

CASE SUMMARY: *MILLER-EL v. DRETKE*

IN THE SUPREME COURT OF THE UNITED STATES. NO.03-9659. DECIDED 13TH JUNE 2005

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United States Supreme Court Upholds Claim of Racial Bias in Jury Selection

In 1986 Thomas Joe Miller-El was convicted of capital murder in Dallas County, Texas and was sentenced to death by lethal injection. Since then he has been trying to enforce his right under the Fourteenth Amendment to the Federal Constitution to due process of law and a fair trial. His argument has been that during the selection of his jury the state prosecutor discriminated against him by striking black *veniremen* (potential jurors) simply on the grounds of their race. His case like many others has involved an exhaustive passage through the appeals procedure in death penalty cases. In the past seventeen years his case has been heard in the State Court of Criminal Appeals, the Federal District Court on a claim for *habeas corpus* relief, the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court in 2002, back to the Fifth Circuit, before finally arriving back at the Supreme Court in December 2004. In almost every previous hearing Miller-El had lost as each court in turn upheld the race-neutral excuses given by the prosecutor for striking black *veniremen*.

Judgment was given on 13th June 2005. By a majority of six to three the Supreme Court upheld Miller-El's claim under *Batson v. Kentucky*,¹ granted him *habeas corpus* relief, and ordered a new trial to be held.²

The opinion of the majority was written by Justice Souter. During jury selection in Miller-El's trial for capital murder, prosecutors used peremptory strikes against ten qualified black *venire* members. Miller-El objected that the strikes were based on race and could not be presumed legitimate, given a history of excluding black members from criminal juries by the Dallas County District Attorney's Office. The trial court received evidence of the practice alleged but found no "systematic exclusion of blacks as a matter of policy" by that office,³ and therefore no entitlement to relief. The court denied Miller-El's request to pick a new jury, and the trial

ended with his death sentence for capital murder.

While an appeal was pending, the Supreme Court decided *Batson v. Kentucky*,⁴ and held that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish a violation of the Fourteenth Amendment. The Texas Court of Criminal Appeals then remanded Miller-El's case to the trial court to determine whether Miller-El could show that prosecutors in his case peremptorily struck prospective black jurors because of race.⁵

The trial court found no such demonstration. It accepted the stated race-neutral reasons for the strikes by the prosecutor, which the judge called "completely credible [and] sufficient" as the grounds for a finding of "no purposeful discrimination."

The Court of Criminal Appeals affirmed, stating it found "ample support" in the *voir dire* record for the race-neutral explanations offered by prosecutors for the peremptory strikes.⁶

Miller-El then sought *habeas corpus* relief, again pressing his *Batson* claim. The District Court denied relief,⁷ and the Court of Appeals for the Fifth Circuit precluded appeal by denying a certificate of appealability.⁸ The United States Supreme Court granted *certiorari* to consider whether Miller-El was entitled to review on the *Batson* claim,⁹ and reversed the Court of Appeals. After examining the record of Miller-El's extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office before and during his trial, the Supreme Court found an appeal was in order, since the merits of the *Batson* claim were, at the least, debatable by jurists of reason.¹⁰ After granting a certificate of appealability, the Fifth Circuit rejected Miller-El's *Batson* claim on the merits.¹¹ The Supreme Court again granted *certiorari*,¹² and again reversed the decision of the Fifth Circuit.

Justice Souter began his opinion by stating that racial discrimination in jury selection

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compromises the right of trial by impartial jury, undermines the integrity of the court and invites cynicism respecting the jury's neutrality. He pointed out that the Court had frequently reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause of the Fourteenth Amendment but said that the problem was that it was very difficult to prove that such discrimination had actually taken place. When the Court decided *Batson v. Kentucky* in 1986 they changed the rule and held that a defendant could make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial.¹³ "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors" within an arguably targeted class.

This case came before the Supreme Court by way of an appeal against the denial of *habeas corpus* relief in the Texas courts. Miller-El's options were limited by the terms of the Antiterrorism and Effective Death Penalty Act 1996 ("A.E.D.P.A.") because under that statute he was only entitled to relief by showing that the conclusion of the Texas courts was "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."

With this standard in mind the judgment of the majority of the Court then analysed the facts in Miller-El's jury selection in order to explain their decision that the Texas courts had reached an unreasonable determination. The first remarkable fact was that nineteen out of twenty black members of the of the jury panel, which totalled 108, were challenged by the State, nine for cause and ten peremptorily. As Justice Souter put it, "happenstance is unlikely to produce this disparity." The judgment then proceeded to compare the way that black panel members were treated by comparison with non-black members. The conclusion of the Court was that non-black jurors who expressed views that suggested there were limits to their willingness to impose the death penalty were accepted by the State whereas black jurors who repeatedly indicated their approval of the death penalty and their willingness to impose it and who therefore "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence" were excluded. The Court suggested that it was difficult to accept the race-neutral explanations put forward by the State and that it was a sham and "a pretext for discrimination."

The prosecution's proffered reasons for striking another black *venireman* were described by the Court as "comparably unlikely" and "implausible" because white jurors who had expressed similar views were accepted when consistency would have demanded that they too be struck. The Court said that the evidence before the state court "supports a conclusion that race was significant in determining who was challenged and who was not."

The Court went on to describe other discriminatory practices by the State during jury selection. On of these was the process of shuffling the *venire* panel. This is a practice permitted under the Texas Code of Criminal Procedure¹⁴ whereby the cards bearing the jurors' names can literally be reshuffled to change the order in which they are likely to be called for examination. The result in this case was that black jurors who were about to be called ended up at the end of the queue and were never in fact called at all. As the Court observed in relation to this practice "no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference."

The next discriminatory practice noted by the Court was that during jury selection the State would explain the process of execution by lethal injection to almost every black juror in far more graphic and emotive detail than was used with non-black jurors. Miller-El's lawyers argued that the only purpose of this practice was to make black jurors appear more hesitant about imposing the death penalty so that the State could then use that as a race-neutral reason for striking them. The Court rejected the State's explanation based on mere hesitation and agreed with Miller-El stating that "the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script."

The Court also criticised as racially discriminatory the use by the prosecution of "trick questions" about the minimum sentence that could be imposed instead of a death sentence, the answers to which were then used as the basis for a challenge to the juror's suitability on the grounds that whereas 100 per cent of the black panel members were asked this question, only twenty seven per cent of the non-black members were asked.

Finally the Court felt confirmed in its conclusion that race had been used by the State as the basis for jury challenges because for decades there had been a policy in the Dallas County Prosecutor's

Office of systematically excluding all blacks from juries, which practice was also confirmed by the emergence in evidence of a prosecutor's manual which gave tips on how to select juries devoid of black members.

In granting Miller-El *habeas corpus* relief the Court concluded that "the State court's conclusions that the prosecutor's strikes ... were not racially determined is shown up as wrong to a clear and convincing degree; the State court's conclusion was unreasonable as well as erroneous."

It will be observed that all this trouble arose from the use of peremptory strikes, that is those for which no reason has to be given (subject to the *Batson* requirement to show that they were race-neutral). Justice Breyer, in a concurring opinion, makes an eloquent case for the abolition of peremptory strikes altogether. In this he was able to call on the considerable authority of Justice Thurgood Marshall who had made the same argument in the *Batson* case itself. Justice Breyer pointed out that William Blackstone in his *Commentaries on the Laws of England* (1769), a text which has great authority in U.S. criminal law, had described the practice as an "arbitrary and capricious species of challenge" as well as to a number of recent articles in legal publications on this subject. He also noted the practice had been abolished in England without making fair trials impossible.

The three dissenting Justices were Justice Thomas, who wrote the opinion of the minority, Chief Justice Rehnquist and Justice Scalia. As usual in cases where the Court has prevented a state from carrying out a death sentence, they were beside themselves with rage at the manner in which the decision had been reached. They cited the restrictive grounds for a challenge under A.E.D.P.A. and stated that the case should never have been heard at all because in their view Miller-El's argument relied upon evidence never presented to the Texas state courts as required in *habeas* proceedings. They rejected his claim for *habeas* relief because they said "he has not even come close to...showing" that the "prosecutors had racially discriminated against prospective jurors." They said the majority had "flout[ed] A.E.D.P.A.'s plain terms and encourage[d] *habeas* applicants to attack State judgments collaterally with evidence never tested by the original triers of fact."

The outcome of Miller-El's appeal depended on the view taken by the Supreme Court about the

adequacy of the reasoning of the lower courts for rejecting his claims of racial bias. It is therefore not surprising that the opinion of the minority then proceeded to examine each of the instances of racial discrimination alleged by Miller-El as set out above. Again, not surprisingly, the minority came to directly contrary conclusions to the majority in respect of each item. The claim that prosecutors evinced racial bias in questioning black *veniremen* was rejected on the basis that such questioning was based not on the race of the jurors but on their attitudes towards the death penalty as shown in their jury questionnaires and "any racial disparity...resulted from the reality that more non-black *veniremen* favoured the death penalty and were willing to impose it." The claim of racial bias in explaining the process of execution was similarly rejected, the allegations about jury shuffling were simply dismissed as "pure speculation" and therefore unproved, and as for the prosecutor's manual Justice Thomas appears to have been happy to accept the evidence that it had fallen out of use years before Miller-El's trial. He concluded by stating that Miller-El's charges of racism "have swayed the Court" but declared that Miller-El had not proved that he was racially discriminated against in the Texas court.

There is a certain irony that the only black justice on the Supreme Court should write the opinion of the minority in this case in which all the allegations of racism by a prosecutors' office in the Deep South were roundly rejected and their obviously racist practices given a clean bill of health. But as readers of this *Journal* and watchers of the Supreme Court will know, we have all come to expect no less from the man who has been described as "a redneck in a black skin."

¹ 476 U.S. 79 (1986).

² The transcript of the judgment of the Supreme Court is available on the website of the Death Penalty Information Centre at www.deathpenaltyinfo.org.

³ App. 882-883.

⁴ *Supra*.

⁵ *Miller-El v. State*, 748 S. W. 2d 459 (1988).

⁶ *Miller-El v. State*, No. 69,677 (Sept. 16, 1992) (*per curiam*), p. 2, App. 931.

⁷ *Miller-El v. Johnson*, Civil No. 3:96-CV-1992-H (ND Tex., June 5, 2000).

⁸ *Miller-El v. Johnson*, 261 F. 3d 445 (2001).

⁹ *Miller-El v. Cockrell*, 534 U. S. 1122 (2002).

¹⁰ *Miller-El v. Cockrell*, 537 U. S. 322 (2003).

¹¹ 361 F. 3d 849 (2004).

¹² 542 U. S. 936 (2004).

¹³ *Batson v. Kentucky*, *supra*, at 94, 96.

¹⁴ Tex. Code Crim. Proc. Ann., Art. 35.11.