jamal has presented to this court.

What he had was a wealth of evidence demonstrating that there was a reason to believe that discrimination may have been at work.

Would totals, would evidence of total systemic exclusion have bolstered that case, you know, exponentially? Certainly.

Did the evidence that he already had

and was already in front of the state courts also do that? Yes, he had already established the evidence that was before the Pennsylvania Supreme Court. And on direct appeal and certainly in state post conviction -- I see my time is up -- clearly established a prima facie case of discrimination.

Just quickly, the McMahon tape was, is and was in the record. There was a remand motion. It was presented to the Pennsylvania Supreme Court by counsel for Mr. Abu-Jamal. They asked that the Pennsylvania Supreme Court remand the matter to the PCRA court for a hearing on the McMahon tape.

They did the same with respect to the Baldus study. The Commonwealth on both, in both instances argued in opposition to those motions, suggesting that the evidence in both instances was irrelevant. And the Pennsylvania Supreme Court ultimately did not accept the information into the record.

So the state courts had the opportunity that the federal courts are required to give them to review and have the opportunity to pass on the evidence. So both the McMahon tape and the Baldus study are squarely and properly before

this court.

Thank you.

THE COURT: Ms. Swarns, thank you very much. Mr. Burns.

MR. BURNS: Your Honors, a number of points to make. I'll try not to repeat myself.

All the arguments that we've been hearing go to step one. So it's not true that all of the facts and circumstances can't be considered with respect to step one. Of course they can.

The point, of course, is that facts and circumstances that tend to undercut or contradict a prima facie case are also relevant and need to be weighed by the state court. And the state court can be reasonable in weighing those factors and deciding that a prima facie case is not established.

THE COURT: What would those factors be?

MR. BURNS: Well, the fact that Mr. McGill said that he wanted black people on the jury; the fact that there was never any accusation during voir dire that Mr. McGill was discriminating; the fact that Mr. McGill accepted

at least four black people that we know of to be on the jury.

THE COURT: Let's just do them one at a time. Are they relevant factors for us to consider or irrelevant factors?

I mean it seems to me, for example, the fact that the defense strikes blacks we know from Brinson is an irrelevant factor.

The fact that the prosecutor did not use all of his strikes on blacks we know from Brinson is an irrelevant factor. We also know it from Holloway. The fact that --

MR. BURNS: Can I --

THE COURT: -- a jury can be nine to three we know is irrelevant. So why are you bringing them up now?

MR. BURNS: I disagree with the characterization of Brinson about irrelevance.

In Brinson the fact that there were, 91 percent of the strikes were used against black people and the prosecutor essentially admitted there was a pattern of strikes outweighed other considerations, to the extent that they were present.

So Brinson doesn't say that these things are irrelevant. They said that under the facts of that case they really didn't predominate, they weren't entitled to very much weight.

THE COURT: A quote from Brinson is, "A prosecutor may violate Batson even if the prosecutor passes up the opportunity to strike some African-American jurors."

MR. BURNS: That's entirely true. But then that's a statement that refers to the end of the process. In Holloway itself this court listed --

THE COURT: What do you mean by that, "the end of the process"?

MR. BURNS: After the burden has shifted. It's not really helpful to the prosecution to say well, the burden has shifted to me, I can't rebut the prima facie case, but I did, you know, allow black people on the jury and so that should count in my favor.

At that point the Batson process would not result in a good outcome for the prosecution because at that point it would be too late. The burden-shifting effect would have taken place

already.

Here we're at a point at the beginning of the process, we're in step one, we're asking whether or not there was established a prima facie case of discrimination, or more accurately --

THE COURT: I thought you started off, you're dealing just with step one, right?

MR. BURNS: Sure. That's the whole point. All of these factors are entitled to be weighed by the state court.

In Holloway itself the court listed five factors that should be considered in determining whether or not there was a prima facie case.

The first one of these is the number of racial group members in the panel, it's something that was never established in this case.

In the Chinchilla case the court held, this was the Ninth Circuit, that accepting minority members to be on the jury is something that undercuts a prima facie case. And these are the kind of factors that we have in this case.

We have -- it was referenced, the statement by the prosecutor that he wanted black

people on the jury, it was argued, is constitutionally irrelevant. That is really an incorrect statement of the law.

In this case there was no accusation that the prosecutor had to try to rebut. No one, at the time he said this, had accused him of racial discrimination.

And so this isn't an instance in which there's been a prima facie case established and the burden has shifted to the prosecution and then the prosecution simply says, as referred to in Batson, well, I had no racial discrimination motives. I can make that general assertion. That's not enough.

THE COURT: And that's why Batson is a three-step analysis.

MR. BURNS: Exactly. But when we're at the first step --

THE COURT: We're still hung up on step one because we never got past there because that's what the district court said Mr. Abu-Jamal did not meet.

MR. BURNS: Exactly.

THE COURT: But the point is --

THE COURT: It's still a self-serving statement though.

MR. BURNS: Well, is it a self-serving statement when there's been no objection and there's been no assertion by the defense, despite every opportunity, despite the claim now that it was apparent on its face that people were being struck because of their race, but the defense doesn't say so.

Reference was made to the March 18 proceeding in which Mr. Jackson referred to this supposed tendency to strike black people. It really proves the opposite of what is being argued, because even though we know from this statement that Mr. Jackson was on the lookout for any substance that he could use to show that there was any kind of racial discrimination, he never actually made any kind of objection, any kind of accusation against the prosecutor.

Now, I disagree with counsel's characterization of Pennsylvania --

THE COURT: What he's saying is this case is so charged that I have a concern that there may be a discrimination against particular jurors

who are black. Isn't that correct?

MR. BURNS: No. I think he simply said that he wanted black people on the jury and --

THE COURT: But he also didn't want qualified black people excluded from the jury.

MR. BURNS: I think that's a valid statement under any circumstances.

THE COURT: So it's really saying the same thing. But he had a concern that there could be a problem and he wanted to be able to do a survey. Correct?

MR. BURNS: It's true that Mr. Jackson wanted to have a survey, but it was never alleged that the purpose of the survey was to prevent or defeat any effort by the prosecution to strike black people because of their race. That was never argued by the defense in his effort to have the questionnaire used. It's simply removed from the whole Batson question.

As I was saying, the March 18th statement by the defense actually proves the opposite of what the defense argues now because, as is argued in the brief repeatedly, it's been said that the defense at the time of the voir dire, was

unable to make an objection because Batson didn't exist yet.

But Swain did. Swain would have been enough under the cases we rely on from other circuits, talking about the timely objection rule.

But according to the briefs filed by Abu-Jamal, there supposedly were very good grounds for making a Swain objection. Yet not even a Swain objection was raised.

It was never alleged at any point during the voir dire that any kind of racial discrimination was taking place in this case.

Now -- oh, by the way, the --

THE COURT: Just as to the March 18 hearing. Mr. Jackson says, "We, as your Honor --" let's see if this is Mr. Jackson. It is Mr. Jackson.

"We, as your Honor well knows, we have 20 peremptory challenges in a criminal case. 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 as I have been practicing law, as well as the experience of the defense bar, the

majority of the defense bar, that that occurs."

He is bringing it front and center.

MR. BURNS: He's not making a Swain objection for two reasons. First, he's making this statement three months before the trial begins, and he has nothing to respond with in terms of a factual basis for the assertion when the judge asks him for one. And --

THE COURT: But he is concerned that persons who otherwise might be qualified will be excluded peremptorily simply because they are of a particular race.

MR. BURNS: But he never actually claims that actually is happening in the voir dire of this case. He never claims that any of the strikes that the prosecutor actually used, in actual jury selection in this actual trial, constituted discrimination against --

THE COURT: His affidavit that he submitted much later I think does make that claim, doesn't it? Didn't he make an affidavit at the PCRA evidentiary hearing, Mr. Jackson?

MR. BURNS: Yes. And he also testified at the evidentiary hearing. But his

testimony was found to be incredible. Judge Yohn notes in his opinion that that finding was never challenged by the petitioner.

And so the fact that he may have after the fact said something in an affidavit that was attached to a brief on appeal which, by the way, doesn't constitute a record for purposes of review in the state court, really has no meaning.

The things that are referred to as add-ons, as alleged evidence of a supposed culture of discrimination, things like the McMahon tape, these continue not to be of the record.

Judge Yohn excluded the McMahon tape and the Baldus study. He made those exclusions and those rulings were never challenged. And they're not challenged on appeal.

Reference has been made to supposed statements of Mr. McGill in terms of explaining the strikes.

Mr. McGill never gave any reasons. It would never reach the point at any time for him to be able to state them.

It's been argued repeatedly by the defense -- pardon me, by Mr. Abu-Jamal, that it was

not his burden in the state PCR --

THE COURT: The footnote that came in to Judge Yohn's opinion which said that for the ten black jurors who were peremptorily challenged that these were the reasons that would have been given by Mr. McGill, how did Judge Yohn know about that?

MR. BURNS: There was a footnote in the state direct appeal opinion which referred to reasons that the state court believed were apparent on the face of the record for the strikes.

These were not reasons that were given by Mr. McGill at any time.

THE COURT: Right. Right. They were not in the record. I didn't know how they got --

MR. BURNS: It was something that the state Supreme Court said were apparent reasons, not reasons being given by the prosecutor in explanation.

So the prosecutor gave no explanation. On the important question of whose burden it was though at the 1995 PCRA evidentiary proceeding, Judge Yohn cited Johnson v. Love as authority for the proposition that it was, yes, the petitioner's burden at all times to produce evidence to support

his claim. And that would certainly include evidence pertaining to the latter steps of Batson, even though no prima facie case had been found.

The reason for this, at the time of the PCRA proceeding there had been no ruling by the PCRA court that there was or was not a prima facie case. The question was open.

There was no restriction on the evidence that the petitioner was entitled to present.

Reference has been made to the composition of the venire. And I want to finish the quote of the United States vs. Esparsen, the Tenth Circuit, which said by itself the number of challenges against members of particular races is insufficient to establish a prima facie case.

The quote concludes, "The number takes on meaning only in the context of other information, such as the racial composition of the venire," and it has been pointed out repeatedly the racial composition of the venire is not something that we have here.

THE COURT: We mention that in Clemmons.

MR. BURNS: And in Clemmons.

THE COURT: But in some of the subsequent cases we have not mentioned it or we haven't relied on it.

MR. BURNS: You did recently in the five-factor analysis for the presence or absence of a prima facie case in Holloway, the very first factor is the number of racial group members in the venire. So that continues to be a valid consideration.

THE COURT: But aren't those -- those are exemplars, aren't they? Those are some of the things you can look at in order to try to deal with the third step of the prima facie test.

MR. BURNS: Yes. Right.

THE COURT: And as I said, other cases have added others, such as Riley v. Taylor adding the fact that you can look at a pattern in other cases.

MR. BURNS: Well, the point is that all the facts and circumstances are open to consideration with respect to the first step.

THE COURT: My understanding is at least some of the circuits have insisted that the

exclusion ratio be established at the prima facie stage and not at a later stage. Am I correct in that?

MR. BURNS: I think it's certainly something that you need to establish. But the question is whether or not that's sufficient in and of itself. And I think the cases agree that it's not sufficient all by itself, except perhaps in a case like Brinson where there's a 91 percent level, which is not reached here.

THE COURT: Yes. By exclusion factor I mean the comparison between the strike ratio and the percentage of minorities in the venire.

MR. BURNS: The part of the record where Mr. Jackson goes on radio and says that blacks aren't on the jury because they're against capital punishment, that's at June 15, 1982, page 59. That is in the record.

THE COURT: You keep coming back to the numbers, 91 percent. Let's go back to Hardcastle. Maybe I'm finally getting the arithmetic right.

There were 20 perempts, 12 of them were used against blacks, is that correct, and

eight against whites, is that -- or 12 of the 20 perempts were used for black persons.

MR. BURNS: I believe it was 12 and like one or two.

THE COURT: And then, as I understand it, there were only 14 available blacks. So that explains the 12 and 14 and the 12 and 20.

MR. BURNS: Well, in this case we don't know how many were available.

THE COURT: That's right.

MR. BURNS: Yes.

THE COURT: What we do know is that ten of 15, which is 66 percent, which is greater than 12 of 20, correct?

MR. BURNS: Right.

THE COURT: I mean I'm trying to deal with the math that we do know.

MR. BURNS: Well, here it would be ten of 20, comparing the number used as compared to the number available.

THE COURT: Well, you never used five.

MR. BURNS: Right.

THE COURT: But I thought, in Hardcastle weren't all 20 used?

MR. BURNS: My recollection is that on -- well, I frankly don't remember.

THE COURT: My recollection is 12 out of 14.

MR. BURNS: Yes, that's what I thought.

THE COURT: Twelve out of 14 available, of 14 available. It's a different math calculation that I think Ms. Swarns explained. There were 14 available and 12 of those 14 were peremptory challenged by the prosecution.

We don't know how many were available here. We just know of the perempts that could be used, ten of 15 that were used were used against blacks.

MR. BURNS: Right.

THE COURT: And in Hardcastle I think --

MR. BURNS: But when you go to Hardcastle you're comparing the number of strikes available to the number used. And the number strikes available here was --

THE COURT: That's the only number we know.

MR. BURNS: But the number of strikes available in this case was 20, not 15. He used 15. He had 20 available. He had five unused.

THE COURT: In the question of Hardcastle, did they use all 20? I'm not sure of that, but I had the impression they did.

MR. BURNS: Yes. When they talk in Hardcastle about 12 of 13 or 12 of 14, they mean of the number used, not of the number that was available.

And the reason the number of black people to be struck is of consideration is because we don't know whether the number of strikes used is high or low compared with the number of people who were available in the venire to be struck.

I want to get back just for a moment to Ford vs. Georgia. In that case it was conceded by the state that there was a timely objection with respect to Batson.

The Supreme Court of the United States has never ruled on a Batson question on which there had not been a timely objection. And Ford doesn't stand for the --

THE COURT: As I said, in Riley and

Wilson we did.

MR. BURNS: Because you found that the state procedural default was defective. This is not an issue of --

THE COURT: In Wilson as well in Riley?

MR. BURNS: Yes. But this is not a question of state procedural default, which was also the case of Ford vs. Georgia. The court held that the state procedural rule was inadequate in a case where there was otherwise a timely objection under Batson.

And finally to conclude --

THE COURT: It was not a waiver.

MR. BURNS: Correct. Again the issue before the district court was not whether or not a prima facie case had been established. The issue before the district court was whether or not the state court was reasonable in applying Batson in the manner that it did on this record and restricting the claim to this record. And Judge Yohn was correct in that ruling.

Thank you, your Honors.

THE COURT: Mr. Burns, thank you very

much.

Mr. Bryan.

MR. BRYAN: I wanted to be sure it was okay to come back up. I will be very brief.

Judge Ambro quoted Anthony Jackson, the defense attorney, in which he referred to, there was something right at the end that I wanted to add, is my point. “It's always been the custom and tradition of district attorney's office to exclude black people.” And when he added these words, "They always do. They always do."

I have somewhat of a rhetorical question. Also the Baldus study rejected, my recall, by the lower court it was '83 to '93 and this was an '82 trial. So suddenly I guess we're supposed to believe things changed in '83 from '82.

It seems like we have bookends here. We have case, after case, after case in which race was used in jury selection. We are talking about again step one, Wilson v. Beard, Brinson, Hardcastle, Holloway, Jones v. Ryan, Harrison v. Ryan, Diggs v. Vaughn,

et cetera, et cetera, in which discrimination was at work by the district attorney's office during this period, which included the time of this trial in 1982.

And my question is: Are we to believe today that this highly charged case of a black defendant accused of killing a white police officer, with all of the other things we've mentioned, MOVE and the Black Panther Party, et cetera, et cetera, are we to believe that this is the exception to the rule of the cases during this period?

Of course things have changed in the district attorney's office. It's very different today. But we are talking about a different era, a different mind-set.

And it seems we have established that there is before this court evidence of a prima facie case that there seemed to be evidence indicating that discrimination was at work.

And I just submit that of all the cases that have come through the court system here, capital cases in Philadelphia, it is hard, logically, to conceive that this was the exception

and discrimination was not at work on jury selection.

With that I thank you, your Honors.

THE COURT: Mr. Bryan, thank you very much.

We thank all counsel for very helpful argument. The court will take this matter under advisement.

CERTIFICATION

I, JAMES DeCRESCENZO, a Registered Diplomate Reporter, Certified Realtime Reporter, Certified Shorthand Reporter of New Jersey, License Number XI 00807, and Notary Public, hereby certify that the foregoing is a true and accurate transcript.

I further certify that I am neither attorney nor counsel for, not related to nor employed by any of the parties to this action; and further, that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.

_____

James DeCrescenzo
Registered Diplomate Reporter
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