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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 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 O.J. Simpson case from the 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, one of the most powerful ones, the failure
5 to ask any questions of Jeffrey Brooks or Elaine Scott.
6 There are very ambiguous general reasons for striking
7 them. They asked no questions. In this case, you could
8 ask anybody any questions 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 back
24 strike 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 the prosecution has the strategy of striking
13 every lawyer who's on the panel. 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.

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

25 JUSTICE ALITO: You are making the argument

1 there were five African-American jurors who were the
2 subject of prosecutorial peremptory challenges.

3 MR. BRIGHT: Yes.

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

6 MR. BRIGHT: Well, no different than
7 Miller-El. The Court in Miller-El says you look at the
8 prima facie case because it is unlikely to happen by
9 chance.

10 JUSTICE ALITO: There were a large number of
11 strikes in Miller-El. This is a much smaller number.
12 Could you just explain, if you can, what is the
13 relevance of strikes that you do not even claim were
14 racially motivated?

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

1 factors that were identified --

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

10 And yet you want them to be considered as
11 convincing racial bias.

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

21 At that point defense counsel said there's a
22 pattern, and I strike based on the pattern of striking
23 African-Americans.

24 JUSTICE GINSBURG: Couldn't counsel at that
25 point have gone back and said, ah, now I see what's

1 going on, so I'm going to challenge -- I'm going to
2 interpose a Batson challenge with respect to the second
3 and third African-American?

4 MR. BRIGHT: Or actually the first and
5 second. You're right. The second and third. There was
6 -- that certainly could have been done. I think
7 basically the defense was snookered here.

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

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

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

1 exclude -- I've seen Batson challenges where a lawyer
2 will say, well, with regards to five and six, then we
3 think those are particularly strong, not with regards to
4 others -- Miller-El did that.

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

9 CHIEF JUSTICE ROBERTS: Out of -- out of how
10 many who were struck.

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

21 JUSTICE SCALIA: The district judge is in a
22 much better position to decide those matters, such as
23 you know, he -- his -- his response was -- was slow on
24 -- one the question of, you know, whether he could
25 consider the death penalty. I can't tell that from a

1 cold record, and that's why we -- rely upon the trial
2 judge.

3 MR. BRIGHT: Well, that was with regard to
4 Ms. Scott.

5 JUSTICE SCALIA: Right.

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

20 They all give the same answer. Two of those
21 people, Justice Scalia, end up on the jury in this case.

22 CHIEF JUSTICE ROBERTS: Well, I'm looking at
23 -- at the joint appendix on page 360. As I read it,
24 Miss Scott gives an answer that can't be heard, right?

25 MR. BRIGHT: Right. The first time.

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

8 MR. BRIGHT: Well, then, just a couple of
9 pages later, Mr. Chief Justice, she says I could. She
10 gives the same answer that the --

11 CHIEF JUSTICE ROBERTS: That's on joint
12 appendix 401?

13 MR. BRIGHT: Yes.

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

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

17 CHIEF JUSTICE ROBERTS: 367.

18 MR. BRIGHT: She says "I think I could" at
19 361. And then just a few pages later they go each
20 juror, and she says "I could."

21 CHIEF JUSTICE ROBERTS: Well, but -- the
22 question is not could you consider the death penalty.
23 It says could you consider both, when they're going
24 through several of the juries. Jurors.

25 MR. BRIGHT: Well --

1 CHIEF JUSTICE ROBERTS: And I thought that
2 was -- the point was made by your friend on the other
3 side, was that it was ambiguous as to what option she
4 was saying she could consider.

5 MR. BRIGHT: Well, I'd invite the Court to
6 look at that. Because what that starts out with is a
7 question about life. Could you consider life
8 imprisonment. And then when Ms. Goff is answered, she
9 says the death penalty, could I consider it? Yes, I
10 could consider it. And then everybody says they could
11 consider it.

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

17 I mean that was in Miller-El -- in the
18 opinion in Miller-El II, the fact that Fields wasn't
19 asked any questions about the position on the death
20 penalty. He had expressed some; but if the
21 prosecutor --

22 JUSTICE SCALIA: Well, these are peremptory
23 challenges. It seems to me if you have one -- one juror
24 who says I think I could and another one who said I
25 could, I'm going to strike the one who said I think I

1 could.

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

10 JUSTICE SCALIA: Did all 21 say I think I
11 could?

12 MR. BRIGHT: No. All 21 said no. And then
13 the prosecution asked them follow-up questions about
14 what their beliefs were. So in those situations, the
15 prosecutor is asking questions to be sure to clarify
16 their position on the death penalty. Miss Calligan is
17 the only one who says well, I'm not sure. So they asked
18 Ms. Calligan a number of questions. How long have you
19 thought about it? What do you think? All those sorts
20 of things. Ultimately it is pretty clear Ms. Calligan
21 is opposed to the death penalty.

22 JUSTICE ALITO: Mr. Bright, you make good
23 arguments about comparisons between white jurors and
24 black jurors.

25 MR. BRIGHT: Yes.

1 JUSTICE ALITO: What do we do with the
2 comparisons that you are making now to white jurors who
3 were never brought to the attention of the Louisiana
4 Supreme Court?

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

13 My experience is most jurors taken out of
14 their homes and out of their work, would like to finish
15 their job and go home early.

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

19 MR. BRIGHT: Right.

20 JUSTICE ALITO: But my understanding is you
21 never relied on Mr. Laws before the Louisiana Supreme
22 Court. Is that correct?

23 MR. BRIGHT: Not Mr. Laws specifically, but
24 you can look at the other people that are mentioned in
25 Justice Kimball's dissent. Mr. Yeager had something

1 coming out on Sunday; he wanted to get home for that.

2 Brandon Burns --

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

8 MR. BRIGHT: Well --

9 JUSTICE ALITO: So that's quite different
10 from somebody -- it could be quite different from
11 someone like Mr. Brooks or Mr. Laws. Isn't that?

12 MR. BRIGHT: Actually the reason they say
13 they're concerned about Mr. Brooks is because he was
14 told, your dean says it won't be a problem. And he says
15 okay. No further expression of worry by him.

16 There is, by the other jurors, that were
17 accepted -- they all say on the record I need to get
18 back to my job, to my family. Mr. Burns -- a single
19 parent, teenagers, 89-year-old grandparents that he
20 wants to get back to. All of those people accepted by
21 the State. And Justice Kimball deals with some of those
22 in her dissenting opinions, and they're briefed up to
23 the Louisiana Supreme Court on remand from this case.

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

25 JUSTICE SCALIA: I don't understand how the

1 dean could resolve his problem.

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

3 (Laughter.)

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

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

14 JUSTICE SCALIA: Whatever. He had to be
15 there to observe. He had to put in a certain number of
16 hours. How could the dean say oh, don't worry, it's no
17 problem?

18 MR. BRIGHT: Well --

19 JUSTICE SCALIA: The hours requirement is a
20 requirement for the degree. I don't think deans have
21 the ability to -- to waive degree requirements.

22 MR. BRIGHT: Well, with all due respect,
23 Your Honor --

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

1 MR. BRIGHT: Well --

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

4 MR. BRIGHT: Well, again, it would have only
5 taken one question. One question -- Mr. Books, now that
6 you've heard that your dean said it won't be a problem,
7 do you have further concerns about wanting to get home
8 quickly? Mr. Brooks --

9 JUSTICE SCALIA: My reaction would be --
10 would depend on how he said okay. And if I were sitting
11 there as the trial judge, I -- I could discern whether
12 okay meant well, you know, that's what he says but I'm
13 still going to have a hard time digging out those hours
14 for the remaining time that I have in the term. I don't
15 know how he said okay.

16 MR. BRIGHT: If --

17 CHIEF JUSTICE ROBERTS: If --

18 MR. BRIGHT: If I could answer that
19 question, Mr. Chief Justice.

20 If you're the lawyer standing there beside
21 him and he says what you just said, then you ask him one
22 question. But there's a professor, Sanders; he's not
23 watching class; he's teaching class at the start of a
24 semester at the University of New Orleans; and he
25 doesn't -- it is no speculation. With Brooks it's all

1 speculation. With Sanders --

2 CHIEF JUSTICE ROBERTS: With Brooks, what he
3 said when he said I'm missing right now something that
4 will better me towards my teaching career, and they
5 say -- and the judge says, is there anybody who could
6 speak to it? And he says, I've already talked to the
7 dean. And so based on the initial conversation with the
8 dean he was still worried.

9 MR. BRIGHT: Well --

10 CHIEF JUSTICE ROBERTS: Then the judge calls
11 the dean, and of course the dean's going to --

12 MR. BRIGHT: No problem.

13 CHIEF JUSTICE ROBERTS: Well, that's what
14 he's going to say to the judge. When Brooks talked to
15 him, apparently there was a problem because his concern
16 remained after having talked to the dean.

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

19 CHIEF JUSTICE ROBERTS: He says I'm missing
20 right now --

21 MR. BRIGHT: Something that --

22 CHIEF JUSTICE ROBERTS: Something that could
23 help me out towards my teaching career.

24 MR. BRIGHT: Sure. Every -- the judge had
25 given this hardship question; we're going to sequester

1 the jury, you're not going to be allowed to communicate
2 with anybody. You're going to have to stay out at the
3 Travelodge while this case is going on. Of course, he
4 doesn't say at that point how long it's going to be.
5 And 44 people come forward. But all -- with most of
6 those people, like with Brandon Burns, who has got to
7 get back to his landscaping business, Mr. Laws who's has
8 to get back two homes he's building; his wife is
9 recovering from surgery and taking his children to
10 school every day -- all those people are assured this
11 case is going to be over by Saturday; it's not going to
12 go very long. This argument that they were worried that
13 the jury might be out for a long time.

14 CHIEF JUSTICE ROBERTS: I don't understand
15 your answer that Mr. Brooks did not say there was a
16 problem. He says, I've already missed half a day.
17 There's something I'm missing right now that will better
18 me towards my teaching career. He says I've already
19 talked to the dean.

20 How can you say he isn't identifying a
21 problem?

22 MR. BRIGHT: Well, he -- he's saying, again,
23 not knowing how long this is going to last, or what's
24 going to be expected of him -- right now I'm missing
25 something to help my education. Everybody is missing

1 something that's going to help them in their job, with
2 their families, or whatever.

3 But once the judge calls him back up to the
4 bench and says, we've talked to the dean. He said it is
5 not going to be a problem for you to be here, most
6 students I know -- and I know a lot of you have had
7 experience with students -- once they're assured by the
8 dean that it's not going to be a problem, it's not going
9 to be a problem.

10 JUSTICE SCALIA: Even if the assurance is
11 only secondhand, right?

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

13 JUSTICE SCALIA: When the dean says it's
14 okay, that's all right.

15 MR. BRIGHT: The judge of the court, the
16 presiding judicial officer there, says we've talked to
17 your dean, and it's not going to be a problem for you to
18 be here this week. And everybody is told this week
19 we're going to try this case. This is a Labor Day
20 weekend coming up. We know you will send the jury out
21 on Friday afternoon. You're not going to wait too long
22 for that verdict probably. And everybody is told --
23 you're going to be out of here by Saturday. Mr. Yeager,
24 you're going to be out of here by Sunday.

25 So we're talking really about Mr. Brooks

1 missing three more days. This is on Tuesday. This case
2 is over on Friday.

3 And everybody knew it was going to be over
4 on Friday, because they told jurors over and over and
5 over again that it was going to be over by Friday, so --
6 or Saturday at the latest.

7 So I -- I would say, again, no questions
8 asked. The lawyers had an opportunity right there when
9 they told him the dean says it's not a problem. Then
10 later he's called in panel 1. You can ask -- you see
11 this voir dire. It is very interesting. It is very
12 short, but the lawyers could ask individual questions to
13 any juror out there on the panel. Mr. Brooks,
14 do you have any concern that you won't be able to
15 concentrate because you need to get back to school?

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

20 JUSTICE ALITO: Well, suppose you are trying
21 this case. You are a defense attorney, and you ask a
22 juror, a potential juror: Would you hold it against a
23 defendant who doesn't take the stand? And the initial
24 answer is: I have to think about that. I'm not quite
25 sure.

1 Now -- and then you go on, and you ask a lot
2 of questions, and the juror comes around to saying: I
3 understand that's a person's constitutional right. They
4 get the -- advice from a lawyer. It doesn't necessarily
5 mean the person has something to hide, et cetera, et
6 cetera.

7 Does that additional questioning allay the
8 concern that you would have had at the beginning about
9 the fairness, the potential fairness, of the juror?

10 MR. BRIGHT: Well, I think you have to look
11 not only at those answers but -- but what the court in
12 Miller-El II said were the side-by-side comparisons.

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

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

19 But the Louisiana Supreme Court said here
20 there was consistent questioning of the jurors about
21 whether whatever their other obligations were, it would
22 interfere with their ability to sit as jurors. There is
23 consistent questioning of everybody except Jeffrey
24 Brooks. And that's the one African-American who the
25 court -- who the prosecutors then say they're striking

1 for that reason.

2 JUSTICE GINSBURG: Mr. Bright, the Judge was
3 quite passive, and was -- was the judge, in fact,
4 present throughout the entire voir dire?

5 MR. BRIGHT: I -- I think the judge was
6 present, but he was quite passive. One of the more
7 remarkable aspects of this jury selection is when he
8 grants a defense strike for cause, the prosecutor,
9 Mr. Williams, says -- are you crazy?

10 And the judge says: No. And they go right
11 on to the next fact.

12 You know, I -- I practiced law for 30 years.

13 JUSTICE SCALIA: It sounds like the right
14 answer to me.

15 (Laughter.)

16 MR. BRIGHT: It wasn't the right question.
17 I've often wondered about that, but I've never
18 articulated it.

19 (Laughter.)

20 MR. BRIGHT: And I think most lawyers
21 wouldn't.

22 There's another point where Williams tells
23 the judge: Swear all these people to say they've got a
24 valid reason for leaving, and send them all out of here
25 -- swearing people to say something that may be true or

1 may not be true.

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

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

7 And the judge goes right along with it.

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

11 The judge is not engaged in questioning.
12 Unlike *Uttecht v. Brown* that Justice Kennedy wrote about
13 last term where you have a judge involved and hearing
14 the lawyers and whatever, that's not present here.

15 So I think that when you look at that
16 factor, you don't have assurance that this judge was
17 involved in a way to make sure that the credibility
18 determinations which were being made -- and the other
19 point I would make is here he's ruling on the Batson
20 strikes as the jury is being selected. So he doesn't
21 have all of the information.

22 Now, he does rule again on the motion for a
23 new trial. That's the only time that all of the
24 information, all of the relevant information, is before
25 the judge. But, there again, all he says is I think the

1 prosecutor's reasons were race-neutral.

2 There is no indication that he went beyond
3 that to consider what Batson said and what Miller-El
4 says we have to consider, which is all the relevant
5 factors.

6 JUSTICE STEVENS: Mr. Bright, may I ask, in
7 your judgment, was all the reference to O. J. Simpson
8 relevant at all to what is before us?

9 MR. BRIGHT: I think it is, Justice Stevens,
10 and I think, even if you don't look at the closing
11 argument, which tells you two important things -- first
12 of all, the prosecutor broke his promise to the judge
13 that he wouldn't mention it. He said as an officer of
14 the court, I will not mention it.

15 JUSTICE SCALIA: What does that have to do
16 with anything?

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

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

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

1 The defense moves to ask to quit referring
2 to the O. J. Simpson case in the media; and, for
3 goodness sakes, Judge, don't let him refer to it before
4 the jury.

5 And the -- the defense makes quite clear:
6 The polls show that the society is divided. This was
7 ten months ago that Simpson came down. It is a very
8 polarizing case. The fact that he is mentioning it is
9 going to inject racial prejudice into this case.

10 CHIEF JUSTICE ROBERTS: What about the
11 explanation that was given that this was referring to
12 the defendant's feigning emotional distress rather than
13 anything to do with race?

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

16 CHIEF JUSTICE ROBERTS: What doesn't have
17 anything to do with it?

18 MR. BRIGHT: The fact of whether or not
19 Mr. Snyder was, in fact, suicidal is not rebutted in any
20 way by bringing in the most racially polarizing case in
21 the country and saying that Simpson was trying to get
22 away with it.

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

1 MR. BRIGHT: Yes.

2 JUSTICE SCALIA: The same as here.

3 MR. BRIGHT: Well, there are a lot of
4 similarities.

5 JUSTICE SCALIA: And then feigned a mental
6 illness by his -- his great-escape escapade, and that is
7 -- that is what the prosecutor said he was trying to
8 bring before the jury.

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

13 So he couldn't have been imitating, if that
14 is what he was arguing -- he couldn't have been
15 imitating O. J. Simpson. I -- I think what this
16 prosecutor learned from O.J. Simpson, Justice Stevens,
17 is that you don't let blacks on the jury.

18 I mean I think he saw that this racially
19 mixed jury in Los Angeles let him -- quote -- "get away
20 with it," and we're going to have an all-white jury here
21 in Jefferson Parish, Louisiana. And unlike what
22 happened out there, we're not going to let -- of course,
23 this was at the penalty phase. He could only get life
24 without parole or the death penalty. He wasn't going to
25 get away with anything. But that was the way it was

1 pictured to the jury: That if they didn't give him the
2 death penalty, he would get away with it.

3 CHIEF JUSTICE ROBERTS: So the relief you
4 are requesting goes only to the penalty and not to the
5 conviction?

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

11 CHIEF JUSTICE ROBERTS: Even though -- even
12 though your theory is that it was only with respect to
13 the penalty that the bias -- you have no allegation --

14 MR. BRIGHT: Oh, no.

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

18 MR. BRIGHT: No. Let me -- let me make this
19 quite clear. Our objection is that when the jury was
20 selected, in terms of the disparate questioning,
21 disparate acceptance, failure to ask any questions,
22 racial prejudice infected the selection of the jury.
23 All the O. J. Simpson case does is put a little icing on
24 the cake. But if you look at the Miller-El factors and
25 you consider them cumulatively, like Justice Kimball did

1 in her dissent, you come away once again with what the
2 Court said in Miller-El. The evidence is too powerful.
3 It all points in one direction, and that's intentional
4 race discrimination. And that was in the jury. And if
5 that happened, Allen Snyder is entitled to a new trial.

6 If I could, I'd reserve the rest of my time.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,

9 Mr. Bright.

10 Mr. Boudreaux.

11 ORAL ARGUMENT OF TERRY M. BOUDREAU

12 ON BEHALF OF THE RESPONDENT

13 MR. BOUDREAU: Mr. Chief Justice, and may
14 it please the Court:

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

18 First of all, concerning Elaine Scott, the
19 lady who said "I think I could." I think the record is
20 quite clear that she was being asked about considering
21 life imprisonment. Beginning at 364 of the joint
22 appendix, the question is asked by the prosecutor four
23 times: "Could you consider a sentence of life
24 imprisonment?" "Could you consider the possibility of
25 life imprisonment?" "Could you consider life

1 imprisonment?" "It is whether you could consider life
2 imprisonment." You get to Ms. Scott, the answer is "I
3 could." She's the lady who said originally, "I think I
4 could." So the prosecutor's --

5 JUSTICE SCALIA: As to life imprisonment or
6 as to the death penalty?

7 MR. BOUDREAUX: As to life imprisonment,
8 Your Honor. As to death, she said "I think I could."
9 When it got to life imprisonment, the full question
10 asked four times, among various -- going down the list
11 -- is when she said --

12 JUSTICE SCALIA: Where is this? I -- 364?
13 Show me --

14 MR. BOUDREAUX: Beginning at 364 of the
15 joint appendix, Your Honor. I just wanted to point out
16 the question posed is regarding life imprisonment.

17 JUSTICE SCALIA: Right.

18 MR. BOUDREAUX: She was originally asked the
19 question about the death penalty, and her response was
20 the "I think I could."

21 CHIEF JUSTICE ROBERTS: Mr. Bright contrasts
22 that with the more probing inquiry with respect to white
23 jurors who said "I think I could," and here there was no
24 follow-up.

25 MR. BOUDREAUX: That's true, Your Honor. In

1 -- in reviewing this record, there are instances where
2 -- where there were not a lot of follow-up questions.
3 We see the situation with Mr. Brooks. This jury, unlike
4 the jury in Miller-El, which took five weeks, this jury
5 took less than a day and a half to pick. So there were
6 not a lot of probing questions.

7 JUSTICE ALITO: The explanation for
8 Mr. Brooks is not terribly convincing on its face. This
9 is -- was an incredibly short trial, was it not?
10 Mr. Brooks is voir dired on Tuesday. And there's a
11 death verdict on Friday.

12 MR. BOUDREAUX: Yes, sir.

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

16 MR. BOUDREAUX: Yes, sir. But you see --

17 JUSTICE ALITO: But you compare him to some
18 of the white jurors, particularly, I think, Mr. Laws.
19 Mr. Laws seemed to have a more compelling reason to be
20 worried about not being -- about being in court. He was
21 a contractor. He had houses he had to finish. His wife
22 had recently had surgery. He was taking kids back and
23 forth to the school.

24 MR. BOUDREAUX: Yes, sir. Mr. Laws, like
25 Mr. Brooks, I think it's good to point out, approached

1 the bench of his own volition. Other -- other
2 individuals waited until they -- if they were called and
3 were questioned. The way the proceedings began, when
4 the venire were summoned into the courtroom, the judge
5 introduced the staff, read the statutory requirements
6 for jury service, and then they started lining up. And
7 one of the people lining up to express his concern, not
8 just about meeting the requirements to be a juror, was
9 "I've got class, I've got" -- and I think it's --

10 JUSTICE GINSBURG: Mr. Laws was an
11 identical -- he came up too. He said --

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

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

17 MR. BOUDREAUX: I'm sorry.

18 JUSTICE BREYER: Could I go back to Ms.
19 Scott?

20 MR. BOUDREAUX: Ms. Scott?

21 JUSTICE BREYER: Yes. If you look at the
22 top of 367 and then you look over at 366, the format, I
23 think, is that the prosecutor is posing a general
24 question. And then he poses his question -- or she --
25 and goes around and gets an answer. Here is Mr. Lindey.

1 So they start out with the death penalty. They have
2 some ambiguous thing at the bottom of 366. Then the
3 prosecutor says, "Mrs. Alvarez -- Ms. Alvarez, you said
4 you could not impose the death penalty." "Mrs. Goff --
5 Ms. Goff: I could consider the death penalty." "Ms.
6 DuPont: I couldn't hear." Prosecutor: You could
7 consider both?" "Yes, I would consider it." "Ms.
8 DuBois: I could consider it. Yes." "Ms. Archonie: I
9 could consider it." "Mrs. Alvino: I could consider
10 it." "Ms. Scott: I could. I could."

11 Now, that doesn't seem too ambiguous for me
12 -- to me. It seems that what they're talking about,
13 each of them, is the death penalty because that's what,
14 by the time they got to the top of 367, they were
15 talking about. Maybe there's ambiguity there.

16 MR. BOUDREAUX: I don't --

17 JUSTICE BREYER: But I haven't noticed in
18 anybody's opinion, so far, making that point that you
19 just made.

20 MR. BOUDREAUX: I would submit that -- that
21 would indicate ambiguity, Your Honor, that the
22 prosecutor starts off with the life imprisonment
23 question, and then it sort of morphed into a death
24 penalty. But, by the time you get back to Ms. Scott --

25 JUSTICE BREYER: No -- well, there's -- I

1 just read you what it was, so I guess people make up
2 their own mind about that. But by -- what I don't think
3 you can make up your own mind as ambiguous is when this
4 prosecutor met with an answer that he considered not --
5 call it strictly kosher, when he found that, like Mrs.
6 Calligan, she said, "I'm not sure." That's more
7 ambiguous than Mrs. Scott. And then he goes on, for
8 three pages of additional questioning, and then 26 pages
9 later, he doesn't excuse her yet and he doesn't excuse
10 her until she volunteers, "I could give a verdict -- I
11 don't think I could give a verdict to take someone's
12 life."

13 And it's at that point that the prosecutor
14 excuses her.

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

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

20 JUSTICE BREYER: And a slight hesitation.

21 Now, what do you say to that?

22 MR. BOUDREAUX: One of the weaknesses in
23 some these jurors is a lack of follow-up questions. But
24 I think we go back to her original comment, which was so
25 softly spoken that the defense attorney said "I can't

1 hear you." There's nothing --

2 JUSTICE BREYER: And that, of course, is a
3 problem I have generally in this area. We can always
4 imagine that things that are not in the transcript,
5 perhaps what she said spokenly not in the transcript is
6 "I hate the death penalty. I'll never -- I'll never
7 apply it under any circumstances." And I grant you, if
8 that's the law, we are never going to find that there's
9 any prejudice. But I just don't see how that could be
10 the law.

11 MR. BOUDREAUX: In the totality of her
12 responses, the ones that were heard which are on the
13 record and the ones which were not heard which are not
14 on the record, the prosecutor felt that she was weak on
15 the death penalty. And that on its face is a
16 race-neutral reason.

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

18 MR. BOUDREAUX: Well, I would just say that
19 the -- we're talking here with the prosecutor's
20 perception of the juror based on her answers and the the
21 trial court's perception in evaluating the prosecutor's
22 proper race-neutral reasons.

23 Could someone look at this and say it's to
24 the contrary? Yes. But in the -- in the totality of
25 the circumstances and the reviewing for clear error with

1 the benefit, of course, that the trial court has in
2 being present, hearing or not hearing what was said, the
3 tone of voice, the demeanor, the mannerisms, the
4 deference's --

5 JUSTICE SOUTER: There -- there isn't much
6 reason, is there, to think that the trial court was
7 being very critical of the prosecutor's answers? My
8 recollection is that, after the O. J. Simpson remark had
9 been made in final argument, that the ultimate
10 resolution of that involved the trial judge saying that
11 one reason that was not a racially significant remark
12 was that the prosecutor had neither -- had mentioned
13 neither the race of the defendant nor the race of O. J.
14 Simpson.

15 Now that is not a critical mind at work, is
16 it?

17 (Laughter.)

18 MR. BOUDREAU: I would -- I would suppose
19 not, Your Honor.

20 (Laughter.)

21 JUSTICE SOUTER: And because --

22 MR. BOUDREAU: The objection was --

23 JUSTICE SOUTER: And because you suppose not
24 and I certainly suppose not, the -- the fact is that we
25 have to -- we have to consider the O. J. Simpson remark

1 in trying to evaluate what went on, in trying to
2 evaluate, for example, the lack of critical follow-up in
3 -- in a disparate way by the prosecutor. And that, in
4 fact, is a fair and potent argument that the other side
5 has, isn't it?

6 MR. BOUDREAUX: Yes, Your Honor. I would
7 like to respond to that by pointing out, though, that
8 the reference to the O. J. Simpson case was based on the
9 factual similarities involving the O. J. Simpson case
10 and this case.

11 JUSTICE SOUTER: Do you believe that, if
12 there had been a white defendant here, the O. J. Simpson
13 case would have been mentioned?

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

16 JUSTICE SOUTER: See, I'd be candid -- I
17 will be candid to say to you, under the -- under the
18 circumstances of the record in front of us, I find that
19 highly unlikely. And because I find that highly
20 unlikely, I put significance in the O. J. Simpson remark
21 which even you concede is significant.

22 MR. BOUDREAUX: Yes, Your Honor. But I
23 think the -- the reason it doesn't fatally infect the
24 proceedings with racism is -- I think the comment would
25 have been made had O. J. Simpson not been white -- I

1 think perhaps the comment would have been made had it
2 not been O. J. Simpson but some other high-profile white
3 athlete celebrity; and I think it is appropriate,
4 putting aside for the moment the assurance to the court
5 that he wouldn't mention it -- but it was in response to
6 the defense counsel's argument. This defendant was
7 tried on a plea of not by season of insanity. The
8 murders are committed; several hours later he's
9 barricaded in his house, calls the police claiming to be
10 suicidal; the police respond.

11 He gets up, unbarricades the door, lets the
12 police in; then goes back into his fetal position. To
13 rebut the -- this perhaps he's thinking, and I think it
14 is significant in Defense Exhibit 2 at trial, what --
15 the defendant's statement taken several hours later,
16 he's oriented; he's aware of the situation; he knew he
17 had done something wrong, was in -- and was in trouble.

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

23 MR. BOUDREAUX: I think he would have, Your
24 Honor. I know the contention is that he didn't, but I
25 think the facts are clear on this record that it was not

1 an appeal to race, but it was an appeal to what was a
2 historical fact, common knowledge among most people in
3 the country, and the facts of this case. The
4 defendant's statement as I said would betray no mental
5 lack of wherewithal. When the search warrant was
6 executed his bloody shirt was found in the attic of his
7 house. That's at page 1311 of the record. It is not in
8 the -- it's not in the joint appendix. But when the
9 defense attorney brings up the police coming to the
10 house and -- and he agreed that the police officer's
11 testimony was correct, he's in a fetal position; he's
12 saying they're coming to get me, I'm suicidal, the
13 defense attorney is bringing up the mental aspects of
14 this case. So I think it was appropriate for the
15 prosecutor to look at the record and -- and to rebut
16 that.

17 JUSTICE GINSBURG: Before -- before the
18 rebuttal, this prosecutor was going around advertising
19 this as his O. J. Simpson case, and the defense attorney
20 said please, Judge, get him to stop saying that. This
21 is long before -- you are painting a picture of someone
22 who was answering an argument made by the defense, but
23 this prosecutor initiated it, and the defense attorney
24 was reacting. She said judge, he's talking in this
25 county, that county about this is his O. J. Case; stop

1 him from doing that.

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

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

5 MR. BOUDREAUX: That's correct; and then he
6 believes -- despite his assurances, when the defense
7 attorneys made the argument they made, they were
8 inviting that -- that response.

9 JUSTICE SOUTER: Well, do you -- do you
10 believe that it would have been appropriate at that
11 point for the prosecutor to invoke in his argument any
12 case from any state in which a criminal defendant had
13 unsuccessfully feigned insanity as a reason to decide --
14 for the jurors to decide that this defendant is -- is
15 feigning insanity?

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

22 Contrast that with the -- or -- kind of,
23 almost similar to that when we're talking about racism
24 being part of these proceedings, one of the amicus
25 briefs refers to David Duke. If Your Honor is not

1 aware, in New Orleans, Louisiana, for a number of years
2 David Duke is high profile Ku Klux Klan. In some of the
3 voir dire in this case, at page 221, 222 of the joint
4 appendix, it is defense counsel who brings up David
5 Duke.

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

10 JUSTICE BREYER: Exactly. He's entitled to
11 a fair trial without prejudice.

12 MR. BOUDREAUX: Right.

13 JUSTICE BREYER: So I think you have two
14 instances here. One is Mrs. Scott, and the other is Mr.
15 Brooks. And with regard to Mr. Brooks, what I've read
16 in the transcript is that he was nervous and unhappy,
17 because he's learning to be a teacher, and he's afraid
18 he's going to miss some student teaching time which will
19 count against him.

20 MR. BRIGHT: Yes, sir.

21 JUSTICE BREYER: What it says is the clerk
22 called the dean and the dean said it he won't, don't
23 worry about it, which Mr. Brook is then told. He's
24 challenged for that reason. He might still worry about
25 it. But Mr. Laws is not. And Mr. Laws is a

1 self-employed contractor who announced to the court, I
2 have a big problem this weekend; two houses are near
3 completion, the owners are supposed to be moving in; my
4 wife has just had a hysterectomy, she's supposed to be
5 taking care of the children back home, and I -- she has
6 nobody to help.

7 Okay? He's not challenged.

8 So we're not worried about Mr. Laws worried
9 about his wife and his business which going down -- you
10 know, serious. But we are worried about Mr. Brooks, who
11 has been told by the dean you have no problem. Now,
12 that's a little bit of a problem to me.

13 MR. BOUDREAUX: Yes, Your Honor.

14 JUSTICE BREYER: If you add them up, we have
15 Ms. Scott we have Mr. Brooks, we have the mention of --
16 and three others -- three others, the only other three
17 black people are challenged off, and we have the -- no
18 black juror us on and we have the references to O. J.
19 Simpson beside.

20 Okay? All right so, there you are. Full
21 case against you.

22 MR. BOUDREAUX: Your characterizations are
23 -- are correct, Your Honor. I won't dispute the factual
24 allegations, but the key thing to point out there is
25 Mr. Laws said he could make arrangements. It is

1 difficult; it's -- the jury duty happens.

2 JUSTICE GINSBURG: What's the difference
3 between that and "okay"?

4 MR. BOUDREAUX: I'm sorry?

5 (Laughter.)

6 JUSTICE GINSBURG: One says I can make
7 arrangements, and the other is more economical and he
8 says "okay."

9 MR. BOUDREAUX: But that -- he said -- I
10 think that's the landscape man, he said, as long as it
11 wasn't a prolonged -- as.

12 JUSTICE BREYER: No, she means the dean.
13 The dean --

14 MR. BOUDREAUX: Oh, the dean --

15 JUSTICE BREYER: -- said no problem at all.
16 What better arrangement can you want?

17 JUSTICE GINSBURG: -- meaning Brooks.

18 MR. BOUDREAUX: Brooks says --

19 JUSTICE SOUTER: Brooks says okay.

20 JUSTICE GINSBURG: The difference is between
21 "I can make arrangements" and "okay."

22 MR. BOUDREAUX: The difference -- difference
23 there, Your Honor, is that Mr. Brooks needs to make
24 these classroom -- undergraduate requirements to
25 graduate. There's a day that's going to come when he's

1 either made his requirements to graduate, or he has not.
2 The people with the jobs, the contractors, their jobs
3 are there when they got -- when they got out of court,
4 when trial was over. If Mr. Brooks didn't meet his
5 requirements, he was not going to graduate. And I would
6 be a little careful to take it as face value from the
7 judge's law clerk calling the dean who then -- she comes
8 back and says it is a 300-hour observation. That's
9 obviously wrong.

10 JUSTICE SOUTER: Well, I wouldn't take it at
11 face value if there had been a further question asked of
12 Mr. Brooks saying, are you really satisfied you have
13 nothing to worry about? And he says well, gee, boy, I
14 sure hope I -- I'm able to make that requirement. But
15 nobody asked that question.

16 MR. BOUDREAUX: Nobody asked that question.

17 JUSTICE SOUTER: All we have is got is
18 "okay" on the one hand and "I can make arrangements" on
19 other.

20 MR. BOUDREAUX: We also have, Your Honor, as
21 far as the question of Mr. Brooks is concerned, a fact
22 that is not articulated by the prosecutor but which
23 would be supported by the record. He's an education
24 teacher; he's young; prosecutors in a death penalty case
25 I think would shy away from asking or leaving on a jury

1 a young person. A teacher, maybe perhaps more
2 sympathetic, maybe more understanding -- nothing wrong
3 with that, but maybe that's not who a prosecutors
4 seeking a death penalty --

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

9 Now you're saying we also have to imagine
10 other reasons, which he didn't state were the reasons
11 why he struck, but which might have been. You really
12 think that that's enough to --

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

15 JUSTICE SCALIA: It is not the problem with
16 it. It is your problem with the record.

17 (Laughter.)

18 JUSTICE SCALIA: It is not mine.

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

23 But talking about a fact -- factual specific
24 inquiry before an appellate court, that brings us back
25 to the -- to the discretion afforded the -- not the

1 discretion, Your Honor, the deference afforded the trial
2 court who is present for the proceedings, who is there,
3 passive or otherwise. He's there. He sees what's going
4 on, the demeanor --

5 JUSTICE STEVENS: May I ask you about Juror
6 Hawkins. You haven't talked much about him.

7 MR. BOUDREAUX: Hawkins?

8 JUSTICE STEVENS: Why did they strike him?
9 He seemed to me to be a pretty good juror for the
10 prosecution.

11 MR. BOUDREAUX: Your Honor, that's a
12 question I've asked myself; and I can't -- I'm not --
13 you would think on the surface of it he would have been
14 a good juror for the State. What I think is equally
15 clear is that the defense would -- objected to his being
16 excused but didn't make a Batson claim because I don't
17 think they wanted to go there. They would not have
18 wanted that juror on their jury. He said he had --

19 JUSTICE STEVENS: Wasn't he struck before
20 they back-struck the first black on the jury?

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

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

24 MR. BOUDREAUX: Yes, you're correct about
25 that. But I think he would have not -- the jurors --

1 the defense perhaps would have struck him. He testified
2 that he had plenty friends who were police officers in
3 this jurisdiction.

4 JUSTICE STEVENS: I understand why the
5 defense would have struck him. I'm trying to understand
6 why the prosecutor --

7 MR. BOUDREAUX: Well, we don't know that,
8 Your Honor, because there was no Batson objection
9 raised, and the prosecutor was not called upon to
10 articulate any reasons.

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

15 JUSTICE SOUTER: He knew nothing about that
16 juror except what Justice Stevens and you have just been
17 reciting. If that's all you knew and you were a
18 prosecutor, would you have struck him? Would you have
19 said: I don't want -- I don't want anybody on this jury
20 who's got friends in the police department? Would you
21 have struck him for that reason?

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

25 JUSTICE SOUTER: How about you?

1 MR. BOUDREAUX: I'm sorry?

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

5 (Laughter.)

6 MR. BOUDREAUX: No, Your Honor. I would --
7 I would --

8 JUSTICE SOUTER: No, you wouldn't have, and
9 neither would I.

10 MR. BOUDREAUX: No, sir. And that's the
11 difficulty that --

12 JUSTICE ALITO: We have no idea -- we have
13 no idea what this man looked like. We have no idea
14 about his demeanor, his tone of voice. This could have
15 been -- there could have been very legitimate reasons
16 for doing it. There could be no legitimate reasons for
17 doing it.

18 MR. BOUDREAUX: Right.

19 JUSTICE ALITO: But nobody asked what reason
20 for doing it was.

21 MR. BOUDREAUX: And no reasons were offered.

22 JUSTICE BREYER: I don't know the answer to
23 this at all but how this is supposed to work? A defense
24 attorneys -- the jury selection, and he sees that the
25 prosecutor doesn't challenge for peremptory or any other

1 reason one black member. Let's call it five.

2 And then they start challenging black
3 members. Obviously, he didn't at the beginning impose
4 any Batson claim. He had no Batson claim. There were
5 five people on the jury who were black. What claim
6 could you make?

7 And then after you begin to get suspicious
8 and start to make them, now they do this thing called
9 black strike and they get everybody off the jury.

10 How is it supposed to work?

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

14 JUSTICE BREYER: They don't know.

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

18 MR. BOUDREAUX: No, sir.

19 JUSTICE SCALIA: Any single person.

20 MR. BOUDREAUX: That's correct.

21 JUSTICE BREYER: I'm speaking reality.

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

25 CHIEF JUSTICE ROBERTS: I still have -- I am

1 curious to the answer to Justice Breyer's question.
2 When they go back and back strike at that point can the
3 defendant say I don't think you can back strike this
4 juror you're doing it on the basis of race.

5 MR. BOUDREAUX: They can go back and back
6 strike, but the defendant could say --

7 CHIEF JUSTICE ROBERTS: They can go back and
8 back strike.

9 MR. BOUDREAUX: Yes, sir.

10 CHIEF JUSTICE ROBERTS: They can go back and
11 object to the back striking? The State would say, well
12 here's the reasons we're back striking.

13 MR. BOUDREAUX: The back strike is when is
14 the challenge exercised. In and of itself you can't say
15 if it is racial or not. It is a challenge.

16 JUSTICE BREYER: That was my question.

17 JUSTICE STEVENS: My problem -- after the
18 back strike of the first black juror who had been
19 accepted, can they thereafter renew an objection if the
20 jurors two and three, who are accepted on the assumption
21 that there would no --

22 MR. BOUDREAUX: I think under Miller-El and
23 related decisions that would be part of the totality of
24 the circumstances. The practical problem --

25 JUSTICE GINSBURG: That wasn't done here.

1 That was the point that you made.

2 MR. BOUDREAUX: Yes.

3 JUSTICE GINSBURG: When the third -- the
4 back strike of Brooks was made, they could have gone
5 back for Hawkins and the others, but they didn't.

6 MR. BOUDREAUX: That could have been argued
7 evidence for them to make their prima facie case.

8 CHIEF JUSTICE ROBERTS: I'm sorry.

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

16 MR. BOUDREAUX: To give you a yes or no
17 answer, yes. The practical problem with that is those
18 two jurors having previously been excused, could be on
19 the way to their office or back to their home.

20 CHIEF JUSTICE ROBERTS: Still, the
21 prosecutor is still there. You can ask the prosecutor,
22 why did you strike that juror?

23 MR. BOUDREAUX: Yes, you could. Yes, you
24 could. Then you have got a practical problem what if it
25 doesn't pass muster. That's the reason for the

1 contemporaneous objection rule.

2 JUSTICE BREYER: Can I ask you one other
3 question. You are the only one who will know the answer
4 to, this too. I noticed in looking at the opinion of
5 the Louisiana Supreme Court that they start out by
6 saying we have conducted another review of the voir dire
7 transcript and find nothing there to disparage the
8 Batson claim. In reading that opinion in several places
9 they refer to their having gone back and having read the
10 whole transcript themselves.

11 And then they have two full pages, or one
12 and a half anyway where they seem to be talking about
13 what happened in a pretrial conference and they refer to
14 that prior review and covered a factor favorable to the
15 State's use of a peremptory challenge.

16 They went back and found a factor of
17 favorable to. Now, was that factor argued to them in
18 the brief? Do you remember that?

19 MR. BOUDREAUX: I wrote the brief, Your
20 Honor, but I don't think -- I don't remember.

21 JUSTICE BREYER: I thought that's why you
22 might know.

23 (Laughter.)

24 MR. BOUDREAUX: I don't remember.

25 JUSTICE BREYER: I thought that, in reading

1 it, it seems as if they are not, and I was thinking
2 about how a judge can't think of everything. But if
3 they're going to think beyond what the briefs tell them,
4 they ought to think of it for both sides, and not just
5 for one side.

6 MR. BOUDREAUX: You know to be honest,
7 Justice Scalia's comment about looking at the record and
8 saying oh, here is another reason that the prosecutor
9 didn't articulate.

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

21 And in this case, the defendant did not
22 testify at either phase of the proceedings.

23 JUSTICE GINSBURG: Mr. Boudreaux, I'd like
24 to ask you a question before you finish. It is not an
25 issue in this case, but we are told that

1 African-Americans are 20 percent of the population of
2 Jefferson Parish, but they were less than 11 percent of
3 the people summoned for jury duty.

4 Is that typical?

5 MR. BOUDREAUX: Certainly pre-Katrina, Your
6 Honor. Yes. The summons go out based on public
7 records, driver licenses, voters registrations. That's
8 basically at random. To say those numbers would not
9 surprise me.

10 JUSTICE GINSBURG: That's -- and because
11 it's almost half of what you would expect.

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

14 JUSTICE GINSBURG: Thank you.

15 MR. BOUDREAUX: In the minute or two I have
16 left, Your Honors, I would just remind the Court, urge
17 the Court to consider its recent opinion last June in
18 Uttecht dealing with the deference due the trial court
19 in these types of proceedings -- that was a habeas case
20 -- what the opinion says to require on direct review,
21 and according to the trial court, the deference having
22 been present and not just relying on a cold record, that
23 the Louisiana Supreme Court's ruling should be farmed.

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

1 MR. BOUDREAUX: Yes, sir.

2 JUSTICE KENNEDY: -- should be any greater
3 than in a Batson case where we have the sensitive issue
4 of racial discrimination?

5 MR. BOUDREAUX: I'm not sure I understood
6 the question, Your Honor.

7 JUSTICE KENNEDY: Well, Uttecht --

8 MR. BOUDREAUX: Whether it's going to the
9 issue --

10 JUSTICE KENNEDY: Uttecht was a death
11 qualified juror --

12 MR. BOUDREAUX: Yes.

13 JUSTICE KENNEDY: -- and this is a Batson
14 case.

15 MR. BOUDREAUX: Right, and it --

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

20 MR. BOUDREAUX: No. Because you're
21 still dealing with --

22 JUSTICE KENNEDY: We haven't discussed
23 this --

24 MR. BOUDREAUX: -- of a factfinder.
25 Obviously, there's some differences in Uttecht being

1 habeas and Witherspoon, but the similarities, I think,
2 are enough that this -- the degree of deference has to
3 still be there, although there's a statutory deference
4 in a habeas.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Boudreaux.

8 Mr. Bright, you have three minutes
9 remaining.

10 REBUTTAL ARGUMENT OF STEPHEN B. BRIGHT
11 ON BEHALF OF THE PETITIONER

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

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

18 Now, notice that with regard to the other
19 four backstrikes used, two by the prosecution and two by
20 the defense, it's at the very end of the process. It's
21 literally when they're down to one juror. Williams
22 says, "Do we have 11 jurors?" And then he backstrikes.
23 The defense says, "Is this my 11th strike?" Backstrike.
24 Williams then, "Are we back to 11?" So these -- the
25 only way the backstrike makes sense really, when you

1 think about it, is to look at the whole jury and then go
2 back and cull out the ones based on a comparison.

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

14 And I think, again, when you look at all the
15 relevant circumstances, it's pretty clear what was going
16 on here with the acceptance of Brooks at the start and
17 the backstrike --

18 CHIEF JUSTICE ROBERTS: Do you agree with
19 your friend on the other side, that you could have
20 objected both to the backstruck juror and to the jurors
21 to whom you -- with respect to whom you did not object
22 because there was -- the juror that was later backstruck
23 on the jury?

24 MR. BRIGHT: I -- I think yes. The answer
25 to that is yes, and I think, if the defense had, we'd be

1 talking about four jurors here today instead of two.
2 But it doesn't diminish from what the Court in Miller-El
3 called the numbers. The fact that it is unlikely to be,
4 by chance, that all five -- all five African-Americans
5 are struck in this case.

6 JUSTICE STEVENS: Although you could have
7 made an objection. As I understand your opponent, he
8 very helpfully said that they probably would have left
9 the courthouse --

10 MR. BRIGHT: They would.

11 JUSTICE STEVENS: So what could you --

12 MR. BRIGHT: So they're gone. And so if the
13 objection had been overruled --

14 CHIEF JUSTICE ROBERTS: The objection would
15 have afforded the state an opportunity to present the --
16 if there was one -- the non-racial reason THAT they
17 struck the juror.

18 MR. BRIGHT: But the reason for doing that
19 would be to have the judge not allow the strike and to
20 put that juror in the box and the juror' gone now. So
21 that, as a practical matter, is not going to work.
22 There's no --

23 JUSTICE SCALIA: Another reason to do it
24 would be to preserve your right on appeal, to object to
25 those jurors.

1 MR. BRIGHT: But there's no procedural rule
2 in Louisiana that says you have to do that. It might
3 have been a stronger case if they had done it.

4 JUSTICE SCALIA: Maybe your rule here that
5 -- that we're not going to postulate the worst reason
6 for a prosecutorial strike rather than a good reason
7 when you haven't given the prosecution an opportunity to
8 set forth a good reason.

9 MR. BRIGHT: If I may answer.

10 That only goes, though -- the only two
11 jurors on the reasons that are before the Court are
12 Jeffrey Brooks and Elaine Scott. But the fact that the
13 prosecutor struck all five, and as Justice Souter points
14 out, you wouldn't have made this argument, I don't think
15 -- this O.J. Simpson argument -- not only depending upon
16 the race of the defendant, but if there had been black
17 people on that jury. This is an argument that resonates
18 with an all-white jury.

19 Thank you.

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

22 The case is submitted.

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

25

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