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IN THE SUPREME COURT

STATE OF NEVADA

JEMAR MATTHEWS, Appellant v. STATE OF NEVADA, Respondent	Case No. 84339

APPELLANT'S REPLY BRIEF

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NRAP 26.1 Disclosure

As required by NRAP 26.1, undersigned certifies that there are no persons or entities as described in 26.1(a) that must be disclosed.

ARGUMENT

1. Juror Hughes

Batson v. Kentucky, 476 U.S. 79 (1986) requires that a district court, when faced with a challenge that a prosecutor's strike is racially motivated, must engage in a three-part process.

> *At step three, a "district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a Batson objection and dismissing the challenged juror." Id. (internal quotation marks omitted). "The court should evaluate all the evidence introduced by each side on the issue of whether race was the real reason for the challenge and then address whether the defendant has met his burden of persuasion." Kaczmarek, 120 Nev. at 334, 91 P.3d at 30.* Matthews v. State, 466 P. 3d 1255 - Nev: Supreme Court 2020

In their Answering Brief, after Respondent recounts the course of the trial proceedings regarding Defendant's Batson challenge of juror Hughes at some length, describing the questions asked, and arguments made, by counsel for the prosecution and counsel for the defense

However, when the brief gets to the point of exactly how it is they claim that the district court made the required "sensitive inquiry," Respondent gives the following brief argument, quoted below in its entirety:

> *Here, the court clearly stated why it was denying each of the Batson challenges. With regards to Ms. Hughes (344), the court found that the State had asked the same questions of all the jurors, and the questions did not differ based on ethnicity or background. 3 AA 507. Additionally, the court found that the State equally struck both jurors that failed to disclose their prior arrests. Thus, the court ruled that the peremptory challenges were not racially motivated. .*

Answering Brief at 25-26

Rather than showing that the district court had engaged in the "sensitive inquiry required under our jurisprudence, Respondent's argument serves to demonstrate how utterly inadequate the district court's analysis was.

As respondent notes, the district court gave two reasons.

The first reason given by the district court was that *"the State had asked the same questions of all the jurors, and the questions did not differ based on ethnicity or background."*

3 AA 507

This assertion demonstrates the district court's failure to engage in the "sensitive analysis" required under Batson. Caselaw makes clear that any difference in questioning between panel members is simply one of many possible indicia of bias on the part of the prosecution. Respondent cites Hawkins v. State, 127 Nev. 575 regarding four "[c]onsiderations that may be argued" by the defense to demonstrate discrimination.

Hawkins does indeed discuss four such considerations, citing Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006), which in turn cites Miller-El v. Dretke, 545 U.S. 231, 240-65 (2005). But Miller-El nowhere states that the four considerations were anything other than illustrative.

In fact, Miller-El stands, if anything, for the proposition that whether a strike of a juror violates Batson does *not* depend on whether the violation stems from a factor that had previously been identified as a consideration.

In Miller-El, the United States Supreme Court reviewed a case from Texas that involved a procedure known as a "jury shuffle," a procedure apparently unique to Texas, and not previously considered as a potential Batson issue.[1]

The Miller-El Court did not restrict itself solely to an evaluation of whether the prosecution in that case had engaged in disparate questioning, or any of the

[1] The Miller-El Court describes the procedure as follows:

> *Furthermore, petitioner points to the prosecution's use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually preferable venire members will be moved forward and empaneled. With no information about 334*334 the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Tex. Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp. 2003). Shuffling affects jury composition because any prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.*

improper behavior that had previously been identified in Batson or other prior precedent. If they had done so, the Miller-El Court would not have been able to find the "jury shuffle" to be improper, as the "jury shuffle" had not shown up on any prior list of examples.

Similarly here, the relentless focus by the district court on whether there had been disparate questioning by the prosecution simply sidesteps the issue actually raised by defense counsel, that of the pattern of strikes against both black, and other minority members on the panel.

The fact that the district court did not consider the prosecution to have engaged in disparate questioning is of no more significance than the question of whether they engaged in jury shuffling, a practice which, to the knowledge of the undersigned, is unknown in Nevada.

The district court's reliance on the lack of disparate questioning to conclude that there was Batson violation in the dismissal of juror Hughes is especially troubling because disparate questioning was not an issue raised by defense counsel in making the challenge.

Rather, defense counsel argued that it was the pattern of the State's challenges that was of concern. AA 0505. However, the district court never

addressed the issues actually raised, instead focusing on an issue not raised, that of disparate questioning.

Respondent notes that the Court gave a second reason to deny the Batson challenge, *"the court found that the State equally struck both jurors that failed to disclose their prior arrests."*

What Respondent fails to note is that defense counsel had argued that the two strikes referenced by the district court were *both* against members of minority group. Ms. Hughes, the first juror to be stricken on the supposed basis of a nondisclosure was black, and Mr. Becenti, the other juror to be so struck was the sole Native American on the panel. AA 0511. Thus 100% of the strikes on the alleged basis of non-disclosure were against minority jurors.

In summary, the district court's ruling as to Ms. Hughes appears to ignore the actual arguments made by counsel, and rather to fall back on one of the four categories referenced in Hawkins, *Supra*, which category was not asserted by defense counsel. As such the district court's ruling utterly fails to demonstrate that the court engaged in a "sensitive analysis." Respondent's brief merely highlights that failure.

2. Juror Collins:

As to juror Collins, Respondent asserts that *"Appellant admitted at the time that the State's peremptory challenge was not racially motivated."* Answering Brief at 26. This assertion is simply false. Defense counsel made Batson challenges as to two stricken jurors, Hughes and Collins. By making a Batson challenge, defense counsel was by definition asserting that the challenges *were* racially motivated. A review of the transcript shows that what defense counsel *did* state was that he felt "in his heart" that the Batson challenge was even stronger regarding Ms. Hughes than the one that the defense had interposed regarding Ms. Collins. AA 0506.

But it is not this Court's charge on appeal to analyze what was in counsel's heart, nor is it pertinent which of the two stricken jurors defense counsel believed had the stronger claim.

Rather, this Court must look at the three-step Batson analysis as applied by the district court, and in particular, whether the district court properly applied the third step. As with Ms. Hughes, it is submitted that the district court simply did not undertake the "sensitive analysis" required, but instead went off on a tangent, ruling again that there was no disparate questioning of Ms. Collins, when again, that was not the argument made by defense counsel.

Respondent describes the district court's ruling as follows:

> *The court again pointed out that the questioning of Ms. Collins (360) was not any different than any of the other jurors (to which Appellant agreed at trial), and the State did not ask questions of her that showed that it was trying to later preempt her. 3 AA 512, 3 AA 515. The court also found that she had made indications that could make both sides nervous when she expressed that her knowledge could be superior to that of the others. 3 AA 516. The court also found that she stated that she did not think the statement* (sic) *was fair, despite working in the system. Therefore, the court properly ruled that the State did not use its peremptory challenge because of a racially motivated reason.*
>
> Answering Brief at 26.

As argued above regarding Ms. Hughes, defense counsel had never claimed that there had been any questioning of Ms. Collins that differed from the other jurors. Quite to the contrary, defense counsel specifically stated that this was *not* an issue that they were raising. Defense counsel actually disavowed making any such argument, not once, but twice.

First, defense counsel stated, *"I can't say that they asked any questions that were different than other jurors."* AA 0512. After further discussion with the court, defense counsel reaffirmed that *"I don't think any of the questioning of her was any different."* Id.

Where counsel says, "my argument is 'A,'" and the district court responds by saying, that she rejects argument 'B,' the court has simply not responded to the argument.

Respondent in its Answering Brief then supports the district court's flawed ruling by citing the Court's comments regarding Ms. Collins having made statements regarding whether the system was fair.

These comments by the district court do not demonstrate a "sensitive analysis" of the totality of the circumstances, *including the arguments actually put forth by defense counsel*, on the part of the district court. Defense counsel had argued (1) that the pattern of strikes was indicative of bias, AA 0505, AA 0511, and (2) that the striking of a law enforcement officer was a suspicious factor likewise indicative of bias, where the law enforcement officer was black, AA 0511, AA 0513.

The district court did not address either of these issues, but rather referred only to the State's purported race-neutral reason. But simply pointing to the asserted race-neutral reason does not comply with the third step in the three-step Batson analysis. Rather, pointing to the asserted race-neutral reason does nothing more than demonstrate that the State had asserted a race-neutral reason as required in step two. After such a race-neutral reason is asserted, the court then must analyze the arguments by defense counsel to determine whether the assertion in step two was pretextual. But the district court never did this, instead repeating the

mantra that the State had "asserted" a race-neutral reason, thus conflating step two with step three.

In performing the "sensitive analysis" required in step three, the court must analyze the defense's argument as to why the State's proferred reason was actually pretextual. As asserted in the above section dealing with juror Hughes, the argument put forth by defense counsel is *not* required to be a practice which had been found to be improper in previous case law. However, the court's failure is even more egregious here, where the argument put forth by the defense actually *had* been been cited as a valid basis for a Batson challenge in previous case law.

The pattern of strikes has been recognized as a basis to find bias as early as in the Batson case itself. The Batson Court stated unambiguously that, *"a '**pattern**' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."* Batson, 476 U.S. at 97.

In this case, the defense argued that it was the pattern of strikes which demonstrated bias. Defense counsel argued that it was telling that the prosecution had failed to even exercise all of their challenges, and yet managed to strike two

black jurors and one Native American juror[2] in the very few peremptory challenges even made.

Where there is a claim of a pattern of strikes, it is not enough for the district court to look at each stricken juror individually to determine whether a facially race-neutral reason is in fact pretextual. In order to determine whether the reason was pretextual, the court must look at the pattern itself as part of the court's duty to *"consider all relevant circumstances before ruling on a Batson objection and dismissing the challenged juror."* Kaczmarek, Supra, 120 Nev. at 334, 91 P.3d at 30. The district court failed to do this, and therefore failed to undertake the "sensitive inquiry" she was required to undertake.

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[2] See, Kaczmarek v. State, 91 P. 3d 16 - Nev: Supreme Court 2004:

> *Nevertheless, we address an unsound argument made by the State regarding this step. The State relies on language from our opinion in Doyle v. State, which in turn relied on Batson and stated that "[t]o establish a prima facie case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." The State suggests that pursuant to Doyle, Kaczmarek did not make a prima facie case "[s]ince none of the [challenged] jurors were the same race as [Kaczmarek]." However, Doyle overlooked the progress of federal constitutional law holding that a defendant need not belong to the same group as the prospective jurors in order to challenge their exclusion on grounds of discrimination and specifically disavowing Batson's requirement of racial identification between the defendant and excused jurors. Accordingly, we hereby overrule Doyle's prima facie test to the extent it requires similar racial identification.*

Four categories of evidence loom large in assessing the Batson issue here, where the State had a persistent pattern of striking black prospective jurors from Flowers' first through his sixth trial. Pp. 2242 - 2250.

In looking at patterns of strikes in Batson challenges, the United States Supreme Court has recognized that the pattern may even extend to prior trials of the same defendant. Thus, in Flowers v. Mississippi, 139 S. Ct. 2228 - Supreme Court 2019, the Court stated:

> *A review of the history of the State's peremptory strikes in Flowers' first four trials strongly supports the conclusion that the State's use of peremptory strikes in Flowers' sixth trial was motivated in substantial part by discriminatory intent. The State tried to strike all 36 black prospective jurors over the course of the first four trials.*

Here, in a previous trial, Appellant raised a Batson issue, where the State had stricken a juror on the proffered basis that she *"gave 'tenuous' responses when asked about being fair and impartial and that she "kind of hesitated and rolled her eyes."* That conviction was overturned on appeal, for the same reason argued here, that the district court had failed to follow the three step process of Batson, with particular regard to the third step. Matthews v. State, 466 P. 3d 1255 - Nev: Supreme Court 2020.

The district court herein should therefore have been especially sensitive to the mandates of our Constitutional jurisprudence, by analyzing and ruling on

Appellant's argument relative to the pattern of strikes. Unfortunately, no such analysis was made.

Respondent also fails to address Appellant's argument in his Opening Brief that *"the trial court must evaluate... whether the prosecutor's demeanor belies a discriminatory intent."* Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)

Rather, Respondent maintains that:

> *However, the district court did not need to consider a specific inquiry into credibility and demeanor because the reasons for the peremptory challenges were clearly established in the record. The peremptory challenges were not based on the juror's demeanor which could have required the court to explain any observations of its own or the reasons for its belief in the proffered reasons.*

Respondent is wrong on both the law and on the facts.

Respondent is wrong on the law because step three of the Batson inquiry involves an evaluation of the prosecutor's credibility, see Batson, 476 U.S., at 98, n. 21, 106 S.Ct. 1712, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge," Hernandez, 500 U.S., at 365, 111 S.Ct. 1859 (plurality opinion).

The United States Supreme Court has emphasized the importance of the district court's demeanor evaluations:

> *Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding "largely will turn on evaluation of credibility." 476 U. S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." Wainwright v. Witt, 469 U. S. 412, 428 (1985), citing Patton v. Yount, 467 U. S. 1025, 1038 (1984).*

Hernandez v. New York, 500 US 352 - Supreme Court 1991

The United States Supreme Court has also stated that *"the trial court must evaluate... whether the prosecutor's demeanor belies a discriminatory intent..."* Snyder, supra. In the instant matter, the district court made reference on numerous occasions to the fact that the State had *"**stated** a race-neutral basis" e.g.* 3 AA 0516 (emphasis added). The court failed to evaluate whether that stated basis was pretextual.

Respondent is likewise wrong on the facts. Respondent claims that there was no demeanor evidence at issue. Answering Brief at 27. This is simply not an accurate description of the record. At trial, the State argued extensively about the demeanors of both juror Hughes and juror Collins.

As to juror Hughes, the State argued:

Ms. Hughes actually hesitated. And I think it was more of a, hey, I got caught, as opposed to, you know, a, oops, that was just my mistake. Okay. I'm sorry, I don't believe that it was just a innocent mistake not disclosing that you were arrested.

And again:

It didn't look to me as if she forgot it – forgot about it.

And again:

She hesitated...

AA 0501.

These are all demeanor arguments.

Likewise, when discussing Ms. Collins, the State argued:

My notes say she feels the criminal justice system is not fair at times while working at P&P. She says she's seen files where the defendant has already been to trial or has already pled guilty.
The decision has already been made, and looking at everything, it looks like -- it looks one way versus what the verdict was. Okay. So that to me questions, you know, a jury verdict?

AA 0509

The arguments the State made as to what Ms. Collins "felt" are undeniably related to her demeanor. Thus for Ms. Collins, as for Ms. Hughes, the court was required to make an evaluation of that demeanor. Instead, the court stated,

I always get offended when someone from law enforcement or that type of a background says something like that in front of a bunch of jurors. Like, you know, they know, they have more information, her

> *knowledge is superior. And she basically did say that, that her knowledge was superior to what a jury had determined, because she looked at everything.* 3 AA 0514

Rather than undertaking a sensitive inquiry into whether the claimed race-neutral basis was pretextual, the district court substituted her personal feelings of being personally "offended" by Ms. Collins' statement.

Rather than being offended, the district court should have considered defense counsel's argument that *"it just doesn't square up that someone in law enforcement is all of a sudden not going to be a good prospective juror for them."* 3 AA 512-513.

This Court has previously held that:

> *While not necessarily "[a]n implausible or fantastic justification," Ford, 122 Nev. at 404, 132 P.3d at 578, we find it* ***unusual*** *that the State based its decision on this prospective juror's law enforcement experience....*

Conner v. State, 327 P. 3d 503 - Nev: Supreme Court 2014 (empasis added)

Likewise, in the instant case, it is, to say the least, "unusual" that the State claimed to be *striking* a potential juror because of the prospective juror's law enforcement experience, when normally it the State that does everything they can to *retain* individuals with law enforcement experience on the jury. As in Connor, the State's alleged basis would not necessaril be "implausible or fantastic" when

taken in a void. However, when this very "unusual" alleged basis for the strike is coupled with the pattern of striking minority jurors that defense counsel demonstrated at trial, it is submitted that the defense carried their burden of showing that the strike was, more likely than not, based on an impermissible attempt to exclude black and other minority members from a jury in which the accused was a black man.

But this Court need not make a determination that the defense definitely carried that burden in order to reverse Appellant's conviction. Despite the reversal of Appellant's prior conviction, and despite the numerous times that this Court has implored district courts to make an adequate record, the district court did not do so here. Instead, the district court focused single-mindedly on the fact that the State had "stated" a race-neutral reason for their strikes. With no "sensitive inquiry" having been performed, this Court simply cannot presume that the district court's rejection of defense counsel's arguments was based on any analysis of those arguments. Instead, the district court's comments repeatedly suggest that the district court considered that her inquiry extended only to a determination of whether the challenged strikes fell into one of the four categories described in Hawkins, Supra. Having found that those four categories were not implicated, the district court concluded her analysis.

Conclusion

For the above reasons, Mr. Matthews' conviction should be reversed and remanded for a new trial.

Respectfully submitted,

/s/ Todd M. Leventhal
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Certificate of Compliance

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements or NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in Times New Roman Font, Size 14.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 points or more, and contains less than 14,000 words, to wit 4,265 words.

3. I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the Nevada Rules of Appellate

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Procedure.

Dated: October 10, 2022

/s/ Todd M. Leventhal

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Dated: October 10, 2022

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