

# Race and Recalcitrance: The *Miller-El* Remands

Sheri Lynn Johnson\*

*In Batson v. Kentucky, the Supreme Court held that a prosecutor may not peremptorily challenge a juror based upon his or her race. Although Batson was decided more than twenty years ago, some lower courts still resist its command. Three recent cases provide particularly egregious examples of that resistance. The Fifth Circuit refused the Supreme Court's instruction in Miller-El v. Cockrell, necessitating a second grant of certiorari in Miller-El v. Dretke. The Court then reversed and remanded four lower court cases for reconsideration in light of Miller-El, but in the two cases the lower courts have thus far considered, those courts have obstinately refused to follow the directives of Miller-El. This article demonstrates that both of those cases, Hightower v. Terry and Snyder v. Louisiana, reflect race-based resistance to the Supreme Court, considers possible sources of that resistance, as well as steps likely to eradicate or at least ameliorate such resistance.*

## I. INTRODUCTION

Pair the words “race” and “recalcitrance” in a title, and the reader expects something quite different than “The *Miller-El* Remands” to follow the colon. The Civil Rights Era (among other things) was a long battle between southern states and the Supreme Court over compliance with the Court’s mandate.<sup>1</sup> That battle is unparalleled in this nation’s history, and it is clearly over,<sup>2</sup> so one might expect that considering “Race and Recalcitrance” would be a historical inquiry.

But it is not. Racially tinged recalcitrance confronts the Court today in the lower courts’ response to its *Miller-El* remands.<sup>3</sup> The Supreme Court’s opinion in *Miller-El v. Cockrell*<sup>4</sup> (“*Miller-El I*”) was an application of *Batson v. Kentucky*<sup>5</sup> and its progeny,

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\* Professor, and Assistant Director, Cornell Death Penalty Project, Cornell Law School. The Project filed amicus briefs in two of the *Miller El* remands discussed in this article. I would like to thank Mark Olive, counsel for John Washington Hightower, and Marcia Widder, counsel for Allen Snyder, for their encouragement of both the amicus and this comment.

<sup>1</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>2</sup> This is not to say that substantive racial equality has been achieved, but only that the Supreme Court’s authority to mandate (at least formal) equality has been vindicated.

<sup>3</sup> *Miller-El v. Cockrell*, 537 U.S. 322 (2003) [hereinafter *Miller-El I*]; *Miller-El v. Dretke*, 545 U.S. 231 (2005) [hereinafter *Miller-El II*].

<sup>4</sup> *Miller-El I*, 537 U.S. 322.

<sup>5</sup> 476 U.S. 79 (1986).

which forbid racial discrimination in a lawyer's exercise of the peremptory challenge. The Supreme Court granted certiorari in *Miller-El I* to review the Fifth Circuit's determination that Miller-El's *Batson* claim was so weak that its denial in the district court was not entitled to substantive review by the Fifth Circuit.<sup>6</sup> The Supreme Court reversed and remanded, finding that Miller-El was entitled to that review because the correctness of the district court's decision was one upon which reasonable jurists could disagree; it also laid out specific facts and principles that the Fifth Circuit should consider on remand.

Instead, the Fifth Circuit barely gave lip service to the Supreme Court's opinion in *Miller-El I* and affirmed the denial of Miller-El's *Batson* claim. The Supreme Court granted certiorari again. In *Miller-El II*, after chastising the Fifth Circuit for its obduracy, and reiterating and elaborating upon its *Miller-El I* opinion, the Court once more reversed and remanded.<sup>7</sup> One might think the necessity of a double remand a fluke, but for the subsequent history of the other *Miller-El* remands. The Supreme Court reversed and remanded four other cases in light of *Miller-El II*; of the two that have been decided on remand, both reaffirm their prior decisions, one, rather defiantly holding that *Miller-El II* is inapplicable,<sup>8</sup> and the other purporting to follow the Supreme Court's remand order, while more quietly but no less blatantly deviating from the principles laid down in *Miller-El II*.<sup>9</sup>

In the first of these two cases, *Hightower v. Terry*,<sup>10</sup> the dissenting judge characterized the majority's decision as "violat[ing] the Supreme Court's express mandate."<sup>11</sup> This article demonstrates that his characterization aptly describes both cases and then considers the implications of such defiance. Part II makes the case for recalcitrance; Part III attempts to understand that recalcitrance, first by considering other instances of defiance of Supreme Court commands, and second by reflecting on the peculiar dynamics of *Batson* litigation. Part IV briefly addresses whether recalcitrance in this setting is worth a second grant of certiorari in either *Hightower* or *Snyder*, as well as whether there are other measures that would instead, or in addition, better assure compliance in the future.

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<sup>6</sup> Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the district court denying a habeas petition must be asked for a "certificate of appealability" ("COA") that determines which claims are entitled to review in the circuit court. With respect to each claim, a certificate of appealability should be issued if reasonable jurists would disagree about the correctness of the district court's ruling.

<sup>7</sup> *Miller-El II*, 545 U.S. at 266.

<sup>8</sup> *Hightower v. Terry*, 459 F.3d 1067, 1069 (11th Cir. 2006) [hereinafter *Hightower II*].

<sup>9</sup> *State v. Snyder*, 942 So. 2d. 484, 492 (La. 2006) [hereinafter *Snyder II*].

<sup>10</sup> 459 F.3d at 1067.

<sup>11</sup> *Id.* at 1078.

## II. ESTABLISHING RECALCITRANCE

The Fifth Circuit's decision in *Miller-El* after the Supreme Court's remand strongly suggests recalcitrance, even given the unusual procedural posture of the case. The Eleventh Circuit's opinion in *Hightower* and the Louisiana Supreme Court's opinion in *Snyder* are amenable to only one interpretation: insubordination.

A. *A Brief History of Peremptory Challenges: Swain, Batson and Purkett*

In 1875, the United States Congress prohibited race-based exclusion from jury service,<sup>12</sup> and five years later, the Supreme Court held that state statutes excluding African Americans violated an African American defendant's equal protection rights under the Fourteenth Amendment.<sup>13</sup> Although the Supreme Court became increasingly vigilant in policing exclusion from the petit jury venire over the next century, it did not address the legitimacy of exclusion by peremptory challenge until 1965, in *Swain v. Alabama*,<sup>14</sup> when it unanimously held that equal protection was not violated by the racially motivated striking of all six African Americans from the jury of an African American defendant. According to *Swain*, a generalization that a juror from a particular racial group is more likely to be partial, based upon the racial identity he shares with the defendant, is permissible. *Swain's* only caveat was that an equal protection claim would arise if the defendant could prove that the prosecutor struck African American jurors in every case, regardless of the crime involved, or the races of the defendant and victim.<sup>15</sup> Claims that a prosecutor had engaged in such pervasive exclusion came to be known as *Swain* claims, and, as one might expect, virtually always failed.<sup>16</sup>

A decade later, the Supreme Court reversed course, and in *Batson v. Kentucky*,<sup>17</sup> held that a prosecutor violates equal protection when he or she exercises peremptory challenges in a racially discriminatory manner—regardless of whether he or she has done so in other cases. *Batson* deems unconstitutional any action taken based upon a presumption that African American jurors are more likely to be partial to African American defendants. It instructs trial judges that defendants must be permitted the opportunity to establish a *prima facie* case of racial discrimination, and that the prosecutor must be permitted to rebut the defendant's claim.<sup>18</sup> Moreover, a trial judge must consider all of the relevant circumstances and must not be satisfied by mere assertions of good faith.<sup>19</sup>

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<sup>12</sup> Act of Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336 (codified at 18 U.S.C. § 243 (1994)).

<sup>13</sup> *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

<sup>14</sup> 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79, 100 n.25 (1986).

<sup>15</sup> *Id.* at 224.

<sup>16</sup> *See Batson*, 476 U.S. at 92–93; *id.* at 101 (White, J., concurring).

<sup>17</sup> *Id.* at 79 (syllabus).

<sup>18</sup> *Id.* at 96–98 (majority opinion).

<sup>19</sup> *Id.* at 96–97.

In short order, the Court extended *Batson* to white defendant/African American juror cases,<sup>20</sup> to civil cases,<sup>21</sup> and to peremptory strikes by defense counsel.<sup>22</sup> Then in *Purkett v. Elem*, it elaborated a bit on proper *Batson* procedure.<sup>23</sup> The first step ascertains whether a *prima facie* case of racial discrimination has been established; the second step determines whether the challenged party has supplied a race-neutral reason for the strike; and the third step evaluates the persuasiveness of that reason as part of the ultimate question of “whether the opponent of the strike has carried his burden of proving purposeful discrimination.”<sup>24</sup> The *Purkett* Court criticized the Eighth Circuit for collapsing the second and third steps, and for requiring a “minimally persuasive” reason at that step.<sup>25</sup> It did, however, note that “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.”<sup>26</sup>

#### B. *The Fifth Circuit: Defiance, or at Least Selective Deafness*

##### 1. *Miller-El I*

After Congress passed the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”),<sup>27</sup> a habeas petitioner challenging the constitutionality of his state court conviction must first seek and obtain a Certificate of Appealability (“COA”).<sup>28</sup> A petitioner is statutorily entitled to a COA only when he can demonstrate “a substantial showing of the denial of a constitutional right.”<sup>29</sup> A petitioner meets this requirement by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are “adequate to deserve encouragement to proceed further.”<sup>30</sup> The *Miller-El I* majority reiterated these principles, and then concluded that “a COA should have issued.”<sup>31</sup>

But that was only the beginning. After noting the distinction between a COA ruling and a decision on the merits, the majority opinion noted that the Court’s

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<sup>20</sup> *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>21</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

<sup>22</sup> *Georgia v. McCollum*, 505 U.S. 42 (1992).

<sup>23</sup> 514 U.S. 765, 767–68 (1995) (per curiam).

<sup>24</sup> *Id.* at 768.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (codified in scattered sections).

<sup>28</sup> 28 U.S.C. § 2253(c)(1) (2007).

<sup>29</sup> 28 U.S.C. § 2253(c)(2) (2007).

<sup>30</sup> *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

<sup>31</sup> *Miller-El I*, 537 U.S. at 327.

determination to reverse the Fifth Circuit “counsels us to explain in some detail the extensive evidence concerning the jury selection procedures.”<sup>32</sup> And indeed, the majority then spent seventeen pages addressing the merits of *Miller-El I*’s discrimination claim, quite thoroughly foreshadowing the later merits opinion in *Miller-El II*.

The *Miller-El I* majority first took trouble to comment upon, in some detail, many of the relevant facts, even though it would eventually say that it “had no difficulty concluding that a COA should have issued.”<sup>33</sup> It began by pointing out that African Americans were excluded from *Miller-El*’s jury in a significantly higher ratio than were white jurors; the state used its peremptory challenges to exclude 91 percent of the eligible black jurors—and only 13 percent of the eligible jurors from other racial groups.<sup>34</sup> Next, the opinion noted the disparate questioning of African American jurors, who much more frequently were given a graphic description of the execution process, observing that “[t]o the extent a divergence in responses [as to their views about the death penalty] can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.”<sup>35</sup> The opinion also described “an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder;”<sup>36</sup> the pattern more frequently employed with African American jurors tended to cause them to commit to a sentence harsher than the minimum provided by Texas law, and thus led, “ironically,” in the Court’s words, to their disqualification on grounds ordinarily raised only by the defense to weed out pro-state members of the venire.<sup>37</sup>

Then the *Miller-El I* majority described the Texas practice of “jury shuffling,” and the State’s use of the practice in the selection of the jury in *Miller-El I*:

With no information about the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Shuffling affects jury composition because any prospective jurors not questioned during *voir dire* are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominant number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported

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<sup>32</sup> *Id.* at 331.

<sup>33</sup> *Id.* at 341.

<sup>34</sup> *Id.* at 331.

<sup>35</sup> *Id.* at 332.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 333.

inadequacy of the card shuffle by a defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that the African-American prospective jurors had been moved forward.<sup>38</sup>

Finally, the Court turned to the pattern and practice evidence Miller-El had adduced at the pretrial hearing on his *Swain* claim, which tended to show a historical pattern of racial discrimination in the Dallas County District Attorney's Office and established that the office had adopted a formal policy of excluding African Americans from jury service; it noted the dispute over whether those practices and policies were still in effect at the time of Miller-El's trial.<sup>39</sup>

After this catalogue of the facts pointing toward a discriminatory motivation, the Court turned to a "preliminary, though not definitive, consideration of the three-step framework mandated by *Batson* [and its progeny]."<sup>40</sup> Because Texas conceded that Miller-El had satisfied the first step, presentation of a *prima facie* case, and Miller-El acknowledged that the State had satisfied the second step by offering facially race-neutral reasons for its strikes, the question was the resolution of the third step: "whether Miller-El 'has carried his burden of proving purposeful discrimination.'"<sup>41</sup> After reciting language from earlier opinions requiring deference to trial court findings on this question, the Court cautioned that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review."<sup>42</sup> Explicitly looking ahead to the analysis of the merits the Fifth Circuit would have to embark upon on remand, the Court then asserted that "a federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence."<sup>43</sup>

The Court then chastised the Fifth Circuit for "accept[ing] without question the state court's evaluation of the demeanor of the prosecutors and jurors," as well as for applying a standard that was too demanding in two respects.<sup>44</sup> Then, just in case the take-home message that Miller-El's evidence amounted to proof of racial discrimination was not perfectly clear, the Court criticized the lower federal court's treatment of Miller-El's evidence on five separate grounds. First, the majority complained that the statistical evidence, i.e., that Miller-El's prosecutor used 10 of his 14 peremptory strikes to exclude 9/10 of the eligible African American venire

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<sup>38</sup> *Id.* at 333–34.

<sup>39</sup> *Id.* at 334–35.

<sup>40</sup> *Id.* at 338 (citing *Purkett v. Elem*, 514 U.S. 765, 765 (1995); *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion) (holding that discrimination on the basis of proficiency in Spanish, at least in a case where some anticipated witnesses would testify in Spanish, does not constitute per se racial discrimination)).

<sup>41</sup> *Id.* at 338 (quoting *Hernandez*, 500 U.S. at 359).

<sup>42</sup> *Id.* at 340.

<sup>43</sup> *Id.* at 340.

<sup>44</sup> *Id.* at 341–42.

members, alone raised a debatable inference of discrimination.<sup>45</sup> Second, it pointed out the presumption of correctness was diminished in Miller-El's case because the trial court held its *Batson* hearing two years after the *voir dire*, and therefore, the trial court had had no contemporaneous opportunity to judge the credibility of the prosecutor's explanations.<sup>46</sup> Third, it emphasized that while the question of whether a comparative juror analysis would demonstrate that the prosecutor's explanations were pretextual was an "unnecessary determination at this stage," the evidence that three of the state's proffered race-neutral rationales applied as well to unchallenged white jurors "does make debatable the District Court's conclusion that no purposeful discrimination occurred."<sup>47</sup> Fourth, the Court "question[ed] the Court of Appeals' and state trial court's dismissive and strained interpretation of petitioner's evidence of disparate questioning."<sup>48</sup> Fifth, it disapprovingly noted that only the federal magistrate judge addressed the importance of the history of discrimination by the Dallas District Attorney's Office.<sup>49</sup>

Justice Thomas alone dissented.<sup>50</sup> Justice Scalia concurred, writing in part to explain why he thought the case was very close.<sup>51</sup>

## 2. *Miller-El II*

Judge DeMoss, author of the Fifth Circuit opinion denying Miller-El's claim that he was entitled to a COA,<sup>52</sup> also authored the opinion on remand that denied the claim on the merits.<sup>53</sup> If the only thing his second opinion had ignored was the strong implication of the *Miller-El I* opinion (along with the lopsided vote) that Miller-El should prevail on the merits, it might be defended as merely thickheaded rather than disobedient. But the explanation of resistance, or at least deliberate inattention, is more persuasive, in part because of the frequency with which the remand opinion either ignores or disputes the Supreme Court's specific comments on aspects of Miller-El's evidence. It is not surprising then, that in *Miller-El II*, the Supreme Court repeatedly disparages the Fifth Circuit's reasoning, ultimately describing the lower court's "conclusion as unsupportable as the 'dismissive and strained interpretation' of [Miller-El's] evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability."<sup>54</sup>

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<sup>45</sup> *Id.* at 342.

<sup>46</sup> *Id.* at 342–43.

<sup>47</sup> *Id.* at 343.

<sup>48</sup> *Id.* at 344.

<sup>49</sup> *Id.* at 346–47.

<sup>50</sup> *Id.* at 354.

<sup>51</sup> *Id.* at 348.

<sup>52</sup> *Miller-El v. Johnson*, 261 F.3d 445 (5th Cir. 2001).

<sup>53</sup> *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004).

<sup>54</sup> *Miller-El II*, 545 U.S. at 265 (citing *Miller-El I*, 537 U.S. at 344).

Justice Souter begins his majority opinion in *Miller-El II*<sup>55</sup> with what might be read as simply a history of the case, or might hint at reproach:

Two years ago, we ordered that a certificate of appealability, under 28 U.S.C. § 2253(c), be issued to habeas petitioner Miller-El, affording review of the District Court's rejection of the claim that prosecutors in his capital murder trial made peremptory strikes of potential jurors based on race. Today we find Miller-El entitled to prevail on that claim and order relief under § 2254.<sup>56</sup>

If Justice Souter meant to suggest displeasure at the Fifth Circuit's stubbornness, there was ample justification. Certainly, the question of whether a COA should issue is distinct from that of whether a claim should prevail under § 2254(d), and in *Miller-El I*, the Court began by noting "a COA ruling is not the occasion for a ruling on the merits of petitioner's claim."<sup>57</sup> Undoubtedly there are many claims for which a COA must issue—but which the petitioner will and should ultimately lose in the court of appeals. In *Miller-El I*, however, the Supreme Court sent every signal that Miller-El's claim was not such a claim.

Indeed, the Supreme Court's review of the merits of the *Batson* claim in *Miller-El II* largely tracks its discussion of its appealability in *Miller-El I*, often quoting from it; it is longer, at some points because the *Miller-El I* observations are elaborated upon, and at others because the majority augments its *Miller-El I* analysis by responding to counterarguments made by the state, the Fifth Circuit, or Justice Thomas's dissent. I summarize below only those additions that are significant for assessing the good faith and/or reasonableness of the remand opinions in *Snyder* and *Hightower*.

The *Miller-El II* Court's longest and most significant expansion of its *Miller-El I* discussion occurs when it addresses the "powerful . . . side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."<sup>58</sup> As the Court explained: "If [the] proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . ."<sup>59</sup> Then the text turns to the "details of two panel member comparisons [that] bear . . . out" *Miller-El I*'s observation "that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served."<sup>60</sup>

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<sup>55</sup> *Id.* at 231.

<sup>56</sup> *Id.* at 235.

<sup>57</sup> *Miller El I*, 537 U.S. at 331.

<sup>58</sup> *Miller-El II*, 545 U.S. at 241.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing *Miller-El I*, 537 U.S. at 343).



But before we turn to the textual comparisons of the particular struck jurors, we need to tarry over footnote two, which, as we shall soon see, has enormous import for evaluating the Eleventh Circuit's opinion in *Hightower*. The *Miller-El II* footnote first reports the dissent's contention that comparisons of black and white prospective jurors (as well as arguments about disparate questioning of black and white jurors and the use of the jury shuffle) were not before the Court because they had not been "put before the Texas courts."<sup>61</sup> It then rejects that contention point-blank, holding that this argument "conflates the difference between evidence that must be presented to the state courts to be considered by the federal courts in habeas proceedings and theories about that evidence."<sup>62</sup> The majority is then both specific and explicit: "There can be no question that the transcript of *voir dire*, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts, nor does the dissent contend that Miller-El did not 'fairly presen[t]' his *Batson* claim to the state courts."<sup>63</sup> It also distinguishes between the jury shuffle, the disparate questioning, and the comparative juror analysis on the one hand, and the juror questionnaires and information cards on the other, stating that only with respect to the latter was there a question about what was before the state courts (and then deems it unnecessary to resolve that question).<sup>64</sup>

Returning to the Court's application of comparative juror analysis brings us to prospective African American juror Billy Jean Fields, a man who "expressed unwavering support for the death penalty,"<sup>65</sup> but was nonetheless struck by the state. Fields also noted on his questionnaire that his brother had been convicted of a criminal offense; on *voir dire*, he added that it was a drug offense about which Fields himself knew little, and stated that it would not in any way interfere with his jury service. The prosecutor first offered a death penalty-attitude justification for striking Fields: He asserted that Fields had both said that he could only give death if he thought a person incapable of rehabilitation and that a person could always be rehabilitated if he found God. But, as defense counsel immediately pointed out, this was a mischaracterization of the testimony of Fields, who had "unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation."<sup>66</sup> And, the Supreme Court observed, "unless he had an ulterior reason for keeping Fields off the jury," if the prosecutor had simply misunderstood Fields, given "Fields's outspoken support for the death penalty, we expect [he] would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike."<sup>67</sup> Moreover, as the Court also observed, if Fields's

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<sup>61</sup> *Id.* at 241 n.2 (Thomas, J., dissenting) (quoting *id.* at 279).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 241–42 n.2 (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

<sup>64</sup> *Id.* at 241–42.

<sup>65</sup> *Id.* at 242.

<sup>66</sup> *Id.* at 244.

<sup>67</sup> *Id.*

thoughts about rehabilitation were the prosecutor's real source of concern about Fields, "he should have worried about a number of white panel members he accepted with no evident reservations."<sup>68</sup>

The Court then noted that the prosecution's response after defense counsel pointed out the mischaracterization of Fields's views further impeached his good faith; "he neither defended what he said nor withdrew the strike . . . [but] [i]nstead . . . suddenly came up with Fields's brother's prior conviction as another reason for the strike."<sup>69</sup> The Court characterized the new explanation as one that "reeks of afterthought," and declared that the trial court's acceptance of the substituted reason ignored the pretextual timing of the reason, its inherent implausibility, given Fields's assertion that he was not close to his brother, and that the prosecutor failed to make further inquiries about the matter.<sup>70</sup> The Court then concluded its discussion of juror Fields by a broad hint at its displeasure with the Fifth Circuit, comparing its judgment to that of *the now-discredited prosecutor's* first explanation, and finding it "unsupportable for the same reason"<sup>71</sup>: that its selective quotation mischaracterized Fields's testimony.

The majority then reviewed the prosecution's reasons for striking Joe Warren, another black venireman, and deemed them "comparably unlikely."<sup>72</sup> Although the prosecutor's stated reason for the strike—that Warren gave inconsistent responses to questions about his death penalty attitudes—was plausible on its face, "its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's."<sup>73</sup> And, according to the Court, the inference of pretext was bolstered rather than mitigated by the prosecutor's further explanation that Warren's brother-in-law had been convicted of a crime involving food stamps: [The prosecutor] never questioned Warren about his errant relative at all; as with Field's brother, the failure to ask undermines the persuasiveness of the claimed concern. And Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by prosecutors.<sup>74</sup>

Again, the Supreme Court chastised the court of appeals, this time for inventing and relying upon a race-neutral reason that would explain the strike even though that reason was not offered by the prosecutor. The court of appeals had hypothesized that it was Warren's general ambivalence about the death penalty that justified the strike, but the Supreme Court deemed this "rationalization was erroneous as a matter of fact and as a matter of law."<sup>75</sup> After pointing out that reading Warren's entire testimony

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 246.

<sup>70</sup> *Id.* at 246.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 247.

<sup>73</sup> *Id.* at 248.

<sup>74</sup> *Id.* at 250 n.8.

<sup>75</sup> *Id.* at 250.

made it clear he was not generally ambivalent about the death penalty, the Court admonished the Fifth Circuit and the dissent that the legitimacy of a strike rises and falls on the reasons a prosecutor in fact gave:

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. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutor's burden of stating a racially neutral explanation for their own actions.<sup>76</sup>

In addition to the lengthy additions to its evaluation of the comparative juror analysis described above, one more addition to the reasoning of *Miller-El I* is important for evaluating *Hightower* and *Snyder*. Regarding the inferences that flow from the use and timing of the jury shuffle, the majority adds a response to the state's protest that there might be racially neutral reasons for shuffling the jury: "[W]e suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference."<sup>77</sup> In a footnote, the Court expresses disapproval of the court of appeals's refusal to give much weight to the jury shuffles based on the fact that Miller-El's counsel shuffled the jury more times than did the prosecutor, deeming Miller-El's shuffles "flatly irrelevant to the question whether prosecutors' shuffles revealed a desire to exclude blacks."<sup>78</sup>

After engaging in a lengthy analysis of the disparate questioning, rejecting the analysis of the State and the court of appeals because it "simply does not fit the facts,"<sup>79</sup> the Court reminds the reader that "for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries, as we explained the last time the case was here."<sup>80</sup> As the majority winds up the opinion, the aspersions cast upon the Fifth Circuit grow stronger yet. The Fifth Circuit's conclusion, according to the Court, was "as unsupportable as the 'dismissive and strained interpretation' of [Miller-El's] evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability."<sup>81</sup> Viewed cumulatively, Miller-El's evidence was "too powerful to conclude anything but discrimination,"<sup>82</sup> and "[i]t blinks reality to deny that the State struck Fields and Warren . . . because they were black."<sup>83</sup>

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<sup>76</sup> *Id.* at 252.

<sup>77</sup> *Id.* at 254–55.

<sup>78</sup> *Id.* at 255 n.14.

<sup>79</sup> *Id.* at 257.

<sup>80</sup> *Id.* at 263 (emphasis added).

<sup>81</sup> *Id.* at 265 (citing *Miller El I*, 537 U.S. at 344).

<sup>82</sup> *Id.* at 265.

<sup>83</sup> *Id.* at 266.

Why a federal court would “blink[] reality” and how a federal court of appeals could go so wrong when given so much specific guidance from the Supreme Court might seem an idiosyncratic conundrum, were it not for the virtual replay presented by *Hightower v. Terry*.

### C. The Eleventh Circuit: Transparent Defiance

The procedural history of *Hightower v. Terry*, standing alone, points toward recalcitrance. When considered with the facts underlying Hightower’s claim, it correlates with no fact as well as with defiance. Hightower’s prosecutor had used six of his seven strikes on African American jurors. In November, 2003, before the Supreme Court had decided *Miller-El II*, Hightower filed a petition for writ of certiorari posing the question: “Whether the Eleventh Circuit improperly affirmed the Georgia courts’ failure to conduct a complete three-prong analysis as required by *Batson v. Kentucky*, 476 U.S. 79 (1986) in evaluating Petitioner’s claim that the prosecution purposefully excluded African-Americans from petitioner’s capital jury in violation of the Sixth and Fourteenth Amendments.”<sup>84</sup> In support of his petition, Hightower argued that “the Eleventh Circuit failed to apply the third prong of the *Batson* analysis as established by this Court . . . ,”<sup>85</sup> and had deferred to state court decisions that “made no effort to determine whether [the prosecutor] exercised his peremptory strikes in a discriminatory manner to strike prospective black jurors, instead accepting [his] proffered race-neutral reasons without further inquiry.”<sup>86</sup> The petition went on to argue that courts reviewing *Batson* claims must consider all relevant circumstances, including comparison of the “attributes of stricken black jurors with those of seated white jurors.”<sup>87</sup> It complained that neither the trial court nor the appellate court had compared the attributes of struck black jurors with those of seated white jurors, and then presented a comparative juror analysis arguing that the prosecutor’s stated reasons for his strikes were pretextual.<sup>88</sup>

On June 13<sup>th</sup>, 2005, the Supreme Court decided *Miller-El II*, and not surprisingly, given the overlap in issues, a week later granted the petition for writ of certiorari in *Hightower v. Schofield*.<sup>89</sup> It vacated the decision of the Eleventh Circuit and remanded the case “for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005).”<sup>90</sup> Also not surprisingly, the Eleventh Circuit then requested letter briefs from the parties. What was surprising, given the terms of the remand order, was Judge Tjoflat’s subsequent opinion, which determined that “*Miller-El* does not control

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<sup>84</sup> Petition for Writ of Certiorari, *Hightower v. Schofield*, 545 U.S. 1124 (2005) (No. 04-609), 2004 WL 2505527, at \*4.

<sup>85</sup> *Id.* at \*14.

<sup>86</sup> *Id.* at \*14.

<sup>87</sup> *Id.* at \*15.

<sup>88</sup> *Id.* at \*15–16.

<sup>89</sup> *Hightower v. Schofield*, 545 U.S. 1124 (2005).

<sup>90</sup> *Id.* at 1124.

our decision” and that “our opinion in *Hightower v. Schofield* is accordingly reinstated.”<sup>91</sup>

Judge Wilson’s dissenting protest that the majority’s decision “violates the Supreme Court’s express mandate”<sup>92</sup> is borne out by examination of the Eleventh Circuit’s purported reasons for rejecting the remand instructions. According to the majority, *Miller-El II* was inapposite because of “how *Miller-El* reached the Supreme Court and how *Hightower v. Schofield* came to us.”<sup>93</sup> *Miller-El II* relied upon evidence that had been developed in federal habeas corpus proceedings, but *Hightower* was “limited to the evidentiary record developed in the state trial court during jury selection and the trial court’s ruling, Hightower’s and the state’s briefs to the Supreme Court of Georgia (with respect to the *Batson* claim), and that court’s opinion (again, with respect to the *Batson* claim).”<sup>94</sup>

Again according to the majority, the *Hightower* record from state court did not support a grant of relief for three reasons. Most importantly, because Hightower’s brief on direct appeal to the Georgia Supreme Court did not expressly argue that a comparison of struck black jurors with seated white jurors revealed discrimination, “if Hightower wants the federal courts to entertain an argument he could have made in the Georgia Supreme Court but did not, he must establish cause for his counsel’s failure to present the argument and resulting prejudice [which he has not done].”<sup>95</sup> Second, the majority insisted that “Hightower never provided the [state trial] court with any evidence tending to discredit the persuasiveness of the prosecutor’s stated reasons for striking black jurors.”<sup>96</sup> Third, the majority wrote that the trial judge’s *silence* on whether the prosecutor’s stated reasons for strikes were credible reflected that the trial court “implicitly *found* the prosecutor’s race neutral explanations to be credible, thereby completing step three of the *Batson* inquiry,” a finding to which the federal court should, and did defer.<sup>97</sup>

But had the Eleventh Circuit majority *in good faith* attempted to apply *Miller-El II* to the facts of *Hightower*, it is hard to see how it could have come to any of these three conclusions. Its initial distinction between “how *Miller-El* reached the Supreme Court and how *Hightower v. Schofield* came to us”<sup>98</sup> turns out to be irrelevant, given explicit language in *Miller-El II* addressing the information that reviewing courts must consider in evaluating *Batson* claims. The Eleventh Circuit’s position that Hightower’s comparative juror analysis could not be considered by a federal court (except in the guise of an ineffective assistance of counsel claim) because he did not

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<sup>91</sup> *Hightower II*, 459 F.3d at 1069, 1072 (11th Cir. 2006).

<sup>92</sup> *Id.* at 1078.

<sup>93</sup> *Id.* at 1069.

<sup>94</sup> *Id.* at 1070.

<sup>95</sup> *Id.* at 1071.

<sup>96</sup> *Id.* (quoting *Hightower v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004)).

<sup>97</sup> *Id.* at 1072 n.9 (emphasis added).

<sup>98</sup> *Id.* at 1069.

present it to the state court is flatly inconsistent with footnote two in *Miller-El II*, where the majority discusses the parallel contention by the *Miller-El II* dissent that comparisons of black and white prospective jurors (as well as arguments about disparate questioning of black and white jurors and the use of the jury shuffle) were not before the Court because they had not been “put before the Texas courts.”<sup>99</sup> Because the majority unambiguously rejects the dissent’s position, holding that this argument “conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence,” the *Hightower* majority is simply and inexcusably wrong.<sup>100</sup> Indeed, the footnote specifically states that there can be no question that the transcript of *voir dire* recording the evidence on which *Miller-El* based his arguments was before the state courts,<sup>101</sup> distinguishing between the jury shuffle, the disparate questioning, and the comparative juror analysis on the one hand, and the juror questionnaires and information cards on the other, and stating that only with respect to the questionnaires and cards was there a question about what was before the state courts.<sup>102</sup> Thus, the Eleventh Circuit had no excuse for deeming *Miller-El II* inapplicable, and no excuse for not considering the merits of *Hightower*’s comparative juror analysis (to which I will shortly turn).

Second, *Miller-El II* also disposes of the majority’s assertion that *Hightower* failed to provide the state court with “any evidence tending to discredit the persuasiveness of the prosecutor’s stated reasons for striking black jurors.”<sup>103</sup> According to the majority:

The only evidence *Hightower* attempted to present to the trial court in support of his *Batson* objection came in the form of a newspaper article [about the Supreme Court argument in *Amadeo*], which . . . [t]he trial court excluded . . . . We are bound by that ruling, and, as such, we do not consider that article as part of the record before the Georgia courts for the purposes of our review under § 2254(d).<sup>104</sup>

But the excluded newspaper article was only half of the story. After making his *Batson* motion, defense counsel stated:

Mr. Briley [the prosecutor] has in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels . .

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<sup>99</sup> *Miller-El II*, 545 U.S. at 241 n.2 (Thomas, J., dissenting) (quoting *Miller-El II*, 545 U.S. at 279).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 241–42 n.2.

<sup>102</sup> *Id.*

<sup>103</sup> *Hightower II*, 459 F.3d at 1071 (quoting *Hightower v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004)).

<sup>104</sup> *Id.* at 1071 n.8.

. . . Your Honor, I have here a copy of the *Fulton Daily Reporter* which was on Wednesday, March 30, 1988, where we got headlines, "Does County Plan to Discriminate, high court hears jury panel." This was regarding the case of the *State vs. Amadeo* which has gone up to the . . . Supreme Court.<sup>105</sup> I will make a quote here from the U.S. Supreme Court Justice John Paul Stevens. "The evidence disclosed is the intentional program of rigging the jury by the prosecutor's office." *This arose out of a memo which has been attributed to Mr. Briley stating that there was a purpose and a plan to have a member [sic] number of blacks on the grand jury in Putnam County in order to have it just half the jury criteria for grand jury . . . . You are well acquainted with that case, Your Honor.* We would say that this is the same circumstances [sic], the same sort of scheme that Mr. Briley was doing in this particular case. He is purposely using his strikes to provide for just the minimum amount of blacks, absolutely the minimum amount . . . .<sup>106</sup>

Most tellingly, Prosecutor Briley did not deny having authored the memorandum, though he disputed its intention, and the trial judge did not deny that he was "well-acquainted" with the case.<sup>107</sup>

It is hard to imagine how this does not constitute *some* evidence of discriminatory intent, given *Miller-El II*'s treatment of the history of discrimination by the Dallas District Attorney's Office. As dissenting Judge Wilson pointed out, this evidence of prior discrimination was greater than that the Supreme Court deemed probative in *Miller-El II*, because in *Miller-El II*, there was no evidence of discrimination by the individuals who prosecuted Miller-El. Here, Hightower's prosecutor personally authored a memorandum that spelled out the scheme to limit the number of blacks in the jury pool.

Finally, the *Hightower II* majority's view that the trial judge's *silence* on whether the stated reasons for strikes were credible reflected implicit findings that they were findings that required deference, cannot be reconciled with *Miller-El II*. As

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<sup>105</sup> Briley had authored a memorandum to Putnam County Commissioners explaining how they could underrepresent blacks, women, and young people on grand and petit juries. Amadeo, a Putnam County death-sentenced inmate, filed a petition for a writ of habeas corpus challenging his conviction based upon this intentional discrimination. The federal district court granted the writ of habeas corpus for Amadeo, finding that Briley's conduct constituted "intentional racial discrimination." *Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988). The State did not dispute that Briley had intended to discriminate on the basis of race. The district court also found that Amadeo's "default" of the claim in state court was excused by "cause," i.e., that the state had concealed its own misconduct. The United States Court of Appeals for the Eleventh Circuit reversed the district court, holding that trial counsel could have discovered the misconduct earlier. The Supreme Court reversed, reinstating the district court's grant of relief, finding that the record sufficiently supported the district court's "cause" findings. The *Batson* challenge in Hightower's case occurred on May 2, 1988; counsel quoted from a March 30, 1988, newspaper article about the *Amadeo* argument before the Supreme Court.

<sup>106</sup> *Hightower II*, 459 F.3d at 1075 n.5 (Wilson, J., dissenting) (emphasis added).

<sup>107</sup> *Id.*

Hightower's second petition for writ of certiorari argues, collapsing the second and third steps of *Batson* is not consistent with *Batson* or any of its progeny, including *Miller-El II*; the specific purpose of the third step is the analysis of credibility, a question that is separate from the determination of whether a race-neutral reason has been articulated. This is a point well-taken; as *Miller-El II* noted, "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false . . ."<sup>108</sup> Moreover, even if the trial court had followed the three step process laid out in *Batson*, and then explicitly stated that it found the prosecutor's reasons credible, *Miller-El II* does not countenance the degree of deference the Eleventh Circuit unskeptically accords the trial court.

*Miller-El II* did not blindly defer to the trial judge's third step credibility determination (even though it was explicit), but instead found "powerful" the "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."<sup>109</sup> And if the Eleventh Circuit had looked at some side-by-side comparisons, as a remand to reconsider in light of what *Miller-El II* clearly requires, it would have had to conclude that at least some of the proffered reasons were pretexts. Following the Supreme Court's order, dissenting Judge Wilson made those comparisons, and concluded that "[t]he record is replete with examples of veniremembers who were struck arguably because of their race, but three strikes are especially troubling, specifically the exercise of peremptory challenges to eliminate Thelma Butler, Ricky Thomas, and Emerson Davis."<sup>110</sup> Judge Wilson first considered—and found wanting—the state's alleged reasons for striking Thelma Butler:

Briley claims that he struck Thelma Butler because he successfully prosecuted her brother-in-law twelve years prior. He also claims that Butler was somewhat hostile. From the record, it appears that Butler was an ideal juror for a prosecutor seeking the death penalty. Butler felt that people tried for murder are treated too leniently. She was strongly in favor of the death penalty. She felt that mitigating circumstances must be proven before she

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<sup>108</sup> *Miller-El II*, 545 U.S. at 240.

As dissenting Judge Wilson reasoned, "even more" than *Miller-El II*, *Hightower* "compels a finding" that *Batson* was violated. *Hightower II*, 459 F.3d at 1072 (Wilson, J., dissenting). While *Miller-El* had been required, under the AEDPA, to show by clear and convincing evidence that the state court's factual determinations were unreasonable in light of the evidence before the state, *Hightower* was not.

In *Hightower*'s case, the trial court merely found that the prosecutor's justifications were "articulable" and "nonrace" related and never touched on the credibility of those statements. The Georgia courts never made factual determinations regarding the plausibility of the proffered justifications because they never applied the final step of *Batson*. Thus, the Georgia courts rendered a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

*Hightower II*, 459 F.3d at 1073 (Wilson, J., dissenting).

<sup>109</sup> *Miller-El II*, 545 U.S. at 241.

<sup>110</sup> *Hightower II*, 459 F.3d at 1076 (Wilson, J., dissenting).



would consider imposing a life sentence. Her answers alone undermine the veracity of Briley's proffered justification, especially since he never questioned Butler about her brother-in-law. Even more striking is the fact that Briley declined to strike a non-black juror, Michael Hensler, who, himself, had been convicted of and imprisoned for voluntary manslaughter by Briley's office.<sup>111</sup>

With respect to the second particularly troubling strike, Judge Wilson wrote:

In another example, Ricky Thomas's father had been convicted of killing his mother. Because of this conviction and the fact that Thomas had lived with his father after his father's release, the prosecutor struck him speculating that Thomas may possibly identify his father's case with Hightower's. Yet, Thomas indicated that he was in favor of the death penalty, and that he did not even remember the circumstances surrounding his mother's killing because he was too young at the time. The prosecutor never questioned Thomas about his relationship with his father or the potential impact on his ability to decide the case fairly. Again, the pretext is more apparent when viewed in light of the fact that Hensler was not struck.<sup>112</sup>

The prosecutor's stated reason for striking Emerson Davis was no more convincing:

Emerson Davis was struck because the prosecutor claimed that Davis was somewhat opposed to the death penalty, more so than other veniremembers. Davis never stated that he was opposed to the death penalty, but rather had to hear the case before imposing the penalty. The prosecutor mischaracterized his voir dire, thereby undermining a claim that the prosecutor's reason was race-neutral. In fact, Davis's views were in line with several non-black jurors whom the prosecutor declined to challenge. If Davis was undesirable as compared to other veniremembers on the question about the death penalty, then the prosecutor would have used his remaining peremptory strikes to eliminate other veniremembers who gave similar answers. However, the non-black veniremembers who gave similar answers were not struck.<sup>113</sup>

In each of the instances Judge Wilson discusses, the inference of pretext seems clear, and viewed cumulatively, the inference from Hightower's evidence, like Miller-

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1076-77 (footnote omitted) (Wilson, J., dissenting).

El's, was "too powerful to conclude anything but [racial] discrimination."<sup>114</sup> Had the Eleventh Circuit examined this evidence—rather than insisting that it did not have to do so because the comparative juror analysis was not presented to the state court—it is hard to see how any conclusion other than that of intentional discrimination would be possible. However, as discussed earlier, the refusal to consider the comparative juror analysis for this reason cannot be squared with the express consideration of that issue in *Miller-El II* and thus, the inference of recalcitrance on the part of the Eleventh Circuit panel seems as powerful as the inference of discrimination on the part of Hightower's prosecutor.

#### D. *The Louisiana Supreme Court: Thinly Veiled Defiance*

Unlike the kindred decision in *Hightower*, *State v. Snyder*<sup>115</sup> does not flaunt its defiance of the Supreme Court. The Louisiana Supreme Court does not disavow the relevance of *Miller-El II*, does not reinstate its prior decision, and even purports to reconsider that prior opinion in light of *Miller-El II*. Nonetheless, *Hightower* and *Snyder* are close relatives.

Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury for the murder of his wife's male companion. Prior to trial, the prosecutor was quoted in the media as referring to Snyder as his "O.J. Simpson case," behavior of which the trial judge was aware because defense counsel moved the court to forbid further such inflammatory comments. During *voir dire*, the prosecutor peremptorily struck all five African Americans who had survived cause challenges. Then, in summation and over objection, he urged the all-white jury he had created to impose death because the *Snyder* case was like the O.J. Simpson case, where the defendant "got away with it."<sup>116</sup> All of this took place in Jefferson Parish, which has a history of *Batson* violations.<sup>117</sup>

On its first review, the Louisiana Supreme Court denied Snyder's *Batson* claims by a 5-2 vote,<sup>118</sup> rejecting his first two *Batson* challenges because defense counsel failed to contemporaneously object to them,<sup>119</sup> and rejecting his other three *Batson* claims by deferring to the trial court's unexplained rulings,<sup>120</sup> all the while ignoring as evidence both the prosecutor's O.J. Simpson analogies and the history of *Batson* violations in Jefferson Parish.

After the United States Supreme Court remanded *Snyder*, directing the Louisiana court to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El II*,<sup>121</sup> a slimmer

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<sup>114</sup> *Id.* at 1070 (quoting *Miller-El II*, 545 U.S. at 265) (majority opinion).

<sup>115</sup> *Snyder II*, 942 So. 2d 484.

<sup>116</sup> *Id.* at 498–99.

<sup>117</sup> *See infra* note 127.

<sup>118</sup> *State v. Snyder*, 750 So. 2d 832 (La. 1999) [hereinafter *Snyder I*].

<sup>119</sup> *Id.* at 839–40.

<sup>120</sup> *Id.* at 841–42.

<sup>121</sup> *Snyder v. Louisiana*, 545 U.S. 1137 (2005).

majority adhered to the prior holding.<sup>122</sup> Although that majority acknowledged the requirement that it review Mr. Snyder's "*Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*,"<sup>123</sup> it nonetheless concluded that *Miller-El II*, when read with the Supreme Court's decision in *Rice v. Collins*<sup>124</sup> "do[es] not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State."<sup>125</sup>

Instead of carefully considering all of the evidence before it, the majority found a reason to dismiss each piece, ignoring the fact that none of those reasons can be squared with the Supreme Court's opinion in *Miller-El II*. The majority deferred to the trial court's acceptance of the prosecutor's proffered reasons, even though the Louisiana Supreme Court had previously chastised the judge who credited those reasons for his careless treatment of *Batson* challenges in another capital case,<sup>126</sup> and even though the prosecutor who proffered those reasons had had his credibility tarnished in a previous capital case.<sup>127</sup>

Snyder argued that the Jefferson Parish District Attorney's Office had practiced race discrimination in jury selection in the past, citing cases previously decided by the Louisiana Supreme Court,<sup>128</sup> a statistical analysis conducted in another Jefferson Parish case by a Tulane University professor, who concluded that the racial disparity in the State's use of peremptory challenges strongly supports an inference that the

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<sup>122</sup> *Snyder II*, 942 So. 2d at 484.

<sup>123</sup> *Id.* at 486. The majority initially characterized the Supreme Court's treatment of race based peremptory challenges as "pendulous," *id.* at 487, beginning with the Court's analysis of the issue in *Swain*, 380 U.S. 202 (1965), *Snyder II*, 942 So. 2d at 487-88, and characterizing *Batson* as the Court's "pendulum [swing] in the opposite direction." *Id.* at 488. So far so good, but then the majority inexplicably characterizes *Miller-El* as "mov[ing] the pendulum back toward middle ground." *Id.*

<sup>124</sup> 546 U.S. 333 (2006).

<sup>125</sup> *Snyder II*, 942 So. 2d at 492.

<sup>126</sup> *See State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001).

<sup>127</sup> The lead prosecutor in the case was Jim Williams, who, together with Cliff Strider, was found by the Supreme Court to have suppressed material exculpatory evidence in *Kyles v. Whitley*, 514 U.S. 419 (1995). This fact was brought to the Louisiana Supreme Court's attention during oral argument. Interview with Marcia Widder, counsel for Allen Snyder (Jan. 15, 2007).

<sup>128</sup> *See State v. Harris*, 820 So. 2d 471, 474 (La. 2002) (finding a *Batson* violation where a Jefferson Parish prosecutor explained that she was striking an African-American juror because he was a "single black male on the panel with no children . . . I don't want him relating to the defendant more so than he would the State's part of the case"); *Jacobs*, 789 So. 2d at 1283 n.2 (though reversing on other grounds, rebuking the same judge who presided over Snyder's trial for the careless manner in which he considered the defendant's *Batson* challenges); *State v. Myers*, 761 So. 2d 498, 499 (La. 2000) (reversing on the ground that the trial court erred in failing to address the defendant's *Batson* challenges to the State's peremptory striking of six of seven African-American venirepersons). *See also State v. Bridgewater*, 823 So. 2d 877, 896 (La. 2002) (all-white jury seated after prosecutor used peremptory strikes to remove prospective black jurors); *State v. Lucky*, 755 So. 2d 845, 851 (La. 1999) (entire panel of jurors struck when juror accused prosecutor of using challenges to remove African-American women); *State v. Seals*, 684 So. 2d 368, 374 (La. 1996) (all-white jury seated after the prosecutor struck three African Americans over defendant's *Batson* objection); *State v. Durham*, 673 So. 2d 1103, 1109 (La. Ct. App. 1996) (same).

Jefferson Parish District Attorney's Office engaged in racially discriminatory jury selection practices,<sup>129</sup> and a climate of racial insensitivity illustrated by prosecutors' wearing of hanging-noose neckties in trial proceedings against African-American defendant Lawrence Jacob.<sup>130</sup> Although the majority recognized that *Miller-El* prohibited "consign[ing] to history" a prosecutor's historical use of peremptory challenges,<sup>131</sup> the Louisiana Supreme Court dismissed the significance of Snyder's historical evidence by complaining that consideration of Snyder's evidence "would take us outside the four corners of the appellate record."<sup>132</sup> What is odd about this dismissal is that while the evidence may have been outside the "four corners" of the record, most of it came from cases decided by the Louisiana Supreme Court itself.

The majority next dismissed the significance of three of the five peremptory challenges the prosecutor exercised against African American jurors, announcing that "[the] court's current task is eased by an initial winnowing out of some of the challenged jurors."<sup>133</sup> The majority reiterated its *Snyder I* refusal to consider the prosecutor's strikes against Greg Scott and Thomas Hawkins because, in its view, these strikes had been waived by trial counsel's failure to raise *Batson* objections to their removal.<sup>134</sup> This is strange, since what defense counsel did was wait to make a *Batson* motion until the prosecutor had struck the third African American juror; he never affirmatively "waived" the first two jurors. Nothing in *Batson* suggests that a *Batson* motion must be made as soon as the first African American juror is struck; nothing in *Miller-El II* says so; and nothing in the Louisiana Supreme Court's previous cases said so. In fact, waiting for more than one strike of an African American juror to bolster the required *prima facie* case showing, as well as the ultimate inference of discrimination, is likely quite common.

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<sup>129</sup> JOEL A. DEVINE, LOUISIANA CRISIS ASSISTANCE CENTER, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE (2003), available at [http://www.blackstrikes.com/resources/report/black\\_strikes\\_report\\_september\\_2003.doc](http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.doc). This study had been introduced into the trial court record following the Louisiana Supreme Court's reversal on *Batson* grounds in *State v. Harris*, and was included as an appendix in Harris's writ application to the Louisiana Supreme Court in *State v. Harris*, 865 So. 2d 735 (2004).

<sup>130</sup> See, e.g., Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at Section 1, Page 14; Joe Darby, *Prosecutors' Choice of Neckties Blasted; Noose, Grim Reaper Worn in Murder Case*, THE TIMES PICAYUNE, Jan. 5, 2003.

<sup>131</sup> *Snyder II*, 942 So. 2d at 488.

<sup>132</sup> *Id.* at 490 n.8. The majority's conclusion that evidence of the pattern of practice by Jefferson Parish prosecutors was "dehors the record" disregarded the import of defense counsel's argument at the pretrial hearing, conducted on the motion in limine to preclude the prosecutor from comparing this case to O.J. Simpson's, that "[t]o play upon these fears and prejudices to what will doubtless be an overwhelmingly—if not all—white jury deciding the case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law." *Id.* at 497 n.19.

<sup>133</sup> *Id.* at 493.

<sup>134</sup> "There is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of [*Snyder I*]." *Id.*

Justice Johnson, in her dissenting opinion, gave a further case-specific reason for condemning the majority's determination that the defense lawyers' hesitation in making a *Batson* motion was a waiver; it was prompted by the prosecutor's devious tactic of accepting the first black juror—and then “backstriking” him later! As she explained, “the prosecutor’s action in accepting the first African-American juror [Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions.”<sup>135</sup> Justice Johnson further observed that the prosecutor’s use of a backstrike to remove Brooks in this case paralleled the Texas “jury shuffle” procedure the Supreme Court had found so suspicious in *Miller-El*.<sup>136</sup>

Moreover, even if the first two struck jurors were “waived” in the sense that Snyder could not prevail if the *only* discrimination he showed was with respect to those jurors, *Miller-El II* clearly states that the entire record must be considered in evaluating whether the prosecutor acted with discriminatory motivation, and prior strikes, especially ones without any apparent justification in the record, contribute to an inference of discriminatory purpose. Thus, at the very least, in assessing the evidence of discrimination contributed by the strikes of Hawkins and Scott, the *Snyder II* court ignored *Miller-El II*'s counsel when it failed to consider the statistical import of the prosecutor’s use of peremptory challenges to remove *every* qualified African-American juror (a pattern even starker than that present in *Miller-El II*) and ignored its insistence that a reviewing court examine the whole record. Likewise, when the majority dismissed the relevance of a third African-American juror struck by the prosecutor, this time because the *Brief upon Remand* did not raise arguments specifically addressing her removal,<sup>137</sup> it erred; at the least, it too was relevant for its statistical import.

Having waved a wand and transformed five struck African-American jurors into two, the majority proceeded to behave just like the Eleventh Circuit panel had in *Hightower*; it adopted its original decision, noting that “[d]espite defense counsel’s reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons,”<sup>138</sup> and then quoted extensively from its earlier opinion.<sup>139</sup> Thereafter, the majority observed, “we . . . find nothing [in the *voir dire* transcript] to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*.”<sup>140</sup>

Noting that “the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott,”<sup>141</sup> the majority did elaborate on its *Snyder I* reasoning with respect to the striking of Jeffrey Brooks. According to the majority,

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<sup>135</sup> *Id.* at 506 (Johnson, J., dissenting) (quoting *Snyder I*, 750 So. 2d at 866 (Johnson, J., dissenting)).

<sup>136</sup> *Id.* at 508.

<sup>137</sup> *Snyder II*, 942 So. 2d at 492–93.

<sup>138</sup> *Id.* at 493.

<sup>139</sup> *See id.* at 493–95 (quoting *Snyder I*, 750 So. 2d at 840–42).

<sup>140</sup> *Id.* at 494.

<sup>141</sup> *Id.* at 496.

the prosecutor's claim that he struck Brooks because of his student teaching schedule was not pretextual, despite the fact that he did not strike white jurors who reported scheduling conflicts;<sup>142</sup> the difference, said the majority, was that the scheduling conflicts identified by prospective white juror Sandras and seated white juror Yaeger<sup>143</sup> were distinguishable because Brooks was a student, while "both of these men were employed and apparently already had established careers."<sup>144</sup> It distinguished white juror McMurray's concerns with service on a different ground; hers, the majority said, were focused on childcare problems, rather than her court-reporting classes at Franklin College.<sup>145</sup> It is impossible to square this pointillistic approach to comparative juror analysis with the *Miller-El II* majority opinion, which rejected the dissent's insistence that white panelists are only similarly situated to a struck black juror when they are "identical in all respects;"<sup>146</sup> reasoning that "potential jurors are not products of a set of cookie cutters,"<sup>147</sup> it found "strong similarities"<sup>148</sup> probative of discriminatory intent. In contrast, dissenting Justice Kimball concluded that the prosecutor's failure to question Brooks about the impact of his teaching schedule on his ability to serve, when considered with his apparent disinterest in the scheduling conflicts of other white prospective jurors, revealed that "there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties [and n]o attempt was made by the State to verify its hypothesis and develop an objective basis for its strike."<sup>149</sup>

The majority's treatment of the prosecutor's second proffered reason for striking Brooks also deviates from *Miller-El I*'s commands. The prosecutor alleged that Brooks was "very nervous,"<sup>150</sup> an assertion that was belied by both the absence of any confirmation by the trial judge (despite defense counsel's protest that he had displayed no nervousness), and by the engaged responses Brooks provided to questions from both parties. Beyond asserting that because "nervousness cannot be shown from a

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<sup>142</sup> Prospective juror Michael Sandras, a white male who taught at the University of New Orleans, expressed concern that classes had "just started the day before and that 'any prolonged absence . . . becomes a real problem.'" *Id.* at 503 (Kimball, J., dissenting). He admitted that concern about his teaching obligations would cause him to have trouble concentrating and that he would "have to somehow pass on the information concerning work." *Id.* Despite his expressed concerns, the State never asked Sandras a single question concerning his commitments, distractions, or motivations to end the trial quickly.

<sup>143</sup> White prospective juror Arthur Yaeger, expressed concern that jury service would interfere with his "longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." *Id.* at 504. The prosecutor neither questioned Yaeger about his concern nor challenged him.

<sup>144</sup> *Id.* at 496 (majority opinion).

<sup>145</sup> *Id.* at 496 n.16.

<sup>146</sup> *Miller-El II*, 545 U.S. at 247 n.6.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 247.

<sup>149</sup> *Snyder II*, 942 So. 2d at 502 (Kimball, J., dissenting).

<sup>150</sup> *Id.* at 493 (majority opinion).

cold transcript, . . . the judge's evaluation must be given much deference,"<sup>151</sup> assertions convincingly disputed by the dissent,<sup>152</sup> the majority creatively reshaped the prosecutor's assertion into something less contestable: it reasoned that "the fact that Brooks was articulate during the *voir dire* may have contributed to the prosecutor's fear that he would get 'smart' during jury deliberation and suggest a verdict lesser than the death penalty."<sup>153</sup> Such creativity, however, was prohibited by *Miller-El II*, which held that:

[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives . . . 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.<sup>154</sup>

Finally, the *Snyder II* majority dismissed as irrelevant the prosecutor's pretrial comments and penalty phase argument comparing this case to O.J. Simpson's case by the incredible declaration that those comments lacked racial content. First, it defended the prosecutor's rebuttal phase argument that Snyder should be put to death because Snyder's case was like O.J. Simpson's, where the defendant "got away with it," as a proper response to defense counsel's statement in closing argument that Mr. Snyder had been suicidal when police officers arrived at his home.<sup>155</sup> This construction of the prosecutor's remarks conveniently failed to note that the prosecutor made similar pretrial comments to the media, which hardly could be responsive to defense counsel's closing argument, as well as the fact that any argument that Snyder was feigning suicide in response to Simpson's acquittal was factually insupportable, given that Snyder's suicidal behavior occurred weeks *before* Simpson was acquitted. The majority then concluded that the prosecutor's O.J. comments did not evince discriminatory intent with an astonishing denial of racial realities in this country:

[O]ther than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks both prior to and subsequent to the *voir dire*, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of the peremptory challenges. The inferences defense

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<sup>151</sup> *Id.* at 496.

<sup>152</sup> As the dissent observed, the record reflected "that Mr. Brooks was an engaged and voluble juror throughout *voir dire* examination." *Id.* at 502 (Kimball, J., dissenting). "In the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks." *Id.* at 503.

<sup>153</sup> *Id.* at 496 (majority opinion).

<sup>154</sup> *Miller-El II*, 545 U.S. at 252.

<sup>155</sup> *Snyder II*, 942 So. 2d at 499.

counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine [sic] referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. *Neither remark referred to Simpson's or Snyder's race.*<sup>156</sup>

It is hard to believe that anyone in America aware of the Simpson trial did not know Simpson's race and equally hard to believe that the jury failed to notice Snyder's race. It is impossible to believe that a prosecutor who struck all of the African-American venirepersons was unaware that he had an all-white jury before him. It is likewise impossible to believe that a person intelligent enough to sit on the Louisiana Supreme Court did not know these things.<sup>157</sup>

Justice Kimball, who had written the majority opinion in *Snyder I*, concluded that "a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks."<sup>158</sup> Given the history of discrimination in Jefferson Parish; the prosecutor's use of his peremptory challenge to strike all five of the African-American jurors who had survived for-cause challenges; the prosecutor's use of a backstrike to eliminate African-American juror Jeffrey Brooks; the prosecutor's reliance on two reasons for that strike, both of which were impeached by the record, as well as his extraordinary summation, in which he urged the all-white jury he had created to impose death because the Snyder case was like the O.J. Simpson case, where the defendant "got away with it"; and given the Supreme Court's opinion in *Miller-El II*—no other conclusion seems possible.

### III. EXPLAINING RECALCITRANCE

#### A. *Prior Refusals to Comply with Supreme Court Commands*

One explanation for recalcitrance is psychological predisposition, not necessarily specific to cases involving race: no one likes to be wrong, and some people resist suggestions that they were wrong with more vigor than do others. It is worth noting

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<sup>156</sup> *Id.* (emphasis added).

<sup>157</sup> In contrast, Justice Kimball, joined by the Chief Justice Calogero, concluded that the "voir dire began against a backdrop of the issues of race and prejudice when the State made reference to the O.J. Simpson case," and that the prosecutor's pretrial assurances to the trial court "that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial . . . appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial." *Id.* at 501 (Kimball, J., dissenting). Justice Johnson simply stated that "[t]he prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments." *Id.* at 506 (Johnson, J., dissenting) (quoting *Snyder I*, 750 So. 2d at 866 (Johnson, J., dissenting)).

<sup>158</sup> *Id.* at 500 (Kimball, J., dissenting).



that for Judge Tjoflat, the author of *Hightower I* and *II*, the opinion, summary remand-adherence sequence, mirrored a similar sequence of opinions—Supreme Court summary remand-adherence to his prior decision in *Burden v. Zant*.<sup>159</sup> Only after a *second* remand from the Supreme Court,<sup>160</sup> this one with a per curiam opinion, did Judge Tjoflat decide that the “the terms of the [Supreme] Court’s most recent mandate compel our conclusion” that the petitioner’s counsel labored under a conflict of interest which mandated issuing the writ.<sup>161</sup>

Whether Tjoflat’s personality contributed to the recalcitrance shown in his second *Hightower* opinion is unknowable to the outsider, but the fact that Chief Judge Anderson, who joined Judge Tjoflat’s decision in *Hightower II* and also joined Tjoflat in the *Eleventh Circuit* opinion following the summary Supreme Court remand in *Burden*, certainly supports the inference that personality (or possibly the interaction between two personalities) plays a role in recalcitrance. On reflection, it would be surprising if it did not. Nonetheless, arrogance and/or stubbornness may not be the whole explanation, for it cannot explain the disinterest of the rest of the circuit in granting rehearing en banc. Moreover, no member of the Louisiana Supreme Court has any history of similar recalcitrance that I can discover. Thus, it is worth looking for additional or alternative explanations.

#### B. Predictable Resistance

“It blinks reality to deny that the [Texas prosecutor] struck Fields and Warren . . . because they were black,”<sup>162</sup> that the Georgia state prosecutor struck Thelma Butler, Ricky Thomas, and Emerson Davis because they were black, and it blinks reality to deny that a Louisiana prosecutor struck Jeffrey Brooks because he was black. Yet multiple courts have blinked these realities, and three of them did so contrary to the direct instruction of the Supreme Court of the United States. Why?

*Miller-El*, *Hightower*, and *Snyder* all stand at the intersection between two factors that may be particularly likely to increase resistance to Supreme Court rulings: race and capital punishment.<sup>163</sup> If we look at the history of resistance to Supreme Court commands, several notorious sequences involve race. President Andrew Jackson, when confronted with the Supreme Court’s decision in the Cherokee Indian cases, is said to have declared, “John Marshall has made his decision, now let him enforce it.”<sup>164</sup> Though commentators suspect that the comment may be apocryphal,<sup>165</sup> they

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<sup>159</sup> 975 F.2d 771 (11th Cir. 1992).

<sup>160</sup> *Burden v. Zant*, 510 U.S. 132 (1994).

<sup>161</sup> *Burden v. Zant*, 24 F.3d 1298, 1299 (11th Cir. 1994).

<sup>162</sup> *Miller-El II*, 545 U.S. at 266.

<sup>163</sup> This is not to say that other areas have not generated significant resistance; at least two come to mind; abortion, beginning with *Roe v. Wade*, 410 U.S. 113 (1973), and the school prayer decisions, beginning with *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), quickly come to mind.

<sup>164</sup> CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 178–79 (1996).

agree that it pretty much reflected Jackson's views.<sup>166</sup> *Scott v. Sanford*,<sup>167</sup> which held that the Missouri Compromise violated the Constitution and that no African Americans were citizens, is often decried as the worst decision in Supreme Court history, and at the time was the cause of great dissatisfaction with the judiciary; *Prigg v. Pennsylvania*,<sup>168</sup> which upheld the Fugitive Slave Act of 1793, and struck down a Pennsylvania law creating impediments to the recapture of slaves, was similarly decried. Certainly the most widespread, protracted, and violent resistance to the Supreme Court's power came in the aftermath of *Brown v. Board of Education*,<sup>169</sup> which declared that racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment. After widespread foot-dragging and intransigence from many school boards across the South, the Governor of Arkansas blocked an integration plan approved by the federal courts in pursuance of *Brown's* mandate. The Governor backed off for a brief time, but integration was again halted when the Little Rock School Board sought and was granted a long postponement of the desegregation plan. The court of appeals reversed, and in an opinion signed by all nine justices, the Supreme Court affirmed, rejecting Arkansas's contention that it was not bound by the *Brown* ruling since it had not been a party to the litigation. As the Court forcefully declared, "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land," which binds "[e]very state legislator and executive and judicial officer . . ."<sup>170</sup>

Thus, issues relating to race might be expected to have a greater potential for eliciting recalcitrance than do many other issues. In part this may be due to deeply rooted feelings about race, and in part it may be because old North-South antipathies often associated with racial issues may be called up when a justice from a Northern state prescribes racial relationships for a Southern court. Moreover, any such tendencies may be exacerbated with respect to *Batson* issues because reversing a trial court's finding of no discrimination requires both accusing a fellow lawyer of racist behavior, and accusing a fellow judge of failing—or refusing—to recognize such racist behavior.

Though the relationship is more speculative, and certainly less widely acknowledged, capital punishment may be another fulcrum for resistance. Certainly the Supreme Court's declaration in *Furman v. Georgia*<sup>171</sup> that capital punishment was unconstitutional did not meet with resignation. On the contrary, virtually every state rushed to reenact a new death penalty statute, hoping that the new one would be upheld. I do not mean to suggest that these new enactments constituted recalcitrance,

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> 60 U.S. 393 (1856).

<sup>168</sup> 41 U.S. 539 (1842).

<sup>169</sup> 347 U.S. 483 (1954).

<sup>170</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>171</sup> 408 U.S. 238 (1972).

but only that they reflected great attachment to the death penalty. Some courts have shown a special eagerness to play fast and loose with the facts to uphold a death sentence,<sup>172</sup> and one can easily imagine that the greater expense of a capital trial would make a court more reluctant to reverse a capital conviction.

#### IV. ELIMINATING RECALCITRANCE

Whether due to the convergence of race and capital punishment, or a special reluctance to accuse members of the bar of racially motivated behavior, and whether or not personality plays a role, viewing collectively the litigation trails in *Miller-El*, *Hightower*, and *Snyder* produces a consistent picture of insubordination—not open rebellion, but insidious insubordination.

##### A. Investing in Obedience

The first question is whether recalcitrance is worth the Supreme Court's time, or put more precisely, whether it is worth either second grants of certiorari or summary reversals. Because this Court does not view its job as simple error correction, the mere fact that *Hightower II* and *Snyder II* are *wrong* is an insufficient reason for the Supreme Court to take action, or even to take note. But the protection of Supreme Court authority is compelling, whether or not the cases themselves are worth the candle. Regardless of the political make-up of a Supreme Court, it cannot be pleased when lower courts flaunt its clear commands, and it might reasonably fear that recalcitrance, if uncorrected, may spread.

Moreover, each of these cases does have some independent significance, *Hightower* because it represents a second instance of recalcitrance by Judges Tjoflat and Anderson, and *Snyder* because the prosecutor's racially inflammatory summation argument was despicable, the more so since he appears to have planned the creation of an all-white jury to inflame. Letting the first slide would seem to signal increased tolerance for disobedience, and letting the second slide to signal indifference to premeditated bigotry.

##### B. Lessening Resistance

These two cases also offer an opportunity to consider how resistance to Supreme Court commands involving equal protection rights in jury selection might be lessened.

Justice Breyer's concurring opinion in *Miller-El II* examines the prevalence of race-based jury selection techniques and the ease of concealing race-based strikes, and concludes that the Supreme Court should seriously consider the elimination of the peremptory challenge. This concurrence echoes Justice Marshall's concerns, expressed when *Batson* was decided, that enforcement of the Equal Protection Clause

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<sup>172</sup> See Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases*, 91 CORNELL L. REV. 1105 (2006).

would be extraordinarily difficult, if not impossible. *Hightower* and *Snyder* add fuel to that fire.

But there are things short of eliminating peremptory challenges that could lessen resistance to the commands of *Batson* and its progeny. It is worth noticing that in *Miller-El* and *Hightower* the prosecutor proffered the *same* pretextual reason, offered multiple times in each case: that the African-American venireperson had relatives who had been criminally prosecuted. Why is this a popular pretext? The answer lies in both its availability and its consistency with racial stereotypes. Many, if not most, venirepersons will have some relative who has been prosecuted for some crime at some time, so it is generally an available reason. But it likely comes more quickly to the prosecutor's mind—and is more quickly accepted by the trial court—because it is consistent with stereotypes of black criminality. As social psychologists tell us, people remember stereotype-consistent information more readily than they do information that is not consistent with a stereotype; thus, a prosecutor, defense attorney, and judge are all more likely to remember when an African-American juror acknowledged that he or she has a family member with a criminal history than they are to remember when a white juror did so. This makes on-the-spot comparative juror analysis that would reveal pretext especially difficult.

What might the Court do in response to this problem? Just as it pointed out in *Miller-El II* that the jury shuffle could be used for racially discriminatory purposes, the Court could instruct lower courts that recitation of stereotypes about African Americans should be viewed with greater suspicion than citation of non-stereotyped characteristics or responses. Any time a prosecutor says that an African-American juror has a relative who is a criminal, or asserts that the juror is poorly educated or on welfare (or unstably employed), lives in a crime-prone neighborhood, is dumb, inarticulate, hostile, or radical, or opposes the death penalty, or mistrusts the police, to name a few, skepticism is warranted.

Or the Court might consider that it is difficult to make a finding that someone with whom you must sit down at the next bar luncheon is a racist—and a liar to boot. If the Court were to emphasize the frequency with which stereotyping is unconscious, it would be much easier for a trial judge to cite that language in determining that race had influenced the exercise of a prosecutor's peremptory challenge, even though he or she may have been unaware of that influence.

Either *Hightower* or *Snyder* might be a vehicle for one or more of these amendments to *Batson* law. If, however, the Supreme Court is unwilling to take any of these steps that might assure greater compliance with the Equal Protection Clause mandate of race neutrality in jury selection, legislatures should consider experimenting with them. For example, it may be that peremptory challenges could be eliminated without significant harm if the standard for challenges for cause were less demanding. But that is another article; right now the best hope for eliminating racially biased jury selection lies in the Supreme Court's commitment to the subject, a commitment it furthered in *Miller-El I*, insisted upon in *Miller-El II*, and should continue to pursue in *Hightower* and *Snyder*.

## V. CONCLUSION

Because insubordination can be more subtle when cloaked in judicial robes, judges are unlikely to resist Supreme Court instruction as boldly as have governors or presidents. But the child that sneaks out at night is no less disobedient than the one that stomps out in daylight. A good parent sleeps with one eye open, as must the Supreme Court. Recalcitrance should be sanctioned, and a second grant of certiorari in *Hightower* and *Snyder* would provide that sanction. But it should also be *examined*, especially when recalcitrance focusing on race is involved, so that both compliance and the monitoring of compliance are easier.

## POSTSCRIPT

Since this article was written, the Supreme Court has ruled upon both petitions for certiorari, denying Hightower's petition and granting Snyder's. Consequently, John Washington Hightower was executed by the state of Georgia. As an opponent of capital punishment and as a human being, I mourn his death, and remain convinced that the Supreme Court should have granted certiorari in both cases.

That said, for the reasons laid out in this article, I think it is important that the Court granted certiorari in at least one of the cases, both to correct the injustice done to Allen Snyder, and to remind other lower courts that recalcitrance is not free. Moreover, in trying to discern why the Court would grant certiorari in one, but deny it in the other, it should be noted that the discriminatory strikes made by Snyder's prosecutor were more egregious for two reasons than were the strikes by Hightower's prosecutor. First, as the sequence of repeated O.J. Simpson comments and the backstriking of the first black juror makes clear, Snyder's prosecutor did not strike black jurors due to unconscious stereotyping, but deliberately struck them on the basis of their race. Second, he struck those jurors on the basis of their race for a particularly heinous purpose: to facilitate the reception of his race-based argument in sentencing. Viewed in this light, *Hightower* was bad, but *Snyder* was worse.

Finally, the certiorari grant in *Snyder* offers the Court the possibility of elaborating its *Batson* jurisprudence, a possibility that is not present in most *Batson* cases that reach the Supreme Court (and would not have been present in *Hightower*) because most such cases are habeas cases; because *Snyder* is on direct review, the constraints of AEDPA—which generally limits relief in habeas cases to instances where the state court decision is contrary to or an unreasonable application of law *previously* clearly established by the Supreme Court—do not apply. One can hope the Court will take advantage of this opportunity so that lower court misunderstanding, as well as resistance, will be eradicated, or at least reduced.

