IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

THOMAS JOE MILLER-EL, :

Petitioner :

v. : No. 01-7662

JANIE COCKRELL, DIRECTOR, :

TEXAS DEPARTMENT OF CRIMINAL :

JUSTICE, INSTITUTIONAL :

DIVISION. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, October 16, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

GENA A. BUNN, ESQ., Chief, Capital Litigation Division, Assistant Attorney General, Austin, Texas; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 01-7662, Thomas Joe Miller-El v. Janie Cockrell.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

Hernandez v. New York described a hypothetical case, a case in which the evidence of racial discrimination during jury selection was so strong that, quote, "a finding of no discrimination is simply too incredible to be accepted." This is truly that exceptional case, and therefore the Court should use it as a model, a model of the weight of evidence sufficient to render objectively unreasonable a trial judge's rejection of a Batson challenge. Indeed, whatever --

QUESTION: Well, now you -- you -- Mr. -- Mr. Waxman, you've got two presumptions going against you here: the -- the first, the Hernandez presumption that the trial court has to be deferred to, and then the AEDPA presumption. So I -- I hope you'll take those into account.

MR. WAXMAN: I want to embrace them, Mr. Chief Justice.

(Laughter.)

MR. WAXMAN: I fully recognize, as an officer of this Court and somebody who has followed this jurisprudence, that even on direct -- that the deference that is paid to a trial judge in a Batson hearing is so strong that even in Hernandez, this case said on direct review -- and Hernandez made reference to the high standards of proof in habeas -- even on direct review, we are going to require proof that a trial court's finding of fact in a Batson hearing is erroneous by clear and convincing evidence.

And to that, AEDPA enacted subsection 2254(d)(2), which says that you -- a writ may not issue unless the State court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented.

There are very good reasons to provide these dual levels of deference to the trial judge. The trial judge in the case, of course, is the finder of fact, and in Hernandez this Court has made clear that the ultimate finding in this case, the finding of whether or not the trial prosecutor engaged in intentional discrimination in making race the tipping factor, a but-for factor with

respect to the strike of any peremptory -- of any juror under a peremptory challenge -- is a factual determination.

But (d)(2) and the clear and convincing evidence standard are there for a reason. They are there for the truly exceptional case in which there are reasons to believe that the trial judge's findings are deluded, and there are reasons to believe that the evidence suggesting that the trial judge's finding was unreasonable are overwhelming.

And I'd like to address the first first and the second second, because I think it is entirely clear that given the facts of this case and the way in which the -- the trial judge in this case conducted the hearing, that whatever this Court decides, this case is going to stand as a benchmark, either that these facts represent an extreme that cannot be tolerated or that even these extreme facts are tolerable under Batson.

Now, let me speak first to the trial judge.

The trial judge was conscientious and he was, of course, to some extent disabled by the fact that the trial in this case immediately preceded this Court's decision in Batson. That is, this is one of these few cases where the trial occurred before Batson, but the case was pending on direct appeal when Batson was decided.

And so we have in this case a trial judge who conducted the Batson hearing over 2 years after the jurors testified and after the trial prosecutors gave their reasons for all but two of the jurors. And therefore, the one hallmark of deference, which is that the trial judge is a percipient witness of the res gestae, if you will, did not exist in this case. The -- the decided cases under the Texas Court of Criminal Appeals reflect significantly more than a dozen cases decided by this judge in that 2-year interim period. He saw thousands of venire members and undoubtedly heard hundreds, if not thousands, of Batson explanations.

And moreover, whereas it is true that the trial judge observes the demeanor of the witnesses and a prosecutor can certainly use as a race-neutral reason questions raised about a juror's fitness or suitability based on demeanor, the objections in this case, with one limited exception, the prosecutor said nothing about the demeanor. The prosecutor's stated objections to the 10 of the 11 African Americans who were struck were substantive reasons there on the record.

In addition, the trial judge in this case did not --

QUESTION: Well, but certainly demeanor could play a part in that even though you don't -- you don't say

it.

MR. WAXMAN: I --

QUESTION: You say he's -- he's prejudiced against the Government and, you know, perhaps the way he answered questions may give you a reason to think that, that the transcript doesn't.

MR. WAXMAN: I can -- I -- I embrace that, Mr. Chief Justice. For many years before I entered this line of work, I was a trial lawyer and I can remember exercising peremptory strikes just because of hesitation.

My only limited point here is that unlike many voir dire hearings -- and I've now reviewed many -- there was only one single isolated instance in which the prosecutor, in giving his reasons either at the time or in the Batson hearing, said he hesitated or his demeanor led me to question it. And so in that one respect, I -- again I think this case is more susceptible to meaningful appellate review.

But I have two more points I think it's very important for the Court to consider about the way this trial judge conducted this unusual case.

QUESTION: At -- at what stage, Mr. Waxman? You say this was 2 years after the actual trial? There was a -- a State habeas proceeding or something?

MR. WAXMAN: Oh, no. It was direct appeal. The

case was tried. There was an immediate appeal taken. During the -- right after -- I think a month after the case was tried, Batson was decided, and 2 years later, the Texas Court of Criminal Appeals abated -- the Texas Court of Criminal Appeals said 10 of 11 African Americans were struck. That raises an inference of discrimination under Batson. Remand it for a Batson hearing. And it was at that hearing that the judge made the findings of fact and conclusions of law that are reflected in the -- in the joint appendix.

There was a subsequent habeas proceeding in the State courts, but the habeas proceeding didn't deal with the Batson issue because it had been fully exhausted.

The trial judge, in evaluating Batson, did not look at the very substantial evidence of pattern and practice evidence with respect to what was going on in Dallas County at this time, evidence that the magistrate deemed appalling. He was told by the State not to look at it. He did not consider what the State acknowledges to be racially disparate -- disparate questioning of the jurors in venire on the question -- their ability to impose a minimum sentence --

QUESTION: How do we know -- how do we know he didn't look at that?

MR. WAXMAN: We -- we don't know to a certainty

that he didn't. He was told by the State that all of that evidence was irrelevant. Indeed, the State took the position that a -- that comparative evidence between white jurors and black jurors was irrelevant. That was the ground on which they urged this Court to deny the petition for certiorari on direct appeal. All I can say is it's nowhere reflected in the district judge's opinion. The -- the trial judge's opinion addresses only the six jurors in question that my predecessor claimed were struck in violation of Batson.

QUESTION: But he did say, didn't he, when he admitted the -- as you pointed out, when he admitted the -- the newspaper article, that he'd take it for what it was worth?

MR. WAXMAN: He did. And there's an ambiguity, and that's why we think, interestingly, that this case is a (d)(2) case rather than a (d)(1) case. In this Court, as opposed to in the State courts, the State of Texas is here before you saying the judge considered everything. The Texas Court of Criminal Appeals considered everything. They don't have to discuss everything that they considered, and therefore, there is no legal error that was committed. And our submission to you is I don't know if that's right or not. It doesn't appear to be right, but whether it's right or not, the result that they

reached, the conclusion that they made that there was no -- that -- that race was not a but for factor with respect to not one, not two, but six of these people.

Under the record of this case and in light of the way they conducted the jury shuffle in this case, which cannot be justified on non-racial grounds --

QUESTION: Before you get to the jury shuffle, how long before the -- the voir dire in this case had the newspaper article surfaced? And there were, I guess, two sitting judges who had once been prosecutors and they said, well, we had a manual that we work with. Could there be an argument that that -- that the last indication that the manual was being used was 5 years before this trial? Or is there evidence that it was being used right up to the time of the voir dire? Could you tell me about that?

MR. WAXMAN: I'll address the newspaper articles first, I guess you were asking about, and also the manual.

QUESTION: Yes.

MR. WAXMAN: The newspaper articles -- there were two series of newspaper articles. There were three articles that came out in the first or second week of March which was either just as the 4 or 5 weeks of jury selection was closing or after it, but it was before the trial began. And those articles precipitated the -- what

was called a Swain challenge but it -- what became a Swain-Batson challenge.

There were -- there were other articles that were subsequently issued after the -- after the trial in the case but before the direct appeal and the Batson remand that looked at the racial percentages in capital cases which mirrored the -- in many ways the -- the March 9th article that examined jury selection in 100 felony cases.

Now, the manual. There were two manuals in the case. One of them, the earlier, more explicit 1963 manual, was not offered. It is discussed in the March 9th Dallas Morning News article which was admitted in evidence at the Batson hearing.

The other manual, the John Sparling manual -- Mr. Sparling testified. There was testimony in the case by Judge Baraka and one other witness -- and it may have been Mr. Sparling -- that they were not sure when the manual ceased to be used. The Texas Court of Criminal Appeals in a case called Halliburton concluded that the manual was in use at least through the early 1980's I think or in -- by 1980 or something like --

QUESTION: And this trial was '85?

MR. WAXMAN: This trial was '86 I believe.

But one of the things that's most striking in

the case is -- there's -- there -- it is clear that at least one of the two prosecutors in this case was trained by this office at a time when the manual was concededly in use. The other one may have been.

But one of the things that I found striking, just going through the juror information cards yesterday actually in preparing for the oral argument, which appear in the joint lodging at pages 54 to 108 -- these are the juror cards that people get, the prosecutors and trial lawyers get, before voir dire begins. If you look at what is noted there, the race and the gender and religion and beards and things like that, there is a remarkable coincidence with the issues and factors that are specifically addressed in the Sparling training manual. It's not our submission that it's proof they were trained by it. It's not our submission that they adhered to it or they used it. We're using this pattern and practice evidence just as a --

QUESTION: Mr. Waxman, could I just interrupt to ask one question? When were those notations put on those cards, do you know?

MR. WAXMAN: The answer must be that they were put on at different times. If you look at the notations that say -- the race and the gender notations, each one has it.

QUESTION: Now, these are --

MR. WAXMAN: Those had to have been put on before any questioning occurred because there -- they are on those cards for jurors that were never reached or were never questioned. There are other notations about answers that appear to be in different handwriting, and I don't think the record shows it at all, but you can infer that they were noted at the same time that the prosecution made notes on the jury questionnaires which are also in the -- in the joint lodging.

But the -- the other point I just want to make about the trial judge is the -- we know -- there's not a question about whether the trial judge's findings are unreasonable in light of the evidence. Finding number 6, the trial judge said there was no disparate examination of any venire member.

Well, in this Court, the State has totally disavowed that. The State acknowledges that when jurors were questioned about their ability to impose the minimum punishment for the lesser included offense of murder, they used two different scripts. And when they talked about the means of execution, they used a graphic script that went on in detail to explain how somebody is executed in Texas, and a regular script that just said, how do you feel about the death penalty? Now, they --

QUESTION: If we agree -- if we agree with your analysis of number 6, does that suffice to vitiate number 2?

MR. WAXMAN: I --

QUESTION: That the -- that the court finds that the explanations given by the prosecutors in each -- prosecutor in each case were completely credible.

MR. WAXMAN: I think it does. The one that we're -- that -- that you have to focus most directly on is number 10 --

QUESTION: That's the conclusion.

MR. WAXMAN: -- which is the -- the finding, which is the ultimate finding.

But my point is that there are a number of findings that this judge made that are at the very least suspect and one in which the State has completely walked away from.

And I want -- I want to spend, if I can, just a few minutes talking about the jury shuffle and the disparate questioning because I've been a trial lawyer for many years, but never tried a case in this system, and it was sort of a little bit confusing to me.

But with respect to the disparate questioning, each of the prospective jurors was questioned about whether they could impose the minimum punishment if they

found that the offense was murder and not capital murder, and the minimum punishment being 5 years. And they were also asked about their views about capital punishment.

Now, some of those people who were asked about their views about capital punishment were first treated to a graphic description of how that punishment occurs. And some of the people who were questioned about minimum punishment were told in advance the range is 5 years to 99 years. Could you do either? And many of them were just asked, what do you think the minimum penalty is that you would impose for willful, deliberate, intentional, cold-blooded murder where there was no robbery?

And our submission in our principal brief and below was that the State used those disparities in a racially discriminatory manner and that bears tremendously on the intent of the prosecutor in executing the peremptory strikes. And their --

QUESTION: Are you saying -- are you saying that the prosecutor on voir dire must ask, when he gets to the question of, you know, how do you feel about -- must ask the same questions to every juror?

MR. WAXMAN: Not at all. They don't have to ask the same questions. They don't have to ask them in the same way. All that we're saying is that when they do ask the same questions and they ask them in a way which is

acknowledged to be different and they acknowledge that they --

QUESTION: Well now, wait a minute. You say when they do ask the same questions and they ask them in a way that's acknowledged to be different, that seems like a contradiction just starting out.

MR. WAXMAN: I think I -- I managed to confuse even myself.

QUESTION: Good.

(Laughter.)

MR. WAXMAN: The prosecution -- I believe that Ms. Bunn will confirm. The prosecution said we had two different ways of questioning about these two subjects, and we used them deliberately at -- with different jurors and we did it in order to remove jurors that we thought were weak on the death penalty. That is the reason that they give and that's the reason against which their justification must be judged, and it is --

QUESTION: You would concede that would be legitimate, that that --

MR. WAXMAN: Sure, if you -- I -- if you -- somebody says, look, I -- there's no way I can impose the death penalty, and -- as a -- as a prosecutor I don't want -- I don't know if I can use a for cause strike, I don't want to use a peremptory, let me see if I can't get them

to say something that will allow the judge to knock them out for cause, that's entirely legitimate.

The question is why did they do it. Because it would be illegitimate if they were doing it deliberately disproportionately against black jurors because they were black and it would be legitimate if they were saying, okay, you know, people who expressed hesitation about the death penalty -- we're going to do everything we can to try and get rid of these people for cause.

And let's just look at the State's own statistics. This is their statistics from their brief at pages 17 and 18 and notes 38 and 39.

With respect to minimum punishment, seven of the eight African American jurors who were questioned about minimum punishment were not told in advance that the minimum punishment was 5 years. And when they were asked what they thought minimum punishment was, they said 20 years, life. One person said that he thought the death penalty was the minimum -- minimum -- punishment.

For the whites, 36 white jurors were questioned. Two -- only two were not told that it was 5 years in advance. Now, they say that's not fair because you only need to compare those jurors who had expressed hesitation about the death penalty because that was our factor. And they identify in their brief 10 white jurors and 10 black

jurors who expressed hesitation.

Well, two things. Okay, we'll use your numbers. That means that of the 10 black jurors who expressed hesitation, 7 were given this trick questioning and 2 --

QUESTION: What was the -- what was the purpose of the prosecution in asking about what they thought the minimum penalty --

MR. WAXMAN: Under Texas -- Mr. Chief Justice, under Texas law, that is grounds for disqualification for cause and the prosecution did seek --

QUESTION: What is -- what is --

MR. WAXMAN: The inability to impose the minimum punishment -- to consider the minimum punishment that the law allows. And they did try and strike two black jurors for inability to impose minimum punishment, however odd that seems given the role of the prosecution in a case.

They say there were 10 of each and even taking -- 10 hesitant jurors, and even taking their numbers at -- at their word, that means, nonetheless, that a black hesitant juror was three-and-a-half times more likely than a white to be struck. And it doesn't account for the fact that their 10 white jurors wildly understates the number of white jurors who expressed hesitation about the death penalty. It doesn't even include a white juror that they struck for cause for inability to impose the death

penalty, Mr. Sohner. And there are at least 8 or 9 other jurors that we identify in our papers that are not in their list of 10. So even if you take their universe at its will, blacks were three-and-a-half times more likely to be tricked by this minimum punishment ploy than whites.

Now, on the graphic script about the death penalty, they said, you bet, there were some people that we went through all the gory details of how execution occurs because we were trying to get those people off the jury because they were hesitant about the death penalty, but we did it with hesitant white jurors and we did it with hesitant black jurors.

Let's look at their numbers. Eight of the 15 African American jurors were given the graphic script, 53 percent. Three of the 49 white jurors were given the graphic script.

QUESTION: But might it not be a justification there that more black jurors showed hesitancy about the death penalty than the white jurors?

MR. WAXMAN: Well, it might -- it might be, but if couldn't be on this record because there were only 15 black jurors. So out of the whole -- I'm using the entire universe of everyone who was questioned.

Let's then go to their explanation. They say it only applied to jurors who expressed hesitation about the

death penalty. Let's just look at that universe. There was 10 of -- there were 10 of each. Okay. That means that 7 of the 10 black jurors that they say expressed hesitation were given this graphic script, and of the 10 white jurors that say expressed hesitation, 2 were given this. And that to us is evidence of conduct that occurred during voir dire that admits of only a racial explanation just as their conduct of the jury shuffle, which is a ubiquitous and unique Texas practice that exists only in the State of Texas.

And we go through in our brief -- perhaps in as not as much detail as -- as would be appropriate but, nonetheless, given the page limits -- and show that the State on at least three occasions used the -- its prerogative to shuffle the jury for the obvious purpose of moving African American jurors who were in the front of the venire where they would be questioned to the back of the venire each week where they would not.

And here it's important to understand something about the procedure in this case. There was a different venire called every week. Jury selection extended over 5 weeks. Each week either 40 or 50 new venire members were brought into the courtroom, and they were seated in order. And as soon as they sat down, the record reflects, the judge asked the State first and then the defense whether

they wanted to, quote, shuffle the jury.

QUESTION: What does that mean?

QUESTION: What does it mean?

QUESTION: Would you tell us?

MR. WAXMAN: I will try to tell you and I would respectfully refer you, in case I fail, to the Texas Bar Journal article that we cited in our reply brief by a professor at, I think, the University of Houston which explains this practice.

But in Texas, jurors of course are -- venires are required to be chosen randomly, but there has always been a practice -- and it's now codified by statute -- that allows the -- the lawyers in the case -- this is in civil and criminal cases -- to look at the venire as it's arrayed in order and based on what Judge Holcomb explained for the Texas Court of Criminal Appeals, based on, quote, visual preference, because they haven't questioned these jurors at all, the State and then the defense can say we want to reshuffle the order. We don't like the order. And it is well understood in Texas that the principal reason for doing that is race and gender.

QUESTION: What are the consequences of, quote, reshuffling the order?

MR. WAXMAN: What happens is you take the -- the juror cards and it's either done in the central jury room

or in the courtroom, and they are shuffled either by the clerk shuffling the way you would shuffle a deck or, in this case, they were apparently, according to the record, put into a metal basket and the lawyer would sort of run his hands around and they'd pick them out, and they would then be in a new order. And after the State exercised its shuffle or declined to exercise its shuffle, the defense could choose whether to shuffle or not.

QUESTION: Are the jurors actually then reseated or are they just called in --

MR. WAXMAN: No. They are reseated so that --

QUESTION: Everybody gets up and moves and the back people get in the front, the front people get in the back.

MR. WAXMAN: Indeed. Indeed, and it can be done not once, but twice. And it's particularly critical here because what the judge --

QUESTION: What's the consequence? I --

MR. WAXMAN: Here's the -- here's the consequence. The way the jury was picked here, they questioned -- they questioned between 15 and -- generally between 15 and 20. One week they got to 30 jurors because they were doing individual voir dire. And so if you were not in the first 15 out of the 50 or certainly in the first 30 out of the 50, you weren't going to be questioned

at all. In fact, the judge told them at the outset, that if they were -- when the order was finally set, if they were in the last two rows, they could just go home that day and never come back.

And so the consequence of shuffling in this case wasn't the consequence you'd have if you had 50 jurors picked -- this is a capital case. We're going to ask all of you -- all of you -- questions, and it's just not that consequential what order you're in. But here the order meant everything. If you could get -- if the -- if the prosecution could get the black jurors out of the first 15 or 20 and into the back, they wouldn't have to worry about the disparate questioning or exercising peremptory challenges. And the -- the record in this case I think -- it doesn't involve an admission but it is very, very strong evidence.

I -- I just want to say, before sitting down for rebuttal, a point that may be obvious, but it is surpassingly important for this Court to decide the merits of the Batson challenge. There are many areas in the law in which -- in which this Court delineates the contours of constitutional doctrine by demonstrating what result a given set of facts yields. And so too Batson's abstract rules, its doctrines about the burden of proof and the quantum of proof, can also only be demonstrated and

meaningfully elucidated by a model. This is the kind of area like voluntariness, ineffective assistance of counsel, First Amendment actual malice in which this Court can and, I submit, under (d)(2) must model a case for the State courts and the lower Federal courts to show what quantum of evidence is sufficient to require a conclusion that a trial court's acceptance of a prosecutor as Batson's avowed reasons are objectively unreasonable.

And I'll please reserve the balance of my time.

QUESTION: Very well, Mr. Waxman.

Ms. Bunn, we'll hear from you.

ORAL ARGUMENT OF GENA A. BUNN

ON BEHALF OF THE RESPONDENT

MS. BUNN: Mr. Chief Justice, and may it please the Court:

Prosecutors in this case exercised their peremptory challenges to remove prospective jurors whom they believed were biased against the State, a belief based not on stereotypical assumptions but on the views actually expressed by these jurors during voir dire.

The trial judge, who observed firsthand the entire voir dire process, credited the prosecutors' race-neutral, case-related reasons for the strikes. The judge's findings of no purposeful discrimination are fully supported by the record and they are entitled to deference

in this Court.

QUESTION: Suppose you have a case in which 10 jurors are excused because of their expressed views on the death penalty, excused by the State. Five of those jurors are white and five of those jurors are black. But with the five black jurors, the questioning was qualitatively and quantitatively different. It went on much longer with much more searching, a different script. What result then?

MS. BUNN: Well, Your Honor, I would say that is circumstantial evidence of some kind of disparate treatment. If those are the facts, if these jurors had -- had expressed very similar or equivalent views on the death penalty in their juror questionnaires and then were treated differently by the prosecutors, that would be circumstantial evidence of disparate treatment. It is evidence that is not in existence in this case, however.

First, petitioner's attempts to make comparisons with white jurors are not supported by the record. They do not have equivalent views, and in any event, to the extent that disparate questioning happened, it was certainly based on the -- the -- either in the case of the graphic script questioning based on the jurors' responses to questions on the questionnaires or in the case of the minimum punishment question -- questioning on a

combination of the responses in the questionnaires and the responses to questioning in the voir dire. So that would be circumstantial evidence, but it is not present in this case.

QUESTION: But may I ask on that -- that question that if the different script was based on concern about the person's attitude toward the death penalty, would it not be true, because the script is -- comes very early in the examination, that the doubt about the death penalty must either have been shown in the written response questionnaire or something said right before that script took -- took place?

MS. BUNN: Yes, Your Honor, that's true and that's supported by the record in this case.

QUESTION: You think it is, yes.

MS. BUNN: Yes, Your Honor. Every prospective juror who was questioned -- with -- with the exception of one white juror, every juror questioned in -- with the graphic script at the outset of the questioning had expressed some level of opposition to the death penalty in their juror questionnaire.

QUESTION: Ms. Bunn, how do you define --

QUESTION: Now, the one -- may I just follow with one question? Now, the one juror who said there were four categories of death penalty and he said he was

somewhere between one and two, would that have been sufficient to justify that kind of script?

MS. BUNN: Well, perhaps following up with it. Now, that particular juror -- I believe you're referring to Edwin Rand -- had no -- there was no indication on his questionnaire of opposition to the death penalty. That's why the prosecutor did not lead off with the graphic script for Mr. Rand. However, after responses like that and then the response of Mr. Rand that he didn't know if he could -- maybe today he could impose the death penalty, but tomorrow maybe he couldn't, after that kind of questioning, then the prosecutor did lead up further along in the examination with a semi-graphic script, but certainly not at the outset.

QUESTION: Thank you.

QUESTION: There is -- I think on your numbers there were 10 white venire members and 10 black who expressed, on the questionnaire, hesitancy about the death penalty. But of those, there were only two of the white jurors who got the graphic script and there were I think eight of the blacks.

MS. BUNN: Well, Your Honor, first off, that's not -- that's not precisely true according to the record. We did list in a footnote 10 white jurors who had, at some point, expressed hesitancy about the death penalty.

However, unfortunately, we do not in a sense have a complete record because the juror questionnaires of the white jurors are not in the record in this case. Defense counsel at trial only presented -- offered into the record the juror questionnaires of the African American jurors.

QUESTION: But you did say that there were that number 10 --

MS. BUNN: Who at some point --

QUESTION: -- of the whites who expressed hesitancy.

MS. BUNN: Yes, Justice Ginsburg. Who at some point in their examination expressed hesitancy about the death penalty. But we don't know of those jurors who had expressed hesitation about the death penalty in their initial questionnaire. By example --

QUESTION: Well, which is something you could have put in I presume, the State could have put in, if -- if it had thought it had relevant evidence at that point, and it didn't. So don't we have to, in effect, make our judgment based on the figures that Justice Ginsburg has just mentioned?

MS. BUNN: Well, Your Honor, the -- for one thing, defense counsel never raised a disparate questioning argument before the trial judge, and that's where the State would have put that -- that evidence in.

And if -- if defense counsel felt like there were a disparate questioning argument, it would have been defense counsel, given that he had the burden --

QUESTION: The graphic script and the minimum punishment. That never came up before the trial judge?

MS. BUNN: The defense counsel did not argue at all the issue of -- of disparate questioning. The State -- the prosecution brought it up as a factor to consider and -- and argued, as we have argued here, that the State certainly did use different lines of questioning from different jurors based on their views but not on race.

QUESTION: But if the -- if the prosecution brought it up, it's -- I assume it's there for us to get into it, and we've got to get into it on the record that was made. And if the prosecution didn't make a further record on that, it's -- it's, it seems to me, appropriate for us to -- to look into the issue on the record that we have. And if we do, we come back to Justice Ginsburg's numbers.

MS. BUNN: Well, again, Your Honor, the -- the record in this case doesn't support those numbers also because we can look to an -- as analogy to the African American jurors, several of whom did not express hesitation about the death penalty in their initial juror questionnaire but who came back later on in their

examinations and did make comments --

QUESTION: All right. But those --

QUESTION: I'm getting confused. I thought the numbers we were talking about were your numbers, 10 of each.

MS. BUNN: They were -- they were numbers that we set forth in talking about -- in discussing the disparate questioning, jurors -- white jurors who had at some point expressed hesitancy about the death penalty. However, to infer from those numbers that it was that universe of jurors who the -- who the prosecutors had to consider their juror questionnaires in determining whether at the outset to -- to use the graphic script, that is not -- that is not how we intended the footnote.

QUESTION: I see. You mean some of that reservation of the death penalty may come later in the -- in the questioning.

MS. BUNN: Yes, Your Honor.

QUESTION: Well, why couldn't the prosecutor have then used the graphic script, or it would have been too late?

MS. BUNN: Well, in some instances the prosecutor did both with African American and white jurors, jurors who initially in their juror questionnaires did not indicate any opposition to the death penalty, but

into their question -- into their voir dire examination did, and there are instances where the prosecutor did go into the graphic script later on in the examination. But that is not what the petitioner is relying on here. He --

QUESTION: Why --

QUESTION: Isn't the fact that we are having this colloquy with you about the significance of the numbers a pretty good argument for the proposition that at least reasonable jurists might disagree about the significance of it, and therefore there should have been a -- a certificate of appeal issued here?

MS. BUNN: Well, Your Honor, given the level of deference that the trial judge's findings were entitled to in this case, we do not think that it -- it presents that kind of case regardless of the --

QUESTION: Well, it seems to me your argument on -- I'm not talking now about the -- the ultimate resolution of it which Mr. Waxman addressed. I'm just addressing the -- kind of the threshold question of whether there should have been a COA here. And it sounds to me as though your argument is saying that unless the defense has got just a slam dunk Batson argument at the end of the day, there shouldn't be a COA, which -- which perhaps reflects what the -- the court below was doing when it seemed to -- to say that there wasn't going to be

a COA because at the end of the day, the -- the Batson claim was not meritorious.

MS. BUNN: Well, Your Honor, it is our position that the court -- the court below correctly determined that no COA should issue in this case given the multiple levels of deference that the trial judge's findings were entitled to, not only the Hernandez standard --

QUESTION: But isn't -- isn't the degree of deference and the significance of that degree of deference with respect to specific claims something that is worthy of being determined in the appellate process rather than something that ought to be determined at the threshold before the appellate argument has even been made?

MS. BUNN: Petitioner has -- has never argued that he was not able to make any level of detailed argument in this case in the court below.

QUESTION: Well, regardless of what the petitioner may have said, what's the answer to my question? I mean, aren't you -- aren't we making out a pretty good case again by our colloquy here for the fact that there was something for the court of appeals to consider here on the -- on the -- the reasonable disagreement among jurists standard?

MS. BUNN: If the issue were looked at de novo, the issue alone of Batson, then yes, it presents

compelling evidence both ways. However, in -- viewed to the scheme of 2254(d), it is, as you referred to, a slam dunk case. And petitioner did not meet the COA burden, and that is -- our position is that the court -- court below correctly denied COA given the deference entitled -- that -- that the trial judge's findings were entitled to in this case.

And getting back to the trial judge's findings, just a few things that we disagree with the petitioner about in characterizing the trial judge's handling of this case.

First, the fact that technically the Batson hearing was conducted 2 years after the trial, that is true. However, when you look at the record of voir dire in this case, though it was pre-Batson, when defense counsel raised an objection to the strike of an African American juror, the prosecution came forward with his race-neutral reasons immediately, contemporaneous --

QUESTION: But that's not true in every case.

MS. BUNN: Every case where defense counsel objected to the strike of that particular juror. And that is true with every juror challenged here with the exception of Mr. Joe Warren.

QUESTION: Well, for example, the -- Joe Warren's case was most interesting to me because the

prosecutor just exercised the peremptory without any explanation whatsoever. And then the judge made quite a speech to the juror about how he had been a very fine juror, and that was sort of the end of it. And then later on, we find out that he was -- he was not a very fine juror.

MS. BUNN: Again, Your Honor, the -- the trial judge -- the trial judge's comments to the juror don't -- certainly don't vitiate the prosecutor's reasons for striking him. But nonetheless, defense counsel --

QUESTION: The prosecutor did not give a reason for striking that juror.

MS. BUNN: Defense counsel didn't object to the striking -- the prosecutor's striking of that juror. Certainly there was nothing even --

QUESTION: Well, as I understand it, the defense counsel had a kind of a running objection and made clear in each record when a black juror was stricken. The record -- he made it -- that be made part of the record. But he didn't object on a juror-by-juror basis. He didn't have any standing to do that.

MS. BUNN: He objected --

QUESTION: Because this was a Swain hearing rather than a Batson hearing at the time.

MS. BUNN: That is true. But he did in this

case -- defense counsel did in this case object to the striking of every single African American juror with the exception of Joe Warren and Paul Bailey. So he was not using a running objection kind of conduct. He -- he specifically objected to 8 of the 10 African American jurors struck. And for whatever reason, he did not object to the prosecutor striking Joe Warren. While this doesn't give rise to a procedural default, it could, in fact, be an indication that defense counsel thought there were legitimate reasons for the prosecutor's strike of Joe Warren.

QUESTION: You were -- you were on the -- the theme of saying that the hearing was conducted properly 2 years later, and I don't want to get you off of -- of that. But at -- at some point just answer this question, and maybe it's consistent with the two -- the hearing you're about to describe.

Mr. Waxman told us -- and -- and he's fair about these things -- that -- that you've walked away from number 6, that there was no disparate prosecutorial examination. But you started your argument by -- by indicating that the answers were -- were sufficient to -- to support that. Are you saying that there was disparate examination but that it was justified?

MS. BUNN: Yes, Your Honor, that's what we're

saying, and that is --

QUESTION: Because of the answers that they gave on the questionnaire and -- and answers that they gave just before the script was used.

MS. BUNN: Yes, Your Honor. It's the State's position now --

QUESTION: So you would say then that you haven't walked away from finding number 6?

MS. BUNN: No, Your Honor, we have not. It -- it's the State's position now. It was the State's position at the time of the Batson hearing that any disparate questioning was a legitimate means to deal with jurors who had expressed different views on different issues but was not based on race. And that is consistent with the trial judge's finding.

QUESTION: So you think that the trial judge, therefore, considered the issue of disparate questioning.

MS. BUNN: Yes, Your Honor.

QUESTION: All right. Now, then the question is, if they considered it, did he reach a reasonable conclusion?

What about Justice Ginsburg's mentioning there were at least eight white jurors who also expressed reservations who were not given this graphic description of what the death penalty involves, but instead were just

asked could you find against a person if that meant the death penalty? What about those eight people?

MS. BUNN: Well, again, disparate questioning, like many other pieces of evidence that petitioner is relying on in this case, are circumstantial evidence of -- of discriminatory motive or can be in a given case. Assuming that there -- that there was some level of -- of disparateness, even within those jurors who had expressed views about the death penalty --

QUESTION: No. The particular thing is what she asked and you say right now, I think correctly, that the trial judge did consider disparate questioning. You also agree that I guess it was -- the number was approximately 8 of the 11 black jurors who expressed doubts about the death penalty were asked this very graphic question, could you find a person guilty and give him the death penalty where that meant taking him in the gurney, et cetera. Only two white jurors were asked that question. Yet, I take it that you concede that there were at least eight other white jurors who also expressed doubts about the death penalty who were not asked that question.

MS. BUNN: Well, I do not concede that to the extent that it is identifying those jurors as being jurors who expressed doubts about the death penalty in their juror questionnaires, and that is the information that the

prosecutor had to go by.

QUESTION: All right. So you say there weren't eight such people. Fine.

MS. BUNN: Yes.

QUESTION: Okay. That's your answer.

MS. BUNN: Yes, Your Honor.

QUESTION: And I have another question which I think is to me more important, which is that these ambiguous answers, a difficult question about what the motive was of the prosecutor in peremptorily striking when he has a legitimate reason, to decide whether it's legitimate or not, I would have thought history, in terms of how the county has behaved in general, would be highly relevant to characterize and decide a difficult question like that.

But on page 911 of this record, the magistrate makes pretty clear that he thought history was not relevant in reviewing that third part of Batson, reviewing what the State did.

And the State court judge himself said on page 844 I guess whether or not I will give it -- I mean such evidence -- any weight is another question, and never referred to it again.

So in respect to that, what is your view?

MS. BUNN: The State's view is that while the

Federal magistrate -- first I'll address the Federal magistrate's handling of the issue. It is the State's position that the Federal magistrate did err in its elucidation of the standard of -- its holding basically that historical evidence is irrelevant at Batson's third step. However, certainly an error by a Federal magistrate does not entitle a petitioner to habeas corpus relief. And -- and any error as well was cured when the Fifth Circuit considered independently all of the evidence that petitioner had presented in his petition.

Moving on to the trial judge, however, there is nothing in the record --

QUESTION: Well, but -- but why -- why isn't this -- you're candid to say that you may have erred on this one regard, but why -- why isn't this a -- a very significant fact to which we must give great weight, especially you indicated the evidence was circumstantial. A little bit odd for a prosecutor to -- to say that circumstantial evidence isn't important. This is all we have in -- in these cases when we're trying to infer motive, and best evidence is often circumstantial. And why isn't the historical evidence here overwhelming circumstantial evidence and good evidence?

MS. BUNN: Justice Kennedy, it is evidence. It is circumstantial evidence. But the trial judge's inquiry

and certainly an appellate court's inquiry must begin, must key in on the reasons that the prosecutors struck these jurors and the record in this case. And in this case, prosecutors struck prospective jurors for legitimate, case-related, race-neutral reasons. That's where the trial judge's analysis began and ended, and it overruled the State's objections to the pattern and practice evidence on relevancy grounds.

QUESTION: Ms. Bunn, if -- if it begins and ends with the prosecutor's neutral reasons, then you would never have a successful Batson challenge because the prosecutor could always give a neutral reason. And the question that is troubling me is what in the end did the court consider and look -- and the -- and the State trial court said, well, he would take that so-called Swain evidence for what it was worth. He never told us. He never said how he resolved the question. And the -- the fact finding seemed to be going at these jurors, the black jurors, against whom peremptories were exercised, one by one and saying as to each one, there was a neutral reason given and that's it. We don't know how anything else figured in this package. We don't know whether the judge said, well, I'll take it -- take the Swain evidence for what it's worth -- did he say he thought it was worthless? He doesn't tell us. We don't -- we just can't tell from

this record what went on at that stage three.

MS. BUNN: Well, respectfully I disagree. The trial judge found the prosecutor's reasons to be credible, and in making that credibility determination and having overruled the State's objections to this pattern and practice evidence and stating candidly that he didn't know what weight he was going to give it, given that while it is circumstantial evidence, he's got a -- he's got a record here where the prosecutor's reasons are supported.

QUESTION: He --

QUESTION: Well, but the credibility finding, which is number 2, doesn't prevent us and -- and really shouldn't prevent a court from determining whether that credibility finding has a foundation. And if you have this very persuasive historical evidence, the different script, that all bears on whether the credibility finding can -- can withstand scrutiny. You can't just say, well, he concluded credibility and that's always for the trial judge and then walk away or, as Justice Ginsburg said, you'll never have a Batson challenge.

MS. BUNN: We are not --

QUESTION: Absent a finding that the -- the prosecutor is dissembling based on demeanor.

MS. BUNN: We are certainly not arguing that a -- a Batson finding from a trial judge is completely

insulated from appellate review. However, in a case such as this where the reasons credited by the trial judge are supported by the record, there -- there is no basis to overrule the trial judge's credibility determination.

QUESTION: Well, but that's not true as to finding 6, because he didn't find there was no -- there was justification for disparate questioning. He found there was no disparate questioning. And the record is perfectly clear that there was disparate questioning.

MS. BUNN: However, in the context of the Batson hearing that he was resolving, that finding is reasonably understood as a finding that there was no disparate questioning based on race.

QUESTION: But if read literally, it's -- if read literally, it's clearly incorrect.

And of course, as to the findings on credibility, there's no finding as to any particular juror. He just made a -- a gross finding that everybody -- I believe everything the prosecutor said. Basically that's what he found.

MS. BUNN: The finding regarding disparate questioning I believe is phrased as disparate questioning of the challenged jurors. So given that, I would say that, yes, that supports the interpretation certainly that it was made within the context of the Batson challenge and

that the finding was limited to based on race. There was no disparate questioning based on race.

QUESTION: May -- may I ask one question about the procedure? Were the juror information cards that have the notations about sex and -- and race noted on it -- when do you think those notations were made?

MS. BUNN: I would --

QUESTION: Because I find it significant there are no notations or very few as to attitude toward the death penalty, which is your -- your key to everything. There doesn't seem to be any card on which the prosecutor said soft on death or hard on death or anything like that.

MS. BUNN: I believe that those sorts of notations were made on the juror questionnaires rather than the juror information cards. And I -- I would agree with Mr. Waxman that the record does indicate that those notations were made toward the beginning of the process, prior to any individual questioning.

QUESTION: So that it would be fair to infer that the prosecutor on each juror noted race and sex, but did not note attitude toward death penalty.

MS. BUNN: Not on the juror -- the juror information cards. That sort of --

QUESTION: Which -- which were cards prepared before the voir dire examination began.

MS. BUNN: That -- that was all they had to go on during the preliminary phases. When they received the -- after the -- the panel was finally seated, when the jurors were given the questionnaires, then that's what the parties worked from in making more notes in determining which to challenge for cause and which to strike.

So, again, what can be inferred from that I -- I think is -- really, it's -- it's -- there's just not a whole lot --

QUESTION: Well, if --

QUESTION: Well, one thing that's clear is they did note the race of every juror before they questioned them. That much is clear.

MS. BUNN: Yes, Your Honor.

QUESTION: All right. So we have -- in essence, we still have a group of three busy judges who are reviewing a magistrate reviewing a record. The record is controversial at best. The magistrate uses the wrong standard concededly. And they don't even issue a certificate of appealability. Well, shouldn't they at least have done that?

MS. BUNN: Well, Your Honor, again it is our position that on this record a certificate of appealability was not warranted. Again, given the multiple levels of deference, the trial judge's clear

findings in this case, and the fact that they are supported by the record. And again --

QUESTION: But there's some absences in the finding, and let me go back to the -- the judge saying, I'll reserve the question whether to give that pattern and practice evidence any weight. And then we haven't got a clue how he resolved that question.

MS. BUNN: Well, again --

QUESTION: Or if he ever even came back to it.

MS. BUNN: Yes, Your Honor. However, it was clearly before the trial judge. The -- there's nothing in the record to indicate that the trial judge did not consider the evidence, nothing besides the mere absence --

QUESTION: But he -- he said he was going to decide whether he was going to give it any weight. Maybe he made a decision that he shouldn't give it any weight, and maybe that was wrong or right. But we just don't know.

MS. BUNN: Perhaps he did, but as the fact finder, that was his prerogative, and the -- the record in this case -- again, there's nothing to indicate that he didn't consider the evidence. It was before him and his findings, however, properly do focus on the record in this case, the reasons that the prosecutor came forward with, and were credited by the trial judge. And again, the --

the record in this case clearly supports those -- those findings.

And these jurors were jurors who the State -- both -- both white jurors and African American jurors who the State struck were jurors who had expressed views that the State was uncomfortable with.

And again, to get a feel for what the prosecutor's job was in this case, they -- they looked at ultimately 108 jurors, individually questioned 65 jurors, and the prosecutor had to view that -- to view those jurors as not even just looking at do you believe in the death penalty, yes or no, but where does this particular juror fall in the spectrum. How likely are they to be able to consider the full range of punishment in a capital murder case? That was what the prosecutor was charged with in this case.

And if you look at the record in this case, it supports the trial -- the prosecutor's reasons for the legitimate strikes in this case. They were supported by the record. They were case-related. And they were simply not based on race. There is ample support for the trial judge's findings and simply no basis to -- to overrule those findings.

Unless there are any more questions.

QUESTION: Thank you, Ms. Bunn.

Mr. Waxman, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Thank you. I just have six short rebuttal points to correct the record.

The -- while the graphic script was given at the beginning of the voir dire and therefore based only on the questionnaires, the minimum punishment ploy -- that is, trying to trick jurors about minimum punishment -- was done at the very end, after they had all of the evidence. And therefore, the relevant universe of whites who expressed hesitation is not 10, as the State says, but 19. And in any event, even with 10, they are three-and-a-half times as likely.

With -- also, we did -- the trial -- the defense lawyers in this case objected over and over and over again to trying to trick these black jurors by asking them what minimum punishment they would give without expressing the number. The voir dire is replete with this.

With respect to the graphic script, which did come at the beginning, well, the State now says, well, we don't have the questionnaires for all the people, so we don't really know how many there were. We know that we used the graphic script with three of them. Okay. The three that they used that they identified are jurors 27,

59, and 68. Two were excused by agreement, and one, number 68, was seated.

But we do know what the juror questionnaires were -- I'm just doing a -- sort of a quick list on the back of my note card here -- for Mr. Vickery, Ms. Mazza, Mr. Gutierrez, Mr. Hearn, and Mr. Duke. Mazza, who is -- who features prominently here and who is not included in their 10, said in her questionnaire, it depends on the crime.

QUESTION: Thank you, Mr. --

MR. WAXMAN: It is that --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)