

Many, perhaps most Americans look at judges as lofty beings of higher, rarer order, divorced from the dull humdrum lives in which we dwell. They are seen as more brilliant, more rational, and wiser than the rest of us. And then Texas, the state that was once a republic, gives us all an example of just how human, how flawed, and yes, how biased judges really can be.

The now-famous case of Thomas Miller-El was just before the U.S. Supreme Court some two years ago, when three of the nine justices determined that the “Court of Appeals erred in denying a certificate of appealability [COA]” on Mr. Miller-El’s claim of racial discrimination in the selection of his jury.

When Mr. Miller-El went back before the state and federal courts of Texas he had every reason to expect them to respect the decision of the U.S. Supreme Court. But, as the saying goes, he “had another thing coming”. Both the Texas Court of Criminal Appeals (sort of a Texas Supreme Court for criminal cases) and the 5<sup>th</sup> Circuit U.S. Court of Appeals promptly denied Miller El’s claims by virtually ignoring what the majority of the Supreme Court said and glomming onto what was written by the lone dissenter in the case, Associate Justice Clarence Thomas, to support their denials. In legal circles, this is almost unheard of. One former Circuit Court Chief Judge, John J. Gibbons, said, “The idea that the system can tolerate open defiance by an inferior court just cannot stand”.<sup>2</sup>

We shall see.

In legal opinions, dissenting views have some, albeit limited value. They reflect splits among courts, and signal to reviewing courts that problems existed in a given case. They have often spoken down through the pages of history of errors made by the present court that will hopefully be seen and addressed at a later age. But, in a strictly legal sense, in the case before it, dissents mean nothing. They have no force of law. It is a fundamental legal principle that majority opinions carry the deciding weight of which way cases are decided.

If that is so, why did a majority of the Texas Criminal Court, and, more importantly, the 5<sup>th</sup> U.S. Circuit Court of Appeals, essentially ignore the determination of the majority opinion and deign to abide by the dissenting opinion? Why would learned, experienced judges dare do such a thing?

Surely, part of the answer may lie in the simple fact that 30% of the Texas appellate courts are staffed by ex-prosecutors who have learned from their

former jobs to give short shrift to defendants' arguments. Many of them worked their way onto the bench by doing the very same things that the Supreme Court has criticized in the 1986 case *Batson v. Kentucky*,<sup>3</sup> where the Court forbade States from removing eligible Black jurors on the basis of race. If such an action was indeed unconstitutional, how many of these judges acted unconstitutionally when they were district attorneys? And while such an answer may suffice for the state appellate judiciary, what of the 5<sup>th</sup> Circuit, where federal judges, not state jurists, hold sway?

The answer to this conundrum may lie not in the law but in the realm of politics. For judges, though they wear black robes are yet political creatures. Even on the federal bench, judicial officers are appointed in, and by, the political system. Senators submit their names; presidents nominate them for Senate votes. And how does the ambitious judge come to the attention of national elected officials? By demonstrating her or his conservative credentials. Judges, in the lower *Miller-El* cases dared to violate fundamental rules of judicial procedure because they were *auditioning* for seats in the judicial hierarchy. Mr. Miller-El was nothing more than a Black, living stepping-stone on the road to their rising position.

For *Miller-El*, 53, there would seem to be some question that cries out for resolution, for, in his case, the prosecutor struck 10 out of 11 eligible Black jurors. Miller-El's argument was that this represented the "systematic exclusion" of such jurors, and, as such, a blatant violation of the *Batson* rule. To the state and federal courts hearing his claim, however, it merited little more than a terse, unsigned *per curiam* decision, which borrowed substantially from Justice Clarence Thomas' earlier lone dissent (without attribution). According to the view of a *New York Times* reporter, the 5<sup>th</sup> Circuit opinion seemed like judicial "plagiarism".<sup>4</sup>

To Gibbons, former chief judge of the 3<sup>rd</sup> U.S. Circuit, "The Fifth Circuit just went out of its way to defy the Supreme Court".<sup>5</sup> Apparently, the Supreme Court agreed with Gibbons' view, for by summer 2005, the Court once again reversed *Miller-El*, echoing its earlier reversal. There was a rare judicial hint that this might be the result, found in the words of then-Justice (since retired) Sandra Day O'Connor (no foe of the death penalty), who expressed clear displeasure at Mr. Miller-El's most recent treatment before the lower courts. O'Connor opined that the 5<sup>th</sup> U.S. Circuit was merely "playing lip service to principles" of capital case jurisprudence, which has "no foundation in the decision of this court".<sup>6</sup>

On June 13, 2005, the Supreme Court again reversed *Miller-El*.<sup>7</sup> As of this writing, he awaits retrial before the same courts that judicially approved the unconstitutional removal of Black jurors in the first place.

We shall see whether majority opinions are the law; or dissenting opinions become the law.

## ENDNOTES

- <sup>1</sup> *Judges of Death* first appeared in audio form, at [www.prisonradio.org](http://www.prisonradio.org), on December 14, 2004. It is reprinted here with permission of [www.prisonradio.org](http://www.prisonradio.org).
- <sup>2</sup> Liptak, Adam and Ralph Blumenthal, "Death Sentences in Texas Cases Try Supreme Court's Patience", *New York Times*, (Online), 5 Dec. 2004, p. 4. <http://www.nytimes.com/2004/12/05/national/05texas.html?hp&ex=1102309200&en=cbc23993931bdaa&ei=5094&partner-homepage>
- <sup>3</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).
- <sup>4</sup> *New York Times*, (Online), 5 December 2004, p. 3.
- <sup>5</sup> *Ibid.*, p.3.
- <sup>6</sup> *Ibid.* pp. 1 and 2.
- <sup>7</sup> *Miller-El v. Dretke*, 545 U.S. \_\_\_\_ [June 13, 2005].

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