Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Juries and Lawyers/Juries

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Miller-El v. Dretke, 545 U.S. 231 (2005)

Thomas Joe Miller-El was arrested and charged with murdering a hotel employee in the course of a robbery. During his trial in early 1986, the prosecutor used preemptory challenges to eliminate ten African-Americans from the jury. Of the twenty African-Americans on the original jury panel, only one was seated on the jury that found Miller-El guilty and sentenced him to death. For the next seventeen years, Miller filed a series of appeals in both state and federal court. These appeals claimed that the prosecution's use of preemptory challenges violated the right to a fair jury trial under the Sixth and Fourteenth Amendments announced in Batson v. Kentucky *(1986). After the Court of Appeals for the Fifth Circuit in 2003 ruled that Texas did not violate his constitutional right to a fair trial, Miller-El appealed that decision to the Supreme Court of the United States.*

The NAACP Legal Defense Fund and a group of former judges and prosecutors filed amicus briefs asking the Supreme Court to rule that the prosecution in Miller-El's case had engaged in unconstitutional race discrimination.

> *The historic and continuing racially biased jury-packing behavior of the prosecutors in Miller-El's case was not at all subtle or discreet; it was open and notorious. Despite this Court's explicit directive to consider it, the panel substituted a curt dismissal of that history as inconsequential for its earlier view that it was irrelevant. As wrong as this was in Miller-El's case, it also signals the failure of the panel to comprehend this Court's determination to end racial bias in jury selection. The only way to put the history of racial discrimination in criminal justice behind us in this country is to acknowledge its reality and remedy its wrongs insofar as those remain correctable, not to write it off as insignificant.*

The Supreme Court by a 6–3 vote ruled that Texas prosecutors had violated Batson *when making preemptory challenges. Justice Souter's majority opinion concluded that Texas did not offer a credible race neutral explanation for the decision to strike all but one of the African-Americans eligible to sit on the Miller-El jury. What reasons did Souter give for reaching those conclusions? Why did Justice Thomas think Miller-El failed to produce clear and convincing evidence that he was the victim of racial discrimination? Who had the better of the argument? Justice Breyer's concurrence suggested that preemptory challenges may be unconstitutional. Was he correct that no really good means exist for determining when racism is infecting the jury selection process? If he was correct, what should be done? Neither the Supreme Court nor the lower court opinions in* Miller-El *indicate Miller-El's race. Was his race relevant to the decision? Should his race have been relevant?*

JUSTICE SOUTER delivered the opinion of the Court.

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"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia* (1880). Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial

lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."

Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . ." That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," and undermines public confidence in adjudication."

The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected. . . .

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Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence." . . .

The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African–American venire members . . . Happenstance is unlikely to produce this disparity."

More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination. . . . The details of two panel member comparisons bear this out.

The prosecution used its second peremptory strike to exclude Billy Jean Fields, a black man who expressed unwavering support for the death penalty. . . .

Although at one point in the questioning, Fields indicated that the possibility of rehabilitation might be relevant to the likelihood that a defendant would commit future acts of violence, he responded to ensuing questions by saying that although he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty. . . . Fields also noted on his questionnaire that his brother had a criminal history. . . .

Fields was struck peremptorily by the prosecution, with prosecutor James Nelson offering a race-neutral reason.

> "[W]e . . . have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case."

Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

If, indeed, Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations. Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." Hearn went so far as to express doubt that at the penalty phase of a capital case

she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future." "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong." But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, but the prosecutors asked her no further question about her views on reformation, and they accepted her as a juror, Latino venireman Fernando Gutierrez, who served on the jury, said that he would consider the death penalty for someone who could not be rehabilitated, but the prosecutors did not question him further about this view. In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.

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The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. Warren gave this answer when he was asked what the death penalty accomplished:

> "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

. . . [P]rosecutor Paul Macaluso referred to this answer as the first of his reasons when he testified at the later Batson hearing:

> "I thought [Warren's statements on voir dire] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more."

On the face of it, the explanation is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's. Kevin Duke, who served on the jury, said, "sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I['d] just as soon have it over with than be in prison for the rest of your life." . . . . Sandra Jenkins, whom the State accepted (but who was then struck by the defense) testified that she thought "a harsher treatment is life imprisonment with no parole." Leta Girard, accepted by the State (but also struck by the defense) gave her opinion that "living sometimes is a worse—is worse to me than dying would be." The fact that Macaluso's reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.

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The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during voir dire to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning Once the order is established, the panel members seated at the back are likely to escape voir dire altogether, for those not questioned by the end of the week are dismissed. . . .

In this case, the prosecution and then the defense shuffled the cards at the beginning of the first week of voir dire; the record does not reflect the changes in order. At the beginning of the second week,

when a number of black members were seated at the front of the panel, the prosecution shuffled. At the beginning of the third week, the first four panel members were black. The prosecution shuffled, and these black panel members ended up at the back. Then the defense shuffled, and the black panel members again appeared at the front. The prosecution requested another shuffle, but the trial court refused. . . .

The next body of evidence that the State was trying to avoid black jurors is the contrasting voir dire questions posed respectively to black and nonblack panel members, on two different subjects. First, there were the prosecutors' statements preceding questions about a potential juror's thoughts on capital punishment. Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, Miller-El contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause. If the graphic script is given to a higher proportion of blacks than whites, this is evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation.

[F]or 94% of white venire panel members, prosecutors gave a bland description of the death penalty before asking about the individual's feelings on the subject. The abstract account went something like this:

> "I feel like it [is] only fair that we tell you our position in this case. The State of Texas . . . is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic death penalty from Judge McDowell."

Only 6% of white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it. This is an example of the graphic script:

> "I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El . . ."
>
> "We do that with the anticipation that, when the death penalty is assessed, at some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically our position going into this thing."

The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire. Prosecutors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State says that giving the graphic script to these panel members would only have antagonized them.

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This argument, however, first advanced in dissent when the case was last here, and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at voir dire testimony expressly discussing answers on the questionnaires we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it. . . .

The State's purported rationale fails again if we look only to the treatment of ambivalent panel members, ambivalent black individuals having been more likely to receive the graphic description than ambivalent nonblacks. Three nonblack members of the venire indicated ambivalence to the death penalty on their questionnaires; only one of them, Fernando Gutierrez, received the graphic script. But of the four black panel members who expressed ambivalence, all got the graphic treatment.

The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation. Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

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There is a final body of evidence that confirms this conclusion. We know that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries.

Prosecutors here "marked the race of each prospective juror on their juror cards." . . .

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In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.

The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.

If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.

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JUSTICE BREYER, concurring.

In *Batson v. Kentucky* (1986), the Court adopted a burden-shifting rule designed to ferret out the unconstitutional use of race in jury selection. In his separate opinion, Justice Thurgood Marshall predicted that the Court's rule would not achieve its goal. The only way to "end the racial discrimination that peremptories inject into the jury-selection process," he concluded, was to "eliminat[e] peremptory challenges entirely," Today's case reinforces Justice Marshall's concerns.

To begin with, this case illustrates the practical problems of proof that Justice Marshall described. As the Court's opinion makes clear, Miller-El marshaled extensive evidence of racial bias. But despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the Batson standard violated and 16 the contrary.

The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge. . . .

At *Batson*' s first step, litigants remain free to misuse peremptory challenges as long as the strikes fall below the prima facie threshold level. At Batson' s second step, prosecutors need only tender a neutral reason, not a "persuasive, or even plausible," one. And most importantly, at step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge.

Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem.

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[A] jury system without peremptories is no longer unthinkable. Members of the legal profession have begun serious consideration of that possibility. And England, a common-law jurisdiction that has eliminated peremptory challenges, continues to administer fair trials based largely on random jury selection.

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Justice Goldberg, dissenting in *Swain v. Alabama* (1965), wrote, "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." This case suggests the need to confront that choice. In light of the considerations I have mentioned, I believe it necessary to reconsider *Batson*' s test and the peremptory challenge system as a whole. With that qualification, I join the Court's opinion.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

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To obtain habeas relief, then, Miller-El must show that, based on the evidence before the Texas state courts, the only reasonable conclusion was that prosecutors had racially discriminated against prospective jurors. He has not even come close to such a showing. . . . In view of the evidence actually presented to the Texas courts, their conclusion that the State did not discriminate was eminently reasonable. As a close look at the state-court proceedings reveals, the majority relies almost entirely on evidence that Miller-El has never presented to any Texas state court.

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The majority's willingness to reach outside the state-court record and embrace evidence never presented to the Texas state courts is hard to fathom. AEDPA mandates that the reasonableness of a state court's factual findings be assessed "in light of the evidence presented in the State court proceeding," and also circumscribes the ability of federal habeas litigants to present evidence that they "failed to develop" before the state courts. . . .

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Even taken on its own terms, Miller-El's cumulative evidence does not come remotely close to clearly and convincingly establishing that the state court's factual finding was unreasonable. . . .

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From the outset of questioning, [Joe] Warren did not specify when he would vote to impose the death penalty. When asked by prosecutor Paul Macaluso about his ability to impose the death penalty, Warren stated, "[T]here are some cases where I would agree, you know, and there are others that I don't." Macaluso then explained at length the types of crimes that qualified as capital murder under Texas law, and asked whether Warren would be able to impose the death penalty for those types of heinous crimes. Warren continued to hedge: "I would say it depends on the case and the circumstances involved at the time." He offered no sense of the circumstances that would lead him to conclude that the death penalty was an appropriate punishment.

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While Warren's ambivalence was driven by his uncertainty that the death penalty was severe enough, that is beside the point. Throughout the examination, Warren gave no indication whether or when he would prefer the death penalty to other forms of punishment, specifically life imprisonment. To prosecutors seeking the death penalty, the reason for Warren's ambivalence was irrelevant.

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The majority points to four other panel members—Kevin Duke, Troy Woods, Sandra Jenkins, and Leta Girard—who supposedly expressed views much like Warren's, but who were not struck by the State. According to the majority, this is evidence of pretext. But the majority's premise is faulty. None of these veniremen was as difficult to pin down on the death penalty as Warren. For instance, Duke supported the death penalty. ("I've always believed in having the death penalty. I think it serves a purpose"). . . . By contrast, Warren never expressed a firm view one way or the other.

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Nevertheless, even assuming that any of these veniremen expressed views similar to Warren's, Duke, Woods, and Girard were questioned much later in the jury selection process, when the State had fewer peremptories to spare. Only Sandra Jenkins was questioned early in the voir dire process, and thus only Jenkins was even arguably similarly situated to Warren. However, Jenkins and Warren were different in important respects. Jenkins expressed no doubt whatsoever about the death penalty. She testified that she had researched the death penalty in high school, and she said in response to questioning by both parties that she strongly believed in the death penalty's value as a deterrent to crime. This alone explains why the State accepted Jenkins as a juror, while Miller-El struck her. In addition, Jenkins did not have a relative who had been convicted of a crime, but Warren did. At the *Batson* hearing, Macaluso testified that he struck Warren both for Warren's inconsistent responses regarding the death penalty and for his brother's conviction.

The majority thinks it can prove pretext by pointing to white veniremen who match only one of the State's proffered reasons for striking Warren. This defies logic. " '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." Given limited peremptories, prosecutors often must focus on the potential jurors most likely to disfavor their case. By ignoring the totality of reasons that a prosecutor strikes any particular venireman, it is the majority that treats potential jurors as "products of a set of cookie cutters,"—as if potential jurors who share only some among many traits must be treated the same to avoid a *Batson v. Kentucky* (1986) violation. Of course jurors must not be "identical in all respects" to gauge pretext, but to isolate race as a variable, the jurors must be comparable in all respects that the prosecutor proffers as important. This does not mean "that a defendant cannot win a Batson claim unless there is an exactly identical white juror." . . . It means that a defendant cannot support a *Batson* claim by comparing veniremen of different races unless the veniremen are truly similar.

The second black venireman on whom the majority relies is Billy Jean Fields. Fields expressed support for the death penalty, but Fields also expressed views that called into question his ability to impose the death penalty. Fields was a deeply religious man, and prosecutors feared that his religious convictions might make him reluctant to impose the death penalty. . . . Fields indicated that the possibility of rehabilitation was ever-present and relevant to whether a defendant might commit future acts of violence. In light of that view, it is understandable that prosecutors doubted whether he could vote to impose the death penalty.

Fields did testify that he could impose the death penalty, even on a defendant who could be rehabilitated. For the majority, this shows that the State's reason was pretextual. But of course Fields said that he could fairly consider the death penalty—if he had answered otherwise, he would have been challengeable for cause. The point is that Fields' earlier answers cast significant doubt on whether he could impose the death penalty. The very purpose of peremptory strikes is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias. Based on Fields' voir dire testimony, it was perfectly reasonable for prosecutors to suspect that Fields might be swayed by a penitent defendant's testimony. The prosecutors may have been worried for nothing about Fields' religious sentiments, but that does not mean they were instead worried about Fields' race.

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As with Warren, the majority attempts to point to similarly situated nonblack veniremen who were not struck by the State, but its efforts again miss their mark for several reasons. First, the majority would do better to begin with white veniremen who were struck by the State. For instance, it skips over Penny Crowson, a white panelist who expressed a firm belief in the death penalty, but who also stated that she probably would not impose the death penalty if she believed there was a chance the defendant could be rehabilitated.

Second, the nonblack veniremen to whom the majority points—Sandra Hearn, Mary Witt, and Fernando Gutierrez—were more favorable to the State than Fields for various reasons. For instance, Sandra Hearn was adamant about the value of the death penalty for callous crimes. Miller-El, of course, shot in cold blood two men who were lying before him bound and gagged. In addition, Hearn's father was a special agent for the Federal Bureau of Investigation, and her job put her in daily contact with police officers for whom she expressed the utmost admiration. This is likely why the State accepted Hearn and Miller-El challenged her for cause.

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Miller-El's claims of disparate questioning also do not fit the facts. . . .

. . . The State questioned panelists differently when their questionnaire responses indicated ambivalence about the death penalty. Any racial disparity in questioning resulted from the reality that more nonblack veniremen favored the death penalty and were willing to impose it.

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Fifteen blacks were questioned during voir dire. Only eight of them—or 53%—received the graphic script. All eight had given ambivalent questionnaire answers regarding their ability to impose the death penalty. The majority claims that Keaton, Kennedy, and Mackey were not ambivalent, but their questionnaire answers show otherwise. For instance, Keaton circled "no" for question 56, indicating she did not believe in the death penalty, and wrote, "It's not for me to punished [sic] anyone." However, she then circled "no" for question 58, indicating that she had no qualms about imposing the death penalty.

Thus far, the State's explanation for its use of the graphic script fares far better than Miller-El's or the majority's. Questionnaire answers explain prosecutors' use of the graphic script with 14 out of the 15 blacks, or 93%. By contrast, race explains use of the script with only 8 out of 15 veniremen, or 53%. The majority's more nuanced explanation is likewise inferior to the State's. It hypothesizes that the script was used to remove only those black veniremen ambivalent about or opposed to the death penalty. But that explanation accounts for only 12 out of 15 veniremen, or 80%. The majority cannot explain why prosecutors did not use the script on Mosley and Smith, who were opposed to the death penalty, or Carter, who was ambivalent. . . .

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[T]he majority cannot take refuge in any supposed disparity between use of the graphic script with ambivalent black and nonblack veniremen. The State gave the graphic script to 8 of 9 ambivalent blacks, or 88%, and 5 of 7 ambivalent nonblacks, or 71%. This is hardly much of a difference. However, when the majority lumps in veniremen opposed to the death penalty, the disparity increases. The State gave the graphic script to 8 of 11 ambivalent or opposed blacks, or 73%, and 6 of 12 ambivalent or opposed nonblacks, or 50%. But the reason for the increased disparity is not race: It is, as the State maintains, that veniremen who were opposed to the death penalty did not receive the graphic script.

In sum, the State can explain its treatment of 23 of 27 potential jurors, or 85%, while the majority can only account for the State's treatment of 18 of 27 potential jurors, or 67%. This is a far cry from clear and convincing evidence of racial bias.

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Miller-El's argument that prosecutors shuffled the jury to remove blacks is pure speculation. At the Batson hearing, Miller-El did not raise, nor was there any discussion of, the topic of jury shuffling as a racial tactic. The record shows only that the State shuffled the jury during the first three weeks of jury selection, while Miller-El shuffled the jury during each of the five weeks. This evidence no more proves that prosecutors sought to eliminate blacks from the jury, than it proves that Miller-El sought to eliminate whites even more often.

Miller-El notes that the State twice shuffled the jury (in the second and third weeks) when a number of blacks were seated at the front of the panel. According to the majority, this gives rise to an "inference" that prosecutors were discriminating. But Miller-El should not be asking this Court to draw "inference[s]"; he should be asking it to examine clear and convincing proof. And the inference is not even a strong one. We do not know if the nonblacks near the front shared characteristics with the blacks near the front, providing race-neutral reasons for the shuffles. We also do not know the racial composition of the panel during the first week when the State shuffled, or during the fourth and fifth weeks when it did not.

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The majority's speculation would not be complete, however, without its discussion (block-quoted from Miller-El I) of the history of discrimination in the D. A.'s Office. This is nothing more than guilt by association that is unsupported by the record.

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[T]he majority notes that prosecutors "'marked the race of each prospective juror on their juror cards.'" This suffers from the same problems as Miller-El's other evidence. Prosecutors did mark the juror cards with the jurors' race, sex, and juror number. We have no idea—and even the majority cannot bring itself to speculate—whether this was done merely for identification purposes or for some more nefarious reason. The reason we have no idea is that the juror cards were never introduced before the state courts, and thus prosecutors were never questioned about their use of them.

Thomas Joe Miller-El's charges of racism have swayed the Court, and AEDPA's restrictions will not stand in its way. But Miller-El has not established, much less established by clear and convincing evidence, that prosecutors racially discriminated in the selection of his jury—and he certainly has not done so on the basis of the evidence presented to the Texas courts. On the basis of facts and law, rather than sentiments, Miller-El does not merit the writ. I respectfully dissent.