NAACP Legal Defense and Educational Fund's
History of Challenging Racial Discrimination in Jury Selection

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") celebrates the 30th Anniversary of *Batson v. Kentucky*, a U.S. Supreme Court case that prohibits the exclusion of jurors based solely on their race as a violation of the Fourteenth Amendment of the U.S. Constitution. Importantly, the case created a new legal standard and opportunity to challenge racial discrimination in jury selection. LDF has fought to ensure that the American criminal justice system is free of discrimination decades before *Batson*, and in the decades since.

The right to a jury trial is a hallmark of the American criminal justice system. The fairness of the system, however, has continuously been called into question because of the tension between the constitutional guarantee of equal protection in courtrooms and the practice of allowing prosecutors to use peremptory challenges to remove jurors from serving for any reason. Despite the guarantee of a trial by jury of one's peers, courts throughout the nation have allowed Blacks who were charged with crimes to be tried by all-white juries. As a result, "legal lynchings" against Black defendants remain a common practice within the American judicial system.

Pre-*Batson* Cases Challenging Jury Discrimination

***Swain v. Alabama* (1965):** Two decades before *Batson*, LDF confronted the issue of racial discrimination in the jury selection process in the Supreme Court case of *Swain v. Alabama*, which involved a Black man – Mr. Swain – accused of raping a white girl. The prosecutor used his peremptory challenges to eliminate all six prospective Black jurors. Mr. Swain was convicted, and, on appeal, LDF argued that Mr. Swain was denied equal protection by Alabama's exercise of peremptory challenges to exclude Blacks from the petit jury. LDF also unsuccessfully attempted to introduce evidence showing that no Black person had served on a jury in that county since 1950. The U.S. Supreme court sided with the prosecution and found no constitutional violation. The Court held that, in order for Mr. Swain to establish that he was denied equal protection, he had to prove that the prosecutors at trial intentionally discriminated against Black potential jurors when they were excluded from the jury – an almost impossible standard to meet. The bar was so high that no litigant won a *Swain* claim for 20 years. As a result, defendants continued to be convicted and executed based on verdicts by all-white juries. This was until *Swain* was overturned by *Batson v. Kentucky*.

***Alexander v. Louisiana* (1972):** Seven years after *Swain*, LDF brought a related issue to the Supreme Court's attention: racial discrimination in the grand jury selection progress. In *Alexander v. Louisiana*, LDF challenged the rape conviction of a Black man who had been indicted by an all-white jury in Lafayette Parish, Louisiana. The local court clerk testified that race never entered into the selection

process, but the facts suggested otherwise. The grand jury was picked by a body of jury commissioners – all of them white – from jury forms that listed the race of each prospective grand juror. Although 14% of the grand jurors who returned jury forms were Black, only 7% of the grand jurors selected by the commissioners were Black. In the case of Mr. Alexander, only 5% of his grand jury venire was Black, and not a single member of his actual grand jury was Black. Despite the lack of evidence of intentional discrimination, the Supreme Court determined that the grand jury selection process violated the Equal Protection Clause and reversed Mr. Alexander's conviction. The Court noted that the grand jury selection process "provided a clear and easy opportunity for racial discrimination," and that random chance was a statistically improbable explanation for the systemic removal of prospective Black grand jurors.

The Supreme Court's *Batson* Decision

The Supreme Court revisited the issue of racially based peremptory challenges again in *Batson v. Kentucky*. This case involved a Black man who was charged with 2nd degree burglary and the possession of stolen goods. Four Black jurors were struck by the prosecution, leaving an all-white jury. Mr. Batson's attorney sought to have the jury dismissed, arguing that the removal of all of the Black jurors denied Mr. Batson of his Fourteenth Amendment equal protection rights. LDF filed an *amicus curiae* (or "friend of the court") brief in support of Mr. Batson, emphasizing the importance of the equal protection issue. This time, the Supreme Court ruled in favor of the defendant – Mr. Batson – finding that removing black jurors from the trial was a violation of the Fourteenth Amendment. The Court held it was unconstitutional for attorneys to exclude jurors based on race or the belief that a juror cannot impartially rule on the case because of his or her race.

In *Batson*, the Court lowered the standard of proof for determining whether a peremptory challenge is racially discriminatory. Instead of demonstrating intentional discrimination, one need only show an inference of discrimination through facts and circumstances, at which point the burden shifts to the prosecutor to explain why he or she removed Black potential jurors. If the prosecutor fails to give a legitimate, non-racial reason for each strike, the trial court can conclude that the prosecutor acted on the basis of race and put the struck jurors back on the jury venire.

In his concurring opinion, Justice Thurgood Marshall, LDF's founder and first Director-Counsel, expressed his view that the Court should have abolished peremptory challenges altogether. He feared that *Batson* did not go far enough, and predicted that the *Batson* framework would be ineffective in abolishing all discriminatory use of peremptory challenges. Justice Marshall also argued that it is extremely difficult to assess the motives of prosecutors, especially when a strike can be attributed to the prosecutor's unconscious bias, and where an explanation based on demeanor can be used to mask a prosecutor's racial bias.

Post-*Batson* Cases Challenging Jury Discrimination

***Johnson v. California* (2005):** LDF has continued to challenge racially based peremptory challenges and strengthen the constitutional protections under *Batson*. For example, in *Johnson v. California*, LDF urged the Supreme Court to reject California's claim that, to establish a prima facie *Batson* violation, a

defendant must not only raise an inference of discrimination, but must prove that the strike was "more likely than not" motivated by racially discriminatory intent. Recognizing the difficulty of finding evidence that would conclusively prove discriminatory intent, LDF urged the court to reject this standard. The Court ultimately did, explaining, "we did not intend . . . that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty[.]"

***Miller-El v. Dretke* (2005):** Also in 2005, LDF participated as *amicus curiae* in the Supreme Court case, *Miller-El v. Dretke*, a capital case that highlighted the prescience of Justice Marshall's misgivings with *Batson*. In *Miller-El*, the entire jury selection process was suffused with racially-motivated acts by the prosecution. Eleven Black prospective jurors made it far enough in the jury selection process to be peremptorily challenged by the prosecution. The prosecution struck ten of them. When forced to justify their strikes of Black jurors, the prosecutor gave answers that were unsupported by the record or that applied equally to white jurors who were not struck. In addition, the prosecution used procedural tricks to re-shuffle the jury pool and put Black jurors at the back of the line. And the prosecution asked Black jurors different questions than white jurors during the jury selection process—questions that were intended to elicit disqualifying answers. Despite this trove of evidence that the prosecution was intentionally purging the jury pool of Black jurors, the trial court ignored the evidence of racial bias and rejected Mr. Miller-El's claims—as did the Texas Criminal Court of Appeals, the federal district court, and the Fifth Circuit Court of Appeals. Finally, after twenty years on death row, Mr. Miller-El's conviction was vacated by the Supreme Court, which found that the prosecution had violated the Equal Protection Clause by intentionally striking prospective Black jurors from the jury pool.

***Edmonson v. Leesville* (1991):** LDF has also recognized the danger of racially discriminatory peremptory challenges in the civil context, particularly for Blacks seeking monetary relief. In *Edmonson v. Leesville, Concrete Co. Inc.*, LDF filed an *amicus curiae* brief on behalf of Thaddeus Edmonson, a Black construction worker injured after a co-worker negligently allowed a company truck to roll back into him, pinning him against construction equipment. During *voir dire,* his employer, Leesville Concrete, used two of its three peremptory challenges to remove Blacks from the prospective jury. Although the jury, in which 11 of 12 of the jurors were white, found that Mr. Edmonson had suffered approximately $90,000 in damages, it reduced his damages to merely $18,000. The Supreme Court reversed the decision on account of Leesville Concrete's use of racially discriminatory peremptory strikes.

As the Court explained, to allow racial discrimination in jury selection, whether in a civil or criminal case, would run counter to the fundamental role that courts play in our country. In short, "racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." To permit racial discrimination in the courthouse, whether in a civil or criminal case, "compounds the racial insult inherent in judging a citizen by the color of his or her skin."

LDF celebrates *Batson* despite its imperfections because its efforts to root out racial discrimination in jury selection has added legitimacy to a criminal justice system that has been long plagued with systemic racism. *Batson* makes clear that not even a single juror can be excluded based on his or her race and gives litigants, including LDF, the tools to combat those who attempt to do so. Once again, the Supreme Court is confronting the issue of discrimination in jury selection in *Foster v. Chatman*. Just as when LDF

first confronted this issue in 1965, the prosecutor used four of his peremptory challenges to strike all the remaining Black jurors. From the trial record, which included the prosecutor's own notes, it is clear that the strikes were based on the prospective juror's race. LDF hopes that the Court uses this case as an opportunity to reaffirm and strengthen its landmark ruling in *Batson*.