IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JOHNNY DUANE MILES, Appellant.	)	S086234 San Bernardino Case No. FSB09438

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Bernardino County

Honorable James A. Edwards, Judge

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INTRODUCTION

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." (*Rose v. Mitchell* (1979) 443 U.S. 545, 555.) Racial discrimination in the selection of jurors "'casts doubt on the integrity of the judicial process,' [citation] and places the fairness of a criminal proceeding in doubt." (*Powers v. Ohio* (1991) 499 U.S. 400, 411.) And as this Court has properly noted, there are "heightened concerns" about racial discrimination in jury selection when there is a "racial identity between the defendant and [a discharged juror] or between the victim and the majority of remaining jurors . . . ." (*People v. O'Malley* (2016) 62 Cal.4th 944, 980.)

This is just such a case of "heightened concern." Appellant Johnny Miles is black. He was charged with the rape and murder of Nancy Willem. Ms. Willem was white. The prosecutor used his peremptory challenges to rid the jury of blacks. By the end of jury selection, not a single black juror remained among the 12 jurors seated to decide Mr. Miles' fate.

The trial court required the prosecutor to state reasons for ridding the jury of blacks, and then accepted those reasons. In the current briefing on file with the Court the parties employed the familiar three-step process of *Batson v. Kentucky* (1986) 476 U.S.

79 and discussed whether the prosecutor's use of peremptory challenges to discharge black prospective jurors SG and KC violated the constitution. (Appellant's Opening Brief ("AOB 45-80; Respondent's Brief ("RB") 19-39; Appellant's Reply Brief ("ARB") 1-53.)

The defense position was simple: three factors showed the prosecutor's stated reasons were pretexts for discrimination. First, the jury questionnaires of both SG and KC showed they would be good jurors for the prosecution. (*See Miller-El v. Dretke* (2005) 545 U.S. 231, 232 [prosecutor's discharge of favorable black prospective jurors is a factor demonstrating pretext].) Second, the prosecutor did not question prospective jurors in areas that, during the *Batson* hearing, he later asserted were in fact critical to his discharge decision. (*Id*. at p. 246 [prosecutor's failure to question prospective black juror in an area the prosecutor later says is critical to the discharge decision is a factor demonstrating pretext].) Third, a comparative juror analysis showed that the reasons the prosecutor gave for discharging SG and KC were equally applicable to white jurors whom the prosecutor did not strike. (*Id*. at p. 241 [where stated reasons apply to non-black prospective jurors who are not discharged, this is a factor demonstrating pretext].)

The briefing currently on file with the Court explores these issues in depth. This supplemental brief addresses the third of these factors: comparative juror analysis.

In defending the prosecutor's discharges, the state's appellate lawyers offered in their brief to this Court new reasons to explain why certain white jurors were kept on the jury -- reasons which the trial prosecutor never gave. The state's approach implicates two principles the Supreme Court recognized in *Miller-El* as central to comparative juror analysis.

The first principle, as this Court itself has recognized, is that pursuant to *Miller-El* "evidence of comparative juror analysis must be considered . . . even for the first time on appeal if relied upon by defendant . . . ." (*People v. Lenix* (2008) 44 Cal.4th 602, 622.) The second principle, as this Court has also recognized, is the "stand or fall" principle: in defending a prosecutor's discharges of black jurors on appeal, the state may not add new reasons on which the prosecutor himself did not rely. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." (*Miller-El*, *supra*, 545 U.S. at p. 252. *Accord People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159.) As Justice Liu has noted "[n]either the Attorney General nor this court may shore up a reason that the prosecutor actually gave with a reason he did not give." (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1064 [Liu, J., concurring].)

To its credit, in its responding brief the state did not offer new reasons for why the

black jurors were discharged. Such evidence would plainly have been barred by *Miller-El*'s stand-or-fall principle. Instead, as noted above, the state repackaged its approach; rather than offer new reasons for why the black jurors were discharged, the state offered new reasons for why the white jurors were *not* discharged. (RB 28.)

The propriety of the state's approach here arises directly at the crossroads of the two *Miller-El* principles referenced above. When a prosecutor has stated reasons for discharging black jurors, *Miller-El*'s stand or fall principle precludes the state from defending those discharges years later on appeal by offering additional reasons for the discharges. The question here is when a comparative juror analysis is done for the first time on appeal (as *Miller-El* permits and as was done in *Miller-El* itself), does the stand-or-fall principle permit the state to add new reasons for why white jurors were seated?

The state's approach is supported by a paragraph in the majority opinion of *People v. Chism* (2014) 58 Cal.4th 1266, 1319. In his dissenting opinion in *Chism*, Justice Liu noted that this conclusion was "dubious" and would, in fact, "cast[] doubt on the utility of comparative juror analysis when conducted for the first time on appeal" because a reviewing court could always find "other answers" to distinguish the seated white juror. 58 Cal.4th at pp. 1349-1350.

Recent case law from the Supreme Court confirms that Justice Liu was correct. The state's approach is barred by *Miller-El*'s stand or fall principle because it is simply the flip side of the same coin of offering new reasons for the discharge of the black jurors. As a result, accepting it simply guts comparative juror analysis of any utility.

Comparative juror analysis necessarily requires the reviewing court to compare answers given by black jurors who were discharged with white jurors that were seated. By way of example, when a prosecutor says that a black juror was struck because he was a social worker -- but the prosecutor does not strike a white juror who is also a social worker -- an inference of pretext is proper. When the state years later says that the real reason the white juror was not discharged was because of an answer to a different question -- for example, that the white juror was a strong supporter of the death penalty -- the state is really saying that the black social worker was *not* struck because he was social worker, but because he was not a strong enough supporter of the death penalty as was the white social worker. In other words, providing new reasons for why the white juror was *not* discharged is just a slightly more subtle way of providing new and different reasons why the black juror *really* was discharged after all. As discussed below, the state's approach to the stand-or-fall principle is inconsistent with recent authority from the Supreme Court, binding language of footnote 4 in *Miller-El v. Dretke*, *supra*, 545 U.S. 231 and sound policy. This aspect of *Chism* should be reconsidered.

STATEMENT OF FACTS

As noted above, the black defendant in this case was charged with raping and murdering a white woman. After hardship and for-cause voir dire, the trial court randomly selected 12 prospective jurors for the exercise of peremptory challenges. (6 RT 1684.) This group included prospective jurors SG and KC. Like defendant, both of these prospective jurors were also black. (6 RT 1685; 21 CT JQ 5975; 24 CT JQ 6825.)

The prosecutor used peremptory challenges to discharge both SG and KC. (6 RT 1705, 1708.) It is not apparent why.

SG "favored the death penalty," he believed death was a proper sentence for serious crimes, he would vote for the death penalty if it was on the ballot, he believed the death penalty was used fairly in California, he would not be reluctant to impose death, he would sign the verdict form and face the condemned with his verdict, his father worked as a DEA agent and he himself had considered a career as a police officer. (21 CT JQ 5983, 5985, 6001-6002.) KC was a former marine who had been married to a correctional officer, he agreed he could vote for death, he had no opposition to the death penalty and he believed prosecutors were trying "to protect the community . . . against those that would cause harm or have harmed." (24 CT JQ 6828- 6830, 6842, 6849-6852.)

In light of the answers SG and KC gave, it was no surprise that when the prosecutor exercised peremptory challenges on these two black prospective jurors, defense counsel made a *Wheeler/Batson* motion. (6 RT 1719.) The trial court agreed: "I don't understand [the challenges] as to [KC] and as to [SG]. You'll have to explain those." (6 RT 1720.)[1]

The prosecutor gave three reasons for discharging SG. First, SG said in answering question 68 on the questionnaire he was not upset at the O.J. Simpson verdict. Second, SG said in answering question 74 that if he felt "that defendant might not have done it, he['s] innocent." Third, SG said in answering question 35 that he "like[d] [his own] opinion over other people[']s." (6 RT 1720-1721; *see* 21 CT JQ 5982, 5993-5994.)

The trial court heard the prosecutor's three-reason explanation. It then denied defense counsel's *Batson* motion with the reassuring double-negative observation that "I cannot say [the prosecutor's reason] is not legitimate." (6 RT 1722.) Ultimately, there was not a single black juror among the 12 jurors seated to try this interracial murder charged as a capital crime.

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[1] For purposes of the legal issue discussed in this supplemental brief, Mr. Miles will focus on the prosecutor's discharge of black prospective juror SG.

In his opening brief on appeal, Mr. Miles contended that the denial of the *Batson* motion required reversal as to both SG and KC. (Appellant's Opening Brief ("AOB") 45-80.) As to SG, this contention was based in large part on a comparative juror analysis showing that stated reasons (1) and (3) above -- SG's answers to questions 68 and 35 respectively on the questionnaire -- were identical to the answers of white jurors who the prosecutor did not strike.

Question 68 on the jury questionnaire asked prospective jurors if they were "upset with the jury's verdict in the O.J. Simpson case." SG checked a box that said he was not upset. (21 CT JQ 5993.) So did seated juror 6 and alternate juror 5 -- both of whom were *not* black. (4 CT JQ 1179, 1197; 5 CT JQ 1401.) The prosecutor did not ask SG or either of the seated jurors even a single question about this response. (6 RT 1699-1702 [voir dire of SG]; 6 RT 1552-1554, 1685-1702 [voir dire of seated juror 6]; 5 RT 1393-1395 [voir dire of alternate juror 5]; 6 RT 1761-1762 [continued voir dire of alternate juror 5].) The prosecutor discharged SG -- while keeping seated juror 6 and alternate jury 5 -- inexplicably declaring that he had excused jurors of all races where "the common denominator is that they were not, were not upset by the O.J. Simpson verdict." (6 RT 1721.)

Question 35 asked prospective jurors if they viewed themselves as a leader or a

follower, and then asked for an explanation. SG said he was a leader, explaining that he "like[d] [his own] opinion over other people[']s." (21 CT JQ 5982.) Seated juror 1 -- who was white -- gave virtually the same answer, stating that she too was a leader who "like[d] to make [her] own decisions." (4 CT JQ 1152.) The prosecutor did not ask SG or seated juror 1 even a single question about their nearly identical answers to question 35. (6 RT 1699-1702 [voir dire of SG]; 6 RT 1714-1715 [voir dire of seated juror 1].) The prosecutor discharged SG -- while keeping seated juror 1 -- explaining that SG's answer to question 35 was a reason he discharged SG. (6 RT 1720-1721.)[2]

In his opening brief on appeal, Mr. Miles contended that because stated reasons (1) and (3) also applied to nonblack jurors whom the prosecutor did not discharge, they were not race-neutral; instead they raised an inference of pretext. (AOB 57-58 [comparative analysis as to question 68]; 58-59 [comparative analysis as to question 35].) In response, and as relevant here, the state argued that although the answers of alternate juror 5 and seated juror 6 were *identical* to SG in connection with question 68 (the O.J. Simpson question), this did not matter because their answers on other parts of the questionnaire were *not* identical to SG's answers. (RB 28.) Similarly, the state argued that as to

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[2] As noted above, the prosecutor also justified his discharge of SG because in answering question 74 SG said that if he felt "that defendant might not have done it, he['s] innocent." The prosecutor did ask SG about this during voir dire and SG explained, quite reasonably, that he would not convict a defendant "if the evidence showed . . . that there was some reasonable doubt." (6 RT 1700.)

question 35 (the question about being a leader), the identical answer given by seated juror 1 did not matter because her answers on other parts of the questionnaire were also *not* identical to SG's answers. (RB 29.)

In his Reply Brief, Mr. Miles contended that the state's reliance on questionnaire answers which the trial prosecutor never identified was improper. (ARB 10-13, 27-28.) After filing of the Reply Brief, the United States Supreme Court faced this same argument in *Foster v. Chatman* (2016) 578 U.S. ___, 136 S.Ct. 1737. More recently, the Fifth Circuit Court of Appeals faced this issue en banc in *Chamberlin v. Fisher* (5th Cir. March 20, 2018) ___ F.3d ___, 2018 WL 1391732. In addition, the Supreme Court has in three very recent cases once again addressed the problem of racial discrimination in the criminal justice system. (*See Tharpe v. Sellers* (2018) ___ U.S. ___, 138 S.Ct. 545; *Pena-Rodriguez v. Colorado* (2017) ___ U.S. ___, 137 S.Ct. 855; *Buck v. Davis* (2017)

___ U.S. ___, 137 S.Ct. 759.) This supplemental brief follows.[3]

[3] In addition to relying on comparative juror analysis in his opening brief, Mr. Miles also contended that other factors showed the prosecutor's stated reasons were pretexts for discharges based on race, including the prosecutor's failure to question prospective jurors in areas he (the prosecutor) later claimed were critical to his discharge decision. (AOB 58 [failure to inquire regarding question 68]; AOB 59 [failure to inquire regarding question 35].) Because the new case law on which this supplemental brief is based is not germane to these other factors, they are not discussed here.

Nor is there any discussion here of the amicus brief submitted for filing days ago by the NAACP Legal Defense Fund. ("LDF""). The LDF contends that a comparative juror analysis of answers to the O.J. Simpson question, combined with the prosecutor's failure to question in that area, shows that the discharges of S.G. and K.C. violated the state and federal constitutions. (LDF Amicus Brief 18-25.) Because that is the essential thesis of the briefing currently on file with the Court, Mr. Miles does not seperately address it in this brief.

ARGUMENT

I. UNDER *FOSTER V. CHATMAN* (2016) 136 S.CT. 1737, THE STATE MAY NOT PROFFER NEW REASONS FOR WHY THE PROSECUTOR KEPT SEATED JURORS 1 AND 5 AND ALTERNATE JUROR 6 BUT DISCHARGED BLACK PROSPECTIVE JUROR SG.

The prosecutor offered specific reasons for discharging SG. Several of those reasons applied equally to jurors the prosecutor did *not* strike -- seated jurors 1 and 5 and alternate juror 6. In contrast to SG, however, none of these seated jurors were black. In defending the discharges, the state does not offer new reasons to explain why SG was discharged, but instead offers new reasons to explain why the three seated jurors were *not* discharged. As noted above, this approach is authorized by a short passage in *People v. Chism*, *supra*, 58 Cal.4th at p. 1319. The question is whether this approach violates the stand-or-fall principle of *Miller-El* in light of recent Supreme Court case law.

It does.

A. The Supreme Court's Recent Decision In *Foster v. Chatman* Bars The State From Offering New Reasons To Explain Why The Prosecutor Did Not Discharge Seated Jurors 1 And 5 and Alternate Juror 6 But Discharged SG.

The United States Supreme Court has addressed this very situation on three

separate occasions, most recently in *Foster v. Chatman*, *supra*, 136 S.Ct. 1737. To put *Foster* in context, however, it is important to briefly review the two earlier decisions which addressed this question: *Miller-El v. Dretke*, *supra*, 545 U.S. 231 and *Snyder v. Louisiana* (2008) 552 U.S. 472.

In *Miller-El*, defendant was charged with capital murder. Prior to trial, the prosecutor discharged black juror Billy Fields. (545 U.S. at p. 242.) At a subsequent *Batson* hearing, the prosecutor explained that he discharged Fields because of his answers to a question regarding rehabilitation. (545 U.S. at p. 243.) In federal habeas proceedings the defense for the first time raised a comparative juror analysis and argued that this stated reason was a pretext for discrimination because seated white juror Hearn had given an identical response to this question. (545 U.S. at pp. 244-45.)

The state responded by taking the identical approach the state urges here. The state argued that the reason the prosecutor did not discharge white juror Hearn was because -- as to *other* questions on which the prosecutor did *not* rely at the *Batson* hearing -- Hearn gave different answers than Fields. (*Miller-El v. Dretke*, 03-9659, Brief for Respondent at 19-20, 2004 WL 2446199 at *20.) Specifically, the state argued that Hearn had said in voir dire that the death penalty was proper for callous crimes such as "murder, but also [for] severe torture and extreme child abuse." (*Ibid.*) According to the state, it

was reasonable to infer this was the real reason the prosecutor did not "strike [Hearn] in a death penalty case." (*Ibid.*)

The Fifth Circuit Court of Appeals adopted this argument, rejecting the *Batson* challenge after noting that Hearn "stated she thought the death penalty should be available for more than just murder but also severe torture and extreme child abuse." (*Miller-El v. Dretke* (5th Cir. 2004) 361 F.3d 849, 858, rev'd and remanded (2005) 545 U.S. 231.) In his dissenting opinion in the Supreme Court, Justice Thomas also embraced this precise rationale, explaining the prosecutor's decision to keep white juror Hearn (while discharging black juror Fields) was because Hearn believed in the death penalty "for callous crimes." (545 U.S. at p. 294.) In other words, both the Fifth Circuit Court of Appeals and Justice Thomas in dissent relied on new reasons offered by the state in post-conviction proceedings for why the prosecutor did not discharge white juror Hearn, reasons which the prosecutor himself had never relied on at the actual *Batson* hearing.

But the majority *explicitly* rejected this approach. The Court could not have been much clearer:

> The dissent offers other reasons why these nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was. See *post*, at 293-296. *In doing so, the dissent focuses on reasons the prosecution itself did not offer*. See

infra, at 252."

(545 U.S. at p. 245, n.4, emphasis added.)

The Court's cite to page 252 of its own opinion in rejecting the dissent's approach is important. At page 252 of its opinion the Court emphasized that the state may not respond to a comparative juror analysis by relying on asserted differences which the prosecutor himself did not give:

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Three years after *Miller-El*, the Supreme Court faced this same situation. In *Snyder v. Louisiana*, *supra*, 552 U.S. 472, the prosecutor struck black prospective juror Brooks. At a subsequent *Batson* hearing, the prosecutor explained that he discharged Mr. Brooks because of time conflicts which the prosecutor thought might adversely impact deliberations. (552 U.S. at p. 478.) On appeal, the defense raised a comparative juror analysis and contended that numerous seated white jurors -- including a Mr. Donnes -- also had time conflicts. (552 U.S. at pp. 483-484.)

Yet again the state made the identical argument the state urges here (and the same argument explicitly rejected in *Miller-El*), arguing that the real reason the prosecutor did not discharge Donnes was because -- as to *other* questions on which the prosecutor did *not* rely at the *Batson* hearing -- he gave different answers than Brooks, answers which showed he was a supporter of the elected district attorney. (*Snyder v. Louisiana*, 06-10119, Brief for Respondent at 43, 2007 WL 3307731 at * 43.) Although the Court in *Snyder* did not explicitly address the argument (as it had done in footnote 4 of *Miller-El*), the Court plainly rejected it, holding that *Batson* had been violated. (552 U.S. at p. 484.)

This brings us to the Court's 2016 decision in *Foster v. Chatman*, *supra*, 136 S.Ct. 1737. There the state charged defendant with capital murder. Prior to trial, the prosecutor struck black prospective juror Hood. At a subsequent *Batson* hearing, the prosecutor explained that he discharged Hood, in part, because Hood had an 18 year-old son, the same age as the defendant. (136 S.Ct. at p. 1751.) On appeal, and just as in *Snyder* and *Miller-El*, the defense raised a comparative juror analysis and noted that the prosecutor elected not to strike white juror Graves who had a 17 year-old son. (*Id*. at p. 1752.)

For a third time the state made the identical argument the state urges here (and the same argument the Court had rejected in *Miller-El* and *Snyder*), arguing that the real

reason the prosecutor did not discharge Graves was because -- as to *other* questions on which the prosecutor did *not* rely at the *Batson* hearing -- Graves gave different answers than Hood. (*Foster v. Chatman*, No. 14-8349, Brief for Respondent at 36.) Specifically, the state argued these other answers showed that Mr. Graves' brother had been a policeman, Mr. Graves had been in the Navy and he knew the police chief and other officers. (*Ibid.*) According to the state, these were the real reasons "the prosecutor . . . accepted Graves as a juror over Hood." (*Ibid.*) Yet again, although *Foster* did not explicitly address the argument, the Court rejected it by relying on the comparison to Mr. Graves to find a *Batson* violation. (136 S.Ct. at pp. 1752-1754.)[4]

Foster, *Snyder* and footnote 4 of *Miller-El* control the legal question in this case. As each of those cases make clear, where a prosecutor gives reasons for discharging a black juror, and those reasons apply equally to white jurors who are not struck, an inference of pretext is proper. Explicitly in footnote four of *Miller-El*, and implicitly in

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[4] The trial prosecutor in *Foster* also said that he discharged Hood because Hood's wife worked at a local hospital that dealt with the mentally ill, and the prosecutor feared Hood might therefore be more sympathetic to a claim of mental illness. (136 S.Ct. at p. 1754.) On appeal, the defense relied on the fact that the prosecutor elected not to strike white juror Blackmon who herself worked at that same hospital. (*Ibid.*) In its briefing the state argued that the real reason the prosecutor did not discharge Blackmon was because of her answers to questions about a potential insanity defense. (*Foster v. Chatman*, No. 14-8349, Brief for Respondent at 40.) As it did in *Miller-El*, *Snyder* and earlier in *Foster*, the Court rejected this argument and relied on the comparison to Ms. Blackmon to find a *Batson* violation. (136 S.Ct. at p. 1754.)

both *Snyder* and *Foster*, the Court has established that in this situation the state may not defend the discharge years later by offering new reasons why the white jurors were not discharged. Simply put, the only way the state can advance the thesis it advances here is by ignoring the language of *Miller-El* footnote 4 and the arguments made by the state there as well as in both *Snyder* and Foster.

As Mr. Miles has noted above, it true that a brief discussion of this issue in *Chism* supports the state's approach. But it is important to note not only that the majority opinion in *Chism* preceded *Foster*, but *Chism*'s short discussion of the issue does not discuss either (1) the arguments made by the *Miller-El* dissent or (2) the explicit discussion of these arguments -- and this precise issue -- in footnote 4 of the *Miller-El* majority, specifically rejecting the approach later adopted in *Chism*.

But the stark conflict between *Foster*, *Snyder* and footnote 4 of *Miller-El* and the state's suggested thesis here is only part of the problem. The state's suggested approach effectively robs comparative juror analysis of any vitality, at least in cases where prospective jurors have completed jury questionnaires. It is hard to imagine any case involving even a reasonably detailed juror questionnaire where the state's appellate lawyers could not find some answers on which the prosecutor did not rely at the *Batson* hearing and argue that was the "real" reasons a white juror was seated but a black juror

was discharged. As the Supreme Court also noted in *Miller-El*, a "rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Miller-El*, 545 U.S. at p. 247, n.6.) Indeed, the state's approach to comparative juror analysis here renders almost irrelevant step two of the *Batson* inquiry. If the state's appellate lawyers can defend a prosecutor's discharge of black jurors by offering new reasons for why the prosecutor may have kept similarly situated white jurors but discharged black jurors, why even require a statement of reasons from the prosecutor in the first place? *Batson* was never intended to be the toothless tiger the state's approach now makes it out to be.

To be sure, petitioner recognizes that there is a practical concern. Where a comparative juror analysis is not done at trial in the first instance (as occurred in this case, and in *Miller-El*, *Snyder* and *Foster*), the prosecutor has not been specifically asked to explain why he or she may have elected not to strike a particular white juror who -- at first blush -- appears to be similarly situated to a black juror whom the prosecutor discharged. The state's suggested approach here permits the state to respond to such a comparative juror analysis by surmising there were proper factors which the prosecutor never articulated at the *Batson* hearing but which -- in the view of the state's appellate lawyers -- the prosecutor may nevertheless have relied on in deciding not to strike a particular

white juror.

But even putting aside the controlling language of footnote 4 of *Miller-El*, and the arguments made and rejected in both *Snyder* and *Foster*, the state's approach is still problematic. Here is why.

As Justice Breyer noted in his separate opinion in *Miller-El*, the "complexity of [the *Batson*] process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 267 [Breyer, J., concurring].) When a comparative juror analysis is first done on appeal and shows that a prosecutor's stated reasons for striking a black juror apply to white jurors who were not struck, there are two approaches a reviewing court could take, but only one is approved by the United States Supreme Court. The approach the state offers here (and offered in *Foster*, *Snyder* and *Miller-El*) attempts to address the difficulties acknowledged by Justice Breyer by offering an approach that actually *increases* the risk that racial discrimination will persist undetected.

According to the state, years after the *Batson* hearing a reviewing court may permit the state's appellate lawyers to offer reasons which the prosecutor did not offer but which

the state can now argue may have been the "real" basis for the prosecutor's decision not to strike the white jurors. The problem in this approach is that it requires the reviewing court to speculate on a prosecutor's hypothetical reasons rather than reviewing the prosecutor's actually-stated reasons. And by considering hypothetical reasons the prosecutor could have had for keeping the white jurors -- reasons which the prosecutor never actually gave -- the reviewing court runs the risk of accepting speculative reasons which did not *actually* motivate the prosecutor's decision to keep the white jurors. Such an approach risks masking instances where race actually did play a role in the prosecutor's decision to discharge black jurors, weighing the costs of reversal in a criminal case heavily but ascribing relatively little weight to the need to ferret out the improper use of race in the criminal justice system.

Alternatively, the reviewing court can follow the approach mandated in footnote 4 of *Miller-El* and followed in both *Snyder* and *Foster*, limiting the inquiry to reasons actually given by the prosecutor at the *Batson* hearing. Such an approach might run the risk of ignoring legitimate race-neutral reasons which could genuinely have motivated the decision to keep the white jurors. In light of the clarity of footnote 4 of *Miller-El*, however, this risk is minimal. Since at least 2005 -- when *Miller-El* was decided -- prosecutors have plainly been on notice that when they discharge a black juror with a reason that also applies to a seated nonblack juror, the state will not be able to

subsequently "offer[] other reasons why these nonblack panel members . . . were otherwise more acceptable to the prosecution than" the black discharged juror. Accordingly, since at least 2005 prosecutors have certainly been on notice of the need to prospectively address, and place on the record, the reasons they have for discharging black jurors but keeping any similarly situated nonblack jurors.

In short, *Batson* recognized that "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'" (476 U.S. at pp. 87–88.) This explains footnote 4 in *Miller-El*, and the Court's subsequent holdings in both *Foster* and *Snyder*. The Court's approach not only accords proper weight to the importance of eliminating all vestiges of discrimination in the criminal justice system, but serves to vindicate the interests of all those with a recognized interested in the elimination of discrimination in that system: the defendant, the jurors themselves and the community as a whole. (*J.E.B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 128 [discriminatory use of challenges implicates constitutional rights of potential jurors]; *Batson v. Kentucky*, *supra*, 476 U.S. t. p. 87 ["The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.'].) Moreover, this approach also best comports with the Supreme Court's recent recognition in a series of criminal cases that

"[t]he Nation must continue to make strides to overcome race-based discrimination." (*Pena-Rodriguez v. Colorado* (2017) ___ U.S. ___, 137 S.Ct. 855, 871 (racism during jury deliberations); *see also Tharpe v. Sellers*, ___ U.S. ___, 138 S.Ct. 545 (same); *Buck v. Davis* (2017) ___ U.S. ___, 137 S.Ct. 759 [error for capital sentencing phase jury to hear expert testimony that defendant was more likely to act violently in the future because he was black].)

At the end of the day, the state's position here -- explaining the prosecutor's decision to discharge certain black jurors while keeping certain white jurors by "focus[ing] on reasons the prosecution itself did not offer" (*Miller-El*, *supra*, 545 U.S. at p. 245, n.4) -- is not a stride toward eliminating racial discrimination in the criminal justice system; instead, it is a leap toward immunizing it from appellate review entirely. This approach simply cannot be squared with *Foster*, *Snyder* or footnote 4 of *Miller-El.* *Chism* should be reconsidered.

B. Although There Is A Split Of Authority In The Circuit Courts On This Question, The Better Reasoned Cases Follow Footnote 4 Of *Miller-El.*

To appellant's knowledge, three federal circuit Courts of Appeals have addressed this issue, one in the post-*Foster* world and two prior to *Foster.* The latest decision is the Fifth Circuit Court of Appeals' very recent (and very divided) en banc decision in

Chamberlin v. Fisher, *supra*, ___ F.3d ___, 2018 WL 1391732. To place *Chamberlin* in context, it is once again useful to start with the prior decisions.

In *Love v. Cate* (9th Cir. 2011) 449 Fed.Appx. 570, the Ninth Circuit rejected the state's suggestion to depart from footnote 4 in *Miller-El*. There, defendant was charged with battery. The prosecutor used a peremptory challenge to discharge the only black juror. At the ensuing *Batson* hearing the prosecutor stated that he struck the juror because he was a social worker and "teachers and social workers don't make good jurors." (449 Fed.Appx. at p. 572.) When subsequently confronted with a comparative juror analysis showing that the prosecutor did not strike three non-blacks on the jury who fell into this same category, the state offered new reasons these nonblack jurors were not struck, relying on "non-racial characteristics that distinguished them from the black venire-member." (*Ibid*.) Citing *Miller-El*, the Ninth Circuit Court of Appeals rejected this argument precisely because "the prosecutor never stated to the state trial court that he relied on these characteristics" and "when a *Batson* challenge is raised, 'a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.'" (*Id*. at pp. 572–573.)

The Seventh Circuit Court of Appeals reached a similar result in *United States v. Taylor* (7th Cir. 2011) 636 F.3d 901. There defendant was charged with murder. The

prosecutor exercised a peremptory challenge to discharge black juror Watson. The trial court found a prima facie case of discrimination and required the prosecutor to state reasons for the discharge. (*United States v. Taylor* (7th Cir. 2007) 509 F.3d 839, 844.) The prosecutor said that he struck Watson because of her statement that she would not impose death on a non-shooter. (*Ibid.*) But the prosecutor did not strike white juror Nowak who gave the identical answer. (*Ibid.*) The Seventh Circuit remanded the case because the District Court had neglected to assess the prosecutor's stated reason. (*Id.* at p. 845.)

On remand, the district court issued a new ruling, stating that the prosecutor's reliance on Watson's refusal to impose death on a non-shooter was both race neutral and credible. (*United States v. Taylor*, *supra*, 636 F.3d 901, 903.) The Seventh Circuit remanded the case a second time because the trial court's ruling "provide[d] no credibility determination as to the critical issue, which is why the prosecutor would excuse an African-American potential juror based on the answers to the non-shooter question, but would not excuse a similarly-situated white juror for that same reason." (*Ibid.*) At the second remand hearing, the prosecutor explained that other answers given by Nowak and Watson actually explained why the prosecutor kept white-juror Nowak but discharged black-juror Watson. (636 F.3d at p. 904.) Just as the Ninth Circuit did in *Love*, the Seventh Circuit Court of Appeals cited *Miller-El* and rejected reliance on the new reasons

for keeping white-juror Nowak because "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Id*. at p. 905.)

This leads to the very recent en banc decision of the Fifth Circuit Court of Appeals in *Chamberlin v. Fisher*, *supra*, 2018 WL 1391732. There defendant was convicted of capital murder. At trial, the prosecutor discharged black prospective jurors Sturgis and Minor. The trial court required the prosecutor to state reasons for the discharges and the prosecutor did so, explaining that he relied on the jurors' answers to questions 30, 34 and 35 on the jury questionnaire. (2018 WL 1391732 at * 1.) The defense did not perform a comparative juror analysis at trial. (*Ibid*.) A subsequent comparative juror analysis showed that the prosecutor did not discharge white juror Cooper who gave identical answers to questions 30, 34 and 35. (2018 WL 1391732 at * 6.) The state responded to this analysis by offering other reasons -- reasons never given by the trial prosecutor -- which explained why the prosecutor did not discharge white-juror Cooper. (2018 WL 1391732 at * 6.) Specifically, answers to question 53 on the questionnaire showed that Sturgis "generally favor[ed]" and Minor had "no opinion" on the death penalty, but Cooper "strongly favor[ed]" it. (*Ibid*.) In the state's view, this was the real reason the prosecutor struck Sturgis and Minor but kept Cooper. (*Ibid*.) The District Court granted relief, refusing to rely on the newly minted justification offered by the state. (*Ibid*.) On the state's appeal, a divided panel affirmed. En banc review was granted.

There were two opinions in the case -- a majority opinion joined by nine judges and a dissent joined by five judges. The majority concluded that the "stand or fall" proposition from *Miller-El* applied only "to the prosecutor's 'reason[s] for striking [a] juror.'" (2018 WL 1391732 at * 7.) The majority was concerned that a different rule would unfairly preclude the state from responding to a comparative juror analysis made for the first time after trial. (2018 WL 1391732 at * 7-8.) Significantly, however, the majority did not (1) discuss the actual arguments made by the state in *Miller-El* and rejected by the *Miller-El* majority, (2) address, or even cite, the controlling language of footnote 4 in *Miller-El* or (3) note that *Miller-El* reached this result even though the comparative juror analysis there was not performed at trial. Nor did the majority discuss the facts of, and arguments made in, either *Foster* or *Snyder*.

In contrast, the dissent discussed the precise arguments made by the parties in *Miller-El*, as well as the language of footnote 4. (2018 WL 1391732 at * 17.) It correctly noted that just as in *Miller-El*, the comparative juror analysis in *Chamberlin* had not been done at trial. (2018 WL 1391732 at * 19.) Noting that *Miller-El*'s stand-or-fall principle precluded the state from offering new reasons for the discharge of black jurors, the dissent concluded that allowing the state to come forward with new reasons why white jurors were not discharged was simply "the other side of the same coin" and "would make meaningless *Miller-El*'s bar on consider new reasons for strikes." (2018 WL 1391732 at

* 16.) The dissent relied on both *Love* and *Taylor*, and noted that the majority's contrary view was "a novel position as the [majority] cites no other example of a court doing this." (*Id*. at *16, 18.) Because of the ease of actually coming up with additional reasons, the dissent concluded that the state's approach gutted *Batson* of its vitality:

> Whether labeled as reasons for striking the black juror or ones for keeping the comparators, allowing new explanations years after trial turns the *Batson* inquiry into a "mere exercise in thinking up any rational basis" as there is no way to ensure the post-trial justification is what actually motivated the decisions made during jury selection. *Miller-El II*, 545 U.S. at 252, 125 S.Ct. 2317.

(*Chamberlin v. Fisher*, *supra*, 2018 WL at *16.)[5]

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[5] In the dissent's view, the majority did an end run around the "stand or fall" principle by "repackaging" reasons for striking black jurors as reasons for keeping white jurors:

> To use a simple example, assume a prosecutor struck Jurors A and B on the ground that they wore hats in the courtroom . . . . But Juror C was also wearing a hat. When this is later pointed out, the reviewing court speculates that Juror C must have been kept in the panel despite the hat because she expressed greater support for the death penalty on a questionnaire than did Jurors A and B. If the court were able to read the prosecutor's mind and this were in fact the real reason for the disparate treatment, then that would mean the hat was not the deal breaker; it alone was not enough for a strike as shown by the acceptance of Juror C. Jurors A and B thus would have been struck, per the court's conjecture, because they wore a hat and were less supportive of the death penalty. And if that were in fact the case, *Miller-El* says the prosecutor had to cite both of those reasons.

(2018 WL 1391732 at *16.)

In short, prior to *Foster*, the only two circuit courts to have addressed this issue rejected the approach the state suggests here. After *Foster*, the Fifth Circuit Court of Appeals decided *Chamberlin* en banc, and the court was sharply split over the state's approach. In order to comply with *Foster*, *Snyder* and *Miller-El* -- and for all the reasons set forth in the *Chamberlin* dissent -- the state's suggested approach here should be rejected.

CONCLUSION

Historically this Court has been the leader in taking steps to eliminate racial discrimination from the criminal justice system. Indeed, a full eight years before the United States Supreme Court decided *Batson*, this Court decided *People v. Wheeler* (1978) 22 Cal.3d 258, declaring improper the "pernicious practice" of using peremptory challenges based on race. With some passion, Justice Mosk -- writing for the Court -- declared that in the battle to eradicate discrimination in the selection of juries "the courts cannot be pacifists." (*Id*. at p. 267.)

The principles animating this Court's decision in *Wheeler* are as important today as they were then. After all, as Justice Breyer noted in his concurring opinion in *Miller-El*, even decades after *Batson* itself, "the discriminatory use of peremptory challenges remains a problem." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 268 [Breyer, J., concurring].)

For the reasons set forth in Argument I-A above, *Foster*, *Snyder* and footnote 4 of *Miller-El* control resolution of this issue. This aspect of *Chism* should be reconsidered

because it renders empty the promise of both *Wheeler* and *Batson*. Given that this case involves a black man charged with raping and killing a white woman -- a scenario this Court itself has recognized involves a "heightened concern" about racial discrimination in jury selection -- reversal is required for trial before a fairly selected jury.

DATED: 5/10/18

Respectfully submitted,

Cliff Gardner
Attorney for Appellant Johnny Miles

CERTIFICATE OF COMPLIANCE

I certify that the accompanying non-redacted brief is double spaced, that a 13-point proportional font was used, and that there are 7691 words in the brief.

Dated: 5/11/18

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702.

On May 11, 2018, I served the within

APPELLANT'S SUPPLEMENTAL BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

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and upon the parties named below by submitting an electronic copy through TrueFiling:

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I declare under penalty of perjury that the foregoing is true. Executed on May 11, 2018, in Berkeley, California.

Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S086234**
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Date

/s/Cliff Gardner
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