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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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MILLER-EL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03–9659. Argued December 6, 2004—Decided June 13, 2005

When Dallas County prosecutors used peremptory strikes against 10 of the 11 qualified black venire members during jury selection for petitioner Miller-El's capital murder trial, he objected, claiming that the strikes were based on race and could not be presumed legitimate since the District Attorney's Office had a history of excluding blacks from criminal juries. The trial court denied his request for a new jury, and his trial ended with a death sentence. While his appeal was pending, this Court decided, in *Batson* v. *Kentucky,* 476 U. S. 79, that discrimination by a prosecutor in selecting a defendant's jury violated the Fourteenth Amendment. On remand, the trial court reviewed the *voir dire* record, heard prosecutor Macaluso's justifications for the strikes that were not explained during *voir dire*, and found no showing that prospective black jurors were struck because of their race. The State Court of Criminal Appeals affirmed. Subsequently, the Federal District Court denied Miller-El federal habeas relief, and the Fifth Circuit denied a certificate of appealability. This Court reversed, finding that the merits of Miller-El's *Batson* claim were, at least, debatable by jurists of reason. *Miller-El* v. *Cockrell,* 537 U. S. 322. The Fifth Circuit granted a certificate of appealability but rejected Miller-El's *Batson* claim on the merits.

Held: Miller-El is entitled to prevail on his *Batson* claim and, thus, entitled to habeas relief. Pp. 3–33.

(a) "[T]his Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia* v. *McCollum,* 505 U. S. 42, 44. The rub

has been the practical difficulty of ferreting out discrimination in selections discretionary by nature and subject to a myriad of legitimate influences. The *Batson* Court held that a defendant can 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. 476 U. S., at 94. Once that showing is made, the burden shifts to the State to come forward with a neutral explanation, *id.,* at 97, and the trial court must determine if the defendant has shown "purposeful discrimination," *id.,* at 98, in light of "all relevant circumstances," *id.*, at 96–97. Since this case is on review of a denial of habeas relief under 28 U. S. C. §2254, and since the Texas trial court's prior determination that the State's race-neutral explanations were true is a factual determination, Miller-El may obtain relief only by showing the trial court's conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," §2254(e)(1). Pp. 3–6.

(b) The prosecutors used peremptory strikes to exclude 91% of the eligible black venire panelists, a disparity unlikely to have been produced by happenstance. *Miller-El* v. *Cockrell,* 537 U. S, at 342. More powerful than the bare statistics are side-by-side comparisons of some black venire panelists who were struck and white ones who were not. If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination. The details of two panel member comparisons bear out this Court's observation, *id.,* at 343, that the prosecution's reason for exercising peremptory strikes against some black panel members appeared to apply equally to some white jurors. There are strong similarities and some differences between Billy Jean Fields, a black venireman who expressed unwavering support for the death penalty but was struck, and similarly situated nonblack jurors; but the differences seem far from significant, particularly when reading 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, that Fields would not vote for death if rehabilitation were possible, a mischaracterization of his testimony, cannot reasonably be accepted when there were nonblack veniremen expressing comparable views on rehabilitation who were not struck. The prosecution's reason that Fields's brother had prior convictions is not creditable in light of its failure to enquire about the matter. The prosecution's proffered reasons for striking Joe Warren, another black venireman, are comparably unlikely. The fact that the reason for striking him, that he thought death was an easy way out and defendants should be made to suffer more, also applied to non-

black panel members who were selected is evidence of pretext. The suggestion of pretext is not, moreover, mitigated by Macaluso's explanation that Warren was struck when the State could afford to be liberal in using its 10 remaining peremptory challenges. Were that the explanation for striking Warren and later accepting similar panel members, prosecutors would have struck white panel member Jenkins, who was examined and accepted before Warren despite her similar views. Macaluso's explanation also weakens any suggestion that the State's acceptance of Woods, the one black juror, shows that race was not in play. When he was selected as the eighth juror, the State had used 11 of its 15 peremptory challenges, 7 on black panel members; and the record shows that at least 3 of the remaining venire panel opposed capital punishment. Because the prosecutors had to exercise prudent restraint, the late-stage decision to accept a black panel member willing to impose the death penalty does not neutralize the early-stage decision to challenge a comparable venireman, Warren. The Fifth Circuit's substituted reason for the elimination, Warren's general ambivalence about the penalty, was erroneous as a matter of fact and law. As to fact, Macaluso said nothing about general ambivalence, and Warren's answer to several questions was that he could impose the death penalty. As for law, the *Batson* rule provides the prosecutor an opportunity to give the reason for striking a juror and requires the judge to assess the reason's plausibility in light of all of the evidence, but it does not does not call for a mere exercise in thinking up any rational basis. Because a prosecutor is responsible for the reason he gave, the Fifth Circuit's substitution of a reason for excluding Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. Comparing Warren's strike with the treatment of panel members with similar views supports a conclusion that race was significant in determining who was challenged and who was not. Pp. 6–19.

(c) The prosecution's broader patterns of practice during jury selection also support the case for discrimination. Texas law permits either side to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed. Here, the prosecution shuffled the cards when a number of black members were seated at the front of the panel at the beginning of the second week. The third week, they shuffled when the first four members were black, placing them in the back. After the defense reshuffled the cards, and the black members reappeared in the front, the court denied the prosecution's request for another shuffle. No racially neutral reason for the shuffling has ever been offered, and nothing stops the suspicion of discriminatory intent from

rising to an inference. The contrasting *voir dire* questions posed respectively to black and nonblack panel members also indicate that the State was trying to avoid black jurors. Prosecutors gave a bland description of the death penalty to 94% of white venire panel members before asking about the individual's feelings on the subject, but used a script describing imposition of the death penalty in graphic terms for 53% of the black venire members. The argument that prosecutors used the graphic script to weed out ambivalent panel members simply does not fit the facts. Black venire members were more likely to receive that script regardless of their expressions of certainty or ambivalence about the death penalty, and the State's chosen explanation failed for four out of the eight black panel members who received it: two received it after clearly stating their opposition to the death penalty and two received it even though they unambiguously favored that penalty. The State's explanation misses the mark four out of five times with regard to the nonblacks who received the graphic description. Ambivalent black panel members were also more likely to receive the graphic script than nonblack ambivalent ones. The State's attempt at a race-neutral rationalization fails to explain what the prosecutors did. The explanation 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 is more persuasive than the State's explanation, 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. The prosecutors asked all black panel members opposed to, or ambivalent about, the death penalty how low a sentence they would consider imposing for murder without telling them that the State requires a 5-year minimum, but prosecutors did not put that question to most white panel members who had expressed similar views. The final body of evidence confirming the conclusion here is that the Dallas County District Attorney's Office had, for decades, followed a specific policy of systematically excluding blacks from juries. The Miller-El prosecutors' notes of the race of each panel member show that they took direction from a jury selection manual that included racial stereotypes. Pp. 19–31.

(d) The Fifth Circuit's conclusion that Miller-El failed to show by clear and convincing evidence that the state court's no-discrimination finding was wrong is as unsupportable as the "dismissive and strained interpretation" of his evidence that this Court disapproved when deciding that he was entitled to a certificate of appealability, *Miller-El, supra,* at 344. Ten of the eleven black venire members were peremptorily struck. At least two of them were ostensibly ac-

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ceptable to prosecutors seeking the death penalty. 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. The selection process was replete with evidence that prosecutors were selecting and rejecting potential jurors because of race. And the prosecutors took their cues from a manual on jury selection with an emphasis on race. It blinks reality to deny that the State struck Fields and Warren because they were black. The facts correlate to nothing as well as to race. The state court's contrary conclusion was unreasonable as well as erroneous. Pp. 32–33.

361 F. 3d 849, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.