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P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-10119, Synder v. Louisiana.

Mr. Bright.

ORAL ARGUMENT OF STEPHEN B. BRIGHT

ON BEHALF OF THE PETITIONER

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

The decision here of the majority of the Louisiana Supreme Court on remand from this Court is an extraordinary departure from the lessons that this Court taught in its Miller-El decisions. And I'd point out sort of three overarching errors in that regard.

First, the majority looked at each of the Miller-El factors, or some of them, and largely discounted them. That there were five African-Americans struck, they whittled that down to two. That there was disparate questioning, they identified that of the white jurors and Jeffrey Brooks, but they said that counted for the State. And Miller-El clearly teaches that it didn't.

They found there was no racial implication in the mention of the O.J. Simpson case from start of the case all the way through, because neither O.J.

1 Simpson's race nor Mr. Snyder's race was mentioned.

2 Secondly, there were some Miller-El factors
3 that were not considered at all, not even acknowledged.
4 For example, and one of the most powerful ones, the failure
5 to ask any questions of Jeffrey Brooks or Elaine Scott.
6 They had very ambiguous, general reasons for striking
7 them. They asked no questions. In this case, you could
8 ask anybody any question you wanted as a lawyer.

9 And then thirdly, when they got to the point
10 of considering them cumulatively, they had now whittled
11 them down to where there was very little to consider.

12 And our position is that what Justice
13 Kimball did, the author of the original decision, who
14 wrote the dissenting opinion, one of the two dissents
15 here, actually did what this Court remanded this case to
16 do, which was reconsideration in light of Miller-El,
17 because when you consider all those factors together,
18 nothing answers the question of or explains them as well
19 as race.

20 You can pick each piece out, each leaf out,
21 and you can try to find an innocent explanation for it.
22 But when you stand back and look at it all together --
23 and that's why the court missed the fact that the
24 backstrike was racially motivated in this case.

25 It just simply didn't look at these things

1 in the context --

2 JUSTICE ALITO: Can I ask you about one of
3 the factors?

4 MR. BRIGHT: Sure.

5 JUSTICE ALITO: It's hard to discuss them
6 all at the same time. What is the relevance of strikes
7 of black lawyers that you don't argue were based on
8 race? It's hard for me to understand why that's
9 relevant in this calculation.

10 Suppose there's a case where it's perfectly
11 clear that certain strikes were not racially motivated.
12 Let's say that the prosecution has the strategy of striking
13 every lawyer who's on the panel, and it strikes every white
14 lawyer and it strikes every black lawyer. Then what is
15 the relevance of the fact that the black lawyers were
16 peremptorily challenged?

17 MR. BRIGHT: Well, I see. You mean the
18 jurors happen to be lawyers and they are struck?

19 JUSTICE ALITO: That's right. Yes.

20 MR. BRIGHT: There's a common reason.

21 JUSTICE ALITO: Right.

22 MR. BRIGHT: Well, if that's the case, and you
23 considered that in Miller-El, that's a factor for race
24 neutrality. The difference here is the reason given for
25 striking Brooks, for example, is he might have a reason to

1 go home --

2 JUSTICE ALITO: No, no. But I -- you're
3 making the argument that there were five African-American
4 jurors who were the subject of prosecutorial peremptory
5 challenges.

6 MR. BRIGHT: Yes.

7 JUSTICE ALITO: And -- but you don't claim
8 that three of those strikes were based on race? Do you?

9 MR. BRIGHT: Well, no different than
10 Miller-El. The Court in Miller-El says you look at the
11 prima facie case because it's unlikely to happen by chance.

12 JUSTICE ALITO: Well, there were a large number
13 of strikes in Miller-El. This is a much smaller number.
14 But could you just explain, if you can, what is the
15 relevance of strikes that you do not even claim were
16 racially motivated?

17 MR. BRIGHT: Well, the difference is that, as
18 in Miller-El, it's unlikely to happen by happenstance.
19 They struck all the blacks they could in this case.
20 There were only five, and they struck every one of them.
21 And the way they went about striking them -- and the
22 context of all this -- it doesn't say that all five of
23 those, but that's -- Justice Alito, that's the classic
24 Batson case where the prima facie case is strong, given
25 the number of people struck, but you zero in on the

1 particular jurors, where doing the side-by-side
2 comparison, the failure to ask any questions, the other
3 factors that were identified --

4 CHIEF JUSTICE ROBERTS: I think that's right
5 that you zero in on the ones as to which you objected.
6 But you also want to rely on the fact that these other
7 jurors were excluded, and no objection was made to their
8 exclusion. If an objection had been made, the State, of
9 course, would have -- could have explained, if they had a
10 reason, a non-racial one, why they were struck. But you
11 didn't object.

12 And yet you want them to be considered as
13 evincing racial bias.

14 MR. BRIGHT: Well -- and part of the reason
15 they weren't struck, Mr. Chief Justice, was one of the
16 elements of race here. The prosecution accepted the
17 first black juror. So when the second one, Gregory
18 Scott is struck, it's only one out of two. There's
19 no pattern. Then Mr. Hawkins is struck. Now it's
20 two out of three. It is when Ms. Elaine Scott was
21 struck that now it's three out of four. There's still
22 one African-American.

23 And at that point, defense counsel says there's
24 a pattern, and I strike based on the pattern of striking
25 African-Americans.

1 JUSTICE GINSBURG: Couldn't counsel at that
2 point have gone back and said, ah, now I see what's
3 going on, so I'm going to challenge -- I'm going to
4 interpose a Batson challenge with respect to the second
5 and third African-American?

6 MR. BRIGHT: Or actually the first and
7 second. Well, yes, you're right. The second and third.
8 Well, there was -- that certainly could have been done. I
9 think basically the defense was snookered here.

10 But also, there was nothing to prevent the
11 prosecution from giving reasons. In fact, Mr. Olinde,
12 the junior prosecutor here, he starts to say, I struck
13 Mr. Hawkins, and at that point Williams, the senior
14 prosecutor, said, don't say anything. Stop --

15 CHIEF JUSTICE ROBERTS: Presumably because
16 no objection was raised as to Mr. Hawkins. I mean, it's --
17 the burden is on you to object if you think jurors are
18 being excluded on a racial basis.

19 MR. BRIGHT: Well, but the only thing we're
20 putting the pattern forward for is it's step three of
21 Batson, where both Miller-El decisions make it quite
22 clear that if the numbers are such that it's unlikely
23 to happen by happenstance, that's one element. It's
24 not that all five necessarily were struck on the basis
25 of race. But it is the fact that that unlikely event,

1 that five out of five were struck, informs that decision
2 in Batson saying looking at all relevant facts. It doesn't
3 exclude -- I've seen Batson challenges where a lawyer
4 will say, well, with regards to five and six, then we
5 think those are particularly strong, not with regards to
6 others -- Miller-El did that.

7 They only challenged seven on direct appeal,
8 only challenged six on the habeas corpus case that
9 ultimately made its way to this Court, and this Court
10 only found with regard to two.

11 CHIEF JUSTICE ROBERTS: Out of -- out of how
12 many who were struck?

13 MR. BRIGHT: Ten. So they only challenged
14 seven of those on -- on direct appeal, six on habeas
15 corpus, and this Court only found Jurors Fields and
16 Juror Warren. That's basically -- we're here saying, you
17 struck five out of five, all that he possibly could
18 have, and Juror Brooks -- if you look at all the
19 Miller-El factors with regard to Jeffrey Brooks, just
20 two general reasons that probably applied to everybody
21 there. He was nervous; I expect every citizen called
22 out of their home or out of their work --

23 JUSTICE SCALIA: The district judge is in a
24 much better position to decide those matters, such as
25 you know, he -- his -- his response was -- was slow on

1 -- on the question of, you know, whether he could
2 consider the death penalty. I can't tell that from a
3 cold record, and that's why we -- rely upon the trial
4 judge.

5 MR. BRIGHT: Well, that was with regard to
6 Ms. Scott.

7 JUSTICE SCALIA: Right.

8 MR. BRIGHT: Justice Scalia, there -- only
9 one juror here was ambivalent about the death penalty,
10 said she wasn't sure. She's cross-examined for four or
11 five pages -- Ms. Calligan -- four or five pages of
12 transcript. 23 -- 21, I'm sorry -- jurors are asked if
13 they are opposed to the death penalty and
14 answer the question yes. 21. Every single one is asked at
15 least two, and some were asked more questions. The
16 only person not asked any questions was Elaine Scott.
17 She first says -- could you impose the death penalty -- "I
18 think I could." Then she says later, "I could." If you
19 look at the three jurors right before her, Ms. DuBois, "I
20 could consider it"; Ms. Saracione, "I could consider
21 it"; Mr. Saulita, "I could consider it"; Ms. -- Ms. Scott,
22 "I could."

23 They all give the same answer. Two of those
24 people, Justice Scalia, end up on the jury in this case.
25 They're --

1 CHIEF JUSTICE ROBERTS: Well, I'm looking at
2 the joint appendix on page 360. As I read it,
3 Ms. Scott gives an answer that can't be heard, right?

4 MR. BRIGHT: Right. The first time.

5 CHIEF JUSTICE ROBERTS: Ms. DaPonte says,
6 "I'm sorry, I can't hear you." I mean, we don't know,
7 since we weren't there, if it was kind of, you know, "I
8 think I could" and then "I think I" -- I mean, you know,
9 it's an atmospheric determination by the -- the district
10 court judge; and as -- as has been pointed out, all
11 we have is the cold transcript.

12 MR. BRIGHT: Well, then, just a couple of
13 pages later, Mr. Chief Justice, she says, "I could." She
14 gives the same answer that the three jurors --

15 CHIEF JUSTICE ROBERTS: That's on joint
16 appendix page 401?

17 MR. BRIGHT: That's on -- yes.

18 CHIEF JUSTICE ROBERTS: And -- and the
19 problem with that, of course, is it's --

20 MR. BRIGHT: I'm sorry. 367.

21 CHIEF JUSTICE ROBERTS: 367.

22 MR. BRIGHT: She says, "I think I could" -- at
23 361. And then just a few pages later, they go each
24 juror, and she says, "I could."

25 CHIEF JUSTICE ROBERTS: Well, but -- the

1 question is not could you consider the death penalty.
2 It says, could you consider both, when they're going
3 through several of the juries. Jurors.

4 MR. BRIGHT: Well --

5 CHIEF JUSTICE ROBERTS: And I thought that
6 was -- the point was made by your friend on the other
7 side, that it was ambiguous as to what option she
8 was saying she could consider.

9 MR. BRIGHT: Well, I'd invite the Court to
10 look at that, because what that starts out with is a
11 question about life: Could you consider life
12 imprisonment? And then when Ms. Goff has answered, she
13 says, "The death penalty, could I consider it? Yes, I
14 could consider it." And then everybody says they could
15 consider it.

16 Now, the Louisiana Supreme Court treated
17 this as her saying, "I could consider the death penalty."
18 That's what they said. But here's the other point with
19 Miss Scott. It only took one question: Ms. Scott, what
20 did you mean when you said I think you could?

21 I mean that was in Miller-El -- in the
22 opinion in Miller-El II, the fact that Fields wasn't
23 asked any questions about the position on the death
24 penalty. He had expressed some; but if the
25 prosecutor is --

1 JUSTICE SCALIA: Well, these are peremptory
2 challenges.

3 MR. BRIGHT: Now, is there --

4 JUSTICE SCALIA: It seems to me if you have one
5 -- one juror who says, "I think I could," and another one
6 who said, "I could," I'm going to strike the one who said,
7 "I think I could."

8 MR. BRIGHT: But, Justice Scalia, there's no
9 reason you wouldn't ask them what they meant. And
10 that's what the prosecutors did with all the white
11 jurors here -- every single one. It's only Ms. Scott,
12 Elaine Scott, that there's no questions asked about the
13 reasons they gave for striking her. So they had the
14 opportunity to ask her what she meant, and they asked all
15 21 of the white jurors. They asked the --

16 JUSTICE SCALIA: Did all 21 say, "I think I
17 could"?

18 MR. BRIGHT: No. All 21 said no. And then
19 the prosecution asked them follow-up questions about
20 what their beliefs were. So in those situations, the
21 prosecutor is asking questions to be sure and to clarify
22 their position on the death penalty. Miss Calligan is
23 the only one who says, "Well, I'm not sure." So they asked
24 Ms. Calligan a number of questions. How long have you
25 thought about it? What do you think? All those sorts

1 of things. Ultimately, it's pretty clear Ms. Calligan
2 is opposed to the death penalty.

3 JUSTICE ALITO: Mr. Bright, you make some
4 good arguments about comparisons between white jurors
5 and black jurors.

6 MR. BRIGHT: Yes.

7 JUSTICE ALITO: What do we do with the
8 comparisons that you are making now to white jurors who
9 were never brought to the attention of the Louisiana
10 Supreme Court?

11 MR. BRIGHT: Well, I think Miller-El, again,
12 answers that, because the entire voir dire was before
13 the Louisiana Supreme Court. On remand from this Court,
14 arguments were made about the disparate questioning of
15 jurors; and also with Jeffrey Brooks, where that's also
16 very clear because the reason given for striking Jeffrey
17 Brooks is that he would have a reason to want to go home
18 early.

19 My experience is most jurors, taken out of
20 their homes and out of their work, would like to finish
21 their job and go home early, if they could.

22 JUSTICE ALITO: I think you have a good
23 argument in comparing him to some of the white jurors,
24 in particular Mr. Laws.

25 MR. BRIGHT: Right.

1 JUSTICE ALITO: But my understanding is you
2 never relied on Mr. Laws before the Louisiana Supreme
3 Court. Is that correct?

4 MR. BRIGHT: Not Mr. Laws specifically, but
5 you can look at the other people that are mentioned in
6 Justice Kimball's dissent. Mr. Yeager had something
7 coming up on Sunday; he wanted to get home for that.
8 Brandon Burns --

9 JUSTICE ALITO: But the arguments as to each
10 of them are different. The argument as to Mr. Yeager, I
11 think, is much weaker. He had one event on a Sunday, and
12 he was told you don't have to worry about that, this
13 case is going to be over by Sunday.

14 MR. BRIGHT: Well --

15 JUSTICE ALITO: So that's quite different
16 from somebody -- it could be quite different from
17 someone like Mr. Brooks or Mr. Laws. Isn't that right?

18 MR. BRIGHT: Actually, the reason they say
19 they're concerned about Mr. Brooks -- because he was
20 told, your dean says it won't be a problem. And he says
21 okay. No further expression of worry by him.

22 There is, by the other jurors, that were
23 accepted -- they all say on the record: I need to get
24 back to my job, to my family. Mr. Burns got -- a single
25 parent -- teenagers, 89-year-old grandparents that he

1 wants to get back to. All of those people accepted by
2 the State. And Justice Kimball deals with some of those
3 in her dissenting opinion, and they're briefed up to
4 the Louisiana Supreme Court on remand from this case.

5 But I believe Miller-El III -- or II --

6 JUSTICE SCALIA: I don't understand how the
7 dean could resolve his problem.

8 MR. BRIGHT: Well, he's the dean.

9 (Laughter.)

10 JUSTICE SCALIA: The man's problem, what
11 he's worried about is that he has to put in a certain
12 number of hours of teaching. And-- what was it? A couple
13 months before the end of the term? It was going to
14 be very --

15 MR. BRIGHT: No, this was in August. This
16 was right before the Labor Day weekend in August. The
17 term went all the way to December, Justice Scalia. And
18 he, at this point -- Brooks -- was just observing
19 someone else teach. I mean, he wasn't teaching himself.

20 JUSTICE SCALIA: Whatever, he had to be
21 there to observe. He had to put in a certain number of
22 hours. How could the dean say, oh, don't worry, it's no
23 problem?

24 MR. BRIGHT: Well, the dean --

25 JUSTICE SCALIA: The hours requirement is a

1 requirement for the degree. I don't think deans have
2 the ability to -- to waive degree requirements.

3 MR. BRIGHT: Well, with all due respect,
4 Your Honor --

5 JUSTICE SCALIA: Maybe the dean was just
6 saying oh, he'll be able to do it, and --

7 MR. BRIGHT: Well --

8 JUSTICE SCALIA: -- that wouldn't inspire a
9 great deal of confidence in me, even if I said okay.

10 MR. BRIGHT: Well, again, it would have only
11 taken one question. One question: Mr. Books, now that
12 you've heard that your dean said it won't be a problem,
13 do you have further concerns about wanting to get home
14 quickly?

15 JUSTICE SCALIA: -- a lot of --

16 MR. BRIGHT: Mr. Brooks --

17 JUSTICE SCALIA: -- my reaction would be --
18 would depend on how he said okay. And if I were sitting
19 there as the trial judge, I -- I could discern whether
20 okay meant, well, you know, that's what he says but I'm
21 still going to have a hard time digging out those hours
22 for the remaining time that I have in the term.

23 CHIEF JUSTICE ROBERTS: Do we know --

24 JUSTICE SCALIA: I don't know how he said okay.

25 MR. BRIGHT: If you're --

1 CHIEF JUSTICE ROBERTS: If --

2 MR. BRIGHT: If I could answer that
3 question, Mr. Chief Justice.

4 If you're the lawyer standing there beside
5 him and he says what you just said, then you ask him one
6 question. But there's a professor, Sandras. He's not
7 watching class; he's teaching class at the start of a
8 semester at the University of New Orleans; and he
9 doesn't -- it's no speculation. With Brooks it's all
10 speculation. With Sandras --

11 CHIEF JUSTICE ROBERTS: With Brooks, what he
12 said when he said, I'm missing right now something that
13 will better me towards my teaching career, and they
14 say -- and the judge says, is there anybody who could
15 speak to it? And he said, I've already talked to the
16 dean. And so based on his initial conversation with the
17 dean, he was still worried.

18 MR. BRIGHT: Well --

19 CHIEF JUSTICE ROBERTS: And then the judge
20 calls the dean, and of course the dean's going to --

21 MR. BRIGHT: No problem.

22 CHIEF JUSTICE ROBERTS: Well, that's what
23 he's going to say to the judge. But when Brooks talked to
24 him, apparently there was a problem because his concern
25 remained after having talked to the dean.

1 MR. BRIGHT: Brooks doesn't say there's a
2 problem. He gives the --

3 CHIEF JUSTICE ROBERTS: He says: I'm missing
4 right now --

5 MR. BRIGHT: Something that --

6 CHIEF JUSTICE ROBERTS: Something that could
7 help me out towards my teaching career.

8 MR. BRIGHT: Sure. Every -- the judge had
9 given this hardship question: We're going to sequester
10 the jury, you're not going to be allowed to communicate
11 with anybody. You're going to have to stay out at the
12 Travelodge while this case is going on. Of course, he
13 doesn't say at that point how long it's going to be.
14 And 44 people come forward. But all -- but with most of
15 those people, like with Brandon Burns, who has got to
16 get back to his landscaping business, Mr. Laws who's got
17 to get back two homes he's filling, his wife
18 recovering from surgery, and taking his children to
19 school every day -- all those people are assured this
20 case is going to be over by Saturday; it's not going to
21 go very long. This argument that they were worried that
22 the jury might be out for a long time, this is one of
23 the most perfunctory --

24 CHIEF JUSTICE ROBERTS: I don't understand
25 your answer that Mr. Brooks did not say there was a

1 problem. He says, "I've already missed half a day.
2 There's something I'm missing right now that will better
3 me towards my teaching career." He says, "I've already
4 talked to the dean."

5 How can you say he isn't identifying a
6 problem?

7 MR. BRIGHT: Well, he -- he's saying, again,
8 not knowing how long this is going to last, or what's
9 going to be expected of him -- right now I'm missing
10 something to help my education. Everybody is missing
11 something that's going to help them in their job, with
12 their families, or whatever.

13 But once the judge calls him back up to the
14 bench and says, we've talked to the dean, he says, it's not
15 going to be a problem for you to be here, most
16 students I know -- and I know a lot of you have had
17 experience with students -- once they're assured by the
18 dean that it's not going to be a problem, it's not going
19 to be a problem.

20 JUSTICE SCALIA: Even if the assurance is
21 only secondhand, right?

22 MR. BRIGHT: Well, I think when the judge --

23 JUSTICE SCALIA: I mean, if you told me the
24 dean says it's okay, that's all right.

25 MR. BRIGHT: The judge of the court, the

1 presiding judicial officer there, says we've talked to
2 your dean, and it's not going to be a problem for you to
3 be here this week. And everybody is told this week
4 we're going to try this case. There is a Labor Day
5 weekend coming up. We know you send the jury out
6 on Friday afternoon. You're not going to wait too long
7 for that verdict probably. And everybody is told: You're
8 going to be out of here by Saturday. Mr. Yeager, you're
9 going to be out of here by Sunday.

10 So we're talking really about Mr. Brooks
11 missing three more days. This is on Tuesday. This case
12 is over on Friday.

13 And everybody knew it was going to be over
14 on Friday, because they told jurors over and over and
15 over again that it was going to be over by Friday, so --
16 or Saturday at the latest.

17 So I -- I would say, again, no questions
18 asked. The lawyers had an opportunity right there when
19 they told him the dean says it's not a problem. Then
20 later he's called in panel 1. You can ask -- you see
21 this voir dire. It's very interesting. It's very short,
22 but the lawyers could ask individual questions to any juror
23 out there in the panel: Mr. Brooks, do you have any
24 concern that you won't be able to concentrate because you
25 need to get back to school?

1 They asked that question over and over, as
2 we pointed out in our brief, of white jurors. In fact,
3 the Louisiana Supreme Court, in what I think is one of
4 its great legal errors --

5 JUSTICE ALITO: Well, suppose you are trying
6 this case. You're defense attorney, and you ask a juror,
7 potential juror: Would you hold it against a defendant who
8 doesn't take the stand? And the initial answer is: I have
9 to think about that. I'm not quite sure.

10 Now -- and then you go on, and you ask a lot
11 of questions, and the juror comes around to saying: I
12 understand that's a person's constitutional right. They
13 get the -- advice from a lawyer. It doesn't necessarily
14 mean the person has something to hide, et cetera, et
15 cetera.

16 Does that additional questioning allay the
17 concern that you would have had at the beginning about
18 the fairness, the potential fairness, of the juror?

19 MR. BRIGHT: Well, I think you have to look
20 not only at those answers but -- but what the Court in
21 Miller-El II said were the side-by-side comparisons.

22 If you're asking the white jurors follow-up
23 questions to determine that, then that, I think, cuts
24 very much against the prosecution and supports an
25 inference of racial discrimination.

1 If you basically asked everybody about the
2 same thing, you can't draw that inference.

3 But the Louisiana Supreme Court said here
4 there was consistent questioning of the jurors about
5 whether, whatever their other obligations were, it would
6 interfere with their ability to sit as jurors. There is
7 consistent questioning of everybody except Jeffrey
8 Brooks. And that's the one African-American who the
9 court -- who the prosecutors then say they're striking
10 for that reason.

11 JUSTICE GINSBURG: Mr. Bright --

12 MR. BRIGHT: Yes, ma'am.

13 JUSTICE GINSBURG: The judge was quite passive.
14 Was -- was the judge, in fact, present throughout the
15 entire voir dire?

16 MR. BRIGHT: I -- I think the judge was
17 present, but he was quite passive. One of the more
18 remarkable aspects of this jury selection is when he
19 grants a defense strike for cause, the prosecutor,
20 Mr. Williams, says, "Are you crazy?"

21 And the judge says, "No." And they go right
22 on to the next thing.

23 (Laughter.)

24 MR. BRIGHT: You know, I -- I practiced law for
25 30 years.

1 JUSTICE SCALIA: It sounds like the right
2 answer to me.

3 (Laughter.)

4 MR. BRIGHT: It wasn't the right question.
5 I've often wondered about that, but I've never
6 articulated it.

7 (Laughter.)

8 MR. BRIGHT: And I think most lawyers
9 wouldn't.

10 There's another point where Williams tells
11 the judge: Swear all these people to say they've got a
12 valid reason for leaving, and send them all out of here
13 -- swearing people to say something that may be true or
14 may not be true.

15 And the judge says: Well, do I do it
16 individually, or do I do it in a group?

17 He says: Do it in a group. Just have them
18 all swear that they've got a legal reason, a hardship
19 reason, to be excused.

20 And the judge goes right along with it.

21 I think what we see with the judge in every
22 ruling here is four or five words: I'm going to allow
23 it. I'm going to allow it.

24 The judge is not engaged in questioning.
25 Unlike *Uttecht v. Brown* that Justice Kennedy wrote about

1 last term, where you have a judge involved and hearing
2 the lawyers and whatever, that's not present here.

3 So I think that when you look at that
4 factor, you don't have assurance that this judge was
5 involved in a way to make sure that the credibility
6 determinations which were being made -- and the other
7 point I would make is here he's ruling on the Batson
8 strikes as the jury is being selected. So he doesn't
9 have all of the information.

10 Now, he does rule again on the motion for a
11 new trial. That's the only time that all the information,
12 all of the relevant information, is before the judge. But,
13 there again, all he says is, I think the prosecutor's
14 reasons were race-neutral.

15 No indication that he went beyond
16 that to consider what Batson said and what Miller-El
17 says we have to consider, which is all the relevant
18 factors.

19 JUSTICE STEVENS: Mr. Bright, may I ask, in
20 your judgment, was all the reference to O.J. Simpson
21 relevant at all to what's before us?

22 MR. BRIGHT: I think it is, Justice Stevens,
23 and, I think, even if you don't look at the closing
24 argument, which tells you two important things: First
25 of all, the prosecutor broke his promise to the judge

1 that he wouldn't mention it. He said, as an officer of
2 the court, I will not mention it.

3 JUSTICE SCALIA: What does that have to do
4 with anything?

5 MR. BRIGHT: It has to do with --

6 JUSTICE SCALIA: So he broke his promise. I
7 mean sue him or something, but I don't see how it has
8 anything to do with whether a fair jury was -- was --

9 MR. BRIGHT: It has to do with his
10 credibility, which is very much what Batson is about.
11 But -- but to the O.J. Simpson case, I think the
12 prosecutor's obsession with O.J. Simpson -- a month
13 before he mentions it in a pretrial hearing.

14 The defense moves to ask to quit referring
15 to the O.J. Simpson case in the media; and, for
16 goodness sakes, Judge, don't let him refer to it before
17 the jury.

18 And the -- the defense makes quite clear:
19 The polls show that the society is divided. This was
20 ten months ago that Simpson came down. It is a very
21 polarizing case. The fact that he's mentioning it is going
22 to inject racial prejudice into this case.

23 CHIEF JUSTICE ROBERTS: What about the
24 explanation that was given that this was referring to
25 the Defendant's feigning emotional distress rather than

1 anything to do with race?

2 MR. BRIGHT: Well, I think, Chief Justice
3 Roberts, it doesn't have anything to do with that.

4 CHIEF JUSTICE ROBERTS: What doesn't have
5 anything to do with it?

6 MR. BRIGHT: The fact of whether or not
7 Mr. Snyder was, in fact, suicidal is not rebutted in any
8 way by bringing in the most racially polarizing case in
9 the country and saying that Simpson was trying to get
10 away with it.

11 JUSTICE SCALIA: Well, it's not just racially
12 polarizing. I mean maybe it is that, but it is also a case
13 in which a man killed his wife with a knife.

14 MR. BRIGHT: Yes.

15 JUSTICE SCALIA: The same as here.

16 MR. BRIGHT: Well, there are a lot of
17 similarities.

18 JUSTICE SCALIA: And then feigned a mental
19 illness by his -- his great-escape escapade, and that is
20 -- that is what the prosecutor said he was trying to
21 bring before the jury.

22 MR. BRIGHT: Well -- and he said Simpson got
23 away with it. Snyder couldn't have possibly known that,
24 because the verdict in Simpson didn't come down until
25 after Snyder's crime had been committed.

1 So he couldn't have been imitating, if that's
2 what he was arguing -- he couldn't have been
3 imitating O.J. Simpson. I -- I think what this
4 prosecutor learned from O.J. Simpson, Justice Stevens,
5 is that you don't let blacks on the jury.

6 I mean I think he saw that this racially
7 mixed jury in Los Angeles let him -- quote -- "get away
8 with it," and we're going to have an all-white jury here
9 in Jefferson Parish, Louisiana. And unlike what
10 happened out there, we're not going to let -- of course,
11 this was at the penalty phase. He could only get life
12 without parole or the death penalty. He wasn't going to
13 get away with anything. But that was the way it was
14 pictured to the jury: That if they didn't give him the
15 death penalty, he would get away with it.

16 CHIEF JUSTICE ROBERTS: So the relief you
17 are requesting goes only to the penalty and not to the
18 conviction?

19 MR. BRIGHT: No, Chief Justice Roberts.
20 This was in striking the jury, and there's no prejudice
21 requirement with race. Allen Snyder is entitled to a
22 new trial with a fair jury that represents the
23 community. So I think that --

24 CHIEF JUSTICE ROBERTS: Even though -- even
25 though your theory is that it was only with respect to

1 the penalty that the bias -- you have no allegation --

2 MR. BRIGHT: Oh, no.

3 CHIEF JUSTICE ROBERTS: -- that this jury
4 did not return a valid conviction. I thought your
5 objection was with respect to the death penalty.

6 MR. BRIGHT: Oh, no. Let me -- let me make
7 this quite clear. Our objection is that when the jury was
8 selected, in terms of the disparate questioning,
9 disparate acceptance, failure to ask any questions,
10 racial prejudice infected the selection of the jury.
11 All the O.J. Simpson case does is put a little icing on the
12 cake. But if you look at the Miller-El factors and
13 you consider them cumulatively, like Justice Kimball did
14 in her dissent, you come away once again with what the
15 Court said in Miller-El. The evidence is too powerful.
16 It all points in one direction, and that's intentional
17 race discrimination. And that was in the jury. And if
18 that happened, Allen Snyder is entitled to a new trial.

19 If I could, I'd reserve the rest of my time.
20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Bright.

23 Mr. Boudreaux.

24 ORAL ARGUMENT OF TERRY M. BOUDREAUX

25 ON BEHALF OF THE RESPONDENT

1 MR. BOUDREAUX: Mr. Chief Justice, and may
2 it please the Court:

3 I had some prepared remarks to begin with,
4 but I think I'd like to go straight into responding to
5 some of the concerns that have just been raised.

6 First of all, concerning Elaine Scott, the
7 lady who said, "I think I could." I think the record is
8 quite clear that she was being asked about considering
9 life imprisonment. Beginning at 364 of the joint
10 appendix, the question is asked by the prosecutor four
11 times: "Could you consider a sentence of life
12 imprisonment?" "Could you consider the possibility of
13 life imprisonment?" "Could you consider life
14 imprisonment?" "It's whether you could consider life
15 imprisonment." You get to Ms. Scott, the answer is, "I
16 could." She's the lady who said originally, "I think I
17 could." So the prosecutor's --

18 JUSTICE SCALIA: As to life imprisonment or
19 as to the death penalty?

20 MR. BOUDREAUX: As to life imprisonment,
21 Your Honor. As to death, she said, "I think I could."
22 When it got to life imprisonment, the full question,
23 asked four times, among various -- going down the list
24 -- is when she said --

25 JUSTICE SCALIA: Where is this? I -- 364?

1 Show me --

2 MR. BOUDREAU: Beginning at 364 of the
3 joint appendix, Your Honor. I just wanted to point out
4 the question posed is regarding life imprisonment.

5 JUSTICE SCALIA: Right.

6 MR. BOUDREAU: She was originally asked the
7 question about the death penalty, and her response was
8 the "I think I could."

9 CHIEF JUSTICE ROBERTS: Mr. Bright contrasts
10 that with the more probing inquiry with respect to white
11 jurors who said, "I think I could." And here there was no
12 follow-up.

13 MR. BOUDREAU: That's true, Your Honor. In
14 -- in reviewing this record, there are instances where
15 -- where there were not a lot of follow-up questions.
16 We see the situation with Mr. Brooks. This jury, unlike
17 the jury in Miller-El, which took five weeks, this jury
18 took less than a day and a half to pick. So there were
19 not a lot of probing questions.

20 JUSTICE ALITO: The explanation for
21 Mr. Brooks is not terribly convincing on its face. This
22 is -- was an incredibly short trial, was it not?
23 Mr. Brooks is voir dired on Tuesday. And there's a
24 death verdict on Friday.

25 MR. BOUDREAU: Yes, sir.

1 JUSTICE ALITO: And the concern -- the major
2 concern about him is that he's going to worry about
3 missing Wednesday, Thursday, Friday student teaching?

4 MR. BOUDREAUX: Yes, sir. The concern that
5 he is going to miss --

6 JUSTICE ALITO: But if you compare him to some
7 of the white jurors, particularly, I think, Mr. Laws,
8 Mr. Laws seemed to have a more compelling reason to be
9 worried about not being -- about being in court. He was
10 a contractor. He had houses he had to finish. His wife
11 had recently had surgery. He was taking the kids back and
12 forth to the school.

13 MR. BOUDREAUX: Yes, sir. Mr. Laws, like
14 Mr. Brooks -- I think it's important to point out --
15 approached the bench of his own volition. Other -- other
16 individuals waited until they -- if they were called and
17 were questioned. The way the proceedings began, when
18 the venire were summoned into the courtroom, the judge
19 introduced the staff, read the statutory requirements
20 for jury service, and then they started lining up. And
21 one of the people lining up to express his concern, not
22 just about meeting the requirements to be a juror, was
23 "I've got class, I've got" -- and I think it's --

24 JUSTICE GINSBURG: But you said Mr. Laws was
25 an identical -- he came up too. He said --

1 MR. BOUDREAUX: He did come up, and I think
2 the distinction there, Your Honor, is that like several
3 of the others, unlike Mr. Brooks, in the end he said, "I
4 can make arrangements. I can deal with it."

5 JUSTICE BREYER: Can I go back to Ms. Scott?

6 MR. BOUDREAUX: I'm sorry.

7 JUSTICE BREYER: Could I go back to Ms.
8 Scott?

9 MR. BOUDREAUX: Ms. Scott?

10 JUSTICE BREYER: Yes. If you look at the
11 top of 367 and then you look over at 366, the format, I
12 think, is that the prosecutor is posing a general
13 question. And then he poses his question -- or she --
14 and goes around and gets an answer. I -- Mr. Olinde. So
15 they start out with the death penalty. Then he asks some
16 ambiguous thing at the bottom of 366. Then the prosecutor
17 says, "Mrs. Alvarez -- Ms. Alvarez, you said you could not
18 impose the death penalty." "Mrs. Goff -- Ms. Goff: I
19 could consider the death penalty." "Ms. DaPonte: I
20 couldn't hear." "Prosecutor: You could consider both?"
21 "Yes, I would consider it." "Ms. DuBois: I could consider
22 it. Yes." "Mr. Saracione: I could consider it." "Mr.
23 Saulino: I could consider it." "Ms. Scott: I could. I
24 could."

25 Now, that doesn't seem too ambiguous for me

1 -- to me. It seems that what they're talking about,
2 each of them, is the death penalty because that's what,
3 by the time they got to the top of 367, they were
4 talking about. Maybe there's ambiguity there.

5 MR. BOUDREAUX: I don't --

6 JUSTICE BREYER: But I haven't noticed in
7 anybody's opinion, so far, making that point that you
8 just made.

9 MR. BOUDREAUX: I would submit that -- that
10 would indicate ambiguity, Your Honor, that the
11 prosecutor starts off with the life imprisonment
12 question, and then it sort of morphed into a death
13 penalty. But, by the time you get back to Ms. Scott, I
14 think there's --

15 JUSTICE BREYER: No -- well, there's -- I
16 just read you what it was, so I guess people make up
17 their own mind about that. But by -- what I don't think
18 you can make up your own mind as ambiguous is when this
19 prosecutor met with an answer that he considered not --
20 call it strictly kosher -- when he found that, like Mrs.
21 Calligan; she said, "I'm not sure." That's more ambiguous
22 than Ms. Scott. And then it goes on for three pages of
23 additional questions, and then 26 pages later, he doesn't
24 excuse her yet, and he doesn't excuse her until she
25 volunteers, "I could give a verdict -- I don't think I

1 could give a verdict to take someone's
2 life."

3 And it's at that point that the prosecutor
4 excuses her.

5 Now, compare that to Ms. Scott, who started
6 out saying, "I think I could" and then, as I read it,
7 said, "I could." Now, that's the kind of comparison
8 here. No follow-up. At the worst, minor ambiguity.

9 MR. BOUDREAUX: Yes, Your Honor. What --

10 JUSTICE BREYER: And a slight hesitation.
11 Now, what do you say to that?

12 MR. BOUDREAUX: One of the weaknesses in
13 some these jurors is a lack of follow-up questions. But
14 I think we go back to her original comment, which was so
15 softly spoken that the defense attorney said, "I can't
16 hear you." There's nothing --

17 JUSTICE BREYER: That, of course, is a problem
18 I have generally in this area. We can always imagine that
19 things that are not in the transcript -- perhaps what she
20 said spokenly not in the transcript is: "I hate the death
21 penalty. I'll never -- I'll never -- apply it under any
22 circumstances." And I grant you, if that's the law, we are
23 never going to find that there's any prejudice. But I just
24 don't see how that could be the law.

25 MR. BOUDREAUX: In the totality of her

1 responses, the ones that were heard, which are on the
2 record, and the ones which were not heard, which are not
3 on the record, the prosecutor felt that she was weak on
4 the death penalty. And that, on its face, is a
5 race-neutral reason.

6 JUSTICE BREYER: Well, of course -- sorry.

7 MR. BOUDREAUX: Well, I would just say that
8 the -- we're talking here with the prosecutor's
9 perception of the juror based on her answers and the
10 trial court's perception in evaluating the prosecutor's
11 proffered race-neutral reasons.

12 Could someone look at this and say it's to
13 the contrary? Yes. But in the -- in the totality of
14 the circumstances and the reviewing for clear error with
15 the benefit, of course, that the trial court had in
16 being present, hearing or not hearing what was said, the
17 tone of voice, the demeanor, the mannerisms, the
18 deference --

19 JUSTICE SOUTER: There -- there isn't much
20 reason, is there, to think that the trial court was
21 being very critical of the prosecutor's answers? My
22 recollection is that, after the O.J. Simpson remark had
23 been made in final argument, that the ultimate
24 resolution of that involved the trial judge saying that
25 one reason that was not a racially significant remark

1 was that the prosecutor had neither -- had mentioned
2 neither the race of the Defendant nor the race of O.J.
3 Simpson.

4 Now that is not a critical mind at work, is
5 it?

6 (Laughter.)

7 MR. BOUDREAUX: I would -- I would suppose
8 not, Your Honor.

9 (Laughter.)

10 JUSTICE SOUTER: And because --

11 MR. BOUDREAUX: The objection was --

12 JUSTICE SOUTER: And because you suppose not
13 and I certainly suppose not, the -- the fact is that we
14 have to -- we have to consider the O.J. Simpson remark
15 in trying to evaluate what went on, in trying to evaluate,
16 for example, the lack of critical follow-up in -- in a
17 disparate way by the prosecutor. And that, in fact, is a
18 fair and potent argument that the other side has, isn't it?

19 MR. BOUDREAUX: Yes, Your Honor. I would
20 like to respond to that by pointing out, though, that
21 the reference to the O.J. Simpson case was based on the
22 factual similarities involving the O.J. Simpson case
23 and this case.

24 JUSTICE SOUTER: Do you believe that, if
25 there had been a white defendant here, the O.J. Simpson

1 case would have been mentioned?

2 MR. BOUDREAUX: Yes, Your Honor, and I
3 believe if the O.J. Simpson case --

4 JUSTICE SOUTER: See, I'd be candid -- I
5 will be candid to say to you, under the -- under the
6 circumstances of the record in front of us, I find that
7 highly unlikely. And because I find that highly
8 unlikely, I put significance in the O.J. Simpson remark,
9 which even you concede is significant.

10 MR. BOUDREAUX: Yes, Your Honor, but I
11 think the -- the reason it doesn't fatally infect the
12 proceedings with racism is I think the comment perhaps
13 would have been made had O.J. Simpson not been white. I
14 think perhaps the comment would have been made had it
15 not been O.J. Simpson but some other high-profile white
16 athlete celebrity; and I think it's appropriate,
17 putting aside for the moment his assurance to the court
18 that he wouldn't mention it, but it was in response to the
19 defense counsel's argument.

20 This Defendant was tried on a plea of not guilty
21 by reason of insanity. The murders are committed; several
22 hours later he's barricaded in his house, calls the police
23 claiming to be suicidal; the police respond.

24 He gets up, unbarricades the door, lets the
25 police in; then he goes back into his fetal position. To

1 rebut the -- this perhaps he's thinking -- and I think it's
2 significant, Defense Exhibit 2 at trial was the Defendant's
3 statement taken several hours later. He is oriented; he is
4 aware of the situation; he knew he had done something
5 wrong, was in -- and was in trouble.

6 CHIEF JUSTICE ROBERTS: Mr. Boudreaux, even
7 if -- even if you're correct that a neutral explanation
8 was given focusing on the emotional distress, are you --
9 do you think the prosecutor would have made the analogy
10 if there had been a black juror on the jury?

11 MR. BOUDREAUX: I think he would have, Your
12 Honor. I know the contention is that he didn't, but I
13 think the facts are such on this record that it was not
14 an appeal to race, but it was an appeal to what was a
15 historical fact, common knowledge among most people in
16 the country, and the facts of this case. The
17 Defendant's statement, as I said, would betray no mental
18 lack of wherewithal. When the search warrant was
19 executed, his bloody shirt was found in the attic of his
20 house. That's at page 1311 of the record. It's not in the
21 -- it's not in the joint appendix. But when the defense
22 attorney brings up the police coming to the
23 house and -- and he agreed that the police officer's
24 testimony was correct, he's in a fetal position; he's
25 saying they're coming to get me, I'm suicidal, the

1 defense attorney is bringing up the mental aspects of
2 this case. So I think it was appropriate for the
3 prosecutor to look at the record and -- and to rebut
4 that.

5 JUSTICE GINSBURG: But before -- before the
6 rebuttal, this prosecutor was going around advertising
7 this as his O.J. Simpson case, and the defense attorney
8 said please, Judge, get him to stop saying that. This
9 is long before -- you are painting a picture of someone
10 who was answering an argument made by the defense, but
11 this prosecutor initiated it, and the defense attorney
12 was reacting. She said, Judge, he's talking in this
13 county and that county about this is his O.J. case; stop
14 him from doing that.

15 MR. BOUDREAUX: That's correct, Your Honor.

16 JUSTICE GINSBURG: Then he says, "I'm an
17 officer of the court, and I'm giving you my word."

18 MR. BOUDREAUX: That's correct. And then he
19 believes, despite his assurances, that when the defense
20 attorneys made the argument they made, they were
21 inviting that -- that response.

22 JUSTICE SOUTER: Well, do you -- do you
23 believe that it would have been appropriate at that
24 point for the prosecutor to invoke in his argument any
25 case from any State in which a criminal defendant had

1 unsuccessfully feigned insanity as a reason to decide --
2 for the jurors to decide that this Defendant is -- is
3 feigning insanity?

4 MR. BOUDREAUX: I think any historical fact
5 well known to people would have been fair game. Just as
6 an analogy, remember this situation. The jury is
7 instructed, argument of counsel is not evidence; take it
8 for what you think it's worth. This was the historical
9 reference this prosecutor used: The facts are similar.

10 Contrast that with the -- or -- kind of,
11 almost similar to that when we're talking about racism
12 being part of these proceedings, one of the amicus
13 briefs refers to David Duke. If Your Honors are not
14 aware, in New Orleans, Louisiana, for a number of years
15 David Duke is high-profile Ku Klux Klan. In some of the
16 voir dire in this case, at page 221, 222 of the joint
17 appendix, it's defense counsel who brings up David
18 Duke.

19 Now you understand if David Duke was on
20 trial here today and we had a photo album of him in his
21 robes, he would still be entitled to a fair trial. So
22 she's using a --

23 JUSTICE BREYER: Exactly. He's entitled to
24 a fair trial without prejudice.

25 MR. BOUDREAUX: Right.

1 JUSTICE BREYER: So I think you have two
2 instances here. One is Mrs. Scott, and the other is Mr.
3 Brooks. And in respect to Mr. Brooks, what I've read
4 in the transcript is that he was nervous and unhappy,
5 because he's learning to be a teacher, and he's afraid
6 he's going to miss some student teaching time which will
7 count against him.

8 MR. BRIGHT: Yes, sir.

9 JUSTICE BREYER: So, what it says is the clerk
10 called the dean and the dean said it won't; don't
11 worry about it, which Mr. Brooks is then told. He's
12 challenged for that reason. He might still worry about
13 it. But Mr. Laws is not. And Mr. Laws is a
14 self-employed contractor who announced to the court, I
15 have a big problem this weekend: Two houses are near
16 completion; the owners are supposed to be moving in. My
17 wife has just had a hysterectomy; she's supposed to be
18 taking care of the children back home; and I -- she has
19 nobody to help.

20 Okay? He's not challenged.

21 So we're not worried about Mr. Laws worried
22 about his wife and his business which going down -- you
23 know, serious. But we are worried about Mr. Brooks, who
24 has been told by the dean, "You have no problem." Now,
25 that's a little bit of a problem to me.

1 MR. BOUDREAUX: Yes, Your Honor.

2 JUSTICE BREYER: If you add them up, we have
3 Mrs. Scott, we have Mr. Brooks, we have the mention of --
4 and three others -- three others, the only other three
5 black people are challenged off, and we have the -- no
6 black juror is on, and we have the references to O.J.
7 Simpson beside.

8 All right so, now, there you are.

9 MR. BOUDREAUX: Your facts in --

10 JUSTICE BREYER: Full case against you, but
11 you --

12 MR. BOUDREAUX: Your characterizations are
13 -- are correct, Your Honor. I won't dispute the factual
14 allegations, but the key thing I would think to point
15 out there is Mr. Laws said he could make arrangements.
16 It's difficult; it's -- the jury duty happens.

17 JUSTICE GINSBURG: What's the difference
18 between that and "okay"?

19 MR. BOUDREAUX: I'm sorry?

20 (Laughter.)

21 JUSTICE GINSBURG: One says, "I can make
22 arrangements," and the other is more economical and he
23 says "okay."

24 MR. BOUDREAUX: But that -- he said -- I
25 think that's the landscape man. He said, as long as it

1 wasn't a prolonged --

2 JUSTICE BREYER: No, she means the dean.

3 The dean --

4 MR. BOUDREAUX: Oh, the dean --

5 JUSTICE BREYER: -- said no problem at all.

6 What better arrangement can you want?

7 JUSTICE GINSBURG: No, I mean Brooks.

8 MR. BOUDREAUX: Brooks says --

9 JUSTICE SOUTER: Brooks says "okay."

10 JUSTICE GINSBURG: But the difference between
11 "I can make arrangements" and "okay" --

12 MR. BOUDREAUX: The difference -- difference
13 there, Your Honor, is that Mr. Brooks needs to make
14 these classroom -- undergraduate requirements to
15 graduate. There's a day that's going to come when he's
16 either made his requirements to graduate, or he has not.
17 The people with the jobs, the contractors, their jobs
18 were there when they got -- when they got out of court,
19 when trial was over.

20 If Mr. Brooks didn't meet his requirements, he
21 was not going to graduate. And I would
22 be a little careful to take it at face value from the
23 judge's law clerk calling the dean who -- she then comes
24 back and says it is a 300-hour observation. That's
25 obviously wrong. Mr. Brooks --

1 JUSTICE SOUTER: Well, I wouldn't take it at
2 face value if there had been a further question asked of
3 Mr. Brooks saying, are you really satisfied that you've got
4 nothing to worry about? And he says well, gee, boy, I
5 sure hope I -- I'm able to make that requirement. But
6 nobody asked that question.

7 MR. BOUDREAUX: Nobody asked that question.

8 JUSTICE SOUTER: All we've is got is
9 "Okay" on the one hand and "I can make arrangements" on
10 the other.

11 MR. BOUDREAUX: But we also have, Your Honor,
12 as far as Mr. Brooks is concerned, factors not articulated
13 by the prosecutor but which would be supported by the
14 record. He was going to be an education -- a teacher; he's
15 young. Prosecutors in a death-penalty case, I think,
16 perhaps would shy away from asking or leaving on a jury a
17 young person, a teacher, maybe perhaps more sympathetic,
18 maybe more understanding. Nothing wrong with that, but
19 maybe that's not who a prosecutor seeking a death penalty
20 would want to be on the jury.

21 JUSTICE SCALIA: Well, we -- we have to
22 go -- your -- this is enough of a fact-specific inquiry
23 for any appellate court, even when we go into the
24 allegations that the prosecution did make.

25 Now you're saying we also have to imagine

1 other reasons which he didn't state were the reasons
2 why he struck, but which might have been. You really
3 think that that's enough to --

4 MR. BOUDREAUX: That's the problem with this
5 record. The State says --

6 JUSTICE SCALIA: The problem -- it -- it's your
7 problem with the record.

8 (Laughter.)

9 JUSTICE SCALIA: It's not mine.

10 MR. BOUDREAUX: The plausibility of the
11 prosecutor's reasons stand or fall on what he says. The
12 other things perhaps the court will say, he didn't say
13 that; we're not going to consider them.

14 But talking about a fact -- factual specific
15 inquiry before an appellate court, that brings us back
16 to the -- to the discretion afforded the -- not the
17 discretion, Your Honor, the deference afforded the trial
18 court who is present for the proceedings, who is there,
19 passive or otherwise. He's there. He sees what's going
20 on, the demeanor --

21 JUSTICE STEVENS: Mr. Boudreaux, can I ask
22 you about the Juror Hawkins? You haven't talked much
23 about him.

24 MR. BOUDREAUX: Hawkins?

25 JUSTICE STEVENS: Why did they strike him?

1 He seemed to me to be a pretty good juror for the
2 prosecution.

3 MR. BOUDREAUX: Your Honor, that's a
4 question I've asked myself; and I can't -- I'm not --
5 you would think on the surface of it he would have been
6 a good juror for the State. But I think what's equally
7 clear is that the defense would -- objected to his being
8 excused but didn't make a Batson claim because I don't
9 think they wanted to go there. They would not have
10 wanted that juror on their jury. He said he had --

11 JUSTICE STEVENS: But wasn't he struck --

12 MR. BOUDREAUX: -- 20 friends --

13 JUSTICE STEVENS: Wasn't he struck before
14 they backstruck the first black on the jury?

15 MR. BOUDREAUX: I believe so, Your Honor.

16 JUSTICE STEVENS: So that probably explains
17 why they didn't make a Batson objection.

18 MR. BOUDREAUX: Yes, you're correct about
19 that. But I think he would have not -- the -- the defense
20 perhaps would have struck him. He testified that he had
21 plenty friends who were police officers in this
22 jurisdiction.

23 JUSTICE STEVENS: I can understand why the
24 defense would have struck him, but I'm trying to understand
25 why the prosecutor --

1 MR. BOUDREAUX: Well, we don't know that,
2 Your Honor, because there was no Batson objection
3 raised, and the prosecutor was not called upon to
4 articulate any reasons.

5 On the face of it, he looks like he could be
6 a good juror. But that's a factual matter that the
7 trial prosecutor, then and there, made that decision.
8 And I think --

9 JUSTICE SOUTER: If he knew nothing about that
10 juror except what Justice Stevens and you have just been
11 reciting, if that's all you knew and you were a
12 prosecutor, would you have struck him? Would you have
13 said: I don't want -- I don't want anybody on this jury
14 who's got friends in the police department? Would you
15 have struck him for that reason?

16 (Laughter.)

17 MR. BOUDREAUX: Well, I can say, Your Honor,
18 that's not the first time that's happened over the years
19 in different -- different trials that I've reviewed.

20 JUSTICE SOUTER: How about you?

21 MR. BOUDREAUX: I'm sorry?

22 JUSTICE SOUTER: Would you -- would you have
23 gotten rid of him? Would you have said: I don't want
24 any cop lovers on my jury?

25 (Laughter.)

1 MR. BOUDREAUX: No, Your Honor. I would --
2 I would --

3 JUSTICE SOUTER: No, you wouldn't have, and
4 neither would I.

5 MR. BOUDREAUX: No, sir. And that's the
6 difficulty that --

7 JUSTICE ALITO: We have no idea -- we have
8 no idea what this man looked like. We have no idea
9 about his demeanor, his tone of voice. This could have
10 been -- there could have been very legitimate reasons
11 for doing it. There could be no legitimate reasons for
12 doing it.

13 MR. BOUDREAUX: Right. And --

14 JUSTICE ALITO: But nobody asked what reason
15 for doing it was.

16 MR. BOUDREAUX: And therefore no reasons were
17 offered.

18 JUSTICE BREYER: How -- I don't know the answer
19 to this at all, but how is this supposed to work? A
20 defense attorney is -- the jury selection, and he sees that
21 the prosecutor doesn't challenge for peremptory or any
22 other reason one black member. Or let's call it five.

23 And then they start challenging black
24 members. Obviously, he didn't at the beginning impose
25 any Batson claim. He had no Batson claim. There are

1 five people who are right on the jury who are black. What
2 claim could you make?

3 MR. BOUDREAUX: Your Honor --

4 JUSTICE BREYER: And then after you begin to
5 get suspicious and start to make them, now they do this
6 thing called "backstrike" and they get everybody off the
7 jury.

8 How is it supposed to work, the procedure?

9 MR. BOUDREAUX: I would disagree that they
10 would not have a Batson claim to make when the first black
11 is struck if they felt that there was evidence of that one
12 individual --

13 JUSTICE BREYER: They don't know.

14 JUSTICE SCALIA: The rule is not that you
15 can't -- so long as you have some black on the jury, you
16 can strike the rest.

17 MR. BOUDREAUX: No, sir. The rule is --

18 JUSTICE SCALIA: Any single person.

19 MR. BOUDREAUX: That's correct.

20 JUSTICE BREYER: I'm speaking reality.

21 MR. BOUDREAUX: That's why you don't have to
22 wait for a pattern. Let's say you have an all-black
23 jury --

24 CHIEF JUSTICE ROBERTS: I still have -- I am
25 curious to the answer to Justice Breyer's question. How

1 does this work? When they go back and backstrike at that
2 point, can the defendant say, "Oh, I don't think you can
3 backstrike this juror. You're doing it on the basis of
4 race"?

5 MR. BOUDREAUX: They can go back and
6 backstrike, but the defendant could say, "I raise a Batson
7 objection."

8 CHIEF JUSTICE ROBERTS: I'm sorry, they can go
9 back and backstrike?

10 MR. BOUDREAUX: Yes, sir. And in this case --

11 CHIEF JUSTICE ROBERTS: I'm sorry. They can go
12 back and object to the backstriking?

13 MR. BOUDREAUX: The backstrike --

14 CHIEF JUSTICE ROBERTS: The State would say,
15 well, here's the reasons we're backstriking her?

16 MR. BOUDREAUX: The backstrike is just when is
17 the -- when is the challenge exercised. In and of itself,
18 you can't say it's racial or not. It's a challenge.

19 JUSTICE BREYER: That wasn't quite my question.

20 JUSTICE STEVENS: There's another problem here.
21 Can, after the backstrike of the first black juror who had
22 been accepted, can they thereafter renew objections to
23 jurors two and three, who are accepted on the assumption
24 that there would no racial discrimination?

25 MR. BOUDREAUX: I think under the Miller-El

1 and the related decisions, yes, sir, because that would be
2 part of the totality of the circumstances. You may have
3 a practical problem because --

4 JUSTICE GINSBURG: But it wasn't done here.
5 And that was -- that was the point that you made.

6 MR. BOUDREAUX: Yes.

7 JUSTICE GINSBURG: When the third -- when the
8 backstrike of Brooks was made, they could have gone
9 back for Hawkins and the others, but they didn't.

10 MR. BOUDREAUX: That -- and that could have
11 been argued -- evidence for them to make their prima facie
12 case. But under the --

13 CHIEF JUSTICE ROBERTS: I'm sorry.

14 There's some ambiguity in your answer.
15 Miller-El says others who were struck can be considered
16 as part of the totality. My question is, can they go back
17 and object not only to the backstruck juror, but, as
18 Justice Stevens points out, to the others who weren't
19 objected to perhaps because there wasn't a black person
20 on the jury?

21 MR. BOUDREAUX: To give you a yes or no
22 answer, yes. The practical problem with that is those
23 two jurors, having previously been excused, could be on
24 the way to their office or back to their home. If the
25 backstrike --

1 CHIEF JUSTICE ROBERTS: Yes, but the
2 prosecutor is still there. You can ask the prosecutor,
3 why did you strike that juror?

4 MR. BOUDREAUX: Yes, you could. Yes, you
5 could. And then you've got a practical problem: What if
6 it doesn't pass muster? That's the reason for the
7 contemporaneous objection rule.

8 JUSTICE BREYER: Can I ask you one other
9 question? You're the only one who will know the answer
10 to this, too. I noticed, in looking at the opinion of
11 the Louisiana Supreme Court, that they start out by
12 saying, "We have conducted another review of the voir dire
13 transcript and find nothing there to disparage the
14 Batson claim." And in reading that opinion, in several
15 places they refer to their having gone back and having read
16 the whole transcript themselves.

17 And then they have two full pages, or one
18 and a half anyway, where they seem to be talking about
19 what happened in a pretrial conference. And they refer to
20 that: "Our review uncovered a factor favorable to the
21 State's use of a peremptory challenge."

22 So they went back and found a factor "favorable
23 to." Now, was that factor argued to them in the brief? Do
24 you remember that?

25 MR. BOUDREAUX: I wrote the brief, Your

1 Honor, but I don't remember.

2 JUSTICE BREYER: Yes. And I thought that's why
3 you might know.

4 (Laughter.)

5 MR. BOUDREAUX: I don't remember.

6 JUSTICE BREYER: My thought is, in reading
7 it, it seems as if they are not, and I was thinking
8 about a judge can't think of everything. But if they're
9 going to think beyond what the briefs tell them, they ought
10 to think of it for both sides, and not just for one side.

11 MR. BOUDREAUX: And that would be at odds
12 with Justice Scalia's comment about looking at the record
13 and saying, oh, here's another reason that the prosecutor
14 didn't articulate.

15 Similarly, Your Honors, in reference to Thomas
16 Hawkins being struck with no objection, there was -- Greg
17 Scott was a black juror peremptory struck by the State.
18 Again with no objection. If you want to talk about -- if
19 we're talking about two or five here, little weight should
20 be given to the exercise of those two. Greg Scott, again
21 like the other juror, I don't think was going to survive
22 the challenge by the defense. His wife was the victim of a
23 carjacking, and he said that if he was a defendant and he
24 was innocent, he would testify. He would need to testify.

25 And in this case, the Defendant did not

1 testify at either phase of the proceedings.

2 JUSTICE GINSBURG: Mr. Boudreaux, I'd like
3 to ask you a question before you finish. It's -- it's not
4 an present issue in this case, but we are told that
5 African-Americans are 20 percent of the population of
6 Jefferson Parish, but they were less than 11 percent of
7 people summoned for jury duty.

8 Is that typical? Is that --

9 MR. BOUDREAUX: Certainly pre-Katrina, Your
10 Honor. Yes. The summonses go out based on public
11 records, driver licenses, voters registrations. That's --
12 that's basically at random. So, to say those numbers would
13 not surprise me.

14 JUSTICE GINSBURG: But that -- and because
15 it's almost half of what you would expect.

16 MR. BOUDREAUX: Yes, and that's going to
17 vary, you know, from venire to venire on any given day.

18 JUSTICE GINSBURG: Thank you.

19 MR. BOUDREAUX: In the minute or two I have
20 left, Your Honors, I would just remind the Court, urge
21 the Court to consider its recent opinion last June in
22 Uttecht dealing with the deference due the trial court
23 in these types of proceedings. That was a habeas case, but
24 the opinion says it would apply on direct review, and
25 according to the trial court, the deference -- having

1 been present and not just relying on a cold record, that
2 the Louisiana Supreme Court's ruling should be affirmed.

3 JUSTICE KENNEDY: Do you think the deference
4 in Uttecht, which was the death-qualified juror --

5 MR. BOUDREAUX: Yes, sir.

6 JUSTICE KENNEDY: -- should be any greater
7 than in a Batson case where we have the sensitive issue
8 of racial discrimination?

9 MR. BOUDREAUX: I'm not sure I understood
10 the question, Your Honor.

11 JUSTICE KENNEDY: Well, Uttecht --

12 MR. BOUDREAUX: Whether it's going to the
13 issue --

14 JUSTICE KENNEDY: Uttecht was a death-qualified
15 juror --

16 MR. BOUDREAUX: Yes.

17 JUSTICE KENNEDY: -- and this is a Batson
18 case.

19 MR. BOUDREAUX: Right, and it --

20 JUSTICE KENNEDY: Because of our concerns in --
21 in the Batson area, do you think we're entitled to have a
22 different standard of deference for the trial court? I
23 think your --

24 MR. BOUDREAUX: No. Because you're
25 still dealing with --

1 JUSTICE KENNEDY: We haven't discussed this,
2 but I think your --

3 MR. BOUDREAUX: -- the demeanor of a
4 factfinder. Obviously, there's some differences in Uttecht
5 being habeas and Witherspoon, but the similarities, I
6 think, are enough that this -- the degree of deference has
7 to still be there, although there's a statutory deference
8 in a habeas.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Boudreaux.

12 Mr. Bright, you have three minutes
13 remaining.

14 REBUTTAL ARGUMENT OF STEPHEN B. BRIGHT
15 ON BEHALF OF THE PETITIONER

16 MR. BRIGHT: Thank you, Mr. Chief Justice.

17 If I could just say, first of all, about
18 this backstrike, because what we see here is after
19 Elaine Scott is struck, that's State number 6, the very
20 next peremptory strike by the State, number 7, is to
21 go back and backstrike Jeffrey Brooks.

22 Now, notice that with regard to the other
23 four backstrikes used, two by the prosecution and two by
24 the defense, it's at the very end of the process. It's
25 literally when they're down to one juror. Williams

1 says, "Do we have 11 jurors?" And then he backstrikes.
2 The defense says, "Is this my 11th strike?" Backstrike.
3 Williams then, "Are we back to 11?" So these -- the
4 only way the backstrike makes sense really, when you
5 think about it, is to look at the whole jury and then go
6 back and cull out the ones based on a comparison.

7 But once Brooks had kept them from striking
8 Mr. Scott, who as Mr. Boudreaux pointed out, his wife
9 was robbed at gunpoint, said he would testify if he were
10 a defendant in a case and was innocent, and then as Chief
11 Justice -- as Justice Stevens pointed out, Hawkins, who had
12 grown children, engineer, friends in the police
13 department -- these two are not struck, but then once
14 Elaine Scott is struck, the third black, and the Batson
15 challenge is made, we don't have any use for Jeffrey
16 Brooks anymore, so he's -- the backstrike is used in
17 that way.

18 And I think, again, when you look at all the
19 relevant circumstances, it's pretty clear what was going
20 on here with the acceptance of Brooks at the start and
21 the backstrike --

22 CHIEF JUSTICE ROBERTS: Do you agree with
23 your friend on the other side, that you could have
24 objected both to the backstruck juror and to the jurors
25 to whom you -- with respect to whom you did not object

1 because there was the juror that was later backstruck
2 on the jury?

3 MR. BRIGHT: I -- I think yes. The answer
4 to that is yes, and I think, if the defense had, we'd be
5 talking about four jurors here today instead of two.
6 But it doesn't diminish from what the Court in Miller-El
7 called the numbers. The fact that it's unlikely to be,
8 by chance, that all five -- all five African-Americans
9 are struck in this case.

10 JUSTICE STEVENS: Yes, and although you could
11 have made an objection, as I understand your opponent, he
12 very helpfully said that they probably would have left
13 the courthouse --

14 MR. BRIGHT: And they would.

15 JUSTICE STEVENS: So what could you --

16 MR. BRIGHT: So they're gone.

17 JUSTICE STEVENS: Yes.

18 MR. BRIGHT: And so if the objection had been
19 overruled --

20 CHIEF JUSTICE ROBERTS: Well, the objection
21 would have --

22 MR. BRIGHT: If the objection was sustained --

23 CHIEF JUSTICE ROBERTS: The objection would
24 have afforded the state an opportunity to present the --
25 if there was one -- the non-racial reason that they

1 struck the juror.

2 MR. BRIGHT: But the reason for doing that
3 would be to have the judge not allow the strike and to
4 put that juror in the box and the juror's gone now. So
5 that, as a practical matter, is not going to work.
6 There's no procedural --

7 JUSTICE SCALIA: Well, no. Another reason to
8 do it would be to preserve your right on appeal, to object
9 to those jurors.

10 MR. BRIGHT: But, the -- Justice Scalia,
11 there's no procedural rule in Louisiana that says you have
12 to do that. It might have been a stronger case if they had
13 done it. But there's --

14 JUSTICE SCALIA: But there may be a rule here
15 that -- that we're not going to postulate the worst reason
16 for a prosecutorial strike rather than a good reason
17 when you haven't given the prosecution an opportunity to
18 set forth a good reason.

19 MR. BRIGHT: If I may answer.

20 That only goes, though -- the only two
21 jurors on the reasons that are before the Court are
22 Jeffrey Brooks and Elaine Scott. But the fact that the
23 prosecutor struck all five, and as Justice Souter points
24 out, you wouldn't have made this argument, I don't think
25 -- this O.J. Simpson argument -- not only depending upon

1 the race of the defendant, but if there had been black
2 people on that jury. This is an argument that resonates
3 with an all-white jury.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Bright.

7 The case is submitted.

8 (Whereupon, at 12:11 p.m., the case in the
9 above-entitled matter was submitted.)

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