IN THE SUPREME COURT OF THE STATE OF MISSOURI

HERBERT SMULLS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 83179
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE - THE ALLIANCE FOR JURIES SELECTED FREE OF RACIAL DISCRIMINATION

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INTRODUCTION AND INTEREST OF AMICI

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that a prosecutor's racially motivated exercise of his peremptory challenges violates the Equal Protection clause of the Fourteenth Amendment. The amici are a collection of organizations that are committed to promoting a racially fair and just society through advocacy and education on matters presenting important issues of racial fairness. The amici believe the trial judge here subverted *Batson's* spirit and its goals of eradicating racial discrimination in jury selection. The judge's behavior produced a result that was unfair to both the excluded venireperson and the defendant.

In this case, there was just one African-American, Ms. Margret Sidney, on the venirepanel. The prosecutor dismissed her, leaving an all-white jury. The defense then made an objection under *Batson*, and it fell to the trial court judge, the Honorable William M. Corrigan, to ensure that the jury selection process had not been polluted by racial animus. Unfortunately, Judge Corrigan was no fan of *Batson*, and the record that has now been compiled in this case shows that he devised a unique but effective obstacle to *Batson* protection: He required that the defense "prove" the race of the black venirepersons before they could be protected from racial discrimination. Tellingly, the judge applied this policy only in the *Batson* setting; in every other judicial and personal venue, Judge Corrigan was capable of discerning who was black without any "proof."

While in most other cases this "prove your race" policy was only an obstacle to *Batson* protection, the record shows that in this case it became an insurmountable barrier. This is because in the proceedings here, the judge did not inform counsel of his "prove your

race" policy until counsel made a supplemental record after Ms. Sidney was discharged. Defense counsel had therefore been unaware that they needed to "prove" what was obvious to everyone in the courtroom - that Ms. Sidney was black, and they had put on no evidence of her race. Because there was no "proof" of the kind he required, Judge Corrigan never acknowledged that Ms. Sidney was a black woman, and he overruled the defense's *Batson* objection without ever making the threshold determination that she was entitled to protection under *Batson*. In effect, he stopped judging at the beginning of the *Batson* proceedings. This refusal to apply *Batson* protections is the gravest form of structural error and reversal is therefore necessary.

Judge Corrigan's actions are troubling, not just because he failed to do what *Batson* required of him, but because he cloaked his refusal in a mantle of "color-blindness" and "race neutrality." In fact, neither his means nor the ends were race neutral. His means - the "prove your race policy" - would cause the "re-racialization" of the jury selection process, requiring jurors to swear to their race or to subject themselves to the type of "racial identity" trial that our judicial system abandoned a century ago. There is nothing race-neutral about adding this kind of needless racial dimension to the jury selection process. Similarly, there was nothing race-neutral in Judge Corrigan's goal, which, the record shows, was to undermine *Batson* and its ban on state sponsored racial discrimination.

This Court ordered this case remanded for further proceedings on the Rule 29.15 action. *See State v. Smulls*, 935 S.W.2d 9 (Mo. banc 1996). The Honorable Emmett O'Brien conducted an evidentiary hearing and denied all the Rule 29.15 claims. This appeal was brought from Judge O'Brien's order denying relief on the Rule 29.15 action.

The amici are:

The Mound City Bar Association;

The Jackson County Bar Association;

The Missouri Legislative Black Caucus;

The St. Louis Metropolitan Clergy Coalition;

Christians United For Racial Equity (CURE) of Jefferson City;

The Missouri Conference Of The African Methodist Episcopal

Zion (A.M.E.Z.) Church;

The African-American Ministerial Alliance of Jefferson City;

The MacArthur Justice Center At The University of Chicago Law School;

The Southern Center For Human Rights;

The Equal Justice Program Of The Howard University School of Law;

The Southern Christian Leadership Conference;

The National Bar Association;

The National Conference of Black Lawyers; and

The National Black Police Association.

POINTS RELIED ON

I. **THE TRIAL JUDGE DELIBERATELY, AND AS A MATTER OF PERSONAL AND JUDICIAL POLICY, REFUSED TO FOLLOW THE STRICTURES OF *BATSON* THEREBY DENYING THE ACCUSED AND THE EXCLUDED JUROR THEIR CONSTITUTIONAL RIGHTS**

State v. Smulls, 935 S.W.2d 9 (Mo. banc. 1996);

State v. Shurn, 866 S.W.2d 447 (Mo. banc. 1993); and

People v. Sims, 618 N.E.2d 1083 (Ill. App. Ct. 1993).

II. **GIVEN THE HIGHLY FACTUAL NATURE OF THE DISPUTE OVER MS. SIDNEY'S DISMISSAL, THE TRIAL COURT'S FAILURE TO GIVE A FAIR HEARING WAS NOT HARMLESS ERROR, AND THIS FACTUAL CONFLICT IS NOT ONE THAT THIS COURT CAN RESOLVE ON APPEAL**

Hernandez v. New York 500 U.S. 352 (1991);

Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995);

Rosa v. Peters, 36 F 3d. 625 (7th Cir. 1994); and

State v. Holman, 759 S.W.2d 902 (Mo. App., E.D. 1988).

III. THE TRIAL JUDGE'S CONDUCT WAS DETRIMENTAL TO THE GOALS THE UNITED STATES SUPREME COURT SOUGHT TO ACHIEVE IN *BATSON* AND DIRECTLY CONFLICTED WITH *BATSON*

State v. Jacobs 51 N.C. (6 Jones) 284 (1859);

Daniel v. Guy I, 19 Ark 122 (1857);

Daniel v. Guy II, 23 Ark. 50 (1861);

Brown v. Board of Education, 347 U.S. 483 (1954);

Sheri L. Johnson, Symposium on Race and Criminal Law: *Batson Ethics for Prosecutors* and *Trial Court Judges*, 73 Chicago Kent L.Rev. 475 (1998);

L. Stuart Ditzen, et. al. *Avoid Poor Black Jurors, McMahon Said*, The Philadelphia Inquirer, April 1, 1997, at A-1;

Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African-Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161 (1997);

Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South,* 108 Yale L. J. 109 (1998);

2 Helen Catterall, *Judicial Cases Concerning American Slavery and the Negro* at 226;

Luther Wright, Jr., *Who's Black, Who's White, And Who Cares: Reconceptualizing The United States' Definition of Race And Racial Classifications*, 48 Vand. L.Rev. 513 (1995); and

Kenneth L. Karst, *Myths Of Identity: Individual And Group Portraits Of Race And Sexual Orientation*, 43 U.C.L.A. L. Rev. 263 (1995).

ARGUMENT

I. THE TRIAL JUDGE DELIBERATELY, AND AS A MATTER OF PERSONAL AND JUDICIAL POLICY, REFUSED TO FOLLOW THE STRICTURES OF *BATSON* THEREBY DENYING THE ACCUSED AND THE EXCLUDED JUROR THEIR CONSTITUTIONAL RIGHTS

A. During the supplemental record after Ms. Sidney had been dismissed, Judge Corrigan informed counsel that he had a firm policy of never acknowledging the race of a prospective juror unless he received proof and direct evidence.

After the close of the voir dire process, during counsel's supplemental *Batson* record, Judge Corrigan informed counsel of a policy that he firmly enforced in his courtroom: he "never" recognized the race of any prospective juror until counsel "prove[d]" that juror's race to him. Judge Corrigan, in fact, repeated this policy in a series of unequivocal statements that left no doubt that, for purposes of *Batson* objections, race was something that required hard "proof" and "direct evidence." A brief review of these statements shows the zeal with which Judge Corrigan applied this "prove your race policy" in the *Batson* setting.

Judge Corrigan stated, and repeated, that he "never" and did not "ever" "under any circumstances" take judicial notice of the race of any juror:

> And I never, in this Court, no matter what any appellate court may say, I never take judicial notice that anybody is black or that only one person or four persons or eight persons are black.

> I do not under any circumstances in this division ever take judicial notice of the number of people who are black.

See State v. Smulls, 935 S.W.2d 9, 25 (Mo. banc. 1996).

He explained that his policy went far beyond judicial notice. Not only did he not take judicial notice that a juror was black, Judge Corrigan emphatically stated that he did not know what black "is", "constitutes" or "means":

> I don't know what it is to be black.
>
> I don't know what constitutes black.
>
> 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? I don't know; I think of *them* as people.

Smulls, 935 S.W.2d at 25 (emphasis added). Since he could not take judicial notice that any juror was black and, more importantly, since he did not know what black "is", Judge Corrigan would not accept the parties' stipulation as to which jurors were black. Instead, he clearly stated his policy as follows:

> I don't think this Court is wise enough or any other appellate court is wise enough unless there is direct evidence as to who is black and who is white and who is orange and who is purple.
>
> And I believe that's counsel's responsibility to prove who is black and who isn't and who is a minority and who isn't.

Apparently somewhat embarrassed by the patent absurdity of his position given the appearance of the lone black venireperson, Ms. Sidney, Judge Corrigan had to concede that "I'm not going to sit here and say to you that Ms. Sidney is *not* black" *Id*. at 25 (emphasis added). But his firmly stated policy precluded him from recognizing that she *was* black. As trial counsel testified during the Rule 29.15 hearing ordered by this Court:

> My impression is that he said that he wasn't going to say she wasn't black, but he wasn't going to say she was.

(Rem. R.Tr. 1240). Similarly, Mr. Smulls' associate trial counsel testified: "I believe that the prosecution and defense had no difficulty in making that determination. As I recall, it was the Court who refused to make such a determination." (Rem. R.Tr. 684)[1].

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[1]The state can be expected to argue that, in spite of everything he said, Judge Corrigan really did acknowledge that Ms. Sidney was an African-American. This contention founders on the Judge's adamant, emphatic and repeated statements that he "never," "no matter what any appellate court might say," "not ever," acknowledge the race of any juror; that he did not know what black "is," "constitutes" or "means;" and that he required "proof" or "direct evidence" of the race of prospective jurors. While the State will ask that Judge Corrigan be given "the benefit of the doubt" on this issue, this Court properly held in its prior opinion, that it is the defendant, not the trial court that is entitled to the benefit of the doubt in situations such as this. *State v. Smulls*, 935 S.W.2d 9, 26-27 (Mo. banc. 1996). Moreover, the question of where the benefit of the doubt should fall in this

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Unfortunately, Judge Corrigan did not make any of the statements quoted above until counsel's supplemental record was made which occurred after the judge had issued his *Batson* ruling allowing the dismissal of Ms. Sidney. Prior to these statements of Judge Corrigan's policy, trial counsel had not been aware that they needed to "prove" by "direct evidence" that Ms. Sidney was black. Since a look at Ms. Sidney established that she was a black woman (see Exs. 4 and 5), and since there was no disagreement between the prosecution and the defense as to Ms. Sidney's racial identity, *Smulls*, 935 S.W.2d at 26 n.6, the parties had assumed that the Judge, like everyone else in the courtroom, recognized her as an African-American for the purposes of the *Batson* objection. It was thus not until after Ms. Sidney was excused that defense counsel realized that they had not put on any "proof" as to Ms. Sidney's race, and that Judge Corrigan had therefore not recognized her as an African-American for the purposes of the *Batson* proceedings.

Judge Corrigan's refusal to acknowledge Ms. Sidney's race was not an isolated mistake. It was part of his established practice for purposes of *Batson* hearings. For example, during the first Rule 29.15 hearing Judge Corrigan stated:

> This Court won't take the position that people are white or black. It is the Court's position that you can't look at people and determine what their race is, okay, because I don't know what constitutes white and what constitutes black or any other race, for that matter.

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case is a moot one, because Judge Corrigan left no room for doubt; he could not have stated his steadfast refusal to acknowledge race in any clearer terms.

(Ex. 22 at 19; R.L.F. 845). Similarly, in *State v. Goldsby*, Judge Corrigan refused to acknowledge the race of the African-American venirepersons even if the parties were willing to stipulate to this fact. (Goldsby Tr. 57-64; Ex. 19). In *Goldsby*, however, unlike the present case, Judge Corrigan informed the parties of his policy before making any ruling, so counsel there was at least given the opportunity to attempt to show that the prospective jurors were black. (Goldsby Tr. 61; Ex. 19).

This process was repeated in the *Batson* proceedings in *State v. Mahaney*. There, Judge Corrigan refused to accept counsel's stipulation as to which venirepersons were African-American, stating bluntly: "Any agreement that you two make I don't accept it." (*Mahaney* Tr. 184, Ex. 18). Judge Corrigan, once again, afforded the counsel in *Mahaney* an advantage that he denied to Mr. Smulls' trial attorneys: the Judge informed Mahaney's counsel of his "prove your race" policy before those who were peremptorily stricken were released.

The evidence thus shows that Judge Corrigan had an established policy of not recognizing the race of prospective jurors for the purposes of applying *Batson*. Even when, as here, the race of a prospective juror was obvious and the attorneys stipulated to it, Judge Corrigan's policy was to require "counse[l] . . . to prove who is black and who isn't . . ." A later section of this brief , explains how this suggestion, if adopted by other courts, would require an ominous "re-racialization" of the American jury selection process and could lead American courts to return to the "racial credential" trials and "human title searches" of the 19th Century. What is relevant here, however, is the fact that it was not until *after* he made his initial ruling and Ms. Sidney was released that Judge Corrigan informed counsel of

his policy that it was their "responsibility" to "prove" Ms. Sidney was African-American. Counsel accordingly was not able to put on such proof, and Judge Corrigan - alone among those in the courtroom - never recognized Ms. Sidney as a black person.

B. Judge Corrigan's feigned ignorance as to Ms. Sidney's race was a pretext.

Evidence adduced on the Rule 29.15 hearing confirms what concerned this Court in its original opinion, that Judge Corrigan's feigned ignorance as to Ms. Sidney's race was a pretext he employed to cover his "[un]willingness to do what *Batson* require[d]." *Smulls*, 935 S.W.2d at 26.

Tellingly, Judge Corrigan's inability to determine race was limited to situations where *Batson* required him to stop racial discrimination against African-American jurors. As noted above, when faced with *Batson* issues in this case, and in the *Goldsby* and *Mahaney* cases, Judge Corrigan emphatically professed an inability to tell black from white. But the record shows that in other instances - where no *Batson* issue was involved, Judge Corrigan (like practically every other American) was amply capable of recognizing race. These instances can be briefly summarized as follows:

First, the record shows that Judge Corrigan was quite capable of acknowledging race in everyday life. The following is testimony from Mr. Smulls' trial counsel that was introduced at the second Rule 29.15 hearing; if nothing else, it shows that Judge Corrigan knew what "black is":

> But a comment that Judge Corrigan made to me subsequent to the first trial I think points out how we all bring biases with us everywhere we go. He was complimenting me and he told me that he thought I was the best black

attorney that had ever tried a case in front of him. I was not offended, although I did note the qualification. So I will just let that speak for itself.

(Rem. R.Tr. 680-81). The evidence proffered through Mr. Smulls' former Rule 29.15 attorney, Ms. Leftwich, at the second Rule 29.15 hearing also shows that Judge Corrigan had asked her Rule co-counsel whether he was aware that Ms. Goodwin, the person who had successfully sued Judge Corrigan for gender discrimination, was "white." (Rem. R.Tr. 853-62; Ex. 23). Again, Judge Corrigan knew what race meant.

In judicial settings other than *Batson* objections, Judge Corrigan was similarly capable of discerning race without "proof" and "direct evidence." For example, when completing the trial judge's report for this case, weeks after the *Batson* issues were safely in the background, Judge Corrigan had no trouble at all making racial identifications. In that report, Judge Corrigan did the following:

- Judge Corrigan identified Mr. Smulls' race as "Black" (Ex. 24 at 4).

- He estimated that "10 to 25" percent of the population of his county was the same race as defendant (Ex. 24 at 7).

- When asked, "Were members of the defendant's race represented on the jury" Judge Corrigan marked "No" (Ex. 24 at 7).

This last response should be compared to the diametrically opposite stance Judge Corrigan took when *Batson* was at issue: When explaining his "prove your race" policy after Ms. Sidney was discharged, Judge Corrigan claimed that, because there were some "dark complexioned people" on the jury panel, he did not know whether there were any African-American jurors remaining after the strike of Ms. Sidney. *Smulls,* 935 S.W.2d at 25. Once

the *Batson* proceedings were over, this knowledge conveniently came to Judge Corrigan, and he was able to admit without qualification on the Trial Judge's Report what everyone had known all along - that Mr. Smulls had been tried by an all-white jury.[2]

Even in the *Batson* proceedings in the present case, there were occasional slips, showing that Judge Corrigan knew what race meant, but that he had simply refused to acknowledge it for the purpose of the defendant's *Batson* objection. A small but telling example is Judge Corrigan's statement:

> I don't know what black means. Can somebody enlighten me of what black is?
>
> I don't know; I think of *them* as people.

Smulls, 935 S.W.2d at 25 (emphasis added). It is significant that Judge Corrigan did not say "I think of *us* all as people"; he said "I think of *them* as people." Like most Americans, Judge Corrigan drew a mental line between his race and other races, between "us" and "them"; and he referred to blacks as "them."[3]

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[2]In making these blatantly contradictory statements, Judge Corrigan failed the test suggested by the dissent in this Court's earlier opinion in this case: "To every extent possible, our trial judges must conduct themselves so that there can be no basis upon which a reasonable person could harbor doubt about a judge's racial impartiality. *Smulls*, 935 S.W.2d at 27.

[3] The record is clear that Judge Corrigan used "them" to refer to people who are black. That record shows that the language just quoted was immediately preceded by the following:

The record thus unequivocally shows that Judge Corrigan knew what "black" "is" both in his personal life and in formal judicial settings. Only when *Batson* was at issue did he have a firm policy of pretending not to know "what black means."

C. The record shows that Judge Corrigan employed his pretext as a means of avoiding his duties under *Batson*.

The record also shows the reason for this pretext: Judge Corrigan disagreed with *Batson*. Judge Corrigan stated his contempt for *Batson* in only the most thinly veiled terms, stating that the United States Supreme Court had gone off the "deep end" when it outlawed racial discrimination in jury selection. (*Goldsby* Sent. Tr. 3; Ex. 20).

Similarly, Judge Corrigan's statements show that he realized that his "prove your race" undermined *Batson* and would be found wanting by higher courts. Nevertheless, he promised to defy these courts:

> And I never, in this Court, *no matter what any appellate court may say*, I never take judicial notice that anybody is black or that only one person or four persons or eight persons are black.

Smulls, 935 S.W.2d at 25 (emphasis added).

> 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.

(Tr. II 381).

In summary, the trial transcript, as augmented by evidence adduced at the second Rule 29.15 hearing, shows the following: Judge Corrigan had a firm, frequently repeated and clearly stated policy of requiring "proof" and "direct evidence" as to the race of potential jurors for the purposes of *Batson* objections; without this evidence he professed not to know what black "is". In the present case, he informed counsel of this policy during the supplemental record proceeding, after Ms. Sidney, the only black venireperson, had already been excused. Consequently, while everyone in the courtroom knew that Ms. Sidney was black, there had been no "proof" or "evidence" of the type that would be needed to establish her obvious racial identity to the Judge. When ruling on the *Batson* objection to the dismissal of Ms. Sidney, Judge Corrigan, therefore, affected ignorance as to Ms. Sidney's racial identity - a make-believe ignorance conforming to his clearly stated aversion to *Batson*.

D. <u>Judge Corrigan never made the threshold finding that Ms. Sidney was Black</u>.

It is settled that the threshold step for a *Batson* objection is as follows:

> To establish a claim under *Batson*, a defendant must object to the prosecutor's use of a peremptory challenge as violating *Batson* and identify the cognizable racial group to which the stricken venireperson belongs.

Smulls, 935 S.W.2d at 14 (citing *State v. Shurn*, 866 S.W.2d 447, 456 (Mo. banc. 1993)). *See, also, Batson*, 476 U.S. at 96. In the present case, the defense objected to the dismissal of Ms. Sidney but, as counsel proceeded to discuss the merits of this objection, Judge Corrigan never went beyond the threshold issue. In spite of the lawyers' agreement that Ms. Sidney was African-American, Judge Corrigan -- as he revealed in the series of statements,

quoted above, that he made after Ms. Sidney was released -- had never recognized that she "belonged to the cognizable racial group." The judge thereby effectively frustrated implementation of a *Batson* objection.

E. Judge Corrigan, in effect, absented himself from the hotly contested *Batson* proceedings.

While Judge Corrigan had quietly stopped judging because he did not know what "black is," the record shows that defense counsel hotly disputed the prosecutor's stated reasons for dismissing Ms. Sidney. The prosecutor for example said that he dismissed Ms. Sidney because of a beret she wore one day and a cap she wore the next; the defense said that her headwear was unremarkable. (Tr. II 369-71). The prosecutor said that Ms. Sidney "glared" and seemed "irritated"; the defense denied this and claimed that her demeanor was appropriate (Tr. II 368-71). The prosecutor said he dismissed Ms. Sidney because she worked for the Post Office at the "bottom of the employment ladder" (Tr. II 369, 379); the defense showed that she did not work for the Post Office at all and that she, in fact, worked at Monsanto.[4] (Tr. II 377). The defense claimed that each of the prosecutor's arguments was a pretext designed to hide the fact that the prosecution sought to excuse Ms. Sidney only because of her race. (Tr. II 370-72, 376-79).

[4]Even if Ms. Sidney had worked at the Post Office, a general policy of striking postal workers may be found to be an impermissible pretext for dismissing African-American jurors. *People v. Sims*, 618 N.E.2d 1083, 1087 (Ill. App. Ct. 1993).

At this point, under *Batson*, the Judge had the duty to weigh the statements of the prosecutor and the dress, demeanor and occupation of Ms. Sidney and determine whether the prosecutor simply wanted to rid the panel of its only African-American member; the Judge bore the responsibility to fairly gauge the situation and to prevent racial discrimination if it was occurring in his courtroom. Instead of shouldering this responsibility, however, Judge Corrigan pretended not to know what "black means." Based on this pretext, Judge Corrigan silently declined to make the threshold finding that would allow him to entertain the *Batson* objection. In-line with his underlying aversion to *Batson*, the Judge refused to do what *Batson* required.

The record thus shows that, substantively speaking, Judge Corrigan was not present to hear the defendant's *Batson* objection. As he made clear after Ms. Sidney was stricken, he had taken the position that he never had any idea who was black and who was not; what mattered in his courtroom was that the parties had failed to put on "proof" or "direct evidence" of Ms. Sidney's race. Because there was no proof of the threshold question - that Ms. Sidney was black - the court improperly removed itself from the disputed issue, never fairly considering the serious factual arguments surrounding her dismissal.

II. GIVEN THE HIGHLY FACTUAL NATURE OF THE DISPUTE OVER MS. SIDNEY'S DISMISSAL, THE TRIAL COURT'S FAILURE TO GIVE A FAIR HEARING WAS NOT HARMLESS ERROR, AND THIS FACTUAL CONFLICT IS NOT ONE THAT THIS COURT CAN RESOLVE ON APPEAL.

The State may argue that the trial court's inaction was harmless error, and that this Court can decide on appeal whether the dismissal of Ms. Sidney was proper. This argument fails. Under *Batson* and its progeny, it is not the province of the appellate court to sort out factual disputes as to the attire or demeanor of a juror. *Hernandez v. New York* 500 U.S. 352, 365-369 (1991). On the contrary, since the trial judge has the ability to (and is in fact required to) carefully evaluate the demeanor and explanations of the prosecutor and the challenged juror, appellate courts generally defer to the trial court's decision, unless it is clearly erroneous. *Id*. When, however, as here, the trial court refuses to conduct a good faith *Batson* hearing, the appellate court cannot take the trial court's discretion upon itself. The Judges of this Court were not, after all, present to evaluate Ms. Sidney's beret or to gauge her demeanor, or, for that matter, the prosecutor's demeanor when he gave his reasons for excusing her and referred to her, with double inaccuracy, as a postal worker at the bottom rung of the employment ladder. That was the job of the trial judge and since he refused to do it based on a clear but emphatically stated pretext, reversal is required. *Cf. State v. Holman*, 759 S.W.2d 902 (Mo. App., E.D. 1988) (*Batson* violation requires reversal); *State v. Robinson*, 753 S.W.2d 36 (Mo. App., E.D. 1988) (same); *State v. Williams*, 746 S.W.2d 148 (Mo. App., E.D. 1988) (same).

In this regard, it should be remembered that prosecutors have fought hard to increase the discretion given to trial judges in deciding *Batson* issues. Having largely won this battle, they *should not* now be able to maintain that it is only "harmless error" when the trial judge declines to do his job. Indeed, such a contention is improper, when, as happened here, the judge expresses contempt for the *Batson* rights he is required to protect, and then employs a pretext to avoid his duty to enforce those rights, it is not "harmless error" that can be corrected on appeal. *See*, *Miller v. Lockhart*, 65 F.3d 676, 680-82 (8th Cir. 1995) (peremptory removal of a venireperson because of his race is not harmless error.); *Rosa v. Peters*, 36 F 3d. 625, 634 n. 17 (7th Cir. 1994) (*Batson* error is not subject to the harmless error analysis under *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1717 (1993)). As this court suspected, the record, as it has now been augmented by the second Rule 29.15 hearing, shows that Judge Corrigan was unwilling to do what *Batson* requires; and there was, accordingly, no judicial officer present at Mr. Smulls' trial who was prepared to fairly consider the issues raised in the *Batson* objection, or to ensure that the jury selection process proceeded without racist exclusion of jurors. As a result, the constitutional rights of the defense, Ms. Sidney and the community as a whole have not been protected. The correct relief must be to reverse the order below.

III. THE TRIAL JUDGE'S CONDUCT WAS DETRIMENTAL TO THE GOALS THE UNITED STATES SUPREME COURT SOUGHT TO ACHIEVE IN *BATSON* AND DIRECTLY CONFLICTED WITH *BATSON*

A. Judge Corrigan's "prove your race" policy was neither color blind nor race-neutral.

Here, the trial court cloaked its refusal to follow the law of the land in a shroud of "color blindness", a pretense that "race does not matter." Beneath this race-neutral cloak, however, is an agenda that would re-racialize the jury selection process in two very significant ways. First, this approach would allow prosecutors to discriminate more easily against African-American jurors while courts, which are sworn to limit such discrimination, feign "color blindness" and allow it to continue. Second, this approach could convert every *Batson* motion into a trial of racial identity, including human title searches of the kind that, mercifully, were abandoned decades ago. *See infra* pgs. 32-34.

B. Judge Corrigan's Color-Blind approach would facilitate state-sponsored racial discrimination.

In Judge Limbaugh's dissent he observed that "[r]acial prejudice is the scourge of our society. . . ." *Smulls*, 935 S.W.2d at 27. Sadly, the jury selection process is one area where this scourge continues barely abated. Racially based exclusion from juries is a burden that African-Americans still bear. Less than two years ago, Justice O'Connor recognized this inequity in a speech to The National Conference on Public Trust and Confidence in The Justice System:

> I urge every participating state to examine its jury system and to make any necessary changes to make them representative and more effective than has been the case. At the very least, every state should reexamine and perhaps narrow the use of peremptory challenges in which jurors are excused with no reason given.

See Text of Justice O'Connor's May 15, 1999 Remarks To The National Conference on Public Trust and Confidence in the Justice System at 5 (available from National Center for State Courts and on its web site at: http://ncsc.dni.us/PTC/trans/oconnor.htm). Many prosecutors still want to exclude blacks from juries. Their reasons, however, are not because of the kind of work the particular jurors do, or the money they make, or the books they read, but simply because they are black. Decades after *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Loving v. Virginia*, 388 U.S. 1 (1967), some prosecutors still work hard to deny African-Americans their rights to serve on juries simply because of their race. *See* Sheri L. Johnson, Symposium on Race and Criminal Law: *Batson Ethics for Prosecutors* and *Trial Court Judges*, 73 Chicago Kent L.Rev. 475 (1998).

Perhaps the clearest example of the way that this scourge still punishes the jury selection process is the notorious videotape that the Philadelphia District Attorney's office made of a jury training session that a senior prosecutor conducted for the young lawyers in his office. Using blatant and demeaning racial stereotypes, this high-ranking prosecutor urged his colleagues to avoid seating poor African-Americans as jurors, and gave tips on how to do this and still get by a *Batson* objection. L. Stuart Ditzen, et. al. *Avoid Poor Black Jurors, McMahon Said*, The Philadelphia Inquirer, April 1, 1997, at A-1. As Professor Johnson notes, what was perhaps most troubling about this video was the way that a roomful of prosecutors sat "and listen[ed] without objection to patently unconstitutional marching orders." Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 Chicago Kent L.Rev. at 475. Certainly this video is not representative of all prosecuting attorneys, but the practice remains common enough that Professor Johnson has observed:

> The participation of African-Americans and other racial minorities in criminal cases is frequently eliminated or minimized for reasons that have more to do with the prospective jurors' color than their qualifications.

Id. at 475. African-American defendants and venirepersons still need protection from racial discrimination, and *Batson* requires that they receive it. Unfortunately, what Judge Corrigan proposed here -- that a juror must prove his or her race before receiving protection under *Batson* -- would frustrate this protection and make it easier for prosecutors to engage in blatant racial discrimination. This is decidedly neither race-neutral in process nor result.

In practice, Judge Corrigan's "prove your race" policy makes discrimination easier and hinders fairness; it helps the prosecutor who wants to discriminate, and disadvantages the prospective juror who does not want his race to be used against him. Nor is such a discriminatory result difficult to understand given the jury selection process. When the prosecutor is presented with a venirepanel, he can make racial judgments in an instant based on how a juror looks, what she says, and how she says it. The prosecutor can discriminate without waiting for racial information from a sworn jury questionnaire or a birth certificate or a "human title search." Under Judge Corrigan's procedures, however, a prospective juror wishing to defend her rights as an American citizen would be made to prove by "direct evidence" what the prosecutor already knows. This is what happened here: The Prosecutor (along with everyone else in the courtroom) discerned in an instant that Ms. Sidney was black. However, since nobody came to court with "direct proof" of this obvious fact, Ms.

Sidney was never given the opportunity to protect herself from the scourge of racial discrimination.

While at first glance, Judge Corrigan's "prove your race" policy may enjoy a patina of "color blindness," it is in fact disturbingly color conscious. This policy, was, after all, born out of the Judge's unwillingness to do what *Batson* required; its effect was to skew the entire *Batson* process in favor of racial discrimination and, in this case, it resulted in *Batson* proceedings where the court brushed aside the rights of the defendant, Ms. Sidney and the community to have a jury seated without racial discrimination. Reversal is therefore required.[5]

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[5]Mr. Smulls' brief argues that reversal is required because Judge Corrigan displayed racial bias during the trial. While there is ample evidence for this position, this brief does

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not reach the issue of the Judge's racial bias. Instead, this brief argues that, because of his aversion to *Batson*, Judge Corrigan failed to fairly consider the defense objections to the dismissal of Ms. Sidney. Whether or not Judge Corrigan had any antipathy toward African-Americans as a race, it is clear that he had so much contempt for *Batson* that he steadfastly refused to do what it required, and he, in effect, absented himself from the *Batson* proceedings here. There is, accordingly, no need to "convict [Judge Corrigan] of racial prejudice" *Smulls*, 935 S.W.2d at 29 (Limbaugh, J. dissenting); reversal is

C. Judge Corrigan has proposed "re-racializing" the jury selection process.

In this case, Judge Corrigan's "prove your race" policy was quickly and erroneously endorsed by Judge Simeone, who formally suggested that under *Batson* the first step is to "show by records, family records, birth certificates, etc. that a person is of a minority race." (Ex.69). In order for a juror to receive *Batson* protection, these judges propose the resurrection of an odious practice of the 19th century: they would require jurors to prove they are black before they could be protected from racial discrimination.

In considering the merits of this proposal, it would be wise to recall that earlier time, when race played a much greater role in our judicial system, and courts were not infrequently called upon to decide who was black and who was not. Thumbing through these cases resurrects the shame and horrors of another era, when people's lives, liberty and property turned on their race, and persons at the margins between black and white were often called upon to do what Judge Corrigan demanded here: "prove" their race. In these old trials, courts looked at skin color and hair texture, they received testimony about the appearance and complexion of parents, grandparents and great grandparents; they also heard evidence about how people acted and with whom they associated. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African-Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161, 1222-1231 (1997); Ariela J. Gross, *Litigating Whiteness:*

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appropriate because of his evasion of an established precedent of the United States Supreme Court irrespective of any arguments as to his racial bias.

Trials of Racial Determination in the Nineteenth Century South, 108 Yale L. J. 109 (1998).

While observation of the person whose race was at issue and the testimony of lay witnesses was often enough to decide the question, sometimes it was not, and the courts then turned to "experts." For example, in *State v. Jacobs*, a North Carolina court affirmed the "expert" status of a planter because as "an owner and manager of slaves. . . more than twelve years, . . . [he] had had much observation of the effects of the intermixture of the negro . . . blood." *State v. Jacobs* 51 N.C. (6 Jones) 284 (1859), quoted in 2 Helen Catterall, *Judicial Cases Concerning American Slavery and the Negro*, at 226. Similar use of "expert" testimony is found in *Daniel v. Guy*, where a mother and her four minor children sued for freedom alleging that they were not black, as black was defined by the law at that time. The testimony of a lay witness that the mother had a telltale "curl on the side of her head," was insufficient to establish the family's race, so the court called an expert, who observed:

> . . . the hair never becomes straight until after the third descent from the negro . . . . The flat nose remains observable for several descents.

Daniel v. Guy I, 19 Ark 122, 127 (1857). To gauge the depth to which this "prove your race" process, in general, sank, consider the holding by Chief Justice English of the Arkansas Supreme Court.

> No one, who is familiar with the peculiar formation of the Negro foot, can doubt, but that an inspection of that member would ordinarily afford some indication of race . . . .

Daniel v. Guy II, 23 Ark. 50, 51 (1861).

Is this the way we want to treat jurors at the end of the Twentieth Century? Must they come to court armed with their birth certificates and, since these usually no longer indicate race, those of their parents and grandparents? Will only those black jurors who can "prove" race by birth records have protection from racial discrimination? When birth certificates are silent will the court clerk take a "snippet" of venirepersons' hair or search for telltale curls or measure their toes? Will skin color charts and pictures of ancestors and copies of old slave certificates become exhibits at these hearings? Will friends and neighbors be called to testify whether the prospective juror or his or her parents or grandparents "acted" black? This is the path we take when we insist that jurors "prove" their race.

In fact, even the most benign means of accumulating this "proof" holds perils for African-Americans. In his dissent, for example, Judge Limbaugh suggests that every venireperson be required to swear to his or her race on a jury information sheet at the outset of the selection process. *Smulls*, 935 S.W.2d at 29. Again, this suggestion presents quite an advantage to prosecutors who are bent on discriminating. It eliminates any doubt as to who is black and who is not, and thus gives the errant prosecutor a neat list of the people against whom he should discriminate. With these sworn forms, black jurors who by appearance are at the margin between the races (and who might, because of their ambiguous appearance have escaped discrimination) are conveniently flagged for dismissal. Moreover, this "swear to your race" policy is hardly race-neutral because it requires *everyone* who enters the courthouse door to swear to their race. Obviously, a more truly race-neutral

approach would be to ask a juror's race only in situations where it is in question and is relevant to the proceedings before the court.

D. Judge Corrigan's "prove your race" policy is wholly unnecessary and its only conceivable purpose is to undermine *Batson*.

What is so intriguing about Judge Corrigan's "prove your race" policy is that it is wholly unnecessary. It solves a problem -- the racial misidentification of jurors -- that simply does not exist. As the dissent noted:

> I have found no case from any jurisdiction, state or federal, that states, or even proposes, any criteria for determining a person's race in order to afford proper consideration under *Batson*.

Smulls, 935 S.W.2d at 29. In the context of the jury selection process, the issue of racial identification has presented few problems. In fact, the issue of racial identity in general has provoked remarkably little litigation. There have been a few modern cases, mainly involving American Indian rights, affirmative action and elections, but these cases have been very, very rare. *See* Luther Wright, Jr., *Who's Black, Who's White, And Who Cares: Reconceptualizing The United States' Definition of Race And Racial Classifications*, 48 Vand. L.Rev. 513, 515-18, 552-54 (1995) (discussing these rare settings where racial identity has been an issue). In recent decades, thankfully, racial identity has, been a question that our society resolves without much aid from lawyers, judges, experts, exhibits or sworn affidavits. Research has yielded not a single case where a venireperson has been accused of misrepresenting his or her race in order to win the privilege of serving on a jury. As

the experienced defense attorneys testified at the Rule 29.15 hearing, in those few cases when there is doubt about the identity of a juror, the solution is a simple one: to ask *that* juror to identify his or her race. (Rem. R.Tr. 683, 1218). *See* Kenneth L. Karst, *Myths Of Identity: Individual And Group Portraits Of Race And Sexual Orientation*, 43 U.C.L.A. L. Rev. 263, 322-52 (1995).

In adopting his "prove your race" policy, Judge Corrigan has thus created a cumbersome and highly suspect "solution" to a problem that simply does not exist. This, in fact, provides some insight into the intensity of the trial judge's aversion to *Batson*. Since his policy was not directed at any real problem, its only conceivable purpose was to make it easier, in the judge's courtroom, for prosecutors to discriminate against black jurors, and more difficult for those jurors to receive the protection promised them by *Batson*. This is further evidence of why reversal is required here. Judge Corrigan's "prove your race" policy was a pretext that allowed him to avoid conducting a good faith hearing on Mr. Smulls' *Batson* objection.

CONCLUSION

In reviewing the current state of *Batson* and its progeny and what they portend for the future, one scholar has noted:

> Some day, the enormous body of *Batson* case law and the reams of commentary may look bizarre. Why did anyone think that the race of the jurors was so important? I hope my children live to see that day, not because I expect them to be tried for criminal offenses, but because the world would be a very different place if race really did not matter in a criminal trial. Until that day, good prosecutors and trial judges have the power and the obligation to minimize racial discrimination in jury selection and jury deliberations: the power to "Do the right thing." Unless they exercise that power, they further delay the day when, blissfully, none of this will matter.

Johnson, *Batson Ethics For Prosecutors And Trial Court Judges*, 73 Chicago Kent L.Rev. at 507. In this case, quite simply, Judge Corrigan failed to uphold justice by his not insuring that Mr. Smulls' right to have a jury selected free of racial discrimination was safeguarded. He closed his eyes to Ms. Sidney's race; he informed counsel after she was released that he recognized her neither as black nor as the only black person remaining on the panel; and he used this pretext as an excuse both for avoiding *Batson* and escaping his duty to stop racial discrimination in the selection of Mr. Smulls' jury. In a practical sense, Judge Corrigan delayed the day when race will no longer matter - his message was that, in his courtroom at least, prosecutors will be allowed to discriminate with impunity against those African-American jurors who fail to bring to court along with their jury selection notices some

concrete proof of their racial identity. More narrowly, Judge Corrigan failed to enforce the defendant's rights, those of Ms. Sidney, and those of the community to a jury-selection process that is not polluted by racial animus. As a result, the prosecutor successfully seated an all-white jury.

The record adduced at the Rule 29.15 hearing confirms that, as this Court suspected, the trial court refused to do what *Batson* required. Defendant's conviction must therefore be reversed.

Respectfully submitted,

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Certificate of Compliance

I, Robert Popper, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

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Robert Popper

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I, Robert Popper, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand delivered, on the ____ day of _____ 2001, to the Office of the Attorney General, 4th Floor of the Broadway Building, Jefferson City, Missouri 65101.

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