In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

JOHNNY DUANE MILES,

Appellant.

CAPITAL CASE

Case No. S086234

San Bernardino County Superior Court Case No. FSB09438
Honorable James A. Edwards, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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ARGUMENT

THE PEOPLE ARE ENTITLED TO CHALLENGE THE FACTUAL PREMISE OF JUROR COMPARABILITY UNDERLYING MILES'S COMPARATIVE JUROR ANALYSIS ARGUMENT ON APPEAL

In his opening brief, appellant Johnny Duane Miles claims the prosecutor's exercise of peremptory challenges against two Black potential jurors, SG and KC, were a pretext for racial discrimination in violation of his rights under the Sixth and Fourteenth Amendments pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79. Miles premises this claim on a comparative juror analysis undertaken for the first time on appeal, purportedly showing the non-racial reasons proffered by the prosecutor at trial for striking SG and KC were equally applicable to unchallenged White jurors, and therefore pretext for racially motivated strikes. (AOB 45-80.)

In response, respondent acknowledged that comparative juror analysis may be entertained for the first time on appeal, but argued that "the reviewing court should be mindful that an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable." (RB 26, citing *Snyder v. Louisiana* (2008) 552 U.S. 472, 483.) Respondent thereafter challenged Miles's assertion that various White and Hispanic jurors and alternates the prosecutor did not challenge were comparable to SG and KC for purposes of his comparative juror analysis. (RB 27-36.)

In his supplemental opening brief, Miles claims the People may not proffer "new reasons" on appeal for the prosecutor's keeping seated jurors. (SAOB 16.) Miles confuses the prosecutor's unstated reasons for not exercising peremptory challenges with the issue at hand – the validity of the underlying premise of his comparative juror analysis argument that SG and KC were comparable to White and Hispanic jurors who were not stricken.

Respondent's Brief did not assign unproffered reasons to the trial prosecutor, but rather challenges the fairness and persuasiveness of Miles's comparisons on appeal. Knowing the reasons given for striking SG and KC, Miles mined the record on appeal for unchallenged White and Hispanic jurors to whom one of those reasons applied. Respondent simply challenges Miles's assertion that those jurors are actually comparable to SG and KC. Accordingly, there is no reason to even consider the issue addressed in the Supplemental Opening Brief – whether the prosecution is entitled to identify possible reasons a prosecutor retained a White juror who otherwise would appear to be comparable to Black prospective jurors the prosecutor peremptorily challenged.

In any event, neither the Supreme Court's holding in *Foster v. Chatman* 2016) 578 U.S. ___, 136 S.Ct. 1737, nor its discussion in *Miller-El v. Dretke* (2005) 545 U.S. 232, 245, fn. 4, serves to foreclose a reviewing court from considering whether there are other plausible reasons why a prosecutor retained a juror that appellant is urging for the first time on appeal is comparable to a challenged juror. Nor has Miles explained why it would be fair to preclude considering plausible reasons when the prosecutor never had any reason to explain on the record why particular jurors are not actually comparable at all in terms of the prosecutor's reasoning because the comparison was not urged by the defense below.

The analysis in the Respondent's Brief is completely consistent with this Court's approach to comparative analysis for the first time on appeal. For example, in *People v. Smith* (2018) 4 Cal.5th 1134 [2018 WL 229440], this Court rejected a comparative juror analysis because it found the particular unchallenged jurors selected by the defendant for his argument were not justifiably comparable. (*Id*. at pp. *6, 8, fn. 3, 13; see also *People v. Melendez* (2016) 2 Cal.5th 1, 18-19 ["none of the sitting jurors defendant cites were similar to D.W. for these purposes" of comparative juror

analysis; "These and other jurors defendant cites did not give overall responses remotely similar to the many responses the prosecutor cited for the challenge"].) And even if respondent had provided reasons for the prosecutor retaining jurors identified by appellant for the first time on appeal as comparable, doing so is completely consistent with this Court's admonition that a "'reviewing court must keep in mind that exploring the question at trial might have shown that the jurors were not really comparable.'" (*People v. Hardy* (2018) __ Cal.5th __ [2018 WL 2437532] *11, quoting *People v. Melendez, supra*, 2 Cal.5th at p. 15.)

Even if Miles's selection of "comparable jurors" were borne out by the record showing truly indistinguishable responses on the same subjects as those identified by the prosecutor for challenging prospective Juror SG and/or KC, his argument is based on a logical fallacy – specifically "a false dilemma." (See *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 448 [a dilemma contemplated on appeal that does not exist].) In essence, Miles's argument is that either the proffered reason for striking a Black juror warranted striking a White or Hispanic juror for the same reason or the prosecutor's peremptory challenge was racially motivated. The argument does not allow for an entire range of intermediate inferences such as the possibility that the unchallenged jurors had favorable positions on other issues of import that outweighed the reason for exercising a peremptory challenge against a juror who did not have any or as strong countervailing views.

Moreover, engaging in comparative juror analysis for the first time on appeal requires the People to prove a negative – that the trial prosecutor did not exercise a peremptory challenge against a certain juror because that juror is not a member of the relevant cognizable class. "'[G]iven the difficulty of proving a negative, . . . a test' requiring conclusive negation 'is often impossibly high.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25

Cal.4th 826, 854, quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 373 (conc. opn. of Chin, J).)

As the Fifth Circuit reasoned in *Chamberlain v. Fisher* (5th Cir. 2018) 885 F.3d 832 (*en banc*) (*Chamberlain*), there is "a crucial difference between asserting a new reason for *striking* one juror and an explanation for *keeping* another [;] [t]hey are not two sides of the same coin." (*Id*. at p. 842 [emphasis in original].) "In the former scenario, the prosecutor effectively concedes that his initial (race-neutral) reasons were insufficient bases for striking the juror[] [and] *Miller-El*'s 'stand or fall' requirement applies to this situation, blocking such post hoc rationalizations." (*Ibid*.) "In the latter, the prosecutor's bases for the strike remain in full effect, so *Miller-El*'s requirement is not implicated." (*Ibid*.) Rather, "the prosecutor is highlighting a crucial difference between the black and non-black jurors that prevented the non-black juror from being struck despite sharing strike-worthy characteristics with a black counterpart that was struck." (*Ibid*.)

To hold that the prosecution is prohibited from pointing to a non-stricken juror's other responses "is to engage in a bait-and-switch that vitiates the probative value of the jury comparison in the first place." (*Chamberlin, supra*, 885 F.3d at p. 842.) Having answered one question posed at trial (why a Black juror was stricken), the prosecution would be cabined with that answer when, years later, the defense shifts gears and asks a different question on appeal (why a White or Hispanic juror was not stricken).[1]

> Not only is this state of affairs manifestly unfair, it is inconsistent with the Supreme Court's directive regarding juror analysis in *Snyder*. If a court does not consider the

[1] Miles suggests that this is no hardship because of prosecutors purportedly being on notice "since at least 2005" that this was the law. (SAOB 26.) Jury selection in this case occurred in 1998. (14 CT 3952.)

> entire context in which a white juror was accepted, then he/she cannot serve as a useful comparator.

(*Ibid*.)

"In order to protect against future comparative juror analysis, the prosecution will not only have to explain why it struck black jurors – as *Batson* requires – but also why it *kept* white jurors." (*Chamberlin, supra*, 885 F.3d at p. 843 [emphasis in original].) "Indeed, the prosecution will have to explain why it kept *every* white juror, because it does not know which white jurors will be selected as comparators at some later date." (*Ibid*. [emphasis in original].) "Such a requirement would make the jury selection process impractical, whereas considering the totality of the circumstances conforms with the Court's instruction in *Batson*, *Miller-El II*, and *Snyder*." (*Ibid*.)

Notwithstanding the unfairness of the limitation Miles urges this Court to impose on the prosecution whenever comparative juror analysis is employed by a defendant for the first time on appeal, respondent has not imputed reasons for the prosecutor not exercising peremptory challenges. Respondent is simply challenging Miles's selection of certain jurors as being indistinguishable in their voir dire responses on the same topics that were the reasons for the prosecutor challenging SG and KC, which is the factual premise of his argument and *Batson* claim.

CONCLUSION

Accordingly, for the reasons stated herein and the Respondent's Brief previously filed in this Court, respondent respectfully requests that the judgment be affirmed in its entirety.

Dated: June 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13-point Times New Roman font and contains **1,441** words.

Dated: June 20, 2018

XAVIER BECERRA
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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No.: **S086234**

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I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 20, 2018, at San Diego, California.

B. Romero	***s/ B. Romero***
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Number: **S086234**
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/20/2018

Date

/s/Seth Friedman

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