IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

APPELLANT'S SUPPLEMENTAL REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

ARGUMENT

I. *MILLER-EL*, *SNYDER* AND *FOSTER* BAR THE STATE FROM PROFFERING NEW REASONS FOR WHY THE PROSECUTOR KEPT SEATED JURORS 1 AND 5 AND ALTERNATE JUROR 6 BUT DISCHARGED BLACK PROSPECTIVE JUROR SG.

Black prospective juror SG appeared to be a favorable juror for the prosecution in this capital case. He "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.) When the prosecutor nevertheless exercised a peremptory challenge on this black juror, and defense counsel made a *Wheeler/Batson* motion, the trial court itself noted that he did not "understand [the challenge]" and required the prosecutor to state his reasons. (6 RT 1719-1720.)

The prosecutor offered specific reasons for the discharge. (6 RT 1720-1721.) The trial court denied the *Batson* motion. (6 RT 1722.) Ultimately, there was not a single black juror among the 12 jurors seated to decide whether black defendant Johnny Miles was guilty of murder and should die.

But the trial record showed that the reasons offered by the prosecutor to explain why he challenged SG applied equally to non-black jurors whom the prosecutor did *not* strike -- seated jurors 1 and 5 and alternate juror 6. On appeal, Mr. Miles contended that this comparison was evidence of pretext. (Appellant's Opening Brief ("AOB") 57-61.) Responding to this claim, the state did not offer new reasons to explain why SG was discharged instead of the three non-black jurors, but instead offered new reasons to explain why the three non-black seated jurors were *not* discharged. (Respondent's Brief ("RB") 28-29.)

In his Supplemental Brief, Mr. Miles contended that the state's approach of providing post-hoc speculative reasons for keeping non-black jurors is barred by three Supreme Court decisions: *Miller-El v. Dretke* (2005) 545 U.S. 231, *Snyder v. Louisiana* (2008) 552 U.S. 472 and -- most recently -- *Foster v. Chatman* (2016) 578 U.S. ___, 136 S.Ct. 1737. (Appellant's Supplemental Brief ("ASB") at 14-25.) There were three components to this argument.

First, Mr. Miles discussed at some length the facts of *Miller-El*, the arguments made by the state and the dissent in that case, and the language in footnote 4 of the Supreme Court's opinion. That footnote *explicitly* rejected the state's attempt to speculate on a prosecutor's reasons for keeping a non-black juror as a way of bolstering

the prosecutor's reasons for striking a black juror. (ASB 14-17 citing 545 U.S. at p. 245, n.4.) Second, Mr. Miles discussed at some length the facts of the Supreme Court decisions in *Snyder* and *Foster*, and the *identical* argument raised and rejected there to defend the prosecutor's decisions to strike black jurors in each of those cases. (ASB 17-20.) Third, Mr. Miles explained why the state's suggested approach was both unlawful and unwise as a matter of policy. (ASB 20-25.)

The state first disagrees that *Miller-El* controls. But the state's entire discussion of *Miller-El* is this:

> In any event, . . . the Supreme Court's . . . discussion in *Miller-El v. Dretke* (2005) 545 U.S. 232, 245, fn. 4, [does not] serve[] 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.

(RSB 5. *See* RSB 1-10.)

In light of the facts of *Miller-El*, the arguments actually made in the case and the plain language of footnote 4, it is difficult to understand the state's unexplained position that *Miller-El* does not "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." (RSB 5.) In fact, that is *exactly* what footnote four of *Miller-El* forecloses. The state's contrary assertion is made without discussing the facts of *Miller-El*, the specific arguments made in that case by the state and without even referring to the actual language of footnote 4. (RSB 1-10.)

This is puzzling indeed. In *Miller-El* the state used a peremptory challenge against black prospective juror Billy Fields. (545 U.S. at p. 242.) At the *Batson* hearing the prosecutor said he discharged Fields because of his views regarding rehabilitation. (*Id*. at p. 243.) A comparative juror analysis raised for the first time in federal habeas proceedings showed that white juror Hearns who was not discharged had given the same answer as Fields. (*Id*. at 244-245.) As such, in federal court the state made the *identical* argument the state urges here, arguing that the Court was free to consider other reasons the prosecutor might have had for not discharging white juror Hearns. (*Miller-El v. Dretke*, 03-9659, Brief for Respondent at 19-20, 2004 WL 2446199 at *20.) The Fifth Circuit Court of Appeals adopted this argument and relied on the new reasons to deny relief. (*Miller-El v. Dretke* (5th Cir. 2004) 361 F.3d 849, 858.) In the Supreme Court, dissenting Justice Thomas did the same. (545 U.S. at p. 294.)

But the Supreme Court majority *explicitly* rejected that argument in footnote four of the majority opinion. The language of that controlling footnote -- which the state does

not even cite in its brief -- could not have been clearer: even when comparative juror analysis is undertaken for the first time *after* the trial is over, the state may not defend against a *Batson* claim by offering new reasons to explain why the prosecutor kept white juror Hearns on the jury:

> 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.*

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

The state's discussion of *Foster* and *Snyder* suffers from a similar flaw. The state mentions these cases in passing (RSB 5, 8), but yet again does not discuss the facts of either case or the arguments made. The tactic is equally puzzling here.

As discussed in Mr. Miles's supplemental brief, in both *Foster* and *Snyder* the defense performed no comparative juror analysis at trial but did so for the first time on appeal. (*Foster*, *supra*, 136 S.Ct. at p. 1752; *Snyder*, *supra* 552 U.S. at p. 483-484.) Just as in *Miller-El*, the record in both cases contained no explanation from the trial prosecutors as to why they did not discharge the white jurors whom the defendant later alleged gave comparable answers to the discharged black jurors. In both cases the state

made the identical argument the state makes here, and the identical argument explicitly rejected in footnote 4 of *Miller-El*, arguing that the Court should consider appellate counsel's newly minted reasons for why the prosecutor did not discharge the white jurors alleged to be comparable. (*Snyder v. Louisiana*, 06-10119, Brief for Respondent at 43, 2007 WL 3307731 at * 43; *Foster v. Chatman*, No. 14-8349, Brief for Respondent at 36, 40.) In both cases the Court rejected the state's argument, holding *Batson* had been violated. (*Foster*, *supra*, 136 S.Ct. at pp. 1752-1754; *Snyder*, *supra*, 552 U.S. at p. 484.)

Instead of discussing *Miller-El*, *Snyder* and *Foster*, the state observes only that Mr. Miles has not "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." (RSB 5.) And not to put too fine a point on it, but this is really the nub of the state's position -- that the rule of *Miller-El* is not fair to the state.

The state is asking the wrong question. The reason *Miller-El* explicitly precludes the state's appellate lawyers from offering "reasons the prosecution did not offer" for either struck black jurors or seated non-black jurors is simple. That reason goes to the very heart of *Batson* and the attempts by both the United States Supreme Court and this

Court to eradicate the "pernicious practice" of using race in jury selection. (*Batson*, *supra*, 476 U.S. at pp. 87-88; *People v. Wheeler* (1978) 22 Cal.3d 258, 283.)

Because comparative juror analysis may be done for the first time on appeal, reviewing courts had two options prior to *Miller-El*. First, they could (as the state suggests here) permit the state's appellate lawyers to offer new explanations years after the *Batson* hearing for why a particular white juror was not struck. Second, they could (as Mr. Miles suggests and as *Miller-El* ultimately held) require the state to stand or fall with the reasons the prosecutor actually gave at the *Batson* hearing.[1]

In his Supplemental Brief, Mr. Miles discussed the risks of each option. (ASB 24-27.) Suffice it to say here, allowing the state's appellate lawyers to provide hypothetical reasons for a prosecutor's decision not to discharge certain white jurors "runs the risk of accepting speculative reasons which did not *actually* motivate the prosecutor's decision to keep the white jurors" and "risks masking instances where race actually did play a role in the prosecutor's decision to discharge black jurors." (ASB 25.) The state ignores these risks entirely. (RSB 1-10.)

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[1] When a prosecutor is asked to state their reasons for a strike under the third step of *Batson*, he or she has wide latitude to state whatever reasons or support might be useful. Here, for example, the prosecutor not only gave reasons for the strike of black juror SG, but he specifically went on to defend that strike by comparing it to his treatment of other non-black prospective jurors. (6 RT 1721.)

But the Supreme Court has not. These risks are unacceptable in light of the interests the Court sought to protect in *Batson* and this Court sought to protect in *Wheeler*. *Batson* rests on the unassailable proposition 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.'" (*Batson*, *supra*, 476 U.S. at pp. 87–88.) Proper application of *Batson* not only vindicates the interests of criminal defendants in securing a fair trial, but jurors themselves and the community as a whole. (*Id* at p. 87. *Accord* *J.E.B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 128.) That explains why in *Miller-El*, and again in *Snyder,* and yet again in *Foster*, the Court rejected the state's identical attempts to institutionalize a process that directly undercuts these interests.

In short, *Miller-El* directly rejects the approach the state suggests here. *Snyder* and *Foster* do the same. As those holdings recognize, the state's suggested approach increases the risk that racial discrimination will persist in the criminal justice system. Recent Supreme Court authority continues to emphasize the invidious nature of racial discrimination in criminal cases and the Court's aversion to taking even small risks that will foster it. (*See Buck v. Davis* (2017) ___ U.S. ___, 137 S.Ct. 759, 777 ["Some toxins can be deadly in small doses."].) And, as Circuit Judge Costa recently concluded, because it is relatively easy for skilled appellate counsel to come up with new reasons for

why certain similarly situated white jurors might have been kept, "whether labeled as reasons for striking the black jurors 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'" for the discharges. (*Chamberlin v. Fisher* (5th Cir. 2018) 885 F.3d 832, 854 [Costa, J., dissenting].)

Batson was never intended to be the toothless tiger the state's approach condemns it to be. *Batson* was violated in this case.[2]

CONCLUSION

The prosecutor at the *Batson* hearing here gave reasons for why he discharged black juror SG, relying on SG's answers to certain questions. In trying to explain why

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[2] In his supplemental brief, Mr. Miles discussed the three circuit court cases that have addressed this issue: *Love v. Cate* (9th Cir. 2011) 449 Fed.Appx. 570, *United States v. Taylor* (7th Cir. 2011) 636 F.3d 901 and, most recently, *Chamberlin v. Fisher*, *supra*, 885 F.3d 832 (ASB 27-33.) *Love* and *Taylor* both rejected the state's position, and *Chamberlin* was an en banc decision resulting in two opinions: a nine-judge majority opinion accepting the state's position and a five judge dissent. (ASB 27-33.)

In its brief, the state does not cite or discuss *Love*. It does not cite or discuss *Taylor.* It discusses the majority opinion in *Chamberlin*, but does not mention the dissent.

There is an obvious split of authority on this issue. Ignoring it will not make it go away.

that prosecutor did not discharge numerous seated nonblack jurors who gave identical answers, the state's appellate lawyers "offer[] other reasons why these nonblack panel members . . . were otherwise more acceptable to the prosecution than [SG] was." (*Miller-El*, *supra*, 545 U.S. at 245, n.4.) Because these "other reasons" were ones which "the prosecution itself did not offer," (*ibid.*), footnote four of *Miller-El* bars those reasons from consideration. So do *Foster* and *Snyder*.

For good reason. "The Nation must continue to make strides to overcome race-based discrimination." (*Pena-Rodriguez v. Colorado* (2017) ___ U.S. ___, 137 S.Ct. 855, 871.) Permitting the state's appellate lawyers to provide new reasons why white jurors were not struck guts comparative juror analysis of any force at all and reduces *Batson* to an empty exercise.[3]

DATED: June 29, 2018

Respectfully submitted,

/s/Cliff Gardner
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[3] In his Supplemental Brief, Mr. Miles recognized that the state's approach was authorized by a short passage in *People v. Chism* (2014) 58 Cal.4th 1266, 1319, but contended that this portion of *Chism* should be reconsidered in light of footnote 4 of *Miller-El*, *Snyder*, *Foster* and sound policy. (ASB 8, 14, 20, 25.) The state does not cite *Chism* in its brief. (RSB 1-10.)

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 2,350 words in the brief.

Dated: June 29, 2018 /s/Cliff Gardner
Cliff Gardner

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APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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I declare under penalty of perjury that the foregoing is true. Executed on June 29, 2018, in Berkeley, California.

Declarant

STATE OF CALIFORNIA
Supreme Court of California

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