

**“ . . . and I see no reason why we should not afford Abu-Jamal the courtesy of our precedents.”** Thomas Ambro

**Dissenting Judge, U.S. 3<sup>rd</sup> Circuit Ct.**

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# **AMBRO'S DISSENT**

The quote above is one of the key opinions rendered by Judge Thomas Ambro in his 41 pages of dissent to his two other colleagues' decision against Mumia in the U. S. Third Circuit Court of Appeals decision against Mumia of March 2008. Below is a brief outline summary of Ambro's position, including many of Ambro's own quotes. Page numbers are given in parentheses. The entire court ruling can be found online: <http://www.ca3.uscourts.gov/opinarch/019014p.pdf>.

## **AMBRO'S BASIC DISSENTING POSITION**

- (1) “I believe that Abu-Jamal presents a case that, at first sight [*prima facie*], infers (i.e. suggests) a reasonable possibility that the prosecutor excluded potential black jurors because of race. This inference requires us to look further.” (page 117)
- (2) “I would remand for [send back to] the District Court to complete an analysis of the remaining steps of the *Batson* claim” [the claim holding that it at least appears that prosecutors were racially discriminatory in striking black jurors during juror selection. This claim was established by *Batson v. Kentucky*, 1986.]. (118)

## **HOW AMBRO DEFENDS HIS DISSENT**

- (1) Ambro faults the other two judges for creating a previously non-existent requirement for Mumia – namely, that Mumia should have made his *Batson* objection about racial discrimination “contemporaneously,” *while* the discrimination was occurring.
  - a. Ambro's Claim: “The Supreme Court has never announced a rule requiring a contemporaneous objection . . . , and I see no reason for us to do so now.” (81)
  - b. Ambro's Claim: The U.S. Third Circuit Court's own history bears witness against use of a contemporary objection rule, “signaling that our

Circuit does not have a federal contemporaneous objection rule – and I see no reason why we should not afford Abu-Jamal the courtesy of our precedents.” (87)

- c. Ambro’s Claim: In the case, *Wilson v. Beard* (2005), the Third Circuit considered evidence about Philadelphia prosecutors using a training tape on how to keep certain kinds of Blacks off of juries, even though “Wilson, the defendant, never made a *Batson* objection pre-trial, during trial, or even in his first post-conviction . . . proceeding.” (88)
- d. Ambro’s Claim: Even in Pennsylvania State law, a contemporaneous objection by defendants has not before been required of other defendants for having their claims of racial discrimination heard by higher courts. “Curiously, . . . here, my colleagues and I agree. . . . I query then why they would choose to come out now with a federal standard when that was not the law heretofore in our Circuit.” (97).

**(2) Ambro reminds the other two judges that Mumia only had to prove the mere suggestion of racial discrimination, a suggestion that appears “at first light,” what the courts call, “*prima facie*.”**

- a. Ambro’s Claim: Thus the defendant, Mumia, should be granted the fewest possible obstacles for proving his case. “The burden of establishing a *prima facie* case is easily met. . . . We should not raise the burden higher than what the Supreme Court requires” (102-104). Even the suggestion of “a single improper strike is enough” (104-106).
- b. Ambro’s Claim: In weighing Mumia’s claim to racial discrimination in juror selection, “courts must look at ‘all relevant circumstances’ to determine whether they ‘give rise to an inference of discrimination’” (106). And, “we do have enough information before us from which to conclude that [Mumia] established a *prima facie* case of racial discrimination in jury selection” (108). Ambro referred to the following seven “relevant circumstances” suggesting racial bias:
  - ▶ 1. Abu-Jamal is black, and therefore “a member of a cognizable racial group,” a minimum fact required by the *Batson* case (108).
  - ▶ 2. “We know that the prosecutor exercised peremptory challenges against black prospective jurors.” The fact that some black jurors were picked should not undermine Mumia’s *prima facie* case (108).
  - ▶ 3. The prosecution’s striking of 10 out of 15 prospective jurors is a “strike rate” for blacks of 66.67 percent. “It is my belief that the 66.67 % strike rate, without reference to the total [pool of available

jurors] can stand on its own for the purpose of raising an inference of discrimination.” (110).

- ▶ 4. Mumia’s case was “a racially charged case, involving a black defendant and a white victim (116).
- ▶ 5. The prosecutors’ videotape about training their lawyers to avoid selecting certain black jurors, gives “a view of the culture of the Philadelphia District Attorney’s Office in the 1980s.” Even though the tape was made 5 years after Mumia’s trial, “I find it difficult to believe that the culture in the Philadelphia D.A.’s Office was any better five years before the training video was made. Indeed, given that Abu-Jamal’s trial preceded *Batson*, it is not far-fetched to argue that the culture of discrimination was even worse (93, emphasis added).
- ▶ 6. “It is noteworthy that Abu-Jamal was a member of the Black Panther Party and that he was charged with killing a police officer” (116).
- ▶ 7. “Finally, it cannot be ignored that this is a capital case,” and the and court precedent requires this to be considered in weighing the issue of racial discrimination (116).

### AMBRO’S CONCLUSION

(1) “I conclude that it was objectively unreasonable for the Pennsylvania Supreme Court to determine that Abu-Jamal failed to make out a *prima facie* case. I would hold that **Abu-Jamal met the burden his *prima facie* case** and remand [send back] to the District Court to hold a hearing to complete the *Batson* analysis” (117)

(2) Ambro holds, at several points throughout his dissenting opinion, that **in spite of the Anti-terrorism Effective Death Penalty Act (AEDP)**, which makes it more difficult to grant defendant claims on appeal, there is nothing in AEDP that should have stood in the way of acknowledging that Mumia Abu-Jamal has met the minimal criteria required for receiving consideration of his claims about racial discrimination.

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