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Miller-El v. Cockrell 123 S. Ct. 1029 (2003)

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I. Facts

Thomas Joe Miller-El ("Miller-El"), his wife and a friend, Kenneth Flowers ("Flowers"), robbed a Holiday Inn in Dallas, Texas. The three individuals took all of the money out of the cash registers and told two employees, Doug Walker ("Walker") and Donald Hall ("Hall"), to lie on the floor. Miller-El, his wife and Flowers gagged Walker and Hall and bound their hands and feet. Miller-El asked Flowers whether he would kill Walker and Hall. When Flowers hesitated, Miller-El shot Walker in the back twice and shot Hall in the side of his body. Subsequently, Walker died from his wounds.[1]

The State indicted Miller-El for capital murder.[2] Miller-El pleaded not guilty and during the early part of 1986, jury selection took place.[3] After voir dire concluded, Miller-El moved to strike the jury on the grounds that the prosecution's exclusion of African-Americans through the use of peremptory challenges violated the Equal Protection Clause of the Fourteenth Amendment.[4] Miller-El's trial preceded the United States Supreme Court's decision in *Batson v. Kentucky*,[5] thus *Swain v. Alabama*[6] was the controlling precedent.[7] In accordance with *Swain*, Miller-El sought to demonstrate that the Dallas County prosecutors conduct was "part of a larger pattern of discrimination" that excluded African-Americans from jury service.[8]

Miller-El presented evidence in support of his motion at a pre-trial hearing held on March 12, 1986.[9] The trial judge determined that the evidence did not "indicate[] any systematic exclusion of blacks as a matter of policy by the District

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1. Miller-El v. Cockrell, 123 S. Ct. 1029, 1034-35 (2003).
2. *Id.* at 1035.
3. *Id.*
4. *Id.*
5. 476 U.S. 79 (1986).
6. 380 U.S. 202 (1965).
7. *Miller-El*, 123 S. Ct. at 1035. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986) (establishing a three-pronged test for evaluating claims that the prosecutor excluded members of the defendant's race from the jury venire on account of race); Swain v. Alabama, 380 U.S. 202 (1965) (requiring that evidence demonstrate that prosecution's conduct was part of a larger pattern of discrimination).
8. *Miller-El*, 123 S. Ct. at 1035.
9. *Id.*

Attorney's office."[10] The judge acknowledged that exclusion of African Americans might have been committed by individual prosecutors.[11] The state court denied Miller-El's motion to strike the jury.[12] The jury found Miller-El guilty and the court sentenced him to death.[13]

II. Post-Conviction Proceedings

Miller-El appealed to the Texas Court of Criminal Appeals.[14] While his appeal was pending, the Supreme Court decided *Batson*. *Batson* established a three-part test for evaluating claims that a prosecutor's use of peremptory challenges violates the Equal Protection Clause.[15] According to *Batson*, the defendant must first make a prima facie showing that a peremptory challenge was exercised on the basis of race.[16] Second, if the defendant makes such a showing, the prosecutor must offer a race-neutral explanation for striking a particular juror.[17] Finally, based on these submissions, the trial court must determine whether the defendant has demonstrated purposeful discrimination.[18]

The Court of Criminal Appeals remanded Miller-El's case in light of *Batson*.[19] A post-trial hearing was held two years after Miller-El's jury was empaneled.[20] The original trial court conducted the *Batson* hearing. It allowed all of the evidence presented at the *Swain* hearing and admitted "further evidence and testimony from the attorneys in the original trial."[21] The trial court decided that Miller-El failed to satisfy the first step of *Batson* because Miller-El's evidence did not raise an inference of racial motivation to support a prima facie case.[22] Additionally, the trial court stated that the State would have prevailed on steps two and three because the prosecutors offered race-neutral explanations for striking the African-American jurors, which included that these jurors displayed reservations about the imposition of the death penalty.[23] The trial court did not discuss Miller-El's other evidence.[24] The Texas Court of Criminal Appeals denied Miller-

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Miller-El*, 123 S. Ct. at 1035.
15. *Batson*, 476 U.S. at 96-98; *see Miller-El*, 123 S. Ct. at 1035.
16. *Batson*, 476 U.S. at 96-98.
17. *Id.*
18. *Id.*
19. *Miller-El*, 123 S. Ct. at 1035.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

El's appeal and the Supreme Court denied certiorari.[25] The Texas Court of Criminal Appeals also denied Miller-El's later state habeas corpus petition.[26]

III. Federal Proceedings

A. District Court

Miller-El filed a petition for a writ of habeas corpus raising his *Batson* claim in federal district court. Miller-El's evidence included the original *Swain* evidence, testimony and an analysis of the jury selection that took place in his case.[27] The United States Magistrate Judge considered the merits of the case and found some of the evidence troubling.[28] Nonetheless, he deferred to the state court's factual findings and recommended that Miller-El be denied relief. The United States District Court adopted the recommendation.[29] Pursuant to 28 U.S.C. § 2253, Miller-El sought a certificate of appealability ("COA") from the District Court, and it was denied.[30] Miller-El then requested a COA from the United States Court of Appeals for the Fifth Circuit; this request also was denied.[31]

B. The Fifth Circuit

The Fifth Circuit recited the § 2253 standard that a COA will only issue " 'if the applicant has made a substantial showing of the denial of a constitutional right.' "[32] The Fifth Circuit added that when an appellate court reviews a habeas petition, the court is bound by 28 U.S.C. § 2254(d)(2) to presume the state court factual findings are correct unless it is determined that the state court "findings result in a decision which is unreasonable in light of the evidence presented."[33] "[T]he unreasonableness, if any, must be established by clear and convincing evidence."[34] Pursuant to this framework, the Fifth Circuit found the state court's decision not unreasonable and that Miller-El did not present clear and convincing evidence to the contrary.[35] The court denied Miller-El's request for a COA.[36]

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25. *Miller-El*, 123 S. Ct. at 1035-36; Miller-El v. Texas, 510 U.S. 831 (1993).

26. *Miller-El*, 123 S. Ct. at 1036; Ex Parte Miller-El, No. 31, 001-01 (Tex. Crim. App. 1996).

27. *Miller-El*, 123 S. Ct. at 1036.

28. *Id.*

29. *Id.*

30. *Id.*; *see* 28 U.S.C. § 2253(b) (2000) (stating that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals").

31. *Miller-El*, 123 S. Ct. at 1036.

32. *Id.* (quoting Miller-El v. Johnson, 261 F.3d 445, 449 (5th Cir. 2001) (quoting 28 U.S.C. § 2253(c)(2) (2000))).

33. *Id.*

34. *Id.*; *see* 28 U.S.C. § 2254(e)(1) (2000) (stating that, in a proceeding instituted by an individual seeking a writ of habeas corpus, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence").

35. *Miller-El*, 123 S. Ct. at 1036. The "clear and convincing evidence" language is from §

IV. The Supreme Court's Opinion

The Supreme Court noted that according to federal statute, a state prisoner seeking a writ of habeas corpus does not have an absolute entitlement to appeal a district court's denial of his petition.[37] The Court stated that a petitioner "must first seek and obtain a COA from a circuit justice or judge."[38] This jurisdictional prerequisite exists because § 2253(c)(1) mandates that an appeal may be taken to the court of appeals only if "a circuit justice or judge issues a certificate of appealability."[39] Unless a COA is issued, that is, unless the requirements of § 2253 are satisfied, federal courts of appeals lack jurisdiction to rule on the merits of an appeal.[40]

Section 2253 allows for an issuance of a COA only when a petitioner makes a "substantial showing of the denial of a constitutional right."[41] In *Slack v. McDaniel*,[42] the Supreme Court held that § 2253 codified the Court's standard, announced in *Barefoot v. Estelle*,[43] for ascertaining what constitutes the required showing.[44] Under the standard, the petitioner must "demonstrate that the issues are debatable among jurists of reason; or that the questions are 'adequate to deserve encouragement to proceed further.' "[45]

The Court noted that the trial court's decision on the ultimate question of the prosecutor's discriminatory intent represents a finding of fact that is given great deference and will be overturned only if it is clearly erroneous.[46] According to § 2254(e)(1), absent clear and convincing evidence to the contrary, factual determinations made by state courts are presumed to be correct.[47] The Court stated that if § 2254 applies, then § 2254(e)(1) deference must be granted to state court fact-finding.[48] Additionally, the Court stated that if an issue is adjudicated

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2254(e)(1), rather than 28 U.S.C. § 2254(d)(2) (2000). *Id.*

36. *Miller-El*, 123 S. Ct. at 1036; § 2254(e)(1).

37. *Miller-El* at 1039; 28 U.S.C. § 2253 (2000) (discussing the process and circumstances under which a defendant may obtain an appeal).

38. *Miller-El*, 123 S. Ct. at 1039.

39. § 2253(c)(1).

40. *Miller-El*, 123 S. Ct. at 1039.

41. § 2253(c)(2).

42. 529 U.S. 473 (2000).

43. 463 U.S. 880 (1983).

44. *Miller-El*, 123 S. Ct. at 1039; Slack v. McDaniel, 529 U.S. 473, 483-85 (2000) (holding that when a habeas applicant seeks permission to initiate appellate review, the court of appeals should engage in a threshold inquiry into the underlying merit of his claims); Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (defining the requirements for the "substantial showing" standard).

45. *Barefoot*, 463 U.S. at 893 n.4 (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. (1980)).

46. *Miller-El*, 123 S. Ct. at 1041.

47. *Id.*; § 2254(e)(1).

48. *Miller-El*, 123 S. Ct. at 1041; *see* § 2254(e)(1) (granting deference to state court finding).

on the merits and based on a factual determination in a state court, it will not be overturned on factual grounds unless it is unreasonable in light of the evidence presented in the state-court proceeding.[49]

Miller-El was not seeking a determination on the merits.[50] Rather, he was seeking a COA.[51] The controlling statute is § 2253.[52] The Fifth Circuit erred in three ways. First, it applied § 2254, "which it interpreted as requiring . . . [Miller-El] to prove that the state court decision was objectively unreasonable by clear and convincing evidence."[53] Second, it merged § 2254(d)(2) and (e)(1) to require clear and convincing evidence that the state court *decision* was unreasonable.[54] The clear and convincing evidence standard of § 2254(e)(1) pertains to state *factual findings*; it does not apply to state *decisions*.[55] Finally, because a COA had not been granted, the Fifth Circuit was without jurisdiction to apply § 2254 to make a decision on the merits.[56]

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.[57]

An examination of the district court's application of AEDPA includes an examination of the district court's application of AEDPA deference.[58] The Court

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Even if the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") warrants analysis, a defendant need not prove by clear and convincing evidence that the state court *decision* was incorrect; rather § 2254(e)(1) requires the defendant to prove by clear and convincing evidence that the state court *determination of fact* was incorrect. *See* § 2254(e)(1).

49. *Miller-El*, 123 S. Ct. at 1041; *see* 28 U.S.C. § 2254(d)(2) (2000) (stating that if an adjudication of the claim resulted in a decision based on an "unreasonable determination of the facts in light of the evidence presented" in state court, then an application for a writ of habeas corpus shall be granted). In § 2254(d) cases, the question is whether it is debatable among jurists of reason that the district court's resolution of the "contrary to"/"unreasonable application of" standards was correct. *See* 28 U.S.C. § 2254(d)(1) (2000) (stating that a writ of habeas corpus pursuant to a state court decision can only be granted if the state court decision was contrary to or an unreasonable application of clearly established federal law; part of AEDPA).

50. *See Miller-El*, 123 S. Ct. at 1036 (stating that Miller-El sought a COA).

51. *Id.*

52. *Id.*

53. *Id.* at 1042.

54. *Id.*

55. *Id.*; *see* § 2254(e)(1).

56. *Miller-El*, 123 S. Ct. at 1042.

57. *Id.* at 1039.

58. *Id.* at 1041.

"only ask[ed] whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and (e)(1), to petitioner's *Batson* claim was debatable amongst jurists of reason."[59] Therefore, a judge deciding whether to grant or deny a COA must ask the following question: is it debatable among jurists of reason that the district court, applying § 2254(e)(1) deference in making its § 2254(d)(2) unreasonable determination of fact decision, reached the correct conclusion?[60] Applying this standard, the Supreme Court held that the COA should have been issued.[61]

V. The Batson *Issue*

In *Batson*, the Supreme Court established a three-part process to evaluate whether a prosecutor's peremptory challenges violate the Equal Protection Clause.[62] The State conceded that Miller-El satisfied step one of the *Batson* analysis by presenting a prima facie case.[63] With regard to step two, Miller-El acknowledged that the State presented race-neutral explanations for the peremptory strikes.[64]

The question that remained was step three: whether Miller-El carried the burden of proving purposeful discrimination by the prosecution.[65] To determine whether purposeful discrimination took place, an examination into the persuasiveness of the prosecutor's justification for his peremptory strikes is necessary.[66] The trial court must determine whether the prosecutor's race-neutral explanations are credible.[67] The Court explained that credibility is measured by the "prosecutor's demeanor; by how reasonable, or how improbable, the explanations . . . [were]; and by whether the proffered rationale has some basis in accepted trial strategy."[68]

The Court found that the Fifth Circuit should have inquired into whether a "substantial showing of the denial of a constitutional right" was proven.[69] "The question is the debatability of the underlying constitutional claim, not the resolu-

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59. *Id.* at 1041-42.

60. *Id.*

61. *Id.* at 1042.

62. *Batson*, 476 U.S. at 96-98; *see supra* notes 15-18 and accompanying text (discussing the three-part process of the *Batson* analysis).

63. *Miller-El*, 123 S. Ct. at 1040.

64. *Id.*

65. *Id.*

66. *Id.*; *see* Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) (stating that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination").

67. *Miller-El*, 123 S. Ct. at 1040.

68. *Id.*

69. *Id.* at 1042.

tion of that debate."[70] The Court found that the statistical evidence alone raised debate as to whether the prosecution's strikes were racially motivated.[71] The prosecution excluded ninety-one percent of the eligible African-American venire members through peremptory strikes and kept only one to serve on Miller-El's jury.[72] Ten out of fourteen of the prosecutors' peremptory strikes were used against African-Americans.[73] The Court doubted that this was "[h]appenstance."[74]

The Court determined that an examination of the "State's defense of the disparate treatment" does not weaken the case for debatability.[75] The Court stated that although the prosecutors proffered contemporaneous race-neutral explanations for the peremptory strikes, the state trial court did not have occasion to judge the credibility of the prosecutors' explanations because, under *Swain*, it was not required.[76] At the *Batson* hearing, the evidence was exposed to the "usual risks of imprecision and distortion from the passage of time."[77]

Three of the State's race-neutral explanations for striking the African-American potential jurors pertained to some white jurors who were not challenged and did serve on the jury.[78] The prosecution explained that the peremptory challenges for six African-American jurors were "based on ambivalence about the death penalty," hesitancy to vote for the death penalty for those defendants who are capable of rehabilitation, and the criminal history of the jurors' family members.[79] Miller-El rebutted the prosecutors' explanations by identifying two white jurors who expressed ambivalence about the death penalty similar to the African-Americans who were struck.[80] Two white jurors expressed hesitation in sentencing a defendant to death if the possibility for rehabilitation existed and four white jurors had family with criminal histories.[81] The Supreme Court determined that although the explanations may appear race-neutral, the application of the rationales to the venire might have been based on racial considerations.[82] The Court stated that this evidence makes the district court's conclusion that no purposeful discrimination existed debatable.[83]

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70. *Id.*
71. *Id.*
72. *Id.*
73. *Miller-El*, 123 S. Ct. at 1042.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 1042-43.
78. *Id.* at 1043.
79. *Miller-El*, 123 S. Ct. at 1043.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

Miller-El argued that the prosecution disparately questioned African-American and white jurors,[84] and that this was done to draw responses from the African-American venire members which reflected an opposition to the death penalty or an unwillingness to impose a minimum sentence.[85] Both reasons justified for-cause challenges under the then applicable state law.[86] Miller-El argued that disparate questioning created the appearance of different opinions even though the venire members' views on the relevant subject may have been the same.[87] The Court determined that if disparate treatment was based on race from the start, then it is likely that a justification for a strike based on the different opinions expressed was pretextual.[88] Therefore, the differences in the questions asked by the prosecution demonstrated purposeful discrimination.[89]

The Court noted that one of the same prosecutors who tried Miller-El's case committed a *Batson* violation in a past case by using the same disparate questioning on mandatory minimums.[90] The Court determined that the prosecutors designed their questions such that the responses elicited would justify the removal of African-Americans from the venire.[91] The Court stated that " '[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact' " so that discriminatory impact may demonstrate unconstitutionality.[92]

The Court agreed with Miller-El's argument that the prosecutor's decision to seek a jury shuffle[93] raised suspicion that the State wanted to exclude African-Americans from the jury.[94] The State shuffled the jury when a predominant number of African-Americans were seated in the front of the panel and delayed

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84. The prosecution prefaced some questions concerning the death penalty by giving a detailed description of the execution process. *Id.* at 1043. The preface was used for 53% of the African-American venire members and only for 6% of the white venire members. *Id.* The disparity along racial lines was greater when considering disparate questioning with regard to minimum punishments. *Id.* at 1044. Only 12.5% of the African-Americans were informed of the statutory minimum sentence compared to 94% of the white venire members who were informed. *Id.*

85. *Miller-El*, 123 S. Ct. at 1044.

86. *Id.* at 1043.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1044; *see* Chambers v. State, 784 S.W. 2d 29, 31 (Tex. Crim. App. 1989) (holding that the defendant established a prima facie case of the State's racially discriminatory exercise of peremptory strikes).

91. *Miller-El*, 123 S. Ct. at 1044.

92. *Id.* (quoting *Batson*, 476 U.S. at 93).

93. This practice allows parties to rearrange the order in which the venire members are examined by shuffling the juror cards. *Id.* at 1038. This is done to increase the likelihood that "visually preferable" venire members will be moved forward and empaneled. *Id.* The appearance of the prospective jurors is the only information that the parties have when deciding to shuffle the jury cards. *Id.*

94. *Id.* at 1038.

its objection to the defense's shuffle only after a new racial composition was apparent.[95] The Court was concerned with the fact that the state court was presented with, but ignored, evidence that the Dallas County District Attorney's Office admitted to using this process in the past to alter the racial composition of the jury.[96] The Court found that the use of this practice tended to erode the credibility of the prosecution's assertions that racial motivation in the jury selection was absent.[97]

The Supreme Court accorded "some weight" to Miller-El's historical evidence of racial discrimination by the District Attorney's office.[98] The evidence presented at the *Swain* hearing indicated that African-Americans were excluded, almost categorically, from jury service and proof of this systematic exclusion raised an inference of purposeful discrimination.[99] Both of the prosecutors in this case joined the District Attorney's office when training included excluding minorities from juries and the prosecutors noted the race of each juror on their juror cards.[100] The Court stated that regardless of whether the evidence could prove systematic exclusion of African-Americans, "it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection."[101] The Court found that this evidence cast doubt on the credibility of the motives behind the State's actions because even if the prosecutors in Miller-El's case were not a part of the "culture of discrimination," they were probably not ignorant of it.[102] The Court determined that the state court was erroneous when it decided that this evidence did not raise an inference of discrimination to support a prima facie case. Based on an examination of Miller-El's case, the Supreme Court determined that the decision of the district court was debatable.[103]

VI. Application

A. Habeas

Justice Scalia's concurrence in *Miller-El* specifically notes that the Fourth Circuit violated § 2253 in *Bates v. Lee*[104] by deciding the merits of the case even though a COA had never issued.[105] The Fourth Circuit has regularly contravened

95. *Id.*
96. *Id.*
97. *Miller-El*, 123 S. Ct. at 1044.
98. *Id.* at 1044.
99. *Id.* (quoting *Batson*, 476 U.S. at 94).
100. *Id.* at 1045.
101. *Id.*
102. *Id.*
103. *Miller-El*, 123 S. Ct. at 1045.
104. 308 F.3d 411 (4th Cir. 2003).
105. *Miller-El*, 123 S. Ct. 1046 n.* (Scalia, J., concurring); *see* Bates v. Lee, 308 F.3d 411, 411

§ 2253 by concluding that the applicant was not entitled to habeas relief on the merits, rather than analyzing whether the applicant made a substantial showing of a denial of a constitutional right.[106] Section 2254 is applicable only after the district court or a judge of the court of appeals has issued a COA.[107] Capital defense practitioners seeking a COA from the Fourth Circuit should carefully state the question, the debatability of an underlying constitutional claim, and the applicable standard, a "substantial showing of the denial of a constitutional right," that the court should apply.[108]

B. Batson

In *Miller-El*, the Supreme Court retained the first and second steps of the *Batson* analysis. The Court expanded the range of evidence relevant to step three of the process—proving purposeful discrimination.[109] First, the Court allowed the presentation and consideration of Miller-El's evidence relating to the historical pattern and practice of the Dallas County Attorney's Office for excluding minority jurors.[110] This evidence included the testimony of the Dallas County assistant district attorneys, judges, and others who observed the prosecutions' conduct during jury selections in the past.[111] The testimony revealed the likely existence of a systematic policy to exclude African-Americans.[112]

Second, the Court considered a broad range of evidence derived from the voir dire in this case. The statistical pattern of strikes demonstrated suspicious behavior on the part of the prosecution.[113] Ninety-one percent of the eligible African-American jurors were removed by peremptory strikes, but only thirteen percent of the eligible non-African-American jurors were removed.[114] The evidence also suggested that the manner in which African-American venire members were questioned regarding the death penalty and minimum sentencing

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(4th Cir. 2003) (incorrectly applying § 2253); Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 443 (2003) (analyzing Bates v. Lee, 308 F.3d 411 (4th Cir. 2003)).

106. *Miller-El*, 123 S. Ct. at 1045 (Scalia J., concurring). *See also* Bramblett v. True, No. 02-3, 2003 WL 58283, at *1 (4th Cir. Jan. 8, 2003) (noting the standard for granting a COA); Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 537 (2003) (analyzing Bramblett v. True, No. 02-3, 2003 WL 58283, at *1 (4th Cir. Jan. 8, 2003)); Brown v. Lee, 319 F.3d 162, 162 (4th Cir. 2003) (discussing that the Fourth Circuit need make only a threshold inquiry into the merits of the case according to *Miller-El*); Janice L. Kopec, Case Note, 15 CAP. DEF. J. 451 (2003) (analyzing Brown v. Lee, 319 F.3d 162 (4th Cir. 2003)).

107. § 2253.

108. *See id.*

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

110. *Miller-El*, 123 S. Ct. at 1038-39.

111. *Id.* at 1038.

112. *Id.* at 1038-39.

113. *Id.* at 1036-37.

114. *Id.* at 1037.

differed by race.[115] The Court found that the race-neutral explanations that the State proffered for striking African-American jurors could pertain to some of the white jurors as well.[116] The Supreme Court determined that this circumstantial evidence "erode[s] the credibility" of race-neutral explanations proffered by the prosecution.[117] Capital defense practitioners should have available a clerical assistant at voir dire to record the race of the venire members who are peremptorily challenged by the prosecution, the questions asked of each juror, and the reasons offered by the prosecutor for each strike. This can be refined into the statistics, disparate questioning, and comparison of juror characteristics which will support a claim of purposeful discrimination. It is also important to research the historical pattern and practice of the particular district attorney's office which is prosecuting the case. In effect, *Miller-El* makes this evidence—historically *Swain* evidence—relevant to the third step of a *Batson* analysis. Also, practitioners should be thorough in discovering the availability of any testimony which will reveal a culture of bias in the prosecutor's office.

Priya Nath

115. *Id.*
116. *Miller-El*, 123 S. Ct. at 1043.
117. *Id.* at 1044.