Miller-El v. Dretke
___ U.S. ___ (June 13, 2005)

JUSTICE SOUTER delivered the opinion of the Court.

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.

I.

In the course of robbing a Holiday Inn in Dallas, Texas in late 1985, Miller-El and his accomplices bound and gagged two hotel employees, whom Miller-El then shot, killing one and severely injuring the other. During jury selection in Miller-El's trial for capital murder, prosecutors used peremptory strikes against 10 qualified black venire members. Miller-El objected that the strikes were based on race and could not be presumed legitimate, given a history of excluding black members from criminal juries by the Dallas County District Attorney's Office. The trial court received evidence of the practice alleged but found no "systematic exclusion of blacks as a matter of policy' by that office," and therefore no entitlement to relief under *Swain v. Alabama*, 380 U.S. 202 (1965), the case then defining and marking the limits of relief from racially biased jury selection. The court denied Miller-El's request to pick a new jury, and the trial ended with his death sentence for capital murder.

While an appeal was pending, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), which replaced *Swain*'s threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation. The Texas Court of Criminal Appeals then remanded the matter to the trial court to determine whether Miller-El could show that prosecutors in his case peremptorily struck prospective black jurors because of race.

The trial court found no such demonstration. After reviewing the *voir dire* record of the explanations given for some of the challenged strikes, and after hearing one of the prosecutors, Paul Macaluso, give his justification for those previously unexplained, the trial court accepted the stated race-neutral reasons for the strikes, which the judge called "completely credible [and] sufficient" as the grounds for a finding of "no purposeful discrimination." The Court of Criminal Appeals affirmed . . . .

Miller-El then sought habeas relief under 28 U.S.C. § 2254, again pressing his *Batson* claim, among others not now before us. The District Court denied relief and the Court of Appeals for the Fifth Circuit precluded appeal by denying a certificate of appealability. We granted certiorari to consider whether Miller-El was entitled to review on the *Batson* claim, and reversed the Court of Appeals. After examining the record of Miller-El's extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office before and during his trial, we found an appeal was in order, since the merits of the *Batson* claim were, at the least, debatable by

jurists of reason. *Miller-El v. Cockrell*, 537 U.S. 322 (2003). After granting a certificate of appealability, the Fifth Circuit rejected Miller-El's *Batson* claim on the merits. We again granted certiorari, and again we reverse.

II.

A.

"It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."

Nor is the harm confined to minorities. 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. So, "[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."

The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected. In *Swain v. Alabama*, we tackled the problem of "the quantum of proof necessary" to show purposeful discrimination, with an eye to preserving each side's historical prerogative to make a peremptory strike or challenge, the very nature of which is traditionally "without a reason stated." The *Swain* Court tried to relate peremptory challenge to equal protection by presuming the legitimacy of prosecutors' strikes except in the face of a longstanding pattern of discrimination: when "in case after case, whatever the circumstances," no blacks served on juries, then "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge [were] being perverted."

Swain's demand to make out a continuity of discrimination over time, however, turned out to be difficult to the point of unworkable, and in *Batson v. Kentucky*, we recognized that this requirement to show an extended pattern imposed a "crippling burden of proof" that left prosecutors' use of peremptories "largely immune from constitutional scrutiny." By *Batson*'s day, the law implementing equal protection elsewhere had evolved into less discouraging standards for assessing a claim of purposeful discrimination, and we accordingly held that a defendant could make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors' within an arguably targeted class." Although there may be "any number of bases on which a prosecutor reasonably [might] believe that it is

desirable to strike a juror who is not excusable for cause . . . , the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e]." "The trial court then will have the duty to determine if the defendant has established purposeful discrimination."

* * *

B.

This case comes to us on review of a denial of habeas relief sought under 28 U.S.C. § 2254, following the Texas trial court's prior determination of fact that the State's race-neutral explanations were true.

Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence." § 2254(e)(1). The standard is demanding but not insatiable; as we said the last time this case was here, "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. at 340.

III.

A.

The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members . . . . Happenstance is unlikely to produce this disparity."

More powerful than these 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. . . . .

The prosecution used its second peremptory strike to exclude Billy Jean Fields, a black man who expressed unwavering support for the death penalty. On the questionnaire filled out by all panel members before individual examination on the stand, Fields said that he believed in capital punishment, and during questioning he disclosed his belief that the State acts on God's behalf when it imposes the death penalty. "Therefore, if the State exacts death, then that's what it should be." He testified that he had no religious or philosophical reservations about the death penalty and that the death penalty deterred crime. He twice averred, without apparent hesitation, that he could sit on Miller-El's jury and make a decision to impose this penalty.

Although at one point in the questioning, Fields indicated that the possibility of rehabilitation

might be relevant to the likelihood that a defendant would commit future acts of violence, he responded to ensuing questions by saying that although he believed anyone could be rehabilitated, this belief would not stand in the way of a decision to impose the death penalty . . . .

Fields also noted on his questionnaire that his brother had a criminal history. . . . .

Fields was struck peremptorily by the prosecution, with prosecutor James Nelson offering a race-neutral reason:

"[W]e . . . have concern with reference to some of his statements as to the death penalty in that he said that he could only give death if he thought a person could not be rehabilitated and he later made the comment that any person could be rehabilitated if they find God or are introduced to God and the fact that we have a concern that his religious feelings may affect his jury service in this case."

Thus, Nelson simply mischaracterized Fields's testimony. He represented that Fields said he would not vote for death if rehabilitation was possible, whereas Fields unequivocally stated that he could impose the death penalty regardless of the possibility of rehabilitation. Perhaps Nelson misunderstood, but unless he had an ulterior reason for keeping Fields off the jury we think he would have proceeded differently. In light of Fields's outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.

If, indeed, Fields's thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he accepted with no evident reservations. Sandra Hearn said that she believed in the death penalty "if a criminal cannot be rehabilitated and continues to commit the same type of crime." Hearn went so far as to express doubt that at the penalty phase of a capital case she could conclude that a convicted murderer "would probably commit some criminal acts of violence in the future." "People change," she said, making it hard to assess the risk of someone's future dangerousness. "[T]he evidence would have to be awful strong." But the prosecution did not respond to Hearn the way it did to Fields, and without delving into her views about rehabilitation with any further question, it raised no objection to her serving on the jury. White panelist Mary Witt said she would take the possibility of rehabilitation into account in deciding at the penalty phase of the trial about a defendant's probability of future dangerousness, but the prosecutors asked her no further question about her views on reformation, and they accepted her as a juror. Latino venireman Fernando Gutierrez, who served on the jury, said that he would consider the death penalty for someone who could not be rehabilitated, but the prosecutors did not question him further about this view. In sum, nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.

The unlikelihood that his position on rehabilitation had anything to do with the peremptory strike of Fields is underscored by the prosecution's response after Miller-El's lawyer pointed out that the prosecutor had misrepresented Fields's responses on the subject. A moment earlier the prosecutor had finished his misdescription of Fields's views on potential rehabilitation with the words, "Those are our reasons for exercising our . . . strike at this time." When defense counsel called him on his misstatement, he neither defended what he said nor withdrew the strike. Instead, he suddenly came up with Fields's brother's prior conviction as another reason for the strike.

It would be difficult to credit the State's new explanation, which reeks of afterthought. . . . .

* * *

In sum, when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences. But the differences seem far from significant, particularly when we read Fields's *voir dire* testimony in its entirety. Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted.

The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. Warren gave this answer when he was asked what the death penalty accomplished:

"I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

The prosecution said nothing about these remarks when it struck Warren from the panel, but prosecutor Paul Macaluso referred to this answer as the first of his reasons when he testified at the later *Batson* hearing:

"I thought [Warren's statements on *voir dire*] were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more."

On the face of it, the explanation is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like Warren's. Kevin Duke, who served on the jury, said, "sometimes death would be better to me than—being in prison would be like dying every day and, if you were in prison for life with no hope of parole, I['d] just as soon have it over with than be in prison for the rest of your life." Troy Woods, the one black panelist to serve as juror, said that capital punishment "is too easy. I think that's a quick relief . . . . I feel like [hard labor is] more of a punishment than putting them to sleep." Sandra Jenkins, whom the State accepted (but who was then struck by the defense) testified that she thought "a harsher treatment is life imprisonment with no parole." Leta Girard, accepted by the State (but also struck by the defense) gave her opinion that "living

sometimes is a worse—is worse to me than dying would be." The fact that Macaluso's reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.

* * *

The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.

B.

The case for discrimination goes beyond these comparisons to include broader patterns of practice during the jury selection. The prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race. Finally, the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected.

The first clue to the prosecutors' intentions, distinct from the peremptory challenges themselves, is their resort during *voir dire* to a procedure known in Texas as the jury shuffle. In the State's criminal practice, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated and reached for questioning. Once the order is established, the panel members seated at the back are likely to escape *voir dire* altogether, for those not questioned by the end of the week are dismissed. As we previously explained,

"the prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past."

In this case, the prosecution and then the defense shuffled the cards at the beginning of the first week of *voir dire;* the record does not reflect the changes in order. At the beginning of the second week, when a number of black members were seated at the front of the panel, the prosecution shuffled. At the beginning of the third week, the first four panel members were black. The prosecution shuffled, and these black panel members ended up at the back. Then the defense shuffled, and the black panel members again appeared at the front. The prosecution requested another shuffle, but the trial court refused. Finally, the defense shuffled at the beginning of the fourth and fifth weeks of *voir dire;* the record does not reflect the panel's racial composition before or after those shuffles.

The State notes in its brief that there might be racially neutral reasons for shuffling the jury, and

we 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.

The next body of evidence that the State was trying to avoid black jurors is the contrasting *voir dire* questions posed respectively to black and nonblack panel members, on two different subjects. First, there were the prosecutors' statements preceding questions about a potential juror's thoughts on capital punishment. Some of these prefatory statements were cast in general terms, but some followed the so-called graphic script, describing the method of execution in rhetorical and clinical detail. It is intended, Miller-El contends, to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause. If the graphic script is given to a higher proportion of blacks than whites, this is evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation.

As we pointed out last time, for 94% of white venire panel members, prosecutors gave a bland description of the death penalty before asking about the individual's feelings on the subject. . . . .

Only 6% of white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it. This is an example of the graphic script:

". . . when the death penalty is assessed, at some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically our position going into this thing."

The State concedes that this disparate questioning did occur but argues that use of the graphic script turned not on a panelist's race but on expressed ambivalence about the death penalty in the preliminary questionnaire. Prosecutors were trying, the argument goes, to weed out noncommittal or uncertain jurors, not black jurors. And while some white venire members expressed opposition to the death penalty on their questionnaires, they were not read the graphic script because their feelings were already clear. The State says that giving the graphic script to these panel members would only have antagonized them.

This argument, however, first advanced in dissent when the case was last here, and later adopted by the State and the Court of Appeals, simply does not fit the facts. Looking at the answers on the questionnaires, and at *voir dire* testimony expressly discussing answers on the questionnaires, we find that black venire members were more likely than nonblacks to receive the graphic script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation for the graphic script fails in the cases of four out of the eight black panel members who received it. . . . .

The State's purported rationale fails again if we look only to the treatment of ambivalent panel members, ambivalent black individuals having been more likely to receive the graphic description than ambivalent nonblacks. Three nonblack members of the venire indicated ambivalence to the death penalty on their questionnaires; only one of them, Fernando Gutierrez,

received the graphic script. But of the four black panel members who expressed ambivalence, all got the graphic treatment.

The State's attempt at a race-neutral rationalization thus simply fails to explain what the prosecutors did. But if we posit instead that the prosecutors' first object was to use the graphic script to make a case for excluding black panel members opposed to or ambivalent about the death penalty, there is a much tighter fit of fact and explanation. Of the 10 nonblacks whose questionnaires expressed ambivalence or opposition, only 30% received the graphic treatment. But of the seven blacks who expressed ambivalence or opposition, 86% heard the graphic script. As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script.

The same is true for another kind of disparate questioning, which might fairly be called trickery. The prosecutors asked members of the panel how low a sentence they would consider imposing for murder. Most potential jurors were first told that Texas law provided for a minimum term of five years, but some members of the panel were not, and if a panel member then insisted on a minimum above five years, the prosecutor would suppress his normal preference for tough jurors and claim cause to strike. Two Terms ago, we described how this disparate questioning was correlated with race:

"Ninety-four percent of whites were informed of the statutory minimum sentence, compared [with] only twelve and a half percent of African-Americans. No explanation is proffered for the statistical disparity. Indeed, while petitioner's appeal was pending before the Texas Court of Criminal Appeals, that court found a *Batson* violation where this precise line of disparate questioning on mandatory minimums was employed by one of the same prosecutors who tried the instant case." *Miller-El v. Cockrell*, 537 U.S. at 345.

The State concedes that the manipulative minimum punishment questioning was used to create cause to strike, but now it offers the extenuation that prosecutors omitted the 5-year information not on the basis of race, but on stated opposition to the death penalty, or ambivalence about it, on the questionnaires and in the *voir dire* testimony. On the State's identification of black panel members opposed or ambivalent, all were asked the trick question. But the State's rationale flatly fails to explain why most white panel members who expressed similar opposition or ambivalence were not subjected to it. It is entirely true, as the State argues, that prosecutors struck a number of nonblack members of the panel (as well as black members) for cause or by agreement before they reached the point in the standard *voir dire* sequence to question about minimum punishment. But this is no answer; 8 of the 11 nonblack individuals who voiced opposition or ambivalence were asked about the acceptable minimum only after being told what state law required. Hence, only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.

There is a final body of evidence that confirms this conclusion. We know 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 . . . .:

" . . .the defense presented evidence that the District Attorney's Office had adopted a formal policy to exclude minorities from jury service . . . . A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El's trial." *Miller-El v. Cockrell*, 537 U.S. at 334-335.

Prosecutors here "marked the race of each prospective juror on their juror cards." *Id.* at 347.

The Court of Appeals concluded that Miller-El failed to show by clear and convincing evidence that the state court's finding of no discrimination was wrong, whether his evidence was viewed collectively or separately. We find this conclusion as unsupportable as the "dismissive and strained interpretation" of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability. *See id.* at 344. It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.

In the course of drawing a jury to try a black defendant, 10 of the 11 qualified black venire panel members were peremptorily struck. At least two of them, Fields and Warren, were ostensibly acceptable to prosecutors seeking a death verdict, and Fields was ideal. The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny.

The strikes that drew these incredible explanations occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race. At least two of the jury shuffles conducted by the State make no sense except as efforts to delay consideration of black jury panelists to the end of the week, when they might not even be reached. The State has in fact never offered any other explanation. Nor has the State denied that disparate lines of questioning were pursued: 53% of black panelists but only 3% of nonblacks were questioned with a graphic script meant to induce qualms about applying the death penalty (and thus explain a strike), and 100% of blacks but only 27% of nonblacks were subjected to a trick question about the minimum acceptable penalty for murder, meant to induce a disqualifying answer. The State's attempts to explain the prosecutors' questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis.

If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.

It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because

they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is shown up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable as well as erroneous. The judgment of the Court of Appeals is reversed, and the case is remanded for entry of judgment for petitioner together with orders of appropriate relief.

It is so ordered.

JUSTICE BREYER, concurring.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court adopted a burden-shifting rule designed to ferret out the unconstitutional use of race in jury selection. In his separate opinion, Justice Thurgood Marshall predicted that the Court's rule would not achieve its goal. The only way to "end the racial discrimination that peremptories inject into the jury-selection process," he concluded, was to "eliminat[e] peremptory challenges entirely." *Id.* at 102-103 (concurring opinion). Today's case reinforces Justice Marshall's concerns.

I.

To begin with, this case illustrates the practical problems of proof that Justice Marshall described. As the Court's opinion makes clear, Miller-El marshaled extensive evidence of racial bias. But despite the strength of his claim, Miller-El's challenge has resulted in 17 years of largely unsuccessful and protracted litigation—including 8 different judicial proceedings and 8 different judicial opinions, and involving 23 judges, of whom 6 found the *Batson* standard violated and 16 the contrary.

The complexity of this process reflects the difficulty of finding a legal test that will objectively measure the inherently subjective reasons that underlie use of a peremptory challenge. *Batson* seeks to square this circle by (1) requiring defendants to establish a prima facie case of discrimination, (2) asking prosecutors then to offer a race-neutral explanation for their use of the peremptory, and then (3) requiring defendants to prove that the neutral reason offered is pretextual. But *Batson* embodies defects intrinsic to the task.

At *Batson*'s first step, litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the prima facie threshold level. At *Batson*'s second step, prosecutors need only tender a neutral reason, not a "persuasive, or even plausible" one. And most importantly, at step three, *Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment—the underlying basis for which may be invisible even to the prosecutor exercising the challenge. In such circumstances, it may be impossible for trial courts to discern if a "seat-of-the-pants" peremptory challenge reflects a "seat-of-the-pants" racial stereotype.

Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem. . . .

II.

Practical problems of proof to the side, peremptory challenges seem increasingly anomalous in our judicial system. On the one hand, the Court has widened and deepened *Batson*'s basic constitutional rule. . . .

On the other hand, the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before. . . . For example, one jury-selection guide counsels attorneys to perform a "demographic analysis" that assigns numerical points to characteristics such as age, occupation, and marital status—in addition to race as well as gender. Thus, in a hypothetical dispute between a white landlord and an African-American tenant, the authors suggest awarding two points to an African-American venire member while subtracting one point from her white counterpart.

* * *

These examples reflect a professional effort to fulfill the lawyer's obligation to help his or her client. . . . Nevertheless, the outcome in terms of jury selection is the same as it would be were the motive less benign. And as long as that is so, the law's antidiscrimination command and a peremptory jury-selection system that permits or encourages the use of stereotypes work at cross-purposes.

Finally, a jury system without peremptories is no longer unthinkable. Members of the legal profession have begun serious consideration of that possibility. And England, a common-law jurisdiction that has eliminated peremptory challenges, continues to administer fair trials based largely on random jury selection.

III.

I recognize that peremptory challenges have a long historical pedigree. They may help to reassure a party of the fairness of the jury. But long ago, Blackstone recognized the peremptory challenge as an "arbitrary and capricious species of [a] challenge." 4 W. Blackstone, Commentaries on the Laws of England 346 (1769). If used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function. The "scientific" use of peremptory challenges may also contribute to public cynicism about the fairness of the jury system and its role in American government. And, of course, the right to a jury free of discriminatory taint is constitutionally protected—the right to use peremptory challenges is not.

Justice Goldberg, dissenting in *Swain v. Alabama*, 380 U.S. 202 (1965), wrote, "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge

peremptorily, the Constitution compels a choice of the former." This case suggests the need to confront that choice. In light of the considerations I have mentioned, I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole. With that qualification, I join the Court's opinion.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

In the early morning hours of November 16, 1985, petitioner Thomas Joe Miller-El and an accomplice, Kennard Flowers, robbed a Holiday Inn in Dallas, Texas. Miller-El and Flowers bound and gagged hotel employees Donald Hall and Doug Walker, and then laid them face down on the floor. When Flowers refused to shoot them, Miller-El shot each twice in the back, killing Walker and rendering Hall a paraplegic. Miller-El was convicted of capital murder by a jury composed of seven white females, two white males, a black male, a Filipino male, and a Hispanic male.

For nearly 20 years now, Miller-El has contended that prosecutors peremptorily struck potential jurors on the basis of race. In that time, seven state and six federal judges have reviewed the evidence and found no error. This Court concludes otherwise, because it relies on evidence never presented to the Texas state courts. That evidence does not, much less "clear[ly] and convincing[ly]," show that the State racially discriminated against potential jurors. However, we ought not even to consider it: In deciding whether to grant Miller-El relief, we may look only to "the evidence presented in the State court proceeding." § 2254(d)(2). The majority ignores that restriction on our review to grant Miller-El relief. I respectfully dissent.

* * *