THE NON-DISCRIMINATION IDEAL OF *HERNANDEZ V. TEXAS* CONFRONTS A "CULTURE" OF DISCRIMINATION: THE AMAZING STORY OF *MILLER-EL V. TEXAS*[1]

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"If [the trial jury's] composition is a sham, the judgment is a sham."

President Lyndon B. Johnson[2]

INTRODUCTION

The history of race discrimination in jury selection dates back to the founding of our nation, but it was not until after Reconstruction that the Supreme Court recognized the right of African-Americans to participate in the jury process. The Court struck down exclusionary statutes[3] and disapproved of discriminatory practices.[4] Congress also provided criminal sanctions for any person who excluded African-Americans from jury service

1. Throughout this Article, the author refers to the case as "*Miller-El v. Texas*," which was the way the case was originally styled. *See* Miller-El v. Texas, 748 S.W.2d 459 (Tex. Crim. App. 1988). The case currently before the United States Supreme Court is actually styled "Miller-El v. Dretke," 361 F.3d 849 (2004), and was previously also styled "Miller-El v. Cockrell," 537 U.S. 322 (2003), and "Miller-El v. Johnson," 330 F.3d 690 (5th Cir. 2003). The original style is chosen because it more clearly identifies the identity of the true respondent, the State of Texas.

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2. *See* Douglas L. Colbert, *Challenging the Challenger: Thirteenth Amendment As a Prohibition Against The Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 88 (1990) (quoting President Johnson's statement published in N.Y. TIMES, Nov. 17, 1965, at 1).

3. *See, e.g.*, Neal v. Delaware, 103 U.S. (13 Otto) 370 (1881) (state excluded African-Americans from jury service on account of race); Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1880) (state statute limiting jury service to white males violates equal protection rights of African-Americans).

4. *See infra* notes 31-39 and accompanying text (regarding color-coded cards and discriminatory application of juror qualifications).

on the basis of race.[5] Thus, no longer can African-Americans be totally excluded from jury lists by statute, nor can they be totally excluded by the discriminatory application of facially neutral statutes.[6]

The Supreme Court has likewise vindicated the constitutional rights of other groups who have been excluded from service on juries. In the 1954 case of *Hernandez v. Texas*, the Court first articulated the universality of the non-discrimination mandate that it had set forth in numerous previous opinions spanning over a century.[7] The Court found that persons of Mexican descent constituted a "separate" and "distinct" class, and, as such, the State of Texas could not discriminate against the group in jury selection.[8] Following *Hernandez*, the Court proceeded to acknowledge the right of women not to be excluded on the basis of their gender.[9] The Court has also held that the right against discrimination belongs to the excluded juror. Thus, it matters not whether the discrimination is practiced by the prosecutor or defense,[10] whether the case is criminal or civil,[11] or whether the defendant in a criminal case is African-American, Latino, or white.[12]

In another line of cases, the Supreme Court extended the non-discrimination rule further than simply prohibiting the systematic exclusion of all people of a distinct group. The Court went so far as to require that groups should be "fairly represented" on jury lists according to population statistics for minority groups in a particular jurisdiction.[13] This right emanates from the Sixth Amendment right to a jury trial, rather than from the Equal Protection Clause.[14] Nonetheless, it is an important com-

5. *See Ex Parte* Virginia, 100 U.S. (10 Otto) 339 (1880) (upholding federal statute criminalizing a state's exclusion of African-Americans from jury service because of their race as a reasonable means of enforcing Equal Protection Clause).

6. *See, e.g.,* cases cited *infra* note 40; Hernandez v. Texas, 347 U.S. 475 (1954) (total exclusion of Mexican-Americans from grand jury service).

7. Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).

8. *Id.* at 482.

9. J.E.B. v. Alabama *ex rel.*, T.B., 511 U.S. 127, 130-31 (1994).

10. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

11. Georgia v. McCollum, 505 U.S. 42 (1992) (criminal defendants do not have right to racially discriminate against potential jurors and State has standing to raise claims on behalf of potential jurors).

12. Hernandez v. New York, 500 U.S. 352 (1991) (discrimination against venire persons on basis of ethnic origin is prohibited by *Batson* principles); Powers v. Ohio, 499 U.S. 400 (1991) (white defendant has right to bring third-party equal protection claims on behalf of excluded black venire person); Peters v. Kiff, 407 U.S. 493 (1972) (white defendant's due process rights violated by total exclusion of African-Americans on his grand jury and petit jury).

13. *See* cases cited *infra* notes 82-84 and accompanying text.

14. *Id.*

ponent of the jurisprudence on non-discrimination in jury selection.

Despite these successes in the Supreme Court for the principal of non-discrimination in jury selection, discrimination continues in many old and new forms. While the Court vigorously rejected total exclusion of a particular racial group from jury lists and even requires fair representation for distinct groups on jury lists, it has never affirmatively required proportionate representation on juries. Instead, the Court continues to allow the exercise of peremptory strikes during jury selection, a practice that has the potential to be used to eliminate all or virtually all of the available minority jurors, and is often used in just that way.[15] Thus, rather than proportionate inclusion on juries, the old practice of total exclusion has been transformed to proportionate inclusion at the front end (jury lists) and, all too often, exclusion or token inclusion at the back end (seated juries).

Such was the state of jury selection practices in 1986 in Dallas County, Texas, when Thomas Joe Miller-El was arrested for murder. When jury selection began in Miller-El's trial, there were twenty African-Americans on his jury venire. Nine of them were excused for cause or by agreement of the parties. During the course of jury selection, the prosecutor exercised ten of his fourteen peremptory strikes to remove ten of the eleven remaining African-Americans from the jury, leaving only one African-American who served on the jury.[16] These numbers, while stark in the apparent use of peremptory challenges to remove African-Americans, may in the end still be found not to constitute an Equal Protection Clause violation. The crucial issue will be whether Miller-El can refute the prosecution's race-neutral reasons for the use of its peremptory strikes and show by clear and convincing evidence that the reasons are pretextual. In addition to the sheer number of peremptory strikes directed at African-American venire persons, Miller-El also offered evidence of alleged disparate questioning of African-Americans as compared to white venire persons, the use of a practice known as "jury shuffling," as well as evidence of a history of discriminatory practices in jury selection by the Dallas County District Attorney's Office.[17]

Miller-El's habeas petition is currently pending before the Supreme Court. The *Miller-El* case may be the rare case in which the Supreme Court finds a violation of *Batson's* rule against racial discrimination in the use of peremptory strikes. Even if it

15. *See infra* notes 85-134 and accompanying text.
16. Miller-El v. Cockrell, 537 U.S. 322, 331 (2003).
17. *See infra* notes 135-56 and accompanying text.

does so find, the case is still a prime example of how nearly impossible it is to obtain a reversal on *Batson* grounds. Coming eighteen years after Miller-El was convicted, the decision should be amazing, regardless of how the Court decides it. The Court will do one of two things. On the one hand, the Court may affirm the Fifth Circuit's rejection of Miller-El's habeas petition, in effect contradicting its own apparent factual findings upon the case's first review in the Supreme Court. This, however, is an unlikely outcome. In all probability, the Court will reverse the Fifth Circuit's decision and declare that the prosecutors in Miller-El's case used their peremptory strikes in a racially discriminatory manner — a finding that is infrequently made in *Batson* jurisprudence.[18] If the Court finds that Miller-El has substantiated his claim of discrimination, it will be interesting to see how broadly the Court's proscription of discrimination will extend. Will it also strike down the Texas practice of "jury shuffles"? Will the Court ease the burden placed on petitioners to prove discrimination? Unless the Court makes some fundamental change in the functioning of *Batson* review, most racial minorities will undoubtedly continue to be excluded from jury service by prosecutors in criminal cases on a regular basis.

This Article adds another voice to the body of literature calling for the abolition of the use of peremptory strikes in order for racial discrimination in jury selection to be eradicated.[19] The Article begins in Part I with a brief review of the history of racial discrimination in jury selection from the nineteenth-century to the 1950s. It traces the development of the Supreme Court's non-

18. *See infra* notes 107-34 and accompanying text.

19. *See, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 821-22 (1997); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502-03, 484 n.109 (listing citations); Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist?: An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000). Many others have offered solutions short of eliminating the peremptory challenge. *See, e.g.*, Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory Challenge*, 12 KAN. J. L. & PUB. POL'Y 323, 343 (2003) (proposing blind questionnaires for use of peremptories); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet The Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 505 (1999) (arguing that all peremptories should have some rational basis to pass constitutional muster); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1110 (1994) (recommending a number of reforms); Colbert, *supra* note 2, at 101 (arguing for use of the Thirteenth Amendment to prohibit use of peremptory challenges to exclude African-Americans); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1698-99 (1985) (proposing that a minimum of three black jurors is necessary to guarantee a fair jury verdict when the accused is black).

discrimination principle as applied in cases in which African-Americans were systematically excluded from jury service.

Part II of the Article highlights the importance of *Hernandez v. Texas* as the first case to broaden the non-discrimination concept to include all identifiable groups. This part describes the evolution of the Court's non-discrimination jurisprudence as it extended its reach to include ethnic minorities and women. The constitutional protections against discrimination in jury selection even include a "fair cross-section" requirement, but this requirement only applies to the creation of jury lists and does not place any limits on the use of peremptory challenges in selecting actual jurors. The last section of Part II provides an empirical analysis of appellate case law reviewing claims of discrimination to determine whether *Batson's* three-part rule appears to provide an effective remedy for discrimination in the use of peremptory strikes.

In Part III, the Article tells the amazing story of *Miller-El v. Texas*, a case that has the potential to change the course of jury selection toward the realization of diverse juries, but which also has the potential to be a testament to the failure of *Batson* to eradicate discrimination in voir dire.

I. A THUMBNAIL SKETCH OF DISCRIMINATION IN JURY SELECTION AND THE FOCUS ON EXCLUSION OF AFRICAN-AMERICANS

At the founding of our country, juries were racist, sexist and elitist in composition.[20] Juries were comprised exclusively of men in all states.[21] With the exception of Vermont, jury service was also restricted to property owners or taxpayers.[22] Three states had statutes permitting only whites to serve on juries, and the state of Maryland disqualified atheists.[23] Over the course of the nineteenth-century, property qualifications for eligibility to *vote* began to disappear and the country moved toward universal suffrage for white males.[24] But the reform of jury eligibility criteria seemed to lag behind the reform of voting requirements.[25]

Interestingly, Alschuler and Deiss note that nineteenth-century juries were faulted more for their incompetence than their elitism. They write, "As early as 1803, St. George Tucker's influential American edition of *Blackstone's Commentaries* reported

20. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States,* 61 U. CHI. L. REV. 867, 876 (1994).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 878.
25. *Id.*

that, 'after the first day or two,' juries hearing civil lawsuits in the rural areas of Virginia were 'made up, generally, of idle loiters about the court, . . . the most unfit persons to decide upon the controversies of suitors."[26] Similar complaints were made in other parts of the country as well, and there were complaints that jurors (of such low qualifications) were easily subject to corruption and bribery.[27]

Statistics on racial inclusion have never been available as such. Any historical description is thus necessarily pieced together from available information gathered from various sources. Alschuler and Deiss report that the first African-Americans known to serve on a jury did so in Massachusetts in 1860.[28] By all accounts, however, jury service was a right exercised by a few African-Americans at this time in a few jurisdictions. Alschuler and Deiss provide examples of integrated juries from two jurisdictions:

> In 1867, the military commander of South Carolina declared every taxpayer or registered voter to be eligible for jury service. Since the military itself had registered virtually every adult African-American male, integrated juries became common in this district. Two years later, the South Carolina legislature mandated not only that grand and petit juries be integrated but also that their racial composition duplicates the composition of the counties in which they sat.[29]

> Almost one-third of the citizens called for grand jury service in New Orleans between 1872 and 1878 were African-Americans – a percentage that matched the percentage of African-Americans in the population of Orleans Parish generally.[30]

Still in most jurisdictions, African-Americans and other minority groups were excluded by means of a number of practices. In most states, "jury commissioners" were (and still are in some states) members of the community who were charged with compiling lists of potential jurors. Cases showed that state courts tended to appoint all-white jury commissioners who applied subjective criteria to create jury lists that tended to include primarily, if not exclusively, white prospective jurors.[31] In some cases,

26. *Id.* at 880 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES APP. 64 (St. George Tucker, ed., Birch and Small 1803)).

27. *Id.* at 881-82.

28. *Id.* at 886.

29. *Id.*

30. *Id.*

31. Carter v. Jury Comm'n. of Greene County, 396 U.S. 320 (1970) (in class action by potential African-American jurors substantially underrepresented in jury service, Court holds that excluded class has a cognizable claim); Turner v. Fouche, 396 U.S. 346 (1970) (jury commissioners used juror qualifications in unconstitutional manner such that African-Americans were substantially underrepresented).

States defended their exclusionary practices by arguing that no African-Americans met the qualifications for jury service. For example, in *Neal v. Delaware*, the Court rejected the State's argument that no African-American had been called to jury service because "the great body of black men residing in [the] State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries."[32] In *Neal*, the Supreme Court rejects this proposition with strong language that it would repeat in several cases over the decades:

> It was, we think, under all the circumstances, *a violent presumption* which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries.[33]

In places in which more diverse jury lists were compiled, trial courts employed other means to exclude African-Americans. In one case, the court used different colored tickets for African-Americans and whites which were drawn by a judge, ostensibly at random, from a box.[34] It so happened that no African-American had ever been selected to serve on a jury.[35] A concurring opinion notes that "the aperture in the box was sufficiently wide to make open to view the color of slips."[36] Moreover, the concurring justice expresses the concern that the "opportunity for working of a discriminatory system exists whenever the mechanism for jury selection has a component part, such as the slips here, that differentiates between white and colored."[37] The practice of distinguishing jurors by race on cards would continue in some places into modern times.[38] In another

32. Neal v. Delaware, 103 U.S. 370, 402 (1880).

33. *Id.* at 397 (emphasis added); *see also* Hill v. Texas, 316 U.S. 400, 405 (1942) (quoting "violent presumption" language); Norris v. Alabama, 294 U.S. 587, 599 (1935) (same).

34. Avery v. Georgia, 345 U.S. 559, 560-61 (1953); *see also* Alexander v. Louisiana, 405 U.S. 625 (1972) (racial designation on both questionnaire and information card established that jury selection procedures were not racially neutral); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from one-volume tax digest divided into separate sections of "Negroes" and "whites"); Arnold v. North Carolina, 376 U.S. 773 (1964) (grand jurors selected from tax records of county in which "Negroes" and "whites" are listed separately).

35. *Avery*, 345 U.S. at 561.

36. *Id.* at 564 (Frankfurter, J., concurring).

37. *Id.*

38. *See, e.g.*, Ford v. Kentucky, 469 U.S. 984, 984 (1984) (Marshall, J., dissenting) (defendant claimed selection system for grand jurors not facially neutral, for the voter registration list from which grand jurors selected in county contained information on gender, race, and date of birth); Alexander v. Louisiana, 405 U.S. 625 (1972) (racial designation on both questionnaire and information card established that jury selection procedures were not racially neutral). Indeed, the Supreme Court has sug-

case, the State argued that the jury lists included African-Americans. The evidence, however, suggested that lists may not have included African-Americans, but that the names of African-Americans may have been added later after the claim of discrimination had been lodged.[39]

Thus, the Supreme Court encountered many forms of discrimination, and in case after case found equal protection violations resulting from the total exclusion of African-Americans from jury lists.[40] In the first seventy-four years of its jury discrimination jurisprudence, the Court had occasion to consider only claims brought by African-Americans. The extent of similar protection for other groups was not determined until the earliest days of the civil rights movement when the Court decided *Hernandez v. Texas* in 1954.[41]

II. THE UNIVERSAL NON-DISCRIMINATION IDEAL OF *HERNANDEZ V. TEXAS:* JURY VENIRES AND PEREMPTORY STRIKES

Whereas the nineteenth-century cases to arrive before the Supreme Court involved the total exclusion of African-Americans from jury lists or venires, the twentieth-century would bring a wider variety of claims and claimants. The Court's landmark decision in *Hernandez v. Texas* recognized the rights of *all* identifiable groups to be free from discrimination in the creation of jury venires, or lists — the first stage in the jury selection process. The final stage in jury selection — the exercise of peremptory strikes during voir dire — would present a different set of obstacles for parties claiming discrimination. Ultimately, the Court attempted in *Batson v. Kentucky* and its progeny to provide a remedy for discrimination in the use of peremptory strikes. Un-

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gested that jury selection procedures are never racially neutral with respect to Latinos, finding that "Spanish surnames are just as easily identifiable as race was from the questionnaires in *Alexander* or the notations and card colors in *Whitus v. Georgia,* and in *Avery v. Georgia.*" Castañeda v. Partida, 430 U.S. 482, 495 (1977).

39. *See* Norris v. Alabama, 294 U.S. 587, 592-93 (1935).

40. *See, e.g.,* Coleman v. Alabama, 389 U.S. 22 (1967) (no African-American had ever served on a grand jury and few, if any, had served on petit juries in the county); Arnold v. North Carolina, 376 U.S. 773 (1964) (only one African-American had served on a grand jury in previous twenty-four years); Eubanks v. Louisiana, 356 U.S. 584 (1958) (uniform and long-continued exclusion of African-Americans from grand jury service); Reece v. Georgia, 350 U.S. 85 (1955) (no African-American had ever been called to serve on grand jury); Patton v. Mississippi, 332 U.S. 463 (1947) (no African-American had served on grand or petit criminal court juries for thirty years or more); Hill v. Texas, 316 U.S. 400 (1942) (no African-American had ever been called to grand jury service); Norris v. Alabama, 294 U.S. 587 (1935) (continuous and systematic exclusion of African-Americans from grand and petit juries); Neal v. Delaware, 103 U.S. 370, 397 (1880) ("no colored citizen had ever been summoned as a juror in the courts of the State").

41. 347 U.S. 475 (1954).

fortunately, *Batson* has not proved to be an effective remedy, and the problem of discriminatory strikes by prosecutors continues virtually unabated.[42]

The following sections trace the Supreme Court's jurisprudence from *Hernandez* to *Batson* and provides a backdrop for a discussion of the pending case of *Miller-El v. Texas* that may signal a sea change in the Court's evaluation of *Batson* claims.

A. Hernandez v. Texas *Extends Equal Protection Against Exclusion From Jury Venires to "Identifiable Groups"*

Pete Hernández was indicted for murder in Jackson County, Texas. He moved timely to quash his indictment on the ground that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors although a substantial number of qualified persons of Mexican descent resided in the county.[43]

As a preliminary matter, the Court would have to determine whether the Equal Protection Clause even applied to persons of "Mexican descent." The State of Texas argued that the Fourteenth Amendment protected only African-Americans against discrimination by whites.[44] The Court found that such a view was not supported either by its own prior case law or that of the courts of Texas. However, since the United States Supreme Court had never considered a similar claim brought by Latinos, it could not rely on its own prior precedent in defining the class of persons belonging to the group. The Court determined that Hernández had the initial burden of showing that "persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites.'"[45] The Court relied on testimony about the disparate and inferior treatment of Latinos in the community as proof that the "attitude of the community" recognized a distinct class.[46]

The Court turned to the question of whether Hernández had proved that Mexican-Americans had been excluded from jury

42. *See infra* notes 107-34 and accompanying text.
43. *Hernandez,* 347 U.S. at 476-77.
44. *Id.* at 477.
45. *Id.* at 479.
46. The Court recounts testimony provided by the petitioner:

> Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican.' The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here').

Id. at 479-80 (citations omitted).

service as a result of discrimination. Typically, the Court considered the percentage of people of different races in the population from which jury lists are drawn. In the case of Latinos, even this can be a tricky thing. In order to determine the percentage of persons of Mexican descent, the Court relied on census data for the county identifying the numbers of people with "Mexican or Latin American surnames," as well as data indicating how many of these persons were native born American citizens and how many were naturalized citizens.[47] The State challenged the reliance on surnames as a method for determining which members of the community were of Mexican descent.[48] The Court found that relying on surnames was a satisfactory method for calculating the relative size of the community, finding that "just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class."[49]

Based on the census data, the Court concluded that fourteen percent of the population of the county and eleven percent of the males over twenty-one bore Spanish surnames.[50] The tax rolls of the county showed that six or seven percent of the freeholders were persons of Mexican descent. At the same time, the State stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury, or petit jury in Jackson County."[51] Based on this evidence, the Court held that Hernández had met the burden of proof of making a strong prima facie case of the denial of equal protection.[52] The State offered only the testimony of five jury commissioners who stated that they did not discriminate against persons of Mexican or Latin American descent. This testimony was not enough to overcome the petitioner's case.[53]

The true significance of *Hernandez* is in the Court's recognition that *any* "separate" and "distinct" class of persons who may be excluded from jury service by invidious discrimination can rely on the Equal Protection Clause to vindicate their rights. Fol-

47. *Id.* at 480-81 n.12. By relying on "Latin American surnames" the Court was presumably willing to include persons whose lineage might be traceable to other Latin American countries such as Peru or Guatemala, although the defendant's claim was that persons of Mexican descent were the "distinct" class. Given the testimony provided at the hearing, it is likely that the community would have treated all persons of Latin American descent as "Mexican."

48. *Id.*

49. *Id.*

50. *Id.* at 480.

51. *Id.* at 481.

52. *Id.*

53. *Id.*

lowing *Hernandez*, cases involving the total exclusion of particular groups dwindled as jurisdictions expanded their jury lists to include both minorities and, eventually, women.[54]

B. *The Supreme Court Upholds Requirement of "Substantial Underrepresentation" on Jury Lists*

Having struck definitive blows against the blatantly discriminatory practices that led to the total exclusion of minorities from jury selection in many jurisdictions, the Court next considered whether groups had a right to "fair representation" on jury lists. In a series of cases, the Court compared census data showing the percentage of the group claiming discrimination in a jurisdiction to the information showing the percentage on grand jury lists.[55]

In the 1965 decision of *Swain v. Alabama,* the Court rejected the contention that African-Americans have a right to fair representation on jury lists. The Court refused to find a prima facie case of discrimination based on statistics showing a consistent underrepresentation of African-Americans on grand and petit jury panels.[56] The Court acknowledged that African-Americans were "unquestionably" included in smaller proportions than members of the white community. Yet, the Court stated that "a defendant in a criminal case is not constitutionally entitled to demand a

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54. As late as the late 1960s, however, the Court was addressing cases of total exclusion of African-Americans. *See* Coleman v. Alabama, 389 U.S. 22 (1967) (defendant established prima facie case of denial of equal protection by evidence that no African-American served on the grand or petit jury in his case and that no African-American had served on a grand jury and few, if any, had served on petit juries in the county).

55. Turner v. Fouche, 396 U.S. 346 (1970) (60% African-Americans in general population, 37% on grand jury lists); Whitus v. Georgia, 385 U.S. 545 (1967) (27.1% of taxpayers, 9.1% on grand jury lists); Sims v. Georgia, 389 U.S. 404 (1967) (24.4% of tax lists, 4.7% of grand jury lists); Jones v. Georgia, 389 U.S. 24 (1967) (19.7% of tax lists, 5% of jury list).

56. 380 U.S. 202, 205-09 (1965). The defendant established the following evidence of discrimination in the creation of jury panels and the selection of juries:

> The evidence was that while Negro males over 21 constitute 26% of all males in the county in this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes, there having been only one case in which the percentage was as high as 23%. In this period of time, Negroes served on 80% of the grand juries selected, the number ranging from one to three. There were four or five Negroes on the grand jury panel of about 33 in this case, out of which two served on the grand jury which indicted petitioner. Although there has been an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has actually served on a petit jury since 1950. In this case, there were eight Negroes on the petit jury venire but none actually served, two being exempt and six being struck by the prosecutor in the process of selecting the jury.

Id. at 205.

proportionate number of his race on the jury which tries him *nor on the venire or jury roll from which petit jurors are drawn.*"[57]

The Court seemed to accept as evidence rebutting the allegation of purposeful discrimination the testimony of jury commissioners that racial considerations did not play a part in their selections.[58] The Court also appears to have placed the burden on the petitioner to prove that different standards of juror qualifications were applied to African-Americans and to whites or that African-Americans satisfied the standards in the same proportion as whites.[59] The Court's treatment of the evidence presented in this case by both parties stands in marked contrast to its treatment in earlier cases of total exclusion. In those cases, the Court had given little to no weight to the testimony of jury commissioners who denied practicing racial discrimination[60] and had categorically refused to accept the proposition that no African-Americans met the qualifications to serve on juries, calling it a "violent presumption."[61] One might have expected the Court to have similarly demanded that the State prove that African-Americans were proportionately less qualified than whites and not place the burden on the defense to prove otherwise.

In a later case, the Court took a different path and found that significant "mathematical disparities" would be enough to make out a prima facie case of discrimination.[62] In *Castañeda v. Partida*, a criminal defendant, Rodrigo Partida, challenged the grand jury selection process that produced the Hidalgo County, Texas, grand jury that indicted him, claiming that Mexican-Americans were not fairly represented on the grand jury.

The Court had previously considered the selection procedures for grand jury service in Texas in *Castañeda* and other cases.[63] Unlike other cases, however, this case did not present a claim of total exclusion. The evidence presented on behalf of the petitioner showed that according to the 1970 Census statistics, "the population of the county was 79.1% Mexican-American, but that, over an eleven-year period, only thirty-nine percent of the persons summoned for grand jury service were Mexican-American," a disparity of forty percent.[64] The State did not dispute this

57. *Id.* at 208.
58. *Id.* at 209.
59. *Id.*
60. *See, e.g.,* Alexander v. Louisiana, 405 U.S. 625, 632 (1972); Hernandez v. Texas, 347 U.S. 475, 481 (1954); Norris v. Alabama, 294 U.S. 587, 598 (1935); *cf.* Castañeda v. Partida, 430 U.S. 482, 498 n.19 (1977).
61. *See supra* notes 32-33 and accompanying text (quoting Neal v. Delaware, 103 U.S. 370, 393-94 (1880)).
62. *Castañeda*, 430 U.S. at 496.
63. *Id.* at 484.
64. *Id.* at 495.

evidence. The Court found this mathematical disparity sufficient to establish a prima facie case of purposeful discrimination against Mexican-Americans in Hidalgo County, Texas.[65]

The State also failed to produce evidence to rebut the prima facie case of discrimination. The jury commissioners were not called to testify.[66] Thus, it was "impossible to draw any inference about literacy, sound mind and moral character, and criminal record from the statistics about the population as a whole" so as to determine what percentage of Mexican-Americans qualified for jury service.[67] As a result, the Court held that the petitioner had proved his claim of unconstitutional discrimination.[68]

In some ways, the more interesting aspect of the *Castañeda* case was the Court's position on the "governing majority" theory on which the District Court had relied in rejecting the petitioner's claim.[69] In fact, both the Texas Court of Criminal Appeals and the Federal District Court had found it impossible to believe that Mexican-Americans, who held a "governing majority," would discriminate against themselves. In this case, the Supreme Court notes the Texas high court's findings:

> [T]hat the foreman of the grand jury that indicted respondent was Mexican-American, and that 10 of the 20 summoned to serve had Spanish surnames. Seven of the 12 members of the petit jury that convicted him were Mexican-American. In addi-

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65. *Id.* at 496.

66. *Id.* The Court notes, however:

> This is not to say, of course, that a simple protestation from a commissioner that racial considerations played no part in the selection would be enough. This kind of testimony has been found insufficient on several occasions. Neither is the State entitled to rely on a presumption that the officials discharged their sworn duties to rebut the case of discrimination.

Id. at 499 n.19 (citations omitted).

67. *Id.* at 498-99.

68. The *Castañeda* "test" for proving substantial underrepresentation was later outlined in *Rose v. Mitchell*, 443 U.S. 545 (1979):

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foremen], over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Id. at 565.

69. Interestingly, the Fifth Circuit had reversed the District Court's decision, finding that the State had not rebutted the respondent's prima facie case and that the "governing majority" theory added little to the State's case in the absence of specific proof to explain the disparity. *Castañeda,* 430 U.S. at 492. The Court nonetheless granted certiorari to consider "whether the existence of a 'governing majority' in itself can rebut a prima facie case of discrimination in grand jury selection, and, if not, whether the State otherwise met its burden of proof." *Id.*

> tion, the state judge who presided over the trial was Mexican-American, as were a number of other elected officials in the county.[70]

The District Court had concluded that this theory filled the evidentiary gap in the State's case.[71] The Supreme Court rejected this without much explanation, "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of the group."[72]

While the Court would uphold the rights of minorities to be fairly represented on jury lists, it maintained its long-held position that there is no right to proportional representation on actual jury panels.[73] The next phase of the challenge in obtaining fair representation in jury service would be to confront the discretionary means employed to severely restrict the number of minorities who actually serve on juries. The following section demonstrates how the Court's jurisprudence requiring that jury lists be representative of a cross-section of the community accomplished little in terms of diversifying juries in this country. Instead, by affirming the constitutionality of the use of peremptory strikes in *Swain v. Alabama,*[74] *Batson v. Kentucky*,[75] and be-

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70. *Id.* at 490 n.9.

71. *Id.* at 499.

72. *Id.* The Court added that the evidence in the record was insufficient to establish a "governing majority" theory in any case. *Id.* at 500.

Justice Marshall's concurring opinion cites social science research showing that, "[M]embers of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group." *Id.* at 503 (Marshall, J., concurring).

73. Since the days of Reconstruction, the Court had clearly stated that the Equal Protection Clause gave African-Americans a right not to be excluded from jury service on account of race, but the Court also made clear that it did *not* grant them a right to fair representation on any particular jury:

> [W]hile a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as a matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, "that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."

Neal v. Delaware 103 U.S. (13 Otto) 370, 394 (1881). The Court would repeat this position numerous times over the years. *See, e.g.,* Swain v. Alabama, 380 U.S. 202, 208 (1965) ("[A] defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn.").

74. *Swain*, 380 U.S. at 205-09.

75. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

yond, the Court's century-long battle to end discrimination in jury selection effectively came to an end.

C. *"Fair Cross-Section" Requirement Applies Only to Jury Lists, Not to Actual Juries*

As the Court's jurisprudence on discrimination in jury selection evolved, claims of discrimination became more varied in terms of the parties claiming a right to be free from discrimination, the type of discrimination claimed, and the constitutional bases for the claims being made. Ultimately, the Court would rely on various constitutional grounds to uphold the rights of all persons to challenge the systematic exclusion of any large and identifiable segment of the community from the jury *lists* from which grand and petit juries are drawn.

The first expansion of the standing to challenge the exclusion of minorities from a grand jury venire came in a 1972 case. In *Peters v. Kiff*, the Court addressed the claim of a white defendant who alleged that his due process right to a fair trial was violated by the systematic exclusion of African-Americans from his grand jury venire.[76] The Court relied on dicta in its earlier cases in which it had spoken of the injury to potential jurors who are denied the "privilege of participating equally . . . in the administration of justice."[77] It also relied on a more recent line of cases identifying a Sixth Amendment right to a jury trial in which the jury venire, panel, or list represents a "fair cross-section of the community."[78] Finding that all criminal defendants have a right to a jury drawn from a fair cross-section of the community, the Court found that a white defendant does have standing to raise a due process claim based on the systematic exclusion of potential African-American jurors.[79] The Court refused to assume that the exclusion of African-Americans had relevance only for issues involving race. Instead, the Court reasoned: "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[80] Since the possible harms caused by the exclusion of a large segment of the community are impossible to discern, the Court determined that "any doubt should be resolved in favor of giving the opportunity to challenge the jury to too many defend-

76. 407 U.S. 493 (1972).
77. *Id.* at 499.
78. *Id.* at 500.
79. *Id.* at 505.
80. *Id.* at 503.

ants, rather than to too few."[81] Thus, the Court both recognized the right of a white defendant to challenge the discrimination against African-Americans on his jury venire, but also recognized that the due process right to a fair trial prohibits discrimination in jury selection.

The Court also expanded the constitutional bases for requiring that jury venires be representative of the community. In addition to the traditional equal protection rights of minorities not to be substantially underrepresented on jury venires, the Court also found that the Sixth Amendment right to a jury trial[82] encompasses the right of all criminal defendants to have a "fair cross-section" of the community on the jury venire, panel or list from which their petit juries are drawn.[83] This right to a "fair cross-section" was announced in two cases brought by male defendants who claimed that they had been denied their Sixth Amendment rights by the systematic exclusion of women. The Court found violations of the fair cross-section requirement in the systematic exclusion of women from jury lists. Women were being underrepresented due to the operation of state statutes providing automatic exclusions of women unless they either requested to serve or upon their request for exclusion.[84] Thus, the Court broadened the right to challenge the systematic exclusion or underrepresentation of identifiable groups so as to permit all criminal defendants to demand a representative venire or list.

D. *Voir Dire Evades Fair Cross-Section Requirement*

In applying the fair cross-section requirement of the Equal Protection Clause, the Supreme Court repeatedly has drawn a firm line at jury *lists*.[85] The actual jury seated, on the other hand, is the product of both strikes for cause and peremptory strikes exercised by both parties. Under such a system, it is, of course, impossible to require that the jury represent a fair cross-section of the community, and the Court has refused to eliminate the rights of the parties to exercise peremptory strikes in selecting a

81. *Id.* at 504. *But see* Ford v. Kentucky, 469 U.S. 984, 985-86 (1984) (Marshall, J., dissenting) (noting that *Peters* opinion on standing had not garnered a majority and that it had spawned confusion in the lower courts).

82. Duncan v. Louisiana, 391 U.S. 145 (1968).

83. Taylor v. Louisiana, 419 U.S. 522, 529 (1975).

84. *Id.* at 531 (women excluded unless submitted a request to serve); Duren v. Missouri, 439 U.S. 357, 366-67 (1979) (women automatically excluded upon request).

85. *See* Holland v. Illinois, 493 U.S. 474, 482-83 (1990) (Sixth Amendment grants right to a jury venire that represents a fair cross section of community, but not that the jury itself must be representative); *cf.* Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.").

jury.[86] Such a system may produce juries that are totally or nearly monochromatic once both sides have exercised their peremptory strikes.

The challenge for the Court was to find a way to regulate the use of peremptory strikes so as to prohibit discriminatory practices without changing the "arbitrary" nature of the strike. The Court took one approach in *Swain v. Alabama*,[87] but then changed course in *Batson v. Kentucky*.

In *Swain*, the Court's first foray into policing the use of peremptory strikes, the defendant showed that there had never been an African-American on a petit jury in either a civil or criminal case in the county and that in criminal cases, he claimed, prosecutors had "consistently and systematically exercised their strikes to prevent any and all [African-Americans] on petit jury venires from serving on the petit jury itself."[88] The Court rejected the defendant's claim on the ground that he had not shown that *the same prosecutor* had systematically used his peremptory challenges to strike African-Americans *over a period of time*.[89] The majority emphasized that unlike the production of the jury venire which is purely a product of state officers, the selection of the petit jury is a product of both a prosecutor's and defense counsel's use of strikes.[90] The majority concluded that the record was insufficient to prove that the prosecutor in the defendant's case — and not defense attorneys — was responsible for removing African-Americans from juries in case after case.

Further, the majority opinion in *Swain* goes to great lengths to extol the virtues and long history of the peremptory strike system in the United States. The Court concludes that "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[91] In order for the peremptory challenge to function properly, it must be allowed to be "exercised without a reason stated, without inquiry and without being subject to the court's control."[92] Moreover, the decision recognizes a *presumption* that "in any particular case

86. *See Holland*, 493 U.S. at 484 ("We have acknowledged that that device [the peremptory strike] occupies 'an important position in our trial procedures,' . . . and has indeed been considered 'a necessary part of trial by jury.'") (citations omitted); *accord* Batson v. Kentucky, 476 U.S. 79, 98 (1986); Swain v. Alabama, 380 U.S. 202, 219 (1965).

87. 380 U.S. at 209.

88. *Id.* at 223.

89. *Id.* at 227.

90. *Id.* at 226-27.

91. *Id.* at 219.

92. *Id.* at 220.

. . . the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court," and that presumption could not be overcome by subjecting the prosecutor to examination on his or her motives.[93]

In a passage that would be highly criticized (as was the entire *Swain* decision),[94] the Court explains the types of "sudden impressions and unaccountable prejudices" that may provoke a peremptory strike:

> It [the peremptory strike] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.[95]

This passage appears to suggest that it is not objectionable, and indeed is to be expected, that prosecutors (and defense counsel) may evaluate a juror on the basis of group affiliation (e.g., race) and decide to exclude that juror on the ground that a juror of a different race may be less partial to one's opponent.

It took twenty-one years for the Supreme Court to overrule the *Swain* rule requiring proof of a systematic pattern of discrimination by the prosecutors in a defendant's case. In *Batson v. Kentucky,* the prosecutor used his peremptory strikes to eliminate all four black persons on the venire, resulting in a jury comprised only of white persons.[96] The defendant argued that this use of peremptory challenges showed a pattern of purposeful discrimination. The Court found that the Equal Protection Clause extends its protection against discriminatory practices by the State in the exercise of peremptory challenges.[97] In contrast to the dicta in *Swain*, the Court in *Batson* expressly condemned the use of peremptory strikes by prosecutors to exclude potential jurors "solely on account of their race or on the assumption that black

93. *Id.* at 222.

94. *See, e.g.,* Thompson v. United States, 469 U.S. 1024, 1025 (1984) (Marshall, J., dissenting); McCray v. New York, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting) (listing citations); *see also* Melilli, *supra* note 19, at 449-50.

95. *Id.* at 220-21 (citations omitted).

96. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

97. *Id.*

jurors as a group will be unable impartially to consider the State's case against a black defendant."[98]

The decision overruled the "crippling" evidentiary burden placed on defendants by the *Swain* rule that required them to prove a pattern of discriminatory strikes, in cases other than their own, by the prosecutors in their cases.[99] Instead, the defendant may establish a prima facie case of purposeful discrimination based "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[100] The showing of a "pattern" of strikes against black jurors, as well as "questions or statements during voir dire" may give rise to an "inference of discrimination" sufficient to make a prima facie showing.[101] Upon making a prima facie showing of purposeful discrimination, "the burden shifts to the State to come forward with a race-neutral explanation for challenging black jurors," and that reason should be "related to the particular case to be tried."[102]

The *Batson* rule has since been broadened to prohibit gender discrimination in jury selection,[103] as well as discrimination by defense counsel,[104] and the non-discrimination rule now applies to civil cases as well.[105] Still, because the evidence required to prove discriminatory intent is ordinarily very difficult or impossible to obtain, the vast majority of claims of discrimination made over the past twenty-four years since *Batson* was decided have been rejected by the courts. The Court has made it very easy for prosecutors to skirt the non-discrimination prohibition of *Batson* by holding that any race-neutral explanation satisfies step two of *Batson*, even if the reason is not specific, trial-related, or even plausible or reasonable.[106]

E. *The Viability of Claims of Jury Selection Discrimination Today*

There is a sad repetitiveness in most jury discrimination cases today. Prosecutors in hundreds of reported cases over the

98. *Id.*
99. *Id.* at 92-93.
100. *Id.* at 96.
101. *Id.* at 96-97.
102. *Id.* at 97-99.
103. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130-31 (1994).
104. Georgia v. McCollum, 505 U.S. 42 (1992) (criminal defendants do not have right to racially discriminate against potential jurors and State has standing to raise claims on behalf of potential jurors).
105. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
106. Purkett v. Elem, 514 U.S. 765 (1995) (prosecutor's race-neutral reason—that potential juror had long, unkempt hair and facial hair — need not be reasonable, plausible, specific, or trial-related; it must only be non-discriminatory to satisfy step two).

years continue to exclude minorities from jury venires by means of the peremptory strike and other techniques.[107] The numbers are staggering if one considers that jury trials are a rare event in the criminal justice systems in this country.[108] Proving that the exclusion is the product of intentional discrimination is a real challenge for defendants. In the first 100 years of jury discrimination cases, claimants were able to show that for many years — decades if not the entire history of the jurisdiction — minority groups had been excluded from jury lists. Based on this type of evidence, the Supreme Court usually upheld claims of intentional discrimination, typically reversing lower court decisions to the contrary.[109] States were prohibited from totally excluding minorities from jury lists, and the Court went so far as to require fair representation on jury lists.[110] One might have expected that the juries actually seated to try cases would be greatly diversified by these changes. Unfortunately, this has not been so. Juries have continued to be, to a large extent, comprised mostly, if not exclusively, of white persons largely because prosecutors in modern times rely heavily on their peremptory strikes to exclude a large number of minorities from juries.[111]

Today persons claiming intentional discrimination in the use of peremptory challenges must prove their claims under the *Batson* rule.[112] In Kenneth Melilli's important study of *Batson* challenges, he examined 1156 published decisions of federal and state courts between April 30, 1986 (the date of the *Batson* decision) and the end of calendar year 1993.[113] Significantly, he found that the vast majority of claims (approximately 88%) were made by criminal defendants, as opposed to prosecutors or civil claimants.[114] Melilli also showed that blacks are the alleged target of discriminatory peremptory challenges in the vast majority of cases (87.38%), with Hispanics being a very distant second

107. *See infra* notes 113-15 and accompanying text (number of *Batson* claims) and notes 135-45 (techniques other than peremptory strikes).

108. Most experts estimate the percentage of cases tried to a jury to be less than ten percent. *See, e.g.,* W. R. LAFAVE, MODERN CRIMINAL LAW 14 (3d ed. 2001).

109. *See supra* note 40 and accompanying text.

110. *See supra* notes 82-84 and accompanying text.

111. *See, e.g.,* HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (2003).

112. *See supra* notes 96-106 and accompanying text.

113. Melilli, *supra* note 19, at 456.

114. *Id.* at 457-58. The Supreme Court did not extend *Batson* to civil cases until June 3, 1991 and did not extend the obligations to comply with *Batson* to the criminal defense until June 18, 1992. Thus, the study could only provide data for the first year and a half (January 19, 1992 – December 31, 1993) that claims could be made against criminal defense as well as by civil parties. The eighty-eight percent figure may therefore have fallen since 1993 as litigants gained greater awareness of the process of making *Batson* challenges.

(6.73%).[115] In a few jurisdictions parties do not get very far with their claims because they encounter a high barrier to making out even a prima facie case.[116] In most places, however, *Batson* challenges are typically defended on the grounds that the peremptory strikes were motivated by "race-neutral" reasons. Melilli found that prosecutors succeeded in providing neutral explanations for their challenges in 79.93% of cases.[117] Thus, the vast majority of these claims are brought against prosecutors who, almost always have used their peremptory challenges to exclude blacks, and most courts applying the *Batson* rule — both trial and appellate — usually reject claims of discrimination in the use of peremptory challenges.

Despite the starkness of the statistics gathered by Professor Melilli, one might yet wonder whether there is any credence to the concern that the challenged peremptory strikes were discriminatory. It is possible, for instance, that criminal defendants tend to challenge *any* strikes against minority venire persons. Unfortunately, a brief review of randomly-selected case law from 2004 reveals that the reasons given often correlate with race, even if they are technically "race neutral" (thus, giving rise to suspicions of pretext), or the reasons are simply specious, yet accepted as valid race-neutral reasons by the courts.[118]

The examples of reasons that may correlate with race include having a connection to someone who has been involved in the criminal justice system, socio-economic factors such as unemployment, education, income, and living or working in a high crime area. African-Americans are often struck by prosecutors because they have had family members or friends who have been prosecuted by the prosecutor's office, even if the venire person states that the person was treated fairly and/or that the venire person would be able to impose the harshest punishment, or even if the family member is only distantly-related.[119] In one case reviewed by this author, the prosecutor cited the fact that his office had prosecuted people with the same last names (Nance,

115. *Id.* at 462.

116. In Louisiana, for example, only sixteen of forty-nine complainants succeeded in establishing a prima facie case, as compared to eighty-one of ninety-six in Texas. *Id.* at 470.

117. *Id.* at 461.

118. This author reviewed fifty randomly-selected published cases from various federal and state jurisdictions that were decided in 2004.

119. *See, e.g.,* State v. Strong, 142 S.W.3d 702 (Mo. 2004) (Black juror excused because juror was employed as assistant dean of seminary and distant cousin incarcerated for murder, despite juror statement that he could impose death sentence). *See also* Melilli, *supra* note 19, at 487 (finding that in 17.88% of cases reviewed parties (most of whom are prosecutors) cited prior involvement with criminal conduct or litigation as reason for striking venire persons and 53.95% of those cases the venire person had a close friend or relative who had prior criminal activity).

Randle, Ledbetter, and Hairston) in using all four of its strikes to exclude African-Americans, without necessarily ascertaining whether those other people were actually related to the venire persons.[120] The high rate of involvement by African-Americans in the criminal justice system means that this reason will correlate strongly with race.[121] A natural corollary of this fact is that predominantly African-American neighborhoods will be considered "high-crime" neighborhoods, another factor cited as a race-neutral reason.[122] Since African-Americans as a group have disproportionately low levels of education and income, which in turn cause high levels of unemployment, reasons related to lower socioeconomic status will tend to eliminate more African-Americans than other groups, and the cases bear this out.[123]

In about seven percent of the cases reviewed by Melilli, demeanor, appearance, and facial hair were cited as race-neutral factors.[124] This author's review of cases decided in 2004 discovered many specific appearance-related reasons that give cause to suspect the application of group stereotypes or that the reasons are simply specious. In one case, the prosecutor cited the chewing of gum by two African-American jurors as evidence of a "lackadaisical attitude for court procedures" and a failure to show "proper respect."[125] The prosecutor had stricken all four of the African-Americans on the venire. In another, the prosecutor thought the venire person's baggy shirt made him look like a gang member and cited his "overly relaxed, lackadaisical" attitude as well.[126]

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120. Clay v. State, 881 So.2d 354 (Miss. Ct. App. 2004).

121. *See* Eric Schlosser, *The Prison Industrial Complex* (1998) *available at* http://www.pinellasfla.com/prison.htm (last visited Apr. 15, 2005). "[A]bout half the inmates in the United States are African-American. One out of every fourteen black men is now in prison or jail. One out of every four black men is likely to be imprisoned at some point during his lifetime." *Id.*

122. Melilli, *supra* note 19, at 493 (living or working in a high-crime area was cited in approximately 2.8% of the cases reviewed (32 of 1156)).

123. Economic factors such as unemployment of venire person or a family member, short or sporadic employment history, low income, renter, welfare recipient, and financial troubles accounted for nineteen percent of the cases reviewed (223 of 1156). *Id.* at 492. Relatedly, educational factors such as insufficient education, errors on juror form, inability to understand basic legal terms or the evidence, and illiteracy also tend disproportionately to correlate with lower economic status, and, thus, disproportionately affects African-Americans. Prosecutors gave such reasons for peremptory strikes in twelve percent of the cases. *Id.*

124. Melilli, *supra* note 19, at 494 (appearance or demeanor accounted for 79 of 1156 of the cases and facial hair accounted for 7 of 1156, for a total of 85 of 1156 or 7.35%).

125. Sykes v. Dretke, No. 3:02-CV-0784-G, 2004 WL 1856826, at *7 (N.D. Tex. Aug. 19, 2004).

126. People v. Johnson, No. B169144, 2004 WL 1879888, at *2 (Cal. Ct. App. Aug. 24, 2004).

The "race neutral" reasons given by prosecutors might be scrutinized closely by the courts if there were a requirement that the reasons be reasonable or persuasive, but there is not. Arguably, the Supreme Court has mandated that courts should accept even silly, but race-neutral reasons for peremptory strikes. In *Purkett v. Elem*, the Supreme Court rejected a reading of *Batson* that would have required the proponent of a strike to give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges" and that the "reason must be 'related to the particular case to be tried.'"[127] The Court stated: "What it [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."[128] In this case, the prosecutor had stricken an African-American male on account of his facial hair and long, "unkempt" hairstyle.[129] Finding that this characteristic is not "peculiar to any race," the Court upheld the state court finding that the prosecutor was not motivated by discriminatory intent.[130] Thus, even a reason that does not "make sense" and is not related to the case to be tried in any way may suffice as long as it is "race neutral."

The Court has also rejected the notion that reasons that disproportionately affect a particular group, even if technically race neutral, should not be allowed. In *Hernandez v. New York,* the Court upheld strikes of bilingual Hispanic jurors who were hesitant to agree that they could rely on the translation of testimony by a court translator.[131] The Court concludes with the following statements:

> It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that is not the case before us.[132]

In so deciding the case in *Hernandez v. New York*, the Court effectively approves of race-neutral reasons that disproportionately affect a particular race or ethnic group. It is understandable that bilingual venire persons would express hesitancy to fully accept a court translator's translation of testimony if the would-be juror

127. Purkett v. Elem, 514 U.S. 765, 768-69 (1995).
128. *Id.* at 769.
129. *Id.*
130. *Id.*
131. Hernandez v. New York, 500 U.S. 352, 361-62 (1991).
132. *Id.* at 371-72 (citations omitted).

speaks the second language and may foresee that the translation could be inaccurate. What bilingual person would *not* hesitate to give full credit to a translation that he or she knows to be wrong or not quite right? It stands to reason then that Hispanics and other ethnic groups with large populations of bilingual persons will be disproportionately affected by a rule that allows them to be struck on this ground. Nonetheless, the Supreme Court found no mistake in the trial court's finding that the strikes were not discriminatory.[133]

In short, the combined holdings of *Purkett v. Elem* and *Hernandez v. Texas* mandate that the lower courts accept as race neutral any reasons that are technically "race neutral," even if those reasons do not "make sense" or relate to the case to be tried, and even if they disproportionately affect a particular race or ethnic group. Thus, it stands to reason that most *Batson* challenges are rejected by the courts[134] and that the practice of excluding most African-Americans from criminal juries proceeds full force.

The following section tells the story of Thomas Joe Miller-El's eighteen year journey through the courts as he has pursued a remedy for an alleged *Batson* violation. As this Article goes to print, the case of *Miller-El v. Texas,* a case as old as *Batson,* will yield a second Supreme Court decision in the near future. Despite the strong evidence of race discrimination in Miller-El's case, it is not likely to have a significant impact on jury selection practices in the trial courts of our country. Unfortunately, no matter how the Court decides the case, the decision is likely to stand as yet another testament to the utter failure of *Batson* to diversify juries.

III. THE AMAZING CASE OF *MILLER-EL V. TEXAS:* OLD-FASHIONED DISCRIMINATION IN MODERN PRACTICE

The case of *Miller-El v. Texas*, as it stands today, illustrates *Batson's* failings in ways that make the case quite fascinating. It is fascinating because it has taken the courts so long to litigate his *Batson* claim — eighteen years and still in progress. It is even more fascinating because prosecutors used multiple methods for ultimately excluding all but one of the African-Americans on the jury. Finally, the strikingly divergent interpretations of the evidence by every court that has reviewed the case, including the two Supreme Court reviews, makes it one of the most remarkable *Batson* cases ever.

133. *Id.* at 370.

134. Melilli's research shows that 84.13% of criminal defendants fail to prove their *Batson* claims. *See* Melilli, *supra* note 19, at 459.

A. *The Jury Selection Process in* Miller-El

Perhaps the most amazing aspect of *Miller-El* is that it is a modern case, tried in 1986 in Dallas County, Texas, yet the description of the jury selection process reads like an early nineteenth-century case. Like cases of an earlier era, prosecutors used the jury selection tools at their disposal to eliminate almost all African-Americans from the jury venire. Unlike the nineteenth-century cases, however, the prosecutors used a combination of several unique techniques to exclude African-Americans — jury shuffling, disparate use of questioning tactics, and peremptory strikes.

The first technique, amazing in its blatant applicability as a tool of racial discrimination, is the "jury shuffle," a practice allowed only in the State of Texas.[135] The United States Supreme Court described it as such:

> This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that *visually preferable* venire members will be moved forward and empaneled. *With no information about the prospective jurors other than their appearance,* the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order.[136]

The Court also explains why practice of jury shuffling affects the composition of the jury:

> [A]ny prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.[137]

In the *Miller-El* case, the prosecutors availed themselves of the ability to employ jury shuffling as a tool of racial discrimination. The Supreme Court writes,

> On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported inadequacy of the card shuffle by the defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward.[138]

A second tactic was to use a different manner of questioning for most African-Americans designed to elicit negative opinions

135. TEX. CRIM. PROC. CODE ANN., Art. 35.11 (Vernon 1989 & Supp. 2004-05).
136. Miller-El v. Cockrell, 537 U.S. 322, 333-34 (2003) (emphasis added).
137. *Id.* at 334.
138. *Id.*

on the imposition of the death penalty, as well as on the subject of the willingness to impose the minimum sentence. The Supreme Court explains:

> Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:
>
> [I]f those three [sentencing] questions are answered yes, at some point[,] Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death . . . as the result of the verdict in this case if those three questions are answered yes.[139]

It was only after being read this "graphic script" (as the defense dubbed it) that the majority of African-Americans were asked whether they could render a decision that would lead to a death sentence.[140] In contrast,

> Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment. Rather, all but three were questioned in vague terms: "Would you share with us . . . your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?"[141]

The Supreme Court notes an even more "pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder."[142] This second line of questioning was pursued as a means of identifying jurors who might be unwilling to impose the minimum sentence, which under Texas law at the time warranted removal of the juror for cause.[143] Ironically, as the Court notes, this tactic is often used by the defense to weed out pro-state members of the venire. Here, the prosecution appears to have used it to weed out African-Americans. Otherwise, it makes no sense for a prosecutor to go out of his or her way to seek out jurors who are reluctant to impose a minimum sentence.

When questioning thirty-four of thirty-six (94%) of white venire members, the prosecutor first informed them that the min-

139. *Id.* at 332 (quoting Miller-El v. Dretke, 361 F.3d 849, 852 (2003)).
140. *Id.* at 364.
141. *Id.*
142. *Id.* at 332.
143. *Id.* at 332-33 (citing Huffman v. State, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970), *vacated in part*, 408 U.S. 936 (1972)).

imum sentence was five years' imprisonment, and only then asked: "'If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you'll give it?'"[144] In this manner, the prosecutor gently led virtually all of the white venire members to state that they would be willing to impose the minimum sentence. For only one of the eight (12.5%) African-American venire members did the prosecutor use this approach. In contrast, for the other seven of eight African-Americans (87.5%), the typical questioning proceeded as follows:

> [Prosecutor]: Now, the maximum sentence for [murder] . . . is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I've set it out for you?
>
> [Juror]: Well, to me that's almost like it's premeditated. But you said they don't have a premeditated statute here in Texas.
>
> [Prosecutor]: Again, we're not talking about self-defense or accident or insanity or killing in the heat of passion or anything like that. We're talking about knowing –
>
> [Juror]: I know you said the minimum. The minimum amount that I would say would be at least twenty years.[145]

Again, one has to wonder why a prosecutor would *ever* lead a venire member in this type of questioning that is so clearly designed to elicit an answer that will likely disqualify the venire member for being inclined to impose a *harsher punishment* than that which the law allows. Obviously, the prosecutor is trying to remove the potential juror for some other reason.

The ultimate tool for eliminating minority jurors from a jury venire today is the peremptory strike. The numbers alone paint a compelling case of racial discrimination:

> Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors . . . . In contrast, the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on [Miller-El's] jury.[146]

In this manner, the prosecutors in *Miller-El* exercised their peremptory strikes so as to remove all but one African-American on the jury. Defense counsel timely objected, and by so doing began what has now been Miller-El's eighteen-year struggle to obtain relief in the courts for his claim of discrimination. In the

144. *Id.* at 333 (quoting App. 509).
145. *Id.* (quoting App. 226-27).
146. *Id.* at 331.

meantime, the jury convicted Miller-El of murder and ultimately sentenced him to death.

B. *Miller-El's Eighteen Years in the Appellate Courts—And Still Counting!*

1. *The Trial Court Hearings*

At the conclusion of jury selection, Miller-El moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment.[147] The timing of the trial in the *Miller-El* case was such that the rules relating to the type of evidence required to prove a claim of race discrimination in the use of peremptory strikes changed mid-course. The trial occurred in 1986 when *Swain v. Alabama*[148] provided the governing rule and just before the rule change in *Batson v. Kentucky*.[149]

In accord with the *Swain* rule, Miller-El presented proof at his pre-trial *Swain* hearing of a history of race discrimination in jury selection by the Dallas County District Attorney's Office. The evidence took the form of testimony given by "a number of current and former Dallas County assistant district attorneys, judges, and others who had observed the prosecution's conduct during jury selection over a number of years."[150] Not surprisingly, most of the witnesses denied that the prosecutors followed a systematic policy to exclude African-Americans from juries, but, remarkably, others stated otherwise:

> A Dallas County district judge testified that, when he had served in the District Attorney's Office from the late-1950's to early-1960's, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.[151]

The Supreme Court recently considered it to be of "more importance" that the defense also presented evidence that "the District Attorney's Office had adopted a formal policy to exclude minorities from jury service."[152] Miller-El's attorneys offered a 1963 circular by the District Attorney's Office that "instructed its prosecutors to exercise peremptory strikes against minorities: 'Do not take Jews, Negroes, Dagos, Mexicans or a member of

147. *See* Miller-El v. Dretke, 361 F.3d 849, 852 (5th Cir. 2004).
148. Swain v. Alabama, 380 U.S. 202 (1965).
149. Batson v. Kentucky, 476 U.S. 79 (1986).
150. Miller-El v. Cockrell, 537 U.S. 322, 334 (2003).
151. *Id.*
152. *Id.*

any minority race on a jury, no matter how rich or how well educated.'"[153] In addition, a manual entitled "Jury Selection in a Criminal Case" was issued to prosecutors in the office. The manual included an article written by a former prosecutor (who later became a judge) that outlined the reasons for excluding minorities from jury service.[154] The Court notes that, "Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial."[155]

The State argued that these practices had been discontinued prior to Miller-El's trail. Some of the testimony offered by the defense, however, cast doubt on the State's claim:

> For example, a judge testified that, in 1985, he had to exclude a prosecutor from trying cases in his courtroom for race-based discrimination in jury selection. Other testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire. Concerns over the exclusion of African-Americans by the District Attorney's Office were echoed by Dallas County's Chief Public Defender.[156]

The trial court considered Miller-El's evidence of a history and culture in the Dallas County District Attorney's Office of racial discrimination against minorities in jury selection. "The trial judge, however, found 'no evidence . . . that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases.'"[157] Thus, the trial court rejected Miller-El's motion to strike the jury.

2. *The State High Court Finds an Inference of Discrimination and Remands for Hearing Under New* Batson *Rule*

After trial, Miller-El appealed to the Texas Court of Criminal Appeals. During the pendency of Miller-El's appeal, the Supreme Court issued its 1986 opinion in *Batson v. Kentucky,* establishing a three-part process for evaluating claims that a prosecutor used peremptory challenges in a racially discriminatory manner in violation of the Equal Protection Clause.[158] Rather than requiring a defendant to prove a history of race dis-

153. *Id.* at 335.
154. *Id.*
155. *Id.*
156. *Id.* (citation omitted).
157. *Id.* at 328.
158. First, a defendant must make a prima facie showing that a preemptory challenge has been exercised on the basis of race. Second, if that showing is made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, the trial court must determine whether the defendant has shown purposeful discrim-

crimination in the voir dire process by the prosecutors in his case, *Batson* now required the defendant to put forth evidence that establishes an inference of discrimination in his or her own voir dire. The Texas Court of Criminal Appeals, finding that Miller-El had established an inference of purposeful discrimination, remanded the case for an evidentiary hearing pursuant to *Batson*.[159]

3. *Trial Court Finds "No Inference of Discrimination" and State High Court Affirms*

The *Batson* hearing was held on May 10, 1988, at which Miller-El presented all of the evidence presented at the *Swain* hearing, as well as the evidence regarding the evidence of differential questioning of African-American venire members regarding their views on the death penalty and their willingness to impose the minimum sentence for murder.[160] Miller-El also presented the statistics regarding the prosecutor's use of peremptory strikes against African-American venire members as compared to white venire members.[161]

Eight months later, on January 13, 1989, the trial court concluded that Miller-El's evidence had failed to satisfy the first step of the *Batson* test, finding it "'did not even raise an inference of racial motivation in the use of the state's peremptory challenges'" to support a prima facie case.[162] Note that the trial court made this finding after the Texas Court of Criminal Appeals had explicitly found that Miller-El *had* established an inference of discrimination.[163] Moreover, the trial court also expressed the opinion that even if Miller-El had raised such an inference, "'the state would have prevailed on steps two and three because the prosecutors had offered credible, race-neutral explanations for each black venire member excluded.'"[164] The trial court also rejected the claim that the prosecutors had engaged in disparate questioning in order to develop grounds for excluding African-American venire members, finding that "'the primary reasons for the exercise of challenges against each of the venire [members] in question [was] their reluctance to assess or reservations concerning the imposition of the death penalty.'"[165]

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ination. Batson v. Kentucky, 476 U.S. 79, 96-99 (1986). *See* cases cited *supra* notes 96-106 and accompanying text.

159. Miller-El v. State, 748 S.W.2d 459, 460-61 (Tex. Crim. App. 1988) (en banc).

160. *See supra* notes 139-45 and accompanying text.

161. *See supra* note 146 and accompanying text.

162. *See Miller-El v. Cockrell*, 537 U.S., at 329.

163. *Miller-El v. State*, 748 S.W.2d at 461.

164. *Id.*

165. *Id.*

The Texas Court of Criminal Appeals denied Miller-El's appeal. Again, note that the appellate court affirms the finding that Miller-El had not proved an inference of discrimination after it had previously found to the contrary. The United States Supreme Court denied his petition for certiorari on direct appeal in 1993.[166] His state habeas petitions fared no better, and the Texas Court of Criminal Appeals again denied him relief.[167] Miller-El then filed a petition for writ of habeas corpus in Federal District Court for the Northern District of Texas.

4. *Federal District and Circuit Courts Reject Miller-El's Claims*

The federal magistrate judge who reviewed the merits of Miller-El's habeas petition was troubled by some of the evidence adduced in the state-court proceedings.[168] Nonetheless, citing the deference that federal courts are required to show to state courts' acceptance of the prosecutors' race-neutral reasons for challenging potential jurors, the Magistrate recommended that Miller-El's petition be denied.[169] In 2000, the district court then found that "[t]he Magistrate Judge properly deferred to the experience of the trial court judge in evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination."[170] Miller-El sought a certificate of appealability (COA) from the district court, which it denied.

He then renewed his request for a COA in the Fifth Circuit, and this request was also denied in 2001. The standards for granting a COA then became the focus of the review in the court of appeals. The Fifth Circuit noted that a COA should issue "'only if the applicant has made a substantial showing of the denial of a constitutional right.'"[171] The court also applied the requirements of 28 U.S.C. § 2254 into the COA determination:

> As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence.[172]

The court of appeals applied this framework in reviewing Miller-El's application and concluded "that the state court's find-

166. Miller-El v. Texas, 510 U.S. 831 (1993).
167. *Miller-El v. Cockrell*, 537 U.S. at 329.
168. *Id.* at 329-30.
169. *Id.* at 330.
170. Miller-El v. Johnson, No. 3:96-CV-1992-H, 2000 U.S. Dist. LEXIS 7763, at *6 (N.D. Tex. June 5, 2000).
171. Miller-El v. Johnson, 261 F.3d 445, 449 (2001) (quoting 28 U.S.C. § 2253(c)(2)).
172. *Id.* at 451.

ings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary."[173] The court, rejecting Miller-El's request for a COA, also determined that "the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court."[174]

5. *The Supreme Court Reverses*

The Supreme Court granted certiorari[175] and then in 2003 — in another amazing twist — reversed the Fifth Circuit's denial of a COA in an eight to one decision, with only Justice Thomas dissenting.[176] The Court reiterated the standard it had previously announced for assessing requests for COAs: "'The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'"[177]

The majority then proceeded to assess whether Miller-El's claim was debatable. Of course, the state trial court had found that his proof did not satisfy the first of *Batson*'s three-step test as it did not even raise an inference of discrimination. Before the Supreme Court, however, the State now conceded that he indeed had satisfied step one.[178] Miller-El also conceded that the State had satisfied the second step by offering race-neutral reasons for the strikes.[179] The "critical question," therefore, was whether Miller-El had proved purposeful discrimination by showing that the prosecutor's proffered reasons were actually pretextual.[180] The Court expresses concern, both with the district court's and Fifth Circuit's exercise of "deference" in reviewing Miller-El's habeas petition and his request for a COA. The Court writes:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.[181]

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173. *Id.* at 452.
174. *Id.*
175. Miller-El v. Cockrell, 534 U.S. 1122 (2002).
176. Miller-El v. Cockrell, 537 U.S. 322 (2003).
177. *Id.* at 338 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).
178. *Id.* at 338.
179. *Id.*
180. *Id.* at 338-39.
181. *Id.* at 340.

Applying a less rigorous standard of review to the evidence presented by Miller-El, the Court, thus, concluded that it had "no difficulty concluding that a COA should have issued." First, the Court found that the district court had erred:

> We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial.[182]

The Court also rejected the Fifth Circuit's COA decision as having imposed a burden of proof that is higher than what the law imposes and as having erroneously ruled on the merits of the claim, rather than on the debatability of the claim:

> In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state court decision was objectively unreasonable by clear and convincing evidence.
>
> This was too demanding a standard on more than one level . . . . The clear and convincing evidence standard . . . pertains only to state-court determinations of factual issues, rather than decisions.
>
> The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. . . . [A] COA determination is a separate proceeding, one distinct from the underlying merits . . . . The question is the debatability of the underlying constitutional claim, not the resolution of that debate.[183]

What is quite striking about the Court's opinion is the extent to which the Court seems to evaluate the merits of the claim itself and appears to conclude that Miller-El may have presented a meritorious claim. The Court is equivocal in discussing the state's use of peremptory challenges, concluding that "even though the prosecution's reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations." However, in evaluating the claim of disparate questioning, the Court comes closer to addressing the merits of this issue:

> We question the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of

182. *Id.* at 341.
183. *Id.* at 341-42.

> disparate questioning .... Disparate questioning did occur.... It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination.[184]

On the issue of the Texas "jury shuffle" practice, the Court agreed with Miller-El that:

> [T]he prosecution's decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury.[185]

This evidence, the Court found, "tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection."[186]

The Court also "accord[ed] some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office."[187] Miller-El had presented evidence at the earlier *Swain* hearing that persuaded the Supreme Court that "African-Americans almost categorically were excluded from jury service" and "that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection."[188] With regard to the prosecutors in Miller-El's case, the Court found it relevant that "[b]oth prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries."[189] Reminiscent of the nineteenth-century cases of systematic exclusion of African-Americans from jury lists, the prosecutors here also raised suspicions that race played a factor in jury selection because they "marked the race of each prospective juror on their juror cards."[190]

Finally, the majority, after having reviewed all the evidence presented by Miller-El, returns again to the state court's rather incredible finding that Miller-El had not raised even an inference of discrimination to support a prima facie case. The Court notes that, "In resolving the equal protection claim against petitioner, the state courts made no mention of either the jury shuffle or the

184. *Id.* at 344.
185. *Id.* at 346.
186. *Id.*
187. *Id.*
188. *Id.* at 346-47.
189. *Id.*
190. *Id.* at 347.

historical record of purposeful discrimination."[191] Acknowledging that detailed factual findings are not required, the Court expresses concerns that the courts might have simply ignored the evidence in "somehow" finding that Miller-El had not raised even an inference of discrimination. This, the Court concludes, was "clear error, and the State declines to defend this particular ruling."[192] Perhaps alluding to the prosecution's "general assertions" that race played no part in jury selection, the Court somewhat cryptically sums up with the following quotation from *Batson*: "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'"[193]

6. *Justice Thomas Dissents*

What makes the Miller-El case a harder case to win on the merits is that the State's arguments regarding the race-neutral reasons for striking the African-American venire members in question is not easily refuted. Justice Thomas dissents from the majority's decision in part based on his divergent view about the correct standard of review and in part based on his assessment of the ultimate issue in the case — whether the prosecution has shown race-neutral reasons for the peremptory strikes against African-Americans.

In Justice Thomas's view, the court of appeals properly required the petitioner to provide "clear and convincing" evidence of purposeful discrimination in order to obtain a COA.[194] His opinion, thus, applying the clear and convincing evidence standard, assesses whether Miller-El has refuted the State's evidence of race-neutral reasons for its strikes by clear and convincing evidence. In contrast, the majority's opinion found only that the question whether Miller-El's evidence supports his claim of discrimination is "debatable."

Interestingly, Justice Thomas quickly dispenses with the historical evidence of discrimination in jury selection by the Dallas County District Attorney's Office, as well as the prosecution's use of the jury shuffle technique to eliminate African-Americans. He writes:

> The "historical" evidence is entirely circumstantial, so much so that the majority can only bring itself to say it 'casts doubt on the State's claim that [discriminatory] practices had been discontinued before petitioner's trial. And the evidence that the

191. *Id.*
192. *Id.*
193. *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986), in turn quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)).
194. *Id.* at 359 (Thomas, J., dissenting).

> prosecution used jury shuffles no more proves intentional discrimination than it forces petitioner to admit that he sought to eliminate whites from the jury, given that he employed the tactic even more than the prosecution did. Ultimately, these two categories of evidence do very little for petitioner, because they do not address the genuineness of prosecutors' proffered race-neutral reasons for making peremptory strikes of these particular jurors.[195]

Justice Thomas then takes issue with Miller-El's evidence of disparate treatment of African-American venire members as compared to similarly-situated white venire members. He states that the white veniremen to whom Miller-El compares the African-American veniremen were not "similarly situated" because they had only expressed one factor of concern to the State, whereas the African-Americans had made two statements of concern to the prosecution. Thus, he concludes that the prosecution has given race-neutral reasons for challenging those African-American veniremen, reasons that do not apply to the whites who only mentioned one item of concern. He concludes, "'Similarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror — it means matching *all* of them."[196]

Finally, he also rejects Miller-El's evidence of disparate questioning, concluding that "it amount[s] to little of substance."[197] Justice Thomas notes that the prosecution counters the complaint about the "graphic script" by arguing that this depiction was used only with those potential jurors who "'expressed reservations about the death penalty in their juror questionnaires.'"[198] While the majority does not address the State's arguments, finding them beyond the scope of a request for a COA, Justice Thomas's view is that petitioner should have refuted this argument since "petitioner bears the burden of showing purposeful discrimination by clear and convincing evidence."[199] With regard to the white jurors who Miller-El claims the State should also have questioned using the graphic script, Justice Thomas explains that:

> [T]he eight white veniremen . . . were so emphatically opposed to the death penalty that such a description would have served no purpose in clarifying their position on the issue . . . . The strategy pursued by the prosecution makes perfect sense: When it was necessary to draw out a venireman's feelings

195. *Id.* at 360 (Thomas, J., dissenting) (citations omitted).
196. *Id.* at 362 (Thomas, J., dissenting).
197. *Id.* at 363 (Thomas, J., dissenting).
198. *Id.* at 364 (Thomas, J., dissenting) (quoting Brief for Respondent at 17, Miller-El v. Cockrell, 537 U.S. 322 (2003) (No. 01-7662)).
199. *Id.* at 364 (Thomas, J., dissenting).

> about the death penalty they would use the graphic script, but when it was overkill they would not. The record demonstrates that six of these eight white veniremen were so opposed to the death penalty that they were stricken for cause without the need for the prosecution to spend a peremptory challenge.[200]

He sums up by calculating the correlation between questionnaire answers and the use of the graphic script, finding that this correlation to be "far stronger" than the correlation with race. He states:

> Sixteen veniremen clearly indicated on the questionnaires their feelings on the death penalty, and 14 of them did not receive the graphic script. Eight veniremen gave unclear answers and those eight veniremen got the graphic script. In other words, for 23 out of 24, or 96%, of the veniremen for whom questionnaire information is available, the answers given accurately predict whether they got the graphic script. Petitioner's theory that race determined whether a venireman got the graphic script produces a race-to-script correlation of only 74% — far worse.[201]

Similarly, Justice Thomas rejects the claim that the prosecution used a "manipulative" script regarding minimum sentences in order to weed out African-American veniremen. The State's position is that it used the questions about the minimum sentence with veniremen who were ambivalent on the death penalty so as to get them excused for cause. Justice Thomas briefly reviews the evidence of potential jurors views on the death penalty and whether the "manipulative" script was used. He finds that Miller-El has not rebutted the State's explanation, finding:

> Unless a venireman indicated he would be a poor State's juror (using the criteria that respondent has identified here) *and would not otherwise be struck for cause or by agreement*, there was no reason to use the 'manipulative' script. Thus, when petitioner points to the 'State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty,' he ignores the fact that of the 10 whites who expressed opposition to the death penalty, 8 were struck for cause or by agreement, *meaning no 'manipulative' script was necessary to get them removed.* The other two whites were both given the 'manipulative' script *and* peremptorily struck, just like [the African-American veniremembers.][202]

To what extent members of the majority would agree with Justice Thomas's views on the merits is not entirely clear since, in deciding the COA issue, the majority confined itself to the

200. *Id.*
201. *Id.* at 368 (Thomas, J., dissenting).
202. *Id.* at 369-70 (Thomas, J., dissenting) (emphasis in original).

threshold issue of whether Miller-El's claim was "debatable" and explicitly *not* whether he should prevail on the merits. On the one hand, there is language that strongly suggests that the majority believes the State's arguments lack credibility. The majority found that the historical evidence of a "culture" of discrimination in the District Attorney's Office tends to cast doubt on the State's claims that it no longer takes race into account. On the other hand, the opinion did not thoroughly review the State's arguments rebutting the claims of disparate questioning nor its proffered race-neutral reasons for the peremptory strikes of African-Americans. For the time being, the Supreme Court had only remanded the case to the court of appeals for its consideration of Miller-El's habeas appeal.

7. *Fifth Circuit Rejects Miller-El's Petition on the Merits*

On February 26, 2004, the Fifth Circuit, having now granted the COA consistent with the Supreme Court's instructions, rejected Miller-El's appeal on the merits.[203] In addressing Miller-El's *Batson* claim, the court noted that there was no longer any dispute that he had satisfied *Batson*'s first step. Nor was there any dispute that the prosecution had presented facially race-neutral reasons for each of its peremptory strikes. Thus, "[t]he only issue is Miller-El's disagreement with the trial court's determination at *Batson*'s third step that Miller-El failed to show that the prosecution's reasons for exercising the challenged peremptory strikes were not credible and Miller-El had not demonstrated that purposeful discrimination had occurred."[204]

Since the case was before the court on habeas review, the appellate court applied the review scheme of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which requires that appellate courts "presume" the state court's findings of fact "to be correct" unless the petitioner rebuts those findings by clear and convincing evidence.[205]

The Fifth Circuit's opinion proceeds to address each of the four types of evidence that Miller-El presented at his *Batson* hearing: (1) the historical evidence of discrimination in jury selection in the Dallas County District Attorney's Office; (2) the use of the "jury shuffle" tactic by the prosecution; (3) the alleged similarity between white venire persons who were not struck by the prosecution and six African-Americans who were struck; and (4) evidence of so-called disparate questioning with respect to venire member's views on the death penalty and their ability to

203. Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004).
204. *Id.* at 853-54.
205. *Id.* at 854.

impose the minimum punishment.[206] It then proceeds to assess each type and renders a judgment as to whether each type of evidence proves by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect.

Interestingly, the Fifth Circuit opinion closely tracks Justice Thomas's dissenting opinion in the Supreme Court's decision reversing the Circuit's denial of a COA.[207] With regard to the evidence of the history of discrimination in the District Attorney's Office, the opinion refers to the "culture of discrimination" as both "disturbing" and "deplorable." Unlike Justice Thomas who simply dismissed the evidence as "entirely circumstantial," the court of appeals acknowledges that it is "relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons."[208] Nonetheless, showing deference to the factual findings of the state court, the opinion concludes: "Under our standard of review, we must presume this specific determination [finding the prosecutors' race-neutral reasons to be genuine] is correct and accordingly the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination . . . was incorrect."[209]

The court adopts Justice Thomas's reasoning with respect to the jury shuffle tactic, concluding that it likewise does not "overcome the race-neutral reasons . . . and accepted by the state court who observed the *voir dire* process including the jury shuffles."[210] The reasoning is puzzling, however. Like Justice Thomas, the Fifth Circuit discounts the jury shuffle claim on the ground that the record shows that Miller-El also shuffled the jury, and, indeed, that the defense shuffled five times while the prosecutors only shuffled twice. This reasoning is puzzling because it does not address whether the prosecutors' shuffles were race-based, as Miller-El argues. It likewise does not say whether Miller-El's shuffles were shown to be race-based. Even assuming that both the defense and prosecution shuffles were motivated by race, it is not clear why a discriminatory act by the defense would cancel out a discriminatory act by the prosecution.

The court next examines the claim that six African-Americans venire members were stricken by the prosecution and simi-

206. *Id.* at 854-55.

207. Indeed, the decision both borrows verbatim and paraphrases heavily (both without attribution) from Justice Thomas's opinion. *Compare Miller-El*, 361 F.3d at 861-62 *and* Miller-El v. Cockrell, 537 U.S. 322, 366-67, 369 (2003).

208. *Miller-El*, 361 F.3d at 855.

209. *Id.*

210. *Id.*

larly situated white venire members were not. The opinion provides detailed findings with respect to each venire member in question. Like Justice Thomas, the court of appeals concludes that the African-American venire members were stricken for more than one reason, while the white venire members cited by Miller-El had only one pro-defense factor in common with the stricken African-American venire members. Thus, the white venire members who were not stricken were not "similarly situated" with the stricken African-American venire members. Thus, the court concludes that based on the record "there were no unchallenged non-black venire members similarly situated, such that their treatment by the prosecution would indicate the reasons for striking the black members were not genuine."[211]

Finally, the court rejects Miller-El's argument that the prosecution engaged in disparate questioning based on race. Like Justice Thomas, the court finds that the record "reveals that the disparate questioning of venire members depended on the member's views on capital punishment and not race."[212] The Fifth Circuit's opinion provides the same analysis of the record as does Justice Thomas in rejecting the claims of disparate questioning on the death penalty as well as on the ability to impose the minimum punishment.

A troubling aspect of the treatment Miller-El's evidence, and especially of both the historical evidence as well as the jury shuffle claim, is that the court takes the approach of requiring that each individual type of evidence must — by itself — prove by clear and convincing evidence that the prosecutors' proffered race-neutral reasons for the strikes were pretextual.[213] Arguably, the court should have considered whether Miller-El's evidence — viewed in combination — proved the race-neutral reasons were pretextual. The court appears to take this issue into account in the last paragraph of the opinion, which states: "In summary, none of the four areas of evidence Miller-El based his appeal on indicate, *either collectively or separately*, by clear and convincing evidence that the state court erred."[214] Yet none of the analysis in the opinion gives any indication that the court viewed the evidence in its totality, and the treatment of the jury shuffle and evidence of discrimination in the District Attorney's Office raises some concern that it rejected the evidence for failing on its own to satisfy the burden of proof.

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211. *Id.* at 856.

212. *Id.* at 860.

213. *See supra* notes 208-11 and accompanying text.

214. *Miller-El*, 361 F.3d at 862.

CONCLUSION

Miller-El's amazing case will have been decided by the Supreme Court shortly after this Article goes to print. The case will determine whether there is to be any teeth at all to the *Batson* rule against discrimination in the use of peremptory strikes. Despite the fact that the prosecutors in his case employed a variety of discriminatory tools to remove ten out of eleven African-American venire members, Miller-El has faced an uphill battle to obtain a new trial. This is in keeping with the outcomes in most every case claiming discrimination in jury selection.

To date, the courts have not enforced *Batson* in such a way as to vindicate the rights of minorities to serve on juries, and the resulting lack of diversity makes an important difference on the ability of a criminal jury to ascertain the truth.[215] Since the Supreme Court has ruled that any "race neutral" explanation may justify a peremptory strike, prosecutors have grown adept at fashioning such explanations. To fulfill the vision of a jury selection process free from discrimination that the Court first articulated in 1880, it is time for the Court to declare the *Batson* test a failed experiment and either make fundamental changes to the three-part test or do away with peremptory challenges altogether.

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215. For a review of the empirical research of juror race on jury decisions, see Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993).