RESPONSE TO "*SNYDER V. LOUISIANA*: CONTINUING THE HISTORICAL TREND TOWARDS INCREASED SCRUTINY OF PEREMPTORY CHALLENGES"

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John P. Bringewatt's recent note makes several important observations about the Supreme Court's opinion in *Snyder v. Louisiana*.[1] Although he provides reasonable support for the claim that *Snyder* represents a sea change in *Batson* jurisprudence, the US Supreme Court's fresh opinion in *Thaler v. Haynes*[2] (rendered on February 22, 2010) reads the *Snyder* majority opinion narrowly and suggests the possibility that *Snyder* is not as potent as it should be. The *Haynes* per curiam's guarded reading of *Snyder* signals the need for courts to continue to conduct the bird's-eye cumulative analysis that the Court performed in *Miller-El v. Dretke*[3] [hereinafter *Miller-El II*]. If lawyers challenging discriminatory peremptory strikes and trial courts replicate *Snyder*'s single-juror approach but ignore concomitant *Miller-El* circumstantial evidence of intentional discrimination, *Snyder* may (counter-intuitively) sap *Miller-El II* of its on-the-ground transformative potential. In other words, lawyers should not rely too much on the "more individualized focus" observed and applauded by the author because a narrow framing of a *Batson* challenge in the *Snyder* opinion's image (rather than a wider framing with a focus on the *Miller-El* factors) may fail in front of courts that view *Snyder* differently than does Bringewatt. A slightly different interpretation of the historical arc of the relevant cases and a critical reconsideration of *Snyder*'s circumstances foreshadow the outcome in *Haynes* and reveal nuances that suggest problems with Bringewatt's theory.

Bringewatt correctly describes several landmark decisions in the Supreme Court's jurisprudence on race discrimination in jury selection, including *Strauder v. West Virginia*,[4] *Swain v. Alabama*,[5] and *Batson v. Kentucky*.[6] However, his analysis is incomplete. While he persuasively

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1. Snyder v. Louisiana, 552 U.S. 472 (2008).
2. Thaler v. Haynes, 130 S. Ct. 1171 (2010).
3. Miller-El v. Dretke, 545 U.S. 231 (2005).
4. Strauder v. West Virginia, 100 U.S. 303 (1880).
5. Swain v. Alabama, 380 U.S. 202 (1965).
6. Batson v. Kentucky, 476 U.S. 79 (1986).

demonstrates that the nature of the judicial inquiry into discrimination has changed over time, the historical trend has not always been "in favor of *stronger* Equal Protection considerations."[7] Rather than charting a neat trajectory, the Court's decisions reflect staggered progress in an on-and-off effort to eradicate race discrimination in jury selection. Bringewatt acknowledges that "*Hernandez* and *Purkett* seem to disrupt [the] pattern," but other cases litter the path as well.[8] After *Strauder*, for example, other Supreme Court cases—including *Neal v. Delaware*[9] and *Bush v. Kentucky*[10]—substantially undercut the progress. These cases presumed state compliance with the Fourteenth Amendment and ignored the history of discrimination that preceded the finding that racially exclusionary statutes were unconstitutional. While it is true that the inquiry into discrimination in jury selection has evolved from a review of blanket statutory exclusions of minorities (in cases like *Strauder*) to case-specific intent-based assessments (required by *Batson*), the Court has not always made enforcement easier or the protection of the Fourteenth Amendment stronger. The history is a bit more erratic than Bringewatt presumes.

This history is important because it shows that the Court has sometimes weakened rather than strengthened mechanisms originally designed to enforce the constitutional mandate. In this context, the question is whether *Snyder* really makes it easier for courts to enforce *Batson*. Although Bringewatt argues *Snyder* was "an effort to create a more enforceable standard," the more individualized focus may actually encumber litigants who allege that opposing counsel is purposely discriminating against prospective jurors on the basis of race.[11] This perverse effect—that *Snyder* could work against those seeking to redress racial discrimination—arises from the Court's framing of *Snyder* and its opinion in *Haynes*.

Snyder could plausibly be read in either of two ways: as a strong holding that made "significant change[s] to the standard of review for *Batson* objections;" or, conversely, as a weak holding—a fact-specific anomaly to be distinguished away in the vast majority of *Batson* cases. As a matter of interpretation, Bringewatt persuasively argues that a "remarkable paragraph . . . alters the *Batson* standard" because its "conclusion is at odds with the deference paid by the Court earlier in the opinion to trial judges' unique capability to decide *Batson* issues." The author is right: the Court's conclusion would be unsupportable if it truly provided the deference due under a traditional *Batson* analysis. If it deferred, the Court would not have stated that it "cannot presume that the trial court credited the prosecutor's assertion that Mr. Brooks [the African American juror] was nervous." Remarkably,

7. John P. Bringewatt, Note, Snyder v. Louisiana: *Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1283 (2010) (emphasis added) [hereinafter '*Increased Scrutiny*'].

8. *Id*. at 1294.

9. Neal v. Delaware, 103 U.S. 370 (1880).

10. Bush v. Kentucky, 107 U.S. 110 (1883).

11. *Increased Scrutiny*, *supra* note 7 at 1286.

the majority was unwilling to acknowledge the significance of this decision to not credit the claim that Mr. Brooks was nervous. Because Bringewatt notes that the Court did not "explicitly claim to create a new legal standard," the weaker reading seems poised to prevail, even though it is analytically unconvincing.

But there is good reason to attribute a strong holding to *Snyder*. On its face, the case is unprecedented: the Supreme Court overruled the judgments of a state trial court and supreme court to find a *Batson* violation where a single African American juror's response to a single question sufficed to render him similarly situated to white jurors who gave similar responses. This was enough to support a finding of intentional discrimination.[12] If *Snyder* means that a single point of agreement between a black juror and a white juror combined with a single instance of disparate treatment between those jurors is sufficient to require a *Batson* reversal on appeal, it is the most potent holding in the entire line of jury discrimination cases.

The *Snyder* holding is paradoxical because the quality that conceivably makes it potent—that it turned on a single explanation that the Court found implausible—also makes it distinguishable, and possibly detrimental to those who seek to rectify racial discrimination in jury selection. Early in the opinion, the majority skirts the *Miller-El* cumulative analysis and positions itself as a one-juror case: "[b]ecause we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to Mr. Brooks, we have no need to consider petitioner's claim regarding Ms. Scott." The opinion also reaffirms the notion that trial court determinations deserve deference, but then disposes of the trial court's ruling on the demeanor-based explanation for the strike against juror Brooks. By writing the opinion in this manner, the Court left open the possibility that lower courts could distinguish the case away—which is what Bringewatt indicates that most courts have done.[13] The tension between *Snyder*'s potential force and its potentially limited application calls into question its precedential value. As a result, although the *Snyder* Court "ultimately applied a nondeferential standard of review," it also effectively ensured that lower courts would not follow suit.

On February 22, 2010, the Supreme Court issued an opinion in *Thaler v. Haynes* that suggests how the highest Court itself views *Snyder*. Bringewatt accurately outlines the available options:

> It is possible that *Snyder* means that trial judges must explain the basis for their decisions on every *Batson* objection. It is also possible that such an explanation is only required if the reason proffered by the prosecutor in support of a peremptory challenge is not supported elsewhere in the re-

12. *See Snyder*, 552 U.S. at 483 ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'."); *id*. at 483-85 (comparing juror Brooks's response to those given by Roland Laws and John Donnes).

13. *See* Bringewatt, *supra* note 7 at 1305-06 (discussing Smulls v. Roper, 535 F.3d 853 (8th Cir. 2008) (en banc); United States v. Prather, 279 F. App'x 761 (11th Cir. 2008) (per curiam); United States v. Reed, 277 F. App'x 357 (5th Cir. 2008) (per curiam)).

> cord. Finally, it is possible that the standard only applies under identical circumstances to *Snyder*, where one of the prosecutor's explanations for a peremptory challenge is not accepted absent an explanation by the trial judge if another proffered explanation is found to be pretext for racially-motivated challenges.[14]

Haynes suggests that the Court will adopt the last view.

Haynes was decided on federal habeas review. The Fifth Circuit determined that the Texas Court of Criminal Appeals opinion denying the defendant *Batson* relief "was contrary to, or involved an unreasonable application of, clearly established federal law."[15] Therefore, the question presented to the Supreme Court was limited to whether the relevant federal law under *Batson* and *Snyder* met the high standard of being "clearly established."

Nonetheless, *Haynes* strongly hinted that the Supreme Court will read *Snyder* to be restrained, not revolutionary. First, the Court stated that *Snyder* does not demand that trial judges explain the basis for their rulings on every explanation offered by the striking party: "*Batson* plainly did not go further and hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor. Nor did we establish such a rule in *Snyder*." The Court then elaborated:

> The part of *Snyder* on which the Court of Appeals relied concerned a very different problem. The prosecutor in that case asserted that he had exercised a peremptory challenge for two reasons, one of which was based on demeanor (i.e., that the juror had appeared to be nervous), and the trial judge overruled the *Batson* objection without explanation. We concluded that the record refuted the explanation that was not based on demeanor and, *in light of the particular circumstances of the case*, we held that the peremptory challenge could not be sustained on the demeanor-based ground, which might not have figured in the trial judge's unexplained ruling. *Nothing* in this analysis supports the *blanket rule* on which the decision below appears to rest."[16]

The Court's language speaks for itself, and indicates that, in Bringewatt's words, "the standard only applies under identical circumstances to *Snyder*."

Snyder's procedural history and the change in the composition of the Court contextualize that opinion and may shed light on why the Court embraced a weak reading in *Thaler v. Haynes*. The Supreme Court remanded *Snyder* in light of *Miller-El II* in June of 2005. *Miller-El II* was a 6-3 decision, with Justice O'Connor in the majority and Chief Justice Rehnquist joining the dissent. When *Snyder* came back to the Supreme Court after the initial remand, Justice Alito and Chief Justice Roberts had replaced O'Connor and Rehnquist, respectively. Even if both Alito and Roberts had

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14. *Id*. at 1304.

15. 28 U.S.C. § 2254(d)(1)

16. *Id*. at 1174-75 (emphasis added).

preferred to deny Snyder relief, they would have been unable to impact the outcome, assuming that the five remaining justices from the *Miller-El II* majority would grant relief in any case. By joining the majority, Chief Justice Roberts seized the authority to assign the duty to write the opinion.[17] He gave that responsibility to the Justice most likely to write a weak holding—Justice Alito.[18] These circumstances help account for the outcome in *Haynes*.

The Court's opinion in *Thaler v. Haynes* chips away at the claim that *Snyder* made *Batson* more enforceable. It also exposes an important flaw in Bringewatt's general theory that a more individualized *Batson* analysis will uniformly benefit those who oppose discrimination. *Miller-El II* helps illustrate the point that a too-individualized analysis can undermine *Batson*. In *Miller-El II*, the Court emphasized the need to consult "all relevant circumstances" of discrimination. Though it didn't alter *Batson*'s framework, *Miller-El II* left no doubt about what had allowed racial discrimination in jury selection to continue in the decades since *Batson*: courts had been conducting *too narrow* an inquiry. Where courts simply looked at the race neutrality of the striking party's explanations and validated them, they failed to uncover the most significant and damning evidence of discrimination.[19] As the Court wrote, "*Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give." By expanding the review—looking at historical evidence, statistical evidence, other evidence of discrimination contained in the record, and the striking party's treatment of similarly situated nonminority jurors—*Miller-El II* actually moved the jurisprudence a step back from the individualized assessment. In this sense, "increased scrutiny" does not necessarily entail a more individualized focus. *Miller-El II* called courts to increase the level of scrutiny, but that did not mean a mere analysis of one juror at a time. Instead, it meant considering voir dire as a whole, as well as all other relevant circumstances that illuminate the striking party's intent.

Thus, an important consequence of the *Snyder*'s single-juror approach is that lower courts may incorrectly read it to narrow the *Batson* analysis. If the judicial inquiry into discrimination in jury selection becomes too indi-

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17. The Chief Justice has the pivotal power to assign the opinion when he sits in the majority. *See, e.g.*, Paul J. Wahlbeck, Symposium: The Chief Justice and the Institutional Judiciary: Strategy and Constraints on Supreme Court Opinion Assignment, 154 U. PA. L. REV. 1729, 1730 (2006) ("The power to assign authorship of the Court's opinion provides the Chief with the capacity to direct the Court's policy-making agenda. This assignment power is unique among the Chief's duties in its ability to shape the development of the law.").

18. Justice Alito's record as a judge on the Third Circuit indicated that he had not been receptive to defendants' claims that the prosecution intentionally discriminated against minorities in jury selection. *See, e.g.*, Riley v. Taylor, 237 F.3d 300 (3d Cir. 2001), vacated and reh'g en banc granted, 237 F.3d 348 (3d Cir. 2001), rev'd, 277 F.3d 261 (3d Cir. 2001) (the initial panel opinion by Alito denying relief on Batson claim was later reversed by en banc Third Circuit; Alito dissented from the en banc opinion); Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994) (opinion by Alito reversing a federal district court ruling that granted Batson relief).

19. Bringewatt acknowledges this problem when he notes that *Purkett v. Elem* required a "low standard for a prosecutor's explanation." Bringewatt, *supra* note 7 at 1294.

vidualized, courts may overlook highly probative evidence of discrimination. Indeed, *Snyder* itself failed to even mention that the trial prosecutor compared the defendant to O.J. Simpson when delivering his argument to the all-white jury.[20] Moreover, courts may fall victim to the bunk notion that every juror's uniqueness means that a side-by-side analysis cannot illuminate the striking party's intent absent perfect symmetry between minority and nonminority jurors. The Court in *Miller-El II* noted that requiring "an exactly identical white juror would leave *Batson* inoperable." If courts looked for perfect or near-perfect symmetry between jurors, they would gut *Batson* and ensure that discrimination would run rampant but remain undetected. In short, a hyper-individualized focus could cultivate myopia in lower courts; litigants must beware, and should proffer as much circumstantial and atmospheric evidence of racism as possible to bolster their claims of discrimination.

Although *Snyder* certainly stands out as an important victory for opponents of race discrimination, its long-term effect cannot be foreseen. The Court's narrow single-juror approach—which ignores circumstantial evidence of discrimination—and its refusal to require trial courts to rule on each proffered race-neutral explanation to trigger appellate deference obscure the signals sent. If relied upon, *Snyder* could trap unwary litigants who anticipate that lower courts or the Supreme Court will view the case as a robust pillar against race discrimination. There is no doubt that Bringewatt was right to state that "[t]he persistence of [race discrimination in jury selection] over time suggests that is has been difficult to find a lasting solution to the problem." *Snyder* very well could be, and should be, a step in the right direction. Yet, history, context, and *Haynes* should give pause. Litigants must remember that *Swain*'s "net was not entirely consigned to history;" circumstantial evidence is critical.[21] If courts (including the Supreme Court) continue to distinguish and minimize *Snyder*, opponents of discrimination who overlooked persuasive circumstantial evidence of discriminatory intent will curse their misfortune, and regret misreading *Batson*'s tea leaves.

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20. The Court's failure to discuss the prosecutor's O.J. Simpson references at trial led one commentator to criticize the opinion. *See, e.g.*, Camille A. Nelson, Batson, *O.J., and* Snyder: *Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1722 (2008) ("Oddly . . . the Court . . . failed to undertake the expansive contextual analysis to which it purportedly subscribes. This was a tremendous missed opportunity. It is remarkable that the Court in assessing the *Batson* challenges in *Snyder* did not even mention the O.J. Simpson case."). The failure was especially notable given the amount of attention the O.J. Simpson references received during oral argument. *See* Posting of Lyle Denniston to SCOTUSblog, *Commentary: Trial judges on trial?*, http://www.scotusblog.com/2007/12/commentary-trial-judges-on-trial/ (Dec. 4, 2007, 2:24pm) ("The case of *Snyder v. Louisiana* (06-10119) may live in history as a case about using O.J. Simpson's legal troubles as a way to 'play the race card' before an all-white jury trying a black man. The Supreme Court, in a hearing on Tuesday, showed some fascination with that part of the case.").

21. *Miller-El II*, 545 U.S. at 239