ORIGINAL

SUPREME COURT
FILED

JUL 2 2 2005

Frederick K. Ohlrich Clerk
BY

No. S065720

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	(Sacramento Superior
	)	Court No. 94F08332)
vs.	)	
	)	
SEAN VENYETTE VINES,	)	
	)	
Defendant and Appellant.	)	
	)	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Sacramento
The Honorable James L. Long, Judge Presiding

APPELLANT'S SUPPLEMENTAL BRIEF
RE: *MILLER-EL V. DRETKE*

Gilbert Gaynor, Cal. Bar No. 107109
Law Office of Gilbert Gaynor
P.O. Box 41159
Santa Barbara, CA 93140-1159
Tel: 805/962-5842
Fax: 805/962-5783

Attorney for Appellant
SEAN VENYETTE VINES

DEATH PENALTY

RECEIVED
JUL 26 2005
CLERK SUPREME COURT

No. S065720

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	(Sacramento Superior
	)	Court No. 94F08352)
vs.	)	
	)	
SEAN VENYETTE VINES,	)	
	)	
Defendant and Appellant.	)	
	)	

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Sacramento
The Honorable James L. Long, Judge Presiding

APPELLANT'S SUPPLEMENTAL BRIEF RE: *MILLER-EL V. DRETKE*

Gilbert Gaynor, Cal. Bar No. 107109
Law Office of Gilbert Gaynor
P.O. Box 41159
Santa Barbara, CA 93140-1159
Tel: 805/962-5842
Fax: 805/962-5783

Attorney for Appellant
SEAN VENYETTE VINES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

I. THE SUPREME COURT'S OPINION IN *MILLER-EL V. DRETKE* MANDATES THAT COURTS CONSIDER ALL AVAILABLE EVIDENCE OF RACIAL DISCRIMINATION IN REVIEWING DENIALS OF *BATSON* MOTIONS.

A. Introduction.

In Argument I, Part B of the opening brief, appellant Sean Vines showed that his conviction and sentence should be reversed because the trial court failed to adequately discharge its constitutional obligation to conduct a meaningful step-three analysis and evaluation of the prosecutor's reasons for peremptorily striking a well-qualified African American juror, as required under *Batson v. Kentucky* (1986) 476 U.S. 79, 100 S.Ct. 1712, 90 L.Ed.2d 69, and this Court's own precedents, e.g., *People v. Silva* (2001) 25 Cal.4th 345. The trial court's failure to conduct the required inquiry into each of the prosecutor's stated reasons resulted in the exclusion of the juror and denial of the *Batson* motion, despite the fact that the record affirmatively contradicted the prosecutor's asserted justifications for excusing that minority juror based on his views about the death penalty. This error, without more, requires reversal.

Vines also conducted a comparative juror analysis as part of Argument I, Part C of his opening brief. He demonstrated that a comparison of the background and views of the challenged African American juror with the background and views of a white juror who was not challenged by the prosecutor and actually served on the jury showed that the prosecutor's reasons for challenging the minority juror based on his views on the criminal justice

system applied with no less force to the white juror who actually served, thus revealing the prosecutor's reasons to be a pretext for discrimination under *Batson v. Kentucky* and *Miller-El v. Cockrell* (2003) 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931.

After Vines filed his opening brief, the United States Supreme Court decided *Miller -El v. Dretke* (2005) 545 U.S. ___, 125 S.Ct. 2317, 2005 U.S. LEXIS 4658. *Miller-El v. Dretke* alters the legal landscape, bringing into sharper focus the obligations of trial and appellate courts in performing their duty to ensure that judicial proceedings are free of the stigma of racial discrimination, particularly in capital cases.

In *People v. Johnson* (2003) 30 Cal.4th 1302, this Court held that comparative juror analysis would generally not be considered on appeal unless first presented to the trial court. *Johnson* involved step one of the three-step procedure under *Batson v. Kentucky*, requiring the court's determination whether the party alleging discrimination has made a prima facie case. An expansive reading of *Johnson*, however, could arguably preclude review of comparative juror evidence in this case, which involves review of the third *Batson* step, in which the court must assess whether there has been purposeful discrimination.

This supplemental brief explores the implications of *Miller-El v. Dretke* for Argument I, Part C of the opening brief, and argues in particular that in light of *Miller-El v. Dretke*, *People v. Johnson* should be overruled.

B. *Miller-El v. Dretke.*

In *Miller-El v. Dretke, supra,* 125 S.Ct. 2317, the United States Supreme Court made unmistakably clear that, in evaluating a *Batson* challenge

on appeal, ***the appellate court must consider all the evidence*** present in the record that may support a claim of unlawful racial discrimination, ***regardless of whether or not particular evidence was specifically brought to the attention of the trial court.***

Charged with a murder committed during a robbery, Thomas Miller-El objected under pre-*Batson* law when prosecutors used peremptory challenges to disqualify 10 African American prospective jurors. The Texas state trial court denied his objections, and he was tried and sentenced to death. While his appeal was pending, the high court decided *Batson v. Kentucky*, 476 U.S. 79, which established as a matter of federal constitutional law the now-familiar three-step procedure for adjudicating issues of racial discrimination in jury selection. The Texas appellate court remanded for a *Batson* hearing. *Miller-El v. Dretke*, *supra*, 125 S.Ct. at pp. 2322-2323.

The Texas trial court held a hearing, heard the prosecutors' explanations for the challenged peremptory strikes, and found the prosecutors' reasons "'completely credible [and] sufficient,'" determining there was "'no purposeful discrimination.'" *Miller-El v. Dretke*, *supra*, 125 S.Ct. at p. 2323. The Texas appellate court affirmed. *Id.*

Miller-El then filed a petition for a writ of habeas corpus in federal court. The federal district court denied relief, and the federal appellate court denied a certificate of appealability. The Supreme Court reversed in *Miller-El v. Cockrell, supra,* 537 U.S. 322, and remanded the case to the Fifth Circuit, which again denied relief. Miller-El again sought high court review, and in *Miller-El v. Dretke*, the Supreme Court, by a 6-3 vote, ruled that Miller-El was entitled to the writ of habeas corpus.

In determining that the *Batson* doctrine had been violated in Miller-El's

case, the Supreme Court specifically considered the jury questionnaires from Miller-El's trial. The Court relied on these jury questionnaires even though, as Justice Souter acknowledged in his opinion for the Court's six-Justice majority,

> "many of the juror questionnaires, along with juror information cards, were added to the habeas record after the filing of the petition in the District Court."

Miller-El v. Dretke, *supra*, 125 S.Ct. at p. 2334, fn.15.

In other words, as Justice Thomas stated in his dissent, the Supreme Court majority

> "base[d] its decision on juror questionnaires and juror cards that Miller-El's new attorneys unearthed during his federal habeas proceedings and that he never presented to the state courts."

Miller-El v. Dretke, *supra,* 125 S.Ct. at p. 2347 (dis.opn. of Thomas, J.).

The *Miller-El v. Dretke* majority and dissenting opinions debate the propriety of the consideration of these materials under federal habeas law, but the majority has now settled the matter: such materials can be considered in federal habeas cases even if not first presented to state courts.

What is significant for our case is this: the *Miller-El v. Dretke* Court unequivocally determined that, in performing its review for federal constitutional error under *Batson*, it was necessary for the Court to evaluate evidence showing purposeful discrimination that was not presented to, or considered, by the state trial judge at the *Batson* hearing.

Thus, the Supreme Court's opinion in *Miller-El v. Dretke* powerfully re-emphasizes that courts, in considering *Batson* challenges, must review ***all*** the available evidence that may bear on the question of invidious discrimination, and may not limit its consideration to the evidence singled out

by a defendant's trial counsel, to the exclusion of other pertinent evidence.

The high court's strong position that all the evidence must be reviewed on appeal in evaluating the trial court's denial of a *Batson* challenge at the third step stems directly from the Court's view of the obligations of the trial courts. In the third step of a *Batson* challenge, the trial court has "the *duty* to determine whether the defendant has established purposeful discrimination," *Batson*, 476 U.S. at p. 98 (emphasis added). Perhaps more than anything else, the opinion in *Miller-El v. Dretke* emphasizes how crucial the Court views the third step to be. The discharge of the court's duty, in the view of the Supreme Court, requires an examination of all the relevant evidence:

> "the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it *requires the judge to assess the plausibility of that reason in light of* ***all evidence with a bearing on it.***" 476 U.S., at 96-97, 90 L.Ed.2d 69, 106 S.Ct. 1712; *Miller-El v. Cockrell*, 537 U.S., at 339, 154 L.Ed.2d 931, 123 S.Ct. 1029."

Miller-El v. Dretke, supra, 125 S.Ct. at pp. 2331-2332 (emphasis added).

Why has the Supreme Court insisted that all relevant evidence bearing on racial discrimination in the jury selection process be considered by reviewing courts, even when such evidence was not presented to the trial court?

The answer lies in the Supreme Court's view of the necessity of eradicating racial discrimination, and the unique and critical role of our nation's courts in doing so.

The Fourteenth Amendment's mandate that racial discrimination be eradicated from all government acts and proceedings is at its "most compelling in the judicial system." *Powers v. Ohio* (1991) 499 U.S. 400, 416, 111 S.Ct. 1364, 113 L.Ed.2d 411. Judges serve as the ultimate guardians of the judicial

process. In that capacity, they

> "are under ***an affirmative duty*** to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]."

Powers v. Ohio, *supra,* 499 U.S. 400, 416 (emphasis added).

The exercise of the right to be free of racial discrimination in the jury selection process certainly benefits defendants in criminal cases. But even more is at stake. The Supreme Court has recognized that the Constitution protects not just defendants, but the jurors themselves. *Powers* v. *Ohio*, *supra*, 499 U.S. at p. 409. Indeed, the *Batson* doctrine protects the essential integrity of the judicial system.

> "When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . .' That is, *the very integrity of the courts is jeopardized* when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,', and undermines public confidence in adjudication."

Miller-El v. Dretke, supra, 125 S.Ct. at pp. 2323-2324 (emphasis added) (citations omitted).

For a trial or appellate court to refuse to consider relevant evidence properly in the record that tends to show racial discrimination is for a court to avoid its affirmative duty under the United States Constitution. It inevitably results in a less intensive, less thorough inquiry. Truncation or restriction of step three of the *Batson* inquiry insulates invidious discrimination by "'those . . . of a mind to discriminate,'" *Batson*, 476 U.S. at p. 96, by eliminating the duty of judges to assess prosecutors' explanations for peremptory challenges based on the totality of the evidence, and leaves open the door to racial discrimination in jury selection, and its corrosive effects.

C. *People v. Johnson.*

People v. Johnson (2003) 30 Cal.4th 1302, reversed on related grounds in *Johnson v. California* (2005) 545 U.S. ___, 125 S.Ct. 2410, 2005 U.S. LEXIS 4842, considered the role of comparative juror analysis on appeal when the trial court did not conduct such an analysis in the first instance. The *People v. Johnson* holding was the product of two express legal propositions: first, that comparative juror evidence and analysis, while relevant, are of relatively minor importance in assessing a claimed *Batson* violation, and second, that appellate review of denial of *Batson* motions demands a high degree of deference to the trial court. Based on these express assumptions, *People v. Johnson* held that when a comparative juror analysis "was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case."

Consideration of *Miller-El v. Dretke* reveals that the *People v. Johnson* majority opinion's analysis of the then-most-recent Supreme Court opinion, *Miller-El v. Cockrell*, is both factually inaccurate, and legally superseded. The *People v. Johnson* majority opinion offered the following analysis of *Miller-El v. Cockrell*:

> "Contrary to the dissent, *People v. Johnson, supra,* 47 Cal.3d 1194 is also entirely consistent with *Miller-El [v. Cockrell].* In that case, the high court had "no difficulty in using comparative juror analysis" (dis. opn., *post*, at p. 1332) because *it was simply reviewing the state court record, i.e., comparative juror evidence that the defendant had first presented to the trial judge* in support of his *Batson* motion. *(Miller-El, supra*, 537 U.S. at pp.___, ___ [123 S. Ct. at pp. 1035-1036, 1043-1045].) Evidently, none of the parties disputed that a comparative juror analysis is a proper or necessary procedure in deciding a *Batson* claim. Thus, that issue was not before the high court, which only addressed whether the underlying evidence before the state trial court

supported the issuance of a certificate of appealability. (*Id.* at pp. ___ [123 S. Ct. at pp. 1042-1045]."

People v. Johnson, supra, 30 Cal.4th at p. 1324, fn.7 (emphasis added). While this reading of the Miller-El case was understandable in light of the somewhat ambiguous *Miller-El v. Cockrell*, it is untenable in light of *Miller-El v. Dretke*.

As discussed *supra,* the majority and dissenting opinions in *Miller-El v. Dretke* each makes clear that the comparative juror evidence in question – the juror questionnaires – were ***not*** in fact introduced and considered by the state trial judge in the original *Batson* hearing, as *People v. Johnson* erroneously stated, but were introduced into the litigation at the federal habeas corpus stage. *Miller-El v. Dretke*, *supra*, 125 S.Ct. at p. 2334, fn.15; *id.* at p. 2347 (dis.opn. of Thomas, J.). Thus, *People v. Johnson* is factually incorrect in expressly assuming that the Supreme Court in *Miller-El v. Cockrell* considered only evidence that was presented to the state trial court.

When *People v. Johnson* was decided, the high court had not yet considered the issue of comparative juror analysis except in the context of an appeal from a denial of a certificate of appealability. Things have changed, and *Miller-El v. Cockrell* has been superseded. Now, the issue has been before the high court, and it has considered comparative juror evidence not presented to the state trial courts, found it persuasive, and ordered that habeas corpus relief be granted.

People v. Johnson takes an approach to appellate review of trial court *Batson* determinations, and a view of how to vanquish racial discrimination in jury selection, that is very different in analysis and emphasis from that of the Supreme Court in *Miller-El v. Dretke*. It is apparent that the analytic underpinnings of *People v. Johnson* have been swept away by the Supreme

Court's later, controlling decision in *Miller-El v. Dretke*.

Two points deserve attention.

First, the *People v. Johnson* opinion incorrectly assesses the importance of comparative juror evidence.

> "We have also said that comparative juror analysis is 'largely beside the point' because of the legitimate subjective concerns that go into selecting a jury."

People v. Johnson, supra, 30 Cal.4th at p. 1323.

The Supreme Court's opinion in *Miller v. Dretke* makes clear that comparative juror analysis is a critically important part of appellate review of third-step cases.

> "***More powerful than . . . bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve***. If a prosecutor's 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 to be considered at *Batson*'s third step."

Miller-El v. Dretke, supra, 125 S.Ct. at p. 2325 (emphasis added).

The *Miller-El v. Dretke* majority opinion performed in-depth comparisons of struck prospective jurors with others who were not struck. The high court's detailed comparisons of challenged black jurors with others not challenged by the prosecution was sufficiently important, in the Court's view, to occupy no less than 11 single-spaced pages of the United States Reports. Although there were other factors tending to show discrimination in the case before the Court, the Court's analysis begins with a comparison of jurors, and it is the centerpiece of the opinion's factual discussion.

After *Miller-El v. Dretke*, there can be no question but that the Supreme Court views comparative juror analysis as critically important in *Batson* cases.

The *People v. Johnson* opinion's view that comparative juror analysis is "largely beside the point" has been discredited.

Second, consideration of *Miller-El v. Dretke* makes clear that the *Johnson* opinion wrongly assessed the degree of deference appellate courts owe trial courts on review of challenges to discrimination in jury selection. *People v. Johnson* reasoned:

> "permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is *inconsistent with the deference reviewing courts necessarily give trial courts*."

People v. Johnson, supra, 30 Cal.4th at p. 1324 (emphasis added). Plainly, this statement cannot be reconciled with the Supreme Court's example in *Miller-El v. Dretke*.

Indeed, in that case the high court had to exercise even *greater* deference than a reviewing court must exercise on direct appeal, because it was reviewing the case on appellate review of a denial of federal habeas corpus relief – a *highly* deferential standard of review, in which the usual deference to trial court is reinforced by additional standards of deference based on the constraints of federalism.

But the Supreme Court's analysis in *Miller-El v. Dretke* demonstrates that, even with such a greater degree of deference due, it is simply not "inconsistent" with that deference for reviewing courts to searchingly examine all the evidence, even evidence that was not brought before the state trial court at the *Batson* hearing, and to grant habeas relief based in part on that evidence.

It is notable that, in contrast to its prior landmark decisions in this area, the Supreme Court in *Miller-El v. Dretke* mentions the concept of deference to state trial courts only ***once*** in its lengthy opinion, and then only in the

context of the deference due under federal habeas corpus statutes. The Court's single mention of the role of deference is this reminder:

"deference does not by definition preclude relief."

Miller-El v. Dretke, *supra*, 125 S.Ct. at p. 2325.

While some degree of deference may still be due the trial court when there are express, specific findings that the trial judge is uniquely positioned to make, such as those relating to a juror's demeanor, the import of *Miller-El v. Dretke* is clear – deference to the trial court's *Batson* rulings will not preclude a detailed examination of all the evidence relevant to the question of discrimination, and little or no deference is due trial courts that do not examine all the relevant evidence in making a determination that no discrimination occurred.

D. This Court Should Overrule *People v. Johnson*.

People v. Johnson has already been overruled in part by *Johnson v. California*, *supra*, 125 S.Ct. 2410, in which the high court held that California's standard for establishing a prima facie case of discrimination was impermissibly demanding and in conflict with the *Batson* doctrine's requirements.

Miller-El v. Dretke and *Johnson v. California* were decided by the Supreme Court on the same day. These two opinions, both by larger-than-necessary majorities, send an unmistakable signal to our nation's trial and appellate courts: challenges to racial discrimination in jury selection, particularly in criminal trials, are to be taken by trial and appellate courts in a new spirit of commitment to the eradication of discrimination. Courts are not to erect procedural obstacles to reaching the merits of a challenge, and they are

actively and critically to scrutinize prosecutors' explanations in view of the entire available record. Less is required of defendants than previously thought to trigger this vital constitutional obligation -- and more is required of the trial and appellate courts to fulfill it.

People v. Johnson correctly identified the most important factors in the calculus as the relative utility of comparative juror analysis, and the degree of deference due the trial court on review. But consideration of *Miller-El v. Dretke* makes it apparent that the *People v. Johnson* opinion reached the wrong conclusions. As the preceding section has demonstrated, *People v. Johnson*'s analysis is founded on an expressed low regard for comparative juror analysis, yet the Supreme Court has made clear that comparative juror analysis is vitally important to appellate review of *Batson* challenges. The *People v. Johnson* opinion is similarly premised on a mistaken view of the role of deference to the trial court's decision that is irreconcilable with the Supreme Court's critical and detailed examination of the record, and its marked de-emphasis of deference, in *Miller-El v. Dretke*.

People v. Johnson's analytic underpinnings have been swept away by superior authority. Its operative assumptions about the importance of comparative juror analysis and the role of deference to the trial court are in fundamental opposition to the views of the Supreme Court. It should be overruled.

II. CONCLUSION.

For the foregoing reasons, as well as those set forth in appellant's opening brief, appellant's convictions and sentence should be reversed.

DATE: July 12, 2005

Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant Sean Vines.

CERTIFICATE OF WORD COUNT

I certify that the foregoing appellant's supplemental brief contains 3,373 words, according to the word-count feature of the WordPerfect program upon which it was prepared.

DATE: July 12, 2005

Respectfully submitted,

GILBERT GAYNOR
Attorney for Appellant Sean Vines.

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SANTA BARBARA)

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is P.O. Box 41159, Santa Barbara, CA 93140-1159. On July 13, 2005 I served the document entitled **APPELLANT'S SUPPLEMENTAL BRIEF RE: MILLER-EL V. DRETKE** by placing a true and correct copy of the document in an envelope addressed as indicated on the attached Service List.

X (BY US MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Barbara, California, in the ordinary course of business.

__ (BY FEDERAL EXPRESS) I placed such envelope in the federal express drop off on for delivery the next business day.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 13, 2005, at Santa Barbara, California.

Gilbert Gaynor

SERVICE LIST

Sean Venyette Vines
P.O. Box K-76300
San Quentin, CA 94974

California Appellate Project
Attn: Mordecai Garelick, Esq.
101 Second Street, Suite 600
San Francisco, CA 94105

ATTORNEY GENERAL - SACRAMENTO OFFICE
Michael D. Dolida, Deputy
P.O. Box 944255
Sacramento, CA 94244-2550

Clerk, Sacramento Superior Court
Sacramento County Courthouse
720 9th St.
Sacramento, CA 95814
(for delivery to Hon. James L. Long)

Robert Gold, Esq.
Office of the District Attorney
901 G St.
Sacramento, CA 95814