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Bell v. Ozmint 332 F.3d 229 (4th Cir. 2003)

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I. Facts

In the early hours of September 1, 1998, the principal of West Franklin Street Elementary School in Anderson, South Carolina, Dennis Hepler ("Hepler"), was found dead outside the school. He had been shot twice. Substantial evidence linked William Henry Bell ("Bell") to the murder. Police discovered Bell's fingerprints on Hepler's car, and neighborhood residents observed Bell in the vicinity of the murder on the night of August 31 with John Glen ("Glen") and Kevin Young ("Young").[1]

After police took him into custody, Bell offered four different statements. In his most damning statement, Bell admitted that he and Glen sought to remove the cassette player from Hepler's car that was parked outside the school. The two heard the school door open and hid behind a wall with Young. As Hepler emerged from the school, Young approached Hepler from behind and asked for his wallet. Hepler complied with Young's request, and Young then shot him in the back. The gun jammed. Bell took the gun from Young, unjammed it, and shot Hepler in the back of the head.[2]

The jury convicted Bell and recommended a death sentence; the trial judge sentenced Bell to death.[3] Bell exhausted his direct appeals.[4] He unsuccessfully sought relief in the state post-conviction relief ("PCR") court.[5] Bell sought a writ of habeas corpus in federal district court, but the court declined to grant habeas relief.[6] The district court did, however, grant a certificate of appealability ("COA") on each of his claims.[7] Bell appealed the district court's denial of habeas relief on the grounds that the district court applied the wrong standard of review to his habeas petition, erred by denying his application for an evidentiary hearing on juror impartiality, improperly denied his claim of prosecutorial

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1. State v. Bell, 406 S.E.2d 165, 167 (S.C. 1991).

2. *Id.*

3. Bell v. Ozmint, 332 F.3d 229, 231 (4th Cir. 2003).

4. *Bell*, 406 S.E.2d at 167; Bell v. South Carolina, 502 U.S. 1038, 1038 (1992) (mem.) (denying certiorari).

5. *Bell*, 332 F.3d at 232.

6. *Id.*

7. *Id.*; *see* 28 U.S.C. § 2253(c)(1) (2000) (allowing a circuit judge or justice to grant a certificate of appealability; part of AEDPA).

bias, and incorrectly denied his claim that the prosecution exercised a peremptory challenge in a racially biased fashion.[8]

II. Holding

The United States Court of Appeals for the Fourth Circuit denied relief on each of Bell's claims.[9] Because the PCR court's order amounted to an adjudication on the merits, the Fourth Circuit found that the district court correctly reviewed the PCR court's decision under 28 U.S.C. § 2254(d).[10] Next, the Fourth Circuit held that the PCR court's refusal to grant an evidentiary hearing on juror impartiality was not an unreasonable application of federal law because Bell produced no evidence that the jury was subjected to any improper influence.[11] The Fourth Circuit found that Bell's prosecutorial bias claim lacked sufficient evidence; therefore, it declined to grant relief on that claim.[12] Although the Fourth Circuit criticized the Supreme Court of South Carolina's analysis of Bell's *Batson* claim, it agreed that the claim was without merit.[13]

III. Analysis

A. Standard of Review

In the state PCR proceedings, after both parties submitted post-hearing briefs to the state PCR court, the PCR court invited both parties to submit proposed findings of fact and conclusions of law.[14] Bell declined to comply with the court's request, but the State submitted a proposed memorandum and order.[15] After careful scrutiny, the PCR court incorporated significant portions of the state's proposed order into its final judgment because of the proposed order's intelligent and complete analysis of the issues.[16]

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8. *Bell*, 332 F.3d at 232. Bell also argued that he was entitled to an evidentiary hearing on an alleged threatening phone call made to an African American juror's husband. *Id.* at 236. In addition, he claimed that his trial counsel was ineffective. *Id.* at 242. The Fourth Circuit declined to grant relief on either claim. *Id.* at 237, 244. Neither claim will be further discussed in this case note.

9. *Id.* at 231.

10. *Id.* at 234; *see* 28 U.S.C. § 2254(d)(1) (2000) (stating that a federal court may only grant habeas relief when a state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; part of AEDPA).

11. *Bell*, 332 F.3d at 236.

12. *Id.* at 239.

13. *Id.* at 241.

14. *Id.* at 233.

15. *Id.*

16. *Id.*

Bell argued that the district court should have made de novo findings of fact and law and that it therefore erred by applying 28 U.S.C. § 2254(d)'s deferential standard of review to the PCR court's findings.[17] Bell claimed that because the PCR court substantially adopted the state's proposed order in its final order, the PCR court failed to render a "decision within the meaning of Paragraphs (1) and (2) of § 2254(d)."[18] By its terms, § 2254(d) only applies to state court decisions.[19] Therefore, Bell reasoned, the district court erred by reviewing the state PCR court's result under § 2254(d) because it was not a "decision."[20]

The Fourth Circuit found the PCR court's reasoning less than ideal but noted that in *Young v. Catoe*[21] it had already determined that a state court's adoption of one party's proposed findings of fact constituted an adjudication on the merits to which the terms of § 2254(d) apply.[22] Bell sought to distinguish *Young* by contending that the petitioner in *Young* only challenged the district court's application of the standard of review found in § 2254(d)(1), while Bell claimed that the district court errantly applied the standards of review in § 2254(d)(1) *and* § 2254(d)(2) to his case.[23] The Fourth Circuit found that this distinction was without merit because *Young* actually involved a challenge to the district court's application of both prongs of the statute and the court in *Young* found that both were applied correctly.[24]

B. Impartial and Competent Jury

Bell argued that the PCR court should have held a hearing to determine whether a fair and competent jury, as guaranteed by the Sixth Amendment, decided his case.[25] Upon learning of allegations that the jurors in Bell's trial frequently drank alcohol with officers in the South Carolina Law Enforcement Division ("SLED") while sequestered, SLED investigated and issued a report on

17. *Bell*, 332 F.3d at 233; *see* 28 U.S.C. § 2254(d) (2000) (stating that a federal court may only grant habeas relief when a state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; part of AEDPA).

18. *Bell*, 332 F.3d at 233 (citations omitted).

19. 28 U.S.C. § 2254(d)(1)-(2) (limiting a federal court's ability to issue writs of habeas corpus with respect to state court decisions; part of AEDPA).

20. *Bell*, 332 F.3d at 233.

21. 205 F.3d 750 (4th Cir. 2000).

22. *Bell*, 332 F.3d at 233; *see* Young v. Catoe, 205 F.3d 750, 755 n.2 (4th Cir. 2000) (stating that if a state court adopts one party's proposed order in a proceeding, then such an action is a decision on the merits and § 2254(d) must be applied upon habeas review by a federal court).

23. *Bell*, 332 F.3d at 234.

24. *Id.*

25. *Id.*; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

those contentions.[26] Although the Supreme Court of South Carolina denied Bell's motion for a new trial based on that report, the PCR court allowed Bell to depose several jurors, alternates, SLED officers, and individuals present at the hotel bar during the times in question.[27] The resulting affidavits indicated that although the jurors and SLED officers drank together during the trial, the officers exerted no improper influence on the jurors.[28]

Under the South Carolina Rules of Evidence, a juror's testimony concerning an earlier verdict is limited to the question of "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[29] The PCR court found that none of the evidence Bell gathered relating to the jury indicated that the jurors were exposed to such an influence.[30] The PCR court then granted the State's motion to exclude the testimony regarding the juror's behavior while sequestered.[31]

The Fourth Circuit decided that the PCR court's declination to consider further evidence of juror impropriety was not contrary to federal law.[32] The court noted that South Carolina Rule of Evidence 606(b) is identical to Federal Rule of Evidence 606(b).[33] Furthermore, in *Tanner v United States*,[34] the Supreme Court decided that Federal Rule of Evidence 606(b) did not require a lower court to hold a hearing into allegations of drug and alcohol abuse during trial.[35] The Fourth Circuit noted that the allegations of juror incompetence in *Tanner*, ingesting drugs and alcohol which caused jurors to sleep during part of the trial, were much worse than those in Bell's case.[36] Therefore, the Fourth Circuit held that

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26. *Bell*, 332 F.3d at 234.

27. *Id.*

28. *Id.* at 235.

29. S.C. R. EVID. 606(b) (restricting juror testimony concerning a prior verdict to questions of extraneous prejudicial influence imposed on the jury).

30. *Bell*, 332 F.3d at 235.

31. *Id.*

32. *Id.* at 236. Like the district court, the Fourth Circuit applied § 2254(d)(1) when it decided Bell's application for a writ of habeas corpus. *Id.* at 234; *see* 28 U.S.C. § 2254(d)(1) (2000) (limiting a federal court's power to grant habeas relief to cases when the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"; part of AEDPA).

33. *Bell*, 332 F.3d at 235; *see* FED. R. EVID. 606(b) (stating "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror"); S.C. R. EVID. 606(b) (identical phrasing).

34. 483 U.S. 107 (1987).

35. *Bell*, 332 F.3d at 235; *see* Tanner v. United States, 483 U.S. 107, 125 (1987) (noting that legislative history strongly implied "juror intoxication is not an 'outside influence' about which jurors may testify to impeach their verdict").

36. *Bell*, 332 F.3d at 235–36 (citing *Tanner*, 483 U.S. at 115–16).

the state PCR court had not unreasonably applied federal law in declining to consider further evidence on Bell's claim regarding the jury because federal law only required such a hearing upon a showing of a prejudicial outside influence.[37]

C. *Prosecutorial Bias*

Bell argued that the prosecutor who elected to seek the death penalty, George Ducworth ("Ducworth"), did so out of racial prejudice.[38] Bell asserted that this decision violated his right to equal protection under the Fourteenth Amendment.[39] Bell based his claim on a study by Professor Theodore Eisenberg ("Eisenberg").[40] The study showed that between 1979 and 1989 prosecutors in Anderson County sought the death penalty in 66.7% of murder cases in which the defendant was African American and the victim white, but that the same prosecutors sought the death penalty in only 8% of cases involving other racial combinations.[41] Bell was an African American, his victim was white, and the trial took place in Anderson County.[42]

The Fourth Circuit relied on the United States Supreme Court's decision in *McCleskey v. Kemp*,[43] in which the Court reiterated that an equal protection claim must contain a showing of discriminatory intent and acknowledged that it had previously found that statistics provided evidence of such intent in limited contexts.[44] In *McCleskey*, however, the Supreme Court indicated its unwillingness

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37. *Id.* at 236. Apparently, Bell did not seek relief on Sixth Amendment grounds but only sought an evidentiary hearing to develop the basis of those claims. *Id.* at 234–35.

38. *Id.* at 238.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Bell*, 332 F.3d at 238.

43. 481 U.S. 279 (1987).

44. *Bell*, 332 F.3d at 237 (citing McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987)); *see McCleskey*, 481 U.S. at 292–93 (requiring a defendant to show discriminatory intent to prove an equal protection violation and noting that, in the past, the Court found that statistics proved such an intent). In *McCleskey*, the Court required that a defendant alleging an equal protection violation prove purposeful discrimination and conceded that "[t]he Court has accepted statistics as proof of intent to discriminate in certain limited contexts." *McCleskey*, 481 U.S. at 293. As a corollary to proving discriminatory intent, the Court also found that a defendant needed to demonstrate a discriminatory effect. *Id.* at 292; *see also* United States v. Bass, 536 U.S. 862, 863–64 (2002) (per curiam) (rejecting defendant's contention that a nationwide study showing United States Attorneys sought the death penalty against African American defendants more frequently than white defendants indicated selective prosecution because the study did not investigate equally situated defendants and therefore could not prove a discriminatory effect); United States v. Armstrong, 517 U.S. 456, 465 (1996) (requiring a defendant to show policy had discriminatory intent and effect to support selective prosecution claim under Equal Protection Clause). For a complete discussion of *Bass*, see generally Kristen F. Grunewald, 15 CAP. DEF. J. 161 (2002) (analyzing United States v. Bass, 122 S. Ct. 2389 (2002)).

to use statistics to establish discriminatory intent in death sentence decisions because such statistics cannot reflect the complexity of those decisions.[45] The Court noted that such decisions are made by juries composed of vastly different makeups from one trial to the next.[46] Further, jury decisions rest on numerous and varied factors and are not susceptible to subsequent inquiry because juries are under no obligation to reveal the content of their deliberations.[47] Moreover, such decisions begin with the choice of the prosecutor to seek the death penalty years before any court inquires into discriminatory intent.[48] Therefore, the Court was unwilling to find that statistics indicated bias in a state's prior decisions to seek the death penalty absent "exceptionally clear proof."[49]

In *McCleskey*, the Court also cited approvingly the Fourth Circuit's prior decision in *Shaw v. Martin*.[50] In *Shaw*, the Fourth Circuit found that a study indicating that South Carolina was more likely to seek the death penalty if the victim was white than if the victim was African American did not constitute proof of discrimination.[51] The study was inadequate because it included cases in which the prosecutor could not seek the death penalty for lack of statutory aggravating circumstances, it did not account for the relative atrocity of the underlying facts in the cases, and it failed to account for other elements of prosecutorial discretion.[52]

The PCR court found that Eisenberg's study was flawed under *McCleskey* and *Shaw* because it did not consider aggravating and mitigating circumstances, it did not consider other factors that might influence a prosecutor's charging decision, and it included years prior to Ducworth's election.[53] Moreover, the PCR court found that even if the study did create a prima facie showing of an equal protection violation, such a showing was rebutted by Ducworth's testimony.[54] Ducworth explained that he charged Bell with capital murder because of the strength of the evidence against him, the nature of the aggravating circum-

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45. *McCleskey*, 481 U.S. at 294–97.

46. *Id.* at 294.

47. *Id.* at 296.

48. *Id.*

49. *Id.* at 297.

50. *Id.* at 292 n.9; *see* Shaw v. Martin, 733 F.2d 304, 312, 314 (4th Cir. 1984) (deciding that evidence that showed defendants in South Carolina received a death sentence more frequently when the victim was white than when the victim was African American was insufficient to establish an equal protection claim).

51. *Shaw*, 733 F.2d at 314.

52. *Id.* at 312–13.

53. *Bell*, 332 F.3d at 239 & n.4.

54. *Id.*

stances, the part Bell played in the murder, and the wishes of the victim's survivors.[55]

The Fourth Circuit agreed with the PCR court that Eisenberg's study failed to meet the high standard required of statistical evidence to show an Equal Protection Clause violation in the application of a state death penalty statute.[56] The Fourth Circuit acknowledged that *McCleskey* and *Shaw* concerned studies that sought to show defendants were unequally sentenced under a death penalty statute across a state, while Eisenberg's study only focused on prosecutor's decisions to charge a defendant in a particular county.[57] Nonetheless, the Fourth Circuit decided that the PCR court reasonably applied federal law when it relied on those cases due to the deficiencies in the study and Ducworth's sufficient explanation of his decision.[58]

D. Batson *Challenge*

Bell contended that the State used a peremptory strike on an African American juror solely because of her race in violation of *Batson v Kentucky*.[59] *Batson* requires a court to undergo a three-step analysis to determine if a prosecutor used peremptory strikes for discriminatory reasons.[60] First, the defendant must make a prima facie showing that the prosecution used its peremptory challenges to remove a potential juror based on race.[61] Second, the prosecution must then provide a race-neutral explanation for its strikes.[62] Finally, the judge must "determine if the defendant has established purposeful discrimination."[63]

During Bell's trial, one African American juror gave vacillating responses to questions concerning her ability to apply the death penalty.[64] These responses were similar to an unchallenged white juror's responses.[65] Bell argued that the prosecution's peremptory challenge of the African American juror indicated a

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55. *Id.*

56. *Id.*

57. *Id.* at 239 n.4.

58. *Id.* at 239.

59. *Bell*, 332 F.3d at 239; *see* Batson v. Kentucky, 476 U.S. 79, 92–95 (1986) (prohibiting a state from exercising peremptory challenges in a racially discriminatory manner and allowing a defendant to show discriminatory intent on the part of the prosecution from the circumstances surrounding jury selection in defendant's case without referencing prior practice of the prosecution).

60. *Bell*, 332 F.3d at 239.

61. *Batson*, 476 U.S. at 96. *Batson* has been greatly expanded in its application. *See* J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) (holding that *Batson* forbids gender-based peremptory strikes).

62. *Batson*, 476 U.S. at 97.

63. *Id.* at 98.

64. *Bell*, 332 F.3d at 240–41.

65. *Id.*

discriminatory intent.[66] On direct appeal, the Supreme Court of South Carolina held that vacillating responses to death penalty questions would support the use of a peremptory challenge and thereby rebut a *Batson* claim.[67] Apparently, the Supreme Court of South Carolina entirely failed to compare the two juror's responses.[68] In light of the recent United States Supreme Court decision in *Miller-El v Cockrell*,[69] the Fourth Circuit found the Supreme Court of South Carolina's reasoning erroneous.[70] In *Miller-El*, the Supreme Court employed a comparative juror analysis in determining the persuasiveness of a prosecutor's race-neutral explanation of his peremptory strikes.[71] Therefore, to the extent the Supreme Court of South Carolina's decision did not compare the two jurors, the Fourth Circuit found it contrary to federal law.[72] However, the Fourth Circuit noted that the Supreme Court of South Carolina also found no *Batson* violation because the challenged juror indicated that due to her children, who were approximately Bell's age, she might have difficulty voting for death, whereas the seated juror did not have similarly aged children.[73] The Fourth Circuit found this distinction between the jurors provided a sufficient reason to deny a *Batson* claim under federal law.[74]

IV. Application in Virginia

A. Miller-El

Bell provided the Fourth Circuit with its first opportunity to examine *Batson* claims under the new framework of *Miller-El*. The Fourth Circuit noted that *Miller-El* allows a defendant to use comparative juror analysis to rebut a prosecutor's race neutral reasons for the use of peremptory strikes.[75] The Fourth Circuit's application of comparative juror analysis was, however, extremely limited because jurors who gave nearly identical answers in voir dire could be excluded because of different backgrounds.[76] Therefore, while the Fourth Circuit acknowledged the importance of comparative juror analysis in *Bell*, it did so in a

66. *Id.*

67. *Id.* at 241.

68. *Id.* Because the prosecutor offered race neutral reasons for his exercise of peremptory challenges, the court proceeded to the third prong of the analysis. *Id.*

69. 537 U.S. 322 (2003).

70. *Bell*, 332 F.3d at 241; *see* Miller-El v. Cockrell, 537 U.S. 322, 343 (2003) (employing comparative analysis between jurors in determining whether prosecutor struck juror for discriminatory reasons).

71. *Miller-El*, 537 U.S. at 343.

72. *Bell*, 332 F.3d at 241.

73. *Id.* at 241–42.

74. *Id.* at 241.

75. *See id.* (citing *Miller-El*, 537 U.S. at 343).

76. *Id.* at 241–42.

manner which is likely to be of little practical use given the scores of differences between individuals which might justify striking one but not the other, i.e. education, profession, experience and age.

The Fourth Circuit misinterpreted another important aspect of the *Miller-El* holding. *Miller-El* arose from a unique procedural history in which the petitioner first challenged the prosecution's use of peremptory strikes under the pre-*Batson* standard of *Swain v. Alabama*.[77] *Swain* required a defendant to prove that a prosecutor exercised peremptory strikes in a discriminatory manner over a period of time prior to the defendant's trial to prove an equal protection violation.[78] *Batson*, however, allowed a defendant to base such an equal protection claim on the prosecutor's behavior during voir dire in the defendant's trial, regardless of the prosecutor's prior history.[79] *Miller-El*, when it reached the Supreme Court, included both *Swain* and *Batson* evidence.[80] The Court in *Miller-El* undertook a standard *Batson* analysis but also considered the *Swain* evidence in the third part of the *Batson* analysis.[81] Bell produced *Swain* evidence in the form of a study by Dr. William Jacoby indicating that Ducworth's office historically struck a greater percentage of eligible potential African American jurors than potential white jurors.[82] The Fourth Circuit decided that the state PCR court did not unreasonably decide that the statistics could only help Bell establish a rebuttable prima facie case of discriminatory use of the strikes.[83] Such a holding clearly misinterprets the import of *Miller-El*, for the state PCR court should have considered the evidence not as creating a rebuttable presumption, but as evidence to be weighed against the prosecutor's explanations in the third step of the *Batson* analysis.

The most frustrating aspect of *Batson* has been the extreme difficulty a defendant faces in succeeding in the third step of the *Batson* analysis.[84] Perhaps

77. *Miller-El*, 537 U.S. at 328; *see* Swain v. Alabama, 380 U.S. 202, 227 (1965) (holding that to prove an equal protection violation petitioner must "show the prosecutor's systematic use of peremptory challenges against [blacks] over a period of time").

78. *See Swain*, 380 U.S. at 227 (stating that a petitioner must reference a prosecutor's "systemic use of peremptory challenges against [blacks] over a period of time" to prove an equal protection violation).

79. *See Batson*, 476 U.S. at 92–94 (allowing defendant to prove discriminatory intent behind use of peremptory strikes by prosecutor from the circumstances surrounding the jury selection in defendant's case without referencing the prior practice of the prosecution).

80. *Miller-El*, 537 U.S. at 328–31.

81. *See id.* at 338 (stating that "the question remaining is step three [of the *Batson* analysis]"). The Court also stated that "[f]inally, in our threshold examination, we accord some weight to petitioner's historical [*Swain*] evidence of racial discrimination by the District Attorney's Office." *Id.* at 346.

82. *Bell*, 332 F.3d at 242 n.8.

83. *Id.*

84. In the reported cases, the prosecutor's race neutral reasons for exercising the peremptory strike are almost always accepted. *E.g.*, Barksdale v. Commonwealth, 438 S.E.2d 761, 764 (Va. Ct. App. 1993) (crediting prosecutor's explanation of "looking for younger people"); Winfield v.

the greatest lesson to draw from *Bell* and *Miller-El* is the importance of creating data on the manner in which the prosecution exercises its peremptory strikes and questions venire members during voir dire, both in the immediate trial and over an extended period of time.[85] *Miller-El* makes clear that both forms of evidence can be used in the third step of the *Batson* analysis.[86] Whereas Bell mainly relied unsuccessfully on comparative juror analysis in his *Batson* claim, Miller-El produced detailed data of the prosecution's behavior during voir dire with considerable success.[87] Therefore, such data appears to provide defense counsel with the greatest hope of presenting a successful *Batson* challenge.

Moreover, *Miller-El* indicates that if regularly kept on a single prosecutor or prosecutor's office over a long period of time, such data may have cumulative value as *Swain* evidence in the third part of the *Batson* analysis. Although *Bell* implies that the Fourth Circuit is presently unwilling to consider historical evidence in the third part of the *Batson* analysis, this practice directly contradicts the Supreme Court's reasoning in *Miller-El*. As a result, historical evidence will probably be considered in the third part of the *Batson* analysis by courts in the Fourth Circuit in the near future. Thus, counsel should consider assigning a member of the defense team to take detailed notes of the prosecution's use of peremptory challenges and questioning of venire members during jury selection and exchange such statistics with other defense counsel regarding individual prosecutors and prosecutor's offices.

Commonwealth, 421 S.E.2d 468, 469, 471–72 (Va. Ct. App. 1992) (en banc) (Benton, J., dissenting) (finding no *Batson* violation when prosecution explained pattern of strikes on assumed basis of lack of education).

85. *See generally* Priya Nath, Case Note, 15 CAP. DEF. J. 407 (2003) (analyzing Miller-El v. Cockrell, 123 S. Ct. 1029 (2003)).

86. *See supra* note 81 and accompanying text.

87. *See Miller-El*, 537 U.S. at 331–33. Miller-El produced considerable *Batson* evidence. *Id.* He showed that peremptory strikes were used against 91% of African Americans eligible to serve on the petit jury but against only 13% of non-African Americans eligible to serve on the petit jury. *Id.* at 331. Furthermore, his statistics showed a dramatic disparity in the manner in which the prosecutor questioned African American and white jurors during voir dire. *Id.* at 332. Before asking 53% of prospective African American jurors whether they could vote for a death sentence, the prosecutor recounted a detailed description of a state execution. *Id.* In contrast, only 6% of white jurors were given such a description before being asked a similar question. *Id.* Furthermore, the prosecutor informed 94% of white venire members of the minimum sentence under applicable state law before asking them whether they felt they could apply it if they found the petitioner guilty. *Id.* at 333. The prosecutor provided the minimum statutory sentence to only 12.5% of the prospective African American jurors before asking them the same question. *Id.* The Court, impressed with the statistics, noted that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Id.* at 342.

B. Selective Prosecution

Bell also shows the substantial difficulties a petitioner will face in using statistical studies to prove discriminatory intent in a prosecutor's charging decisions. The Fourth Circuit's treatment of Eisenberg's study indicates the near impossibility of proving discriminatory selective prosecution through a study. First, the court criticized the study for including years during that Ducworth was not the district attorney.[88] Next, the court found the study unpersuasive because it failed to compare murders of similar aggravating and mitigating circumstances and did not account for other factors which may influence prosecutorial discretion.[89] Consequently, defendants will have a difficult time compiling statistics sufficient to show discrimination in prosecutorial charging decisions because comparing murders of similar aggravating circumstances is a highly subjective and uncertain task. Is a murder committed after a rape comparable to a triple shotgun slaying? Or is a murder during a convenience store robbery comparable to an individual hiring an assassin to kill his or her spouse? Because so few murders are actually comparable and the Fourth Circuit seems to prefer that a study deal with a single prosecutor's office during a single head prosecutor's tenure, defendants will not likely be able to compile a large enough data sample on this topic to create meaningful statistics. Therefore, defendants will be hard pressed to compile a study the Fourth Circuit would find persuasive under *McCleskey*, *Shaw* and *Bell*.

C. Jury Issues

Finally, the Fourth Circuit rejected Bell's argument that he was entitled to an evidentiary hearing to support his claim that his right to a fair and impartial jury was violated.[90] The Fourth Circuit did so on the ground that the applicable state and federal rules of evidence, as interpreted by the United States Supreme Court, allowed juror testimony to impeach a prior verdict only on a showing that an outside influence corrupted the verdict.[91] In Virginia, the rule allowing juror testimony which impeaches a verdict is slightly different because the Supreme Court of Virginia has declined to adopt the Federal Rules of Evidence.[92] "Generally, [Virginia courts] have limited findings of prejudicial juror misconduct to

88. *Bell*, 332 F.3d at 238.

89. *Id.*

90. *Id.* at 237.

91. *Id.*; *see* Fullwood v. Lee, 290 F.3d 663, 682–83 (4th Cir. 2002) (granting evidentiary hearing to a defendant who showed juror's husband influenced her to vote for death and that the jury found out about defendant's prior trial and death sentence); Priya Nath, Case Note, 15 CAP. DEF. J. 189 (2002) (analyzing Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002)).

92. *See* Jenkins v. Commonwealth, 471 S.E.2d 785, 796 (Va. Ct. App. 1996) (Benton, J., dissenting) ("The Supreme Court of Virginia, however, has not adopted the Federal Rules of Evidence as rules of evidence in Virginia.").

activities of jurors that occur outside the jury room."[93] Applying this rule, Virginia courts have frequently declined to delve into allegations of improper jury deliberations because the misconduct occurred inside the jury room.[94] However, some Virginia courts have also required an evidentiary hearing upon allegations that the jury was exposed to some type of prejudicial information.[95] Therefore, the rule in Virginia is much broader than the rule applied in *Bell*, as a Virginia trial court should investigate allegations that the jurors were exposed to some type of prejudicial information or that juror misconduct occurred outside the courtroom. Had Bell's trial occurred in Virginia, the court might have granted Bell's request for an evidentiary hearing concerning the alleged juror misconduct because it clearly took place outside the jury room. Counsel with a similarly situated defendant should also seek to find some type of prejudicial information or influence that was brought to bear on the jury to bring the claim under both parts of the Virginia common law rule and further increase the chances of obtaining the evidentiary hearing.

V. Conclusion

The most important aspect of this case is its application to *Batson* claims in the wake of *Miller-El*. The third step of the *Batson* analysis has long been a haven in which prosecutors' explanations for prima facie showings of discrimination have gone unchallenged. After *Miller-El* this haven may be breached, but *Bell* implies it will not be done through comparative juror analysis alone. Rather, counsel must increase the odds of success by seeking to compile and use statistics of the prosecutor's behavior during voir dire, and, if available, similar statistics from prior cases, to rebut the prosecution's explanations in the third part of the *Batson* analysis.

Maxwell C. Smith

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93. Caterpillar Tractor Co. v. Hulvey, 353 S.E.2d 747, 751 (Va. 1987); *see* Kasi v. Commonwealth, 508 S.E.2d 57, 67 (Va. 1998) (allowing jurors only to testify about prejudicial juror misconduct that occurred outside of the jury room); Jenkins v. Commonwealth, 423 S.E.2d 360, 370 (Va. 1992) (same).

94. *See Kasi*, 508 S.E.2d at 67 (refusing to investigate contentions that jurors considered defendant a terrorist during deliberations, despite judge's explicit orders to parties to not refer to defendant as a terrorist, because those statements occurred within the jury room); *Jenkins*, 423 S.E.2d at 370 (declining to investigate allegations that jury improperly considered defendant's parole eligibility during deliberations because such conduct occurred within the jury room); *Caterpillar*, 353 S.E.2d at 751–52 (deciding trial court improperly found civil jury tainted when juror read magazine article disparaging high jury verdicts in civil cases during deliberations because it happened in the jury room and did not involve facts directly related to the trial).

95. *See* Harris v. Commonwealth, 408 S.E.2d 599, 601–02 (Va. Ct. App. 1991) (holding that trial court should have inquired into jury proceedings upon production of evidence that juror, who was associated with department of corrections, explained parole system to jury); Evans-Smith v. Commonwealth, 361 S.E.2d 436, 447–48 (Va. Ct. App. 1987) (holding that trial court should have examined whether juror's consultation of an almanac that was not in evidence prejudiced the jury).