No. 08-7465

In The Supreme Court of the United States

HERBERT SMULLS,

Petitioner,

v.

DON ROPER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of the National Association of Criminal Defense Lawyers. MACDL believes that excluding African-Americans from jury service brings disrepute to the criminal justice system and impairs the accused's right to a fair trial before an impartial and representative jury. These concerns are particularly weighty in St. Louis County, which far and away leads all Missouri jurisdictions in death sentences, and as to which lawyers as well as courts require further guidance in carrying out this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).[1]

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Counsel for both parties have consented to the filing of this brief. This brief was not authored in whole or part by counsel for any party. No person other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I. Introduction and Summary of Argument

Herbert Smulls faced the ultimate trial as an African-American defendant, before an all-white jury, in a suburban jurisdiction known for excluding jurors of his race, and before a judge who openly defied this Court's law aimed at detecting and remedying such exclusion ("no matter what any appellate court may say . . . "). (Pet. App. I at 54). Amicus submits this brief to show that the trial court's willful error was no empty or academic formality. A conscientious trial court would have disallowed the strike of Margaret Sidney had it properly examined all of the circumstances surrounding the State's purported reasons for the strike. This Court's precedents require nothing less, notwithstanding the short shrift given them by the trial judge and Eighth Circuit alike.

II. St. Louis County's ongoing history of excluding African-American jurors strengthens Petitioner's claim and additionally justifies this Court's intervention.

This Court has recognized the significance of local history in assessing a prosecutor's explanation that a particular juror was stricken for a particular reason. *Miller-El v. Dretke*, 545 U.S. 231, 263-66 (2005). *Miller-El II* relied upon historical evidence of the Dallas County prosecutor's policy of excluding African-American veniremembers, including an office manual. *Id.* The evidence "confirm[ed]" the court's

conclusion that disparate treatment of white and minority panelists was attributable to race. *Id.* at 263.

The County's history – Such "confirming" evidence is present in St. Louis County as well. The jurisdiction has seen no fewer than seven *Batson* reversals, including two in capital cases. *See State v. McFadden*, 216 S.W.3d 673 (Mo. 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. 2005); *State v. Hopkins*, 140 S.W.3d 143 (Mo. Ct. App. 2004); *State v. Holman*, 759 S.W.2d 902 (Mo. Ct. App. 1988); *State v. Robinson*, 753 S.W.2d 36 (Mo. Ct. App. 1988); *State v. Williams*, 746 S.W.2d 148 (Mo. Ct. App. 1988). These cases reveal seven separate incidents in which reviewing courts held, as a matter of law, that the prosecuting authorities in St. Louis County excluded African-American jurors because of their race. The fact of seven such adjudications is significant in a State so unaffected by *Batson*. *See Smulls v. State*, 71 S.W.3d 138, 159 (Mo. 2002) (Wolff, J., concurring) ("If *Batson* has any effect in this state, it is simply trial court law where even rumors of sustained *Batson* challenges are hard to come by.").

The County's seven *Batson* reversals are but the tip of a troubling iceberg, representing only those instances in which the State's tactics have been acknowledged and thwarted. The Missouri Supreme Court has recognized the County's systemic problem

of excluding black jurors, but without crafting a systemic or consistent remedy.[2] During oral argument in the second *McFadden* case in January 2007, members of the court made the following statements to the State's attorney:

> Judge: It's disappointing that there are no African Americans on the jury again in St. Louis County. Now that's troublesome.
>
> Judge: An awful lot of our *Batson* cases come from there.
>
> Judge: All of them recently.

(*State v. McFadden*, Missouri Supreme Court No. SC87753, Arg. Tr. at 47:08-47:21, available at <<http://supremecourt.missourinet.com/audio_live/index.cfm?id=10523>> (last visited Dec. 30, 2008))

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[2] In *State v. Edwards*, 116 S.W.3d 511 (Mo. 2003), for example, the court tried to limit the "postal worker" end-run around *Batson*, but with limited effect. The court held that prosecutors cannot overcome a charge of pretext by simply declaring that a juror is a "postal worker." *Id.* at 528. Yet, the court did not require a case-specific explanation of why postal workers would make bad jurors, as the prosecutors in *Edwards* and the present case failed to do. *Id.*; *cf. People v. Bennett*, 614 N.Y.S.2d 430, 432 (N.Y. App. Div. 1994) (holding that juror's employment must be related to the factual circumstances of the case); *People v. Sims*, 618 N.E.2d 1083, 1087 (Ill. App. Ct. 1992) (explanation that postal workers are "dishonest and have no respect for the law" disapproved by court because it "smacks of the kind of non-specific, subjective and racially suspect explanations which the Supreme Court hoped to obliterate via the *Batson* decision").

> Judge: [Y]our problem is that we have a fairly repetitive pattern, as Judge Limbaugh indicated, of having a problem with St. Louis County. Because St. Louis County is a county, it's the county where I reside, that has a substantial African American community and we are having, we are seeing still all white juries and that's not mathematically probable.

(*Id.* at 54:21-54:48). The point is not that each and every conviction from St. Louis County is constitutionally suspect. It is simply that the County's ongoing history helps to explain why the prosecutor excluded Juror Sidney.

St. Louis County's practice of excluding African-American jurors both predates and follows *Batson*. In 1990, attorneys representing since-executed inmate Maurice Byrd submitted seven affidavits from criminal defense lawyers who regularly practiced in St. Louis County. All stated that African-Americans were systematically and all but universally excluded by the prosecution's peremptory strikes, and several described the prosecutor's decades-long practice of such exclusion. Byrd's Eighth Circuit panel did not consider the affidavits on habeas review, but on en banc consideration, Judges Lay and Wollman believed they established "a *prima facie* due process violation under *Swain v. Alabama*, 380 U.S. 202, 222-24 (1965)." *Byrd v. Delo*, 942 F.2d 1226, 1233-34 (8th Cir. 1991) (statement of Lay, C.J., joined by Wollman, J.).

St. Louis County's history of excluding African-American veniremembers is no secret to the public. When former assistant prosecutor Rick Barry ran against Robert McCulloch in the 1990 Democratic primary, he campaigned on ending the St. Louis County Prosecutor's policy of peremptorily striking African-Americans from criminal cases. *See* Tim Poor, *Barry Stresses Minority Hiring*, ST. LOUIS POST DISPATCH, Jun. 29, 1990, at 8A, available at 1990 WLNR 460283. Barry said his more experienced colleagues in the prosecutor's office urged him to strike African-Americans from juries. *Id.* Additionally, in a 1971 hearing conducted on a motion for new trial in the case of *State v. Collor* (St. Louis County Cause No. 312753), two former St. Louis County prosecutors acknowledged their jurisdiction's practice of intentionally excluding black jurors. *See* Resp. Dist. Ct. Ex. T, at 96, and sources cited; *cf. Miller-El II*, 545 U.S. at 263 ("We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries[.]").

The prosecutor – County patterns aside, Juror Sidney was stricken by an adjudicated *Batson* violator: Dean Waldemer, who was also a prosecutor in *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006). *See* William C. Lhotka, *Murder Conviction Rejected, But Defendant is Expected to Face Execution in Another Killing*, ST. LOUIS POST-DISPATCH, May 17, 2006, at B5, available at 2006 WLNR 8502544. The prosecution's actions in the two cases are telling.

In *McFadden*, the prosecution claimed to strike a black juror because she worked as a public school teacher, among other reasons. The Missouri Supreme Court found the explanation to be a pretext for discrimination, and thus, rejected the prosecution's attempt to hide its race-conscious motives behind a juror's profession. *See* 191 S.W.3d at 653; *id.* at 657 n.27 (describing "the prosecutor's attempt to mask racially discriminatory peremptory challenges with absurd rationales"). That, of course, is exactly how the prosecutor excluded Juror Sidney. (Pet. App. I at 42, 52-53). Mr. Waldemer claimed to strike the allegedly mail-sorting Juror Sidney because of his more general concern about postal employees. (*Id.*). Faced with defense counsel's showing that Juror Sidney is a decorated managerial employee for a large private company and is neither a mail sorter nor a postal worker, the prosecutor nevertheless persisted, stating that people who work in a mail room are "at the bottom of the employment ladder . . . in terms of ambition, in terms of job challenge." (Pet. App. I at 50, 52-53).

Mr. Waldemer's explanation ought to raise suspicions. For one thing, a policy of striking postal workers "bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Blacks make up 19.6 percent of St. Louis County's population but roughly 50 percent of the postal employees in the St. Louis area. *See* Resp. Dist. Ct. Ex. Q, R, at 142-44; 702-07; Resp. Dist. Ct. Ex. T, at 43-44, 94, and sources cited; *see also* <<http://www.co.st-louis.mo.us/plan/demo/

stlouiscounty.pdf>> (last visited Dec. 23, 2008). When a race-neutral explanation creates racially disparate impacts, the trier may consider those disparities when deciding whether to believe the explanation. *Hernandez v. New York*, 500 U.S. 352, 363 (1991). The "postal worker" explanation may serve as a convenient and short-hand method for excluding black jurors. At the very least, a trial court faithfully applying *Batson* should have assessed whether the stated concern is genuine. One trial court in St. Louis County has held that it is not. *See* Resp. Dist. Ct. Ex. T, at 43, and sources cited (discussing trial court's 1992 finding in *State v. Anderson*, No. FCR-8905528, that the "postal worker" explanation was a pretext for race discrimination).

Perhaps more troubling is the stated concern that mail workers lack "ambition." That excuse bears no factual relationship to Juror Sidney, who enjoyed a long and successful career in management. *See Jones v. Ryan*, 987 F.2d 960, 974 (3d Cir. 1994) (holding that pretext may be found "where the venirepersons are challenged 'without regard to the particular circumstances of the trial or individual responses of the jurors' "), quoting *Hernandez*, 500 U.S. at 372. Moreover, it accords with the centuries-old and offensive stereotype that African-Americans are shiftless and lazy. *See* James D. Unnever et al., *Race, Racism and Support for Capital Punishment*, 37 CRIME & JUST. 45, 64-66 (2008); Jon Hanson et al., *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 435 (2006); Dorothy A.

Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 796 & sources cited at n.194 (2005). That stereotype has justified untold racial discrimination throughout our history, dating from slavery and persisting to the present day. Brown, *supra*, at 796; Hanson, *supra* at 435-40; Unnever, *supra*, at 64-65. It certainly does not *exonerate* the prosecutor's explanation, as held below. *See Smulls v. Roper*, 535 F.3d 853, 865 (8th Cir. 2008) (en banc) ("He also noted that she worked in the mail department, which he equated with postal service workers who he asserted generally lack ambition.").

Addressing the continuing doubt – The circumstances present a number of conflicting possibilities. It may be sheer coincidence that Mr. Waldemer believes postal employees, who are disproportionately black, embody a widely held stereotype about black people. It may be that Mr. Waldemer believed Juror Sidney to be lazy because she is black, or simply because her work involves supervising mail handlers. Or it may be that Mr. Waldemer believes that black jurors tend to oppose the death penalty – an impermissible and stereotyped basis for striking Juror Sidney without more specific evidence of her views. *See Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("We may not accept as a defense to racial discrimination the very stereotype the law condemns."). Despite these possibilities, the trial court refused even to concede that Juror Sidney was the only black venireperson, much less to employ *Batson* to determine why the

State struck her. As a result, there persist doubts as to why the State acted as it did. It is now too late for those doubts to be resolved, more than a decade after trial. *Smulls v. Roper*, 535 F.3d 853, 861 n.4 (8th Cir. 2008) (en banc), citing *Snyder v. Louisiana*, 128 S. Ct. 1203, 1212 (2008).

The Eighth Circuit's solution is to allow the State to benefit from the error intentionally created by its agent, by pretending the judge implicitly made the very findings he expressly refused to make. *See Smulls*, 535 F.3d at 861 ("Here, by denying the *Batson* challenge, the trial court implicitly found that the prosecution's proffered nondiscriminatory reasons were credible."). That solution not only allows the State to benefit from the willful error of its functionary; it is also squarely at odds with this Court's precedents. *Hernandez*, 500 U.S. at 359 ("[T]he trial court must determine whether the defendant has carried his burden of proving purposeful discrimination."); *Miller-El II*, 545 U.S. at 251-52 (stating that *Batson* "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it"). *Batson* requires not only relevant findings from the trial judge, but "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 476 U.S. at 93. The judge presiding over Herbert Smulls' trial could not have been any *less* sensitive to the critical issues presented:

> There were some dark complexioned people on this jury. I don't know if that makes them black or white. As I said, I don't know what

> constitutes black. Years ago, they used to say one drop of blood constitutes black. I don't know what black means. Can somebody enlighten me of what black is?

(Pet. App. I at 54-55).

Contrary to the Eighth Circuit's opinion, meaningful appellate review must be based upon findings actually reached below rather than benignly imputed from above – as made clear only last term. *See Snyder*, 128 S. Ct. at 1208-09. At issue in *Snyder* were the prosecutor's two explanations for striking African-American potential juror Jeffrey Brooks: his demeanor and his availability for trial. Before the Court debunked the latter explanation, it observed that the trial court had made no finding on Mr. Brooks' demeanor or on whether it believed the State's excuse. The trial court in *Snyder* simply ruled, "I'm going to allow the challenge." This Court declined to accord deference to the possibility that the judge may have found the facts a particular way, and thus, declined to credit the "demeanor" explanation. *Id.* at 1209.

The present case is even more easily resolved than *Snyder*. If a reviewing court cannot defer to silent findings within a *Batson* ruling, as in *Snyder*, it surely cannot extend deference when the trial judge expressly refuses to apply *Batson* at all, and in a jurisdiction known for excluding black jurors. To credit the trial court's ruling is to endorse the judge's approach of solving the problem of racism by ignoring

it. Such an approach undermines the stated aims of *Batson*'s holding:

> By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

476 U.S. at 99 (footnote omitted). But this Court's holdings "ensure" nothing when they are not followed. Amicus therefore urges the Court to grant certiorari and thereby provide lower courts with the guidance they so conspicuously require.

CONCLUSION

The Constitution cannot guarantee a perfect trial, but courts must at least attempt to enforce it. The trial judge in Herbert Smulls' case spurned *Batson* by expressly refusing to make relevant and required findings. Not to be outdone by the trial court's defiance of binding authority, the Eighth Circuit spurned *Snyder* by creating its own retrospective *Batson* findings and deferring to those findings as supported by the evidence. But with the ultimate punishment at stake, it is past time for *some* court to enforce the rule of law. The right of Equal Protection

would ring hollow if the State were allowed to extinguish Mr. Smulls' life on the present record and its State-created deficiencies.

Respectfully submitted,

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