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# JUSTICES CRITICIZE JURY SELECTION BIAS AGAIN

## Supreme Court Sends Back Texas Capital Case for Retrial

BY JOHN GIBEAUT

Six members of the U.S. Supreme Court appeared to have no difficulty rebuking once again a lower court for failing to deal with racism that had infected jury selection in the trial of a black Texas death row inmate.

But one justice wondered anew whether tough talk alone ever could rid the justice system of unconstitutional discrimination.

The court pronounced no new law June 13 when it ruled 6-3 that Thomas Joe Miller-El deserves another trial because Dallas County prosecutors improperly based their peremptory challenges on race to disqualify 10 of 11 potential black jurors from his first trial in 1986. He wound up with a death sentence for murdering white hotel clerk Douglas Walker in a 1985 robbery that left another clerk paralyzed. *Miller-El v. Dretke*, No. 03-9659.

The outcome was widely expected, but concurring Justice Stephen G. Breyer also said Miller-El's experience proves Justice Thurgood Marshall was right nearly 20 years ago when he wrote that the only way to weed out illegal bias in jury selection is to eliminate peremptory challenges. Concurring in a decision where the court supposedly made it easier to smoke out discrimination, Marshall nevertheless worried that racism still could seep into the porous test the court set up to detect it. *Batson v. Kentucky*, 476 U.S. 79 (1986).

From Breyer's perspective, discrimination has become much more sophisticated since Marshall's day. He also inserted a reference to his *Miller-El* concurrence in a second *Batson*-type case decided June 13, in which the justices voted 8-1 to strike down as too rigorous California's standard for determining whether prosecutors engaged in discrimination in excusing potential jurors. *Johnson v. California*, No. 04-6964.

"The use of race-and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before," Breyer wrote in *Miller-El*.

Besides academic studies and anecdotal accounts, Breyer cited a jury selection guide, a bar journal article, continuing legal education materials and other sources

that counsel lawyers to demographically analyze or rate potential jurors. Also cited was a Pensacola, Fla., trial consulting firm, CTS America, which advertises a software package called SmartJURY that boasts: "Whether you are trying a civil case or a criminal case, SmartJURY likely has determined the exact demographics (age, race, gender, education, occupation, marital status, number of children, religion and income) of the type of jurors you should select and the type you should strike."

Breyer ascribed no sinister motives to the distributors of the cited materials, saying the "examples reflect a professional effort to fulfill the lawyer's obligation to help his or her client." Nevertheless, he added, "the outcome in terms of jury selection is the same as it would be were the motive less benign."

A CTS America spokesman says the SmartJURY software uses demographic composites based on 20 different characteristics and that using race as a lone reason for exercising a peremptory challenge simply won't work. "Anyone who's crazy enough to use race as a factor is an incompetent lawyer," says chief operating and financial officer Martin H. Levin, himself a litigator.

Before *Batson*, the only way a criminal defendant could prove illegal prejudice was to show a historical pattern and practice of racial exclusion by the prosecutors involved. The *Batson* decision added a three-step individualized test to address discrimination in specific cases. Under that test, the defendant first must make a prima facie showing of bias, after which the prosecutor has the chance to offer a racially neutral explanation for using a peremptory strike. Then the defendant must satisfy the judge that the explanation serves as a pretext for racial motives.

Among other fears, Breyer worried—as Marshall had before him—that the complexity of the test makes it too easy for prosecutors to offer neutral-sounding reasons that really aren't neutral at all. Ambivalence toward the death penalty is a favorite reason prosecutors regularly offer to excuse prospective jurors in capital cases, including Miller-El's. Breyer also cited Miller-El's own tortuous path through the federal system as an example of the practical problems that spring from the *Batson* test.

The justices in 2003 had severely scolded the New Orleans-based 5th U.S. Circuit Court of Appeals for refusing to consider Miller-El's petition for a writ of habeas corpus despite a mountain of evidence of both institutionalized racial bias in the Dallas County District Attorney's Office and against Miller-El in particular. *Miller-El v. Cockrell*, 537 U.S. 322. There, eight of the justices all but told the 5th Circuit to grant the petition. In a rare move, the justices took the case again and decided it on the merits June 13 after the appeals court still refused to grant the petition, citing in support the lone dissent in the 2003 decision by Justice Clarence Thomas.

The majority opinion issued by Justice David H. Souter, with Thomas again writing for the dissent, centers more on factual disputes than it does on legal questions. Joining Souter were Breyer and Justices John Paul Stevens, Sandra Day O'Connor, Anthony M. Kennedy and Ruth Bader Ginsburg. Chief Justice William H. Rehnquist and Justice Antonin Scalia joined Thomas.

"As the court's opinion makes clear, Miller-El marshaled extensive evidence of racial bias," Breyer wrote. "But despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including eight different judicial opinions and involving 23 judges, of whom six 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 the use of a peremptory challenge."

Despite Breyer's complaint, none of his fellow justices joined the concurrence. And, at least in the short term, he isn't likely to garner much support from criminal or civil litigators on either side of the bar. For example, the idea of chucking peremptories went nowhere this past winter when the ABA's American Jury Project considered whether to include it in its Principles for Juries and Jury Trials.

"Our view was that when properly used, they continue to play an important role in ensuring fair and impartial juries," says project chair Patricia Lee Refo of Phoenix. "But we're also clearly aware there are abuses, and we tried to address these in *Batson*-type language."

One lawyer involved in Miller-El's case says she would rather first see more effective enforcement of *Batson* at both the trial and appellate levels.

"The right to excuse a juror whom you know can't be fair but can't challenge for cause is just too important to give up," says Elisabeth Semel, director of the Death Penalty Clinic at the University of California-Berkeley Boalt Hall School of Law. Semel wrote an amicus brief supporting Miller-El on behalf of a dozen former prosecutors and judges.

Semel points to Souter's analysis in the decision as the proper way to conduct a *Batson* inquiry. An especially significant aspect was a comparison of answers given during jury selection by blacks who were dismissed and whites who were seated.

"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," Souter wrote.

In one instance, Souter concluded that dismissed black prospect Billy Jean Fields, who expressed unwavering support for capital punishment, "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence."

Writing of another excused black panelist, Joe Warren, Souter found that consideration of all the voir dire testimony "casts the prosecutor's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of other panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not."

Semel also notes that Souter reached into the past and considered a 1960s manual used in the Dallas district attorney's office that ordered prosecutors to use peremptory strikes against minorities: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well-educated." Though the manual fell into disuse years before Miller-El's trial, Souter determined that prosecutors still "took their cues" from it because they made notes on the race of each possible juror.

"You don't simply accept at face value the prosecutor's response," Semel says. "You look at the totality of the prosecutor's actions."

But few courts employ such a painstaking approach to *Batson* complaints, Semel says. That, she adds, is why Breyer's concurrence is so important.

"I do think Breyer is holding up a mirror and asking a very serious question about how far we have come—or not," she says. "Will it light a fire under the courts to do the enforcement?"