IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, v. JOHNNY DUANE MILES, Appellant.	S086234 San Bernardino Case No. FSB09438

APPELLANT'S REPLY BRIEF

Appeal From The Judgment Of The Superior Court
Of The State Of California, San Bernardino County

Honorable James A. Edwards, Judge

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DEATH PENALTY

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A. Introduction.

Defendant is a black man charged with raping and murdering a white woman. After hardship and *Hovey* voir dire, 12 jurors were randomly called into the jury box for general voir dire and the exercise of peremptory challenges. (6 RT 1684.) Among this first group of 12 jurors were two prospective jurors who were also black: prospective jurors SG and KC. (6 RT 1685; 21 CT JQ 5975; 24 CT JQ 6825.)

KC was a former marine who had been married to a correctional officer, he agreed he could vote for death, he had no opposition to the death penalty and he believed prosecutors were trying "to protect the community . . . against those that would cause harm or have harmed." (24 CT JQ 6828- 6830, 6842, 6849-6852.) SG "favored the death penalty," thought it was fairly used in California and would not be reluctant to impose it, his father worked as a DEA agent and he himself had considered a career as a police officer. (21 CT JQ 55983, 5985, 6001-6002.) The prosecutor used peremptory

challenges to discharge both KC and SG. (6 RT 1705, 1708.)

Defense counsel made a *Wheeler/Batson* motion. (6 RT 1719.) The trial court itself made clear that in light of the answers given by both KC and SG, it did not understand why the prosecutor challenged them:

> "I don't understand [the challenges] as to [KC] and as to [SG]. You'll have to explain those." (6 RT 1720.)

The prosecutor gave three reasons for each discharge. (6 RT 1720-1722.) The trial court then denied defense counsel's motion because "I cannot say [the prosecutor's reason] is not legitimate." (6 RT 1722.) Ultimately, there was not a single black juror among the 12 jurors seated to try the case; of the 6 jurors eventually seated as alternates, there was a single black. (5 CT JQ 1009 [alternate juror 2].)

In his opening brief Mr. Miles contended that reversal was required for four reasons. First, the legal premise of Mr. Miles's argument was that in evaluating the trial court's ruling here, this Court should consider four types of evidence: (1) whether the reasons given by the prosecutor applied equally to white jurors who were not discharged, (2) whether the prosecutor's reason are unrelated to the case, (3) whether jurors KC and SG would have been favorable jurors for the prosecution and (4) whether the process

which resulted in the use of peremptory challenges suggested pretext (as where the prosecutor fails to question a discharged juror on an area he later says is critical). (Appellant's Opening Brief ("AOB") 52-54.) Second, as to prospective juror SG, the prosecutor's stated reasons for the discharge were a pretext for discrimination; these reasons were equally applicable to white jurors who were not struck, SG was a juror the prosecutor should have wanted on this capital jury and the prosecutor selectively questioned (or failed to question) the discharged and seated jurors. (Appellant's Opening Brief ("AOB") 55-63.) Third, as to prospective juror KC, the prosecutor's stated reasons for the discharge were also a pretext for discrimination; these reasons were equally applicable to white jurors who were not struck and the prosecutor again selectively questioned the seated and discharged jurors. (AOB 64-75.) Finally, if the Court found some of the prosecutor's reasons invalid -- and that race played some role in the prosecutor's decision to discharge either SG or KC -- then reversal was required because race should have played no role at all in the process of selecting the jury. (AOB 76-80.)

The state's position as to the initial legal premise of Mr. Miles's argument is not entirely clear. The state concedes the essential question to be resolved at the third stage of a *Batson* inquiry is "whether the prosecutor's race-neutral explanation for a peremptory challenge should be believed." (Respondent's Brief ("RB") 24.) The state suggests, however, that there "will rarely by much evidence bearing on" this question. (RB 24.)

In fact, the outlook is not nearly as glum as the state suggests. The case law discussed in Mr. Miles's opening brief shows that there are many different types of evidence which bear on this question.

The state concedes that comparative juror analysis is a "form of circumstantial evidence that is relevant." (RB 25.) In light of the case law, the concession is entirely warranted. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 ["If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."].)

In addition to comparative juror analysis, however, and as Mr. Miles pointed out in his opening brief, other forms of evidence bear on this question as well. Thus, where a prosecutor's stated reasons for a discharge are unrelated to the case itself, this too is circumstantial evidence that is relevant to the question of whether race-neutral reasons are a pretext for discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *Batson v. Kentucky* (1986) 476 U.S. 79, 98; *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 359.) Where prospective black jurors who are struck would otherwise have been favorable jurors for the prosecution, this too is a factor demonstrating pretext. (*See, e.g., Miller El v. Dretke, supra*, 545 U.S. at p. 232; *People v. Allen* (2004) 115 Cal.App.4th 542, 550.)

And where a prosecutor fails to question a prospective juror on an area he later alleges is critical to the discharge decision, this too demonstrates pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246. *Accord Reed v. Quarterman* (5th Cir. 2009) 555 F.3d 364, 376; *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1033.) This Court has quite recently noted the importance of examining the prosecutor's pattern of questioning in evaluating a claim of pretext. (*See People v. Chism* (2014) 58 Cal.4th 1266, 1317 [prosecutor states that he discharged a Black prospective juror because she had no supervisory work experience; held, court rejects claim of pretext where prosecutor questioned both minority and non-minority prospective jurors on this subject].)

Moving beyond the relatively uncontroversial legal premise of Mr. Miles's argument, and as noted above, the state recognizes that the key question is "whether the prosecutor's race-neutral explanation . . . should be believed." (RB 24.) Mr. Miles entirely agrees. The state argues that as to prospective juror SG, the record does not support a finding of pretext. (RB 25-31.) The state makes a similar argument as to prospective juror KC. (RB 31-36.) And the state argues that even if the prosecutor based his decision to strike SG or KC partly on race, that is entirely permissible and reversal is not required. (RB 36-38.)

None of the state's arguments have merit. Reversal is required.

B. The Prosecutor's Stated Reasons For Discharging Prospective Juror SG Were A Pretext For Discrimination.

SG was a 24-year-old African-American. (21 CT JQ 5975.) It is difficult to imagine a more favorable juror in a capital case. SG favored the death penalty, he believed death was a proper sentence for serious crimes, he would vote for the death penalty if it was on the ballot, he believed the death penalty was used fairly in California, he would not be reluctant to impose death and he would sign the verdict form and face the condemned with his verdict. (21 CT JQ 5983, 6001-6002.)

Nevertheless the prosecutor used his fourth peremptory challenge to discharge SG from this capital case. (6 RT 1708.) Given that SG was so favorably inclined towards the death penalty, and would therefore have been an excellent juror for the prosecution, the trial court stated that it did not understand why the prosecutor would challenge SG. (6 RT 1720.) The prosecutor gave three reasons for the discharge: (1) SG said in answering question 68 on the questionnaire he was not upset at the O.J. Simpson verdict and the prosecutor was discharging prospective jurors regardless of color if they "were not upset by the O.J. Simpson verdict," (2) SG said in answering question 74 that if he felt "that defendant might not have done it, he['s] innocent" and (3) SG said in answering question 35 that he "like[d] [his own] opinion over other people[']s." (6 RT 1720-1721; *see* 21 CT JQ 5982, 5993-5994.)

In his opening brief, Mr. Miles contended that none of these reasons held up under scrutiny. (AOB 55-64.) The state defends each and every one. (RB 25-31.) They will be discussed in turn.

1. The prosecutor's stated concern that SG was not upset about the O.J. Simpson verdict.

Question 68 in the jury questionnaire asked jurors if they were "upset with the jury's verdict in the O.J. Simpson case." SG checked a box that said he was not. (21 CT JQ 5993.) During voir dire, the prosecutor did not ask SG a single question about this response. (6 RT 1699-1702.) Nevertheless, SG's answer to this question was one of three reasons the prosecutor gave in explaining his discharge of SG, adding that he had excused jurors of all races where "the common denominator is that they were not, were not upset by the O.J. Simpson verdict." (6 RT 1721.)

As Mr. Miles explained in his opening brief, the problem here is that there really was nothing common about the prosecutor's "common denominator" after all. Prospective jurors who were *not* black -- like alternate juror 5 and seated juror 6 -- both gave answers that were *identical* to SG, explaining that they too were not upset by the O.J. Simpson verdict. (4 CT JQ 1179, 1197; 5 CT JQ 1401.) Nevertheless, the

prosecutor simply discharged SG -- while keeping alternate juror 5 ("AJ5") and seated juror 6 ("SJ6") -- explaining that the "the common denominator" in his discharge decisions was the answer to question 68.

The following chart starkly illustrates why the prosecutor's "common denominator" theory does not add up:

Juror	Question 68	Answer	Race	Result
SG	"Were you upset with the jury's verdict in the O.J. Simpson case?"	"No."	Black	Discharged.
AJ 5	"Were you upset with the jury's verdict in the O.J. Simpson case?"	"No."	Not Black	Seated
SJ 6	"Were you upset with the jury's verdict in the O.J. Simpson case?"	"No."	Not Black	Seated

Whatever else this chart shows, it makes clear that the "common denominator" in the prosecutor's decision to strike prospective jurors was *not* the prospective jurors' views about the O.J. Simpson case. If views as to the O.J. Simpson verdict were really the "common denominator," then both AJ5 and SJ6 would also have been discharged. A comparative juror analysis shows that the reason given by the prosecutor for striking SG stated applied equally to non-black jurors who were not struck. As such, the prosecutor's

reliance on the O.J. Simpson answer is plainly a sign of pretext. Indeed, if anything, the above chart suggests that the real "common denominator" in the discharge decision was the prohibited category of race.

But it is not just the comparative juror analysis that points to a finding of pretext. As noted above, although the prosecutor stated that the answer to the O.J. Simpson question was a critical factor in his decision to strike jurors -- the prosecutor himself called it the "common denominator" which he applied "across the board" -- he did not ask SG about it before striking him, and he did not ask seated juror 6 or alternate juror 5 about it before deciding to ignore their identical answers entirely. This too suggests pretext. (*See Miller-El v. Dretke, supra*, 545 U.S. at p. 246 [prosecutor's failure to question a prospective juror on an area the prosecutor later alleges is critical to the discharge decision is evidence of pretext]; *United States v. Williamson* (5th Cir. 2008) 533 F.3d 269, 276-277 [when a prosecutor identifies a given area as a factor in his decision to strike a black juror, the prosecutor's failure to inquire into that same area with white jurors is a plain sign of pretext].)

The state does not dispute either these facts or the law. Instead, the state argues the comparative juror analysis and the prosecutor's failure to question do not matter. As to the comparative juror analysis, the state makes two points. First it notes that the

prosecutor *did* discharge several other prospective jurors who also said they were not upset at the O.J. Simpson verdict. (RB 28.)

While the factual point is accurate, it is entirely beside the point. The goal of comparative juror analysis has never been to compare answers given by jurors who are discharged with answers given by other jurors who are discharged. That tells a reviewing court very little. The goal of comparative juror analysis is to compare answers given by jurors who are discharged with answers given by jurors who are *not* discharged so the reviewing court can compare the two and make an assessment of pretext:

> "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

The state's alternative point as to the comparative juror analysis is equally unavailing. The state notes that although the answers of alternate juror 5 and seated juror 6 were *identical* to SG in connection with the O.J. Simpson question, this does not matter because their answers on other parts of the questionnaire were not identical. (RB 28.)

Mr. Miles will start with a point of agreement. *Of course* the other answers given by alternate juror 5 and seated juror 6 were not identical to the answers given by SG in all

other parts of the questionnaire. It was, after all, a 130-question questionnaire. But as discussed below, the conclusion the state urges the Court to draw from this fact -- that the comparative juror analysis is therefore not evidence of pretext -- is made not by relying on binding authority from the United States Supreme Court (*Miller-El*) but by ignoring it completely.

The record shows -- and the state concedes -- that it was the prosecutor himself who identified the answer to question 68 as the "common denominator" which explained his decision to discharge jurors "across the board." The record shows -- and the state concedes -- that black prospective juror SG's answer to question 68 was identical to two non-black jurors who were not discharged. That is all that is required for an inference of pretext. Contrary to the suggestion in the state's brief, the Supreme Court has *explicitly* rejected the notion that comparative juror analysis requires the discharged and non-discharged juror to be "identical in all respects." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, n.6.)

Significantly, the facts of *Miller-El* show that the Supreme Court was faced with -- and rejected -- the *identical* argument the state makes here. There, defendant contended the prosecutor had improperly discharged black jurors Billy Fields and Joe Warren. (545 U.S. at pp. 242, 247.) The trial prosecutor explained these discharges, relying on (1) Mr.

Fields's specific answers to a question regarding rehabilitation and (2) Mr. Warren's specific answer to a question on what the death penalty accomplished. (545 U.S. at p. 243 [Fields] and 247-248 [Warren].) On appeal, the defense relied on the fact that numerous seated white jurors had given identical responses to these questions. (545 U.S. at pp. 244-245 [Fields] and 248 [Warren].) The state made the same argument the state makes here, arguing that the white jurors identified by the defense were not similarly situated to the discharged black jurors because -- *as to other questions* -- the discharged jurors gave different answers than the white jurors. (*Miller-El v. Dretke*, 03-9659, Brief for Respondent at pp. 19-20 [Fields] and 22 [Warren], 2004 WL 2446199 at *11-17 .) The Supreme Court acknowledged that these answers to other questions showed "some differences" between the discharged and seated jurors but nevertheless rejected the state's argument:

> "None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . . A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, n.6.)

The state does not address this aspect of *Miller-El*. Courts around the country, however, have recognized their obligation to follow *Miller-El*; the notion that jurors must be identical before an inference of pretext may be drawn had been consistently rejected.

(*See, e.g., Reed v. Quarterman, supra,* 555 F.3d at p. 376; *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 927 n.3; *United States v. Torres-Ramos* (6th Cir. 2008) 536 F.3d 542, 559; *United States v. Williamson, supra,* 533 F.3d at p. 274 n.14; *Green v. LaMarque, supra,* 532 F.3d at p. 1030, n.3; *United States v. Odeneal* (6th Cir. 2008) 517 F.3d 406, 420; *Kesser v. Cambra, supra,* 465 F.3d at p. 366.) It should be rejected here as well.

Turning to the prosecutor's failure even to question SG, seated juror 6 or alternate juror 5 on their identical answers to the critical O.J. Simpson question, the state argues this does not matter because the prosecutor *did* question SG on his answer to question 74. (RB 29.) The state's apparent thesis is that the failure to question prospective jurors in an area which the prosecutor himself later relies on as a reason to discharge the juror is somehow less probative of pretext when the prosecutor *has* questioned the prospective juror in a different area.

The state's thesis makes little sense in light of the facts of *Miller-El.* In that case, during voir dire the prosecutor questioned prospective juror Fields (who was Black) extensively about his views on the death penalty. (*Miller-El v. Dretke,* No. 03-9659, Joint Appendix, 2004 WL 2899955 at ** 173-189.) The prosecutor also questioned Mr. Fields very briefly about his brother who had been convicted of a drug offense, learning that he

was not close to his brother. (*Id.* at p. 189.) The prosecutor later used a peremptory challenge to discharge Mr. Fields, stating two reasons to support the discharge: (1) Mr Fields would not give death if rehabilitation were possible and (2) Mr. Fields's brother had a criminal conviction. (545 U.S. at p. 243, 246.) After finding that the first reason was a pretext, the Supreme Court addressed the second reason. Although there had been *extensive* voir dire by the prosecutor on Mr. Fields's death penalty views -- and even some voir dire on Mr. Fields's relationship with his brother -- the Supreme Court nevertheless concluded that the prosecutor's reliance on the conviction suffered by Mr. Fields's brother was a pretext precisely because "the prosecution asked nothing further about the influence his brother's history might have had on Fields, as it probably would have done if the family history had actually mattered." (545 U.S. at p. 246.)

In other words, *Miller-El* holds that where a prosecutor fails to question a prospective juror in an area he (the prosecutor) later alleges is critical to the discharge decision, that is a sign of pretext. The fact that the prosecutor engaged in extensive voir

dire of that same juror in a *different* area does *not* undercut the significance of this failure as a sign of pretext.[1]

Alternatively, the state suggests that the prosecutor's failure to question SG about his views on the O.J. Simpson verdict is less probative of pretext since the jurors filled out long questionnaires in the case. (RB 29.) The state cites numerous decisions of this Court for the proposition that when a lengthy juror questionnaire has been completed, a prosecutor's failure to question in a particular area may be less probative of pretext. (RB 30.)[2]

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[1] The state's appellate lawyers assure the Court that the prosecutor's exchange with SG about his answer to question 74 involved the "topic that concerned [the prosecutor] the most." (RB 29.) The state cites nothing in the record to support this insight into the trial prosecutor's concerns.

The Court need not linger over the absence of record support for the state's assertion. In light of the facts in *Miller-El*, the state's factual observation -- even if supported by the record -- would again be legally irrelevant.

In *Miller-El*, the prosecutor extensively questioned prospective juror Fields on the "topic that concerned him the most" -- Fields's views on the death penalty. (*Miller-El v. Dretke*, No. 03-9659, Joint Appendix, 2004 WL 2899955 at ** 173-189.) Nevertheless, once the prosecutor sought to justify discharging Mr. Fields by relying on the fact that Fields had a brother who had been convicted of a crime, the prosecutor's failure to question Mr. Field's about his relationship with his brother was a plain sign of pretext. In other words, affirmative questioning in a primary area of concern does not undercut the probative value of a prosecutor's total failure to question in another area which the prosecutor himself alleges is critical to the discharge decision.

[2] The state cites *People v. Edwards* (2013) 57 Cal.4th 658, *People v. Taylor* (2010) 48 Cal.4th 574, *People v. Dement* (2011) 53 Cal.4th 1 and *People v. Bell* (2007) 40 Cal.4th 582 to support its position. (RB 30, 36.)

In evaluating the meaning of these state-court decisions it is worth noting that in *Miller-El* -- the very case in which the Supreme Court articulated the rule that a prosecutor's failure to question may be a factor demonstrating pretext -- the parties used a very extensive jury questionnaire at trial. (*See Miller-El v. Dretke*, *supra*, 545 U.S. at p. 242 [referring to the questionnaire "filled out by all panel members"], 297 [Thomas, J., dissenting] [referring to "question 58" on the jury questionnaire].) In its contrary argument, the state ignores this aspect of *Miller-El* entirely.

But neither Mr. Miles nor this Court have that same luxury. The fact of the matter is that *Miller-El* itself involved an extensive jury questionnaire. Nevertheless, the Supreme Court held that where a prosecutor fails to question a prospective juror in an area he later alleges is critical to the discharge decision, this affirmatively demonstrates pretext. (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.) In light of the actual facts of *Miller-El*, the state simply cannot contend that the presence of an extensive jury questionnaire precludes a reviewing court from considering a prosecutor's complete failure to question prospective jurors in an area he later says is critical as evidence of pretext.

Indeed, in light of the facts of *Miller-El*, it is not surprising that the state-court decisions relied on by the state here do not stand for any such broad proposition. In

People v. Edwards, *supra*, 57 Cal.4th 658, for example, a prospective capital case juror filled out a jury questionnaire which had a detailed section regarding death penalty views. The prospective juror indicated her ambivalence about the death penalty in this detailed section of the questionnaire. The prosecutor affirmatively asked the juror about this on voir dire, learning she was still ambivalent. This Court held that in this situation, the failure to question the juror more extensively in this area was not a sign of pretext. (57 Cal.4th at p. 698-699. *Accord People v. Dement* (2011) 53 Cal.4th 1, 20-21 [in a capital case involving an extensive jury questionnaire, the prosecutor's failure to question discharged jurors was not evidence of pretext where the prospective jurors "were asked questions as a group by the parties that did not require a response unless a prospective

juror had a question or comment about that area" and "the prosecutor could observe the prospective juror' demeanor as each . . . question was asked."].)[3]

Given the facts of *Miller-El*, *Edwards* and *Dement* stand for the proposition that where a prosecutor has sufficient information in a particular area -- either because a juror questionnaire covered that area in detail or the jurors were asked questions by the parties or court itself -- the prosecutor's failure to question extensively in that area is not necessarily evidence of pretext. In that situation -- when sufficient information is

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[3] As noted above, the state also relies on *People v. Taylor*, *supra*, 48 Cal.4th at p. 615 and *People v. Bell*, *supra*, 40 Cal.4th at pp. 598-599 for the proposition that a prosecutor's failure to ask any questions of discharged jurors should not be considered evidence of pretext when there is an extensive juror questionnaire. (RB 30, 36.) Reliance on these two cases is distinctly odd.

In *Taylor*, this Court held that a prosecutor's failure to question prospective jurors prior to discharge was not a sign of pretext where "at the time of defendant's trial in 1996, the trial court, not the parties, had primary responsibility for conducting voir dire. . . . Neither the prosecutor nor defense counsel asked questions of any prospective juror during voir dire in open court. Thus, the prosecutor's failure to ask T.B. any questions is not significant here." (48 Cal.4th at p. 615.) Mr. Miles quite agrees that where the trial court is conducting the voir dire pursuant to state law, a prosecutor's failure to question jurors is not evidence of pretext. But even the state itself does not contend that is what happened here. *Taylor* does not aid the state's case.

Bell is equally inapplicable. There in analyzing defendant's *Batson* claim this Court actually recognized the relevance of a prosecutor's failure to question discharged jurors but noted that the prosecutor in that case "*had* asked the [discharged jurors] questions" and that as a consequence, the defendant there did *not* "assert the prosecutor engaged these prospective jurors in particularly 'desultory' questioning on voir dire." (40 Cal.4th at pp. 598-599 and n. 5, emphasis in original). Thus, *Bell* did not even involve a claim that a prosecutor's failure to question jurors was evidence of pretext.

provided by other sources for a prosecutor to distinguish one set of answers from another -- there may be no need for a prosecutor to ask questions in a particular area and the failure to do may not be probative of pretext.

But that is certainly not the case here, nor does the state even argue otherwise. The jury questionnaire asked one question -- and one question only -- about the O.J. Simpson case. It asked prospective jurors if they were upset by the verdict. (21 CT JQ 5993.) SG checked the box that said he was not upset. (21 CT JQ 5993.) Alternate juror 5 and seated juror 6 did the same. (4 CT JQ 1197, 5 CT JQ 1401.) No other question in the questionnaire, and no other questions during voir dire, covered this subject. On this record, if the prosecutor had genuine concerns about a prospective juror's views on the O.J. Simpson case, he would certainly have asked alternate juror 5 and seated juror 6 about their answers since nothing else in the questionnaire or the court's voir dire touched on this subject area. The fact that the prosecutor did not ask *any* questions in this area -- while discharging SG but not discharging alternate juror 5 or seated juror 6 -- is powerful evidence of pretext. Contrary to the state's suggestion, that there was a lengthy juror questionnaire covering *other* subjects (like publicity, views of law enforcement, views on the death penalty) really has nothing at all to do with the prosecutor's failure to ask questions about the one area that was, *in the prosecutor's own words*, the "common denominator" to his discharges.