NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESSE BOND.,

Cross-Petitioner,

v.

JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections, WILLIAM S. STRICKMAN, Superintendent of the State Correctional Institution at Greene; and JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview,

Cross-Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

STUART LEV, ESQ.
MICHAEL WISEMAN, ESQ.
Assistant Federal Defenders
LEIGH M. SKIPPER, ESQ.
Chief Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Cross-Petitioner, Jesse Bond.

Dated: May 6, 2009
Philadelphia, Pennsylvania

QUESTIONS PRESENTED IN THIS CAPITAL CASE

1. Did the Court of Appeals err in holding that the trial court made a proper finding of no discriminatory intent under Step 3 of the Batson v. Kentucky, 476 U.S. 79 (1986) standard where the trial court interrupted defense counsel's efforts to show that the reasons provided by a prosecutor for his peremptory strike were pretextual, as the prosecutor had not applied the same reasoning to similarly situated white jurors he had accepted, and told defense counsel,"I'm not going to try to get into [the prosecutor'] mind, and I don't think it's appropriate really for you to"?

2. Whether this Court should grant certiorari to resolve the conflicts between the Circuit Courts of Appeals as to what constitutes a proper Step 3 finding under Batson, and whether trial counsel must be given the opportunity to contest a prosecutor's reasons as pretext; and whether this Court should provide its guidance to the lower court on the minimum requirements of a Step 3 finding.?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

Cross-Petitioner, Jesse Bond, prays that, in the event this Court grants Cross-Respondents ("the Commonwealth") Petition for Writ of Certiorari (filed April 6, 2009), this Court will also issue its writ of certiorari to review that portion of the decision of the United States Court of Appeals for the Third Circuit, which affirmed the District Court's denial of guilt phase relief.[1]

OPINIONS BELOW

The Third Circuit panel decision is Bond v. Beard, 539 F.3d 236 (3d Cir. 2008). The Circuit's denials of the parties' cross petitions for rehearing were issued in unpublished Orders. The District Court decision is reported. Bond v. Beard, 2006 WL 1117862 (E.D. Pa. April 24, 2006). These decisions are reproduced in the Commonwealth's Appendix.

The relevant state court decision for purposes of this Cross-Petition is the decision of the Pennsylvania Supreme Court affirming Mr. Bond's conviction and death sentence on direct appeal. Commonwealth v. Bond, 652 A.2d 308 (Pa. 1995). A copy of that opinion is attached as Appendix 1.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). This Conditional Cross-Petition is timely under Rule 12.5 of this Court's rules as it is filed within 30 days of the Commonwealth's filing of a Petition for Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury . . . ."

---

[1] All emphasis herein is supplied unless otherwise indicated. Relevant parts of the state court record were included in an Appendix filed in the Third Circuit under that Circuit's rules, and are cited herein as "A" followed by the page number.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

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

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

STATEMENT OF THE CASE

Facts Relevant to the Batson Questions

Trial. Jesse Bond is African-American. During *voir dire* at Bond's trial, the Assistant District Attorney, John Doyle, first struck two African-Americans. He then struck three white jurors consecutively. His sixth strike was against Kimberly Clark, an African-American woman. A-201-05. He next struck Lottie Richardson, another African-American woman. A-206-11.

The trial court noted that with the strike of Richardson, Doyle struck four of the five African-American veniremembers that he had the opportunity to strike. A - 218-19. Shortly thereafter, Doyle complained about defense counsel's strikes of white venirepersons, and asked the court to find that defense counsel were discriminatorily excluding them from the jury. The court responded: "Quite the contrary. I am concerned about the Commonwealth's actions here, not about the defense." Id. The court then noted that Doyle had been consistently accepting

white jurors until he suddenly struck three in a row, and explained that "it seems to me to be leading up to this kind of statement." Id. The court chastised Doyle, expressing doubt about his motives in striking these three white jurors and then raising the issue of defense counsels' strikes. A - 241-46.

Doyle's eighth strike was of another African-American woman, Geraldine McClendon. A - 234-39. With the strike of McClendon, Bond's counsel asked that the court find a *prima facie* case of discrimination. A - 239. The court responded by finding that Doyle struck five of the six African-Americans he had the opportunity to challenge; accepted 15 of 18 white jurors; and that five whites and one African-American were seated. A - 240.

Accordingly, the court required Doyle to justify his strikes of McClendon and Clark. A - 248. Doyle offered that Clark "did not seem very enthusiastic about the proceedings and merely did not want to be here. . . . I did not like the way she came off to me. That was the reason I struck her." Doyle also compared Clark to "two of the white jurors [he] struck," without identifying them. He said that McClendon had equivocated about the death penalty when she said she could impose it "if necessary." He said "something in the vibes" made him think she could not "pull the trigger." A - 248-49. The court declined to find a *prima facie* case. A - 251-52.

Doyle's ninth and tenth strikes were also against African-American women; his eleventh was against a Latino woman. A - 303-11; 317-23; 367-74. Doyle's twelfth and thirteenth strikes were against African-American men. A - 375-83; 385-93.

Doyle used his fourteenth strike against Nicole Gilyard, an African-American woman. Doyle asked Gilyard many questions (unlike his questioning of white jurors), eliciting that: she

was attending college, her sister had been robbed on the street a year before, and someone she knew "that just lived in my neighborhood" had recently been accused of a robbery. A - 393-96. When asked if this was a boyfriend, Gilyard responded, "No. Someone that just lives in my neighborhood." A - 396. The only follow-up question Doyle asked was whether or not she "ha[d] any bad blood toward the authorities" because of the way the case was handled, to which Gilyard responded "No." Id.. Gilyard told Doyle, without hesitation, that she could impose a death sentence. Id.

When Doyle struck Gilyard, defense counsel again requested that the court find that Doyle was discriminating. A - 398. The court then noted that Doyle had struck 9 of the 13 African-Americans he had the chance to strike; accepted four;[2] and accepted 17 of the 20 white jurors he had the chance to strike. A - 400. The court required Doyle to justify his last three strikes. Doyle explained that he struck one African-American juror, his 12th strike, because of his answer regarding his inability to impose the death penalty. A - 402. Doyle then explained that William Williams, his 13th strike, had been ideal, and that he had been prepared to accept Williams until he gave him a surprise answer that raised doubts about his ability to impose the death penalty. A - 402, 404. Doyle then stated that he was "very concerned" about Gilyard's "close relationship" with someone who had been accused of robbery. A - 403.[3]

---

[2]Three of these four African-Americans were seated – one having been rejected by defense counsel.

[3]Doyle did accept a white juror, Thomas Dunst, who had a co-worker whom he described as being a "pretty close" friend (A-359), who had recently been tried on manslaughter charges involving a shooting. A-355. Dunst even testified as a character witness on his behalf just a week prior. A-355, 359. Also, Doyle accepted another white venireperson, Mary Wetzel, who had a nephew she reported seeing "all the time" who, at the time of voir dire, was on house arrest for stealing a car. A-118.

Defense counsel tried to challenge the legitimacy of Doyle's explanation of his strike of Mr. Williams, stating that Doyle had accepted a white juror (number 11) who made a similar response. A - 404. Counsel argued:

> And I would submit to the Court that that factor alone, if that was a reason for striking Mr. Williams, should have also come into play when accepting Number 11. And so the same reasons that the Commonwealth is using to strike people he seems to avoid when it's a white potential juror... .

A-405

The trial court cut off any further challenges or argument, telling counsel, "*I'm not going to try to get into Mr. Doyle's mind, and I don't think it's appropriate really for you to*. What I need from him is some objective statement that's racially neutral. Now, and I'm satisfied that he has given it at this juncture." A - 405. Although it now found a *prima facie* case of the Commonwealth striking jurors because of race, the court took no further action. A - 405-09.

Doyle's fifteenth and final strike was against another African-American woman. Joyce Hinton had worked for the last nine years in a nursing home as a nurse's assistant. Her father had been a Philadelphia police officer. A - 420-23. After eliciting that she could impose the death penalty, Doyle asked again, "Are you sure?" (another question asked to many of the African-American, but not the white, jurors). The court sustained defense counsel's objection to this repetitive question, and asked Hinton if she was able to consider the alternatives and "in a proper circumstance find the death penalty." Hinton responded affirmatively and without hesitation. A - 424-25.

Bond's counsel renewed his objection to Doyle's strikes. Having already found a *prima facie* case of racial discrimination, the court gave Doyle the opportunity to explain his final

strike. In response, Doyle stated: "Judge, I was all set to accept this juror, except I asked the witness [sic] when she hesitated, clearly hesitated about the death penalty." The court expressly rejected this explanation, stating: "she didn't hesitate one bit in this court's opinion." A - 426. Doyle then changed his reason and told the court he really struck her because he did not like her attitude, that she "resented" him for asking if she was sure she could impose death. The court accepted Doyle's second answer as race-neutral, without any further analysis or action. A - 426-29.[4]

Post trial. In its post-trial opinion, the trial court revisited the Batson issue, and held that in the first Batson challenge, Petitioner did establish a *prima facie* case that the Commonwealth was using its peremptory challenges to remove black jurors; that the court found the Commonwealth's explanations for striking three black jurors were racially neutral and permitted the three strikes. At the second Batson challenge, the prosecutor explained his strike and the court found this reason to be racially neutral. The court then stated that "[r]eviewing the totality of the circumstances[,] there is no showing of intentional discrimination by the prosecutor in the jury selection process and defendants are not entitled to a new trial on that basis." See Bond v. Beard, 539 F.3d at 267.

---

[4]In the end, Doyle struck African-Americans at a highly disproportionate rate. He used 11 of 15 (73.3%) of his peremptory strikes to eliminate African-Americans. Conversely, he struck only 4 of 24 (16.6%) non-African-American prospective jurors he had the opportunity to challenge. While Doyle accepted 4 of 15 (26.6%) African-Americans, he accepted 20 of 24 (83.3%) non-African-American venire members. African-American women were struck at the most disproportionate rate (8 of 10, or 80%), with African-American men close behind (3 of 5, or 60%). Doyle's strike rate alone is strongly indicative of purposeful discrimination. See Miller-El v. Cockrell, 537 U.S. 322, 348 (2003) ("Miller-El-1") ("happenstance is unlikely to produce this disparity," and consequently, statistical disparity such as this "alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors").

Direct Appeal. Petitioner raised a Batson claim on direct appeal. The Pennsylvania Supreme Court said that the trial court "accepted the explanations as legitimate and race-neutral," and ruled that "[b]ased upon our review of the record we find no reason to disturb the findings of the trial court as to the legitimacy of the race-neutral responses offered in this case." Commonwealth v. Bond, 652 A.2d at 313.

Third Circuit Rulings. The Third Circuit held that the state courts repeatedly failed to identify the three steps of Batson analysis, which gave "serious cause for concern that the state courts did not reach the third step of the Batson analysis." The court further stated:

> Most troubling, the trial court suggested that it was 'not going to try and get into [the prosecutor's] mind' and suggested that it only needed 'some objective statement that's racially neutral.' This seems to indicate that the trial court believed it could stop after the prosecutor satisfied the second step of the Batson analysis by stating a race-neutral explanation for a strike. The *voir dire* transcript never explicitly clarifies whether, in accepting explanations to be race-neutral, the trial court or the Pennsylvania Supreme Court believed that the prosecutor truly acted in a race-neutral fashion (satisfying step three of the Batson analysis), or merely that the stated explanations were race-neutral (at step two).

Bond v. Beard, 539 F.3d at 267.

However, the Third Circuit held that the trial court reached the third step of the Batson analysis in its order denying post-trial motions, because the trial court stated that the prosecutor made no showing of "intentional discrimination," indicating that Petitioner did not meet his burden of showing that purposeful racial discrimination motivated the prosecutor. Id. The Third Circuit also held that the Pennsylvania Supreme Court had addressed the Batson third step when it accepted the prosecutor's explanations as "legitimate and race neutral," and thus was entitled to review under 28 U.S.C. § 2254(d). Id. at 268.

Under that standard, the Third Circuit denied habeas relief. The Court recognized,

however, that there was evidence of discrimination throughout the record, and that it might have reached a different result under a different standard of review:

> Taken as a whole, the *voir dire* transcript raises legitimate concerns that the prosecutor struck black venirepersons disproportionately and gave pretextual reasons for doing so. We agree with the District Court's suggestion that reasonable minds could differ on the proper result of the third step of the Batson analysis with respect to the evidence before the state courts. That is not our inquiry, however. As discussed, we apply the deferential AEDPA standard. The possibility that we might have resolved this question differently had we sat as the trial court does not provide a basis for *habeas* relief under that standard.

Id. at 272.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THE MINIMUM REQUIREMENTS OF A STEP THREE BATSON RULING TO INSURE THAT THE COURTS OF APPEALS, WHICH HAVE TAKEN DIFFERING APPROACHES TO THIS QUESTION, DO NOT GIVE DEFERENCE TO A STATE COURT RULING WHERE THE TRIAL COURT DID NOT ALLOW THE DEFENSE TO CHALLENGE A PROSECUTOR'S REASONS FOR A STRIKE AND INDICATED THAT IT WOULD NOT TRY TO DETERMINE THE PROSECUTOR'S INTENT.

In Batson, this Court held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor from striking potential African-American jurors on account of their race, based on the assumption that such jurors will not impartially consider a case against an African-American defendant. In addition to violating the rights of the defendant and the struck juror, "the very integrity of the courts is jeopardized [because] a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication." Miller-El v. Dretke, 545 U.S. 231, 238 (2005) ("Miller-El-2"). The exclusion of even a single person from the jury on the basis of race violates the Equal Protection Clause and requires a new trial. See Batson, 476 U.S. at 89. Batson issues are analyzed under the now familiar three step

process:

> First, the trial court must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question…. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating "the persuasiveness of the justification" offered by the prosecutor, but "the ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike.

Rice v. Collins, 546 U.S. 333, 338 (2006) (citations omitted).

This Court further explained the nature of the Step 1 inquiry in Johnson v. California, 545 U.S. 162, 170 (2005) (petitioner need only produce evidence sufficient to permit the court to "draw an inference that discrimination has occurred"). In Purkett v. Elem, 514 U.S. 765, 768 (1995), this Court explained the limited nature of Step 2. This Court has not, however, had occasion to address the minimum requirements of a Step 3 determination; nor has this Court addressed whether the trial court *must provide the defense with a fair opportunity to contest the prosecutor's asserted reasons for a strike, and thus satisfy its burden of proof*?

Whether or not the trial judge made a proper Step 3 finding is a critical question – especially in habeas cases where it is determinative of the standard of review to be applied. The Court below recognized that:

> We first address the threshold question of whether to apply the deferential AEDPA standard of review. The Commonwealth would have us answer that question "yes." Bond disagrees and asks us to apply a *de novo* standard of review. Their dispute centers on whether the state courts reached the third part of the *Batson* analysis and resolved it on the merits. If the state courts performed a step-three analysis and made a finding about the prosecutor's intent, that finding is presumed correct, *see* 28 U.S.C. § 2254(e)(1), and Bond is entitled to relief only if (1) the state court decision was "contrary to," or involved an "unreasonable application" of, Supreme Court precedent, *id.* § 2254(d)(1); or (2) the finding was unreasonable in light of the record before the state court, *id.* § 2254(d)(2); or (3)

> Bond rebutted that finding with clear and convincing evidence in the District Court, *id.* § 2254(e)(1). Failure to make a step-three finding, on the other hand, would render the state court's decision either "contrary to" or an "unreasonable application" of *Batson, see, e.g., Hardcastle v. Horn,* 368 F.3d 246, 259 (3d Cir.2004), and we would not apply AEDPA deference. We would review the issue *de novo* with the exception that we would review relevant factual findings made by the District Court for clear error. *See Whitney v. Horn,* 280 F.3d 240, 249 (3d Cir.2002).

Bond v. Beard, 539 F.3d at 264. Indeed, this question is so critical that it will often determine the outcome of the case, as here, where both the District Court and the Court of Appeals indicated that they had serious concerns about the evidence of discrimination and that their result may have been different were it not for the application of a deferential standard of review. Id. at 272.

This Court has provided some understanding of the nature of the Step 3 finding. Courts must examine the persuasiveness of the justification of the Government's proffered race-neutral explanation. E.g., Miller-El v. Cockrell, 537 U.S. 322, 338-39 (2003) (Miller-El-1), citing Purkett v. Elem, 514 U.S. 765, 768 (1995). Here, the prosecutor's credibility is key:

> [T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

Miller-El-1, at 339. To evaluate credibility, therefore, the trial judge has a duty to evaluate the prosecutor's "state of mind." Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion); Snyder v. Louisiana, 128 S.Ct.1203, 1208 (2008). The court must determine persuasiveness in light of all relevant circumstances. Snyder v. Louisiana, 128 S.Ct. 1203, 1208 (2008); (Miller-El-2), citing Batson, 476 U.S. at 98

But, as the facts of Bond's case (as well as the conflicts in the lower courts discussed,

infra) show, this guidance has not been sufficient to insure a proper understanding and application of the Step 3 analysis. Here, at trial, the court explicitly refused to consider the defense efforts to challenge the proffered reasons for a strike by comparing the struck black jurors with accepted white jurors who possess similar characteristics.[5] The trial court told counsel, "I'm not going to try to get into Mr. Doyle's mind, and I don't think it's appropriate really for you to." A - 405. The court made plain that its only interest was whether the prosecutor provided "some objective statement that's racially neutral." Id. This is not a Step 3 finding.

Indeed, the Third Circuit appeared to recognize the flaws in the trial court's pronouncement at the time of the challenge. Nevertheless, the Court of Appeals held that the trial judge cured his error in his post-verdict opinion, when he wrote that there was no intentional discrimination. The problem here, however, is that the trial court had cut off defense counsel's efforts to challenge the prosecutor's reasoning. Thus, when the trial court reviewed the record post trial (and where the Pennsylvania Supreme Court relied on that post-trial review), it was without the benefit of defense counsel's argument and evidence to rebut the prosecutor's explanation. Such a critical lapse should not form the basis of a proper Step 3 finding entitled to habeas deference. See Jordan v. Lefevre, 206 F.3d 196, 199-201 (2d Cir. 2000) (when trial

[5]This Court has consistently used such a comparative analysis in its review of a state court's Step 3 finding. Miller-El-2 at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."); Snyder, 128 S.Ct. at 1211 (this Court measured the plausibility of the prosecutor's argument that he struck a black prospective juror because since the juror was a student teacher, he might be more likely to come back with a guilty of a lesser verdict so there wouldn't be a penalty phase and that he could be released earlier, against the fact that the prosecutor accepted white jurors who also disclosed similar conflicts "at least as serious as Mr. Brooks").

judge denied defense counsel from making a statement regarding the Batson challenge, the court found that because the record was incomplete, the trial judge could not have properly reached Batson's third step); Sims v. Berghuis, 494 F.Supp.2d 575, 580 (E.D. Mich. 2007) (when defense tried to respond to prosecutor's explanations, the trial court interrupted him and stated that the record had been made, the District Court held that the trial court omitted Batson's third step). Here, the Third Circuit's contrary ruling is in conflict with these courts.

The absence of definitive guidance from this Court on the Step 3 question has led the Courts of Appeals to take conflicting positions and reach contrary results. The Third Circuit (as exemplified here in Bond) and the Eighth Circuit hold that Batson's Step-3 is satisfied simply when the trial court rules on the issue; the trial court need not make any explicit findings regarding the validity of the prosecutor's reasons. In contrast, the Second, Sixth, and Ninth Circuits require the trial judge to make a specific finding on the record regarding the prosecutor's motivation.

The Eighth Circuit, although encouraging its courts to make on-the-record rulings articulating the reasoning underlying a determination on a Batson objection, does not require such rulings. See Smulls v. Roper, 535 F.3d 853, 860 (8th Cir. 2008) In Smulls, the petitioner argued that the trial court made no findings regarding the validity of the prosecutor's claimed race-neutral reasons for the strike. 535 F.3d at 860. However, the Eighth Circuit held that the trial court's final ruling on a Batson challenge is in itself a factual determination, and that the court had "repeatedly upheld rulings made without additional reasoning." Id. In fact, here the Eighth Circuit stated that federal law "has never required explicit fact-findings following a Batson challenge...," citing Miller-El-1, at 347. So, too, in U.S. XPress Enterprises v. J.B. Hunt

Transport, 320 F.3d 809, 814 (8th Cir. 2003) the Eighth Circuit held that the trial court did engage in a "full Batson analysis," where, in Step 3 specifically, the trial court heard from both counsel before making his determination, made no specific findings, and then simply ruled that the Plaintiff would not be allowed to strike the juror. Id.

In U.S. v. Jenkins, 52 F.3d 743, 747 (8th Cir. 1995), the Eighth Circuit likewise held there was no Batson Step-3 violation when the district court "complied with the spirit of Batson." There, the government stated in its opposition to the juror strike that some of the jurors' body language and facial expressions indicated disinterest. Id. at 745-6. Although the district court did note that attorneys are allowed to make judgments based on their observations of demeanor or body language and that the attorneys' versions of the situation could vary due to their differing interests, the court did not make specific findings about the jurors based on its own observations. The court then simply declared the explanations "race neutral, legitimate and reasonable." Id. The Eighth Circuit held that the district court had implicitly found there was a credible basis for the government's reasoning. Id. at 746. "No doubt the district court could have more precisely tailored its specific findings to the three step Batson analysis and drawn them out more explicitly... we conclude that the district court... made sufficient findings to cover each required element." Id. at 747.)

In contrast, in United States v. Hill, 146 F.3d 337 (6th Cir. 1998), the Sixth Circuit required the trial court do more than merely rule on the Batson objection. Instead, the Court required a weighing of the prosecutor's asserted justification against the strength of the defendant's *prima facie* case under the totality of the circumstances. Hill, 146 F.3d at 342. In that case, the trial court's "abrupt conclusion indicating the apparent view that the prosecutor's

asserted justification outweighed" the defendant's *prima facie* showing of discriminatory intent was held insufficient to satisfy the Batson Step 3. Id. The Sixth Circuit held that a trial court's mere holding would not meet this weighing requirement. Id.

The Second Circuit also requires that a trial court explain its grounds for ruling in favor of the prosecution, and is specifically concerned with the court addressing the prosecutor's credibility. E.g., Galarza v. Keane, 252 F.3d 630 (2d Cir. 2001) (trial court was vague in its statements in reply to the prosecutor's reasons for striking, and the Second Circuit therefore held that the trial court failed to adjudicate whether it credited these reasons before denying the challenges); Barnes v. Anderson, 202 F.3d 150, 156-57 (2d Cir. 1991) (when trial judge refused to "rule on credibility of attorneys," the Appeals court held that because the credibility of an attorney offering a race-neutral explanation is at the very heart of that analysis, the district court therefore erred, and remanded the case to the district court for a new trial). Just recently, in Dolphy v. Mantello, 552 F.3d 236, 239 (2d Cir. 2009),the Court required the trial court to explain its grounds for ruling in favor of the prosecution's race-neutral explanation. The Circuit held that the trial court's initial ruling accepting the prosecutor's explanation that the strike was based on the juror's overweight appearance was made without inquiry or finding, "as though the ground for making the strike was self–evident." Id. at 238. Instead, the Circuit demanded something more: "[b]ecause the trial court did not assess the credibility of the prosecution's explanation" there was no adjudication of the Petitioner's Batson claim on the merits, and the case was remanded for further proceedings. Id. at 239.

The Ninth Circuit has also held that Batson's Step 3 analysis requires that the trial court evaluate the prosecutor's credibility, which could entail: factoring in the court's own

observations; reviewing the record for pretextual reasons; comparatively analyzing the struck juror with those empaneled; and then evaluating the reasons together. E.g., Williams v. Rhoades, 354 F.3d 1101, 1108 (9th Cir. 2004); Lewis v. Lewis, 321 F.3d 824, 830-31 (9th Cir. 2003). In United States v. Alanis, 335 F.3d 965, 967 (9th Cir. 2003), the trial court denied defense counsel's Batson motion, stating that the government had given a plausible explanation grounded in something other than gender. The Ninth Circuit held that although it was not deciding what exact procedures a trial court must follow to comply with Batson's Step 3, the trial court's determination that the explanation was "plausible" was not sufficient: "at a minimum this procedure must include a clear record that they made a deliberate decision on the ultimate question of purposeful discrimination." Id. at 968, n. 2.

In this case, the Third Circuit's ruling gives deference to the decision of a judge who declined to permit the defendant from probing the prosecutor's intent stating it would not "get into the head" of the prosecutor. This ruling stands in sharp contrast to the decisions of the Second, Sixth, and Ninth Circuits. The Court should grant the writ to resolve this conflict between the Courts of Appeal on this important matter.

CONCLUSION

For all of the above reasons, Petitioner requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

Stuart Lev
Michael Wiseman
Federal Community Defender Office
for the Eastern District of Pennsylvania
Capital Habeas Corpus Unit
Suite 545 West–The Curtis Center
Philadelphia, PA 19106
215-928-0520

Counsel for Jesse Bond

Dated: Philadelphia, PA
May 6, 2009

Certificate of Service

I, Stuart Lev,, hereby certify that on this 6th day of May, 2009 I served a copy of the foregoing upon the following person by United States Mail, first class, postage prepaid:

Thomas Dolgenos, Esq.
Office of the Philadelphia District Attorney
Three South Penn Square
Philadelphia, PA 19107-3499

_____
Stuart Lev