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# Deference Does Not the Definition Preclude Relief: The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals

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# "Deference Does Not by Definition Preclude Relief"[1]: The Impact of *Miller-El v. Dretke* on *Batson* Review in North Carolina Capital Appeals



## INTRODUCTION

In 1986, the United States Supreme Court laid out in *Batson v. Kentucky* a three-step process for determining if racial discrimination has occurred during jury selection.[2] Since then, the Supreme Court of North Carolina has reviewed sixty-one *Batson* claims on direct appeal from capital convictions,[3] yet not once has it found a *Batson* violation.[4] In three cases, the court found reversible procedural

1. Miller-El v. Dretke (*Miller-El II*), 125 S. Ct. 2317, 2325 (2005) (quoting Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 340 (2003)).

2. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986). *Batson*'s three-step process requires the objecting party to make a prima facie showing of discrimination, at which point the burden shifts to the other party to show that its reasons for a peremptory challenge are race-neutral. Finally, the trial court must determine whether racial discrimination has in fact occurred. For further discussion of the three-step process announced in *Batson*, see *infra* notes 26–32 and accompanying text.

3. This figure includes cases of three capital defendants whose appeals were heard twice, two because the Supreme Court of North Carolina remanded for procedural *Batson* error during their first appeal, and when the trial court denied relief on remand, they appealed again. *See infra* notes 5–8 and accompanying text. The third was heard twice because on the first direct appeal, the Supreme Court of North Carolina remanded on other grounds. *See* State v. Robinson, 330 N.C. 1, 35, 409 S.E.2d 288, 308 (1991) (remanding case for resentencing because the trial court gave improper jury instructions). This figure also includes two separate appeals of the same defendant for two separate convictions of capital murder. State v. Smith, 352 N.C. 531, 532 S.E.2d 773 (2000) (conviction for murder of Kelli Froemke); State v. Smith, 347 N.C. 453, 496 S.E.2d 357 (1998) (conviction for murder of David Cotton). For a thorough discussion of the Supreme Court of North Carolina's *Batson* jurisprudence in capital cases up through 2004, see ROBERT L. FARB, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 91–96 (2004).

4. This Recent Development will focus only on capital cases. There are two reasons for this particular focus. The first is practical, in that it reasonably limits the scope of the research while still providing a significant representative sample of cases, especially given the limited criminal jurisdiction of the Supreme Court of North Carolina (which hears as a matter of right only death penalty cases, *see* N.C. GEN. STAT. § 7A-27(a) (2005), or cases

*Batson* errors[5] but has never granted substantive *Batson* relief.[6] In two of those cases that were reversed for procedural errors (the third case is still pending),[7] after new *Batson* hearings, neither trial court found a *Batson* violation.[8] Only one of these defendants raised his *Batson* claim again on appeal, and he was ultimately denied relief.[9] In a half-page conclusory opinion in *State v. Hoffman*, the Supreme Court of North Carolina stated:

> The trial court concluded that the State had offered valid, race-neutral explanations for its peremptory challenges of prospective jurors . . . and that defendant had failed to meet his ultimate burden of proof of showing purposeful racial discrimination in the challenging of these prospective jurors. The transcript contains evidence that supports the trial court's findings, and the findings in turn support its conclusions. This assignment of error is therefore overruled . . . .[10]

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from the Court of Appeals in which there was a dissent, *see id.* § 7A-30(2)). Review of most other criminal cases is discretionary. *See id.* § 7A-27(b) (appeal as of right of all other judgments lies in the Court of Appeals); *id.* § 7A-31 (Supreme Court may, in its discretion, grant review of decisions of the Court of Appeals). The second, more important reason is substantive and deals with the significant difference in death as a punishment than any other kind of sanction. For more discussion of "death is different" jurisprudence and its implications in the *Miller-El II* decision, see *infra* notes 80–89 and accompanying text.

5. *See* State v. Barden, 356 N.C. 316, 344, 572 S.E.2d 108, 127–28 (2002) (holding that the trial court erred in not finding a prima facie case of discrimination where the prosecutor challenged five out of seven Black jurors, for an acceptance rate of only 28.6%); State v. Hoffman, 348 N.C. 548, 553–54, 500 S.E.2d 718, 722 (1998) (holding that the trial court erred in not finding a prima facie case of discrimination where prosecutor had excluded every Black juror not excused for cause and attempted to exclude another Black juror from the twelfth seat on an all-White jury); State v. Green, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989) (holding that the trial court erred in denying defendant the right to present evidence to rebut state's proffered race-neutral reasons for its peremptory challenges of Black jurors). For more discussion about *Batson*'s three-step process, see *infra* notes 26–32 and accompanying text.

6. There is evidence that the Supreme Court of North Carolina performs no better in noncapital cases. In the five years after the *Batson* decision, neither the Supreme Court of North Carolina nor the North Carolina Court of Appeals ever granted substantive relief to any defendant on a *Batson* claim. *See* Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1535 (1991).

7. Barden's case is too new to have been raised again on appeal. *Barden*, 356 N.C. 316, 572 S.E.2d 108.

8. *See Hoffman*, 349 N.C. at 173, 505 S.E.2d at 84; *Green*, 336 N.C. at 153, 443 S.E.2d at 21. Green did not raise his *Batson* claim again.

9. *See Hoffman*, 349 N.C. at 173, 505 S.E.2d at 84.

10. *Id.*

This type of deference, without much further inquiry, to the trial court's findings characterizes the vast majority of the Supreme Court of North Carolina's reviews of capital *Batson* claims.[11] It is this very sort of deference for which the United States Supreme Court admonished the Fifth Circuit in its recent decision in *Miller-El v. Dretke* ("*Miller-El II*").[12]

In a six-three opinion, and without announcing any new law, the Supreme Court suggested new contours for the level of scrutiny that should be applied to *Batson* claims, finally granting relief to capital defendant Thomas Miller-El, who had been denied such by seven state and six federal judges over the course of eighteen years.[13] The majority delved deep into a factual review of Miller-El's evidence showing that the prosecution discriminated against Black jurors when exercising peremptory challenges during jury selection at his trial.[14] This Recent Development explores the new contours provided by the United States Supreme Court, the rationale behind them, and what impact, if any, they might have on the Supreme Court of North Carolina's review of *Batson* claims in capital appeals. First, this Recent Development briefly discusses the history of United States Supreme Court jurisprudence in the area of racial discrimination in jury selection. It then explores that Court's decision in *Miller-El II*, the rationale behind it, and the Court's suggested approach to *Batson* review in capital cases to provide for a more searching and honest inquiry into possible racial discrimination. Next, this Recent Development analyzes how the Supreme Court of North Carolina has rejected this same approach in its *Batson* review in capital cases for two decades, thereby denying relief to every defendant that has brought a *Batson* claim. Finally, this Recent Development argues that the Supreme Court of North Carolina should conform its *Batson* jurisprudence to the approach suggested in *Miller-El II*.

11. The rare exceptions are noted above, where the court found flaws only in the trial courts' process for determining whether a *Batson* violation occurred. *See supra* note 5 and accompanying text.

12. 125 S. Ct. 2317 (2005).

13. *Id.* at 2344 (Thomas, J., dissenting).

14. *See id.* at 2325–40 (majority opinion).

## I. RACE AND THE PEREMPTORY CHALLENGE: *BATSON*'S (FAILED?) EXPERIMENT

Racial stereotyping has pervaded the selection of juries in this nation for many decades.[15] After the United States Supreme Court held in 1880 that it was an equal protection violation to exclude Black men from being called to jury service,[16] the use of the peremptory challenge became a primary tool for attorneys seeking to keep Black citizens off juries.[17] Peremptory challenges have a long and checkered history in American courts.[18] Historically, the peremptory challenge has been seen as a tool to level the playing field at trials, allowing parties to exclude jurors whom they fear, for whatever reason, will be partial to the opposing side.[19] However, the very nature of the peremptory challenge leaves it susceptible to abuse via racial, ethnic, gender, and other kinds of discrimination.[20]

In *Swain v. Alabama*[21] in 1965, the United States Supreme Court held that while Black defendants have no right to a jury composed in full or in part of members of their own race, a state violates the Equal Protection Clause when it deliberately excludes jurors on the basis of race.[22] However, in order to raise a prima facie case of discrimination in the jury selection process, *Swain* required that the defendant show "the prosecutor's systematic use of peremptory challenges against Negroes over a period of time."[23]

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15. *See* Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 235–36 (1968). Kuhn traces this history back to the Civil Rights Act of 1875, which made it a crime to discriminate on the basis of race in jury selection. *Id.* at 235.

16. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1880).

17. *See* Batson v. Kentucky, 476 U.S. 79, 103–04 (1986) (Marshall, J., concurring) (suggesting that when it became illegal to bar Blacks from jury service, "[s]tate officials then turned to [peremptory challenges as] somewhat more subtle ways of keeping Blacks off jury venires").

18. *See* Swain v. Alabama, 380 U.S. 202, 213–21 (1965) (discussing the roots in English common law of peremptory challenges and the role of the peremptory challenge in American jury selection).

19. Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 157 (2005) ("At least in theory, [the peremptory challenge] helps ensure both the reality and perception of an impartial jury and thus a fair trial.").

20. *Id.* at 160; *see also Batson*, 476 U.S. at 99 ("The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against Black jurors.").

21. 380 U.S. 202 (1965).

22. *Id.* at 203–04.

23. *Id.* at 227.

Two decades later, the Court developed a new test for discrimination in *Batson v. Kentucky*,[24] stating that the standard set out in *Swain* "placed on defendants a crippling burden of proof," leaving "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny."[25] To lessen this burden, the Court held in *Batson* that to make a prima facie showing of discrimination in jury selection, a defendant could rely solely on the relevant facts surrounding the behavior of the prosecutor in the defendant's own trial.[26] The prima facie case is the first step in *Batson*'s three-step process. After the defendant raises an inference of discrimination, the burden shifts to the prosecutor to rebut the prima facie case by providing a "neutral explanation related to the particular case to be tried."[27] The prosecutor's reasons do not have to be enough for a challenge for cause but neither may they be a general denial of bad faith nor an assertion that the juror might be biased toward a defendant of the same race.[28] Once the state provides its reasons for challenging the jurors, the trial court must determine whether

24. *Batson*, 476 U.S. at 79.

25. *Id.* at 92–93. Batson was convicted of second-degree burglary by an all-White jury after the prosecutor peremptorily challenged all four Black jurors from the venire. *Id.* at 82–83.

26. *Id.* at 95. In order to make a prima facie case, a defendant must show that he is a member of a "cognizable racial group," that the prosecutor used peremptory challenges to exclude members of that group from the jury, and that the relevant facts and circumstances raise an inference of discrimination. *Id.* at 96. Furthermore, the defendant is "entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

27. *Id.* at 98.

28. *Id.* at 97–98. For example, if a prospective juror states that she is unequivocally opposed to the death penalty and would never vote for it in any circumstances, such a person would be a good candidate for a challenge for cause. *See* N.C. GEN. STAT. § 15A-1212(8) (2005) (stating that a challenge for cause may be made on the grounds that "[a]s a matter of conscience, regardless of the facts and circumstances, [the prospective juror] would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina"); RONALD M. PRICE, NORTH CAROLINA CRIMINAL TRIAL PRACTICE § 18–10 (4th ed. 1994) ("The trial court is permitted to excuse for cause a potential juror in capital cases if his views on capital punishment . . . would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."). On the other hand, if a prospective juror expresses reluctance about the death penalty, but upon questioning by the attorneys or the judge, makes clear that she would be able to follow the law, the prosecutor would not succeed on a challenge for cause but still might want to excuse the juror with a peremptory challenge. This would be an acceptable "race-neutral" reason for a peremptory challenge. *See, e.g.*, State v. Lyons, 343 N.C. 1, 13, 468 S.E.2d. 204, 209 (1996) (holding that prosecutor's belief that a prospective juror "was not unequivocal in her ability to impose the death penalty" was not enough to "justify an excusal for cause" but was a "clear, reasonably specific [reason] and related to the particular case to be tried" and therefore acceptable grounds for a peremptory challenge).

deliberate racial discrimination occurred.[29] Unfortunately, the *Batson* Court gave little guidance as to how to make such a determination,[30] instead placing its trust in the trial judges to do so.[31] The Court further stated, in a footnote, that these determinations, dependent upon a trial judge's evaluation of the prosecutor's credibility, would be entitled to "great deference" by reviewing courts.[32]

The great difficulty, as Justice Marshall noted in his *Batson* concurrence, is how to determine whether a prosecutor's given reasons are truly race-neutral or are merely pretextual and disguising a race-based motive:

> How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, or seemed "uncommunicative," or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case." If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.[33]

To make matters worse, two later decisions made it even easier for prosecutors to rebut a prima facie case by focusing the inquiry on whether the state's proffered reason is facially race-neutral, even if, in effect, it disproportionately excludes a particular racial group[34] or is not related to the particular case for which the jury is being selected.[35] The first of these decisions was a plurality opinion, and the second a

29. *Batson*, 476 U.S. at 98.

30. *Id.* at 99 n.24 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

31. *Id.* at 99 n.22 ("Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination.").

32. *Id.* at 98 n.21.

33. *Id.* at 106 (Marshall, J., concurring) (citations omitted).

34. *See* Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) (stating that exclusion of jurors based on Spanish-language preference is not race-related, as long as the prosecutor's stated reason is concern that the jurors will not accept the official translation by the court interpreter).

35. *See* Purkett v. Elem, 514 U.S. 765, 769 (1995) (per curiam) (holding that a strike because a juror has "unkempt hair, a mustache, and a beard—is race neutral and satisfies the prosecution's step two burden"). The Court stated, "What [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*

short per curiam opinion, demonstrating that the justices themselves were perhaps perplexed, or frustrated, with *Batson*'s application.[36]

*Batson*'s progeny effectively rendered *Batson* almost meaningless: as Justice Marshall recognized in *Batson*, if a prosecutor need only some race-neutral reason to justify her challenge, it is not difficult to find one, and even less difficult for a judge to accept it as valid.[37] Couple the simplicity of producing and accepting "race-neutral" reasons with the great deference that *Batson* says is to be afforded to trial courts, and it is little wonder that, in sixty-one opportunities, the Supreme Court of North Carolina has not once held that a trial court erred in finding no *Batson* violation.[38]

## II. *MILLER-EL*: A CALL TO ACTION

In the preface to its opinion in *Miller-El II*, the United States Supreme Court itself recognized the chink in *Batson*'s armor: the Court noted, "*Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*."[39] The Court's opinion in *Miller-El II* goes against

36. *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 528 n.152 (discussing that some commentators saw the per curiam opinion in *Purkett* as an opportunity for the Court to pass on the *Batson* issue for the time being). Lower courts also struggled mightily with the implementation of *Batson*. *See* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure To Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625, 633–36 (1994).

37. *See Batson*, 476 U.S. at 106; *see also* Cavise, *supra* note 36, at 501 ("Only the most overtly discriminatory or impolitic lawyer can be caught in *Batson*'s toothless bite and, even then, the wound will be only superficial."); Jeffrey L. Fisher, *No Clear Ideologies*, NAT'L L.J., Aug. 3, 2005, at 14, 14 ("All [*Batson*] seemed to require at times was that a prosecutor or a court proffer a race-neutral reason, no matter how frivolous or implausible, for each strike. Peremptory challenges, by their nature, are based on stereotypes and intuitions, so courts often hesitated to delve very deeply into prosecutors' motives."); Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993) ("If prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar examinations are too easy. If judges exist who wish to believe proffered 'racially neutral' reasons and cannot rationalize that desire, impeachment for incompetence ought to be more frequent.").

38. *See supra* notes 4–8 and accompanying text. For an empirical discussion of the "marginal impact" of *Batson* and its progeny in one metropolitan area (Philadelphia), see David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001).

39. *Miller-El II*, 125 S. Ct. 2317, 2325 (2005).

the grain of a long tradition of respect for finality of judgments and deference to trial courts as fact finders. It demonstrates that the Court remains deeply concerned about the possible taint of any racial discrimination in capital punishment proceedings and suggests that appellate courts have not taken *Batson* review seriously enough in capital cases.[40] While the *Miller-El II* Court did not create any new law or test, it did insist that courts fulfill their duty to conduct a genuine and thorough inquiry in order to eliminate, to the extent practicable, the specter of racial discrimination from the process of sentencing a person to death.

The Supreme Court first heard Miller-El's appeal when the Fifth Circuit denied him a certificate of appealability.[41] The Supreme Court reversed, ordering the Fifth Circuit to hear Miller-El's *Batson* claim.[42] On remand, the Court of Appeals for the Fifth Circuit denied Miller-El's *Batson* claim on the merits, and he appealed yet again to the United States Supreme Court.[43] Once again, the Supreme Court reversed, this time with a six-three majority ruling directly on the merits.[44] Such a ruling is remarkable given the substantial burden of proof Miller-El had to overcome: under the Antiterrorism and

40. *See* Fisher, *supra* note 37, at 14 (arguing that the Court's point in *Miller-El II* was to tell "the lower courts to take *Batson* more seriously").

41. *See* Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2001). The procedural history of Miller-El's case is, in fact, labyrinthine. He first objected to his jury at his trial in 1986, alleging systemic discrimination under the *Swain* standard. *See Miller-El II*, 125 S. Ct. at 2322. The trial court found no purposeful historical discrimination and therefore denied him relief under *Swain*. *Id.* While his direct appeal was pending, the United States Supreme Court decided *Batson*, and the Texas Court of Criminal Appeals remanded Miller-El's claim for a hearing on the *Batson* issue. *Id.* at 2322–23. After the trial court found no *Batson* violation, the Texas Court of Criminal Appeals affirmed. *Id.* at 2323. The federal district court then denied Miller-El habeas corpus relief on the same claim, leading him to appeal to the Fifth Circuit, which refused to hear his claim.

42. *See Miller-El I*, 537 U.S. 322 (2002). A reversal on the certificate of appealability issue in *Miller-El I* would have required little more than a "threshold inquiry into the underlying merits of [the defendant's] claims." *Id.* at 327. And yet, in an eight to one opinion, the Court launched into an intensive review of the evidence of the prosecution's purposeful discrimination and ultimately came close to ruling on the merits. *See id.* at 331–47; *see also* Sandra Guerra Thompson, *The Non-Discrimination Ideal of* Hernandez v. Texas *Confronts a "Culture" of Discrimination: The Amazing Story of* Miller-El v. Texas, 25 CHICANO-LATINO L. REV. 97, 129 (2005) ("What is quite striking about the Court's opinion is the extent to which the Court seems to evaluate the merits of the claim itself and appears to conclude that Miller-El may have presented a meritorious claim."). For a synopsis of the Court's factual review in *Miller-El II*, see *infra* notes 50–75 and accompanying text.

43. *Miller-El II*, 125 S. Ct. at 2323.

44. *Id.* at 2340 ("The state court's conclusion that the prosecutors' 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.").

Effective Death Penalty Act of 1996 (the "AEDPA"),[45] to receive federal habeas corpus relief, a capital defendant in Miller-El's situation must prove that a state court's conclusion was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[46] This standard, coupled with the "great deference" *Batson* suggested is owed to the trial court's conclusions,[47] creates a high hurdle for defendants with a *Batson* claim. That the Supreme Court found Miller-El's evidence to have overcome that hurdle is significant because it supports the Court's intention to reinvigorate *Batson* review in capital cases. In fact, the Court indicated this intent first in *Miller-El I*, stating that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief."[48] The Court reiterated this stance in *Miller-El II* and granted Miller-El relief.[49]

In *Miller-El II*, the Court conducted a second review of Miller-El's claim that was even more probing than in *Miller-El I*. In this review, the Court repeatedly criticized the manner in which the court of appeals treated the evidence.[50] The Supreme Court examined five pieces of evidence of discrimination: 1) statistical evidence showing that the prosecutors disproportionately excluded Blacks from the jury venire;[51] 2) disparate questioning by the prosecutor of Blacks and Whites;[52] 3) a side-by-side comparison of Black venire members who were challenged with White panelists who were accepted;[53] 4) the use by the prosecutor of a Texas practice of "jury shuffling" to move

45. 28 U.S.C. § 2254 (2000).

46. *Id.* § 2254(d)(2).

47. *See supra* text accompanying note 32.

48. *Miller-El I*, 537 U.S. 322, 340 (2002).

49. *Miller-El II*, 125 S. Ct. at 2325 ("The standard is demanding, but not insatiable; as we said the last time this case was here, 'deference does not by definition preclude relief.' " (citation omitted)). In this case, the Court remanded for "entry of judgment for petitioner together with orders of appropriate relief," which will mean a new trial for Miller-El. *Id.* at 2340.

50. *See, e.g., id.* at 2328 ("[T]he court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible."); *id.* at 2331 ("[T]his rationalization was erroneous as a matter of fact and as a matter of law."); *id.* at 2339 ("We find this conclusion [of the court of appeals] as unsupportable as the 'dismissive and strained interpretation' of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability."); *id.* at 2340 ("It blinks reality to deny that the State struck [the jurors] . . . because they were Black.").

51. *Id.* at 2325.

52. *Id.* at 2333.

53. *Id.* at 2325.

Black members of the venire to the back of the order for voir dire questioning;[54] and 5) evidence that the Dallas County prosecutors had a specific policy of discrimination against Blacks in jury venires, including the use of a manual entitled "Jury Selection in a Criminal Case," which was distributed to Dallas County prosecutors in the 1970s and outlined why prosecutors should seek to exclude minorities from juries.[55] The latter two pieces of evidence involve local procedures that may or may not be applicable to other states and counties and were not central to the Court's analysis. The Court wrote very little about the jury shuffling or the unofficial policy of the prosecutor's office, spending less than a page of its opinion on each.[56] Conversely, the majority spent close to seven pages discussing the disparate treatment of similarly situated jurors,[57] and almost six pages discussing the differential questioning of Black and non-Black jurors.[58] While it is true that the Court spent only a paragraph discussing the statistics of the peremptory challenges used in the case,[59] these numbers were the first piece of evidence discussed by the Court in both *Miller-El I*[60] and *Miller-El II*,[61] and the Court referred to the statistical evidence three times more in the *Miller-El II* opinion.[62] Therefore, the remainder of this discussion will focus only on the first three pieces of evidence.

The Court first noted that the "numbers describing the prosecution's use of peremptories are remarkable."[63] Of 108 venire members, twenty of whom were Black, only one Black juror ultimately helped decide Miller-El's fate.[64] The prosecution struck ten of eleven Black prospective jurors (ninety-one percent) who remained after challenges for cause.[65] In contrast, the state struck only thirteen percent of the eligible non-Black prospective jurors.[66]

54. *Id.* at 2332–33.
55. *Id.* at 2338–39 (citing *Miller-El I*, 537 U.S. 322, 334–35 (2003)). Another 1963 circular instructed Dallas County prosecutors: " '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.' " *Miller-El I*, 537 U.S. 322, 335 (2003) (citation omitted).
56. *Miller-El II*, 125 S. Ct. at 2332–33, 2339.
57. *Id.* at 2325–32.
58. *Id.* at 2333–38.
59. *Id.* at 2325.
60. *Miller-El I*, 537 U.S. at 331.
61. *Miller-El II*, 125 S. Ct. at 2325.
62. *Id.* at 2339–40.
63. *Id.* at 2325.
64. *Id.*
65. *Id.*
66. *Miller-El I*, 537 U.S. at 331.

Citing its decision in *Miller-El I*, the Court noted that " '[h]appenstance is unlikely to produce this disparity.' "[67]

The Court also discussed at some length the prosecution's use of differential questioning of Black and non-Black jurors.[68] The prosecution used two different "scripts" to question venire members about their views on the death penalty—one rather bland,[69] the other a graphic description of what would result if the jury imposed the death penalty.[70] Only six percent of prospective White jurors heard the graphic script, while fifty-three percent of prospective Black jurors heard it.[71] Because the graphic script might be more likely to prompt a reluctance to impose the death penalty, thereby giving the prosecutor a race-neutral reason to challenge the juror, the Court stated, "If the graphic script is given to a higher proportion of Blacks than Whites, this is evidence that prosecutors more often wanted Blacks off the jury, absent some neutral and extenuating explanation."[72] The Court rejected the State's argument that the graphic script was used to eliminate jurors who had expressed uncertainty about the death penalty on their juror questionnaires, finding that Blacks were more likely than non-Blacks to receive the script regardless of feelings about the death penalty.[73]

Most importantly, however, the Court conducted an incisive inquiry into side-by-side comparisons of Black jurors who were challenged and non-Black jurors who were accepted, stating, "If a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise-similar non-Black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be

67. *Miller-El II*, 125 S. Ct. at 2325 (citing *Miller El I*, 537 U.S. at 342).

68. *Id.* at 2333–38.

69. *Id.* at 2334. The bland script simply noted that if the jury answered "yes" to a series of questions, those answers would result in the death penalty for the defendant.

70. *Id.* This script involved the prosecutor pointing directly at Miller-El and explaining that if the death penalty were imposed, the defendant would be "at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court." *Id.*

71. *Id.*

72. *Id.* at 2333–34.

73. *Id.* at 2335–36. The Court conducted a similar analysis of the prosecution's questioning of jurors about the minimum sentence they might consider for murder—non-Black jurors were disproportionately informed that the minimum was five years in Texas, while Black jurors were more likely not to hear the minimum, again in order to create a cause to strike jurors whose answers showed they would be tougher than the law required (the Court noted the irony in this, stating that the "prosecutor would suppress his normal preference for tough jurors and claim cause to strike"). *Id.* at 2337–38. Here again, the Court stated, "[T]he implication of race in the prosecutors' choice of questioning cannot be explained away." *Id.* at 2338.

considered at *Batson*'s third step."[74] The Court focused on two challenged Black jurors, both of whom were challenged for their statements during voir dire; however, these same statements were echoed by accepted non-Black jurors. As explanation for the challenges of these jurors, the State said that both had reservations about the death penalty, but as the Court noted, several accepted White jurors expressed similar sentiments.[75]

Lower courts should deduce three key principles from the Court's decision in *Miller-El II*, the first two narrow and the third broad. First, the Court made clear that it is not critical, when comparing accepted and rejected jurors, that the two jurors be identical in all respects for the comparison to be probative. Justice Thomas's dissent challenged this notion, saying, " 'Similarly situated' does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them."[76] But the majority flatly rejected Justice Thomas's reasoning, recognizing that requiring such a one-to-one match of all characteristics would "leave *Batson* inoperable," because "potential jurors are not products of a set of cookie cutters."[77] Indeed, if defendants were limited to comparing only those jurors for whom the state's proffered reasons were identical in every way, a significant tool for proving purposeful discrimination would be effectively eliminated. This would leave the prosecutor free to use any reason at all for challenging a Black juror (e.g., that the juror bit his fingernails during voir dire and thus seemed nervous), knowing that this reason will not be scrutinized: if none of the non-Black jurors share the characteristic, comparison would be impossible.

Second, the Court challenged attempts by the court of appeals and by Justice Thomas to substitute their own race-neutral reasons for the prosecution's strikes when the prosecutor's own given reasons

74. *Id.* at 2325.

75. *Id.* at 2327. The first challenged juror stated that he believed some people could be rehabilitated and might take that into account in his decision to impose the death penalty, but the accepted White jurors said the same. *Id.* The second juror said he thought the death penalty might be too light of a punishment, yet other accepted White jurors expressed similar opinions, as did the one Black juror that actually served. *Id.* at 2329–30. In both cases, the State attempted to offer other reasons to support these challenges as well, but the Court dismissed these as pretextual because of the prosecutor's failure to engage in meaningful voir dire with the jurors on those issues. *Id.* at 2328, 2330.

76. *Id.* at 2354 (Thomas, J., dissenting). Justice Thomas made the same argument in *Miller-El I*, in which he was the lone dissenter from the Court's decision to grant Miller-El a certificate of appealability. *See Miller-El I*, 537 U.S. 322, 362–63 (2003) (Thomas, J., dissenting).

77. *Miller-El II*, 125 S. Ct. at 2329 n.6.

were clearly pretextual.[78] Here, the Court made a critical point, saying that a *Batson* objection requires more than "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."[79]

Third, and most importantly, the Court made another in a string of implicit statements about the profound difference of death as a punishment from any other punishment, and the ensuing need for even greater accuracy and fairness in the proceedings that result in a death sentence.[80] The United States Supreme Court has long recognized that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."[81]

While the Supreme Court has held that the *Batson* doctrine protects jurors' Fourteenth Amendment rights to equal protection

78. *Id.* at 2330. In particular, the majority was concerned with the Fifth Circuit's and Justice Thomas's statements that the prosecutor had stricken a particular juror because of a general ambivalence toward the death penalty, *see id.* at 2331, or "inconsistent answers about his ability to apply the death penalty," *id.* at 2346 (Thomas, J., dissenting), when in fact, the juror expressed no general ambivalence but actually stated that the death penalty might not be severe enough for some defendants. *See id.* at 2331 (majority opinion).

79. *Id.* at 2332. The Court also said, "The Court of Appeals's and the dissent's substitution of a reason for eliminating [a juror] does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions." *Id.* at 2331.

80. The Court's recent decisions in the areas of ineffective assistance of counsel and prosecutorial misconduct also demonstrate the Court's concern that lower courts are not conducting the critical intensive review of capital cases that Eighth Amendment jurisprudence demands. For example, in *Rompilla v. Beard*, the Court held that defense counsel has a duty to reasonably investigate all evidence that the prosecution might rely on for aggravating circumstances, even though the defendant's family has indicated that there is no mitigating evidence. 125 S. Ct. 2456, 2465–66 (2005). To grant relief in this case, AEDPA required that the Court find that the state court's resolution of Rompilla's claim was an "unreasonable application of [ ] clearly established Federal law." *Id.* at 2462 (citing 28 U.S.C. § 2254(d)(1) (2000)). The Court found objectively unreasonable the state court's decision that Rompilla's counsel acted reasonably when it failed to investigate a prior conviction that the prosecution intended to use for aggravation. *Id.* at 2465. Similarly, the Court's decision in *Banks v. Dretke* was also an implicit statement that lower courts must do a better job reviewing capital claims in order for the death penalty to survive Eighth Amendment scrutiny. 540 U.S. 668 (2004). Like *Miller-El II*, the Court announced no new law in *Banks*, but a strong majority (seven-two) held that the Fifth Circuit had wrongly denied Banks's request for a certificate of appealability, when Banks could show that the prosecution had withheld evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that would have allowed Banks to impeach two of the State's key witnesses. *Banks*, 540 U.S. at 675–76. These decisions demonstrate that the Court remains very concerned that lower courts apply the necessary degree of rigor when reviewing capital cases. *Miller-El II* is the third in this line of recent cases that seem to rebuke lower courts for not taking capital cases seriously enough.

81. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

(rather than defendants' Sixth Amendment rights to a fair trial by a cross-section of the community),[82] the fundamental credibility of the capital punishment process still depends in large part upon the public's perception that the process is fair. As Justice Stevens has noted, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures."[83]

Racial discrimination in jury selection, more than many other possible procedural flaws, "casts doubt on the integrity of the judicial process, and places the fairness of a criminal proceeding in doubt."[84] While the Supreme Court has held that statistics indicating that race is a significant factor in the imposition of the death penalty are not, by themselves, enough to show a "constitutionally significant risk of racial bias,"[85] the Court is still keenly aware of the potential insidious impact of racial factors in capital sentencing proceedings. For example, on the same day the Court decided *Batson*, which applies to all defendants, both capital and noncapital, the Court also decided *Turner v. Murray*,[86] in which it held that capital defendants accused of interracial murders are entitled to question potential jury members about racial bias, while noncapital defendants do not enjoy the same constitutional right.[87] The Court stated, "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."[88]

Having decided in 1976 that the death penalty is constitutional only so long as its imposition is free from arbitrary or capricious decisionmaking,[89] the Court is loath to permit race to be an operative factor in capital proceedings, whether it be during jury selection or jury deliberations. *Miller-El II* is another statement of the Court's

82. *See* Holland v. Illinois, 493 U.S. 474, 478 (1990).

83. Smith v. Murray, 477 U.S. 527, 545–46 (1986) (Stevens, J., dissenting).

84. Powers v. Ohio, 499 U.S. 400, 411 (1991) (quotations omitted).

85. McCleskey v. Kemp, 481 U.S. 279, 313 (1987).

86. 476 U.S. 28 (1986).

87. *Id.* at 33. The Court distinguished a prior case, *Ristaino v. Ross*, 424 U.S. 589 (1976), where the Court held there was no constitutional right to question venire members about racial bias, *id.* at 590, stating, "What sets this case apart from *Ristaino*, however, is that in addition to petitioner's being accused of a crime against a White victim, the crime charged was a capital offense." *Turner*, 476 U.S. at 33. The Court held, however, that the constitutional violation only applied to the death sentence, not the guilty verdict. "The inadequacy of *voir dire* in this case requires that petitioner's death sentence be vacated. It is not necessary, however, that he be retried on the issue of guilt. Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the *capital sentencing proceeding*." *Id.* at 37.

88. *Turner*, 476 U.S. at 35.

89. Gregg v. Georgia, 428 U.S. 153, 188–89 (1976).

persistent vigilance in the capital punishment arena, and operates as an admonition to lower courts to pay similar attention when reviewing capital cases. This determination to achieve fairness in capital sentencing explains the Court's ability to overcome its preference for deference to state court determinations and for preserving the finality of state court judgments.

It is difficult to predict how lower courts will treat *Miller-El II*. On one hand, as discussed above, the majority opinion in *Miller-El II* is a salient attempt to reanimate judicial review in the area of racial discrimination in capital cases in particular and to return to the spirit of *Batson*, when *Batson*'s letter had proved somewhat inadequate in getting reviewing courts' attention.[90] The Court chided, and not gently, the meager analysis conducted by the appellate courts below it.[91] The Court acknowledged that "[t]he rub [of *Batson*] has been the practical difficulty of ferreting out discrimination in selections discretionary by nature."[92] In its review of Miller-El's *Batson* evidence, the Court suggested three analytical tools to determine whether purposeful discrimination has occurred in jury selection: 1) review of statistical evidence;[93] 2) analysis of disparate questioning;[94] and 3) comparison of challenged Black jurors with accepted non-Black jurors.[95] The Court painstakingly applied these tools to the record to conclude that Miller-El was entitled to relief.

On the other hand, the decision has inherent weaknesses that make its precedential value somewhat uncertain. When the Court granted certiorari in *Miller-El II*, some wondered if there might be a sea change in the works.[96] Yet, while the Court stated that "deference does not preclude relief," it also noted that it was the *collective* weight of Miller-El's evidence (the raw statistics, the disparate questioning, the side-by-side comparisons, the use of the jury shuffle, and the evidence of a historical policy of discrimination) that was "too powerful to conclude anything but discrimination."[97] Unfortunately, the average defendant trying to prove that purposeful

90. For a discussion of *Batson*'s failure to provide the necessary framework to eliminate racial discrimination in jury selection, see generally Cavise, *supra* note 36.

91. *See supra* note 50.

92. *Miller-El II*, 125 S. Ct. 2317, 2324 (2005).

93. *See supra* notes 63–67 and accompanying text.

94. *See supra* notes 68–73 and accompanying text.

95. *See supra* notes 74–75 and accompanying text.

96. *See* Thompson, *supra* note 42, at 100 ("If the Court finds that Miller-El has substantiated his claim of discrimination, it will be interesting to see how broadly the Court's proscription of discrimination will extend .... Will the Court ease the burden placed on petitioners to prove discrimination?").

97. *Miller-El II*, 125 S. Ct. at 2339.

discrimination is at work in the selection of his jury will seldom have all five of these pieces of evidence at his disposal. Thus when a defendant attempts to use *Miller-El II* to coax an appellate court to examine the evidence more closely, the court can still shirk its responsibility by noting that the defendant's evidence, viewed cumulatively, does not have the same weight that Miller-El's did, and therefore, does not merit relief.[98] Such an approach leaves the opinion open to an interpretation that it should operate as a fact-specific test for *Batson* claims, instead of a broader mandate to intensify capital review of racial discrimination in jury selection. Given the court's recent pronouncements in other areas of capital punishment,[99] lower courts should view it as the latter. Otherwise, the unfortunate result will be that, once again, only the most blatant and overt cases of discrimination will fall within *Batson*'s radar.

## III. WILL NORTH CAROLINA RESPOND?

The need for intensive scrutiny of *Batson* claims in capital appeals cannot be understated in a state like North Carolina, which ranks seventh in the nation both in the number of inmates on the state's death row and the number of inmates executed since executions resumed in the United States in 1976.[100] The issue of race remains prominent in the state's dialogue about the death penalty. Sixty-three percent of North Carolina's death row inmates are racial minorities,[101] compared to forty-five percent of death row inmates nationwide.[102] Preliminary findings in a recent study of the state's capital sentencing system shows that even controlling for other variables, such as prior convictions or murders committed in the

98. In fact, several reviewing courts have already used this tactic to reject a *Batson* claim. *See* Majid v. Portuondo, 428 F.3d 112, 131 (2d Cir. 2005) (rejecting petitioner's *Batson* claim and distinguishing that case from *Miller-El II*, stating that petitioner lacked similar evidence of past discriminatory practices in the prosecutor's office like the use of jury shuffling or official policies); Murphy v. Dretke, 416 F.3d 427, 439 (5th Cir. 2005) (rejecting *Batson* claim where defendant was tried and convicted by an all-White jury after the State struck five of six prospective Black jurors, noting that there was no evidence of jury shuffling or a decades-old prosecution manual suggesting historical discrimination against Black venire members); McPherson v. Commonwealth, 171 S.W.3d 1, 3 (Ky. 2005) (rejecting defendant's claim and distinguishing the "overwhelming evidence" in *Miller-El II* from the face in the case at bar).

99. *See supra* note 80.

100. DEBORAH FINS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW USA FALL 2005, at 6, 25–27 (2005), *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/drusa_fall_2005.pdf.

101. North Carolina Department of Corrections, Offenders on Death Row, http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm (last visited Jan. 1, 2006).

102. FINS, *supra* note 100, at 1.

course of rapes or robberies, a defendant is three and a half times more likely to receive the death penalty if the murder victim is White.[103] The highest rate of death penalties occurs when the defendant is non-White and the victim is White (6.4%) and the lowest when the defendant is White and the victim non-White (1.7%).[104] Furthermore, currently thirty-eight of thirty-nine (97%) North Carolina district attorneys (who make the decision to seek the death penalty)[105] are White.[106] Thus, race is still very much a salient factor in North Carolina's capital punishment system.

Furthermore, the Supreme Court of North Carolina, like the Texas state courts and the Fifth Circuit in Miller-El's case, has traditionally been completely deferential to trial court determinations of the facts in *Batson* claims.[107] In almost every single capital case where the Supreme Court of North Carolina has considered a *Batson* claim, it has remarked that because *Batson* determinations often turn on the credibility of the prosecutor's stated reasons for the objectionable challenges, the trial court is owed great deference.[108]

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103. ISAAC UNAH & JOHN CHARLES BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS: 1993–1997, at 4 (2001), *available at* http://www.common-sense.org/pdfs/NCDeathPenaltyReport2001.pdf.

104. *Id.* at 3.

105. *See* N.C. GEN. STAT. § 15A-2004 (2005) ("The State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists.").

106. Email correspondence with Peg Dorer, Director, N.C. Conference of Dist. Attorneys, in Raleigh, N.C. (Feb. 10, 2006). This figure is comparable to that in most states, where the percentages of White district attorneys in 1998 ranged from 93%-100%, with a national average of 97.5%. *See* RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN BLACK AND WHITE: WHO LIVES, WHO DIES, WHO DECIDES, fig.9 (1998), http://www.deathpenaltyinfo.org (click on "Reports" and scroll to the title).

107. *See supra* notes 3–10 and accompanying text (discussing the fact that the Supreme Court of North Carolina has never overruled a trial court's substantive determination on a *Batson* issue); *see also* Cavise, *supra* note 36, at 527–35 (discussing numerous cases from several different state and federal courts where a wide variety of allegedly race-neutral reasons were upheld on appeal).

108. *See, e.g.*, State v. King, 353 N.C. 457, 469–70, 546 S.E.2d 575, 586–87 (2001) ("A trial court's rulings regarding race-neutrality and purposeful discrimination are largely based on evaluations of credibility and should be given great deference."); *see also* State v. Lawrence, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000) (same); State v. White, 349 N.C. 535, 549, 508 S.E.2d 253, 262 (1998) (same); State v. Bonnett, 348 N.C. 417, 433, 502 S.E.2d 563, 575 (1998) (same). Note that the United States Supreme Court did suggest in *Batson*, albeit in dicta and in a footnote, that because of the credibility determinations involved, trial courts should be given deference on these determinations. Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986). The deference offered by the Supreme Court of North Carolina to trial court rulings on these matters is not surprising given North Carolina's long tradition of allowing the litigating attorneys great leeway in the jury selection process. *See* Schwartz, *supra* note 6, at 1539 n.54. North Carolina was also one of the first states to

However, in light of the United States Supreme Court's implicit demand in *Miller-El II* that appellate courts conduct a more vigorous review of *Batson* claims in capital cases, much of the Supreme Court of North Carolina's jurisprudence in this area will have to change significantly. The fact that Miller-El won federal habeas corpus relief, despite the enormous hurdles facing defendants in that process,[109] suggests that the Supreme Court of North Carolina's consistent and automatic deference to trial court determinations on a simple direct appeal has been off target. The *Miller-El II* opinions outlined two approaches to *Batson* review: that of the majority, which involved a searching, earnest inquiry into the facts and circumstances giving rise to an inference of discrimination, and that of Justice Thomas, which took a hands-off, very deferential approach to review of trial court decisions.[110] This Part will examine how the Supreme Court of North Carolina has consistently chosen the latter approach, particularly as regards the treatment of the three types of evidence considered in *Miller-El II*. This Part will consider each kind of evidence—statistics, disparate questioning, and side-by-side juror comparisons—and discuss how the Supreme Court of North Carolina has also condoned the use of the trial court's own substituted race-neutral reasons for the state's peremptory challenges, in direct contradiction to the United States Supreme Court's holding in *Miller-El II*.[111]

The Supreme Court of North Carolina has only once held that statistical evidence of racial discrimination in capital cases is enough to make a prima facie case under the *Batson* test.[112] While *Miller-El II* does not suggest that statistics alone are enough for a final determination of racial discrimination, it does suggest that statistics are probative of an inference of discrimination, which is all the defendant need show at the prima facie stage of the *Batson* process.[113] In *Miller-El I*, the Court stated that "the statistical evidence alone

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allow peremptory challenges in jury selection. *Id.* at 1538. Furthermore, trial judges are not even required to make a record of jury selection in noncapital cases except on motion of one of the parties. *See* N.C. GEN. STAT. § 15A-1241(a)(1). Nor is the North Carolina Supreme Court the only state court to construe *Batson* so narrowly. *See, e.g.*, John H. Blume, *Racial Discrimination in the State's Use of Peremptory Challenges: The Application of the United States Supreme Court's Decision in* Batson v. Kentucky *in South Carolina*, 40 S.C. L. REV. 299, 300 (1989) (arguing that the South Carolina Supreme Court has taken an "unduly restrictive view" of the *Batson* decision).

109. *See supra* notes 45–49 and accompanying text (discussing the high hurdles defendants must overcome in federal habeas proceedings).

110. *See supra* notes 50–79 and accompanying text.

111. *See supra* notes 78–79 and accompanying text.

112. *See infra* note 118 and accompanying text.

113. *See supra* note 26 and accompanying text.

raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors."[114] Although the Court was addressing the issue of debatability (the standard for the issuance of a certificate of appealability) rather than the *Batson* standard per se, this statement still acknowledges that statistical evidence alone can be some indication of possible discrimination.

In both *Miller-El I* and *Miller-El II*, the statistical evidence was the first factor discussed.[115] In *Miller-El II*, the Court described the statistical evidence as "remarkable."[116] Furthermore, in a case decided the same day as *Miller-El II*, the Court held that simple numbers alone, without any other facts or circumstances, were enough to raise an inference of discrimination to satisfy the first step of the *Batson* test.[117]

In the only North Carolina capital case where the acceptance rate of Black jurors was, in and of itself, enough to raise a prima facie case of discrimination, the prosecutor accepted only 28.6% of the eligible Black jurors.[118] In this case, the Supreme Court of North Carolina noted that it "risk[ed] splitting hairs unduly if [it] attempt[ed] to distinguish between the 37.5% acceptance rate of prospective minority jurors" found insufficient in another case[119] but also noted that the prima facie case was never intended to be a major hurdle for defendants—it is only supposed to be enough to shift the burden to the State to provide race-neutral reasons for its challenges.[120]

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114. *Miller-El I*, 537 U.S. 322, 342 (2003).

115. *See id.*; *Miller-El II*, 125 S. Ct. 2317, 2325 (2005).

116. *Miller-El II*, 125 S. Ct. at 2325.

117. *See* Johnson v. California, 125 S. Ct. 2410, 2413 (2005). In *Johnson*, the trial court found that the defendant had failed to establish a prima facie case, even though the prosecution challenged all three of the prospective Black jurors, resulting in an all-White jury. *Id.* at 2414. The trial court stated that the question was close but found no inference of discrimination, and the California Supreme Court deferred to that judgment. *Id.* at 2415. The U.S. Supreme Court noted that the statistical evidence, which was all Johnson offered to bolster his *Batson* objection, was enough to make the trial judge remark "that 'we are very close,' " and that on review, the California Supreme Court found it suspicious that the only available Black jurors were challenged. *Id.* at 2419. The Court held that "[t]hose inferences . . . were sufficient to establish a prima facie case under *Batson*," and that the defendant need not prove that race was more likely than not the reason for the challenges. *Id.*

118. *See* State v. Barden, 356 N.C. 316, 344, 572 S.E.2d 108, 127–28 (2002). Note that this is one of three cases in which the Supreme Court of North Carolina has remanded on procedural grounds for a new *Batson* hearing. *See supra* note 5 and accompanying text.

119. *See* State v. Gregory, 340 N.C. 365, 398, 459 S.E.2d 638, 657 (1995) (holding that a 37.5% acceptance rate was not enough for prima facie case).

120. *See Barden*, 356 N.C. at 344, 572 S.E.2d at 127–28.

Nevertheless, no other capital defendant has successfully used statistical evidence alone to make his prima facie case. Although the Supreme Court of North Carolina has recognized that discrimination against even one juror would violate *Batson*,[121] it has also held that the prosecution can sometimes accept enough jurors of a certain race to refute an inference of discrimination.[122] Indeed, in many cases, the court has found that a certain acceptance rate of Black jurors either negates a defendant's attempt to raise a prima facie case[123] or is a probative rebuttal to a prima facie case.[124] Even when the prosecutor's challenges remove every eligible Black juror from the venire, this alone has not been enough to establish a prima facie case.[125] Thus, the prima facie showing has been very much a high hurdle for defendants to overcome.

In *Miller-El II*, the United States Supreme Court took note of the fact that Miller-El's prosecutors accepted only nine percent of eligible Black jurors,[126] while it had previously noted in *Miller-El I* that the State accepted fully eighty-seven percent of the eligible non-Black jurors.[127] While the Court stated that this discrepancy was

121. *See* State v. Rouse, 339 N.C. 59, 80, 451 S.E.2d 543, 554 n.3 (1994) ("We emphasize that exercising some peremptory challenges in a manner which does not discriminate on the basis of race does not correct, or erase, a constitutional violation as to an individual juror.").

122. *See, e.g.*, State v. Locklear, 349 N.C. 118, 141, 505 S.E.2d 277, 290–91 (1998) ("[W]hile the excusal of even a single juror for a racially discriminatory reason is impermissible, the trial court may consider the acceptance rate of minority jurors by the State as evidence bearing on alleged discriminatory intent." (citations omitted)).

123. *See, e.g.*, *Nicholson*, 355 N.C. at 24, 558 S.E.2d at 126–27 (holding that a 50% acceptance rate is not low enough to show a prima facie case); State v. Braxton, 352 N.C. 158, 182, 531 S.E.2d 428, 442 (2000) (holding that a 47% acceptance rate is not low enough); State v. Fletcher, 348 N.C. 292, 320, 500 S.E.2d 668, 684 (1998) (40%); State v. Gregory, 340 N.C. 365, 398, 459 S.E.2d 638, 657 (1995) (37.5%); Allen, 323 N.C. at 219, 372 S.E.2d at 862 (41%).

124. *See, e.g.*, State v. Rogers, 355 N.C. 420, 445, 562 S.E.2d 859, 875 (2002) (holding that the fact that the final jury consisted of ten Blacks and two Whites refutes an inference of discriminatory intent); State v. Thomas, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991) (holding that although the prosecutor accepted only 13.5% of eligible Black jurors, and 78.4% of Whites the fact that the very first panelist accepted by the prosecutor was Black tends to refute an inference of discrimination).

125. *See* State v. Chapman, 359 N.C. 328, 342, 611 S.E.2d 794, 807 (2005) (holding that the State's challenge of the only three Black venire members not excused for cause was not, by itself, enough to make a prima facie case); *Williams*, 343 N.C. at 359–60, 471 S.E.2d at 387 (same, but two Black venire members challenged); State v. McNeill, 326 N.C. 712, 719, 392 S.E.2d 78, 82 (1990) (holding that without evidence of some pattern of discrimination by the district attorney's office, there is no reason to suspect racial motive, even when the State challenged the only Black venire members).

126. *Miller-El II*, 125 S. Ct. 2317, 2325 (2005).

127. *See Miller-El I*, 537 U.S. 322, 331 (2003).

likely evidence of discrimination,[128] it gave no guidance as to if or when lower courts should draw a line marking an acceptance rate under which there might be a per se inference of impermissible discrimination to make out a prima facie case. When the Supreme Court of North Carolina holds that a low acceptance rate relative to other races is not enough even to raise a mere inference of discrimination that the State must rebut with race-neutral reasons, it allows for the possibility that any one of the challenged venire members might have been stricken because of race, without even asking the State to justify itself. It encourages the State to accept one or two Black jurors early on so that it might avoid *Batson* scrutiny when it wants to purposefully exclude Black jurors later. The court states, rightly, that numbers alone are not dispositive proof of discrimination[129] but then simply ignores the numbers altogether when determining whether a defendant has made a prima facie case.

Despite statistical evidence that should give rise to an inference of discrimination, the trial court rulings on the prima facie case in many of these cases are based upon the court's own consideration of the challenged venire members' responses on voir dire.[130] For example, in *State v. Williams*, the trial court stated, " '[T]he Court holds that there hasn't been a prima facia [sic] showing that [the prosecutor] purposefully discriminated at all on the basis of the Court's hearing of the [jurors'] answers and especially the demeanor of the last one.' "[131] Considering these responses during the prima facie step of *Batson* also contravenes *Miller-El II*, because in so doing, the trial court comes up with its own race-neutral reasons to rebut the

128. *Id.*

129. *See, e.g.*, *Williams*, 343 N.C. at 360, 471 S.E.2d at 387.

130. *See, e.g.*, State v. Augustine, 359 N.C. 709, 716, 616 S.E.2d 515, 522 (2005) ("The trial court observed Bryant's answers concerning her son, and such responses from prospective jurors are pertinent to a determination of whether defendant has met his burden [of making a prima facie case of discrimination]."); *Chapman*, 359 N.C. at 342–43, 611 S.E.2d at 808 ("[R]esponses of prospective jurors during voir dire are relevant circumstances which may be considered to determine whether a defendant has established a prima facie showing under *Batson*."); State v. Nicholson, 355 N.C. 1, 23, 558 S.E.2d 109, 126 (2002) ("The responses of these jurors, even if insufficient to support a challenge for cause, are relevant to a determination of whether defendant has made a prima facie showing." (citations omitted)); *Williams*, 343 N.C. at 471 S.E.2d at 387 ("The trial court based its finding [of no prima facie case] on the answers and demeanor of the peremptorily excused jurors .... [Therefore] we must give the court's judgment deference."); State v. Richardson, 342 N.C. 772, 783, 467 S.E.2d 685, 691 (1996) (citing facts from the record about prospective juror's statements during voir dire that refute a prima facie case, when neither trial court nor prosecutor mentioned them); State v. Gregory, 340 N.C. 365, 398, 459 S.E.2d 638, 657 (1995) (same).

131. *Williams*, 343 N.C. at 359, 471 S.E.2d at 387.

defendant's objection instead of forcing the State to justify its challenges and then ruling on whether those reasons appear to be mere pretext.[132]

While the *Miller-El II* opinion was primarily concerned with courts substituting their own reasons at *Batson*'s third step (determining whether the state's proffered race-neutral reasons are plausible and then substituting other race-neutral reasons supported by the record if they are not), a trial court commits a similar error when it considers jurors' voir dire responses when determining whether a defendant has made a prima facie case. When the Supreme Court of North Carolina defers to these findings on review, it allows discriminatory prosecutors to escape scrutiny. Permitting the trial court to consider its own view of the jurors in deciding whether a defendant made a prima facie case, even in the face of stark statistical evidence of discrimination, takes the burden off the prosecution to articulate a specific, race-neutral reason for its challenges.[133] This kind of deferential review will not satisfy the obligation set forth by *Miller-El II* to conduct more than a cursory analysis of the trial court's determination of the facts.

The other two analytical tools used by the United States Supreme Court in *Miller-El II* were an examination of disparate questioning of Black and non-Black venire members[134] and a side-by-side comparison of challenged Black jurors with accepted non-Black jurors.[135] The issue of disparate questioning has been raised by the defendant in only a handful of North Carolina capital cases, and in each, the Supreme Court of North Carolina has rejected the

132. *See supra* text accompanying notes 78–79; *see also* Schwartz, *supra* note 6, at 1552–56. Schwartz notes that the practice of trial judges considering voir dire responses as relevant circumstances at the first step of the *Batson* inquiry is a common one in North Carolina courts. *Id.* at 1552. Schwartz also discusses how this practice inherently contradicts *Batson*: "The language of *Batson* specifically commands that prosecutors provide legitimate reasons for their peremptory challenges once defendants establish a prima facie case. If the lower courts consider prosecutors' potential reasons before the prosecutors state those reasons themselves, this command becomes meaningless." *Id.* at 1554.

133. *See also* Fisher, *supra* note 37, at 14 ("Further, the [*Miller-El II*] court clarified that courts may not search for and proffer their own race-neutral justifications to resolve *Batson* challenges. Prosecutors are responsible for the reasons they give, and those reasons alone must justify their actions in terms of the equal protection clause."); Schwartz, *supra* note 6, at 1554–55 ("[T]aking prosecutors' anticipated reasons into account at the prima facie stage prevents the proper functioning of the *Batson* prima facie case," which is to shift the evidentiary burden to the prosecution to "explain their allegedly discriminatory actions upon a mere threshold showing by the defendant.").

134. *See Miller-El II*, 125 S. Ct. 2317, 2333–38 (2005).

135. *Id.* at 2325–32.

arguments with the same reasoning it uses to reject arguments regarding side-by-side comparisons of jurors.[136] Thus, this Part will discuss the two together.

The United States Supreme Court made clear in *Miller-El II* that in order for a side-by-side comparison of two prospective jurors to be probative in determining whether a state's proffered reasons are mere pretext for racial discrimination, the prosecutor's reasons for challenging the two jurors need not be identical in every way.[137] The Court's discussion recognizes that such a requirement of total identity would defy common sense, for it would effectively eliminate comparison of jurors as a tool for exposing pretext, since it would be a rare case indeed where two prospective jurors were challenged for the exact same reasons.

Again, a review of the Supreme Court of North Carolina's past analyses of such claims demonstrates that it has never before used and in fact has rejected the *Miller-El II* majority's approach. In every case where a capital defendant has attempted to use side-by-side comparison of challenged and accepted jurors to prove that the state's race-neutral reasons were pretextual, the Supreme Court of North Carolina has rejected these arguments using the same logic employed by Justice Thomas in *Miller-El II*.[138] The first post-*Batson* capital defendant to raise the issue of side-by-side comparisons in North Carolina was William Porter in 1990.[139] Porter was Native American, and the state challenged ten out of thirteen Native American prospective jurors at his trial.[140] Porter argued both that similarly situated White jurors had been accepted by the state and that the prosecutor had questioned Native American venire members differently from Whites.[141] In rejecting this claim, the court laid out its precedent for how it would analyze such claims:

136. *See* State v. Chapman, 359 N.C. 328, 341, 611 S.E.2d 794, 807 (2005); State v. Fletcher, 348 N.C. 292, 317, 500 S.E.2d 668, 682–83 (1998); State v. Barnes, 345 N.C. 184, 212, 481 S.E.2d 44, 59 (1997); State v. Smith, 328 N.C. 99, 127, 400 S.E.2d 712, 727–28 (1991); State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990).

137. *Miller-El II*, 125 S. Ct. at 2329 n.6.

138. *See supra* note 76 and accompanying text.

139. *See Porter*, 326 N.C. at 501, 391 S.E.2d at 152.

140. *Id.* at 499, 391 S.E.2d at 151.

141. *Id.* at 501, 391 S.E.2d at 152. Specifically, Porter argued on appeal that the prosecutor had challenged some of the Native American jurors because they knew the defense counsel, had been represented by the defense counsel, or had unsteady employment backgrounds, while White jurors with these same characteristics had been passed by the State. *Id.*

> [T]he alleged disparate treatment of prospective jurors would not be dispositive necessarily. Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State.[142]

Here, the court almost prophesies Justice Thomas's dissents in both *Miller-El* cases, where he argued that "similarly situated" means matching not just one but all of the given reasons for a strike.[143]

Having made its position clear, the court has not yet changed it in any capital appeal. No capital defendant has succeeded in proving that the State's proffered race-neutral reasons were pretextual by comparing rejected non-White jurors with accepted White jurors. While at least nineteen capital defendants have made the argument and been denied relief,[144] a few of the most extreme cases are noteworthy. In *State v. Lyons*,[145] for example, the State challenged one Black juror because she was a nurse, saying it "did not want those folks with an absolute nurturing type of personality."[146] Yet the State accepted three other White jurors who were nurses.[147] On review, the Supreme Court of North Carolina gave its standard pronouncement

142. *Id.*

143. *See Miller-El II*, 125 S. Ct. 2317, 2354 (2005) (Thomas, J., dissenting); *Miller-El I*, 537 U.S. 322, 362–63 (2003) (Thomas, J., dissenting).

144. *See* State v. Chapman, 359 N.C. 328, 341–43, 611 S.E.2d 794, 807–08 (2005); State v. Bell, 359 N.C. 1, 15–16, 603 S.E.2d 93, 104 (2004); State v. Rogers, 355 N.C. 420, 445–46, 562 S.E.2d 859, 875–76 (2002); State v. King, 353 N.C. 457, 471, 546 S.E.2d 575, 588 (2001); State v. Golphin, 352 N.C. 364, 430, 533 S.E.2d 168, 213 (2000); State v. Lawrence, 352 N.C. 1, 15, 530 S.E.2d 807, 816 (2000); State v. Thomas, 350 N.C. 315, 332–35, 514 S.E.2d 486, 497–99 (1999); State v. Locklear, 349 N.C. 118, 140, 505 S.E.2d 277, 289–90 (1998); State v. Fletcher, 348 N.C. 292, 317, 500 S.E.2d 668, 682–83 (1998); State v. Barnes, 345 N.C. 184, 211–12, 481 S.E.2d 44, 59 (1997); State v. Lyons, 343 N.C. 1, 13–14, 468 S.E.2d 204, 209 (1996); State v. Richardson, 342 N.C. 772, 783, 467 S.E.2d 685, 691 (1996); State v. Kandies, 342 N.C. 419, 435–36, 467 S.E.2d 67, 75–76 (1996); State v. Williams, 339 N.C. 1, 17–19, 452 S.E.2d 245, 255–56 (1994); State v. Rouse, 339 N.C. 59, 80, 451 S.E.2d 543, 554 (1994); State v. Robinson, 330 N.C. 1, 19, 409 S.E.2d 288, 298 (1991); State v. Thomas, 329 N.C. 423, 432, 407 S.E.2d 141, 147 (1991); State v. Smith, 328 N.C. 99, 123–24, 400 S.E.2d 712, 725–26 (1991); *Porter*, 326 N.C. at 501, 391 S.E.2d at 152.

145. 343 N.C. 1, 468 S.E.2d 204 (1996).

146. *Id.* at 12, 468 S.E.2d at 208.

147. *Id.* at 13, 468 S.E.2d at 209.

about refusing to compare a single factor between two jurors.[148] However, when the State makes a categorical statement that it does not want a Black juror because she is a nurse and nurses have a "nurturing personality" that the State does not want on its jury, it cannot then turn around and accept three White nurses without raising suspicion. Yet neither the trial court nor the Supreme Court of North Carolina found a *Batson* violation.

In *State v. Fletcher*,[149] the defendant argued both that the prosecution had questioned a particular Black juror, Greene, more intensively than White jurors about his views on the fairness of the criminal justice system and also that the prosecution struck Greene for expressing reservation about it but accepted White jurors who expressed similar views.[150] Again, the Supreme Court of North Carolina rejected this approach because it did not consider all the factors a prosecutor might weigh when striking a juror.[151] However, the reservation was the primary reason the State gave for excusing Greene.[152] But what renders the court's decision to ignore this side-by-side comparison most suspect is that the trial court had already found that a *Batson* violation had occurred with another juror, McKinney, stricken at the same time as Greene. When the court asked the prosecutor for his reasons for striking McKinney, the prosecutor could not answer right away, and when he finally answered, he stated that McKinney was a member of the NAACP, an organization the prosecutor "strongly associate[d] with being anti-state and anti-death penalty."[153] He struck McKinney even though McKinney had stated during voir dire that he did not know the NAACP's position on the death penalty and did not himself oppose

148. *See id.* at 13–14, 468 S.E.2d at 209.

149. 348 N.C. 292, 500 S.E.2d 668 (1998).

150. *Id.* at 317, 500 S.E.2d at 682–83.

151. *Id.* at 317–18, 500 S.E.2d at 683.

152. *Id.* at 313–14, 500 S.E.2d at 680–81. While the opinion states that the prosecutor also offered the juror's prior record as a reason for the strike, the opinion is unclear as to whether the prosecutor actually raised the conviction as a reason for the challenge. The quoted portion of voir dire with Greene simply refers to the prosecution's questioning of Greene regarding a prior DWI case. *Id.* at 315–15, 500 S.E.2d at 681–82. The opinion then refers to the trial court's findings of fact that Greene had "previously been convicted of a misdemeanor and expressed a significant degree of dissatisfaction with the court system," and the trial court's conclusion that "the reasons given to excuse Mr. Greene, his expressed lack of confidence in the court system and his prior record, were racially neutral . . . ." Thus, it is unclear whether the prosecutor actually offered the prior record as a reason for striking Greene, or the court substituted the prior conviction as its own reason for upholding the challenge.

153. *Id.* at 315, 500 S.E.2d at 682.

the death penalty.[154] The judge determined that this proffered reason was not race-neutral and offered as a remedy to throw out the entire jury panel—at which point the State withdrew its challenge.[155] Here, the Supreme Court of North Carolina deferred again to the trial court's determination and refused to even consider the side-by-side comparison involving prospective juror Greene despite the probative weight of the other incident of discrimination.

Finally, and perhaps most significantly, the court rejected a side-by-side comparison argument in *State v. Kandies*.[156] This case takes on particular importance for two reasons. First, Kandies's federal habeas corpus appeal from the Fourth Circuit[157] was pending before the United States Supreme Court when that Court decided *Miller-El II*. After its decision in *Miller-El II*, the Court granted Kandies's petition for certiorari, vacated the denial of relief by the Court of Appeals, and remanded the case for reconsideration in light of *Miller-El II*.[158] This suggests that the Court intended the Fourth Circuit to use *Miller-El II* as a guideline for reviewing Kandies's *Batson* claim. Secondly, the facts of Kandies's case are very similar to those in Miller-El's. The prosecutor in Kandies's case challenged nine out of twelve eligible Black jurors, or seventy-five percent.[159] Furthermore, there was significant evidence that the prosecutor treated Black venire members differently from similarly situated White venire members.[160]

The prosecutor justified his challenges of five of the Black jurors based on their responses to his questions about capital punishment.[161] The prosecutor described one of these jurors as "hesitant"[162] on the death penalty, even though the juror stated she did not oppose capital punishment and could follow the law.[163] But the prosecutor accepted several White jurors who expressed similar views on the death

154. *Id.* at 315–16, 500 S.E.2d at 682.

155. *Id.* at 316, 500 S.E.2d at 682

156. State v. Kandies, 342 N.C. 419, 435–36, 467 S.E.2d 67, 75–76 (1996).

157. *See* Kandies v. Polk, 385 F.3d 457, 502 (4th Cir. 2004).

158. Kandies v. Polk, 125 S. Ct. 2974, 2974 (2005).

159. *Kandies*, 342 N.C. at 435, 467 S.E.2d at 75. Kandies raised his *Batson* objections successively at four different points when Black jurors were challenged individually or in groups. *See id.* at 435–37, 467 S.E.2d at 75–76. The trial court considered each objection in turn, as did the Supreme Court of North Carolina, *see id.*, so neither court ever considered the cumulative effect of the statistical evidence.

160. *Id.*

161. *Id.* at 435–36, 467 S.E.2d at 75–76.

162. Transcript of Jury Selection Proceedings at 124, *Kandies*, 342 N.C. 419 (No. 197A94) (prospective juror Randleman).

163. *Id.* at 85–86.

penalty, including one who arguably was more hesitant about the death penalty than the challenged juror.[164]

The prosecutor also challenged one Black juror ostensibly because she worked with three- and four-year old children.[165] But the prosecutor accepted other White venire members who were associated with young children, including two elementary school teachers.[166] One of the accepted jurors even admitted that she might have difficulty being impartial because she had "really young ones at school."[167]

Kandies alleged further disparate treatment of Black and non-Black venire members based on those jurors' concerns about missing work while sitting on the jury. While the State challenged a Black juror for this reason, the state accepted two White jurors who expressed similar concerns, one of whom even stated that missing work would be a "very big problem" for him.[168]

Finally, there was evidence in Kandies's case of historical discrimination against Black jurors by this prosecutor: the defense counsel, in lodging his first *Batson* objection, noted that "in [his] ten years of practice," he had never seen this prosecutor "[leave] a single minority member on the jury that he has picked."[169] Despite this history, the statistical evidence, and all of the evidence of disparate treatment of similarly situated Black and White jurors, the Supreme

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164. *Id.* at 666 (prospective juror Spence). The accepted White juror in question, when asked whether she had strong feelings about capital punishment, answered, "That's a hard question. I have been thinking about that since we came in here Tuesday, a lot. Only in certain cases do I think it would be necessary." *Id.*

165. *Id.* at 124 (prospective juror Jinwright). This reason is particularly suspect. The victim in this case was a four-year-old girl, *Kandies*, 342 N.C. at 430, 467 S.E.2d at 72, so it would seem that jurors with children that age would be more likely to favor the State, not the defendant.

166. *See* Transcript, *supra* note 162, at 675–76 (prospective juror Spence had taught second grade, kindergarten, and preschool); *id.* at 1004–05 (prospective juror Arlington was an elementary school teacher).

167. *Id.* at 1006 (prospective juror Arlington).

168. Prospective White juror Mayberry was self-employed and said, "Figuring out how to pay the bills will be a hardship" and that missing work would be "a very big problem." *Id.* at 132. The State later passed him. *See id.* at 158 (noting that the State challenged only prospective jurors McClure and Rawlinson, both Black). Prospective White juror Bryant also suggested that being away from work would be difficult for him. *See id.* at 448–49. The State later passed him as well. *See id.* at 466 (prosecutor passes all the jurors he has just examined). But the State challenged prospective Black juror Hines, *id.* at 597–98, who also expressed concern about being away from work, *id.* at 595–96. Upon a *Batson* objection, the first reason the prosecutor gave for challenging Hines was Hines's concern about his employment. *Id.* at 599.

169. *Id.* at 123.

Court of North Carolina clung to its old mantra, citing its original holding in *Porter*:[170]

> Defendant's approach "involves finding a single factor among the several articulated by the prosecutor . . . and matching it to a passed juror who exhibited that same factor." We rejec[t] this approach . . . again because it "fails to address the factors as a totality which [render] a juror . . . undesirable by the State."[171]

Thus, it appears that the Supreme Court of North Carolina is well-entrenched in its doctrine regarding the assessment of a prosecutor's disparate treatment of similarly situated White and non-White jurors. Given *Miller-El II*, however, the Supreme Court of North Carolina seems to have decided Kandies's *Batson* claim wrongly. Considering the statistical evidence, the evidence of pretext inherent in the disparate treatment of similarly situated jurors, and the alleged historical discrimination by this prosecutor's office, "[i]t blinks reality to deny that the State struck [the jurors] . . . because they were Black."[172] Thomas Miller-El had evidence of very similar discrimination to that in Kandies's case and won federal habeas corpus relief from the United States Supreme Court. That Jeff Kandies could not even win relief on direct appeal to the Supreme Court of North Carolina highlights the lethargic nature of that court's *Batson* review in capital cases. After *Miller-El II*, Eighth Amendment jurisprudence will tolerate such lethargy no longer.

## CONCLUSION

The critical question that remains is whether lower courts will treat *Miller-El II* as a directive to view *Batson* claims with much more scrutiny or as merely a narrow factual determination in one particular case against which to measure other *Batson* claims.[173] To comport with the requirements of the Eighth Amendment, the Supreme Court of North Carolina must view the decision as the former: a mandate to

170. *See supra* notes 139–42 and accompanying text.

171. State v. Kandies, 342 N.C. 419, 435–36, 467 S.E.2d 67, 75–76 (1996) (citing *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990)).

172. *Miller-El II*, 125 S. Ct. 2317, 2340 (2005).

173. Indeed, the Fifth Circuit, whose opinion was reversed in *Miller-El II*, has already characterized the decision as the latter: "The Court did not announce any new elements or criteria for determining a *Batson* claim, but rather simply made a final factual and evidentiary determination of that particular petitioner's *Batson* claim . . . ." Murphy v. Dretke, 416 F.3d 427, 439 (5th Cir. 2005).

increase its scrutiny of *Batson* claims in capital appeals.[174] No lingering shadow of the nation's long history of racial discrimination has any place in our criminal justice system, let alone in jurisprudence that governs life-or-death determinations.[175] The role of the courts in ensuring both the actual and perceived fairness of the capital punishment process cannot be understated, and the Supreme Court of North Carolina must bring to an end its practice of allowing even the worst cases of discrimination in capital jury selection to escape unremedied.

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174. Unfortunately, there is no sign of any change in sight. The court has heard one capital case with a *Batson* claim since *Miller-El II* was decided. *See* State v. Augustine, 359 N.C. 709, 616 S.E.2d 515 (2005). Not once did the court mention *Miller-El II*, and with little discussion, the court upheld the finding of the trial court that the defendant had not established a prima facie case, even though the defendant raised the objection when the State challenged the only Black prospective juror on the first panel of twelve, and the number of Black individuals in the jury pool was small. *See id.* at 714–15, 616 S.E.2d at 521–22. Furthermore, the Supreme Court of North Carolina considered the challenged prospective juror's responses on voir dire to be relevant circumstances negating an inference of discrimination, *see id.* at 716, 616 S.E.2d at 522, rather than putting the burden of rebutting that inference on the state as required by *Miller-El II*. *See supra* note 78–79 and accompanying text.

175. Note that many critics believe that the only way to eliminate racial discrimination in jury selection is to ban peremptory challenges altogether. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989); Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 564 (1992); Jonathan B. Mintz, Note, Batson v. Kentucky: *A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1039 (1987). As Justice Marshall argued in his concurrence in *Batson*, *see* Batson v. Kentucky, 476 U.S. 79, 105–07 (1986) (Marshall, J., concurring), and Justice Breyer in his concurrence in *Miller-El II* twenty years later, *see Miller-El II*, 125 S. Ct. at 2340–44 (Breyer, J., concurring), the great difficulty of sorting the wheat from the chaff in prosecutors' proffered reasons for peremptory challenges means that some discrimination will ultimately still elude even the most watchful eyes of the courts. Justice Marshall put it aptly, stating, "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system." *Batson*, 476 U.S. at 107 (Marshall, J., concurring).