No. 06-10119

IN THE

Supreme Court of the United States

ALLEN SNYDER,
Petitioner,
v.

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Amicus curiae the Constitution Project respectfully submits this brief supporting reversal of the decision of the Louisiana Supreme Court in *State* v. *Snyder*, 942 So. 2d 484 (La. 2006) ("*Snyder III*").[1]

INTEREST OF *AMICUS CURIAE*

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. The Project's essential mission is to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. The Project promotes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In 2000, the Project convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system to examine the current capital punishment system and to recommend ways to ensure that fundamental fairness is guaranteed for all. The Committee's first report, *Mandatory Justice: Eighteen Reforms to the Death Penalty*,[2] was issued

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. This brief was written with the assistance of Desiree Ramirez and Armilla Staley, students in the Death Penalty Clinic at the University of California Berkeley Law School. Letters indicating the parties' consent to the filing of this *amicus* brief have been submitted to the Clerk.

[2] Hereinafter *Mandatory Justice I*, *available at* http://www.constitutionproject.org/pdf/MandatoryJustice1.pdf.

the following year. In 2006, the Committee released an updated version of its 2001 report and consensus recommendations. *Mandatory Justice: The Death Penalty Revisited*[3] describes 32 reforms aimed at reducing the risk of wrongful capital convictions and executions. Both reports concluded that "the issues of racial neutrality, fairness, and public confidence that racial discrimination plays no role in the [life and death] decisions . . . are among the most important confronting the death penalty system."[4]

The opinion of the Louisiana Supreme Court in *Snyder III*, which reaffirmed the denial of Petitioner's *Batson* challenge after this Court's remand in light of *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"),[5] implicates at least two interests of the Constitution Project. First, "to help ensure that racial discrimination plays no role in [a jurisdiction's] capital punishment system, and to thereby enhance public confidence in the system,"[6] the Death Penalty Committee's reports recommended "bring[ing] members of all races into every level of the decision-making process."[7] More specifically, the Committee's two reports proposed that "efforts should be redoubled, through [*inter alia*] vigorously enforcing *Batson* v. *Kentucky*, 476 U.S. 79 (1986), . . . to ensure that members of all races are part of . . . petit juries that decide guilt and punishment."[8]

Second, the Project and its Death Penalty Committee are concerned that prosecutors uphold their constitutional responsibilities, including their duty to "seek justice" and

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[3] Hereinafter *Mandatory Justice Revisited*, *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

[4] *Mandatory Justice I*, at 25; *Mandatory Justice Penalty Revisited*, at 37-38.

[5] *Snyder* v. *Louisiana*, 545 U.S. 1137 (2005).

[6] *Mandatory Justice I*, at 23; *Mandatory Justice Revisited*, at 35.

[7] *Id.*

[8] *Mandatory Justice I*, at 24; *Mandatory Justice Revisited*, at 37.

adhere to the highest professional standards.[9] Consistent with these objectives, the Committee's two reports proposed, *inter alia*, reforms to "provide a check on broad prosecutorial discretion,"[10] "prevent discrimination from playing a role in the capital-decision making process,"[11] keep the prosecutor "free of the pressure of media attention and political considerations,"[12] and institute policies to improve the accuracy and reliability of the capital punishment process.[13]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has made clear that, at step three of the *Batson* inquiry, a court must assess the credibility of the prosecutor's explanation for a peremptory challenge "in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 252 (citing *Batson*, 476 U.S. at 96-97, and *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) ("*Miller-El I*")). The importance of this requirement cannot be overstated. As the Court observed in *Miller-El II*, although "'this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause,' . . . [t]he rub has been the practical difficulty of fer-

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[9] *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83, 88 n.2 (1963) ("[The prosecutor's] chief business is not to achieve victory but to establish justice." (internal citations omitted)); NAT'L PROSECUTION STANDARDS § 1.1 (National District Attorneys Ass'n 2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."); CRIMINAL JUSTICE PROSECUTION FUNCTION STANDARDS ("PROSECUTION FUNCTION") S. 3-1.2 (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); NAT'L PROSECUTION STANDARDS § 1.5 ("At a minimum, the prosecutor should abide by all applicable provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction.").

[10] *Mandatory Justice I*, at 27; *Mandatory Justice Revisited*, at 39.

[11] *Id.*

[12] *Mandatory Justice I*, at 53; *Mandatory Justice Revisited*, at 103.

[13] *See Mandatory Justice I*, at 47-54; *Mandatory Justice Revisited*, at 96-107.

reting out discrimination in selections discretionary by nature and subject to a myriad of legitimate influences." 545 U.S. at 238 (quoting *Georgia* v. *McCollum*, 505 U.S. 42, 44 (1992)).

Indeed, there is ample empirical support for the conclusion that lawyers will go to considerable lengths to avoid "the appearance of racial bias," notwithstanding the fact that their peremptory challenges are "consciously and strategically" influenced by racial considerations.[14] "Even in extreme instances of bias—such as the exclusion of every Black member of the venire—. . . it would be relatively easy to generate multiple, race-neutral justifications."[15] Therefore, this Court must firmly reject efforts by lower courts to adjudicate *Batson* challenges on anything less than a full accounting of all the evidence that may bear upon a prosecutor's motives.

In *Snyder III*, a narrow majority of the Louisiana Supreme Court veered far off the course this Court set in *Miller-El II*, failing at step three to adequately "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This Court's characterization of the Fifth Circuit's "'dismissive and strained interpretation'" of the evidence presented by Thomas Miller-El applies equally to the state court's treatment of the evidence presented by Allen Snyder, which, "viewed cumulatively . . . is too powerful to conclude anything but discrimination" was

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[14] Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 Law & Hum. Behav. 261, 263 (June 2007); *id.* at 269 ("[T]his investigation provides clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence—findings that are strikingly similar in direction as well as magnitude to the conclusions of archival analyses of real peremptory use[.]" (citations omitted)).

[15] *Id.* at 269.

the reason the prosecutor exercised his peremptory challenges to remove all African Americans from the jury. *Miller-El II*, 545 U.S. at 265 (citing *Miller-El I*, 537 U.S. at 344).

This brief emphasizes the unusual, unethical, and unconstitutional nature of the prosecutor's conduct in this case, beginning with his comments to the media comparing Mr. Snyder to O.J. Simpson, and culminating in his rebuttal penalty phase argument referencing the O.J. Simpson case and implicitly urging the jury not to let Mr. Snyder "g[e]t away with it" like O.J. Simpson did. A narrow majority of the Louisiana Supreme Court deviated from this Court's directive on remand and from its *Batson* jurisprudence by failing to acknowledge that this provocative and impermissible conduct was powerful evidence of the prosecutor's discriminatory intent to use his peremptory challenges to purge Mr. Snyder's capital jury of all African Americans. *Snyder III*, 942 So. 2d at 498-500.

So long as *Batson* defines the Equal Protection regime,[16] rigorous insistence on compliance, particularly, as here, where lower courts decline to follow this Court's directives, is a constitutional and public policy imperative.[17] Any-

[16] Some members of this Court have questioned *Batson*'s continued viability to eliminate race as a factor in jury selection, proposing, instead, that enforcement of the Equal Protection Clause in this aspect of the trial process will only be achieved by the elimination of peremptory challenges. *Batson*, 476 U.S. at 102-103 (Marshall J., concurring); *Miller-El II*, 545 U.S. at 266-267, 269-270, 272-273 (Breyer, J., concurring); *Rice* v. *Collins*, 546 U.S. 333, 342-343 (2006) (Breyer J., with Souter, J., concurring); *see also Swain* v. *Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.").

[17] *See Johnson* v. *California*, 545 U.S. 162, 172 (2005) ("'For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society

thing other than a reversal of the Louisiana Supreme Court's decision would be a sharp retreat from this Court's *Batson* jurisprudence and particularly from the Court's recent elucidation in *Miller-El I* and *II* of step three of the analysis. The decision of the Louisiana Supreme Court in this case—coming particularly as it does on remand from this Court—undermines public confidence in the prosecutorial function, the jury system, and the principle that redress of constitutional violations can be achieved through the process of judicial review.

STATEMENT OF THE CASE[18]

In June 1994, O.J. Simpson was arrested for the murder of his wife, Nicole Brown Simpson, and Ronald Goldman.[19] An estimated 95 million television viewers[20] watched Los Angeles police pursue Mr. Simpson in a low-speed freeway chase that lasted almost two hours.[21] As discussed in Part I of the argument below, the double murder, Mr. Simpson's arrest, and the Simpson trial precipitated media and public interest that was unprecedented in degree and duration.

Some fourteen months after Mr. Simpson's arrest, on August 16, 1995, Allen Snyder was arrested in Jefferson Parish, Louisiana, for the nonfatal stabbing of his wife, Mary Snyder, and the stabbing death of Howard Wilson. J.A. 1; *State* v. *Snyder*, 750 So. 2d 832, 836 (La. 1999) ("*Snyder I*"). Mr. Snyder was subsequently charged with first-degree murder.

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and a representative government.'" (quoting S*mith* v. *Texas*, 311 U.S. 128, 130 (1940)).

[18] This section sets forth certain facts relevant to the arguments made below. *Amicus curiae* adopts the facts and procedural history set forth in petitioner's brief on the merits.

[19] Seth Mydans, *The Simpson Case: Simpson Is Charged, Chased, Arrested*, N.Y. Times, June 19, 1994, at A1.

[20] Lynn Elber, *Estimated 95 Million Watch Simpson Chase*, S.F. Chron., June 22, 1994, at E3.

[21] *O.J.: Story of the Year*, Seattle Times, Dec. 26, 1995, at E1.

On October 2, 1995, less than two months after Mr. Snyder's arrest, the jury in Mr. Simpson's case acquitted him of all charges.[22] But rather than put an end to the story, the not-guilty verdicts ignited a media firestorm about race and the criminal justice system.[23] As explained in Part I of the argument below, the media coverage of the Simpson case became more racially divisive, and it did not begin to subside for many months.

Between the time of Mr. Snyder's indictment and the commencement of his trial less than a year later on August 27, 1996 (J.A. 16), the prosecutor, Jim Williams, repeatedly and publicly referred to the Snyder case as "his O.J. Simpson case." J.A. 51-52, 57b. In response, the defense moved *in limine* to preclude the prosecutor from making such remarks. J.A. 48-50. As the motion urged (J.A. 49):

> References of the kind [made by the prosecutor to the media] serve no purpose other than as an attempt to confuse and prejudice the jury. Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly—if not all—white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

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[22] *See* Don Melvin, *Not Guilty, O.J. Simpson a Free Man After Verdicts*, Atlanta J.-Const., Oct. 3, 1995, at A1.

[23] *See, e.g.*, Ronald Brownstein, *Simpson Defense's Focus on Racial Identity Further Divides a Nation*, L.A. Times, Oct. 9. 1995, at A1 ("Brownstein"); Martin Gottlieb, *Not Guilty: The Racial Prism; Split at the End, as at the Start*, N.Y. Times, Oct. 4, 1995, at A1 ("Gottlieb"); Leonard Greene, *Racism is Still the Hot Coal the Nation Refuses to Touch*, Boston Herald, Oct. 2, 1995, at 004 ("Greene").

At the hearing on the motion *in limine*, defense counsel argued (J.A. 51-52):

> Mr. Williams has been all over two parishes talking about this is his O.J. Simpson case. And, it's certainly [sic] the similarities are obvious, but they're also very prejudicial. Sixty-something percent of all white people in America think that O.J. Simpson got away with murder. We've got a ninety-five percent jury venire that is white. I believe that such comparisons are irrelevant. They are highly prejudicial and I think that they prevent Mr. Snyder from getting a fair trial, and I would ask that they be precluded in this trial.

The prosecutor did not dispute any of defense counsel's assertions regarding his public statements, the volatile coverage of the O.J. Simpson case, the deep divide between the white and African-American communities over the Simpson verdict, or the grave risk to a fair jury verdict in Mr. Snyder's case if any of "these [racial] fears and prejudices" were exploited to a white or predominately white jury. J.A. 49. Mr. Williams responded by insisting that he knew "what constitutes a mistrial and what is prejudice and what is not." J.A. 52. He protested that he would "never be allowed to refer to anything in connection with the argument of any case if the Court allows this motion." *Id.* Initially, Mr. Williams stated that he would most certainly not refer to the case as "the Jefferson Parish O.J. Simpson court—case" during *voir dire*, but might do so in argument. *Id.* Conceding that such a statement in argument "might be inappropriate," he argued that, at least, the motion was "premature," and assured the trial court that he would not refer to the O.J. Simpson case during the evidentiary portion of the trial. *Id.* His response prompted the following exchange with counsel for Mr. Snyder, Ms. daPonte (J.A. 52-53):

> Ms. daPonte: That's—Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witness, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned

> about one of Mr. Williams' famous arguments. And I think—
>
> Mr. Williams: Judge, give me a break. I think—
>
> Ms. daPonte: I'm not finished, Your Honor—
>
> Mr. Williams: Trust me, trust me.

Ms. daPonte then requested that the court order the prosecutor not to "make comparisons in any way with the O.J. Simpson case" and to be "held in contempt if he does that." J.A. 53. Mr. Williams responded (*id.* (emphasis added)):

> Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence *or before the jury in this case*, mention the O.J. Simpson case.

The prosecutor then urged that the motion be denied, repeating his assurance: "I have given the Court my word that I won't do this." *Id.* Defense counsel closed by asking the judge to grant the motion so that the case to be tried would be Mr. Snyder's case, "not the O.J. Simpson case." J.A. 53-54. The court announced that "based upon Mr. Williams' representations," it was denying the motion. J.A. 54.

Immediately before the commencement of *voir dire*, defense counsel filed a motion seeking an order prohibiting all counsel from making comments to the media—pointing out that the prosecutor's repeated, public O.J. Simpson comparisons "abridges Mr. Snyder's right to a fair trial." J.A. 55-57, 57a-57c. Mr. Williams responded that he did not think there had been any showing of prejudice; the sequestered jury would not be exposed to any coverage of Mr. Snyder's trial; he was "currently" disinclined to speak to the press; and, if granted, the order would "bring about a tidal wave of other motions, trying to limit what I can and cannot do, and I don't think it's relevant to this case." J.A. 57a-57c. Mr. Snyder's lawyer told the court that the previous day, a television re-

porter had requested that she comment on "the second O.J. Simpson case that was scheduled to go to trial in Jefferson Parish today." J.A. 57b.[24] She argued that an order was necessary to ensure that Mr. Snyder's case—unlike Mr. Simpson's—was tried in the courtroom and not in the media. *Id.* The prosecutor did not dispute defense counsel's account of the reporter's inquiry. Instead, Mr. Williams protested that he could not keep the press from following him, and told the judge that he would not speak to them during his "case in chief" because it was "against office policy." J.A. 57c. The court denied the motion. *Id.*

As the Louisiana Supreme Court recognized, "[t]he record of the voir dire proceedings reveals that the prosecutor used peremptory challenges to strike every African-American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for [Mr. Snyder], who is African-American." *Snyder I*, 750 So. 2d at 839. Counsel for Mr. Snyder immediately raised *Batson* challenges to three of the five African-American jurors struck by the prosecutor (J.A. 401, 444, 447),[25] but those challenges were rejected (J.A. 402, 445, 448).

Mr. Snyder was convicted of first-degree murder. J.A. 34. At the sentencing phase of the trial (J.A. 34-38), the defense presented evidence and argued that Mr. Snyder was under extreme emotional distress and, indeed, suicidal at the time of the crimes. *Snyder III*, 942 So. 2d at 498. Specifically, the evidence showed that following the stabbings, Mr.

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[24] The reporter confirmed to defense counsel "that it was the District Attorney's Office which had billed this trial with the by-now infamous moniker and intimated that it was the reference that made the story newsworthy." J.A. 56.

[25] Defense counsel did not make a *Batson* challenge when the prosecutor used his second and fourth peremptory challenges to remove African Americans from the venire, but noted the race of the prospective jurors on the record. J.A. 345, 400-401. When the prosecutor struck the third African American from the venire, the defense made its first *Batson* challenge, and noted that the juror was the third African American subject to a peremptory strike. J.A. 401.

Snyder returned home, barricaded himself inside, and later called the police. *Snyder I*, 750 So. 2d at 836. When officers responded, the furniture was in disarray and had been placed against the doors. Mr. Snyder was inside, curled up in a fetal position, repeating the phrase "[t]hey're coming to get me." *Snyder III*, 942 So. 2d at 498.

Despite the prosecutor's assurances to the court that he would not invoke comparisons to the O.J Simpson case (J.A. 52-53), during rebuttal closing argument, the prosecutor argued to the jury (J.A. 606):

> And it was 12 hours later when [Allen Snyder] called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of[.]

Defense counsel objected that the prosecutor was about to mention the O.J. Simpson trial. J.A. 606. The prosecutor responded that he intended to tell the jury that Mr. Snyder "sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away with it . . . ," and told the trial judge that this argument was "fair comment on something that's common knowledge." J.A. 606-607. The court overruled the objection. J.A. 607. Mr. Williams continued before the jury (*id.* (emphasis added)):

> The most famous murder case, and all of you all have heard about it, happened in California *very, very, very similar to this case.* The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that was what [Mr. Snyder] was thinking about when he called in and claimed that he was going to kill himself?*

After deliberating for two and a half hours, the jury returned a death verdict. J.A. 34.

Prior to sentencing, newly retained counsel for Mr. Snyder filed a motion for new trial, arguing, *inter alia*, that the prosecution's use of "strikes on all jurors that were Afro-American" (J.A. 616) and the judge's erroneous *Batson* rulings required vacating the conviction and death sentence (J.A. 638). At the hearing on the motion, defense counsel argued that the prosecutor had exercised his peremptory challenges in order to secure an all-white jury because the prosecutor knew that he could not make the O.J. Simpson comparison to a jury that included even one or two African Americans.[26] J.A. 659. Mr. Snyder's lawyer then described the transparently racial content of the rebuttal argument and its racial directive to the jury (*id.*):

> [Y]ou'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O.J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it . . . [a]nd to hammer this man down, and to get a jury to say, That's right, you know, O.J. Simpson got off, this guy is trying to get off, he's like O.J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

The trial court denied the motion for new trial (J.A. 665) and formally sentenced Mr. Snyder to death, *Snyder I*, 750 So. 2d at 837.

The Louisiana Supreme Court twice found no error in the trial court's denial of Mr. Snyder's *Batson* claims. *Snyder I*, 750 So. 2d at 842-843; *Snyder III*, 942 So. 2d at 499-500. Its second opinion addressing the *Batson* issue (*Snyder III*) followed this Court's grant of *certiorari*, vacatur of judg-

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[26] *See* La. Code Crim. P. art. 782.

ment, and remand in light of *Miller-El II*. *See Snyder* v. *Louisiana*, 545 U.S. 1137 (2005). On remand, the Louisiana Supreme Court concluded that any inferences of discriminatory intent to be drawn from "the prosecutor's remarks both prior to and subsequent to voir dire" were "no more compelling than other race-neutral inferences to be drawn when one considers the prosecutor's remarks in context." 942 So. 2d at 499. The court determined that the prosecutor's rebuttal argument was race-neutral for two reasons.[27] First, the prosecutor's Simpson analogy was "in direct response" to defense counsel's argument that, among the mitigating circumstances for the jury to consider, were facts relating to "whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident." *Id.* at 498-499. Second, the argument did not "refer[] *to Simpson's or Snyder's race.*" *Id.* at 499 (emphasis added).

ARGUMENT

In *Miller-El II*, this Court observed, with regard to the prosecutor's explanations for his strikes of African-American jurors, that, because "[s]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." 545 U.S. at 240. Therefore, the *Batson* framework permits the defendant to carry his burden of establishing "'purposeful discrimination" by relying on "'all relevant circumstances.'" *Id.*

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[27] In an earlier section of the opinion, the court characterized the prosecutor's remarks as no more than "an indirect reference to the O.J. Simpson case." 942 So. 2d at 498. Later, the majority appeared to concede that the reference to Simpson was unmistakable. *See id.* at 499 ("the remark during rebuttal referred to the fact that Simpson feigned suicidal intent"). Both dissenting opinions had no difficulty discerning the comparisons. *Id.* at 501 (Kimball, J., dissenting) ("the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial"); *id.* at 505 (Johnson, J., dissenting) ("the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial").

(quoting *Batson* v. *Kentucky*, 476 U.S. 79, 96-97 (1986)).[28] In *Miller-El II*, those circumstances included the decades-long "specific policy of systematically excluding blacks from juries" practiced by the Dallas County District Attorney's Office, which the Texas courts and the Fifth Circuit had failed to properly consider. 545 U.S. at 263, 265-266.

Here, the "relevant circumstances" included the prosecutor's racially inflammatory statements to the media before Mr. Snyder's trial comparing the case to the O.J. Simpson case and his argument to the jury analogizing the case to the Simpson case in the face of his promise to the court that he would not do so. Although the prosecutor did not mention O.J. Simpson's race or Mr. Snyder's race in his rebuttal argument, in light of the extensive media coverage regarding the racially divisive nature of the O.J. Simpson case and the prosecutor's prior conduct in this case, there can be no doubt that the prosecutor was well aware that his argument was racially provocative.

The Louisiana Supreme Court declined properly to consider the prosecutor's O.J. Simpson strategy as evidence that he intended to discriminate when he cleared the jury of all African Americans. That was fundamental error.

I. THE PROSECUTOR'S CONDUCT MUST BE CONSIDERED IN LIGHT OF THE EXTENSIVE CONTEMPORANEOUS MEDIA COVERAGE REVEALING THE RACIALLY CHARGED NATURE OF THE O.J. SIMPSON CASE

The Louisiana Supreme Court failed to consider the context in which the prosecutor (1) made repeated comments to the media about the O.J. Simpson case before trial, (2) struck all five qualified African-American jurors, and

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[28] Although this language refers specifically to the evidence to be considered at step one in raising an inference of discrimination, *Miller-El II* affirmed that at step three of the inquiry the judge must "assess the plausibility" of the prosecutor's reasons for his strike "in light of all evidence with a bearing on it." 545 U.S. at 252. Also, *Miller-El I* specifically makes the point that the evidence supporting a *prima facie* case should be considered at step three of the *Batson* analysis. 537 U.S. at 340-341.

then (3) referenced the Simpson case in his argument to the all-white jury he had selected. As Justice Kimball observed in her dissent, "voir dire began against a backdrop of the issues of race and prejudice." 942 So. 2d at 501 (Kimball, J., dissenting).

The press accounts of the O.J. Simpson case are relevant to the *Batson* inquiry in at least two respects: (1) the scope and duration of the coverage was extraordinary; and (2) the content of the stories became markedly more racially divisive after the verdict in October 1995. In her motion and argument at the hearing to preclude reference to O.J. Simpson during the trial, defense counsel emphasized how dramatically the local white and black communities were polarized over O.J. Simpson's acquittal. J.A. 49, 52-54. In the motion for new trial, Mr. Snyder's counsel made the same point, arguing that the prosecutor had purged the jury of African Americans in order to exploit these racial divisions through his O.J. Simpson comments during his rebuttal argument. J.A. 658-659.

Justice Johnson's dissent correctly identified the "nationwide media focus on O.J. Simpson." 942 So. 2d at 506. According to *The Atlanta Journal-Constitution*, the Simpson trial was "the most publicized trial of the century."[29] *The Chicago Sun-Times* called it "the most closely watched murder trial in the nation's history."[30] Nearly every major newspaper in the United States, including *The New York Times*, *The Washington Post*, *USA Today*, and *The Los Angeles Times*, called Mr. Simpson's case "the trial of the century."[31]

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[29] Betsy White, *School Watch: Class Doesn't Think Simpson is One for the Books*, Atlanta J.-Const., Oct. 10, 1995, at 3E.

[30] Alex Rodriguez, *A City's Silence Turns into Joy and Disbelief*, Chi. Sun-Times, Oct. 4, 1995, at SS10.

[31] *The Simpson Verdict*, N.Y. Times, Oct. 4, 1995, at A20; Saundra Torry, *The Verdict Is in: These Forecasters Didn't Fare Too Well*, Wash. Post, Oct. 9, 1995, at F7 ("Torry"); Tony Mauro, *Simpson Free: Prosecutors 'Ran from Their Evidence,'* USA Today, Oct. 4, 1995, at 1A

This was as true in Jefferson Parish as it was elsewhere in the United States. *The Times-Picayune*, the New Orleans-based newspaper that covers and serves Jefferson Parish, also referred to the Simpson trial as the "Trial of [the] Century."[32] A Westlaw search of national newspapers during the period between the Simpson verdict and the start of Mr. Snyder's trial revealed over 5,065 articles about the Simpson case.[33]

Much of the press emphasized that the Simpson trial was "one of the most racially divisive trials in our history."[34] As *The Los Angeles Times* reported only ten months prior to Mr. Snyder's trial:

> [T]he explicit nature of the defense's appeal to racial solidarity—and the apparent responsiveness of the predominantly black jury to the defense claim that Simpson was the victim of a vast, racially motivated police conspiracy—has clearly stained the verdict in the eyes of most white Americans. The stunning pictures of blacks cheering while whites muttered or choked back tears when the verdict

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("Mauro"); Sheryl Stolberg, *The Simpson Legacy: Just Under the Skin, Will We Ever Get Along?* L.A. Times, Oct. 10, 1995, at S3 ("Stolberg").

[32] *Readers Respond to Verdict in "Trial of Century,"* Times-Picayune, Oct. 5, 1995, at A14.

[33] The Westlaw search was performed on August 20, 2007, using the search term "OJ Simpson" appearing in the title line, and restricting the search to the time period between October 3, 1995 and August 26, 1996. A similar Westlaw search of the New Orleans *Times-Picayune* identified 40 articles citing to O.J. Simpson in the title.

[34] Greene, *supra*, at 004. A number of legal commentators shared this view of the trial and the outcome. *See, e.g.*, Robert J. Cottrol, *Perceptions and Decision Making: Racial Perspectives: Through a Glass Diversely: the O.J. Simpson Trial as Racial Rorschach Test*, 67 U. Colo. L. Rev. 909, 913 (1996) ("The selection of a predominately black jury led to speculation from the very beginning that the jurors would somehow be derelict in their duty . . . . And indeed, in the post-verdict milieu, the immediate public reaction was that jury nullification did occur; that the verdict was not justified[.]").

> was announced chillingly captured the widening separation of interests that increasingly defines American life in the 1990s.[35]

Newspapers across the country ran story after story about the racially polarized reactions to the verdict.[36] Locally, *The Times-Picayune* reported on the "the cheers and whistles from [a] mostly African-American group that greeted O.J. Simpson's acquittal," in contrast to the "stony silence" at a local eatery "popular with lawyers and other white professionals."[37] One local businessman was quoted: "There's no other way to put it. He's got away with murder."[38] Soon after the Simpson verdict was announced, *The Louisiana Weekly*, a local African-American newspaper, ran articles that characterized the trial as "American racism on trial," and observed that the trial demonstrated the ways in which "America is infected, from the bottom to the top, with the deadly disease of racism."[39]

National polls were also unanimous in their findings that the Simpson trial sparked reactions that varied significantly according to race. A poll undertaken by *The Washington Post* shortly after O.J. Simpson's acquittal found that

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[35] Brownstein, *supra*, at A1.

[36] *See, e.g.*, *Not Guilty; BR-area Reactions Range From Cheers To Disbelief*, The Advocate (Baton Rouge), Oct. 4, 1995, at 1A ("race . . . appeared to influence . . . individuals' reactions"); Gottlieb, *supra*, at A1 ("The scene . . . was repeated in thousands of different settings across the country yesterday, with reactions that seemed often to be shaped by race—especially by race[.]").

[37] John Pope, *Some in N.O. Elated, Some Stunned*, Times-Picayune, Oct. 4. 1995, at A4 ("Pope").

[38] *Id.*

[39] C.C. Campbell-Rock, Editorial, *The People vs. O.J.: Simpson American Racism on Trial*, La. Wkly., Sept. 11-17, 1995, at A6 (discussing Simpson's innocence and observing all evidence was circumstantial); Earl Ofari Hutchinson, *Why White America Won't Accept the Simpson Verdict*, La. Wkly., Oct. 23-29, 1995, at A5 (criticizing the apparent presumption of "white America" that African-American jurors reflexively acquit African-American defendants).

85 percent of African Americans agreed with the "not guilty" verdict, while just 34 percent of whites agreed with the verdict.[40] In May of 1996, three months prior to Mr. Snyder's trial, a Gallup poll found that 80 percent of whites believed that the charges against O.J. Simpson were true, as compared to 34 percent of African Americans. The poll also found that 79 percent of whites, compared to 36 percent of African Americans, were unsympathetic towards O.J. Simpson.[41] A poll by *The Los Angeles Times* summed up the general sentiment about the Simpson trial: "Americans overwhelmingly believe that race loomed large as an issue in the trial—and inappropriately so."[42]

The racially charged response to the O.J. Simpson verdict made it an ideal vehicle for injecting race into Mr. Snyder's trial without expressly mentioning it. Social science literature is replete with evidence that, today, due to the widespread acceptance of the norm of equality, racial messages are more often implicit than explicit.[43] The use of analogies—such as the prosecutor's O.J. Simpson comparisons—to communicate racially charged messages is therefore common.[44]

"'[D]ominative racists,' persons who express bigotry and hatred openly, are less common than they were twenty-five years ago, they have been replaced, in substantial

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[40] Richard Morin, *Poll Reflects Division Over Simpson Case; Trial Damaged Image of Courts; Races Agree*, Wash. Post, Oct. 8, 1995, at A31, A34; *see also* Jerelyn Eddings, *Black & White In America: Racial Aspects Of O.J. Simpson Case Verdict*, U.S. News & World Rep., Oct. 16, 1995, at 32 (U.S. News survey taken after verdict found that 62 percent of whites still thought O.J. Simpson was guilty as compared to 55 percent of blacks who agreed with the jury that he was not.).

[41] Frank Newport, *Americans Still Think O.J. Simpson Guilty*, Gallup Poll Monthly, Issue 386 (May 1996).

[42] Cathleen Decker & Sheryl Stolberg, *Half of Americans Disagree With Verdict*, L.A. Times, Oct. 4, 1995, at A1.

[43] *See* Teun A. Van Dijk, *Communicating Racism: Ethnic Prejudice in Thought and Talk* 224-226 (1987).

[44] *Id.* at 90-91.

measure, by closet or 'aversive' racists, persons who continue to hold negative stereotypes of minorities and wish to avoid them."[45] Moreover, "[t]here is an intrinsically collective or group-based dimension to racial prejudice generally, and to modern issues of racial politics in specific"[46] that influences how individuals think, what motivates them and how they behave.[47] In the post-Civil Rights era, "institutionalized racial inequalities" have been replaced by "persistent negative stereotyping of Black Americans" and views "substantially rooted in perceptions of threat and protection of collective group privileges."[48]

In her motion to prohibit the prosecutor from making comparisons to O.J. Simpson before the jury, defense counsel correctly identified the "fears and prejudices" among the white community that had been exacerbated by Mr. Simpson's acquittal. R. 160.[49] It is against this backdrop that the prosecutor's references to O.J. Simpson must be considered.

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[45] *See* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 Wm. & Mary L. Rev. 21, 75 (1993).

[46] Lawrence D. Bobo, *Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. Soc. Issues 445, 448 (1999).

[47] *Id.* at 448-450.

[48] *Id.* at 464; *see also* Thomas F. Pettigrew, *The Nature of Modern Racism in the United States*, 2 Revue Internationale de Psychologie Sociale 291, 297-298 (1989).

[49] The racially charged news stories about the Simpson case were consistent with the larger picture of how the media cover crime and, particularly, how the media report on violent crime. *See generally*, Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 Journalism Q. 341, 341-361 (Summer 1992). "Because most people do not have direct experience with the serious violent crimes that they most fear, the role of the media in generating such fear becomes particularly important." Margaret T. Gordon & Linda Heath, *The News Business, Crime, and Fear*, in *Agenda Setting: Readings on Media, Public Opinion, and Policymaking* 71, 72 (David L. Protess & Maxwell McCombs eds., 1991). Research conducted in 1993 and 1994 in Chicago revealed that "[r]acial representation on television . . . does not appear to match crime statistics." Robert M. Entman & Andrew Rojecki, *The Black*

II. THE PROSECUTOR'S REPEATED REFERENCES TO O.J. SIMPSON IN STATEMENTS TO THE MEDIA EVIDENCE HIS DISCRIMINATORY INTENT IN STRIKING ALL AFRICAN AMERICANS FROM MR. SNYDER'S JURY

This Court has repeatedly affirmed that the constitutional duty of prosecutors differs from that of other lawyers:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[50]

Federal and state judiciaries have also adopted and applied this definition of the prosecutor's mandate.[51] National and state bar associations, as well the prosecution bar, have incorporated this overarching constitutional principle into a

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Image in the White Mind: Media and Race in America 81 (2000). The research concluded that the over-representation of African-American suspects, the under-representation of African-American victims, and the over-representation of white victims in local news worsened negative stereotyping of African Americans by whites, and might focus on African Americans the "anxiety and hostility" caused by televised violence. *Id.* at 81-82.

[50] *Berger* v. *United States*, 295 U.S. 78, 88 (1935); *see also Viereck* v. *United States*, 318 U.S. 236, 248 (1943) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (internal quotation marks and citations omitted)); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

[51] *See, e.g.*, *Hodge* v. *Hurley*, 426 F.3d 368, 376 (6th Cir. 2005); *United States* v. *Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993*); United States ex rel. Lusterino* v. *Dros*, 260 F. Supp. 13, 17 (S.D.N.Y. 1966); *State* v. *Barfield*, 723 N.W.2d 303, 312-313 (Neb. 2006); *Maretick* v. *Jarrett*, 62 P.3d 120, 125 (Ariz. 2003); *State* v. *Pabst*, 996 P.2d 321, 326 (Kan. 2000).

range of ethical rules and standards addressing the prosecutor's unique role in the administration of criminal justice.[52]

Mr. Williams first breached his ethical obligations before Mr. Snyder's trial even began. In the context of the unrelenting and racially divisive media coverage of the O.J. Simpson trial discussed in Part I above, the prosecutor's remarks to the local press comparing Mr. Snyder's case to that of O.J. Simpson (J.A. 55, 57a-57d) were just the types of prejudicial statements prohibited by applicable professional standards. His comments to the media violated standards prohibiting prosecutors from making "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[53] The American Bar Association added Rule 3.8(g) to the Model Rules of Professional Conduct in recognition that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an ad-

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[52] MODEL RULES OF PROF'L CONDUCT ("MODEL RULES") (1983) R. 8.4(d) (a lawyer is prohibited from "engag[ing] in conduct that is prejudicial to the administration of justice"); *id.* R. 8.4 cmt. [4] ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens."); *accord* LA. RULES OF PROF'L CONDUCT R. 8.4(c)-(d); PROSECUTION FUNCTION S. 3-1.2 (the prosecutor is an "administrator of justice" and "officer of the court," whose duty is "to seek justice, not merely to convict"); *id.* S. 3-1.2 cmt. ("The prosecutor's obligation is . . . to guard the rights of the accused," he has been described as a "'minister of justice,'" who "occup[ies] a quasi-judicial position."); NAT'L PROSECUTION STANDARDS § 1.1 ("The primary responsibility of prosecution is to see that justice is accomplished.").

[53] MODEL RULES R. 3.8(g); *see also* LA. RULES OF PROF'L CONDUCT R. 3.8(f) (same). The comments to Model Rule 3.6 (prohibiting attorneys from making extrajudicial statements that may prejudice the trial) identify "certain subjects which are more likely than not to have a material prejudicial effect on a proceeding . . . particularly when they refer to . . . a criminal matter." MODEL RULES R. 3.6 cmt. Those subjects include "the character . . . of a party," *id.*, "any opinion as to the guilt or innocence of a defendant," *id.*, and "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence and that would, if disclosed, create a substantial risk of prejudicing an impartial trial," *id.* The prosecutor's comments to the media clearly fall within one or more of these categories.

vocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[54]

Although Mr. Snyder argued to the Louisiana Supreme Court that the prosecutor's statements to the media regarding O.J. Simpson were evidence of his intent to strike African Americans from the jury, the Louisiana Supreme Court failed altogether to address this argument on remand. That was error. Evidence that the prosecutor had already begun to inject racial bias into this case before the trial began was part of the "relevant circumstances" the court was required under *Miller-El II* to consider.

III. THE PROSECUTOR'S MISLEADING, UNETHICAL COMPARISON OF MR. SNYDER TO O.J. SIMPSON IN HIS REBUTTAL ARGUMENT IS COMPELLING EVIDENCE OF DISCRIMINATORY INTENT

"The Constitution prohibits racially biased prosecutorial arguments." *McCleskey* v. *Kemp*, 481 U.S. 279, 310 (1987).[55] The prosecutor's O.J. Simpson comparisons in his rebuttal argument were exactly the type of racial arguments condemned by the Court and compelling evidence of the prosecutor's intent to achieve a categorical exclusion from the jury of all qualified African Americans through the exercise of his peremptory challenges.

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[54] MODEL RULES R. 3.8(g) cmt. [1]; *see also* NAT'L PROSECUTION STANDARDS § 33.1 (beyond limited information such as the identity of a suspect, circumstances of the arrest, and the existence of "competent evidence," prosecutors are only permitted to release additional information that would, *inter alia*, "dispel widespread rumor or unrest, or promote confidence in the criminal justice system").

[55] It is well settled that the jury is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder* v. *West Virginia*, 100 U.S. 303, 309 (1879). As Judge Jerome Frank wrote in his dissent in *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946), "[a] keen observer has said that 'next to perjury, prejudice is the main cause of miscarriages of justice.'" *Id.* at 659 (Frank, J., dissenting) (internal citations omitted).

"It blinks reality to deny" that the prosecutor's reference to O.J. Simpson at the penalty phase was a deliberate and improper appeal to racial prejudice.[56] Yet the Louisiana Supreme Court dismissed the prosecutor's argument as race-neutral. 942 So. 2d at 499. The court concluded that the remark was a proper rebuttal of Mr. Snyder's contention that he was suicidal following the murder and noted that the prosecutor did not "refer[] *to Simpson's or Snyder's race*." *Id.* (emphasis added). That explanation simply is untenable.

It could not have escaped this all-white jury, as it would not have escaped a jury of any racial composition, that O.J. Simpson and Mr. Snyder are both African American. And in light of the media coverage of the racially divisive nature of the Simpson case, the potential effect of the Simpson analogy was obvious. In response to defense counsel's objection to the Simpson comparisons, Mr. Williams told the trial judge that his argument was "fair comment on something that's common knowledge." J.A. 607. Indeed, the analogy was "common knowledge" and more. The prosecutor seized upon two of the most highly publicized aspects of the O.J. Simpson case—Simpson's behavior prior to his arrest and his acquittal. *Id.* The latter certainly was the most racially divisive event in the case—and in recent American history.[57] This was unquestionably improper.[58]

The prosecutor would have been well within bounds had he relied on evidence before the jury to rebut defense counsel's assertions that Mr. Snyder was under extreme emotional distress at the time of the crime and was suicidal at

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[56] *Miller-El II*, 545 U.S. at 266 ("It blinks reality to deny that the [prosecutor] struck [two jurors] . . . because they were black.").

[57] *See, e.g.*, *The Simpson Verdict*, N.Y. Times, Oct. 4, 1995, at A20; Torry, *supra*; Mauro, *supra*; Stolberg, *supra*.

[58] "Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused . . . such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence." PROSECUTION FUNCTION S. 3-5.8 cmt.

the time of his arrest.[59] But he did not. The prosecutor's comparisons to O.J. Simpson were manifestly an attempt to divert the jury from its duty to render a verdict according to the evidence and the law.

The prosecutor's points were straightforward: (1) Allen Snyder had feigned suicidal intent, as had O.J. Simpson; (2) O.J. Simpson's ploy resulted, unjustly, in an acquittal by a jury; but (3) this jury should not allow Mr. Snyder to "g[e]t away with it," as O.J. Simpson had. J.A. 606-607; R. 1592-1593. The fact is, however, that Allen Snyder could not have been mimicking O.J. Simpson in the hope of obtaining an acquittal because Simpson was not acquitted until nearly two months after Mr. Snyder's arrest.[60] Moreover, at the time the prosecutor delivered his rebuttal argument, Mr. Snyder had already been convicted of capital murder. He faced a sentence of death or life without possibility of parole, and could not "g[e]t away" with anything. However, the all-white jury understood the message: anything less than a death sentence would allow Allen Snyder to "g[e]t away" with murder. Although this fact was ignored by the majority,[61] it did not escape Justice Johnson:[62]

> The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to 'get away with.' The prosecutor utilized the O.J. Simpson verdict to

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[59] *See, e.g.*, *State* v. *Smith*, 554 So. 2d 676, 681 (La. 1989), *overruled on other grounds by State* v. *Taylor*, 669 So. 2d 364 (La. 1996); *see also* La. Code Crim. P. art. 774 (providing that "[t]he argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case").

[60] *See, e.g.*, Gottlieb, *supra*, at A1; Pope, *supra*, at A4.

[61] *Snyder I*, 750 So. 2d at 842, 845-846; *Snyder III*, 942 So. 2d at 499.

[62] *Snyder I*, 750 So. 2d at 867 (Johnson, J., dissenting); *Snyder III*, 942 So. 2d at 506 (Johnson, J., dissenting).

> racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

The prosecutor's O.J. Simpson comparison was even more egregious in light of his promise to the trial court that he would make no reference to Simpson before the jury. In making this misrepresentation to the trial judge, the prosecutor breached his "unqualified duty of scrupulous candor that rests upon government counsel." *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 358 (1963); *see also Burns* v. *Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (noting that the "duty of candor goes beyond the moral duty imposed on counsel by ethical codes or good conscience").[63]

Justices Lemmon and Johnson concluded in separate dissenting opinions in *Snyder I* that "the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson 'got away with it.'" 750 So. 2d at 864 (Lemmon, J., concurring and dissenting in part); *see also id.* at 867 (Johnson J., dissenting) ("The prosecutor utilized the O.J.

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[63] The Model Rules impose a duty of candor on all attorneys. Rule 3.4(e) prohibits trial counsel from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence" as well as offering his "personal opinion as to the justness of a cause," including "the guilt or innocence of an accused." MODEL RULES R. 3.4(e); *see also* LA. RULES OF PROF'L CONDUCT R. 3.4(e) (In trial, lawyers shall not, "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . or state a personal opinion as to the justness of a cause . . . or the guilt or innocence of an accused."); PROSECUTION FUNCTION S. 3-2.8(a) (providing that "[a] prosecutor should not intentionally misrepresent matters of fact or law to the court"); *id.* S. 3-12.8(a) cmt. ("It is fundamental that in relations with the court, the prosecutor must be scrupulously candid and truthful in his or her representations in respect to any matter before the court."); NAT'L PROSECUTION STANDARDS § 23.1 (providing that "at all times," prosecutors must maintain "[p]roper respect for the judicial system and appropriate respect for the court").

Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors."). Justices Lemmon and Johnson were correct.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be vacated.

Respectfully submitted,

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